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VIA EMAIL

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: Industrial Loan Companies and Industrial Banks Request for Comment

Ladies and Gentlemen:

This comment letter is submitted on behalf of First Data Corporation ("First Data") in response to the FDIC's request for comment on issues relating to industrial loan companies and industrial banks ("ILCs"). First Data appreciates the opportunity to comment on this important issue.

Background

First Data, with headquarters in Denver, Colorado, is a global leader in electronic transactions and payments. As the leading provider of electronic commerce and payment solutions for businesses and governments around the world, First Data provides card and loan processing, merchant services, ATM management, point-of-sale network management, electronic check services, loyalty programs, Internet commerce solutions and prepaid services.

First Data has an industrial bank subsidiary, First Financial Bank ("FFB"), chartered under Colorado law. FFB's primary activities involve the provision of banking services to or on behalf of its affiliates within the First Data family of companies, in order to support the financial services First Data provides to clients. For example, FFB provides clearing and sponsorship services for the merchant acquiring and payment card processing business of its affiliates First Data Merchant Services, Inc. and Cardservice International, allowing merchants to accept credit and debit cards. FFB also provides debit network sponsorship to customers of the STAR network and related First Data companies desiring to connect ATMs and/or debit cards into the Visa, Plus and/or Interlink networks, without becoming direct members of the networks. FFB also issues prepaid cards and provides related trust and depository services in connection with the Money Network® and Universal Card payroll card programs, as well as other First Data stored value card programs.

Overview

After declaring a six-month moratorium on ILC deposit insurance applications and change in control notices, the FDIC published its request for comment on a range of issues relating to ILCs. The FDIC seeks insight into the issues presented by recent trends and changes in the industry to assist the agency in determining whether changes are needed in the way the FDIC supervises ILCs. The implication underlying these actions is either that something is broken in the supervision of the ILC industry, or that the ILC industry has changed in such a way that the existing supervisory approach is inadequate. First Data believes neither of these premises is accurate: we believe that the current regulation and supervision of ILCs is generally equivalent to the regulation and supervision of other financial institutions, and that any changes occurring in the activities of industrial banks can be adequately addressed under the current supervisory structure.

The activities performed by FFB are conducted within the limitations imposed by its charter (principally the inability to accept demand deposits) and under comprehensive regulation and supervision by both the State of Colorado and the FDIC. These external controls serve to ensure that FFB operates in a safe and sound manner, and that it does not pose undue risks to the deposit insurance fund, nor an unfair competitive threat to the rest of the banking industry. For these reasons, as further described below, FFB opposes changes to the current supervisory framework for ILCs. To the extent any changes in the supervision of ILCs are deemed necessary, however, such changes should be tailored to the specific concerns that have been raised regarding the potential exploitation of the ILC charter by commercial entities that wish to conduct full-service retail banking.

Questions posed by the FDIC

1. Have developments in the ILC industry in recent years altered the relative risk profile of ILCs compared to other insured depository institutions? What specific effects have there been on the ILC industry, safety and soundness, risks to the Deposit Insurance Fund, and other insured depository institutions? What modifications, if any, to its supervisory programs or regulations should the FDIC consider in light of the evolution of the ILC industry?

We do not believe that recent developments in the ILC industry have materially altered the risk profile of ILCs relative to other insured depository institutions. ILCs continue to pose less risk to the insurance fund than other depository institutions as evidenced by the consistently higher levels of risk-based capital held by ILCs.[1] The capital ratios of FFB, in particular, are in the 99th percentile of its peer group designated by the FFIEC's Uniform Bank Performance Report. FFB maintains a conservatively managed balance sheet, and its portfolio management ensures strong levels of liquidity. First Data's access to the capital markets and its

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[1] Based on Call Report data from June 30, 2006, the average core capital, tier-1 capital and total risk based capital ratios of the ILCs in California, Colorado, Hawaii, Nevada and Utah show that such ILCs had higher ratios compared against all insured institutions.

asset size relative to FFB's assets support the notion that First Data can serve as a source of strength to FFB. Furthermore, we note that over the past 20 years there have been few ILC failures. More recently, the failure of Conseco had no impact on the Insurance Fund as the ILC was sold quickly to GE Capital.

