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SEC You Later: Eliminating the Bank Holding Company and Reducing SEC Oversight Under Section 3(a)(2)

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I. Introduction

In April of 2017, Bank of the Ozarks ("Ozarks") unveiled a restructuring and reorganization plan that surprised many in the banking community.[1] The bank announced that it was merging its holding company with its affiliated banking subsidiary, effectively dissolving its holding company altogether.[2] The decision was somewhat unprecedented for a bank the size of Ozarks, as almost all banks with a similar asset size work under a bank holding company ("BHC") structure.[3] At the time, Ozarks became the first publicly traded bank to dissolve its holding company.[4] Upon the dissolution of its holding company, Ozarks also essentially rid itself of two federal regulators in the process.[5] The first, which came as no surprise to the industry, was the Federal Reserve Board ("FRB"), which serves as the primary federal regulator of holding companies.[6] Therefore, with the dissolution of its BHC, Ozarks was no longer subject to the FRB's oversight.[7] While this is significant and deserves its own analysis it was the diminishing of oversight from a second federal

1. Allison Prang, *Bank of the Ozarks to Dissolve Holding Company,* AM. BANKER, Apr. 11, 2017 [hereinafter *Bank of the Ozarks to dissolve Holding Company*].

2. *Id.*

3. At the time of the restructuring, Ozarks became one of only three banks with over $10 billion in assets to not have a holding company the other two are Signature Bank and First Republic Bank, however they never formed a holding company in the first place. Brian Cheung, *Why and How Bank of the Ozarks Cut Holding Company*, BANKING EXCH. (Aug. 17, 2017, 4:44 PM), http://m.bankingexchange.com/news-feed/item/7003-why-and-how-bank-of-the-ozarks-cut-holding-company.

4. Zach Baliva, *A Better Way to Bank*, MODERN COUNSEL (May 31, 2018), https://modern-counsel.com/2018/bank-of-the-ozarks/.

5. Cheung, *supra* note 3.

6. *Bank of the Ozarks to Dissolve Holding Company*, *supra* note 1.

7. As a state non-member bank, Ozarks continues to be subject to the oversight of the FDIC, as well as its state banking authority. If the bank was a state member bank then it would actually still retain the FRB as its regulator as the FRB is the primary regulator for state member banks.

regulator that really surprised many within the industry.[8] After the reorganization, Ozarks announced that it would no longer be registering its securities offerings with the Securities Exchange Commission ("SEC") and would instead submit periodic reports to the Federal Deposit Insurance Corporation ("FDIC").[9] Through this strategic move, Ozarks rid itself of significant SEC oversight, surprising many in the banking and securities community.[10] To support its decision, Ozarks cited section 3(a)(2) of the 1933 Securities Act ("Securities Act"), an infrequently used section that exempts banks from having to register securities offerings with the SEC.[11]

This Note examines the section 3(a)(2) exemption and how it can be used to diminish SEC oversight. The Note also explores the advantages and disadvantages of utilizing the exemption, as well as how it fits into the larger question of whether a BHC is necessary for some banks. Part II examines the section 3(a)(2) exemption and the depression-era rational behind it.[12] Part III examines how the exemption can be used in combination with provisions in the 1934 Securities Exchange Act ("Exchange Act") to diminish SEC oversight.[13] Part IV discusses the advantages of utilizing Section 3(a)(2) and diminishing SEC oversight.[14] Part V addresses a potential disadvantage to using the exemption.[15] Part VI discusses the recent trend of banks utilizing the exemption to reduce SEC oversight.[16] Finally, Part VII analyzes how section 3(a)(2) fits into the larger question of whether a BHC is necessary.[17]

8. John Maxfield, *Bank of the Ozarks No Longer Submits Regulatory Filings to the SEC,* MOTLEY FOOL (Sept. 21, 2017, 11:11 AM), https://www.fool.com/investing/2017/09/21/bank-of-the-ozarks-no-longer-submits-regulatory-fi.aspx

9. *Id.*

10. Allison Prang, *Why More Banks Could Ditch Their Holding Company*, AM. BANKER, July 12, 2017.

11. Securities Act of 1933 § 3(a)(2), 15 U.S.C. § 77c(a)(2) (2012).

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See infra* Part V.

16. *See infra* Part VI.

17. *See infra* Part VII.

II. WHAT IS THE SECTION 3(A)(2) EXEMPTION?

In terminating its registration obligations with the SEC, Ozarks cited Section 3(a)(2) of the Securities Act.[18] This section examines this statutory exemption and its application.

