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June 6, 2006

FDIC - San Francisco Regional Office
Regional Director John F. Carter
25 Jessie Street at Ecker Square, Suite 2300
San Francisco, California 94105

Re: The Home Depot Interagency Notice of Change in Control

Dear Mr. Carter:

The American Bankers Association (ABA)[1] is writing in response to the Interagency Notice of Change in Control (Notice) submitted by The Home Depot (Home Depot) in connection with its proposed acquisition of EnerBank USA (EnerBank) from CMS Energy Corporation.

The ABA opposes the Notice. As with the pending application of Wal-Mart Stores, Inc. to obtain deposit insurance for its proposed ILC, the Home Depot Notice jeopardizes the continued separation between banking and non-financial commerce that has served our banking industry and our nation so well. Congress has on numerous occasions reinforced the basic principle of separating banking from non-financial commerce. That issue, from a congressional and public policy viewpoint, should be considered settled.

Background

A brief discussion of the history of ILCs helps place into context the issues raised by the application.

History of ILCs.

ILCs had their genesis in banks chartered by states in the early 1900s to provide uncollateralized consumer loans to low- and moderate-income workers unable to obtain such loans from existing commercial banks.[2] Although at first, the FDIC held that ILCs were not eligible for federal deposit insurance, its policy changed over time until, with passage of the Garn-St Germain Depository Institutions Act of 1982, all ILCs were granted eligibility for deposit insurance, as were the thrift

[1] The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—makes ABA the largest banking trade association in the country.
[2] GAO-05-621 *Industrial Loan Companies*, September 15, 2005.

certificates they offered in lieu of deposits.[3] Some states thereafter *required* ILCs to obtain FDIC insurance as a condition of chartering, with the result that by 1987, the FDIC insured most ILCs and shared supervision with their state charterers.

In 1987, Congress enacted the Competitive Equality Banking Act, one of the primary purposes of which was to close the so-called "non-bank bank loophole." Because the definition of "bank" in the Bank Holding Company Act at that time included only entities that offered commercial loans *and* accepted demand deposits, a number of large retail commercial entities had chartered institutions that made loans but did not offer demand deposits, thereby avoiding supervision as bank holding companies and enabling them to offer banking services on an interstate basis.

When Congress amended the definition of "bank" in the Bank Holding Company Act to eliminate the non-bank bank loophole, it also provided an exemption from that definition for certain ILCs that:

1) do not accept demand deposits that can be withdrawn by check or similar means for payment to third parties;
2) have total assets of less than $100 million; or
3) whose control did not change after 1987.[4]

The exemption applied to a comparatively few, small institutions. In 1987, most ILCs had less than $50 million in assets. The few states that were able to charter ILCs were not promoting the charter. In fact, at the time, Utah had a moratorium on the creation of new ILCs. In short, there was no significant risk that the problems caused by mixing banking and non-financial commerce would seriously arise from the ILCs that existed at the time that the exemption was codified.

Almost twenty years later, the characteristics of ILCs have changed dramatically. Since 1987, aggregate growth in ILC assets has increased over 3,500 percent, from $3.8 billion to over $140 billion in 2004, with the average ILC holding $2.5 billion in assets. The number of ILCs also has significantly increased as certain states have begun actively to promote this charter as a means to own a bank without being regulated as a bank holding company. According to the GAO report, although seven states have active ILCs, California, Nevada and Utah charter more than half, with Utah leading in ILC asset growth.[5] This is not an accident. In 1997, Utah lifted its moratorium on new charters, permitted ILCs to call themselves "banks," and authorized them to engage in virtually all of the

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[3] Pub. L. No. 97-320 § 703.

[4] The exemption applies only to ILCs chartered in states that in 1987 required ILCs to have deposit insurance, namely, California, Colorado, Hawaii, Minnesota, Nevada and Utah.

