

# UPDATE

---

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

---

---

### \* *IN THIS ISSUE* \*

---

#### *Acquisition of Minority Shares in an Arkansas Bank*

#### *Letters of Intent*

#### *Health Savings Accounts*

#### *Cases, Releases and Rulings*

---

#### *Acquisition of Minority Shares in an Arkansas Bank*

The Arkansas Banking Code allows for the acquisition of minority shares in Arkansas chartered banks. This acquisition of minority shares is accomplished through a state bank adopting a plan whereby an acquirer, such as an existing bank holding company that may already own a majority of the outstanding shares (or a newly formed bank holding company), entering into a plan of exchange with the bank whereby the remaining shares not owned by the holding company may be exchanged for cash, stock, other securities or a combination of cash, stock or other securities of the acquiring bank holding company. To effect the exchange with minority shareholders, a plan of exchange must be entered into between the state bank and the acquirer, setting forth the terms and conditions of the proposed exchange. Once the plan of exchange has been approved by a majority of the board of directors of the state bank and the acquiring entity, it is submitted to the shareholders of the state bank. Only a majority of the shareholders of the state bank are required to approve the plan of exchange. Although the provisions of the Arkansas Banking Code permitting the plan of

exchange are technical in nature, including requiring the approval by the Arkansas Bank Commissioner, these provisions may be an effective tool in eliminating costs associated with minority shareholders and for other purposes.

#### *Letters of Intent*

Letters of intent, which are sometimes known as memorandums of understanding or letters of understanding, are generally utilized by parties to a business transaction to set forth the major terms of their understanding prior to the execution of a definitive agreement. Letters of intent may be either binding or non-binding, and it is important that the parties to a letter of intent state their understanding. A typical provision in letters of intent is a statement that it is not a binding agreement. However, the parties may want to specifically provide that although the letter of intent is not binding on the parties until the execution of the definitive agreement, that certain portions of the letter of intent are binding and enforceable such as (i) the parties will deal exclusively with one another and will not utilize the letter of intent to shop the proposed transaction to third parties, (ii) a confidentiality provision requiring the parties to maintain in strict confidence all confidential information relating to the terms of the proposed transaction and the disclosed information by one party to another, (iii) access to information to determine if the proposed transaction should proceed, commonly referred to as "Due Diligence", and (iv) each party will be responsible for their own legal fees and expenses. The main purpose of a letter of intent is to summarize the material terms of the proposed transaction and to prevent unnecessary expense in the preparation of the definitive agreement. In those cases where the parties

cannot agree upon the terms of a letter of intent, there is no need to proceed with the effort and expense of preparing a definitive agreement. A non-binding letter of intent may include material terms such as, the purchase price, the assets involved in the transaction, side agreements to be entered into by the parties, closing conditions, date for closing, and other terms such as representations, warranties and indemnification provisions which may also be in the definitive agreement. Besides setting forth the key elements of a proposed transaction, a letter of intent provides a sense of assurance that each side is committed to moving forward with the proposed transaction. The letter of intent needs to be signed by the parties to the proposed transaction. In connection with the execution of a letter of intent by the parties, courts have recognized the obligation of each party to act in good faith in attempting to negotiate a definitive agreement. Some years ago after signing a letter of intent to merge with Pennzoil, the Getty Oil board of directors backed out of the deal and merged with Texaco because Texaco had made a better offer. When litigation arose over the obligations of the parties to the letter of intent, the jury in the case awarded Pennzoil over \$10 billion in compensatory and punitive damages with the case being ultimately settled by the parties for approximately \$3 billion. As a result, even though certain terms and conditions of a letter of intent are not binding and enforceable, each needs to deal in good faith when entering into a letter of intent.

### ***Health Savings Accounts***

Health Savings Accounts ("HSAs") were signed into law on December 8, 2003. HSAs work like and resemble individual retirement accounts except that money in HSAs is used to pay health care costs. Every year the money not spent remains in the account and the interest earned is not taxed. Individuals who are covered by a high-deductible health plan may establish tax deductible HSAs. For

2004, a high-deductible insurance plan is defined as a health plan with a minimum deductible of \$1,000 for individual coverage and \$2,000 for family coverage. Annual contribution limits for 2004 are limited to either the high-deductible plan deductible or \$2,600 for an individual or \$5,150 for a family, whichever amount is less. Persons between age 55 and 64 are allowed to make additional catchup contributions to their HSAs (limited to \$500 in 2004). Contributions can be made in three ways: (i) by an individual and family members, (ii) by an individual's employer and (iii) cafeteria plans maintained by employers. Money distributed from HSAs is not taxed so long as it is used to pay qualifying medical expenses. If the monies in HSAs are used by the owner for purposes other than the payment of medical expenses, there is a 10% penalty imposed in addition to the income taxes. The U. S. Treasury Department will be issuing additional guidance on the use of HSAs later this year. Information on HSAs (questions and answers and Notice 2004-2) is available on the web site of the U. S. Treasury Department at [www.ustreasury.gov](http://www.ustreasury.gov).

### ***Cases, Releases and Rulings***

The Federal Deposit Insurance Corporation ("FDIC") has recently made available on its web site a guide entitled *Community Development Investment Guide* to assist institutions supervised by the FDIC in meeting the requirements of the Community Reinvestment Act ("CRA"). The primary purpose of the Guide is to assist banks in assessing community development opportunities and to explain the type of investments that banks are authorized to make and how those investments may meet the requirements of a CRA qualified investment. The Guide is also designed to assist banks that are considering community development investments in navigating the complex laws and regulations that may apply. The guide is available on the web site of the FDIC at [www.fdic.gov](http://www.fdic.gov).