A. Section 3(a)(2)

Congress enacted the Securities Act on May 27, 1933, as the first piece of federal legislation to regulate securities.[19] The provisions of the Securities Act are enforced by the SEC, which was subsequently created in 1934.[20] While the Securities Act typically requires the registration of securities offerings with the SEC, it provides certain exemptions from this registration requirement.[21] One such exemption is contained in section 3(a)(2) of the Securities Act.[22] The section provides, in part, that "any security issued or guaranteed by any bank" is exempt from the registration provisions of the Securities Act.[23]

B. Definition of "Bank" Under the Section 3(a)(2) Exemption

For purposes of section 3(a)(2), the statute provides a specific definition of a "bank."[24] Pursuant to the statute, a bank "means any bank, or banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is *substantially confined* to banking and is supervised by the State or territorial banking commission or similar official."[25] This second part is crucial, as it disqualifies BHCs from utilizing the exemption.[26] While a BHC may oversee its affiliated bank subsidiary, a BHC's business is not *substantially* confined to banking, as it may be involved in activities closely related to banking

18. Securities Act of 1933 § 3(a)(2), 15 U.S.C. § 77c(a)(2) (2012).
19. U.S. SEC. & EXCH. COMM'N., THE LAWS THAT GOVERN THE SECURITIES INDUSTRY (2013), https://www.sec.gov/answers/about-lawsshtml.html#secact1933.
20. *Id.*
21. *Bank Securities Offerings Exempt Under Section 3(a)(2)*, Practical Law Practice Note 0-503-6503 (Westlaw).
22. § 77c(a)(2).
23. *Id*.
24. *Id.*.
25. *Id.* (emphasis added).
26. BRADLEY BERMAN ET AL., MORRISON & FOERSTER LLP, FREQUENTLY ASKED QUESTIONS ABOUT SECTION 3(A)(2) BANK NOTE PROGRAMS (2016), http://www.iflr.com/pdfs/faqs-section-3a2-bank-note-programs.pdf.

or, if it qualifies as a financial holding company, activities that are financial in nature.[27]

C. Rationale for the Exemption's Existence

The main objective of enacting the Securities Act was to ensure that the public had sufficient access to financial information regarding publicly offered securities to enable potential investors to make informed decisions about whether to invest in a company's securities.[28] With this goal of transparency in mind, it is reasonable to ask why banks are exempt from this registration requirement which seemingly decreases transparency.[29] The usual explanation for the exemption is that banks are already subject to a heavy amount of regulation.[30] Whether it comes from the Office of the Comptroller of the Currency ("OCC") for nationally chartered banks, or a mixture of the FDIC, FRB, and state banking regulators for state chartered banks, banks are subjected to a great deal of regulatory oversight.[31] Therefore, the rationale for this exemption is that the regulations already in place are sufficient to protect potential investors from securities fraud and improper disclosures without the need for SEC oversight.[32]

D. Federal Regulators' Treatment of Initial Securities Offerings in Absence of Securities Act Registration

While banks may be exempt from Securities Act registration, federal regulators still have the ability to promulgate their own rules regarding securities offerings in the absence of SEC registration. The OCC requires national banks to file security offering registration statements with its office.[33] These filings are extremely similar to those required under

27. 12 U.S.C. §§ 1843(k)(1)–(4) (2012).

28. U.S. SEC. & EXCH. COMM'N., THE LAWS THAT GOVERN THE SECURITIES INDUSTRY: SECURITIES ACT OF 1933 (2013), https://www.sec.gov/answers/about-laws-shtml.html#secact1933.

29. John Maxfield, *Is This Why Bank of the Ozarks Ditched the SEC?*, MOTLEY FOOL (Oct. 12, 2012, 8:11 AM), https://www.fool.com/investing/2017/10/12/is-this-why-bank-of-the-ozarks-ditched-the-sec.aspx.

30. BERMAN, *supra* note 26.

31. BERMAN, *supra* note 26.

32. BERMAN, *supra* note 26.

33. 12 C.F.R § 16 (2018).

the Securities Act.[34] While there are exemptions from this OCC registration requirement, the OCC specifically notes that banks relying on the section 3(a)(2) provision of the Securities Act are *not* exempt from having to file securities offering registration statements with the OCC.[35] Given this similarity and the requirement to file, it seems that some of the advantages conferred by the section 3(a)(2) exemption may be lessened for national banks, as they are required to make substantially similar filings with the OCC.[36]

For state non-member banks, the FDIC has a statement of policy concerning the use of offering circulars with initial offerings of securities.[37] The policy states that the FDIC believes "that every insured state nonmember bank or bank in organization publicly offering its securities, including offerings under preemptive rights, should use an offering circular."[38] However, the FDIC also explicitly states that it believes that the statement of policy is beneficial to small banks, as it does not impose a burden of filing or awaiting regulatory approval and allows for certain flexibility.[39] Essentially, while providing guidance in connection to the offering of securities, the FDIC does not require registration like the SEC or OCC does.[40] This registration process is substantially less burdensome than that involved with the SEC for a non-exempt offeror.[41] For state member banks, the FRB does not provide guidance or regulations pertaining to the registration of securities beyond Securities Act registration.[42]

III. HOW THE SECTION 3(A)(2) EXEMPTION CAN BE USED IN

34. § 16.3.