[5] The GAO report states that "As of December 31, 2004, there were 29 ILCs, representing 82 percent of the ILC industry assets, with headquarters in Utah. According to officials at the Utah Department of Financial Institutions, ILC growth in Utah occurred because other state laws are not as 'business friendly' as Utah. These officials also stated that Utah has state usury laws that are more desirable than many other states and the state offers a large well-educated workforce for the financial institutions industry." GAO-05-621, *Industrial Loan Companies,* September 15, 2005 at 19.

powers of state-chartered banks. EnerBank is one of the many ILCs[6] that have been chartered by Utah since then.

Today, an ILC—even one with *more* than $100 million in assets—may effectively compete with full-service insured depository institutions. As recently observed by then Federal Reserve Board Chairman Alan Greenspan, ILCs may engage in the "full range of commercial, mortgage, credit card and consumer lending activities; offer payment-related services, including Fedwire, automated clearing house and check clearing services, to affiliated and unaffiliated persons; [and] accept time and savings deposits, including certificates of deposit from any type of customer."[7]

Historical Separation of Banking and Non-Financial Commerce.

Increasingly, our banking laws have provided for the separation of banking and non-financial commerce to protect depository institutions, the federal deposit insurance fund, and our financial system in general from a variety of potential risks. The rationale is clear—the banking industry is carefully regulated for safety and soundness and systemic risk because of the critical nature of the industry to the functioning of our economy. By contrast, non-financial firms are regulated under differing programs and for a variety of purposes.

Permitting the ownership of a bank by a non-financial commercial firm creates a number of risks, not the least of which is managing a large company where the importance of banks requires a priority draw on the talent and resources of the firm, a priority that in competition with the basic non-financial interests and history of the firm might not be readily forthcoming.

Over the past 50 years, Congress has repeatedly acted to close avenues through which non-financial commercial entities could own depository institutions. The Bank Holding Company Act of 1956 prohibited companies that owned two or more banks from engaging in non-financial commercial activities. In 1970, Congress extended that prohibition to companies that owned only a single bank. In 1987, Congress closed the so-called "non-bank bank" loophole. More recently, the Gramm-Leach-Bliley Act closed the door on non-financial commercial entities owning a single thrift institution.[8]

Current bills in Congress continue to reflect a heightened interest in preserving the separation between non-financial commerce and banking, with the current focus directed to the risks posed by ownership of ILCs. On three recent occasions – twice in this Congress and once in the last Congress – the House of Representatives has passed provisions that would restrict the authority of ILCs

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[6] ILCs are now referred to as industrial banks in Utah. This does not change the analysis offered in this letter.
[7] Letter from Federal Reserve Board Chairman Alan Greenspan to Congressman James Leach dated January 20, 2006.
[8] Pub. L. No. 106-102 (1999).

that are controlled by "commercial firms"[9] after October 1, 2003, to engage in nationwide branching or to pay interest on certain business accounts. Members of the House Committee on Financial Services have stated publicly their intent to introduce legislation shortly that will address the ILC issue in a comprehensive manner. In addition, on May 19, 2006, Representatives Paul Gillmor and Barney Frank circulated a letter to their House colleagues, asking them to sign onto correspondence to FDIC Acting Chairman Gruenberg that would request that the FDIC wait until Congress has acted before authorizing any additional commercially-owned ILCs.

The ABA has consistently supported these efforts. Last year, our Board of Directors unanimously reaffirmed ABA's position that non-financial commercial firms should not acquire new or existing banks, including ILCs.

Conclusion

The Home Depot Notice presents the potential for a direct and irreparable breach of the wall separating banking from non-financial commerce. This separation is one that has served our country well and is one that Congress has repeatedly reinforced. Accordingly, the ABA opposes the application.

Sincerely,

Mark J. Tenhundfeld

[9] "Commercial firm" is defined in the bills as any company that obtains on a consolidated basis more than 15 percent of its gross revenues from activities that are non-financial in nature.