

The JOBS Act: Increase and Division of Section 12(g) Registration Requirement

On April 5, 2012, President Obama signed into law the [Jumpstart Our Business Startups Act](#) (the “Act”), a wide-ranging legislative response to the private sector which repeatedly voiced concerns regarding the existence of substantial burdens on the ability of issuers to engage in capital formation activities. As expected, the Act will have a significant impact upon federal securities laws and is intended, among other things, to provide increased access to debt and equity capital for issuers generally and “Emerging Growth Companies” specifically.

This Alert primarily addresses the Act’s amendment to the threshold which triggers the registration requirement of Section 12(g) (“**Section 12(g)**”) of the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”). For additional information regarding the Act, please refer to The JOBS Act: General Solicitation and Advertising in Certain Private Placements and Exempt Offerings, The JOBS Act: Crowdfunding, The JOBS Act: Emerging Growth Companies and the IPO On-Ramp and The JOBS Act Quick Reference Chart.

What Was The Registration Requirement Of Section 12(g) Prior To The Act?

Generally, prior to the Act, Section 12(g):

- required that an issuer register a class of equity securities with the SEC if, on the last day of the issuer’s fiscal year, equity securities in the class were held by 500 or more record holders and the issuer had total assets of more than \$10 million;
- required that, if an issuer had registered a class of securities under Section 12(g), all of the reporting requirements of the Exchange Act, such as annual reports on Form 10-K and quarterly reports on Form 10-Q, would have applied to the issuer; and
- allowed an issuer to de-register a class of equity securities under Section 12(g) when (i) the class of equity securities was held of record by less than 300 persons or (ii) the class of securities was held of record by less than 500 persons and the total assets of the issuer had not exceeded \$10 million on the last day of each of the issuer’s three most recent fiscal years.

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How Does The Act Affect The Registration Requirement Of Section 12(g)?

The Act simultaneously (i) increases and divides the threshold which triggers the registration requirement of Section 12(g) and (ii) alters the de-registration threshold for banks and bank holding companies. Pursuant to the Act:

- an issuer that is not a bank or bank holding company (i) will become subject to the Section 12(g) registration requirement if the issuer has total assets exceeding \$10 million and a class of equity securities which is held of record by either (a) 2,000 or more persons or (b) by 500 or more persons who are not “accredited investors” and (ii) may, upon filing a certification with the SEC, de-register the class of equity securities under Section 12(g) and thereby terminate its Exchange Act reporting requirements if the number of record holders is reduced to less than 300 persons;
- an issuer that is a bank or bank holding company (i) will become subject to the Section 12(g) registration requirement if the issuer has total assets exceeding \$10 million and a class of equity securities which is held of record by 2,000 or more persons and (ii) may, upon filing a certification with the SEC, de-register the class of equity securities under Section 12(g) and thereby terminate its Exchange Act reporting requirements if the number of record holders is reduced to less than 1,200 persons; and
- equity securities which are acquired (i) pursuant to an equity compensation plan in an exempt offering and (ii) in a Crowdfunded offering would be excluded from the determination of record holders for purposes of the Section 12(g) registration requirement.

These modifications provide issuers with a greater (i) cushion for avoiding, whether intentionally or unintentionally, the Section 12(g) registration requirement and (ii) ability to raise capital before approaching or surpassing the new threshold of Section 12(g). Notably, for purposes of calculating the number of record holders, the Act also requires the SEC to promulgate safe harbor provisions that issuers can follow to determine whether record holders received securities pursuant to an employee compensation plan in an exempt offering (the “**Safe Harbor Provisions**”).

Did The New Section 12(g) Registration Requirement Become Effective Immediately?

Yes. The new Section 12(g) registration requirement became effective as of April 5, 2012, although, the SEC must promulgate implementing rules and regulations for the new bank or bank holding company registration and de-registration thresholds by April 5, 2013. Additionally, as of the date of this Alert, the SEC has not yet promulgated the Safe Harbor Provisions.

Has The SEC Issued Guidance Regarding The New Section 12(g) Reporting Requirement?

Yes. The SEC issued the [Jumpstart Our Business Startups Act Frequently Asked Questions](#) on April 11, 2011 to provide guidance regarding the new Section 12(g) registration requirement.

Are There Any Potential Consequences?

Yes. The modifications to the Section 12(g) registration requirement should prompt non-reporting and certain reporting issuers alike to undertake a number of actions, including the following:

- review of prior issuances of equity securities and the ownership of such issued and outstanding securities to determine (i) the number of record holders, (ii) the number of record holders that acquired equity securities pursuant to executive compensation plans in exempt offerings, and (iii) the types of equity securities issued pursuant to executive compensation plans (i.e., subject to certain conditions, options and restricted stock units may not count toward the threshold which triggers the reporting requirement of Section 12(g));

- assess (i) whether a certification regarding de-registration may potentially be filed with the SEC in the future and, if so, (ii) how the lack of a steady stream of financial and operational information may impact the issuer's ability to communicate effectively with such holders, to conduct routine corporate business and to execute future corporate transactions that require the focus and consent of potentially disparate and disjointed bases of equity holders; and
- seek to (i) monitor the trading of equity securities in secondary markets as the new threshold of Section 12(g) allows for increased capacity for trading activity and (ii) if desired, retard such trading through the implementation of transfer restrictions or more aggressive transfer restrictions in the issuer's governing documents.

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