35. § 16.5(a).

36. *See infra* Part IV (thoroughly discussing the advantages conferred by utilization of Section 3(a)(2)).

37. An offering circular is a prospectus for a new security listing that is circulated to individuals and brokerage houses who are interested in potentially buying the newly issued stock. *Offering Circular*, Investopedia, https://www.investopedia.com/terms/o/offeringcircular.asp (last visited Jan. 22, 2018). The offering circular includes financial information about the issuer, the purpose of the funds being raised, and other information that may be helpful to a potential buyer. *Id.*

38. Statement of Policy Regarding Use of Offering Circulars in Connection with Public Distribution of Bank Securities, 61 Fed. Reg. 46808 (Apr. 20, 2014).

39. *Id.*

40. *Id.*

41. See *infra* Part IV.

42. At the time of publication, February 2019, the FRB had not promulgated any rules pertaining to the registration of securities beyond what is required by the Securities Act.

CONJUNCTION WITH THE EXCHANGE ACT TO DIMINISH SEC OVERSIGHT

As noted above, the section 3(a)(2) exemption provides banks—but not BHCs—an exemption from having to register their securities with the SEC under the Securities Act.[43] However, the Securities Act is not the only piece of legislation that requires SEC registration in connection to bank-issued securities.[44] The Securities Act only governs the initial offering of securities.[45] Thus, Section 3(a)(2) only provides bank issuers with an exemption from having to file registration statements with the SEC in connection with Initial Public Offerings ("IPOs") or primary follow-on offerings.[46]

The Securities Exchange Act of 1934 regulates securities in the secondary market and, among other things, requires certain issuers to register with the SEC and submit periodic reports.[47] The Exchange Act does not contain a bank issued exemption like section 3(a)(2) of the Securities Act.[48] This led many in the banking and securities industries to wonder how Ozarks dissolution of its BHC and utilization of section 3(a)(2) of the Securities Act allowed it to practically escape SEC regulation stemming from the Exchange Act.[49] In order to answer this question, it is necessary to examine the registration requirements of the Exchange Act and how they interact with the section 3(a)(2) exemption in the Securities Act, allowing a bank issuer to substantially rid itself of SEC oversight.[50]

A. *Statutory Provisions of the 1934 Securities Exchange Act that*

43. Securities Exchange Act of 1933 § 3(a)(2), 15 U.S.C. § 77c(a)(2) (2012).

44. THOMAS LEE HAZEN, FEDERAL SECURITIES LAW 2–4 (West, 2d ed. 2003).

45. *Id.* at 25.

46. *Id.* at 32.

47. Securities Exchange Act of 1934, 15 U.S.C. § 78 (2012); *see* U.S. SEC. & EXCH. COMM'N., THE LAWS THAT GOVERN THE SECURITIES INDUSTRY: SECURITIES EXCHANGE ACT OF 1934 (2013), https://www.sec.gov/answers/about-lawsshtml.html#secact1933 (providing a general overview of the Securities Exchange Act).

48. HAZEN, *supra* note 43, at 25.

49. John J. Maxfield, *Why Investors Prefer Holding* Companies, BANK DIRECTOR (2018), http://www.wallerlaw.com/portalresource/lookup/wosid/cp-base-4-145006/media.name=/Bank%20Director%20-%20Bank%20Holding%20Companies.pdf.

50. BERMAN, *supra* note 26.

Trigger SEC Registration and Reporting

There are three statutory provisions within the Exchange Act that require a bank issuer to register with the SEC and submit periodic filings.[51] Section 12(b) requires that an issuer that elects to list a class of securities on a national securities exchange becomes subject to the registration and reporting requirements of the Exchange Act.[52] The second triggering provision is found in section 12(g).[53] This section stipulates that any bank issuers with total assets exceeding ten million dollars and a class of securities held of record by 2000 or more persons must register and report under the Exchange Act.[54] The final triggering provision is found in Section 15(d) and mandates registration and reporting for any issuer that files a registration statement under the Securities Act.[55]

This is where section 3(a)(2) of the Securities Act has an important effect. As noted previously, a bank utilizing section 3(a)(2) does not have to register its securities under the Securities Act.[56] Therefore, a bank utilizing the exemption does not have to worry about triggering section 15(d) of the Exchange Act.[57] This would leave only two possible Exchange Act triggers left, section 12(b) and section 12(g).[58] Smaller community banks may not fall under either of these two provisions.[59] A smaller community bank may elect to not list its securities on a national

51. There are three main periodic filings required by the SEC: (1) annual reports (Form 10-K); (2) quarterly reports (Form 10-Q); and (3) current reports (Form 8-K). U.S. SEC. & EXCH. COMM'N., THE LAWS THAT GOVERN THE SECURITIES INDUSTRY: SECURITIES EXCHANGE ACT OF 1934 (2013), https://www.sec.gov/answers/about-lawsshtml.html#secact1933.

