

Client Update

The “FAST” Act: New Limited Private Resale Exemption

NEW YORK

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Title LXXVI of the Fixing America’s Surface Transportation Act, or the “FAST” Act, signed into law on December 4, 2015, amends Section 4 of the Securities Act of 1933 (the “Securities Act”) to provide for a new limited resale exemption intended to “enhance liquidity in the [private] market for company-issued securities and further improvements made by the [JOBS Act].”¹

Under U.S. federal securities laws, securities may be offered and sold only pursuant to a registration statement filed with the SEC under the Securities Act or pursuant to an exemption from registration. The Securities Act and related regulations provide for several exemptions from registration, most notably Section 4(a)(1), which applies to transactions by any person other than an issuer, underwriter or dealer, and Section 4(a)(2), which applies to transactions by an issuer not involving any public offering. Nonetheless, neither these two statutory provisions nor the related safe harbors in Rule 144 and Regulation D provide a specific exemption for the private resale of previously issued securities. Instead, sellers have come to rely on a judicial and administrative interpretation referred to by securities practitioners as the Section 4(a)(1½) exemption.

NEW SECTION 4(a)(7) EXEMPTION FOR PRIVATE REALES OF SECURITIES

Title LXXVI of the FAST Act amends Section 4(a) of the Securities Act to add a new subsection (7) which exempts from registration a private resale of securities by persons other than an issuer or its subsidiary that meets the following requirements:

- *Accredited investors*: Each purchaser is an “accredited investor” within the meaning of Regulation D;

¹ Report of the House Committee on Financial Services from October 6, 2015 (the “October House Report”).

- *No general solicitation or advertising:* Neither the seller, nor anyone acting on its behalf, uses general solicitation or advertising to offer or sell the securities;
- *Non-reporting company information requirement:* Issuers not subject to SEC reporting requirements or not exempt from reporting under Rule 12g3-2(b) must provide the seller and prospective purchaser with certain information, including: the name and address of the issuer and the nature of its business, the title and class of the securities and the number of shares or total amount of the securities outstanding, the issuer's officers and directors, the issuer's most recent balance sheet and profit and loss statement "and similar financial statements" for the two preceding fiscal years, each prepared in accordance with generally accepted accounting principles, and, if the seller is a control person of the issuer, a brief statement of the nature of the affiliation and a certified statement by the seller that it has no reasonable grounds to believe the issuer is in violation of the securities laws or regulations;
- *Bad actor prohibition:* Neither the seller, nor any person receiving a commission for participation in the transaction, would be disqualified as a "bad actor" under Rule 506(d)(1) of Regulation D or is subject to disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934 (i.e., a person recently convicted of a crime related to securities, subject to an order or judgment from a court, a state securities regulator or the SEC related to certain actions with securities, or disqualified from membership or participation in a self-regulatory organization);
- *Business requirement:* The issuer is engaged in a business that is not in the organizational stage or in bankruptcy, and is not a blank check, blind pool or shell company;
- *Underwriter prohibition:* The transaction does not involve securities which are part of an unsold allotment to an underwriter; and
- *Outstanding 90 days:* The securities to be resold have been authorized and outstanding for at least 90 days prior to the transaction.

Securities acquired in reliance on Section 4(a)(7) will be deemed to be acquired in a transaction not involving any public offering and not to be part of a distribution. In addition, such securities will be deemed to be "restricted securities" within the meaning of Rule 144. Finally, such securities will be "covered securities" within the meaning of Section 18(b) of the Securities Act and, therefore, exempt from state "blue sky" registration requirements.

Whereas the October House Report notes that Section 4(a)(7) is intended to "increase market liquidity and resolve legal uncertainty that impedes employees

of private companies from selling their company-issued securities,” we note that Section 4(a)(7) also applies to control persons and other affiliates of the issuer.

CONCLUSION

While described by some as a codification of the “Section 4(a)(1½)” exemption, Title LXXVI of the FAST Act clarifies that new Section 4(a)(7) does not replace the Section 4(a)(1½) exemption. Further, given its prescriptive nature, the utility of Section 4(a)(7), like other provisions created by the JOBS Act in 2012, may emerge only over time.

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Please do not hesitate to contact us with any questions.