Submitted via electronic mail.

January 13, 2021

John Conneely
Regional Director
FDIC Chicago Regional Office
300 South Riverside Plaza, Suite 1700
Chicago, IL 60606-3447

RE: FDIC DEPOSIT INSURANCE APPLICATION OF GM FINANCIAL BANK

Dear Mr. Conneely,

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the federal deposit insurance application of GM Financial Bank (The Bank). According to its application, GM Financial Bank will have a business model focused solely on auto lending and be headquartered in Salt Lake City, Utah. Due to our strong opposition to mixing banking and commerce and the failure of General Motors Acceptance Corporation (GMAC) in 2008, ICBA urges the FDIC to reject the Bank's application for deposit insurance.

According to its public application, the Bank, organized as an industrial bank pursuant to Utah law, will engage in purchasing indirect retail installment sales contracts originated mostly through General Motors-franchised automobile dealers as its primary lending activity.[2] It will fund its operations through savings and time deposit products offered to: (i) General Motors Company (GM) and General Motors Financial Company, Inc. (GMF) employees and retirees, (ii) GM dealer principals, employees, and customers, (iii) GMF loan and lease customers, (iv) GM customers without an existing GMF relationship, and (v) individuals with no GM affinity. Its deposit services will be offered over the internet and through a mobile application.

The Bank will be a subsidiary of GMF, itself a wholly-owned captive finance subsidiary of the GM. GMF is the exclusive provider for GM's auto loan and lease offerings, operating in North American and international segments. GMF also offers commercial lending products, such as floorplan loans, dealer working capital loans, and real estate loans to GM-franchised dealers. In 2019, its revenue was $14.55 billion and its net income was $1.57 billion. GMF currently has

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[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $3.4 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.
[2] Interagency Charter and Federal Deposit Insurance Application for GM Financial Bank, a Utah State-Chartered Industrial Bank, No. 20201367 (Dec. 14, 2020), available at: FDIC: Deposit Insurance (New Bank) Report.

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consumer and commercial lending licenses in 42 states and is supervised by the Consumer Financial Protection Bureau as a larger participant in the market for automobile financing.

ICBA Position

ICBA has long opposed granting deposit insurance applications to new industrial banks or industrial loan companies (ILCs) on the grounds that the ability of non-financial parent companies to own ILCs is antithetical to the long-established policy in the United States that banking and commerce should be kept separate.[3] Furthermore, because commercial parent companies of ILCs are not subject to consolidated supervision by the Federal Reserve, we believe they inherently pose a greater risk to the Deposit Insurance Fund (DIF) than conventional bank or financial holding companies.

The policy of separating banking and commerce is not arbitrary. It arose in order to prevent undue concentrations of economic power and conflicts of interest that might impair fair and competitive access to credit or impact lending decisions in a way that destabilizes insured depository institutions (IDIs). Additionally, the separation of banking and commerce is a bulwark that prevents the insolvency of a bank's commercial parent company from destabilizing the financial system, and dampens the contagion of financial system liquidity shocks to commercial firms. GM Financial Bank's deposit insurance application does not provide sufficient reasons to justify the risk it poses to the financial system in light of this long-established separation.

Furthermore, ILCs with commercial parent companies present an outsized risk to the DIF because they are exempt from the Bank Holding Company Act of 1956 and are not subject to consolidated supervision by the Federal Reserve.[4] In December 2020, the FDIC approved a rule that codified the agency's supervisory processes and policies that apply to parent companies of industrial banks.[5] The final rule concludes that the agency's supervision of industrial banks is "substantially similar" to the supervision of other IDIs, but also cites a GAO study which "noted the added benefit of Federal consolidated supervision."[6]

As we argued in our comment letter on the FDIC's ILC Rule, the FDIC's supervisory framework is not equivalent to consolidated supervision because it does not impose consolidated capital requirements for the commercial parent of an ILC.[7] Furthermore, it would not make commercial parent companies subject to the Gramm Leach Bliley Act's Privacy and Safeguards Rules.

