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MARCH 2003

U P D A T E

News of Developments in the Financial Sector and Related Areas

* *IN THIS ISSUE* *

Arkansas Usury Law

Franchise Taxes

Cases, Releases and Rulings

Arkansas Usury Law

Recently, the Attorney General of Arkansas issued Opinion No. 2002-334 ("the Attorney General's Opinion") regarding the maximum rate of interest on loans under Arkansas law. The Attorney General's Opinion addresses the maximum rate of interest permitted by the Arkansas Constitution which limits the maximum rate on any contract to five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract. The Attorney General's Opinion concluded that there is no longer a "Federal Reserve Discount Rate" leaving in question the amount of interest that may be charged by lenders in Arkansas. The Attorney General's Opinion also concluded that the phrase "Federal Reserve Discount Rate" is equivalent to the Federal Reserve Board's "primary credit" rate which became effective on January 9, 2003, but in the Opinion he also said that the issue could only be resolved definitively by an amendment to the Arkansas Constitution or through interpretation by a court. In a release dated January 9, 2003 by the Federal Reserve Board regarding the term "Discount Rate," the release states, "Because primary credit is the Federal Reserve's main discount window program, the Federal Reserve at times uses the term 'discount rate' to mean the primary credit rate." There will probably be a test case of this issue in the very near future. Releases such as the one by the Federal Reserve Board on January 9, 2003 should be extremely helpful to a court in determining if the "primary credit" rate is equivalent to the phrase "Federal Reserve Discount Rate" under the Arkansas Constitution. In a prior test case of the Arkansas usury law, *Johnson v. Bank of Bentonville*, the United States Court of Appeals for the Eighth Circuit upheld the constitutionality of Section 731 of the Gramm-Leach-Bliley Financial Modernization Act of 1999 which overrides the interest rate limitations of the Arkansas Constitution in connection with loans made by banks.

Franchise Taxes

Corporations, bank holding companies and banks organized under the laws of the State of Arkansas need to consider amending their articles to provide for a par value of $.01 or less 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. Recently, the Office of the Comptroller of the Currency ("OCC") issued Advisory Letter AL 2002-9 in which the OCC described its statutory

authority to regulate national banks. The Advisory Letter advises national banks to consult with the OCC in the event a state authority seeks the enforcement of state laws over a national bank. Although the Advisory Letter did not address the issue of franchise taxes, one may draw the conclusion that national banks are not subject to franchise taxes imposed by Arkansas law. A summary of the Advisory Letter is available on the *Update* web site at *www.GWBinns.com* by clicking on Update Archives in the February 2003 issue under the heading entitled *State Regulation of National Banks.*

Cases, Releases and Rulings

The Board of Governors of the Federal Reserve System has issued Supervisory Letter SR 03-2 regarding the adoption of Regulation W which implements Section 23A and 23B of the Federal Reserve Act. The Regulation is effective April 1, 2003. Regulation W limits the risks to a bank from transactions between the bank and its affiliates by imposing quantitative and qualitative limits on the ability of a bank to extend credit to, or engage in certain other transactions with, an affiliate. Transactions between a bank and a nonaffiliate that benefit an affiliate of the bank are also covered by Regulation W. The Supervisory Letter and Regulation W is available on the web site of the Federal Reserve Board at *www.federalreserve.gov.*

Securities and Exchange Commission v. J. T. Wallenbrock and Assocs., Case No. 02-55481 (2002), is a decision by the United States Court of Appeals for the Ninth Circuit which held that promissory notes purportedly secured by accounts receivable constitutes securities under federal securities law since the promissory notes were made generally available to the investing public and would have been construed as securities by reasonable investors. Citing *Reves v. Ernest & Young,* 494 U. S. 56 (1990), the court based its decision in large part on the fact that the notes were held by over 1,000 investors in at least twenty-five states who were primarily interested in the profit the notes were expected to generate. The promissory notes did not fall within the exemption under federal law for notes with a maturity period of less than nine months because this exemption only applied to commercial paper which is short-term, highly quality investments and sold generally to sophisticated investors.

The Federal Banking Regulatory Agencies have issued proposed rules governing their authority to take disciplinary actions against accountants performing audit and attestation services. The proposed rules would establish procedures under which federal banking agencies could remove, suspend or bar an accountant for good cause from performing audit and attestation services for depository institutions with assets in excess of $500 million or more. Under the proposed rules, violations of law, negligent conduct, reckless violations of professional standards or a lack of qualifications to perform auditing services would be considered good cause to remove, suspend, or bar an accountant. The proposed rule is available on the web site of the Federal Reserve Board at *www.federalreserve.gov* under the heading Banking and Consumer Regulatory Policy Press Release December 17, 2002.

In a recent Interpretive Letter No. 948, the Office of the Comptroller of the Currency concluded that a national bank has the legal authority to purchase and sell transferrable state tax credits because both the courts and the OCC have recognized that national banks serve as financial intermediaries for the public to facilitate the flow of money and credit among different parts of the economy. A national bank would have the legal authority by purchasing tax credits and either utilizing the tax credits to reduce the bank's own tax liability or selling the tax credits to individuals and businesses able to utilize the credits to reduce their tax liabilities. The Interpretive Letter is available on the web site of the OCC at *www.occ.treas.gov.*