52. § 78l(b).

53. § 78l(g).

54. Section 12(g) actually stipulates that any issuer with a class of securities held of record by either (i) 2,000 persons or (ii) 500 persons who are not accredited investors. However, the 2012 Jumpstart Our Business Startups Act (the "JOBS Act) set a threshold for bank issuers at 2000 persons, without regard to accredited investor status. In addition, a bank, bank holding company or savings and loan holding company may terminate or suspend the registration of a class of equity securities under the Exchange Act if the securities are held of record by fewer than 1200 persons. U.S. SEC. & EXCH. COMM'N., CHANGES TO EXCHANGE ACT REGISTRATION REQUIREMENTS TO IMPLEMENT TITLE V AND VI OF THE JOBS ACT (2016), https://www.sec.gov/info/smallbus/secg/jobs-act-section-12g-small-business-compliance-guide.htm.

55. § 78o.

56. § 77c(a)(2).

57. *Id.*

58. § 78l(b), (g).

59. *JOBS Act Presents Opportunity for Community Banks,* MERCER CAP. (June 2012), [hereinafter *JOBS Act*], https://mercercapital.com/article/jobs-act-creates-opportunity-for-community-banks/.

securities exchange.[60] Furthermore, it is also possible that a smaller community bank will not have a class of securities with more than 2,000 holders of record.[61] In these situations, the bank would not be subject to any of the reporting requirements of the Exchange Act and thus, would substantially avoid SEC oversight.[62]

For banks that *do* trigger reporting requirements under either section 12(b) or 12(g) of the Exchange Act, they may still drastically diminish SEC oversight through utilization of section 12(i) of the Exchange Act.[63] Section 12(i) allows banks that are subject to the Exchange Act to submit their required periodic reports to their primary federal regulator as opposed to the SEC.[64] This provision is what allowed Ozarks to submit its required filings with the FDIC.[65]

The SEC does place restrictions on this transfer of regulatory oversight.[66] Specifically, section 12(i) mandates that the relevant regulatory agency "shall issue substantially similar regulations to regulations and rules issued by the Commission . . . unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors."[67] Therefore, the SEC gives some leeway to federal banking regulators in regards to the oversight of mandatory Exchange Act filings for banks that choose to transfer under section 12(i).[68]

In sum, for smaller community banks that are exempt from the triggering provisions of the Exchange Act, the section 3(a)(2) exemption from securities registration under the Securities Act means that they are able to effectively diminish SEC oversight.[69] For larger banks that *do* trigger Exchange Act reporting, they are able to transfer that reporting

60. Chet Fenimore, *What to Do (and Not Do) When Providing Liquidity to Shareholders,* BANK DIRECTOR (June 22, 2015), https://www.bankdirector.com/issues/legal/what-to-do-and-not-do-when-providing-liquidity-to-shareholders/.

61. *JOBS Act*, *supra* note 59.

62. This occurs by combining the use of the Section 3(a)(2) exemption of the Securities Act with the lack of triggering the reporting requirements of the Exchange Act.

63. § 78l(i) (2012).

64. *Id*.

65. As a state non-member bank, the FDIC is the primary federal regulator for Ozarks.

66. § 78l(i).

67. *Id*.

68. *Id.*

69. *See supra* Part IV.

under section 12(i) and combine this transfer with the use of section 3(a)(2) of the Securities Act to greatly diminish SEC oversight as well.[70]

IV. ADVANTAGES OF UTILIZING SECTION 3(A)(2) AND REDUCING SEC OVERSIGHT

A. Avoiding Strict Liability Under Section 11 of the 1933 Securities Act

Another advantage of the section 3(a)(2) exemption is that it allows banks to avoid liability under section 11 of the Securities Act.[71] Section 11(a) "creates an express right of action for damages by securities purchasers when a registration statement contains untrue statements of material fact or omissions of material fact."[72] This liability is based on statements or omissions that make the registration statement false or misleading.[73] Since utilization of section 3(a)(2) exempts a bank from having to file these statements, the bank is also relieved from exposure to the aforementioned section 11 liability.[74]

