

UPDATE

News of Developments in the Financial Sector and Related Areas

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Share Exchanges - Minority Shareholders - Reverse Stock Splits

In Interpretive Letter No. 869, the Office of the Comptroller of the Currency ("OCC") held that a national bank may elect the corporate governance provisions of state law where the main office of the bank is located and complete a share exchange in accordance with the laws of Alabama. The national bank proposed to amend its articles of association and bylaws to elect to be governed by the provisions of Alabama law and to form an Alabama business corporation as its parent holding company and then to have a share exchange between shareholders of the bank and the holding company in order to assure that the holding company would own 100 percent of the outstanding shares of the bank. If two-thirds of the shares of the bank approve the share exchange, the holding company would then exchange its shares for shares of the bank using procedures described in Alabama law. As a result, each shareholder of the bank would own shares of the holding company. Shareholders not

voting in favor of the proposed share exchange, could exercise dissenters' rights and receive cash for their shares. 12 U.S.C. § 7.2000(b) expressly permits a national bank to elect the corporate governance provisions of the law of the state in which the main office of the bank is located. In its interpretive ruling, the OCC stated that a national bank may adopt state corporate governance procedures and conduct a share exchange to the extent those procedures are not inconsistent with applicable federal banking statutes and regulations.

Under the Arkansas Banking Code, there is a Subchapter entitled Reorganization Through Plan of Exchange (Ark. Code Ann. § 23-48-601 et. seq.) which allows a state bank to adopt a plan of exchange very similar to the provisions of Alabama law, which may be an avenue for national banks to follow in those states with laws similar to Alabama. In regard to Arkansas law, a holding company may acquire ownership both by exchange of stock and/or payment of cash.

In Conditional Approval No. 335, the OCC granted the application of First National Bank, Hot Springs, Arkansas, permitting the Arkansas national bank to amend its bylaws to elect the corporate governance provisions of Arkansas law and thereby engage in a reverse stock split as provided by Arkansas law. The Arkansas national bank proposed the reverse stock split to eliminate the responsibilities associated with a substantial shareholder base, including the reduction of corporate expense associated with shareholder communications and meetings and in order to convert to a Subchapter S corporation. In its approval, the OCC held that eliminating the responsibilities associated with

a substantial shareholder constituency is a proper business purpose citing *Leader v. Hycor, Inc.*, 479 N.E. 2d 173, 178 (Mass. 1985).

Nonpublic Personal Information

Title V of the Gramm-Leach-Bliley Act (the "Act") sets forth the provisions that require financial institutions to protect nonpublic personal information. The Act requires financial institutions to disclose both initially and annually to customers the institution's policies and procedures for projecting and disclosing nonpublic personal information. "Nonpublic personal information" is defined as personally identifiable financial information:

- Provided by a customer (as in a deposit account application);
- Resulting from any transaction with or service performed for the customer (as in a loan transaction); or
- Otherwise obtained by the financial institution (from third party marketing analyses, census bureau data, etc.).

Customers must be given the opportunity to "opt-out" of having their nonpublic personal financial information shared with unaffiliated third parties. The Act requires federal banking agencies to promulgate regulations to implement the privacy protections of the Act which are required to be effective on or about November 12, 2000.

Motor Carrier Safety Improvement Act

The Motor Carrier Safety Improvement Act of 1999 (the "Act") was signed into law by President Clinton on December 9, 1999. The Act creates a new agency within the Department of Transportation to oversee motor carrier and bus safety. The legislative intent of the Act is to keep dangerous vehicles off the roads, save lives, and to aide the Department of Transportation in meeting

its goal of fifty percent reduction in transportation-related fatalities over the next ten years.

ATM Surcharges

On December 20, 1999, the Connecticut Supreme Court issued its decision in *Burke v. Fleet National Bank*, No. 16157, overturning a Connecticut banking regulation which prohibited imposing surcharges on automated teller machine transactions. Iowa is the only remaining state in the United States that bans non-customer surcharges; however, the municipalities of San Francisco and Santa Monica, California recently adopted legislation banning surcharging. In a letter opinion by the Chief Counsel of the Office of Thrift Supervision ("OTS") dated November 22, 1999, to First Federal Bank of California, F.S.B., the OTS issued its interpretive opinion that state law restrictions and requirements pertaining to the establishment, advertising, disclosure requirements and regulation of federal savings association's ATM operations were preempted by federal law, i.e., The Home Owners' Loan Act.

Investment Bank Holding Company

The Gramm-Leach-Bliley Act creates a new type of supervised entity that engages in securities activities called an Investment Bank Holding Company or "IBHC". The IBHC can elect to be subject to regulation by the Securities and Exchange Commission ("SEC"). In general, an IBHC is defined as any person (other than a natural person) that owns or controls one or more brokers or dealers. Once an IBHC voluntarily elects SEC supervision, the SEC will have authority to oversee the entire entity and the IBHC and its affiliates would be subject to SEC examinations and reporting requirements.