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August 19, 2022

Kathy Moe
Regional Director
FDIC San Francisco Regional Office
25 Jessie Street at Ecker Square, Suite 2300
San Francisco, CA, 94105-2780

RE: COMMENTS OF THE INDEPENDENT COMMUNITY BANKERS OF AMERICA CONCERNING THE APPLICATION FOR DEPOSIT INSURANCE BY FORD CREDIT BANK

Dear Ms. Moe,

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the federal deposit insurance application of Ford Credit Bank (the Bank). ICBA has consistently opposed the industrial bank charter and the ownership of FDIC-insured institutions by non-financial firms. We believe this arrangement creates risks to consumers, the financial system, and even to the commercial parent companies of industrial banks. Therefore, we strongly urge the FDIC to reject Ford Credit Bank's application for deposit insurance.

According to the Bank's public application, the Bank "will focus on auto-related lending and help Ford promote adoption of electric vehicles across the nation as a de novo Utah industrial bank located in Salt Lake City, Utah." The Bank will be a wholly owned subsidiary of Ford Motor Credit Company, LLC (Ford Credit), which is in turn a wholly owned subsidiary of the Ford Motor Company (Ford). While the Bank intends to provide "innovative and simplified banking solutions that enable electric vehicles to be accessible to all Americans," we believe the more likely outcome is that it will create outsized risks to the Deposit Insurance Fund (DIF) and to Ford itself.

Furthermore, while the Bank's application claims to present a "unique Community Reinvestment Act ("CRA") value proposition," we are concerned that, under the Bank's proposed strategic plan, its record of making auto loans to low- and moderate- income customers will not be assessed. Traditionally, wholesale and limited purpose banks have been able to meet their CRA obligations solely through community development lending, investments, and services because they either do not make retail loans or make retail loans in a product line not evaluated under CRA's lending test (for example, credit

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5.8 trillion in assets, over $4.8 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org

cards or auto loans). The Bank has applied to be considered a limited purpose bank. In our opinion, it is unclear whether the Bank qualifies as a limited purpose bank under the current definition, but it is even less likely that it should qualify under the interagency CRA proposal, which explicitly considers auto loans as a retail product line, subject to mandatory evaluation, for lenders with more than $10 billion in assets.[2]

Background

Industrial banks, also known as Morris Plan Banks or Industrial Loan Companies (ILCs) began as small, state-supervised financial institutions created in the early 1900s to provide small loans to industrial workers. At that time, many commercial banks did not offer small, uncollateralized loans to moderate income workers with no credit history. Therefore, industrial banks were able to occupy a niche in the lending market. Because many early ILCs were legally unable to accept deposits, they were not originally subject to FDIC supervision or able to receive deposit insurance.

When commercial banks began expanding their consumer lending operations in the 1940s and 1950s, the market share of industrial banks shrunk dramatically. However, in 1982, the Garn-St. Germain Depository Institutions Act made all ILCs eligible for FDIC insurance. This change has allowed the ILC industry to grow its market share consistently ever since. Some states, namely Utah, which is where GM Financial Bank proposes to be chartered, have enacted “business friendly” laws that have broadened the powers of ILCs beyond their traditional niche role of consumer lending and made them equivalent to full-service banks.[3]

In 1987, Congress passed the Competitive Equality Banking Act (CEBA) which exempted ILCs from the definition of “bank” in the Bank Holding Company Act in the handful of states where they then existed. As the FDIC acknowledges, this loophole, “provides an avenue for commercial firms to own or control a bank. By contrast, BHCs and savings and loan holding companies are subject to Federal consolidated supervision by the FRB and are generally prohibited from engaging in commercial activities.”[4]

In our view, the CEBA exemption from the definition of “bank” has created a backdoor in the banking code that allows large, commercial conglomerates, which would otherwise be prohibited from owning an insured depository institution, to purchase full-service banks without becoming bank holding companies or becoming subject to consolidated supervision. This backdoor has not escaped the notice of commercial giants. In 2005-06, Wal-Mart and Home Depot both applied for ILC charters. These applications were ultimately withdrawn in the face of overwhelming public backlash and by opposition from ICBA and its members.

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[2] *See* 87 Fed. Reg. 33928, VIII. Retail Lending Test Product Categories and Major Product Lines.