> *2. Do the risks posed by ILCs to safety and soundness or to the Deposit Insurance Fund differ based upon whether the owner is a financial entity or a commercial entity? If so, how and why? Should the FDIC apply its supervisory or regulatory authority differently based upon whether the owner is a financial entity or a commercial entity? If so, how should the FDIC determine when an entity is "financial" and in what way should it apply its authority differently?*

Whether the parent company is a financial entity or a commercial entity, the risk posed to the ILC and in turn to the Deposit Insurance Fund is that financial problems at the parent will spread to the depository institution. In either case, the mechanisms for ensuring that these financial problems at the parent are not transferred to the depository institution already exist, and apply equally to financial or commercial parent companies. The principal mechanisms are the restrictions on transactions between regulated financial institutions and their affiliates set out in sections 23A and 23B of the Federal Reserve Act. We see little reason to believe that the nature of the parent's principal business activities would alter the temptation to exploit the depository institution's ability to raise funds inexpensively. We also see little reason to believe that financial entities are inherently less risky than commercial entities. The restrictions on affiliate transactions do not vary based on the nature of the parent's business activities. In the case of FFB, which conducts business primarily with its affiliates, the affiliate transactions rules are strictly observed and are closely monitored by its regulators.

We also note that the FDIC's examination policies permit examiners to identify the extent to which a parent company serves as a source of strength to a depository institution and its willingness to do so, especially when the depository institution may be in need of such support.[2] If a depository institution becomes undercapitalized, the FDIC has the authority, pursuant to its prompt corrective action powers, to force the depository institution and the parent into certain action, up to and including recapitalizing the institution, further restricting transactions with affiliates, and forcing divestiture of the institution.[3] In addition, if the FDIC determines that a depository institution or certain of its affiliates including the parent company is engaging or is about to engage in unsafe and unsound practices with the bank, the FDIC can impose cease and desist orders against the institution and its affiliates.[4] Moreover, the FDIC can and has conditioned approval orders on the commitment that the parent will serve as a source of strength to the depository institution.

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[2] *See* Section 4.3 of the Risk Management Manual of Examination Policies.

[3] *See* 12 USC § 1831o.

[4] *See* 12 USC § 1818(b).

3. Do the risks posed by ILCs to safety and soundness or to the Deposit Insurance Fund differ based on whether the owner is subject to some form of consolidated Federal supervision? If so, how and why? Should the FDIC assess differently the potential risks associated with ILCs owned by companies that (i) are subject to some form of consolidated Federal supervision, (ii) are financial in nature but not currently subject to some form of consolidated Federal supervision, or (iii) cannot qualify for some form of consolidated Federal supervision? How and why should the consideration of these factors be affected?

We believe that effective supervision of the depository institution leads to safe and sound operations and limits risks to the Insurance Fund. ILCs, like other state-chartered banking institutions, are subject to all of the state and federal banking laws applicable to such institutions. We do not believe that umbrella supervision of a depository institution's affiliates and parent will necessarily lead to a safer and sounder depository institution that poses less risk to the Insurance Fund. However, to the extent that such an argument might be made we believe, as noted above, that sections 23A and 23B of the Federal Reserve Act amply shield the depository institution from the activities of affiliates regardless of whether those affiliates are themselves subject to supervision. We also note that publicly traded parents such as First Data face exacting scrutiny in the marketplace. Furthermore, as noted above, the FDIC does have authority pursuant to which it can take actions to prevent the parent from jeopardizing the safety and soundness of the ILC.

4. What features or aspects of a parent of an ILC (not already discussed in Questions 2 and 3) should affect the FDIC's evaluation of applications for deposit insurance or other notices or applications? What would be the basis for the FDIC to consider those features or aspects?

The FDIC currently reviews the audited financial reports of the acquiring institution, financial and biographical information about senior management officials, business plans for the depository institution, as well as other information. We believe that the information that applicants must provide creates a robust record upon which the FDIC is able to make an informed judgment regarding the application thus ensuring that only qualified commercial entities may assume control over ILCs.

5. The FDIC must consider certain statutory factors when evaluating an application for deposit insurance (see 12 U.S.C. 1816), and certain largely similar statutory factors when evaluating a change in control notice (see 12 U.S.C. 1817(j)(7)). Are these the only factors FDIC may consider in making such evaluations? Should the consideration of these factors be affected based on the nature of the ILC's proposed owner? Where an ILC is to be owned by a company that is not subject to some form of consolidated Federal supervision, how would the consideration of these factors be affected?

