Waging War with Wal-mart: A Cry for Change Threatens the Future of Industrial Loan Corporations

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Zachariah J. Lloyd*

I. INTRODUCTION

The numbers are overwhelming: 1.9 million employees, $345 billion in annual sales, 4022 locations in the United States alone spanning more than 600 million square feet of retail space,\(^1\) and 127 million customers per week.\(^2\) Beyond these staggering statistics, however, “few efforts illustrate the breadth of Wal-Mart Stores, Inc.’s [(“Wal-Mart”)] ambitions . . . as much as a nearly decade-long drive to establish its own bank.”\(^3\)

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After a firestorm of criticism from banking industry officials and consumer watchdog groups, legislative threats from lawmakers, and an extended moratorium freezing all ILC applications by the Federal Deposit Insurance Corporation (FDIC), Wal-Mart, America’s behemoth one-stop-shop, withdrew its most recent attempt to secure a bank charter—a Utah Industrial Loan Corporation (ILC)—on March 16, 2007. This attempt by the world’s largest retailer to enter the world of banking served as ample fodder to stoke anew the flames of controversy surrounding America’s age-old public policy decision to keep banking and commercial entities separate as the surge in ILCs appears to be dismantling that dividing wall brick by brick.

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4 See Fine, infra note 61, at 1.

5 See infra note 197.

6 See infra Part II.C.2.

7 See infra Part II.C.1.

8 As of March 17, 2004, Utah law was amended to rename the industry from Industrial Loan Corporations (ILCs) to Industrial Banks. Utah Code Ann. § 7-8-21 (2006). This article will utilize the term “ILC” to refer to both Industrial Loan Corporations and Utah Industrial Banks.

9 Eric Dash, supra note 3, at C1.

Although ILCs have existed with relatively little fanfare for decades and several blue chips already control ILCs of their own,\textsuperscript{11} Wal-Mart’s ILC application created unprecedented opposition and drastic calls for legislative action from nearly every arena to prevent Wal-Mart and other giant retailers like it from controlling a banking institution. The purpose of this Note is to chronicle the development of the ILC industry and analyze whether the separation of banking and commerce is a justifiable basis for opposing ILCs. Part II will address: the history of the ILC, from its creation to emergence as the banking entity of choice for some of the Nation’s largest financial and commercial companies; Wal-Mart’s role in advancing the controversy; and the regulatory and legislative responses to large commercial entities seeking to control ILCs. Part III will address the separation of banking and commerce as it relates to ILCs, three different solutions available to Congress, and the impact the implementation of the proposed legislation will have on the ILC industry as a whole and the state of Utah in particular. Part III concludes that in the absence of any risk peculiar to commercially-affiliated ILCs and in light of the regulatory success of the FDIC and Utah DFI, a wall of separation should not be erected between ILCs and commercial holding companies but rather they should continue to be granted charters provided there is sufficient regulatory supervision to manage the risks inherent in their holding structure as determined on an case by case basis by the FDIC and applicable state regulator.

\textsuperscript{11} See infra notes 32–40 and accompanying text.
II. THE CONTROVERSY

A. ILC Overview: From Creation to Expansion to Explosion

1. ILC Growth and Development

ILCs are “state-charted financial institutions that emerged in the [early] twentieth century to provide consumer credit to low and moderate income workers who were generally unable to obtain consumer loans from commercial banks.” ¹² Although most ILCs were not federally insured by the FDIC until the passage of the Garn-St. Germain Act of 1982,¹³ these financial institutions raised capital by issuing investment certificates and deposits and then made unsecured,
high interest loans to consumers.\textsuperscript{14} However, in the last ten years, commercial entities have been increasingly interested in owning ILCs; consequentially, the ILC industry has “experienced significant asset growth.”\textsuperscript{15}

\textit{(a) ILC Statutory Creation and Advantages}

ILCs were originally exempted from the Bank Holding Company Act of 1956 (“BHC Act”)\textsuperscript{16}—which did not permit bank holding companies to engage in insurance, securities underwriting, or commercial business\textsuperscript{17}—with other “nonbank banks” that either did not: (i) accept demand deposits or (ii) make commercial loans.\textsuperscript{18} As a result, many banking institutions were organized and participated in only one of the above permissible activities and thereby avoided classification and regulation as a bank under the BHC Act. In response to the growing number of “nonbank banks,” the Board of Governors of the Federal Reserve System (“Federal Reserve Board”) sought to redefine “bank” under the BHC Act to include any FDIC-insured bank—“nonbank banks”—and the

\textsuperscript{14} Raymond Natter, \textit{The Industrial Loan Corporation Controversy}, FIN. SERVICES INST. July 2005 ¶ 2.

\textsuperscript{15} GAO REPORT, \textit{supra} note 12, at 1.


\textsuperscript{17} Natter, \textit{supra} note 14, ¶ 3.

