

UPDATE

News of Developments in the Financial Sector and Related Areas

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In January 2010, President Obama in his State of the Union Address announced a program to provide \$30 billion of capital to community banks for the purpose of extending credit to small businesses. It took Congress until September 2010 to enact the legislation known as the Small Business Jobs Act of 2010 that included the creation of a \$30 billion Small Business Lending Fund (the "Fund") to provide capital to participating depository institutions in order to support small business lending.

The Fund authorized the Treasury to make capital investments in depository institutions with an incentive structure to support new small business lending. The Fund was designed to encourage broader participation by depository institutions in that participants would not face existing TARP restrictions such as limitations relating to executive compensation. Current participants in TARP were to be able to convert from the existing TARP program to the new program thereby substantially reducing their costs.

The Treasury did not publish the application and guidelines for C corporations until the end of December 2010. C corporations had until May 16, 2011 to apply. The initial rate for C corporations was 5% with adjustments to the rate based on increases or decreases in small business lending by a depository institution. The guidelines for S corporations were not issued until May 2011, and S corporations had until June 6, 2011 to apply. The initial rate for an S corporation was 7.7% with adjustments to the rate based on increases or decreases in small business lending by a depository institution. The Treasury did not begin funding approved depository institutions until the latter part of June 2011 and the program ended on September 27, 2011.

933 depository institutions applied for \$11.8 billion in funds. Of those depository institutions that applied, the Treasury issued 400 approvals of which 68 decided not to participate. The remaining 332 depository institutions received \$4.03 billion in funds. Approximately two-thirds of the \$4.03 billion in funds went to TARP participants. There were 319 TARP recipients that applied for participation in the Fund but only 137 were permitted to participate by refinancing funds received from TARP for funds received from the Fund.

Approximately two-thirds of the depository institutions that applied were rejected without explanation by the Treasury for various reasons including failure to obtain approval from their primary bank regulator or the inability to pay dividends. The rejected depository institutions were permitted by the Treasury to withdraw their

applications. Recently the Treasury has begun calling rejected institutions to provide explanations of the reasons their application was rejected.

Those depository institutions that were permitted to participate were generally well capitalized with low levels of non-performing assets. Only four banks from Arkansas received funding from the Treasury under the program. California had the largest number of recipients with 29. In the end, the program did not accomplish its intended goal of providing capital to banks for extending credit to small businesses.

Letters of Intent

Letters of intent, which are sometimes known as memorandums of understanding or letters of understanding, are generally utilized by parties to a business transaction to set forth the major terms of their understanding prior to the execution of a definitive agreement. Letters of intent may be either binding or non-binding, and it is important that the parties to a letter of intent state their understanding.

A typical provision in letters of intent is a statement that it is not a binding agreement. However, the parties may want to specifically provide that although the letter of intent is not binding on the parties until the execution of the definitive agreement, that certain portions of the letter of intent are binding and enforceable such as (i) the parties will deal exclusively with one another and will not utilize the letter of intent to shop the proposed transaction to third parties, (ii) a confidentiality provision requiring the parties to maintain in strict confidence all confidential information relating to the terms of the proposed transaction and the disclosed information by one party to another, (iii) access to information to determine if the proposed transaction should proceed, commonly referred to as

“Due Diligence”, and (iv) each party will be responsible for their own legal fees and expenses.

The main purpose of a letter of intent is to summarize the material terms of the proposed transaction and to prevent unnecessary expense in the preparation of the definitive agreement. In those cases where the parties cannot agree upon the terms of a letter of intent, there is no need to proceed with the effort and expense of preparing a definitive agreement.

A non-binding letter of intent may include material terms such as, the purchase price, the assets involved in the transaction, closing conditions, date for closing, and other terms which may also be in the definitive agreement. Besides setting forth the key elements of a proposed transaction, a letter of intent provides a sense of assurance that each side is committed to moving forward with the proposed transaction. The letter of intent needs to be signed by the parties to the proposed transaction.

In connection with the execution of a letter of intent by the parties, courts have recognized the obligation of each party to act in good faith in attempting to negotiate a definitive agreement. Some years ago after signing a letter of intent to merge with Pennzoil, the Getty Oil board of directors backed out of the deal and merged with Texaco because Texaco had made a better offer. When litigation arose over the obligations of the parties to the letter of intent, the jury in the case awarded Pennzoil over \$10 billion in compensatory and punitive damages with the case being ultimately settled by the parties for approximately \$3 billion. As a result, even though certain terms and conditions of a letter of intent are not binding and enforceable, each party needs to deal in good faith when entering into a letter of intent.