[3] Under Utah law, industrial banks are authorized to make all kinds of consumer and commercial loans and to accept federally insured deposits. Utah also has no fixed usury cap and only requires the interest charged on loans to be less than “unconscionable.” Utah ILCs may export this permissive usury cap to out of state customers. For Utah ILCs that exceed $100 million in assets, the use of NOW accounts makes them functionally equivalent to traditional banks.

[4] 85 Fed. Reg. 17772.

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Suite 900
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The FDIC correctly responded, at that time, by imposing a moratorium on new ILC charters owned by commercial firms until the danger they posed could be evaluated more fully. In 2010, the Dodd-Frank Act imposed a three-year moratorium on ILC deposit insurance applications.

Unfortunately, as predicted by ICBA, since the end of that moratorium, we have seen a surge of ILC applications – including applications from financial companies like Square and Nelnet, and from non-financial companies like Rakuten – the Amazon of Japan – and GM Financial, a director competitor of Ford Credit, and a former owner of a failed ILC. In 2021, the FDIC finalized a rule codifying its supervision practices for the parent companies of industrial banks.[5]

ICBA will continue to petition Congress to permanently close the ILC Loophole, but in the interim, it is incumbent on the FDIC to exercise its discretion and reject deposit insurance applications from commercial-financial conglomerates like Ford Credit Bank that subject the DIF to unnecessary risk. We do not argue that Ford Credit should be prohibited from making auto loans to Ford customers. Indeed, Ford Credit currently has the ability to make all the direct or indirect retail car loans that it wants and does not need an ILC to make car loans. Rather, we object to Ford Credit establishing an ILC so that they can offer insured deposit products to fund their retail installment lending and therefore take advantage of the federal subsidy of deposit insurance. The purpose of FDIC insurance is to protect depositors, not to subsidize the lending operations of large commercial-industrial firms.

Separation of Banking and Commerce

ICBA's primary objection to industrial banks generally is that they allow commercial, i.e., non-financial, firms to own FDIC insured depository institutions. We believe that this creates risk for the financial system, the DIF, and for the commercial parents of industrial banks. In their role as independent and neutral arbiters of commercial and consumer credit, banks assess risk and create fair access to credit based on the power of an idea, the track record of management, the current marketplace, and economic potential. When a bank is owned by a commercial firm there is always a risk that its role as a neutral arbiter of creditworthiness will be undermined by the economic incentives of its commercial parent.

In the case at hand, we see a risk that Ford may, however indirectly, influence Ford Credit Bank to imprudently relax its underwriting standards to allow Ford to sell more cars. This may be appealing in the short term to hit a quarterly sales target, but in the longer term it could expose Ford Credit Bank and Ford itself to considerable credit risk if there is a sharp economic downturn.

There is a risk, of course, of a similar phenomenon occurring today between Ford and its captive finance company, Ford Credit. The critical difference, however, is that the risk created by any improper reduction in underwriting criteria is currently born entirely by Ford itself. If, on the other hand, Ford Credit Bank's application for deposit insurance is approved, the risk of failure stemming from improperly lowering underwriting criteria would then create a risk to the DIF.

But insulating commercial companies from credit risk is not the only reason we have historically separated banking and commerce. The separation also discourages inappropriate concentrations of

[5] 12 CFR Part 354.

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

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518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

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economic power and decreases the number of Too-Big-To-Fail institutions – companies which may eventually require government assistance in times of crisis.

Ford may already be such a company, without an FDIC-insured bank subsidiary. In the 2008 Financial Crisis, Ford differentiated itself from its competitors GM and Chrysler in that it did not declare bankruptcy or accept funds from the Troubled Asset Relief Program. However, in 2009, Ford did accept a $5.9 billion loan from the Department of Energy as part of a "loan program that handed out money during the same time period explicitly to shore up automakers."[6] As a large and important manufacturer, if the failure of an industrial bank subsidiary threatened the solvency of Ford, Congress would be compelled to bail the company out to an even greater extent.

