

# UPDATE

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## News of Developments in the Financial Sector and Related Areas

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#### *Extension of Effective Date on Rules Regarding Insurance Activities of Banks*

The federal banking agencies have extended the effective date of the insurance consumer protection rules in connection with the sale of insurance products by depository institutions. The rules cover practices, solicitations, advertising or offers of any insurance product by a depository institution by any person who performs such activities at an office of, or on behalf of, the institution. The rules require, among other things, various consumer disclosures, consumer acknowledgments, and segregation of deposit taking and insurance sales areas. The new effective date of the rules will be October 1, 2001. In extending the effective date of the rules, the federal banking agencies recognized that a certain lead time would be necessary for depository institutions and other entities acting "on

behalf of" those institutions to adjust their internal systems and sales practices to comply with the disclosure, consumer acknowledgments, and other requirements of the rules. The rules are outlined in a related article entitled "Final Rules on Insurance Activities of Banks" in the March 2001 issue of Update, copies of which are available upon request.

#### *Business Reporting Research Project*

The Financial Accounting Standards Board ("FASB") has published three sections of a broad study entitled the *Business Reporting Research Project*. The study, which was sponsored by the FASB to determine, in selected industries, the kind of business information corporations are reporting outside of financial statements. The first report entitled *Electronic Distribution of Business Reporting Information* describes the electronic distribution of business information and casts a new light on the exciting possibilities and problems of the Internet and technology on the business reporting universe. The first report addresses the growth of the Internet as a medium for delivering business reporting information that has altered the way information flows from companies to investors and creditors. The first study notes that the structure for delivering business reporting information will continue to change as companies bring new technologies to the process and as information users find new ways to gather and analyze information. The second report entitled *Improving Business Reporting: Insights into Enhancing Voluntary Disclosures* identifies the kinds of business information that corporations in selected industries are reporting outside of financial statements. The third report entitled *GAAP-SEC Disclosure Requirements* identifies

redundancies between generally accepted accounting principles and Securities Exchange Commission ("SEC") disclosure requirements and ways to eliminate them as well as other observations that the SEC is encouraged to consider in future rule-making activities. The three reports are available on the web site of the FASB at <http://accounting.rutgers.edu/raw/fasb>.

### *Liability of a Control Person Under the Securities Exchange Act of 1934*

In *Dietrich v. Bower*, 95 Civ. 7051 (2001), the U.S. District Court for the Southern District of New York, held that the owner of a company registered as a broker-dealer was not entitled summary judgment seeking dismissal of the lawsuit against him because he could be liable as a control person in an alleged scheme to manipulate the price of a stock. Section 20(a) of the Securities Exchange Act of 1934 (the "Act") imposes joint and several liability on any person who "directly or indirectly, controls any person liable under the Act or any rule or regulation thereunder." The owner asserted that he was merely a passive investor not involved in the day-to-day management of the broker-dealer and had no knowledge of the alleged fraud, but evidence showed he owned 100 percent of the broker-dealer's stock, contributed 100 percent of the equity in the company and was named as the control person on the company's broker-dealer registration form. The Court rejected the owner's "good faith" defense that he had no notice of any alleged wrongdoing and, therefore, had no duty to investigate or control the broker-dealer's activities in the alleged scheme. The court found that there was ample evidence from which a jury could conclude that the owner was a control person of the company.

### *Accounting for Goodwill*

At its meeting in April, the Financial Accounting Standards Board ("FASB") agreed to modify the definition of a "reporting" unit

to allow goodwill to be allocated and tested at a higher level within a merged company. In its revised draft of the 1999 proposed Statement, *Business Combinations and Intangible Assets*, merged companies would have been required to allocate a pro-rata share of goodwill to each of its "reporting" units which the FASB defines as "the lowest level of an entity that is a business and that can be distinguished, physically and operationally and for internal reporting purposes, from the other activities, operations, and assets of the entity." An article on the revised draft of the proposed Statement by the FASB is in the April 2001 issue of Update, copies of which are available upon request. A final rule on the treatment of the goodwill is expected to be issued by the FASB later this year.

### *Court Decisions*

*Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361 (2000) addressed the issue of whether an arbitration clause contained in a check cashing agreement was enforceable with the court holding that it was not because of a lack of mutuality between the parties. The Supreme Court of Arkansas found that the arbitration clause was invalid and not enforceable because of the lack of mutual obligations on both parties since check cashing customers had to submit all disputes and controversies to arbitration while the check cashing company could proceed directly to court to collect its monies.

*Holytrent Properties, Inc. v. Valley Park Ltd.*, 32 S.W.3d 27 (Ark. App. 2000) held that parties are free to make contracts based on whatever terms and conditions they agree upon, provided that the contract is not illegal or tainted with some infirmity such as fraud, overreaching, or the like.

*Morehouse v. Behlmann*, 31 S.W. 3d 55 (Mo.App. E.D. 2000) held that a used motor vehicle salesman's representations that the vehicle was "in excellent condition," "in good

condition," "in tip-top shape" and would be "reliable" were statements of fact, rather than mere opinion, that were actionable when the vehicle's engine failed, where a salesman had 42 years of experience, and purchaser told the salesman that she was inexperienced and had no idea what to look for.

*Luebbers v. Money Store, Inc.*, 344 Ark. 232 (2001) held that the Arkansas General Assembly may not avoid the constitutional prohibition against usury by merely stating that these shall not be deemed "interest" or by stating that a transaction shall not be deemed to be a "loan" and the General Assembly does not have the power to usurp the judicial function of the Courts pursuant to the separation-of-powers doctrine contained in the Arkansas Constitution. In this case, the Arkansas legislature had enacted legislation regarding fees charged by check cashers which provided that the fee would not be deemed "interest". In the present case, the fee would have constituted an annual percentage rate of 372.4%.