Garland W. Binns, Jr.
Dover Dixon Horne PLLC
Attorneys at Law
425 West Capitol, 37th Floor
Little Rock, Arkansas 72201
Telephone: (501) 978-9923
Facsimile: (501) 375-6484
Email: gbinns@ddh-ar.com
Web Site: www.GWBinns.com

JANUARY 2016

U P D A T E

News of Developments in the Financial Sector and Related Areas

* *IN THIS ISSUE* *

Capital Through
Private Placement of Securities

Subordination, Nondisturbance and
Attornment Agreements

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 debt 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 potential investors.

Subordination, Nondisturbance and Attornment Agreements

Subordination, nondisturbance and attornment agreements are often referred to as SNDA agreements. They are generally utilized in connection with real estate leases when there is a mortgage by the landlord to a lender. SNDA agreements provide protection for the lender in that the lessee agrees to subordinate its interest to the lender=s mortgage and in the event of foreclosure by the lender of its mortgage, the lessee agrees to attorn to the new owner and recognize the new owner as the landlord under the terms and conditions of the lease agreement.

SNDA agreements also provide protection for the lessee in that the lease will continue in the event of a foreclosure and a new owner, and the lessee=s use of the premises will not be disturbed or impaired as a result of lessee subordinating its interest under the lease to the mortgage of the lender. For the benefit of the lender, the SNDA agreement will provide that the lease will be subject and subordinate to the mortgage, the lien imposed by the mortgage and all advances under the mortgage. For the benefit of the lessee, the SNDA agreement will provide that a new owner will not terminate or disturb the lessee=s possession of the premises under the lease except in accordance with the terms of the lease, and the new owner will be bound to the lessee under the terms and conditions of the lease agreement.

SNDA agreements should also provide that in the event of a default under the lease by the landlord, that the lessee will provide notice to the lender in order to provide the lender an opportunity to cure the default by the landlord. SNDA agreements provide important protections to both a lender and to a lessee and should be utilized in the lease of premises subject to an outstanding mortgage.

This newsletter provides general information and should not be used or taken as legal advice for specific situations, which depend on the evaluation of precise factual circumstances. U P D A T E is a registered trademark. Copyright 2016/Garland W. Binns, Jr. All Rights Reserved. **Comments, ideas, opinions and questions - email gbinns@ddh-ar.com - telephone (501) 978-9923 - facsimile (501) 375-6484.**