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[3] *See* Independent Community Bankers of America, "Industrial Loan Companies: Closing the Loophole to Avert Consumer and Systemic Harm" (March 2019), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/reports/ilc-white-paper.pdf?sfvrsn=ea6f4317_2.

[4] 12 U.S.C. 1841(c)(2)(H).

[5] FDIC, *Press Release*, "FDIC Approves Rule to Ensure Safety and Soundness of Industrial Banks," FDIC: PR-137-2020 (Dec. 15, 2020), available at: https://www.fdic.gov/news/press-releases/2020/pr20137.html.

[6] FDIC ILC Final Rule at 20, available at https://www.fdic.gov/news/board/2020/2020-12-15-notice-dis-b-fr.pdf; *citing* U.S. Government Accountability Office, GAO-12-160, Characteristics and Regulation of Exempt Institutions and the Implications of Removing the Exemptions (Jan. 2012), available at https://www.gao.gov/products/GAO-12-160.

[7] Independent Community Bankers of America, "Comment Letter Responding to NPR on Parent Companies of Industrial Banks and Industrial Loan Companies" (July 1, 2020), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/fdic-ilc-rule-comment-letter.pdf.

Finally, we believe that the commercial parents of ILCs fall outside the scope of the FDIC's Orderly Liquidation Authority (OLA), which may significantly hamper the agency's ability to resolve a failed ILC and eventually lead to a taxpayer-funded bailout, as was the case in the failures of Bear Sterns and Lehman Brothers.

The aforesaid reasons are simply our objections to granting deposit insurance to new ILCs generally and we believe they alone provide sufficient justification to reject GM Financial Bank's application for deposit insurance. However, we believe the case to reject this application becomes even stronger when one considers that GM, the parent of GMF and the proposed GM Financial Bank, has already been down this road before and it has demonstrated a record of inadequate risk management. General Motors Acceptance Corporation (GMAC) was GM's industrial bank subsidiary until it failed in the 2008 Financial Crisis. Ultimately, GMAC required three rounds of bailouts from the United States Treasury through the Troubled Asset Relief Program (TARP) totaling $17.2 billion.[8]

The precedent set by GMAC's failure and the FDIC's lack of consolidated supervision or orderly liquidation authority over GM, poses an excessive risk to the DIF and may foreseeably result in another taxpayer funded bailout. Therefore, because GM Financial Bank fails to satisfy the factors considered under 12 U.S.C. 1816, we strongly urge the FDIC to reject its application for deposit insurance.

History of the ILC Loophole

ILCs began as small, state-supervised financial institutions created in the early 1900s to provide small loans to industrial workers. Because early ILCs were legally unable to accept deposits, they were not subject to FDIC supervision or eligible 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.[9]

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

[8] *See* Congressional Research Service, CRS Report R41427, "Troubled Asset Relief Program (TARP): Implementation and Status" at 9 (Aug. 21, 2014), available at: [Troubled Asset Relief Program (TARP): Implementation and Status (congress.gov)]().

[9] 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.

companies are subject to Federal consolidated supervision by the FRB and are generally prohibited from engaging in commercial activities."[10]

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. 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.

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 GM Financial Bank that subject the Deposit Insurance Fund to unnecessary risk. We do not argue that GM Financial should be prohibited from making auto loans to GM customers, but it should not receive the federal subsidy of deposit insurance to do so. The purpose of FDIC insurance is to protect depositors, not to subsidize the lending operations of large commercial firms.

The Separation of Banking and Commerce

To preserve the character and safety of our economy and to uphold consumer and business confidence in our banks, commercial companies must not be allowed to own banks or bank-like institutions. 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. That critical role would be jeopardized if commercial firms were allowed to own or control banks or their functional equivalents.