\textsuperscript{18} Id.
Competitive Equality Banking Act (“CEBA”) was enacted in 1987.\textsuperscript{19} CEBA strengthened the BHC Act’s supervisory reach by subjecting all non-excepted FDIC-insured banks to consolidated supervision and subjected them to the BHC Act’s limitations on bank holding companies. Except for a limited number of qualifying institutions, such as grandfathered unitary thrift holding companies and companies that own limited purpose credit card banks (CEBA credit card banks), entities that own or control insured depository institutions generally may engage, directly or through subsidiaries, only in activities that are financial in nature.\textsuperscript{20} With respect to ILCs, CEBA excepted from the BHC ACT four types of ILCs because they did not fall within the definition of “bank”:

(i) an ILC that does not accept demand deposits that the depositor may withdraw by check or similar means for payment to third parties;

(ii) an ILC that has less than 100 million in total assets;

\begin{flushright}
\	extsuperscript{19}\emph{Id.} ¶ 4.
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\begin{flushright}
\	extsuperscript{20}\emph{See} 12 U.S.C. §§ 1843, 1467a(c) (2006). Grandfathered unitary thrift holding companies are not subject to these activities restrictions. Limited purpose credit card banks are also exempt from the BHC Act. 12 U.S.C. § 1841(c)(2)(F) (2006).
\end{flushright}
(iii) an ILC that has not undergone a change in control after the date of enactment of CEBA (Aug. 10, 1987); and

(iv) an ILC that does not, directly or through an affiliate, engage in any activity in which it was not lawfully engaged as of March 5, 1987.21

It is important to recognize that three of these exceptions (excluding class 4) do not require the ILC to be in existence as of a certain date. Thus, a new ILC may be chartered in any state permitting such entities and avoid application of the BHC Act provided it meets one of the three classes of exceptions set forth above.22 Some argue that this exception for ILCs creates special supervisory risks because the ILC’s parent company and non-banking affiliates may not be subject to supervision on a consolidated basis by a federal agency such as the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision (“OTS”), and the National Credit Union Association.23

ILCs are now “the only federally-insured depository institutions with the authority to offer a broad range of banking products and services in a holding

21 Natter, supra note 14, ¶ 5.
22 Id. ¶ 8.
23 GAO REPORT, supra note 12, at 10.
company structure exempt from the [BHC Act].” 24 which means that neither the holding company nor its subsidiaries are restricted in any way as to the services or products it may offer. FDIC insurance permits ILCs to generate funds through deposits, which are often the most cost-effective way to acquire funding. Additionally, ILCs share with FDIC-insured institutions the ability to “export” their home state’s usury laws—laws regarding interest and finance charges—regardless of where their customers reside. 25 Yet another advantage is the ILCs’ ability to become an originator of “Visa or MasterCard credit, debit, charge, and business cards.” 26 Each ILC is chartered and regulated by the state banking commissioner in the state where the institution is based. As will be addressed in subsection (c), infra, virtually all ILCs established in recent years have been chartered and regulated by the State of Utah.

(b) Major Participants in the ILC Market


25 Id. at 180.

26 Id.
In the time since CEBA’s passing, ILCs have grown from relative obscurity to an industry with over $212.8 billion in assets.27 Today, “the typical [ILC] is owned by a parent corporation with well established multistate operations.28 Most ILCs offer “specifically-tailored financial products and services to established customers of the parent company.”29 Thus, in general, the ILC’s mission becomes twofold: taking advantage of “existing customer relationships” while also putting more products “through established distribution channels.”30 ILCs offer a versatile depository charter for companies that are not permitted to, or that choose not to, become subject to the BHC Act.31

An overview of the ILC industry reveals the following: “of the 61 existing industrial banks, 43 are either independently-owned or affiliated with a parent company whose business [purpose] is primarily financial in nature.”32 Further,

27 See H.R. REP. NO. 110–155, at 10 (2007). In 1987, the largest ILC had total assets of $410 million. Id. By 2006, the largest ILC had total assets of $67 billion with $54 billion in deposits, “making it among the twenty largest [FDIC] insured banks in terms of deposits.” Id.

28 See Sutton, supra note 24, at 179.

29 Id.

30 Id.

31 See id.

32 G. Edward Leary, Remarks of the Utah Commissioner of Financial Institutions before Utah Association of Financial Services at the Canyons Resort,
“these 43 [charters] comprise approximately 90% of the industry’s assets and deposits.”

Those remaining eighteen charters “are associated with parent companies that can be considered non-financial . . . [and] account for [only] 10% of . . . assets and deposits.”

The active ILCs not independently-owned come in three distinct business plans. The first group, comprising those ILCs owned by financial institutions and comprising over ninety percent of the industry, are part of large and “complex financial institutions with extensive access to the capital markets.”

