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U P D A T E

News of Developments in the Financial Sector and Related Areas

IN THIS ISSUE

Trust Preferred Securities

In Interpretive Letter No. 908, the Office of the Comptroller of Currency ("OCC") held that trust preferred securities may be purchased and treated as loans by national banks. In its request to the OCC, a bank holding company proposed to form a business trust as a wholly-owned subsidiary for the sole purpose of issuing trust preferred securities to investors. The business trust would then lend the proceeds that it received on the sale of the trust preferred securities to the holding company in exchange for a subordinated debenture with terms that were identical to the terms of the trust preferred securities. The payments on the debentures would be the sole source of cash flow from which the trust's obligations to the holders of the trust preferred securities would be satisfied. The OCC noted that trust preferred securities are instruments that possess characteristics particularly associated with debt securities. Like debt holders, the holders of the trust preferred securities do not have voting rights in the management or the ordinary course of business of the trust. In addition, holders of the trust preferred securities do not share in any appreciation in the value of the trust and are protected from changes in the value of the principal of the instruments except for credit risk. Since the trust's only source of revenue for the dividends on the trust preferred securities is the interest on the underlying subordinated debt, the trust preferred securities must be redeemed upon redemption of the subordinated debt. Before purchasing trust preferred securities as loans, the OCC noted that a national bank should conduct a complete review of relevant credit information and loan administration practices, and determine that the purchases meet the bank's own internal loan underwriting standards. The interpretive ruling by the OCC provides a vehicle for a bank holding company to convert debt to equity while allowing a bank purchaser of the trust preferred securities to treat the purchases as loans. The amount of trust preferred securities that may be included in Tier 1 capital of a bank holding company is limited to 25% of Tier 1 with the remainder being classified as Tier 2 capital. At this time, there is no formal regulation on the issuance of trust preferred securities, however, the staff of the Federal Reserve Board is in the process of putting together a Supervisory Release ("SR Letter") which will summarize the requirements of trust preferred securities. The SR Letter by the staff of the Federal Reserve Board is expected to be issued in the third quarter of 2001.

Broker-Dealer Registration by Banks

The Securities and Exchange Commission ("SEC") has adopted interim final rules that address the bank exceptions to registration as a broker-dealer pursuant to the provisions of the Gramm-Leach-Bliley Act. These statutory provisions were effective as of May 12, 2001, and replace the long-standing full exception by

banks from the broker-dealer registration under the Securities Exchange Act of 1934. Banks that limit their securities activities to fifteen functional exceptions remain excepted from registration as a broker-dealer. Banks that engage in securities activities outside the fifteen exceptions will be required to register as a broker-dealer. The SEC has extended the time for registration by banks as a broker-dealer until October 1, 2001, and will give banks until January 1, 2002, before their compensation arrangements must meet the conditions of certain statutory exceptions. The SEC also adopted a rule that will treat savings associations and other thrifts the same as banks for broker-dealer registration purposes. The interim final rules are reprinted in Fed. Banking L. Rep. (CCH) ¶ No. 92-765.

Save Money on Franchise Taxes

Corporations, bank holding companies and banks organized under the laws of the State of Arkansas may want to consider amending their articles to provide for a par value of $.01 for each share of authorized stock. Bank holding companies and banks in Arkansas generally have a par value of $10.00 per share. Assuming that a corporation or bank had 500,000 shares of stock outstanding at a par value of $10.00 per share and all of its assets were in Arkansas, a corporation or bank would pay an annual franchise tax of $13,500.00. By amending the articles to provide for a par value of $.01 per share, the corporation or bank would only pay the minimum annual franchise tax of $50.00. A corporation or bank would not want to amend its articles to provide for no par value since shares without par value are assessed at a rate of $25.00 per share, which if 500,000 shares were outstanding, would result in an annual franchise tax of $33,750.00. The *Arkansas Corporate Franchise Tax Act of 1979* is available in the Arkansas Code at § 26-54-101 et. seq. (Repl. 1997).

Potpourri

The Office of the Comptroller of Currency has notified banks of a proposal that would facilitate customers' informed choice about whether to purchase debt cancellation contracts ("DCC") and debt suspension agreements ("DSA"), based on an understanding of costs, benefits, and limitations of the products. The proposal would also discourage inappropriate or abusive sales practices. Under a DCC or DSA, the customer agrees to pay an additional fee to the bank in exchange for the bank's promise to cancel or temporarily suspend payments on the debt. The proposed rule is reprinted in Fed. Banking L. Rep. (CCH) ¶ No. 92-744.

Freyermuth v. Credit Bureau Services, Inc., Case No. 00-2661 (8th Cir. 2001) held that a debt collector's letter demanding payment of debts that were older than the statute of limitations did not violate the Fair Debt Collection Practices Act as long as there was no collection suit filed or threatened. The expiration of the statute of limitations did not eliminate the debts, but only limited the judicial remedies available to collect them.

Hayes v. Advance Towing Services, Inc., 40 S.W. 3d 800 (Ark. App. 2001) held that the issue of whether truthful statements by a towing company to customers that a competitor had a criminal record, in an attempt to strip business away from the competitor towing company, was fair and reasonable or constituted tortious interference with business relations was a question for the jury to decide.

Wharf (Holdings) Ltd. v. United International Holdings, Inc., Case No. 00-347 (2001), the United States Supreme Court held that a sale of an option to buy stock while secretly intending never to honor the option was misleading and violated Section 10(b) of the Securities Exchange Act of 1934, which prohibits using any manipulative or deceptive device or contrivance in connection with the purchase or sale of any security.