As we have commented to the FDIC in the past, weakening the separation between banking and commerce "could transform our financial system as well as our economy and society" by creating issues with unfair competition, conflicts of interest, abusive sharing of customer data between commercial parents and ILC affiliates, and increased systemic risk.[11] In July, we warned the FDIC that its decision to grant deposit insurance to Square and Nelnet, as well as its decision to create a new ILC supervisory framework, could "result in a surge in new ILC applications."[12] The GM Financial Bank application is an early indicator of this trend.

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[10] 85 Fed. Reg. 17772.

[11] *See* Art Wilmarth, "The FDIC Should Not Allow Commercial Firms To Acquire Industrial Banks," The FinReg Blog, Duke University School of Law (June 23, 2020). Available at: https://sites.law.duke.edu/thefinregblog/2020/06/23/the-fdic-should-not-allow-commercial-firms-to-acquire-industrial-banks/.

[12] *Supra* note 3, at 6.

This transformation of the financial system would not be justified in the best of times, but it is particularly imprudent in the midst of the COVID-19 pandemic. The long-term economic effects of this epidemic are not yet known, nor are the potential consequences of the unprecedented fiscal and monetary response. It is not appropriate to approve the creation of too-big-to-fail commercial and financial conglomerates in a period of clear risks to financial stability.

The GMAC Failure

GMAC was founded in 1919 to provide auto loans to customers buying GM cars and loans to GM dealers to purchase their lots. For decades, GMAC was a profitable part of GM's business and its activities remained relatively limited in scope. However, "[o]ver the decades, GM's once-small credit arm expanded far beyond the realm of automotive lending, providing home mortgages beginning in 1985, auto insurance for both dealers and consumers, and even financing to manufacturers and distributors in the nonautomotive sectors."[13]

For most of its history, GMAC, like the present day GMF, obtained funding to make its auto loans by accessing private credit markets. It could generally obtain capital fairly cheaply and sell its loans on the secondary market because "the majority of GMAC's auto loans were considered "prime loans," meaning that GMAC loaned money to customers with high credit scores."[14] However, GMAC entered the banking sector by forming GMAC Bank, which received its charter in 2001. Later, "in 2004, GMAC created GMAC Automotive Bank to purchase retail installment sale and lease contracts from automobile dealers, and this institution's application for federal deposit insurance was approved by the Federal Deposit Insurance Corporation (FDIC) in June 2004."[15]

Shortly after this time, GMAC's credit position began to decline. Its credit status was downgraded to non-investment grade and auto sales continued to fall. In 2006, its declining financial position led GM to sell 51 percent of the equity in GMAC to Cerberus Capital Management for about $14 billion. Its mandate was to "transform GMAC from a captive operation to a more globally diversified operation."[16]

In 2007-2008, the bottom fell out. GMAC incurred a net loss of $2.3 billion for 2007, and the Financial Crisis of 2008 virtually halted the company's mortgage and automotive lending businesses. In 2008, GMAC, LLC requested the approval of the Board of Governors of the Federal Reserve System to become a Bank Holding Company. The reason for this conversion, which would eventually require GM to sell its remaining interest in the company, was to make GMAC "eligible for access to the FDIC's Temporary Liquidity Guarantee Program (TLGP) facility and the TARP's Capital Purchase Program (CPP)."[17]

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[13] Congressional Oversight Panel, "The Unique Treatment of GMAC Under the TARP" (Mar. 10, 2010), available at: The Unique Treatment of GMAC Under the TARP: Congressional Oversight Panel March Oversight Report (stlouisfed.org).
[14] Special Inspector General for the Troubled Asset Relief Program, "Taxpayers Continue to Own 74% of GMAC (Rebranded as Ally Financial Inc.) from the TARP Bailouts" (Jan. 20, 2013), available at: Taxpayers_GMAC.pdf (sigtarp.gov).
[15] *Supra* note 8 at 11.
[16] GMAC, LLC, GMAC Financial Services Reports 2006 and Fourth Quarter Earnings (Mar. 13, 2007).
[17] *Supra* note 8, at 15.

