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U P D A T E

News of Developments in the Financial Sector and Related Areas

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Securities Nonissuer Transactions

The Arkansas Securities Act of 1959, as amended (the "Act") exempts from the filing requirements under the Act "any isolated nonissuer transactions..." This exemption from the filing requirements exempts secondary sales of securities by a nonissuer which are already issued and outstanding by the issuer. The term "nonissuer" is defined under the Act to mean not directly or indirectly for the benefit of the issuer. Under the Act the term "issuer" means any person who issues or proposes to issue any security. Under federal law the term "issuer" includes any person directly or indirectly controlling the issuer. Generally, a principal shareholder or executive officer of an issuer is treated as a control person. The term "controlled" has been defined to mean the power to exercise a controlling influence over the management policies of a company. A person serving as a director of a company establishes a presumption of control although such presumption is clearly rebuttable. Any person who owns more than 25% of the voting securities of a company will be presumed to be in a control position. The isolated nonissuer exemption has been termed "primarily an exemption of last resort" because it is ambiguous and indefinite in its application in that it does not address how many nonissuer sales may be made and still considered isolated transactions. For instance, two or more sales may destroy the exemption depending on a specific fact situation. In addition, controlled persons are in a position to supply the same type of information such as financial statements as would be supplied by an issuer. Depending on the circumstances, a filing under the Act will generally be required to be made and obtained prior to the issuance of securities by an issuer. In the event a filing is not made, the issuer will be strictly liable under the Act to a purchaser of the securities for the amount of the principal investment plus 6% interest and any expenses incurred by the purchaser. Since the nonissuer exemption may not be available to a control person, it is recommended that a filing be made on behalf of the control person in order to avoid the liability provisions of the Act.

Debt Cancellation Disclosures

Rivera v. Grossinger Autoplex, Inc., No. 01-1015, is a case before the United States Court of Appeals for the Seventh Circuit involving an automobile dealer's disclosures of a debt cancellation fee in which the fee was excluded from a consumer's finance charges. The Truth in Lending Act (the "Act") requires creditors to disclose any finance charges that a consumer will pay under a given credit transaction. Finance charges can include debt cancellation fees. However, debt cancellation fees may be excluded from finance charges if the following requirements are met:

- the debt cancellation agreement or coverage is not required by the creditor and this fact is disclosed in writing;

- the fee or premium for the initial term of coverage is disclosed. If the term of coverage is less than the term of the credit transaction, the term of coverage shall be disclosed...; and

- the consumer signs or initials an affirmative written request for coverage after receiving the disclosures specified in 12 C.F.R. § 226.4(d)(3)(i). Additionally, any disclosures made in compliance with these requirements must be clear and conspicuous as well as in writing as set forth in 12 C.F.R. § 226.17(a)(1).

The court held that the dealer's disclosures of the debt cancellation fee was sufficient to allow the fee to be excluded from the finance charges, and the disclosure plainly stated that the debt cancellation program was voluntary and not a prerequisite to receiving credit. In addition, the court noted that the provisions relating to the debt cancellation coverage were labeled and capitalized in a manner that made them sufficiently conspicuous. The court noted that the dealer was not required to disclose the term of the debt cancellation coverage when the term of the coverage was equal to the term of the loan. Lastly, the court noted that the consumer's signature on an addendum to the financing agreement accepting the debt cancellation was sufficient to constitute an affirmative written consent to the coverage.

Broker-Dealer Registration by Banks

Pursuant to the provisions of the Gramm-Leach Bliley Act (the "Act"), the Securities and Exchange Commission ("SEC") adopted interim final rules which were effective as of May 12, 2001, that address the bank exceptions to registration as a broker-dealer and replaced the long-standing full exception by banks from the broker-dealer registration provisions of the Securities Exchange Act 1934. Under the interim final rules, banks with nonexempt securities activities would have to register as broker-dealer or move the activities into a registered broker-dealer affiliate. Many banks would prefer to avoid registration because it subjects them to more regulations by another regulatory agency. Federal bank regulators have argued that the interim rules go beyond the SEC's power and are based on a misunderstanding of banking industry practices. Criticism of the rules by federal bank regulators, include excluding some traditional trustee relationships from the definition of "trustee"; the rules' exception for investment advice given for a fee is narrower than intended by the Act; and the Act allows a bank employee to receive a nominal one-time fee of a fixed amount for referring customers to an associated broker-dealer, but the SEC rules limit this by restricting the fee to no more than one hour's compensation and prohibiting the payment of bonuses. Under pressure from the bank regulatory agencies, compliance by banks was extended by the SEC until May 12, 2002. In a recent SEC news release *SEC News Digest 2002-36*, the SEC stated that it did not expect banks to develop compliance systems until after the adoption of final amendments by the SEC. In addition, the SEC stated that it expects to extend the compliance, as appropriate, so that banks would have sufficient time to implement the changes necessary to comply with the rules as amended. As part of the rulemaking process, the news release reflects that the SEC continues to have discussions with banks and other interested parties. The news release does not specify a new compliance date.

Goverance of Banks by State Law

Interpretive Letter No. 921 issued by the Office of the Comptroller of the Currency reaffirms that a national bank may designate in its bylaws to be governed by the business corporate code in the state in which it is located to the extent that the state business corporate code is not inconsistent with federal banking law and bank safety and soundness.