This exemption from section 11 liability under the Securities Act turns out to be a major advantage for bank-issuers since it has been interpreted to impose strict liability.[75] Thus, in order to establish a prima facie case for section 11 liability, a plaintiff need only show a material misstatement or omission in the registration statement connected to the securities that the plaintiff bought.[76] Additionally, defenses for an issuer in a section 11 claim are extremely limited.[77]

It is important to note that while banks may be exempted from the strict liability imposed on registration statements, they are still subject to the anti-fraud provision of the federal securities law.[78] These anti-fraud provisions apply to any "substitutions" for Securities Act

70. *See supra* Part IV.
71. Securities Act of 1933 § 11, 15 U.S.C. § 77k (2012).
72. HAZEN, *supra* note 44, at 62.
73. § 77k.
74. § 77c(a)(2).
75. *See* In re NationsMart Corp., 130 F.3d 309 (8th Cir. 1997) (holding that issuer liability for misstatements under Securities Act is virtually absolute, even for innocent misstatements).
76. *Id.* at 311.
77. *See* HAZEN, *supra* note 44, at 62–63 (stating the only three affirmative defenses available for an issuer are: (1) The purchaser knew of the purported inaccuracies in the statement, (2) the inaccuracies are immaterial, or (3) the statute of limitations has run).
78. *See* HAZEN, *supra* note 44, at 62-63.

registration statements.[79] The two main sections that impose liability on bank issued securities are section 17(a) of the Securities Act[80] and section 10(b) of the Exchange Act.[81] Section 17(a)(2) of the Securities Act states that "it shall be unlawful for any person in the offer or sale of any securities . . . to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."[82] Since this provision does not apply specifically to registration statements made pursuant to the Act, a bank issuer could still be liable under this section for any general misstatements made in an offering circular.[83] This subsection has been interpreted over the years to require evidence that the defendant acted with negligence, setting it apart from the strict liability standard of section 11.[84] Additionally, section 17(a)(2) does not provide for a private right of action, as it only permits action taken by the SEC.[85]

Section 10(b) of the Exchange Act has been referred to as a "catchall" antifraud provision.[86] A section 10(b) action can be brought by a purchaser or seller of any security against any person who has used any manipulative or deceptive device in connection with the purchase or sale of a security.[87] However, section 10(b) imposes a much heavier burden on the plaintiff to establish a cause of action than does section 11 of the Securities Act.[88] Unlike section 11, section 10(b) does not impose strict liability; instead, the plaintiff must show that the issuer acted with *scienter*, or the intent to deceive or defraud.[89]

Overall, bank issuers utilizing section 3(a)(2) are able to significantly reduce their potential exposure to liability.[90] Plaintiffs wishing to bring an action against a bank for misstatements will not be able to rely

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79. Such as an offering circular filed with the FDIC or FRB, or the registration statement required by the OCC.
80. Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a) (2012).
81. Securities Exchange Act of 1934 § 10(b), § 78j(b) (2012).
82. Securities Act of 1933 § 17(a)(2), § 77q(a)(2) (2012).
83. Brook Dooley et al., *Section 17(a) of the Securities Act of 1933: Unanswered Questions*, SECURITIES REGULATION & LAW REPORT, 45 SRLR 1265 (July 8, 2013).
84. *Aaron v. SEC*, 446 U.S. 680, 696–97 (1980).
85. *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568-71 (1979).
86. Herman & MacLean v. Huddleston, 459 U.S. 375, 375 (1983).
87. 17 C.F.R. § 240 (2017).
88. *Herman & MacLean*, 459 U.S. at 382.
89. *Id.* at 375.
90. BERMAN, *supra* note 26.

on the strict liability advantage provided by section 11 and will instead have to rely on the heightened requirements of a section 17(a) or section 10(b) claim.[91]

B. Increased Speed and Efficiency with Capital Raising

As previously discussed, section 3(a)(2) allows a bank to issue securities without having to file a registration statement with the SEC.[92] This exemption applies to IPOs as well as primary follow-on offerings.[93] Thus, the exemption can be a major advantage for banks in terms of speed and efficiency in the capital raising process.