These ILCs—such as Merrill Lynch Bank USA ($60.9 billion), American Express Centurion Bank ($23.4 billion), and UBS Bank USA ($23.1 billion)—use the ILC


33 Id.
34 Id.
35 The GAO REPORT notes that there are a few ILCs which are “community-focused, stand-alone institutions such as Golden Security Bank and Tustin Community Bank.” GAO REPORT, supra note 12, at 18. In contrast to most ILCs, these function much more like traditional community banking institutions.
36 Id.
entity to service their brokerage accounts and make securities-backed loans. The second group, comprised of commercial and retail corporations such as GMAC Automotive Bank ($20.7 billion), Target Corporation ($11.8 million), and GE Capital Financial ($2.1 billion),\textsuperscript{38} incorporate the ILC as a “financial arm of [much] larger corporate organization[s]” in order to enhance their retail operations.\textsuperscript{39} The third type of ILC is that used by BMW ($2.3 billion) and Volkswagen ($639 million)\textsuperscript{40} which uses the ILC to “directly support the holding company organizations’ commercial activities.”\textsuperscript{41}

The variety in ILC business models is ample evidence of the ILC’s flexibility and utility. As really only three particular assets are needed to enter the financial services market—capital, information technology, and distribution—it is logical that most commercial entities with these in hand would gravitate toward the opportunities afforded by the ILC. As Ross & Sutton observed, “[e]ach company tends to market specialized [financial] products to [its] national and international markets.”\textsuperscript{42} These products may “include general consumer credit cards, business

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\textsuperscript{38} \textit{Id.}
\textsuperscript{39} GAO REPORT, \textit{supra} note 12, at 18
\textsuperscript{40} Current Utah ILC Asset Statistics From FDIC, \textit{supra} note 37.
\textsuperscript{41} \textit{Id.}
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credit cards, [and] affinity group and private label cards [as well as] small
consumer loans, commercial loans (both large and small . . .), home equity loans,
and auto loans.”

(c) Utah’s Emergence as the ILC Industry Leader

As of June 30, 1993, the state of Utah regulated fourteen active ILCs with
just over $1.0 billion in assets. By year-end 2004, twenty-nine ILCs were
chartered in Utah with assets totaling more than $115.0 billion. These twenty-
nine ILCs comprised eighty-two percent of the ILC industry’s total assets.
Utah’s emergence as the ILC industry leader can be attributed to three primary
factors.

First, Utah has desirable usury law. Because an ILC enjoys the same
authority as other FDIC insured institutions to export the interest rate laws of its
home state everywhere it does business, the home state’s usury laws are of vital
import. As George Sutton analyzed, “[w]ith minor exceptions, the Utah
Consumer Credit Code (Title 70C of the Utah Code) does not impose caps on

43 Id.
44 Id. at 8.
45 GAO REPORT, supra note 12, at 19.
46 Id.
47 Id.
48 Id. at 21.
interest rates, finance charges, or other fees that a lender and borrower can specify in a credit contract.”

Second, on the whole, Utah’s general laws are business- and institutionally-friendly. Fundamentally, Utah businessmen and legislators have collaborated to be on the forefront of deregulation of the financial industry in passing laws and regulations that have fostered business and financial development. As a result, Utah has a regulatory framework that benefits both the state and the financial institutions as state regulators continue to work to enable further improvement and expansion of financial industries while still maintaining proper safety and soundness as directed by the FDIC.

Third, Utah is a preferred operations site. Salt Lake City is markedly “less expensive than many other . . . urban areas” in terms of operation costs, yet it provides an urban center in which “80 percent of the state’s population is within forty miles.” Additionally, Utah’s “education and literacy levels are among the highest in the nation” and “productivity levels in the Utah facilities of many national organizations are among the highest in those organizations.” All three

\footnote{Sutton, supra note 24, at 180.}

\footnote{Id.}

\footnote{Id.}

\footnote{Id.}

\footnote{Id. at 180–181.}
of these factors demonstrate why almost all ILCs established in the last decade have been chartered in Utah.\textsuperscript{54}

2. \textit{Regulatory Framework}

Under the BHC Act, the Federal Reserve Board “generally supervises bank holding companies and has established a consolidated supervisory framework for assessing the risks to a depository institution that could arise because of their affiliation with other entities in the holding company structure.”\textsuperscript{55} However, the ILC exemption from the BHC Act removes the institutions from this consolidated supervisory oversight and is one facet of the great controversy surrounding the continuing existence of ILCs.\textsuperscript{56}

\begin{itemize}
\item[(a)] \textit{The FDIC}
\end{itemize}

Exemption from the BHC Act does not remove an ILC from federal regulation. “The FDIC is the primary federal supervisor of state-chartered

\begin{itemize}
\item[54] See id.
\item[55] GAO REPORT, supra note 12, at 1.
\item[56] Id.
\end{itemize}
institutions that do not join the Federal Reserve system, including ILCs.” It has the same broad supervisory, regulatory, and enforcement authority over ILCs as it has over other non-member insured state banks under its jurisdiction. As the GAO Report noted, the “FDIC’s supervisory authority over the holding companies and affiliates of ILCs, however, is more limited than the authority that consolidated supervisors have over the holding companies of banks and thrifts.” Further, “ILCs are subject to the same laws and regulations pertaining to bank safety and soundness and consumer protection as other state-chartered banks.”

57 Id. at 11. “As of December 31, 2004, 3 of the top 16 largest insured institutions supervised by the FDIC were ILCs.” Id. Further, it should be noted that ILCs may choose whether to be regulated by the FDIC or Federal Reserve Board but that no ILCs in Utah have selected the Federal Reserve Board to be its primary regulator. See Sutton, supra note 24, at 179.


