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U P D A T E

News of Developments in the Financial Sector and Related Areas

* *IN THIS ISSUE* *

Covenant Not to Compete

Broker-Dealer Reporting

Exempt Offerings Under SEC Rule 701

Citicorp / Travelers Merger

Sale of General Insurance by Banks

Pooling-of-Interest Accounting

Student Harassment

Covenant Not to Compete

In Dawson v. Temps Plus, Inc., 337 Ark. 247, the Arkansas Supreme Court delivered its opinion on April 15, 1999, upholding a covenant not to compete as valid and enforceable. Dawson provided the capital for the formation of a temporary-employment business which was formed under the name Temps Plus, Inc. (the "Company"). Dawson was not involved in the business operations of the Company, although he was a member of its board of directors. The Company was successful, but Dawson did not want to expand the business outside of Arkansas, and he began negotiating for the sale of his interest. Subsequently, Dawson sold his stock in the Company, and as part of the transaction, entered into a five year non-compete agreement with the Company which covered a 70 mile radius of Blytheville, Arkansas. Approximately one year later, Dawson formed his own temporary-employment business in Blytheville and hired two employees of the Company. Upon notice from counsel for the Company to cease operating the temporary-employment business, Dawson immediately ceased doing business. However, approximately two weeks later, Dawson's brother went into the temporary-employment business hiring the two former employees of the Company, paying for a computer system that Dawson had ordered, and later renting office space in a building that Dawson had built for his new business. The Court concluded that the Company had a legitimate interest to be protected and that the geography and time restraints of the non-compete covenant were not unreasonable. However, the Court was unwilling to extend the non-compete to Dawson's brother, nor was the Court willing to find that Dawson's brother was liable for damages, holding that absent a restrictive agreement with Dawson's brother, "this Court will not shackle the privilege to engage in legitimate competition by extending a non-compete agreement to third parties".

Broker-Dealer Reporting

The Securities and Exchange Commission has amended Form BDW and related filing procedures. The amendments implement changes to allow filings from the World Wide Web. The amendments clarify Form BDW and its filing procedures under the Securities Exchange Act of 1934. Release No. 34-41356, dated April 30, 1999, effective June 9, 1999.

Exempt Offerings Under SEC Rule 701

The Securities and Exchange Commission has adopted amendments to Rule 701 under the Securities Act of 1933, which provides an exemption from registration for securities issued by non-reporting companies pursuant to compensatory arrangements. The SEC has removed the $5 million aggregate offering price ceiling and set the maximum amount of securities that may be sold in a 12-month period to a more appropriate, flexible limit related to the size of the issuer. Release No. 33-7645, dated February 25, 1999, effective April 7, 1999.

Pooling-of-Interest Accounting

The Financial Accounting Standards Board has set for January 1, 2001, for all mergers to be subject to purchase accounting treatment instead of pooling-of-interest accounting, which will require premiums in connection with mergers to be accounted for as goodwill.

Student Harassment

The United States Supreme Court recently ruled in Davis v. Monroe County Board of Education, No. 97-843, that schools can be sued and forced to pay damages under a federal anti-bias law when school officials fail to protect students from severe and pervasive sexual harassment by fellow students. In a 5-4 vote by the Court on May 24, 1999, the Court held that school districts can be sued for harassment under Title IX of the Education Amendments of 1972 which prohibits so-called student-on-student sexual harassment. The Court held that students filing peer harassment claims against school districts must show that school officials with authority to take correction action knew about the alleged harassment and were deliberately indifferent to it. Damages are only available where the behavior is so severe, pervasive and objectively offensive, that it denies victims the equal access to education that Title IX is designed to protect. Title IX bars discrimination in any educational program or activity receiving federal funds.

Citicorp / Travelers Merger

The Independent Community Bankers of America recently filed a brief with the United States Court of Appeals for the District of Columbia alleging that the Federal Reserve Board violated the Bank Holding Company Act and the Glass-Steagall Act in approving the merger of Citicorp and Travelers Group alleging:

- The Federal Reserve should have required a plan submitted for divesting Travelers' insurance underwriting units within two years as required by the Bank Holding Company Act in connection with impermissible activities.

- Violation of the Glass-Steagall Act in connection with securities underwriting activities.

- Violation of the United States Constitution's separation of powers which interferes with Congress' ability to enact legislation governing banking activities versus insurance activities.

It is doubtful that the Court will overturn the decision by the Federal Reserve Board.

Sale of General Insurance by Banks

The Texas legislature has approved legislation which would allow state-chartered banks to sell general insurance through branches anywhere in Texas. The legislation eliminates the requirement that banks do insurance business through offices in towns of less than 5,000 in population. If signed by the Governor, the legislation would take effect September 1. Texas is the second state to pass legislation of this nature, with Florida being the first state.