In the absence of an exemption from the Securities Act, the process for preparing and registering securities pursuant to the Securities Act can be time consuming.[94] The securities being offered cannot be sold until a registration statement has been filed and subsequently declared effective by the SEC.[95] A Securities Act registration statement consists of two parts: (1) a prospectus, which includes audited financial statements and must be delivered to everyone who is offered the securities, and (2) additional information and exhibits which do not have to be delivered to investors but must be filed with the SEC.[96] After submitting these registration documents to the SEC, an issuing company enters what is known as a "quiet period" while it waits for the SEC to declare the registration statement effective.[97] During this quiet period, the issuer may not sell the related securities.[98]

The review of a company's registration statement can take up to thirty days.[99] After an initial review the SEC may declare the registration statement effective, or it may send the registration statement back to the company with comments addressing any concerns its reviewers may have regarding the registration.[100] The issuing company must then respond to all comments made by the SEC regarding the registration statement until

91. Dooley, *supra* note 83.
92. Securities Act of 1933 § 3(a)(2), 15 U.S.C. § 77c(a)(2) (2012).
93. HAZEN, *supra* note 44, at 26.
94. *Registration Process: SEC Review*, Practical Law Corporate & Securities (Westlaw).
95. *Id.*
96. *Id.*
97. HAZEN, *supra* note 44, at 26.
98. HAZEN, *supra* note 44, at 26.
99. *Registration Process: SEC Review*, *supra* note 94.
100. *Id.*

the SEC is satisfied with the disclosures.[101] This back and forth between the issuing company and the SEC can be an extremely lengthy process, sometimes taking months, during which time the company cannot sell the securities.[102] Ultimately, it is a substantial advantage to be able to utilize section 3(a)(2) to avoid this registration process with the SEC.

While banks claiming the exemption from SEC registration do not have to file a registration statement with the SEC, their federal regulator may still prescribe certain requirements for these banks to follow.[103] For many banks, these requirements are not as restrictive as those set forth by the SEC in terms of capital raising.[104] For instance, as noted above, the FDIC has set forth guidance on offering circulars for state nonmember banks.[105] In its policy statement, the FDIC explicitly states that "in as much as the statement of policy does not impose the burden of filing and awaiting regulatory approval . . . the FDIC believes it will be beneficial to small banks."[106]

C. *Increased Speed and Efficiency in Mergers and Acquisitions Transactions*

With bank merger and acquisition ("M&A") activity on the rise in recent years, section 3(a)(2) provides another potential major advantage for banks engaged in M&A.[107] Initially, the Securities Act did not require the registration of securities used as consideration in M&A transactions,[108] but SEC Rule 145 was amended to require securities used in M&A transactions to be registered pursuant to the Securities Act.[109]

101. U.S. SEC. & EXCH. COMM'N., REGISTRATION UNDER THE SECURITIES ACT OF 1933 (2011), https://www.sec.gov/fast-answers/answersregis33htm.html.

102. *Registration Process: SEC Review*, Practical Law Corporate & Securities (Westlaw).

103. *See supra* Part II.D.

104. Statement of Policy Regarding Use of Offering Circulars in Connection with Public Distribution of Bank Securities, 61 Fed. Reg. 46808 (Sept. 5, 1996).

105. *Id.*

106. *Id.*

107. Lea Nonninger, *M&A Activity is on the Upswing at Retail Banks*, BUS. INSIDER (May 30, 2018, 9:27 AM), https://www.businessinsider.com/merger-acquisition-activity-upswing-banking-2018-5.

108. Anthony G. Mauriello & Robert L. Wernli, Jr., *Securities Law Challenges in Mergers and Acquisitions: Overview of Exemptions from Registration Under the 1933 Securities Act*, STRAFFORD (Feb. 15, 2017), http://media.straffordpub.com/products/securities-law-challenges-in-mergers-and-acquisitions-using-section-4-2-exemption-for-transfer-or-issuance-of-securities-2017-02-15/presentation.pdf.

109. 17 C.F.R. § 230.145 (2018).

Since SEC registration can be a long and involved process,[110] Section 3(a)(2) also provides the benefit of avoiding this registration process in M&A transactions and substantially increasing the speed and efficiency at which these sometimes time sensitive transactions can be completed.[111]

D. Possible Elimination of Filing Fees

The SEC charges filing fees for registration filings required under the Securities Act as well as periodic filings required under the Exchange Act.[112] By utilizing section 3(a)(2), certain banks may be able to avoid filing fees, depending on their charter.[113] As previously discussed, national banks that issue securities must register these securities with the OCC, which charges a filing fee in connection to this registration.[114] Additionally, the OCC charges national banks a filing fee for Exchange Act filings.[115]

In contrast, state nonmember banks using section 3(a)(2) do not have to file a securities registration statement with the FDIC and are therefore able to avoid that filing fee.[116] The FDIC also does not charge a filing fee for Exchange Act filings made by state nonmember banks.[117] The same applies to state member banks, as the FRB does not require Exchange Act filing fees either.[118]

V. POSSIBLE DECREASE IN TRANSPARENCY FOR INVESTORS

While the advantages stemming from utilization of section 3(a)(2) are substantial, it is important to point out a potential downside stemming from its use. For banks that do not trigger the reporting requirements of section 12(b) or section 12(g) of the Exchange Act, invoking section 3(a)(2) allows the bank to cease Exchange Act reporting *in*