59 GAO REPORT, supra note 12, at 6.

60 Sutton, supra note 24, at 179.
Many banking industry leaders and lawmakers are critical, however, of the ILC exemption from the BHC Act because they believe the FDIC does not have the same coercive power to regulate as the consolidated regulators (Federal Reserve Board or OTS). The GAO Report notes that, while a consolidated supervisor is generally able to examine the holding company and any nonbank subsidiary regardless of whether the subsidiary has a relationship with the affiliated insured bank, the FDIC’s “examination authority of affiliates of the insured bank is limited to examinations necessary to disclose fully the relationship

61 See GAO REPORT, supra note 12, at 5–7 (expressing skepticism as to the FDIC’s ability to supervise effectively a large and complex ILC holding company—especially in a time of financial stress); Letter from Camden R. Fine, President and CEO, Independent Community Bankers of America, to Donald E. Powell, Chairman, FDIC (Aug. 18, 2005), at 5, available at http://www.icba.org/files/ICBASites/PDFs/lttr081805.pdf (last visited Oct. 26, 2007) (stating that “[w]hile the FDIC would have the authority and tools to address safety and soundness problems confined to the Wal-Mart ILC, it lacks the essential tools the [BHC Act] gives the Federal Reserve [Board] to oversee and supervise bank holding companies and ensure the safe operation of the overall enterprise.”).
between the affiliate” and the insured bank and the effect of that relationship on the insured bank.\textsuperscript{62}

Despite this criticism, the Federal Deposit Insurance Act bolsters this express examination power with a statutory grant to the FDIC to “exercise by its Board of Directors, or duly authorized officers or agents, all powers . . . necessary to carry out the powers so granted.”\textsuperscript{63} Additionally, in view of the broad scope the Supreme Court has given to “incidental powers” in the banking context,\textsuperscript{64} the FDIC has plenary powers that, historically, have resulted in comparable supervisory results with those of the consolidated supervisors.\textsuperscript{65} However, it is the


\textsuperscript{65} See generally West, supra note 58, at 11–13 (discussing a recent FDIC staff study setting forth the FDIC’s excellent track record supervising ILCs and noting that of the twenty-one ILCs that have failed, none was either a Utah ILC or owned by a commercial entity).
FDIC regulatory track record that is the determining proof of the adequacy of the FDIC’s supervisory powers.\textsuperscript{66}

\hspace{1cm} (b) \hspace{1cm} \textit{Utah Department of Financial Institutions}

Each ILC is chartered and regulated by the state banking commissioner in the state where the institution is based.\textsuperscript{67} All ILCs in Utah are chartered and regulated by the Utah Department of Financial Institutions (“Utah DFI”).\textsuperscript{68} The Utah DFI has robust, plenary authority over both its ILCs and the companies that control them (under Utah Code Title 7).\textsuperscript{69} The Commissioner of the Utah DFI has broad supervisory, regulatory, and enforcement authority over Utah ILCs that is parallel to the FDIC’s authority. Its supervisory authority includes the right to examine the ILC and to take enforcement and remedial actions against the ILC and its affiliates.\textsuperscript{70} Its enforcement powers include the right to issue cease and desist

\textsuperscript{66} \textit{See infra} notes 156–70 and accompanying text.


\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{See} Leary Remarks, \textit{supra} note 32, at 5–6 (setting forth the Utah DFI’s examination procedures).

\textsuperscript{70} \textit{See}, \textit{e.g.}, \textit{Utah Code Ann.} §§ 7-1-307 to -308, -313 to -314, -501, -510, and 7-2-1 (granting the Utah DFI authority to issue cease and desist orders,
orders, remove officers and directors, take possession of the institution, and
enforce supervisory acquisitions and mergers. The Utah DFI’s regulatory power
also has led to ILCs being subject to the same laws and regulations, as well as
standards for safe and sound lending practices, as other Utah commercial banks.

Because the Utah ILC application process closely mirrors that of the FDIC,
an ILC applicant may file the FDIC application in lieu of filing the application for
the ILC charter with the state of Utah. The Utah DFI approves applications for
ILC charters according to various factors, which, depending on the business
model of the ILC applicant, may be accorded different weights as needed. Some
of these include:

1. The character, reputation and financial standing of the
organizer(s).

suspend or remove an officer or director, require remedial action to be taken by
institutions in unsound condition, and examine every institution under its
jurisdiction).

See id.

GAO REPORT, supra note 12, at 24. The GAO Report also notes that
California, the other state with any significant concentration of ILC assets, has
similarly subjected its ILCs to the same standards and regulatory limitations as its
commercial banks. Id.

Utah Department of Financial Institutions, supra note 67.

Id.
2. The organizers have the resources (source of capital) to support an I[LC].

3. The establishment of a Utah organization where autonomous decision making authority and responsibilities reside with the board and management such that they are in control of the I[LC]’s activities and direction.

4. Utah-based management that has a track record, the knowledge, expertise and experience in operating a depository institution in a regulated environment.

6. Management that is independent of the parent; however, the goals and policies of the parent may be carried out if defined in the I[LC]’s business plan.

