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U P D A T E

News of Developments in the Financial Sector and Related Areas

* *IN THIS ISSUE* *

The Stimulus Bill

Capital Through
Private Placement of Securities

The Stimulus Bill

On February 17, 2009, the American Recovery and Reinvestment Act of 2009 ("The Stimulus Bill") was signed into law. There are numerous aspects of The Stimulus Bill, some of which are in the developmental stage. One significant area covered in The Stimulus Bill is the restrictions on executive compensation by institutions who receive funding under the Treasury Capital Purchase Program. The restrictions prohibit the payment or accrual of bonus, retention and incentive compensation of any kind, other than restrictive stock awards (stock awards are also subject to specific limitations), except for payments made pursuant to a written employment agreement executed on or before February 11, 2009. The Treasury has up to one year before issuing final rules for implementing the legislation. Employees covered by the restrictions are as follows:

- Less than $25 million - the single most highly compensated employee.
- $25 million but less than $250 million – the five most highly compensated employees.
- $250 million but less than $500 million – essentially the top five senior executive officers plus the next ten most highly compensated employees.
- $500 million or more – essentially the top five senior executive officers plus the next twenty most highly compensated employees.

Except for nonpublic companies that receive less than $25 million in funds, financial institutions must have a Board Compensation Committee comprised entirely of independent directors. The Stimulus Bill also requires a shareholder vote on a nonbinding advisory basis to approve executive compensation.

Our firm is closely monitoring The Stimulus Bill and is available to answer questions.

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 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.

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