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110. *See supra* Part IV.B.
111. Mauriello & Wernli, *supra* note 108.
112. 15 U.S.C. § 77f(b)(1) (2012).
113. *See* 12 C.F.R. § 335.801(a) (2012) (stating that the FDIC does not charge filing fees), *but see* 12 C.F.R. § 16.33 (2018) (stating that the OCC does require filing fees).
114. 12 C.F.R. § 16.33 (2018).
115. *Id.* § 11.4.
116. Statement of Policy Regarding Use of Offering Circulars in Connection with Public Distribution of Bank Securities, 61 Fed. Reg. 46808, 46808 (Sept. 5, 1996).
117. § 335.801(a).
118. § 208.36(c)(2).

addition to not having to register offerings of securities.[119] As a result, investors lose access to information they would normally gather from the bank's public filing of Exchange Act reports.[120] This decrease in transparency could be met negatively by investors.[121] However, an unlisted public company may not be as concerned about this possibility.[122]

For banks that *do* trigger Exchange Act reporting even after utilizing the section 3(a)(2) exemption from registration, there still exists the chance for reduced transparency in regards to transferring Exchange Act filings to their primary federal banking regulator.[123] The primary platform for Exchange Act filings is the SEC's Electronic Data Gathering, Analysis and Retrieval system ("EDGAR").[124] EDGAR is typically one of the first places an investor will go to research a current or potential investment.[125] Exempt bank issuers must still file reports with their federal regulator and may even make them available on their website.[126] However, as there are relatively few banks that are submitting these reports to their regulator, many investors may not be aware that they can find the information through that path.[127] Furthermore, the SEC's EDGAR system provides a more streamlined point of access for the filings than the FDIC's system.[128] As a result, there may be a perception of decreased transparency for investors who are typically accustomed to researching information on a bank's filing through the EDGAR system.

119. Recall that section 15(d) of the Exchange Act requires any issuer who registers securities under the Securities Act to become subject to the reporting obligations of the Exchange Act. *See supra* Part III.A. Therefore, for a bank issuer that only falls under the purview of section 15(d) and not section 12(b) or 12(g), deregistering under the Securities Act will simultaneously allow the bank issuer to avoid the reporting requirements of the Exchange Act. *Id.*

120. Maxfield, *supra* note 49.

121. *Id.*

122. *Id.*

123. *Id.*

124. U.S. SEC. AND EXCH. COMM'N, IMPORTANT INFORMATION ABOUT EDGAR (Feb, 16, 2010), https://www.sec.gov/edgar/aboutedgar.htm.

125. Ted Knutson, *SEC Aims to Make EDGAR More Useful for Investors, Spotting Cybercrime*, FORBES (June 5, 2018, 9:05 AM), https://www.forbes.com/sites/tedknutson/2018/06/05/sec-zeroing-in-on-making-edgar-more-useful-for-investors-cybercrime-says-clayton/#87333635c716.

126. Maxfield, *supra* note 49.

127. For example, there are only fifteen institutions that currently submit Exchange Act reports to the FDIC instead of the SEC. *List of FDIC-Supervised Banks Filing Under the Securities Exchange Act,* FDIC (July 23, 2018), https://www.fdic.gov/bank/individual/part335/.

128. Maxfield, *supra* note 49.

This has the potential to hurt public investment in a bank using the SEC exemption.[129]

VI. BEGINNING OF A TREND?

As discussed in Section I, Ozarks' decision to dissolve its BHC and simultaneously diminish SEC oversight was unprecedented at the time.[130] However, it seems that Ozarks' decision may be starting a trend.[131] Shortly after Ozarks completed its reorganization, BancorpSouth Inc. ("BancorpSouth") announced a similar reorganization involving the dissolution of its BHC.[132] BancorpSouth subsequently announced plans to transfer its submission of its Exchange Act reporting to the FDIC and deregister its securities with the SEC, citing section 3(a)(2) of the Securities Act.[133]

Within the span of a few months, the banking industry saw the first two publicly traded banks on major stock exchanges dissolve their BHC's and subsequently utilize section 3(a)(2) and diminish SEC oversight.[134] Moreover, there are signs that the trend may continue beyond these two entities.[135] Ozarks CEO indicated that after the reorganization, Ozarks was contacted by multiple banks interested in potentially pursuing similar reorganizations themselves.[136]

There is a third recent BHC-shedding transaction which, despite very distinct features from the two above mentioned transactions, deserves mentioning due to the size of the bank.[137] On September 12, 2018, the Financial Stability Oversight Council ("FSOC") approved an application by Zions Bancorporation ("Zions") to merge its holding company into its affiliated national bank subsidiary Zions Bank ("ZB").[138] With