While we agree that the FDIC does not have unlimited discretion to establish the criteria upon which it reviews applications for deposit insurance, we do not believe that the existing criteria is inadequate. In our experience with the application process, we found the review to be rigorous, fair and clearly designed to identify qualified owners of depository institutions. For example during the change in control application process, the FDIC evaluates whether the financial condition of the acquirer would jeopardize the financial stability of the bank or the interests of the depositors of the bank and whether the competence, experience or integrity of the acquiring person indicates that it would not be in the interests of the depositors of the bank or in the interest of the public to permit such person to control the bank.[5] In connection with its evaluation of an application for deposit insurance the FDIC has broad authority to consider various factors relevant to the application for insurance, including factors it considers for changes in control, such as the competence, experience and integrity of the acquiring person.[6]

> *6. Should the FDIC routinely place certain restrictions or requirements on all or certain categories of ILCs that would not necessarily be imposed on other institutions (for example, on the institution's growth, ability to establish branches and other offices, ability to implement changes in the business plan, or capital maintenance obligations)? If so, which restrictions or requirements should be imposed and why? Should the FDIC routinely place different restrictions or requirements on ILCs based on whether they are owned by commercial companies or companies not subject to some form of consolidated Federal supervision? If such conditions are believed appropriate, should the FDIC seek to establish the underlying requirements and restrictions through a regulation rather than relying upon conditions imposed in the order approving deposit insurance?*

We do not believe that the FDIC has the authority to impose restrictions on certain categories of ILCs that it would not impose on other categories of institutions. As stated above, we see no need to differentiate between types of charters or the nature of the parent entity. The FDIC does have authority, however, to place limitations on the activities of any financial institution based on particular circumstances present in individual cases.

For example, the FDIC already possesses the authority the limit the growth of an interstate network of bank branches, in that the FDIC's prior consent is required in order to open a new domestic branch.[7] In connection with such prior approval authority, the FDIC is required to consider the factors in 12 USC § 1816, including future earnings prospects, the general character and fitness of management and the convenience and needs of the community.

The FDIC can condition individual approval orders on various factors, including limitations on changes to a business plan. Violations of such conditional orders would constitute

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[5] *See* 12 USC § 1817(j)(7) and 12 CFR § 308.111.

[6] *See* 12 USC § 1816 and 12 CFR § 303.6.

[7] *See* 12 USC § 1828(d)(1).

cause for proceedings in connection with involuntary termination of the insured status of the institution.[8] Such conditions can be imposed in an approval order for deposit insurance irrespective of whether the owner of the ILC is a commercial company or not subject to consolidated supervision.

7. Can there be conditions or regulations imposed on deposit insurance applications or changes of control of ILCs that are adequate to protect an ILC from any risks to safety and soundness or to the Deposit Insurance Fund that exist if an ILC is owned by a financial company or a commercial company? In the interest of safety and soundness, should the FDIC consider limiting ownership of ILCs to financial companies?

As discussed above, we do not believe there is a sound basis for distinguishing between the risks commercial entities and financial entities pose as owners of ILCs. In addition to the FDIC's own experience supervising ILCs owned by commercial entities, regulators in other countries have successfully managed any safety and soundness risks that may be posed by the affiliation of a depository institution and a commercial entity. Such diversification may actually reduce earnings volatility and other cyclical risks to the institution.

Most of the products and services First Data provides to businesses and consumers are financial in nature, and would likely qualify for certain exemptions currently being considered by Congress. However, we do not believe that restricting the owner of an ILC to a financial entity improves risks or enhances safety and soundness, and we oppose the activities restrictions on parents of ILCs.

8. Is there a greater likelihood that conflicts of interest or tying between an ILC, its parent, and affiliates will occur if the ILC parent is a commercial company or a company not subject to some form of consolidated Federal supervision? If so, please describe those conflicts of interest or tying and indicate whether or to what extent such conflicts of interest or tying are controllable under current laws and regulations. What regulatory or supervisory steps can reduce or eliminate such risks? Does the FDIC have authority to address such risks in acting on applications and notices? What additional regulatory or supervisory authority would help reduce or eliminate such risks?

Banks, including ILCs, are subject to the prohibition against tying that all companies who engage in interstate commerce are subject to pursuant to the Sherman Act and the Clayton Act.[9] Banks are also subject to a higher standard prohibiting tying arrangements pursuant to section 6 of the Bank Holding Company Act ("BHCA").[10] ILCs and their parent

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[8] *See* 12 USC § 1818(a)(2)(A)(iii).

