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Securities and Exchange Commission
100 F St. NW
Washington, DC 20549-9303
Rule-comments@sec.gov

Re: JOBS Act Title V and Title VI comments on definition of shareholders "of record"

Dear Securities and Exchange Commission:

Here are my thoughts on how to define the number of shareholders "of record."

Summary

- The JOBS Act requires the SEC to revisit the definition of shareholder "held of record."
- Technology changes in the manner of holding shares have sharply reduced the number of shareholders who hold shares in certificated form.
- SEC registration will become totally voluntary unless the SEC updates the definition of shareholders of record to include beneficial owners. Over 1,300 U.S. exchange-listed companies, including such household names as Netflix, could easily deregister from the SEC if they wanted to as they report less than 300 shareholders "of record."
- The SEC should include all beneficial owners in its interpretation of shareholders "held of record."
- The number of voting materials that an issuer pays to distribute to shareholders should be accepted as a suitable proxy for the number of shareholders of record.

- The SEC should provide a safe harbor so that unregistered public companies can provide adequate disclosure and good corporate governance without fear of triggering registration requirements by being shareholder friendly.

Introduction

Titles V and VI of the JOBS Act contain several provisions relating to the number of shareholders needed to trigger registration requirements with the SEC. Congress attempted to reduce the regulatory burden on smaller companies by increasing the numerical threshold for SEC registration to 500 unaccredited shareholders or 2,000 total shareholders (§501), and by excluding shares issued through crowdfunding (§303) and employee share ownership programs (§502).[1] Yet at the same time Congress expressed concern about the ability of the SEC to enforce the registration threshold by requiring that the SEC study whether new enforcement tools are needed (§504). Congress has also re-iterated the 300 shareholder cutoff for issuers to deregister (§601). The SEC has been directed (§503) accordingly to revise the definition of shareholder "held of record."

Technology has made the old interpretation of shareholder "of record" obsolete.

It is clear that Congress has intended that firms with large numbers of shareholders should be subject to SEC registration requirements, and has left it up to the SEC to figure out how to count the number of shareholders. Traditionally, this was done by counting the number of shareholders "held of record." SEC Rule § 240.12g5-1 states "… securities shall be deemed to be "held of record" by each person who is identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer …" In practice, this has meant counting the number of shareholders directly registered with the issuer, such as those who hold paper certificates. Shareholders who held shares in "street name" through brokers or custodians were not included in the count. Even though shares held in street name are being maintained indirectly on behalf of the issuer, it was expedient not to count them.

This made sense in the olden days before widespread computerization when most shareholders held shares in certificate form. It would have been excessively burdensome to identify, let alone count, all of the beneficial holders holding shares in street name. However, now the majority of shares are generally held in street name through Depository Trust Company (DTC). DTC's nominee name of Cede & Co is often counted as only one shareholder of record, regardless of how many hundreds or thousands of beneficial owners are holding their shares indirectly through DTC. This results in many large companies having a relatively small number of shareholders "of record."

[1] It would also make sense to examine ways to reduce compliance costs on SEC registrants while still maintaining consumer protection, rather than just make it easier for companies to avoid SEC registration altogether.

Here are just a few examples:

NYSE-listed Boise Cascade (NYSE:BCC), a company with a market capitalization of over $1 billion, reports only two stockholders of record in its 10-K:

> "On February 26, 2014, there were 39,365,350 shares of our common stock outstanding, held by two stockholders of record, one of which was Cede & Co., which is the nominee of shares held through The Depository Trust Company, and the other of which is BC Holdings."[2]

They are not the only one. Antero Resources (NYSE:AR) also reports only two shareholders of record.

> "We have one class of common shares outstanding, our par value $0.01 per share Common Stock ("Common Stock"). Our Common Stock is traded on the New York Stock Exchange under the symbol "AR". On February 20, 2014, our Common Stock was held by 2 holders of record. The number of holders does not include the shareholders for whom shares are held in a "nominee" or "street" name. "[3]

Likewise, Interactive Brokers (NASDAQ: IBKR) reports five in its 10-K:

> On February 20, 2014, there were five holders of record, which does not reflect those shares held beneficially or those shares held in "street" name. Accordingly, the number of beneficial owners of our common stock exceeds this number." [4]

Swift Transportation Co (NYSE:SWFT) reports

> "On December 31, 2013, there were eight holders of record of our Class A common stock and three holders of record of our Class B common stock. Because many of our shares of Class A common stock are held by brokers or other institutions on behalf of stockholders, we are unable to estimate the total number of stockholders represented by the record holders."[5]

