



## LEGAL ALERT

January 4, 2016

### **New Law Eases Private Resales of Restricted Securities**

The President recently signed into new law a statutory exemption under the federal Securities Act of 1933 (“1933 Act”) for certain private resales of restricted securities not involving the issuer. With respect to financial institutions, this law would impact only those securities issued by bank holding companies as securities issued by banks remain exempt from registration under Section 3(a)(2) of the 1933 Act.

This law will have a positive impact on companies raising capital by means of a private offering exempt from registration with the U.S. Securities & Exchange Commission (“SEC”), particularly by issuers that are not subject to the reporting requirements of the Securities Exchange Act of 1934 (“1934 Act”) (a “Reporting Company”).

Previously, the purchaser of securities from an issuer in a private offering could resell those securities without registering the transaction with the SEC only if he or she held the securities for 6 months from the date of purchase if the issuer was a Reporting Company or 12 months from the date of purchase for all other issuers.

Now, individuals who purchased securities from the issuer in a private offering will be able to resell those securities without registration of the transaction with the SEC if (i) the securities subject to the resale transaction have been authorized and outstanding for a minimum of 90 days; (ii) the purchaser is an Accredited Investor; (iii) no general solicitation or general advertising is used in connection with the

resale transaction and (iv) the purchaser receives certain required information if the issuer is not a Reporting Company (“Required Information”).

In order to facilitate a resale transaction made in reliance on this exemption, an issuer which is not a Reporting Company, after the completion of a private offering, should maintain the Required Information so that it can be made available to security holders of the issuer who wish to engage in a resale transaction in reliance on this exemption.

#### **What Are Restricted Securities?**

Securities that are offered and sold by an issuer in reliance upon an exemption from SEC registration almost always carry a restriction on resale. Under SEC Rule 144, this means that the purchaser is prohibited from reselling the securities purchased in the offering for 12 months if the issuer is not a Reporting Company and 6 months if the issuer is a Reporting Company.

#### **What Does the New Law Allow?**

*Applies only to non-issuer transactions.* The new law creates a separate category of exempt transactions under the 1933 Act if the transaction is not for the sale of a security where the seller is an issuer or a subsidiary, either directly or indirectly, of the issuer. In other words, the exemption is available only for transactions not involving the issuer of the securities.

*Resales only to Accredited Investors.* Under this new exemption, holders of restricted securities may resell them only to Accredited Investors as defined by the

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federal securities laws.

No Use of General Solicitation or General Advertising.

No general solicitation or general advertising may be used in connection with the exempt resale transaction. For example, this would prohibit placing a post on your Facebook page that you want to sell a restricted security, even if the eventual purchaser was an Accredited Investor.

Resale restrictions in Rule 144 continue to apply. An Accredited Investor who purchases a security from a seller in reliance on this exemption still must comply with the holding provisions of SEC Rule 144 in a resale transaction not exempt under this new provision (i.e., to a non-accredited investor). Although there is no specific provision in SEC Rule 144 relating to this specific exemption, it would be anticipated, based on previous SEC pronouncements, that the SEC would permit “tacking.” In other words, the holding period for the restricted securities imposed by SEC Rule 144 would run from the date of the original sale of the security by the issuer.

Other requirements. Other requirements include that the class of security which is the subject of the transaction must be authorized and outstanding for at least 90 days prior to the date of the transaction. Furthermore, neither the seller nor any person who has been or will be paid (directly or indirectly) remuneration or a commission for their participation in the offer or sale of the securities, including solicitation of purchasers for the seller, can be subject to an event that would constitute a disqualification of an issuer or any other covered person under SEC Rule 506(d) under the 1933 Act or Section 3(a)(39) of the 1934 Act.

Duty of seller to furnish Required Information to purchaser. If the issuer of the securities that are involved in a transaction under this new exemption is not a Reporting Company, the seller must make the following Required Information available to the purchaser:

- The exact name of the issuer and the issuer’s predecessor;
- The address of the issuer’s principal executive offices;
- The exact title and class of the security, including the par or stated value of the security;
- The number of shares or total amount of securities outstanding as the end of the issuer’s most recent fiscal year;
- The name and address of the transfer agent, corporate secretary or other person responsible for transferring shares and stock certificates;
- A statement of the nature of the business of the issuer and the products and services it offers, which shall be presumed reasonably current if the statement is as of 12 months before the transaction date;
- The names of the officers and directors of the issuer;
- The names of any person registered as a broker, dealer, or agent that shall be paid or given, directly or indirectly, any commission or remuneration for such person’s participation in the offer or sale of the securities;
- To the extent that the seller is a control person of the issuer, a brief statement regarding the nature of the affiliation and a statement certified by such seller that they have no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations; and
- The issuer’s most recent balance sheet and profit and loss statement and similar financial statements prepared in accordance with generally accepted accounting principles which shall be for such part of the two preceding fiscal years as the issuer has been in operation.

### **Preemption of State Law**

The new law prohibits the states from requiring the registration or qualification of transactions made in reliance on this new exemption. However, states may be able to impose a notice filing or fee requirement.

### **Need More Information?**

If you would like additional information, please contact any of the following members of Bybel Rutledge LLP at (717) 731-1700 or at their respective email addresses:

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