

UPDATE

News of Developments in the Financial Sector and Related Areas

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Treasury Stock

Treasury stock is generally referred to as stock which has been issued by a company to stockholders and thereafter acquired by the company from its stockholders. A company will acquire its own stock for a number of reasons including, but not limited to:

- To help its stockholders get a better price for their shares.
- To be reissued to employees as compensation.
- To help maintain a market for its shares.
- To avoid a hostile takeover.

Assuming the shares are not cancelled, treasury shares acquired by a company are recorded at cost. When treasury stock is retired by a company, the stock reverts to authorized by unissued shares. Depending on the circumstances, a filing under the Arkansas Securities Act (the "Act") will generally be required to be made and obtained prior to the issuance of authorized but unissued stock to

a purchaser. In the event a filing is not made, the company will be strictly liable under the Act to a purchaser of the stock for the principal investment plus 6% interest and any expenses incurred by the purchaser. Some companies mistakenly believe that if the proper filing has been made in connection with the original issuance of authorized but unissued shares that no subsequent filings under the Act are required relating to the sale of treasury stock. A company would need to make the proper filing for the sale of treasury stock in order to avoid the liability provisions of the Act. For purposes of the filing requirements of the Act, treasury stock is treated the same as authorized but unissued stock which has never been issued to stockholders.

Proposed Legislation

President Bush has proposed legislation to help small-business which would include (i) permitting banks to pay interest on checking accounts, (ii) permanent repeal of estate taxes, and (ii) increasing the cost of equipment and machinery that can be divided in one year to \$40,000 from \$25,000. There is also proposed legislation which would require companies to include options awarded to their employees as an expense.

Audits of Depository Institutions

In a Joint Press Release issued by the federal bank regulatory agencies, a depository institution should follow the guidance issued by the Securities and Exchange Commission ("SEC") with respect to auditing and accounting work performed by Arthur Andersen LLP, including representations that Andersen is following generally accepted auditing standards and that its employees will be able to complete audits. The Joint Press

Release and the guidance issued by the SEC is available on the web site of the Federal Reserve at www.federalreserve.gov.

Privacy Rights Brochure

The federal bank regulatory agencies along with other federal agencies have issued a brochure entitled *Privacy Choices for Your Personal Financial Information* that details privacy requirements of the Gramm-Leach-Bliley Act in plain language. The brochure is available on a number of federal web sites including www.fdic.gov.

Cases, Releases and Rulings

The National Association of Dealers, Inc. ("NASD") has produced a brochure as part of a package of information to assist in understanding securities analyst recommendations. The brochure entitled *NASD Guide to Understanding Securities Analyst Recommendations* is available on the web site of the NASD at www.nasd.com.

In Interpretive Letter No. 922, the Office of the Comptroller of the Currency held that the offering of FDIC-insured deposit notes in denominations of \$5,000 or \$10,000 for terms ranging to 20 years with fixed or floating rates of interest by an affiliate registered broker-dealer of the bank would not constitute the sale of securities relying on *Marine Bank v. Weaver*, 455 U.S. 551 (1982).

Moore v. Midwest Distribution, Inc., 76 Ark. App. 397 (2002) involves an employee who entered into an agreement with his employer in which he agreed that for a period of one year following termination of his employment that he would not provide, solicit or offer services to any present or former customers of the employer in those geographical areas where the employer conducted business. The court noted that in order for a covenant such as the one entered into by the employee to be enforceable, three requirements must be met: (i) the covenantee must have a valid

interest to protect; (ii) the geographical restriction must not be overly broad; and (iii) a reasonable time limit must be imposed. The court held that the covenant was not enforceable because there was no valid interest existing of the employer in need of protection in that the employee received no special training and had not been provided with any trade secrets, confidential business information or customer lists. The court also noted that the geographical area in the agreement was too broad in that the agreement precluded the employee from working in a number of states one of which the employer did not conduct any business.

The Office of the Comptroller of the Currency ("OCC") has issued an opinion concluding that certain provisions of Massachusetts insurance law are preempted under the Gramm-Leach-Bliley Act (the "Federal Act"). In reaching its conclusion, the OCC applied section 104(d)(2)(A) of the Federal Act which provides: "That in accordance with the legal standard for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, or interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or cross-marketing activity." Specifically, the OCC determined that the following provisions of Massachusetts law frustrate the ability of national banks to solicit and cross-market insurance: (i) prohibiting non-licensed personnel from referring a prospective customer to a licensed insurance agent or broker except upon an inquiry initiated by the customer; (ii) prohibiting a bank from compensating an employee for such a referral; and (iii) prohibiting a bank from telling a loan applicant that insurance products are available through the bank until the application is approved.