7. A bona fide business plan and purpose for the existence of an I[LC], in which deposit taking is an integral component, including three years pro forma projections and supporting detail.\textsuperscript{75}

Imposition of these factors by the regulator is meant to ensure that each ILC has sufficient autonomy, is insulated from the parent company, and “held accountable

\textsuperscript{75} \textit{Id.}
for ensuring that all bank operations and business functions are performed in compliance with banking regulations and in a safe and sound manner.”

In addition to the initial review conducted before a depository charter is approved, and as with all depository institutions, ILCs are subject to safety and soundness examinations by the Utah DFI and the FDIC. These examinations are usually conducted jointly by the two regulators annually. The Utah DFI has over forty-two field examiners experienced at regularly conducting examinations of holding companies and it still plans “to provide further training and increase [its] number [of examiners] so that [it] can conduct, independently, if need be, holding company inspections of all financial institution holding companies registered in Utah.” Under this regulatory framework and with exception from the restrictions

76 West, supra note 58, at 9.

77 Utah Department of Financial Institutions, supra note 67.

78 Id.

79 See Leary Remarks, supra note 32, at 6. Additionally, Commissioner Leary stated that “Utah is participating with the FDIC in the Large Bank Supervision Program for four ILCs” and “[t]he supervision of these banks is coordinated by a full-time relationship manager for Utah as well as the FDIC.” Id. These examiners instigate a bank-specific regulatory and supervisory plan that usually “involves three targeted reviews that roll-up to an annual Examination Report reviewed with both ILC management and board.” Id.
of the BHC Act, ILCs have grown out of relative obscurity to include among their ranks one of the twenty largest FDIC-insured banks.80

B. Wal-Mart’s Efforts to own a Bank

Sam Walton opened his first discount store in 1962.81 In the forty-five fiscal years since, Wal-mart’s corporate footprint has permeated communities in every state and 13 countries worldwide to include 1075 discount stores, 2256 Supercenters, 579 Sam’s Clubs, and 112 Neighborhood Markets.82 Its 1.36 million American employees make it the Nation’s largest employer and it currently sits atop the Fortune 500.83 Yet, despite its remarkable growth and repeated efforts, Wal-Mart has been unable to accomplish something it wants most—acquire its own banking institution.

1. Past Attempts

80 See supra note 27 and accompanying text.
82 Id.
Wal-Mart commenced its quest to own a bank when it attempted to purchase a small thrift in Broken Arrow, Oklahoma named the Federal BankCenter. The Gramm-Leach-Bliley Act (“Gramm-Leach”) passed by Congress in 1999 “blocked this attempt . . . by closing the ‘unitary thrift holding company’ loophole and reaffirming the nation’s policy of separating banking and commerce.” This would not be the last time during the course of Wal-Mart’s quest to acquire its own bank that the company would run head-on into national legislative opposition attempting to prevent it from controlling a bank.

In 2001, Wal-Mart’s next attempt was made through a strategic alliance with Toronto-Dominion Bank USA (“TD Bank”) “to offer banking services in 100 Wal-Mart stores.” However, Wal-Mart’s plan to share in the banks profits


85 *Id.* at 192 n. 34. Interestingly, Congress grandfathered in exempted thrifts approved before May 4, 1999; a date carefully chosen to exclude an application from Wal-Mart. *Id.* at 192 n. 38.

86 *Id.* A unitary thrift holding company was a holding company that owned only one savings and loan or thrift institution and was thereby exempt from limitations on the nature of the activities conducted by its commercial subsidiaries. *Id.* at 200.

87 *Id.* at 191 (citing Rob Blackwell, *Wal-Mart, TD Venture Hits Regulatory Wall*, AM. BANKER, Nov. 5, 2001, at 1.).
and have its associates perform transactions in the banks led to the merger’s rejection by the OTS because it “would give Wal-Mart unauthorized control over TD Bank.”  

Undaunted, in 2002, Wal-Mart turned its attention to the ILC structure by attempting to acquire a small, bankrupt California ILC named Franklin Bank. This time the California Legislature stepped in by passing legislation that prevented “non-financial institutions from acquiring state-chartered ILCs unless they are ‘engaged in the activities permitted for financial holding companies’ as established by [Gramm-Leach].” California governor Grey Davis stated that he signed the prohibitive legislation “in accordance with the federal prohibition against mixing banking and commerce, as intended by [Gramm-Leach].”

2. The Utah ILC Application

March 16, 2007 marked the end of the most recent chapter of Wal-Mart’s quest for a bank of its own. The nearly eighteen-month effort begun on July 19, 2005 ended with an application for a Utah ILC being denied.

88 Id. at 191–92.
89 Id. at 192 (citing California Closes Door on Wal-Mart Bank Buy, ELEC. PAYMENTS INT’L, Oct. 30, 2002, at 2.).
90 Id.
91 Id.
92 Eric Dash, supra note 3, at C1.
2005 to charter a Utah ILC came to a close when Wal-Mart withdrew its application for an ILC charter amidst swelling controversy and the extension of the FDIC moratorium (the moratoria will be addressed in Part III.1.C, infra) on all ILC applications for FDIC insurance by non-financial institutional applicants.  