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[2] http://www.sec.gov/Archives/edgar/data/1328581/000132858114000010/bcc1231201310-k.htm#sD2AE18798387B288257BAEAB4FF0C13F

[3] http://www.sec.gov/Archives/edgar/data/1433270/000104746914001424/a2218464z10-k.htm#do15304_item_5._market_for_registrant___ite04666

[4] Interactive Brokers 10K, page 40, http://www.sec.gov/Archives/edgar/data/1381197/000104746914001697/a2218588z10-k.htm#de74301_item_5._market_for_registrant___ite04681

[5] http://www.sec.gov/Archives/edgar/data/1492691/000149269114000013/swft-12312013x10k.htm#s28615b0516384fc39c05a6a18b719608

NYSE Imperial Holdings Inc. (NYSE:IFT) reports

> "As of February 28, 2014, we had 10 holders of record of our common stock."[6]

However, the number of beneficial shareholders of these exchange-listed firms is undoubtedly much higher. NYSE and NASDAQ generally require at least 400 total or public shareholders, not just shareholders of record.[7] As issuers apparently have little trouble counting the total number of beneficial shareholders for purposes of exchange listing, they should have little trouble counting them for the purposes of SEC registration.

SEC registration will become totally voluntary unless the SEC clarifies the interpretation of shareholder "of record."

There are many, many, more examples. A look at the Compustat database reveals 425 NYSE-listed issuers and 712 NASDAQ-listed issuers with less than 300 shareholders.[8] As the threshold for deregistration is 300 shareholders "of record," this implies that a large number of issuers could deregister from the SEC if they wanted.[9] Netflix, with only 215 shareholders of record, could easily deregister.[10]

The OTC market has improved dramatically in recent years. Investors can now trade OTC stocks almost as easily as exchange-listed stocks. It is increasingly attractive for companies to "go dark" by delisting from the exchanges and deregistering from the SEC. A failure by the SEC to clarify the interpretation of

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[6] http://www.sec.gov/Archives/edgar/data/1494448/000119312514091791/d654315d10k.htm#toc654315_7

[7] Nasdaq Rule 5450(a)(1)(2) requires at least 400 "Total Holders" for continued listing on the Global Select Market for primary equities. Nasdaq Rule 5550(a) requires at least 300 "Public Holders" for continued listing of primary equities. Rule 5555 requires 100 public holders for preferred continued listing. NYSE Rule 802.1(a) requires the "total number of stockholders" to be at least 400. The NYSE explicitly counts the number of beneficial shareholders.

[8] As of April 29, 2014, accessed via WRDS. The CSHR field on Compustat generally records the number of shareholders of record as listed in Item 5 of Form 10-K. As the CSHR field is blank for many firms in the database, the number of issuers that could claim to have less than 300 shareholders "of record" is undoubtedly higher.

[9] Section 12(g) of the '34 Act generally permits the termination of registration if the issuer certifies that "… the number of holders of record of such class of security is reduced to less than 300 persons." Likewise, section 15(d) generally permits the suspension of filing requirements when the number of shareholders held of record is less than 300 persons, or 1200 for a bank or bank holding company. Exchange listing requirements require firms to be registered with the SEC, so firms wishing to deregister would also have to delist from the exchanges.

[10] http://www.sec.gov/Archives/edgar/data/1065280/000106528014000006/nflx10k2013.htm#s76FE18BC0E76D709C0150127F4109FF9 page 14

shareholders of record could lead to a mass defection of over 1,000 companies from our exchange-listed markets, with disastrous implications for corporate governance and consumer protection.

As the industry continues its march to dematerialization, it is likely that number of shareholders traditionally counted "of record" will continue to decline. Eventually, all U.S. public companies may have less than 300 shareholders "of record," making registration with the SEC totally voluntary.

The SEC should clarify the interpretation of shareholders "of record" to include beneficial holders held in street name in the total count.

Clearly, something has to be done. The SEC should clarify its current definition of the number of shareholders of record to specifically include those shareholders who hold their shares in street name. Exchange-listed companies already count their total number of shareholders for purposes of exchange listing, so it would not be excessively burdensome to do so.

The number of shareholders can easily be estimated using the number of voting materials issuers pay to transmit to shareholders.

