

UPDATE

News of Developments in the Financial Sector and Related Areas

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Entry Into Banking By Non-Financial Corporations

The number of non-financial corporations seeking entry into banking continues to increase. Ford Motor Co. seeks to open an industrial loan company, i.e., bank chartered in the state of Utah, by the name of FMCC Auto Bank which would offer retail car loans to the public. Although the application by Ford has been withdrawn for technical reasons, it is expected to be refiled. The application by Ford with the Federal Deposit Insurance Corporation ("FDIC") follows applications by Wal-Mart Stores, Inc. to establish an industrial loan company by the name of Wal-Mart Bank which was filed in July 2005 for the purpose of processing electronic payments such as credit cards and checks. Later, Home Depot, Inc. filed an application with the FDIC in May 2006 for the acquisition of EnerBank USA for the purpose of offering lending services to customers of independent home improvement contractors. Both the applications by Wal-Mart and Home Depot, along with the comment letters from the public on each application, are available on the website of the FDIC at www.fdic.gov. The United States General

Accountability Office ("GAO"), which is the investigative arm of Congress, in its report entitled "*Industrial Loan Companies*" dated September 15, 2005, reflects that these types of banks were chartered by states in the early 1900s to provide uncollateralized consumer loans to low- and moderate-income workers who were unable to obtain loans from existing commercial banks. Although industrial loan companies were not eligible for federal deposit insurance, the policy changed in 1982 with the passage of the Garn-St Germain Depository Institutions Act which granted eligibility for deposit insurance to industrial loan companies. The GAO report reflects that as of December 31, 2004, there were 29 industrial loan companies representing 82% of the industrial loan company industry assets with headquarters in Utah. A number of states, such as Iowa, Maryland, and Virginia have enacted legislation to ban industrial loan companies from opening bank branches on the site of a commercial affiliate, which would have the effect of preventing a bank such as Wal-Mart Bank from opening a branch at a Wal-Mart store location. Because industrial loan companies remain one of the few types of FDIC insured depository institutions that are not subject to the Bank Holding Company Act and regulations by the Federal Reserve, they are an attractive vehicle for non-financial institutions, such as Wal-Mart, Home Depot and Ford Motor Co., seeking to own or control a bank.

Health Savings Accounts Legislation

Health Savings Accounts ("HSAs") were authorized by Congress in 2003 to permit

individuals who are covered by a high-deductible health plan to establish tax deductible HSAs for the purpose of paying qualifying medical expenses. Monies in HSAs utilized by an owner for purposes other than payment of medical expenses currently incur a 10% penalty in addition to the income taxes. Earlier this year in his State of the Union address, President Bush requested Congress to authorize legislation permitting pretax earnings accumulated in HSAs to be utilized by the owner for health related expenses and to allow individuals who contribute to HSAs on their own to get the same tax treatment as those with employer sponsored insurance. Recently introduced legislation in Congress would improve HSAs, such as allowing early retirees to use HSAs to pay for insurance premiums, giving employers the same payroll tax deductions that are permitted for offering traditional insurance plans, allowing employers to make larger contributions for chronically ill employees and raising account contribution limits. The proposed legislation would also allow rollovers to HSAs from existing employer sponsored health plans and certain individual retirement accounts and extend eligibility to spouses, veterans and employed senior citizens. One of the negative aspects in one of the pending bills which may impact its passage is an increase in the penalty to 30% for owners who use monies in HSAs for expenses unrelated to qualifying medical expenses. According to published information by the U. S. Treasury Department, 3.2 million individuals currently have high deductible health insurance plans, thus making them eligible for HSAs. The Treasury Department estimates that 14 million people will be eligible for HSAs by the year 2010 and that figure would increase to 21 million if legislation were authorized along the lines as requested by President Bush.

Fairness Opinions

A fairness opinion is a letter prepared by an independent, qualified person generally

addressed to the board of directors of a company which addresses the fairness of a transaction, such as a merger, from a financial point of view. The opinion letter does not address whether a transaction is fair from a legal viewpoint, nor is it intended to constitute a recommendation from the point of view of the company. For a transaction to be fair, it only needs to fall in a range of fair market value, which may mean that the price that a shareholder will receive may not be the highest price. The opinion letter is simply the judgment of an independent and experienced professional that the terms of a transaction are fair to the company's shareholders. Since the enactment of the *Sarbanes-Oxley Act of 2002* a greater responsibility has been placed upon members of boards of directors to make informed business decisions. The board of directors maintain the responsibility for recommending what is in the best interest of shareholders of the company. As a result, an opinion letter is not intended to constitute a recommendation as to how shareholders should vote on a proposed transaction since the board of directors has that responsibility. However, a fairness opinion helps insulate directors from violating their fiduciary duties to the company and its shareholders as required by the *business judgment rule*. The *business judgment rule* generally holds that directors are not liable for decisions that are made in good faith, on an informed basis and with the belief that the action taken was in the best interest of the company and its shareholders. Although there are no laws requiring fairness opinions, they are customarily utilized in assisting the board of directors of a company in fulfilling their fiduciary duties to the company and its shareholders. Fairness opinions are useful in situations when a company has an employee stock option plan, there is a likelihood of dissenting shareholders or management is receiving additional consideration in a transaction, such as deferred compensation or employment agreements.