

UPDATE

News of Developments in the Financial Sector and Related Areas

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National Banks Save on Franchise Taxes

In a recent Interpretive Letter, the Office of the Comptroller of the Currency ("OCC") concluded that a national bank had the authority to decrease the par value of its shares to \$.01 per share in order to pay the minimum franchise tax under Arkansas law. Section 52 of The National Bank Act provides that capital stock shall be divided into shares of \$100 each or such lesser amount as provided in the articles of association of a national bank. Assuming that a national bank had 50,000 shares of stock outstanding at a par value of \$100 per share and all of its assets were in Arkansas, the bank would pay an annual franchise of \$13,500. By amending the Articles to provide for a par value of \$.01 per share the bank would only pay the minimum annual franchise of \$50.00.

SEC Reporting Companies

Companies having total assets in excess of \$10 million and equity securities held of record by 500 or more persons must register with the Securities and Exchange Commission ("SEC") and make certain periodic reports with the SEC which are also available to the general public. Currently, Rule 12g5-1 of the Securities Exchange Act only requires

companies to count those shareholders listed on the corporate records of the company that have been issued a stock certificate and excludes shareholder accounts held in a street name. If the SEC modifies its rule to require that each account held in street name be counted, a larger number of companies would be required to begin reporting to the SEC.

Enforceability of Arbitration Clauses

Livingston v. Associates Finance, Inc., No. 02-3624 and No. 02-8025, is a recent case before the United States Court of Appeals for the Seventh Circuit, involving violations of the Truth in Lending Act ("TILA"). In this case, the Livingstons obtained loans from the defendant, and both parties signed an Arbitration Agreement in which they waived their rights to litigate in court any and all claims relating to the loans. The Arbitration Agreement permitted either party to demand arbitration in response to a lawsuit and provided that the defendant would pay the arbitration costs if the Livingstons were unable to do so themselves. The Livingstons argued that the Arbitration Agreement was unenforceable because of the high costs of arbitration. However, the defendant subsequently agreed to pay all costs of the arbitration. The Court of Appeals upheld the Arbitration Agreement since the Livingstons would not have to bear the cost of the arbitration and based on a prior decision of the United States Supreme Court decision reached in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (the "Green Tree Case"). In the Green Tree Case, the United States Supreme Court upheld the enforceability of arbitration clauses in consumer loan contracts. In 1994, Randolph purchased a mobile home from a dealer and financed her purchase through Green Tree Financial Corp.-Alabama ("Green Tree

Financial"). Randolph contended that Green Tree Financial required her to obtain "vendor's single interest insurance" which protects a lienholder against the cost of repossession in the event of default, but this requirement was not mentioned in TILA disclosure. The retail installment contract signed by Randolph contained an arbitration clause requiring all disputes to be resolved by binding arbitration. Randolph brought a suit in district court in 1996 alleging that Green Tree Financial violated the TILA by failing to include the requirement of the vendor's single interest insurance in its TILA disclosure, and violated the Equal Credit Opportunity Act by requiring mandatory arbitration of all claims. Randolph also sought certification of a class action by individuals who had entered into similar contracts with Green Tree Financial. The district court granted the motion to compel arbitration by Green Tree Financial and declined to certify a class action. Randolph then appealed the case to the United States Court of Appeals for the Eleventh Circuit which reversed the decision of the lower court finding that the consumer loan agreement's arbitration clause that denied the consumer minimum guarantees of her ability to vindicate her rights under the TILA was unenforceable, and that the arbitration clause could have subjected Randolph to liability for costs, filing fees, arbitration costs and other expenses that would have made it impossible for Randolph to assert her claim. Green Tree Financial then appealed the case to the United States Supreme Court. In upholding the arbitration clause, the Supreme Court held that a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive had the burden of showing the likelihood of incurring such costs. In the Green Tree Case, Randolph did not meet that burden, and the fact that the arbitration agreement's silence with respect to costs and fees did not render it unenforceable.

Cases, Releases and Rulings

The National Association of Securities Dealers, Inc. ("NASD") has made available an online learning center entitled *Smart 401(k) Investing* which provides information on 401(k) plans and outlines different options and special features that should be considered when investing in such plans. The online training center is designed to help plan participants better understand their plans and other retirement options and to educate those who have not yet begun to save for retirement. The NASD online learning center guides investors through the process of enrolling and managing a 401(k) account and answers questions about everything from investment options to asset allocation and diversification, moving a plan when changing jobs to handling withdrawals after retirement. The online learning center provides a number of interactive tools including allowing the user to calculate the amount of money the law requires investors to withdraw from their plans. The online training center is available on the web site of the NASD at www.nasd.com.

The Federal Banking Regulatory Agencies have issued final rules governing their authority to take disciplinary actions against accountants performing audit and attestation services. The final rules establish procedures under which federal banking agencies may remove, suspend or bar an accountant for good cause from performing audit and attestation services for depository institutions with assets in excess of \$500 million or more. Under the final rules, violations of law, negligent conduct, reckless violations of professional standards or a lack of qualifications to perform auditing services would be considered good cause to remove, suspend, or bar an accountant. The final rules are available on the web site of the Federal Deposit Insurance Corporation at www.fdic.gov under the heading "Federal Register Citations."