[9] *See* 15 USC § 1 *et seq.* and 15 USC § 12 *et seq.*

[10] *See* 12 USC § 1971 *et seq.*, esp. 12 USC § 1972(1).

companies are expressly required to comply with the anti-tying provisions of the BHCA.[11] Moreover, the ILC parent company and other affiliates of the ILC are subject to the anti-tying restrictions of the BHCA in connection with transactions involving the products or services of the ILC, its parent and any affiliate "as if such company or affiliate were a bank and such institution were a subsidiary of a bank holding company."[12] Therefore, once a company acquires an ILC, the parent and affiliates are subject to the higher anti-tying restrictions of the BHCA in connection with transactions involving the affiliate ILC. As noted above, conflicts of interest are largely addressed by sections 23A and 23B of the Federal Reserve Act which we believe amply shield the depository institution from the parent and other affiliates.

> *9. Do ILCs owned by commercial entities have a competitive advantage over other insured depository institutions? If so, what factors account for that advantage? To what extent can or should the FDIC consider this competitive environment in acting on applications and notices? Can those elements be addressed through supervisory processes or regulatory authority? If so, how?*

ILCs owned by commercial entities do not have a competitive advantage over other insured depository institutions. On the contrary, the ILC charter severely restricts their ability to compete with other insured depository institutions.

In particular, ILCs are prohibited from accepting demand deposits if the ILC has total assets of $100 million or more. This restriction on accepting demand deposits severely restricts the commercial deposit taking activities of an industrial bank. The only type of transaction account that an industrial bank can maintain is a NOW account (an account for which the bank reserves the right to require seven days notice before permitting the withdrawal of funds). Only individuals, charitable organizations and governmental entities are eligible to hold NOW accounts. Because commercial entities are not eligible to hold NOW accounts and industrial banks cannot accept demand deposits, the only type of account that a commercial entity may hold at an industrial bank is a savings account. Savings account are limited to six withdrawals per month. The withdrawal limitation makes such accounts highly impractical for a commercial entity which, generally, must make withdrawals daily in conducting its business activities. By not being able to offer transaction accounts to businesses, ILCs are generally precluded from building multi-layered relationships with businesses based on core banking services.

FFB, in particular, does not pose any serious competitive threats to community banks or other full-service retail banks. FFB provides banking related services to its affiliates and their customers, has no walk-in deposit facility, and does not market itself as a full-service commercial bank. FFB has no branches.

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[11] *See* 12 USC § 1843(h)(1).

[12] 12 USC § 1843(h)(2)

10. Are there potential public benefits when a bank is affiliated with a commercial concern? Could those benefits include, for example, providing greater access to banking services for consumers? To what extent can or should the FDIC consider those benefits if they exist?

FFB seeks to be a leading provider of banking services that facilitate and support the development of consumer payment systems, with a particular focus on online debit payment systems, consistent with sound banking practices. Through its affiliation with First Data, FFB is able to produce benefits to the public by enabling First Data to more efficiently service consumer payment systems.

11. In addition to the information requested by the above questions, are there other issues or facts that the FDIC should consider that might assist the FDIC in determining whether statutory, regulatory, or policy changes should be made in the FDIC's oversight of ILCs?

As noted above, we believe the current supervisory structure is more than adequate and see no basis for change. The FDIC has been granted broad incidental powers necessary to carry out its functions under the Federal Deposit Insurance Act and to protect the Insurance Fund.[13] The FDIC can use such authority on a case-by-case basis to address concerns related to particular institutions. There is no evidence that the supervisory structure is broken, nor is there any evidence that the system is in danger of failure.

12. Given that Congress has expressly excepted owners of ILCs from consolidated bank holding company regulation under the Bank Holding Company Act, what are the limits on the FDIC's authority to impose such regulation absent further Congressional action?

Congress expressly exempted parents of ILCs from the consolidated supervisory framework of the Bank Holding Company Act. The FDIC has the supervisory authority to examine affiliates, including the parent, of an insured institution in order to disclose fully the relationship between the affiliate and the institution and the effect of such relationship on the institution.[14] Furthermore, as noted above, the FDIC does have authority pursuant to which it can take actions to prevent the parent from jeopardizing the safety and soundness of the ILC.

Conclusion

Once again, First Data appreciates the opportunity to provide its comments on this matter. If you have any questions regarding the foregoing, please contact me at 402-222-5670.

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[13] *See* 12 USC § 1819(a).

[14] *See* 12 USC § 1820(b)(4).

Very truly yours,

Pamela J. Griffin

Pamela J. Griffin
Senior Counsel
First Data Corporation