One good approximation for the number of beneficial shareholders is the number of voting materials that issuers pay to transmit to their shareholders. Currently, issuers pay to have brokerage firms transmit proxy materials to the beneficial shareholders, and they are billed for these services based on the number of shareholders serviced.[11] The number paid for (which I will refer to as "the proxy count") is an easy number for an issuer (and SEC enforcement staff) to examine to determine whether an issuer is subject to registration requirements under the '34 Act.

Using the estimated number of beneficial shareholders based on the "proxy count" will greatly simplify determination of compliance for issuers and regulators alike. It will also alleviate the problems brought about by changing technology that have drastically reduced the number of shareholders under the old method of counting.

The registration thresholds using the modernized definition should be increased to avoid a sudden jump in the number of companies required to register.

Modernizing the method of counting shareholders will increase the measured number of shareholders for many issuers with street name shareholders. This could result in an increase in the number of issuers subject to registration requirements under the '34 Act. However, the intent of Congress in the JOBS Act

[11] Broadridge Shareholder Services transmits voting materials and collects voting instructions for the overwhelming majority of shares held in street name in a well-oiled process. A few brokerage firms do it themselves or use another firm such as Mediant Communications.

appears to be to increase the registration threshold for accredited (increased to 2,000), but not unaccredited (still 500), investors.

To avoid an unintended increase in the number of issuers required to register with the SEC, the SEC should use its broad Section 36 exemptive authority to create a safe harbor for firms with a proxy count less than, say, 1,000 under the new method of counting.[12] The exact level should be guided by a study by the SEC's Division of Economic and Risk Analysis (DERA) to determine what level of the proxy count is roughly equivalent to the 2,000 accredited or 500 unaccredited shareholders under current counting methods.

Of course, truly private companies do not have shares in street name and would not have to rely upon the safe harbor. They can more easily determine their number of shareholders and their accredited status.

Using the proxy count for safe harbor determination simplifies the problem of determining the accreditation status of investors.

One problem with the 2,000 accredited or 500 unaccredited shareholders standard is that many retail brokerage firms do not maintain records on the accredited status of their customers. Even if the retail brokerage firms collect such information on account opening as part of their "know your customer" procedures, the information regarding accreditation status is often voluntary and not verified. Such information is also generally not updated regularly. Thus issuers with shares held in street name will have difficulty in determining the accreditation status of their investors. A safe harbor based on the proxy count will simplify the problem of determining compliance for issuers as well as for the SEC enforcement staff.

The safe harbor should be conditional upon fair treatment of shareholders and securities law compliance.

The logic behind exemption from registration is that companies with a small number of shareholders are generally smaller companies. The high costs of registration are an excessive burden relative to the size of

[12] A proxy count of 1,000 seems like a reasonable guess at the equivalent proxy count. Clearly a firm with a proxy count of 2,000 would trigger registration requirements even if all of the shareholders were accredited. If half of the beneficial shareholders are unaccredited, then a proxy count of 1,000 would indicate 500 unaccredited shareholders and thus trigger registration requirements. While the fraction of accredited account holders at a retail brokerage firms is often far less than half, one would expect unaccredited shareholders with fewer assets to be invested in fewer companies than unaccredited shareholders. Furthermore, one would expect the fraction of accredited shareholders to be higher at brokerage firms catering to professional traders and institutions.

the company, especially given the relatively small number of shareholders.[13] However, the shareholders in these companies still require consumer protection. The federal securities laws with respect to fraud, manipulation, corporate governance, and insider trading still apply. History shows that without legal protection, public shareholders can be badly mistreated.[14] This is the whole reason our securities laws exist in the first place. History also shows that state regulation has been inadequate to protect the public shareholders in companies that claim exemption from SEC registration.

It is a sad fact of life that lawyers sometimes advise non SEC-registered issuers to adopt a "scorched earth" policy of providing no public information to the market, despite a large number of public shareholders and publicly quoted stock. The perverse logic behind this stonewalling approach is the fear that if the company treats its shareholders fairly, it might end up with more shareholders. An increase in the number of shareholders would push the company over the threshold triggering SEC registration, triggering the burdensome cost of SEC registration. Thus, in order to avoid the cost of registration, such companies mistreat their remaining shareholders.

Section 36 of the '34 Act allows for conditional exemptions. Likewise, section 303 of the JOBS Act also permits conditionality in the exemption of crowdfunded shares. Such exemptions from registration should be based on issuer compliance with the securities laws and adhering to a set of cost-effective best practices for smaller issuers.

This safe harbor would provide a strong incentive for smaller issuers to treat their shareholders fairly.

The SEC should promulgate a series of voluntary best practices for unregistered companies with public shareholders.

