

Investment Advisors Act Relief for SBICs and other Private Equity Funds

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On May 3, 2016, the SEC approved amendments revising the rules related to the thresholds for registration, termination of registration, and suspension of reporting under Section 12(g) of the Securities Exchange Act of 1934 (the “Act”).¹ In a press release,² the Securities and Exchange Commission (the “SEC”) Chair Mary Jo White stated, “With the adoption of these amendments, the Commission has completed all of the rulemaking mandated under the JOBS Act.” The Jumpstart Our Business Startups Act (the “JOBS Act”) was signed into law by President Obama on April 5, 2012. It required the SEC to write and amend rules regarding disclosure and registration requirements.

The amended provisions impact reporting obligations under Section 12(g) of the Act to account for the increased thresholds created by the JOBS Act, increasing the threshold for a majority of issuers (i.e., issuers other than banks or savings and loan holding companies, as defined in Section 10 of the Home Owners’ Loan Act, or bank holding companies, as defined Section 2 of the Bank Holding Company Act of 1956). As amended, Rule 12g-1 provides that, generally, an issuer is not required to register a class of equity securities pursuant to Section 12(g)(1) of the Act if, on the last day of its most recent fiscal year, the issuer has total assets not exceeding \$10 million *OR* the class of equity securities is held of record by less than 2,000 persons or 500 persons who are not accredited investors. For banks, savings and loan holding companies or bank holding companies, the class of equity securities must be held of record by less than 2,000 persons to avoid the required registration under Section 12(g). In addition, a bank, savings and loan holding company or bank holding company may terminate registration or suspend reporting for a class of securities under the Act if the securities are held of record by fewer than 1,200 persons.³ The final rules also clarify that whether a “holder of record” is an “accredited investor” is determined by the issuer as of the last day of the fiscal year, rather than at the time of the sale of securities. The issuer must take appropriate steps to establish a reasonable belief that the “holder of record” is an “accredited investor,” as defined in Rule 501(a).

The SEC further amended Section 12(g) of the Act by amending the definition of “held of record,” establishing a non-exclusive safe harbor for holders of record that allows issuers to exclude, for Section 12(g) purposes, securities “held of record” by persons who acquired them pursuant to an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act or held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act. The safe harbor is available to surviving entities after an M&A transaction if they have a reasonable belief that at the time of issuance, the securities of the predecessor were issued in a transaction meeting the requirements of Rule 701(c) of the Securities Act (which exempts certain offers and sales of securities under certain benefit plans).

While the amended rules provide a more liberal landscape for investors and issuers, issuers must be careful to follow the more complex thresholds and definitions laid out under the amended provisions. The final rules will become effective 30 days after publication in the Federal Register.

¹ SEC Adopts Amendments to Implement JOBS Act and FAST Act Changes for Exchange Act Registration Requirements. 2016. <https://www.sec.gov/news/pressrelease/2016-81.html>

² U.S. Securities and Exchange Commission. *Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act*. Washington, D.C.: Securities and Exchange Commission, 2016. <https://www.sec.gov/rules/final/2016/33-10075.pdf>

³ For other issuers, the threshold for suspension of reporting and termination of registration remains at 300 holders of record.

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