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U P D A T E

News of Developments in the Financial Sector and Related Areas

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Home Depot's Entry Into Banking

Home Depot, Inc. is making its entry into banking through the acquisition of EnerBank USA, which is an industrial loan company, i.e., bank chartered by the state of Utah. Home Depot's purpose for purchasing the industrial bank is to offer lending services to customers of independent home improvement contractors. Contractors who may purchase materials from Home Depot will refer their customers to the industrial bank to secure financing for home improvement projects. One of the issues that will have to be addressed by the Federal Deposit Insurance Corporation ("FDIC") is whether the arrangement between the industrial bank and Home Depot would violate Sections 23A and 23B of the Federal Reserve Act, which requires that transactions between affiliates be adequately collateralized to insure that transactions are not unsafe or unsound, i.e., home improvement customers borrowing money from the industrial bank, with the customers paying the loan proceeds to contractors who would then utilize the monies to purchase materials from Home Depot. Most industrial loan companies became eligible for FDIC insurance with the passage of the Garn-St Germain Depository Institutions Act in 1982. Subsequently, even though Congress enacted new legislation under the Competitive Equality Banking Act in 1987 regarding banks that are subject to jurisdiction and regulation of the Federal Reserve Board under the Bank Holding Company Act, there are a number of exceptions for industrial loan companies under the definition of a "bank." 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 regulation by the Federal Reserve Board, they are attractive vehicles for non-financial companies, such as Wal-Mart and Home Depot, seeking to own or control a bank.

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Fees for Cashing Checks

In Interpretive Letters #1054 and #1055, issued by the Office of the Comptroller of the Currency ("OCC"), the OCC addressed

the authority of a national bank to charge fees for cashing a check presented by a non-accountholder that is drawn on the account of one of the bank's customers. These fees are sometimes referred to as "on-us check cashing fees" or "on-us fees." The OCC noted that 12 U.S.C. § 24 (Seventh) authorizes national banks to engage in activities that are part of, or incidental to, the business of banking, which would include the cashing of checks, and that the authority to charge fees for services is expressly set forth in the OCC's regulations at 12 C.F.R. § 7.4002. The OCC also noted in its Interpretive Letter rulings that national banks may charge these fees in spite of state laws to the contrary. Under the Arkansas Wild Card Statute, Arkansas Code Annotated Section 23-47-101(c) and Regulation 47.101.3 of the Arkansas State Bank Department, the Arkansas Bank Commissioner may authorize Arkansas chartered banks to engage in any banking activity permitted to national banks.

Letters of Intent

Letters of intent, which are sometimes known as memorandums of understanding or letters of understanding, are generally utilized by parties to a business transaction to set forth the major terms of their understanding prior to the execution of a definitive agreement. Letters of intent may be either binding or non-binding, and it is important that the parties to a letter of intent state their understanding. A typical provision in letters of intent is a statement that it is not a binding agreement. However, the parties may want to specifically provide that although the letter of intent is not binding on the parties until the execution of the definitive agreement, that certain portions of the letter of intent are binding and enforceable such as (i) the parties will deal exclusively with one another and will not utilize the letter of intent to shop the proposed transaction to third parties, (ii) a confidentiality provision requiring the parties to maintain in strict confidence all confidential information relating to the terms of the proposed transaction and the disclosed information by one party to another, (iii) access to information to determine if the proposed transaction should proceed, commonly referred to as "Due Diligence", and (iv) each party will be responsible for their own legal fees and expenses. The main purpose of a letter of intent is to summarize the material terms of the proposed transaction and to prevent unnecessary expense in the preparation of the definitive agreement. In those cases where the parties cannot agree upon the terms of a letter of intent, there is no need to proceed with the effort and expense of preparing a definitive agreement. A non-binding letter of intent may include material terms such as, the purchase price, the assets involved in the transaction, closing conditions, date for closing, and other terms which may also be in the definitive agreement. Besides setting forth the key elements of a proposed transaction, a letter of intent provides a sense of assurance that each side is committed to moving forward with the proposed transaction. The letter of intent needs to be signed by the parties to the proposed transaction. In connection with the execution of a letter of intent by the parties, courts have recognized the obligation of each party to act in good faith in attempting to negotiate a definitive agreement. Some years ago after signing a letter of intent to merge with Pennzoil, the Getty Oil board of directors backed out of the deal and merged with Texaco because Texaco had made a better offer. When litigation arose over the obligations of the parties to the letter of intent, the jury in the case awarded Pennzoil over $10 billion in compensatory and punitive damages with the case being ultimately settled by the parties for approximately $3 billion. As a result, even though certain terms and conditions of a letter of intent are not binding and enforceable, each party needs to deal in good faith when entering into a letter of intent.