Garland W. Binns, Jr.
Dover Dixon Horne PLLC
Attorneys at Law
425 West Capitol, 37th Floor
Little Rock, Arkansas 72201
Telephone: (501) 375-9151
Facsimile: (501) 375-6484
Email: gbinns@ddh-ar.com
Web Site: www.GWBinns.com

JUNE 2010

U P D A T E

1News of Developments in the Financial Sector and Related Areas

1* *IN THIS ISSUE* *

Bank Closures

Employment and Change in Control Agreements

Bank Closures

When an insured bank is closed, the Federal Deposit Insurance Corporation ("FDIC") is appointed the receiver to minimize the loss to the insurance fund from the closing of the bank. Prior to 2007 there had not been a bank failure since the second quarter of 2004. During 2007 there were three bank failures with the largest being NetBank located in Georgia with approximately $2.5 billion in assets and $2.3 billion in total deposits.

During 2008 there were twenty-six bank failures with the largest being Washington Mutual Bank located in Washington with approximately $307 billion in assets and $188 billion in deposits. During 2009, there were one-hundred forty bank failures with the largest being Colonial Bank located in Alabama with approximately $25 billion in assets and $20 billion in deposits. For the first four months of this year, there were sixty-four bank failures with the largest being Western Bank Puerto Rico located in Mayaguez, Puerto Rico with approximately $11.9 billion in assets and $8.6 in deposits.

The number of institutions on the FDIC's problem list has risen to its highest level in 16 years. At the end of 2009, there were 702 insured institutions on the problem list, up from 552 on September 30, 2009. This is the largest number of problem institutions since June 1993. Problem institutions are characterized as those institutions having a risk of failing and being closed by the FDIC.

A bank facing closure by the FDIC should place the insurance carrier for its directors and officers liability insurance coverage on notice of potential claims by the FDIC for potential violations of banking laws and regulations or failure to take appropriate action. In connection with criticisms contained in regulatory examinations of the bank and actions required in formal agreements in an effort to prevent potential liability, the bank will want to document steps taken by it both in committee and board minutes and in communications with bank regulatory agencies.

Once a bank is closed, regular bank counsel can no longer advise the officers and directors of the bank on matters that are adverse to the FDIC. As a result, the board of directors should consider retaining independent special counsel prior to the closing of the bank in order to assist officers and directors and in avoiding claims from both the FDIC and shareholders. Retention of bankruptcy counsel should be considered

at the bank holding company level for banks that are owned by a bank holding company.

Our firm is available to answer questions involving bank closures.

Employment and Change in Control Agreements

As consolidation continues in the financial sector, banks and bank holding companies should consider the use of employment agreements and change in control agreements for key senior management. In the event a bank or bank holding company has either of these agreements in place, they need to be reviewed from time to time to determine if revisions are needed because of economic or legislative changes, including changes in tax laws.

An employment agreement is generally defined as an agreement between a company and its employee which specifies the rights and obligations of each. The term of an employment agreement will normally run for a fixed period of time or it may run for a fixed term plus rolling renewal periods. One of the advantages of a rolling renewal period in an employment agreement is that the parties do not have to renegotiate the agreement at the end of the fixed term. Besides the term, an employment agreement will normally specify such things as duties, salary, bonus, benefits, disability, death and retirement.

A change in control agreement is designed to become effective upon a change in control of the company. A few examples of events constituting a change in control are as follows:

- A third party acquires 50% or more of the outstanding voting stock of the company.
- The company is a party to a merger or consolidation which results in 50% or more of the voting stock of the company being converted into securities of another entity.
- The sale or disposition of all or substantially all of the company's assets.
- A change in the composition of the board of directors within a specific period of time, resulting in fewer than a majority of the directors continuing to serve as directors.

A change in control agreement serves at least two purposes. It assures that key management personnel will be available both prior to and following the transition in the change in control of a company. Secondly, it assures key management personnel that they will be employed and continue to have their existing authority, duties and compensation.

Employment agreements and change in control agreements generally contain provisions regarding the protection of confidential information belonging to the company, and a noncompete period prohibiting the executive from competing with the company for a specific period of time and in a specific geographic area following the termination of employment. In addition, both agreements may address termination for cause by the company for acts of the employee, such as fraud, conviction of a felony, excessive absences without approval, use of drugs or alcohol and similar conduct. At the same time, both agreements should provide protection for the executive by allowing termination for good cause, such as reduction in salary, demotion or relocation without the executive's consent. Unlike a termination for cause by the company, a termination for good cause by the employee will generally allow the executive to receive the

This newsletter provides general information and should not be used or taken as legal advice for specific situations, which depend on the evaluation of precise factual circumstances. U P D A T E is a registered trademark. Copyright 2010/Garland W. Binns, Jr. All Rights Reserved. Comments, ideas, opinions and questions - email gbinns@ddh-ar.com - telephone (501) 375-9151 - facsimile (501) 375-6484.

compensation and benefits under the remaining term of the agreement had the agreement remained in force. Because provisions in employment and change in control agreements may result in adverse tax consequences to the parties, as well as having provisions which may be unenforceable, it is best to utilize the services of a professional to make sure that the agreements comply with applicable law.

This newsletter provides general information and should not be used or taken as legal advice for specific situations, which depend on the evaluation of precise factual circumstances. U P D A T E is a registered trademark. **Copyright 2010/Garland W. Binns, Jr. All Rights Reserved.** **Comments, ideas, opinions and questions - email gbinns@ddh-ar.com - telephone (501) 375-9151 - facsimile (501) 375-6484.**