One solution is to promulgate a series of best practices for investor protection for public investors in unregistered companies. Adherence to these practices would provide a safe harbor against various Commission enforcement activities. For example, if the company promptly releases material information to the general public, its officers, directors, and employees will be able to buy or sell shares with less fear of engaging in unlawful insider trading.

These best practices would include:

[13] For example, Harbor Biosciences (now Harbor Diversified (OTC: HRBR)) claimed that it would save $370,000 per year in costs by deregistering from the SEC. Unfortunately, the remaining public shareholders have no way of knowing what is going on with their investments now that the firm has gone dark. http://www.sec.gov/Archives/edgar/data/899394/000119312511238879/ddef14a.htm

[14] See, for example, the sad saga (SEC File 81-939) of the preferred shareholders of W2007 Grace Acquisition I (OTC: WGCBP and WGCCP) who bought preferred shares in an NYSE-listed REIT and ended up with illiquid shares in a dark company. http://www.sec.gov/comments/81-939/81-939.shtml

1. The company posts regular financial results on its web site in a timely manner and leaves them up for at least five years. The public financial statement should be audited, if audited financial statements are available. If not, the company need not spend the money on a professional audit, but must post copies of its tax returns. Tax returns are even more credible than audited financial statements, as companies are highly unlikely to exaggerate profitability to the IRS.
2. Important company information is promptly disseminated through postings on the company web site or social media such as Twitter. Anything that would merit an 8-K filing for a larger company should be either tweeted, Facebooked, or emailed to a distribution list of interested investors and posted on the web site, such as a link to the Twitter or Facebook page.
3. The company takes no steps to inhibit the public market for the shares. If the shares are quoted in the OTC market, the company takes the appropriate steps to make the shares DTC eligible.[15]
4. The company will provide size-appropriate investor relations activities for its shareholders, including appropriate answers to reasonable questions about the company's business. Stonewalling investor questions as a matter of policy is not permitted.
5. The company will have a policy to prevent preventing officers, directors, affiliates and employees from engaging in improper insider trading in the company stock.
6. The company will provide adequate information to shareholders regarding the background and qualifications of candidates for the board of directors.
7. The company will follow standard good corporate governance practices.

Respectfully submitted,

James J. Angel, Ph.D., CFA

[15] Shares that are "DTC eligible" can be transferred electronically through the regular U.S. settlement process. Shares that are not DTC eligible generally must be transferred through paper certificates, an archaic and expensive process.

Appendix:

§ 240.12g5-1 Definition of securities “held of record”.

(a) For the purpose of determining whether an issuer is subject to the provisions of sections 12(g) and 15(d) of the Act, securities shall be deemed to be “held of record” by each person who is identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer, subject to the following:

(1) In any case where the records of security holders have not been maintained in accordance with accepted practice, any additional person who would be identified as such an owner on such records if they had been maintained in accordance with accepted practice shall be included as a holder of record.

(2) Securities identified as held of record by a corporation, a partnership, a trust whether or not the trustees are named, or other organization shall be included as so held by one person.

(3) Securities identified as held of record by one or more persons as trustees, executors, guardians, custodians or in other fiduciary capacities with respect to a single trust, estate or account shall be included as held of record by one person.

(4) Securities held by two or more persons as coowners shall be included as held by one person.

(5) Each outstanding unregistered or bearer certificate shall be included as held of record by a separate person, except to the extent that the issuer can establish that, if such securities were registered, they would be held of record, under the provisions of this rule, by a lesser number of persons.

(6) Securities registered in substantially similar names where the issuer has reason to believe because of the address or other indications that such names represent the same person, may be included as held of record by one person.

(b) Notwithstanding paragraph (a) of this section:

(1) Securities held, to the knowledge of the issuer, subject to a voting trust, deposit agreement or similar arrangement shall be included as held of record by the record holders of the voting trust certificates, certificates of deposit, receipts or similar evidences of interest in such securities: *Provided, however,* That the issuer may rely in good faith on such information as is received in response to its request from a non-affiliated issuer of the certificates or evidences of interest.

(2) Whole or fractional securities issued by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution for the sole purpose of qualifying a borrower for membership in the issuer, and which are to be redeemed or repurchased by the issuer when the borrower's loan is terminated, shall not be included as held of record by any person.

(3) If the issuer knows or has reason to know that the form of holding securities of record is used primarily to circumvent the provisions of section 12(g) or 15(d) of the Act, the beneficial owners of such securities shall be deemed to be the record owners thereof.