This risk is not remote. Ford's competitor GM, which did own an industrial bank during the time of the 2008 crisis, was compelled to accept funds from TARP. GMAC Bank, which was formed for similar purposes as the proposed Ford Credit Bank, received its industrial bank charter in 2001. In 2008, GMAC Bank was sustaining billions in losses and was compelled to divest from GM and convert into a Bank Holding Company in order to make GMAC "eligible for access to the FDIC's Temporary Liquidity Guarantee Program (TLGP) facility and the TARP's Capital Purchase Program (CPP)."[7]

The federal government was compelled to bail out GMAC Bank not because the bank was systemically important or Too-Big-To-Fail on its own – though it was large at $176 billion in assets in 2009 – but rather because its failure would have led to the failure of GM. As the TARP Congressional Oversight Panel later concluded, this importance to GM stemmed not only from GMAC Bank's role as a lender to GMAC customers but from floorplan loans (revolving loans to dealerships), which sustained GM's dealership network and provided a point of sale for its cars. As the Congressional Oversight Panel found, "For the lender, the generally low profit margins in floorplan financing are balanced by an attractive credit profile and gateway business opportunities to other, potentially more lucrative product lines (e.g., consumer auto and dealer real estate lending)."[8]

The interdependency and overlapping incentives between industrial bank subsidiaries and their commercial industrial parents illustrated by GMAC's floorplan loans is precisely the reason the separation between banking and commerce exists. Industrial bank subsidiaries make loans at terms other lenders wouldn't, abdicating their role as neutral arbiters of credit, for the benefit of the commercial parent. Together, they grow intertwined until they become a systemically important company and, when the music stops, the taxpayer is compelled to bail them out. Ford Credit Bank, like the ill-fated GMAC Bank, plans to offer floorplan loans.

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[6] Phoebe Wall Howard, *Detroit Free Press*, "Ford took $6B government loan in 2009 — and debt still haunts company" (July 29, 2020), available at: https://www.freep.com/story/money/cars/ford/2020/07/29/ford-government-loan-department-energy-debt/5526413002/.

[7] Congressional Research Service, CRS Report R41427, "Troubled Asset Relief Program (TARP): Implementation and Status" at 9 (Aug. 21, 2014), available at: https://archive.org/details/R41427TroubledAssetReliefProgramTARPImplementationandStatus-crs.

[8] Congressional Oversight Panel, March Oversight Report, "The Unique Treatment of GMAC Under the TARP" (March 10, 2010), available at: https://www.govinfo.gov/content/pkg/CPRT-111JPRT54875/html/CPRT-111JPRT54875.htm.

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Suite 900
Washington, DC 20036

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Sauk Centre, MN 56378

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Gaps in Supervisory Authority

Aside from the increased risks posed by commercial ownership of FDIC-insured banks, there are also gaps in the ability of the FDIC to supervise these institutions. The FDIC has taken some steps to increase its ability to strengthen its supervision of commercial parents of ILCs by requiring written agreements, but in our view, this still falls short of the robust consolidated supervision of Bank Holding Companies by the Federal Reserve. The commercial parents of industrial banks remain exempt from consolidated supervision by virtue of their exemption from the Bank Holding Company Act.

More troublingly, we believe that the commercial parent companies of industrial banks exist outside the scope of the FDIC's Orderly Liquidation Authority ("OLA"). The FDIC's OLA only applies to financial companies and commercial parents of ILCs fall outside this definition.[9] This exemption could make it impossible for the FDIC to reach the assets of Ford in the event of Ford Credit Bank's insolvency, potentially exacerbating losses to the DIF.

In the 2008 Financial Crisis, Bear Sterns, Lehman Brothers, and AIG were not eligible for FDIC receivership because they were not commercial banks.[10] As a result, they were forced to declare bankruptcy or to receive emergency aid from the Federal Reserve. This limitation was addressed in the Dodd Frank Act, which extended the FDIC's ability to resolve non-commercial bank financial companies. However, that authority does not extend to non-financial firms. Therefore, if a large commercial parent of an ILC fails in the next crisis, taxpayers may be compelled to bail out the firm in order to stop contagion from spreading to the banking system through its ILC subsidiary.

Though questions remain about the ability of OLA to resolve a large financial institution generally, including regarding the problems associated with accessing assets located in jurisdictions outside the United States, it remains an important tool in the FDICs arsenal in times of crisis. By contrast, the FDIC's tools to resolve a large commercial-financial conglomerate are more limited. By allowing for the creation of large, interconnected companies not subject to the BHCA to exist, the FDIC undoes much of the work undertaken by the FDIC and the Federal Reserve to craft resolution strategies for large financial firms since the 2008 crisis.

