

## Strawberries and Raspberries – Truly Strange Bedfellows re: Fixing America’s Surface Transportation Act

Article By:

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When I served as Deputy Secretary and General Counsel of the ***California Business, Transportation & Housing Agency***, the ***Departments of Transportation and Corporations*** were part of that agency. As a result, my days often involved a concatenation of transportation and securities law legislative issues. After leaving government service, I didn’t expect to see this unusual pairing again. But now, Congress has joined them in the “[Fixing America’s Surface Transportation Act](#)” or the “FAST Act”.

As the name implies, the FAST Act is largely concerned with transportation funding. However, it does include some important amendments to the securities laws. Today’s post discusses one of those amendments. Section 76001 of the FAST Act amends Section 4(a) of the Securities Act of 1933 to add a new exemption for certain secondary transactions. The new exemption imposes conditions on the prospective purchaser, the seller, the transaction and the issuer:

**Purchaser condition:** Each purchaser must be an “accredited investor” as defined in Rule 501(a) of Regulation D.

**Seller conditions:** (1) Neither the seller, nor any person that 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 may be subject to an event that would disqualify an issuer or other covered person under Rule 506(d)(1) of Regulation D; and (2) the seller must not be an issuer or a direct or indirect subsidiary of the issuer.

**Transaction conditions:** (1) Neither the seller, nor any person acting on the seller’s behalf, may offer or sell securities by any form of general solicitation or general advertising; (2) The transaction must not involve an unsold allotment to, or a subscription or participation by an underwriter or a redistribution; and (3) The transaction must be with respect to a security of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

**Issuer conditions:** (1) the seller and prospective purchaser must obtain specified financial information from the issuer when the issuer is not subject to the reporting requirements of the Securities Exchange Act of 1934, is not a foreign private issuer exempt from the registration requirement of Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b), or is not a foreign

government as defined in Rule 405; (2) the seller must not be an issuer or a direct or indirect subsidiary of the issuer; (3) the issuer must be engaged in business; and (4) the issuer must not be (a) in the organizational stage, bankruptcy or receivership, (b) a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that the issuer's primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person.

## Finding strange bedfellows in the garden

Transportation funding and securities law amendments do make strange bedfellows. The same thing is often said about politics. I wonder, however, how many people know that the original quotation is a pun from a 19th century book on gardening by Charles Dudley Warner. Below is the quotation in context:

Even the Colfax variety was as ambitious as the others. After having seen the declining letter of Mr. Colfax, I did not suppose that this vine would run any more, and intended to root it out. But one can never say what these politicians mean; and I shall let this variety grow until after the next election, at least; although I hear that the fruit is small, and rather sour. If there is any variety of strawberries that really declines to run, and devotes itself to a private life of fruit-bearing, I should like to get it. I may mention here, since we are on politics, that the Doolittle raspberries had sprawled all over the strawberry-bed's: so true is it that politics makes strange bedfellows.

[My Summer in a Garden](#) 131 (1871). Mr. Colfax is a reference to Vice President Schuyler Colfax and the reference to his "declining letter" may be to his announcement in 1870 that he would not seek reelection. My hunch is that the reference to Doolittle is a reference to James Rood Doolittle, a Republican supporter of Abraham Lincoln who in 1871 ran on the Democratic ticket for Governor of Wisconsin. Conveniently, Colfax and Doolittle were also names of two plant varieties sharing space in Warner's garden bed.

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