Garland W. Binns, Jr.
Dover Dixon Horne PLLC
Attorneys at Law
425 West Capitol, Suite 3700
Little Rock, Arkansas 72201
Telephone: (501) 375-9151
Facsimile: (501) 372-7142
Email: gbinns@ddh-ar.com
Web Site: www.GWBinns.com

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U P D A T E

News of Developments in the Financial Sector and Related Areas

* *IN THIS ISSUE* *

Capital Through Private Placement of Securities

In the early 1900s, companies often sold securities on the basis of a promise of fantastic profits without disclosing any meaningful information to investors. These conditions contributed to the Stock Market Crash of 1929. As a result of the Stock Market Crash, the United States Congress enacted federal securities laws and created the Securities and Exchange Commission ("SEC") to administer them. Under federal law, the sale of securities is governed by the Securities Act of 1933 and other applicable federal laws. Every state also has its own securities laws, which are commonly known as "Blue Sky Laws" because their purpose is to prevent speculative schemes which have no more basis than so many feet of blue sky. Both federal law and state Blue Sky Laws require a company, as the issuer of securities, to make full disclosure of all material facts before offering securities for sale. Securities laws are designed to require companies to give investors full disclosure of all material facts in order for them to make an investment decision.

Because of the higher interest rate spreads on trust preferred and noncumulative perpetual preferred securities with institutional purchasers, a bank holding company may want to consider the private placement of its equity, debt or hybrid (trust preferred and noncumulative perpetual preferred) securities with local investors such as board members, existing shareholders and major customers. Funds derived from the private placement of securities may be utilized for acquisitions, internal growth and increasing tier 1 capital.

Allowing the company to select investors with compatible goals and interests is one of the advantages of a private placement. Another advantage is they are less expensive and time consuming since a private placement does not require the assistance of an underwriter.

Although other exemptions from the requirements to register securities may be available, Sections 3(b) and 4(2) of the Securities Act of 1933 may be utilized in making a private placement with local investors. Section 4(2) of the Securities Act of 1933 exempts from registration "transactions by an issuer not involving a public offering." To qualify for this exemption, purchasers of the securities must:

- have enough knowledge and experience in finance and business matters to evaluate the risks and merits of the investment or be able to bear the investment's economic risk;

- have access to the type of information normally provided in a prospectus, *i.e.*, an offering memorandum; and
- agree not to resell or distribute these securities to the public.

Section 4(2), often referred to as the *private offering exemption,* is one of the most frequently relied upon exemption in making private placements under the provisions of both state and federal law. This exemption has developed to include not only Section 4(2) transactions, but also transactions described in Section 3(b) [i.e., securities issued pursuant to regulations of the SEC in an aggregate amount not to exceed $5 million]. Sections 3(b) and 4(2) are the basis for SEC Regulation D, which is designed to permit the sale of securities to sophisticated investors, which are also known as accredited investors under Regulation D. The enactment of Regulation D sets forth the requirements for a substantial portion of private offerings. A bank holding company as issuer still may claim an exemption under Section 4(2) even though the technical provisions of Regulation D are not fully met. Although an issuer may fully comply with the requirements of federal law relating to a private placement, it must also comply with any applicable state law relating to the offer and sale of its securities.

In connection with the sale of securities through a private placement, an offering memorandum should be prepared for purposes of disclosing to potential investors information on the company including background information on management, terms of the offering (including the number of shares available, the price and the intended use of the funds), capital structure of the company before and after the sale of the securities, the risks involved in the investment and financial statements of the company.

Our firm is available to answer questions on the benefits of issuing securities in a private placement with local investors.

Securities Activities of Finders

It is common for professionals to be involved in a securities transaction when helping a client in the sale or acquisition of a business. The Securities and Exchange Commission ("SEC") has issued a publication entitled *Guide to Broker-Dealer Registration* which provides insight as to whether a professional when acting as a "finder" may be required to register as a "broker". In its publication, the SEC notes that finders and business brokers may need to register as a broker when engaged in the following activities:

- finding investors or making referrals to, or splitting commissions with registered broker-dealers.
- finding investors for a company that is issuing its securities, even in a consultant capacity.
- finding buyers and sellers of businesses (*i.e.*, activities relating to mergers and acquisitions involving securities).

Factual situations which may involve a professional acting as a broker include:

- participating in important parts of a securities transaction, including solicitation, negotiation or execution of the transaction;
- the compensation of the professional involved in the transaction depends upon, or is related to, the outcome or size of the transaction or deal.
- the professional is otherwise engaged in the business of effecting or facilitating securities transactions.

In SEC No-Action Letter, *BondGlobe, Inc.,* dated February 6, 2001, the staff of the SEC noted that a person effects transactions in securities if he or she participates in such transactions "at key points in the change of distribution" which includes assisting an issuer in structuring prospective securities transactions, helping an issuer to identify potential purchasers of securities and soliciting securities transactions. The publication by the SEC is available on its website at *www.sec.gov*.

 Comments, ideas, opinions and questions - email gbinns@ddh-ar.com - telephone (501) 375-9151 - facsimile (501) 372-7142.