When the FDIC issued its final rules on Parent Companies of Industrial Banks and Industrial Loan Companies[11], the agency argued that it had both the statutory authority and the capacity to regulate industrial banks. However, despite the enactment of these new rules on parent companies of ILCs, the new FDIC regime has failed to achieve parity with the Federal Reserve and its regime of consolidated supervision required for bank holding companies. For instance, parent companies of ILCs are not subject to consolidated capital and liquidity standards nor are they subject to compliance under the Volcker Rule. The FDIC does not have the authority to conduct full-scope examinations across all affiliates of an ILC including its parent company. Furthermore, even if it had the necessary legal authority, as we have noted above, the FDIC lacks the resources to conduct adequate supervision, examination, and resolution of large commercial-financial conglomerates.

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[9] 12 U.S.C. 5381(a)(11).

[10] *See* Aaron Klein, *Brookings*, "A Primer on Dodd Frank's Orderly Liquidation Authority," (June 5, 2017), available at: https://www.brookings.edu/blog/up-front/2017/06/05/a-primer-on-dodd-franks-orderly-liquidation-authority/.

[11] 86 Fed. Reg. 10703

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1615 L Street NW
Suite 900
Washington, DC 20036

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518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

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Convenience and Needs of the Community

Ford Credit Bank has applied to be considered as a limited purpose bank for purposes of its CRA evaluation. Limited purpose banks are evaluated on the basis of their community development activities and not their retail lending under the community development test for wholesale and limited purpose banks.[12] A limited purpose bank is currently defined as "a bank that offers only a narrow product line (such as credit card or motor vehicle loans) to a regional or broader market" that has been designated as a limited purpose bank.[13]

The purpose of the limited purpose distinction is to create a framework for evaluating banks that do not engage in retail lending that is mandatorily evaluated under the CRA Lending Test. Under the current rule, home mortgage, small business, small farm, and community development lending are evaluated as retail product lines.[14]

First, while a vast majority of Ford Credit Bank's loans are likely to be motor vehicle loans, it is not clear that is sufficient to qualify it as a limited purpose bank. Ford Credit Bank also proposes to offer "loans to auto dealers and loans to help consumers and businesses finance automotive-related parts and accessories, including EV charging stations, over-the-air updates and EV infrastructure." It seems likely that some of the loans extended by Ford Credit Bank to auto dealers or loans to finance EV charging stations will qualify as either small business loans or community development loans that should be properly evaluated under the Lending Test. In any case, the fact that Ford Credit Bank plans to offer loan products of any type beyond motor vehicle loans casts some doubt on the appropriateness of a limited purpose designation.

However, our skepticism of the appropriateness of this designation increases in light of the proposed changes to the CRA rule. The proposed definition of a limited purpose bank is "a bank that offers only a narrow retail product line (such as credit cards, other revolving consumer credit plans, other consumer loans, or other non-reported commercial and farm loans) to a regional or broader market" that has been designated as a limited purpose bank.[15] This change makes sense in light of the proposed rule's designation of automobile loans as a product line subject to mandatory evaluation under the Retail Lending Test for banks in excess of $10 billion in assets. If this portion of the proposal is finalized as proposed, it is clear that Ford Credit Bank should not qualify as a limited purpose bank – therefore, even if Ford Credit Bank's application for deposit insurance is approved, which it should not be, its CRA Strategic Plan and request to be considered as a limited purpose bank should be rejected. It should instead be subject to the large bank test under both the current and proposed CRA rule.

Conclusion

ICBA appreciates the opportunity to comment on Ford Credit Bank's deposit insurance application. While we understand that it is ultimately the role of Congress to close the ILC Loophole, the FDIC has the ability to reject applications for deposit insurance applications from institutions that create outsized risks to the DIF and/or that fail to adequately meet the convivence and needs of their communities.

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[12] 12 CFR 345.25.
[13] 12 CFR 345.12(n).
[14] *See* 12 CFR 345.22.
[15] 87 Fed. Reg. 34017.

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Suite 900
Washington, DC 20036

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518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Because we believe that Ford Credit Bank would fail both tests, we strongly urge the FDIC to reject its application.

Please feel free to contact Christopher Cole at Chris.Cole@icba.org or Mickey Marshall at Michael.Marshall@icba.org if you have any questions about the positions stated in this letter.

Sincerely,

Christopher Cole
Executive Vice President and Senior Regulatory Counsel

Mickey Marshall
Director, Regulatory Legal Affairs

CC: Martin Gruenberg, Acting Chairman, FDIC
Michael Hsu, Acting Comptroller, OCC
Rohit Chopra, Director, CFPB

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1615 L Street NW
Suite 900
Washington, DC 20036

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