According to Wal-Mart, its major purpose in acquiring a Utah-chartered ILC was to process credit, debit, and electronic check transactions.  

Denis Bouchard, Wal-Mart’s director of payments services, said “the bank will serve as an acquirer of credit transactions in the Visa and MasterCard systems, and will be the sponsor for debit transactions in automated clearing house (“ACH”) transactions.”  

Presently, Wal-Mart uses First Data to process an estimated sixty percent of its millions of annual transactions, or about $172 billion per year. Savings on transactional costs would be an estimated $650 million annually—this alone could justify Wal-Mart’s desire to charter an ILC.  

The biggest fear of banking industry leaders and lawmakers who opposed Wal-Mart’s application was not that Wal-Mart would charter an ILC in order to more cost-efficiently process credit transactions but rather that it likely would

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93 Id.

94 Wal-Mart Drops the Other Shoe, ELECTRONICS PAYMENTS WK., July 26, 2005, at 29.

95 Id.

96 Id.

97 Id.
have expanded its business model once the initial three-year period following its charter by the FDIC expired.98

According to federal and Utah law, once an ILC has been established and receives FDIC insurance, it is only restricted to the original business model for the first three years of the ILC’s existence.99 After three years, an ILC may seek approval for an amendment to its original charter from the FDIC and Utah DFI to expand its business and conduct full-service banking.100 Thus, there is the possibility that a Wal-Mart ILC would be able to expand its charter from merely

98 See generally Fine, supra note 61, at 2 (highlighting Wal-Mart’s repeated efforts to enter the banking industry as evidence that the likelihood of expansion of its ILC charter is quite high).


100 See 12 C.F.R. 333.101(a) (2007). The typical change, which might require the prior written consent of the FDIC, would be to exercise trust powers. Id. § 33.101(b). Yet, an ILC may engage in any practice permitted by law after three years without the FDIC’s prior consent if such a change would not be considered a change in the general character or type of business of the ILC. Press Release, Paul E. Gillmor, supra note 99.
processing credit transactions to engaging in any practice of a commercial bank permitted by law.\textsuperscript{101}

If approved, an amendment to Wal-Mart’s ILC charter would allow Wal-Mart to immediately open branches in twenty-two states.\textsuperscript{102} As summarized by one author, “[f]ive states permit ILC charters and seventeen additional states have agreed to the ‘opt-in’ provision under the Riegle-Neal Interstate Banking and Branching Act of 1994” that authorized reciprocal arrangements.\textsuperscript{103} This permits banks chartered in one state to branch in to all other states “opting-in” without the need for any additional consent by state officials.\textsuperscript{104} With this relatively easy transition from a limited ILC charter to having the ability to branch in nearly half of the states, it is easy to see why community bankers nationwide were intensely opposed to the prospect of a Wal-Mart banking institution.\textsuperscript{105}

\textsuperscript{101} Press Release, Paul E. Gillmor, \textit{supra} note 99. So long as the Wal-Mart ILC is in compliance with its original business plan with the FDIC for the first three years, it will only need to notify the FDIC of its change in the general character of business and will not need consent. \textit{See} 12 C.F.R. 333.101(a) (2007).


\textsuperscript{104} Nolan, \textit{supra} note 84, at 190–91.

\textsuperscript{105} \textit{See Wal-Mart’s Utah ILC Application Running into Flack}, ELECTRONICS PAYMENTS WK., Nov. 1, 2005; \textit{see also} Werner, \textit{supra} note 10, at 230.
3. Bank Branching and Wal-Mart’s Expansive Ambitions

Before Wal-Mart eventually abandoned its efforts to charter the Utah ILC, it stated in a comment to the first FDIC moratorium on all ILC applications that it would be willing to accept a charter approved by the FDIC that included a ban on branching.\(^\text{106}\) According to Jane Thompson, the President of Wal-Mart Financial Services, Wal-Mart had no desire to establish branches or engage in lending, and the ILC is “not a bank that a consumer will ever see.”\(^\text{107}\) In addition, Thompson pointed out that Wal-Mart is actively encouraging community banks to open more branches in its stores.\(^\text{108}\)

\(^{106}\) Comment Submitted by Wal-Mart Stores, Inc. to FDIC Request for Comment 71 Fed. Reg. 49456 (Aug. 23, 2006). The FDIC has developed conditions that may be imposed when approving deposit insurance applications for institutions that will be owned by or significantly involved in transactions with commercial or financial companies. See West, supra note 58, at 10 (citing a list of conditions the FDIC has applied in the past).


\(^{108}\) Id. at 5. As of the date of its Utah ILC application, Wal-Mart had arrangements with more than 300 banks operating more than 1100 branches in Wal-Mart stores across the country. Id.
However, against the backdrop of these comments, there are two critical historical trends surrounding Wal-Mart’s development that deserve mentioning here. First, Wal-Mart already has a long history of branching out into markets that it previously said it had no interest in. Second, and somewhat interrelated, once Wal-Mart enters into new markets—critics of its ILC charter and business model argue—“it uses its competitive pricing model as well as other techniques to reduce local competition.”