While GMAC was relatively large (approximately $172 billion in assets in 2009), it is difficult to make the case that it was systemically important to the financial system. It was orders of magnitude smaller than a Bank of America or a Citi, and less interconnected than a Goldman Sachs. So why did Treasury conclude that it was appropriate to grant not one but three rounds of bailouts to GMAC? Quite simply, "It wasn't too big to fail: it was too important to GM to fail."[18]

GM was, and remains, a large and important American manufacturer. It is a major domestic employer and an iconic brand whose existence was threatened by the failure of its financial arm. That meant that, even if GMAC was not in itself systemically important to the financial system, it needed to be bailed out to save its commercial parent. This is the ever-present danger of mixing banking and commerce – doing so creates ever more "too big to fail" companies, both financial and non-financial, and increases the potential liabilities of the DIF and the U.S. taxpayer.

Lessons from the Collapse of GMAC

There are several lessons that can be learned from the collapse and bailout of GMAC that should inform the FDIC decision to reject GM Financial Bank's current application for deposit insurance. The FDIC has a statutory duty to consider the "financial history and condition of the depository institution," and we believe it is entirely appropriate for the agency to consider the failure of GM's previous ILC subsidiary when evaluating this new application.[19]

First, some have argued that the problem with GMAC was that it expanded its business into product lines and markets where it was not expert. For example, perhaps GMAC would have been more financially sound if it had not been involved in the mortgage lending bubble which eventually popped in 2008. GM Financial Bank's application attempts to address this problem by limiting itself to auto loans and promising that it "will not engage in commercial vehicle lending or fleet financing, nor will the Bank engage in mortgage lending or secondary market transactions."[20]

This solution fails to account for the fact that business models have a natural tendency to drift over time. After all, for decades, GMAC limited itself to auto financing, only expanding into mortgage lending 66 years after its formation. The management of GM has already proven themselves to be inadequate risk managers and shown that they are expansion oriented – indeed, the application refers to forming a bank as a "natural extension of GMF's existing business strategy."[21] Granting GM Financial Bank's application for deposit insurance creates a foreseeable risk of future expansion into other product lines and sows the seeds for a future crisis.

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[18] Daniel Indiviglio, "GMAC: To Important to Fail," *The Atlantic* (March 12, 2010), available at: GMAC: Too Important to GM to Fail - The Atlantic.
[19] 12 U.S.C. 1816(1)
[20] *Supra* note 2, at 4.
[21] *Supra* note 2, at 3.

Moreover, GM Financial Bank's limited business model fails to adequately address the risks created by allowing GM to own any banking subsidiary – irrespective of whether its loan offerings are diversified or concentrated in a single product line. GMAC was not the only financial institution to fail in the 2008 financial crisis, nor was it the only bank to financially suffer from its exposure to the mortgage bubble. The difference is that, because of its affiliation with its commercial parent GM, the risk created by the failure of GMAC was dramatically amplified compared to the failure of a purely financial company of the same size. This compelled a taxpayer bailout.

This problem will continue to exist if the FDIC approves GM Financial Bank's application. After all, according to TARP's Special Investigator General, "[d]espite GMAC's significant losses from ResCap's subprime mortgage business, it was its auto financing for GM that would lead the Government to bail it out."[22] GMAC's mortgage business was unprofitable before its auto lending business also began reporting losses, but it is not clear that confining itself to auto lending alone would have prevented the company from needing a bailout. Given that changing technology surrounding electric and self-driving cars may fundamentally alter automotive demand, we believe that GM Financial Bank's plan to limit itself to auto lending is more of a weakness than a strength because it tends to concentrate risk.

Conclusion

ICBA appreciates the opportunity to comment on GM Financial Bank's deposit insurance application. Because granting this application would endanger the Deposit Insurance Fund and further erode the separation of banking and commerce, we strongly urge the FDIC to reject it. 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,

/s/ Christopher Cole

Christopher Cole
Executive Vice President and Senior Regulatory Counsel

/s/ Mickey Marshall

Mickey Marshall
Director, Regulatory Legal Affairs

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[22] *Supra* note 14, at 6.