129. *Id.*
130. Baliva, *supra* note 4.
131. Dennis Seid, *BancorpSouth Restructuring Dissolves Bank Holding Company*, MISS. BUS. J. (July 31, 2017), http://msbusiness.com/2017/07/bancorpsouth-restructuring-dissolves-bank-holding-company/.
132. *Id.*
133. *Id.*
134. *Bank of the Ozarks to Dissolve Holding Company*, *supra* note 1; Seid, *supra* note 131.
135. Baliva, *supra* note 4.
136. Baliva, *supra* note 4.
137. V. GERARD COMIZIO & NATHAN S. BROWNBACK, FRIED FRANK FINANCIAL SERVICES, CLIENT ALERT: FSOC CLEARS ZIONS' PLAN TO ELIMINATE SIFI STATUS (July 23, 2018), https://www.friedfrank.com/index.cfm?pageID=25&itemID=8119.
138. *Id.*

$66 billion in assets, Zions is by far the largest BHC to have undergone this transaction.[139] However, as a systematically important financial institution ("SIFI") that took Troubled Asset Relief Program Funds ("TARP") in 2010, Zions had to receive special permission from FSOC to "de-SIFI" and shed its BHC.[140] With the successful completion of its merger and loss of SIFI status, ZB was able to shed the FRB as a federal regulator.[141] As of now, the bank has not announced plans to transition its SEC Exchange Act reporting to the OCC and continues to submit reports to the SEC.[142]

VII. CONCLUSION: HOW THE SECTION 3(A)(2) EXEMPTION FITS INTO THE LARGER QUESTION OF WHETHER BHCS ARE NECESSARY

Notwithstanding the numerous advantages to utilizing section 3(a)(2) and the three recent cases of banks dissolving their BHC and utilizing the exemption, the vast majority of banks still operate under a BHC.[143] Given that the utilization of section 3(a)(2) requires the dissolving of the BHC, this section examines how the exemption fits into the larger, ongoing debate regarding the necessity of BHC's for certain banking institutions.[144] Specifically, for which banks would the potential to use section 3(a)(2) actually make a difference in a decision to dissolve the BHC?[145]

For the largest banking institutions, regardless of the advantages provided by section 3(a)(2), it is simply impractical to dissolve their BHCs.[146] These large institutions generate a fair amount of their revenue from financial activities conducted under their FHC that they would not

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. Gerard Comizio, *Revisiting the Bank Holding Company Structure: Do Community and Regional Banks Still Need a Bank Holding Company?,* 5:2 AM. UNIV. BUSINESS L. REV. 189, 190 (2012).
144. Kristin Broughton, *For Midsize Banks What's the Point of a Holding Company?*, AM. BANKER, Dec. 15, 2017, at 240.
145. For a more detailed discussion on the necessity of BHCs, see Comizio, *supra* note 143.
146. Comizio, *supra* note 143, at 190.

be able to continue to conduct without a holding company.[147] In fact, all banks with over $100 billion in assets currently operate under a BHC.[148]

Additionally, for nationally chartered banks (large and small), the utilization of section 3(a)(2) may not be as important of a factor in the decision to dissolve a BHC as it would be for state chartered banks.[149] This is due to certain OCC requirements that mitigate the advantages provided by section 3(a)(2), as discussed previously.[150]

For small to medium sized state chartered banks, the section 3(a)(2) exemption should play a substantial role in a bank's decision on whether or not to keep a BHC.[151] This is especially true for the banks in this category that are primarily engaged in deposit taking and loan making.[152] Such institutions do not necessarily use or need to take advantage of the expanded range of activities provided by BHCs.[153] This was precisely the case with Zions Bank. With $66 billion in assets and by all accounts a large institution, 99.7% of its revenue came from its bank level activity.[154]

Ultimately, the section 3(a)(2) exemption can provide banks with certain substantial advantages, including a reduction in liability exposure, increased efficiency with capital raising, and certain regulatory savings.[155] While not the only consideration, for certain banks that currently operate under a BHC, the ability to utilize section 3(a)(2) is an advantage that cuts in favor of the dissolution of the BHC.

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147. BHCs that elect to become an FHC may engage in certain activities that are financial in nature, which is beyond the normally allowed activities that are either "closely related to banking" or "incidental to the business of banking at the bank level". 12 U.S.C. § 1843(k) (2012).

148. Comizio, *supra* note 143, at 190.

149. Broughton, *supra* note 144, at 240.

150. *See supra* part III.

151. Broughton, *supra* note 144, at 240.

152. Comizio, *supra* note 143, at 190.

153. Comizio, *supra* note 143, at 190.

154. CLIENT ALERT, supra note 137.

155. *See supra* Part IV.

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