Camden Fine, the president of the Independent Community Bankers of America (“ICBA”) noted this checkered past: “[f]ifteen years ago, Wal-Mart said it had no designs on the grocery business and twenty years ago, they said they had no designs on the hardware business but now they dominate both businesses.”


111 *Id.* Wal-mart is currently the largest grocery retailer in the United States, as well as “the nation’s No. 1 retailer of recorded music, DVDs, toys, [and] pet food.” Mary Deibel, *Q & A about Wal-Mart’s bid to branch into banking*, *Deseret Morning News*, May, 15, 2006, web edition, available at
Evidence of this cycle repeating itself surfaced on June 20, 2007, when, only months after withdrawing its ILC application and stating that it had no intentions of branching banks even if it could own an ILC, Wal-Mart announced its plans to open 1000 “financial-service centers” by 2009.\footnote{Lauren Colman-Lochner, \textit{Wal-Mart Will Open 1,000 Financial Centers by 2009}, \textsc{Bloomberg}, June 20, 2007, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3P.tll8xXIw (last visited Oct. 25, 2007).} In a partnership with Visa, General Electric Co.’s ILC, and the Green Dot automated-teller network, customers at the 450 Wal-Mart’s MoneyCenters that will be opened by the end of 2007 will be able to cash checks, pay bills, and use a prepaid Wal-Mart-brand Visa nationwide.\footnote{Id.} ICBA President Fine stated that “Wal-Mart wants in to the financial-services business and they’re going to try every way conceivable to do that.”\footnote{Telephone Interview with Camden R. Fine, President, Independent Community Bankers Association, in Salt Lake City, Utah (June 21, 2007).} Further, Steve Verdier, an ICBA lobbyist said “[i]t looks like they’re building an infrastructure for a nationwide network of bank branches.”\footnote{Colman-Lochner, \textit{supra} note 112.} Thus, contrary to its recent statements, it seems Wal-Mart does have intentions of


\footnote{113}{Id.}

\footnote{114}{Telephone Interview with Camden R. Fine, President, Independent Community Bankers Association, in Salt Lake City, Utah (June 21, 2007).}

\footnote{115}{Colman-Lochner, \textit{supra} note 112.}
expanding its broad array of in-store departments to include many banking and financial services.

After Wal-Mart expands into another sector of the market and reduces local competition or does away with it in its entirety, Wal-Mart frequently increases its own prices. The rippling effects of these two historical trends shown above are far-reaching. In an Iowa State University study, it was revealed that “after Wal-Mart’s expansion into Iowa, 555 grocery stores, 298 hardware stores, 293 building suppliers, and 116 pharmacies closed” their doors. Further, “other studies have [predicted] that for every Wal-Mart Supercenter opened, two local grocery stores will close.” A Wal-Mart ILC—if permitted to charter—could similarly harm the community banking industry “if the Wal-Mart ILC charter were amended to include full retail banking services” in each of its Supercenters nationwide.

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116 Nolan, supra note 84, at 194.


118 Nolan, supra note 84, at 194.

119 Nolan, supra note 84, at 195. See also Anthony Bianco & Wendy Zellner, IS WAL-MART TOO POWERFUL, BUS. WK., Oct. 6, 2003, at 100, available at
C. Fallout from Wal-Mart’s Application

1. The FDIC Moratoria

In the first six months following the July 19, 2005 submission of Wal-Mart’s ILC application, the FDIC received about “1700 letters, with the majority of respondents vehemently opposing Wal-Mart’s [ILC]” and received 13,800 comment letters by the end of 2006. In a letter to the FDIC, Members of the House Committee on Financial Services requested that the FDIC “defer any decision until the [FDIC Board] has it full complement of directors” because of

http://www.businessweek.com/magazine/content/03_40/b3852001_mz001.htm (last visited Jan. 2, 2008).

120 Pasha, supra note 109, at 1.

121 Moratorium on Certain Industrial Bank Applications and Notes, 72 Fed. Reg. 5290, 5291–92 (February 5, 2007) (“Approximately 12,485 comments were generated by what appears to be organized campaigns either supporting or opposing the proposed industrial bank to be owned by Wal-Mart or the proposed acquisition of Enerbank, also an [ILC], by The Home Depot. Of this total, approximately eight-two percent generally were opposed to the ownership of [ILCs] by Wal-Mart or other commercial companies.”).
the importance of the application.\textsuperscript{122} By the time a year elapsed following Wal-Mart’s application, the ILC controversy was in full bloom.

On July 28, 2006, the FDIC issued a moratorium on all states currently chartering ILCs in order to prevent any additional applicants from receiving ILC charters so that the FDIC could evaluate the risks to the FDIC insurance fund and the banking industry posed by ILCs.\textsuperscript{123} The FDIC posited twelve questions with the intent to evaluate:

(i) industry developments;

(ii) the various facts, issues, and arguments raised with respect to the ILC industry;

(iii) whether there are emerging safety and soundness issues or other risks to the Deposit Insurance Fund or other policy issues involving ILCs; and


\textsuperscript{123} Moratorium on Certain on Certain Industrial Loan Company Applications and Notices, 71 Fed. Reg. 43482, 43483 (August 1, 2006).
(iv) whether statutory, regulatory, or policy changes should be made in the FDIC’s oversight of ILCs in order to protect the Deposit Insurance Fund or other important Congressional objectives.\textsuperscript{124}

At the conclusion of the six-month moratorium on all ILC applications, the FDIC’s much anticipated decision was met with yet another moratorium—this time a one-year extension solely on applications from ILCs to be owned by commercial companies.\textsuperscript{125} The FDIC stated that “the original moratorium demonstrated that the growth of the ILC industry, the trend toward commercial company ownership of ILCs[,] and the nature of some ILC business models have raised significant questions about the risks to the deposit insurance fund.”\textsuperscript{126} In addition, the FDIC announced a proposed regulation that would create a framework for the FDIC to make decisions on the ILCs owned by financial parents.\textsuperscript{127} Ultimately, FDIC chairman Sheila C. Blair said “[t]he moratorium will provide Congress with an opportunity to address the issue legislatively[,] while

\textsuperscript{124} Id.


\textsuperscript{126} Id.

\textsuperscript{127} Id.
the FDIC considers how best to respond to any safety and soundness issues surrounding commercial ownership under existing law.”

2. Congressional Actions

Since Congress passed Gramm-Leach in 1999, thereby closing the BHC Act loophole for unitary thrift holding companies, critics have wondered why it chose to expressly reaffirm the separation of banking and commerce yet excluded ILCs from BHC Act supervision? The Gillmor-Frank Amendment of 2005, sponsored by Barney Frank (D-MA) and Pal Gillmor (R-OH), is representative of the type of changes to the ILC industry Congress has considered over the past decade. Under the provision, the benefits of the ILC exception from consolidated supervision would not extend to any ILC that is owned by a parent company that receives fifteen percent or more of its annual gross revenues from non-financial

128 Id.


activities.\textsuperscript{131} Although the provision passed the House, it was never enacted into law.\textsuperscript{132}

As the Wal-Mart ILC application catapulted the ILC controversy back into the financial-sector’s spotlight, Congress took aim again with the Industrial Bank Holding Company Act of 2006.\textsuperscript{133} While this bill did not make it out of committee before the end of Congress’s term, a nearly identical version of the bill emerged at the commencement of the next Congressional session as the Industrial Bank Holding Company Act of 2007 (“House Bill 698”).\textsuperscript{134} This bill requires an ILC holding company to register and file certain reports with the FDIC within 120 days after becoming an ILC holding company, prohibits such holding company from being controlled by a commercial firm, and grandfathers certain institutions to exempt them from the requirements of the act.\textsuperscript{135} Under House Bill 698, a “company will be considered ‘commercial’ if it derived 15 percent or more of its

\textsuperscript{131} \textit{Id.}


\textsuperscript{134} H.R. REP. NO. 110-155 at 2–8 (2007) (restoring “the traditional separation between banking and commerce by prohibiting commercial ownership of ILCs and empowering the FDIC as the federal supervisor of ILC holding companies” and generally prohibiting commercial companies from owning ILCs).

\textsuperscript{135} \textit{Id.} at 7.
gross revenue, on a consolidated basis, from non-financial activities.”\textsuperscript{136} The House Report concludes, however, that “[t]hose commercial companies that already own ILCs . . . will be exempt from this prohibition under one of two grandfathering provisions.”\textsuperscript{137} House Bill 698 will be addressed in detail in Part III.B, \textit{infra}. Other legislative proposals Congress has considered over the past few years have had an expansive rather than restrictive view of the ILC industry. The GAO Report notes that recent “legislative proposals would remove the current prohibition on paying interest on demand deposits and, separately, authorize insured depository institutions, including most ILCs, to offer interest-bearing NOW accounts.”\textsuperscript{138} Opponents of ILCs argue this expansion of ILC powers “could further blur the distinction between ILCs and traditional banks.”\textsuperscript{139} The GAO Report also highlights “another legislative proposal that would allow banks and most ILCs (those included in a grandfathered provision) to branch into other states by establishing new branches—known as de novo branching—by removing

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\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.} at 5.

\textsuperscript{138} GAO Report, \textit{supra} note 12, at 76; \textit{see} H.R. 1224, 109\textsuperscript{th} Cong. \S\S 2, 3 (1st Sess. 2005).

\textsuperscript{139} GAO REPORT, \textit{supra} note 12, at 76.
states’ authority to prevent them from doing so.” 140 Federal Reserve Board officials said that these provisions would yet again “increase the attractiveness of owning an ILC.” 141 This attractiveness would likely lead to further expansion of the ILC industry.

III. POSSIBLE SOLUTIONS

In the wealth of comments submitted to the FDIC in response to the FDIC moratoria, countless interest groups, corporations, and law and policy makers have offered their respective remedies to the ILC controversy. Many have suggested that the FDIC reject ILC applications from commercial entities by considering the competitive effects, potential conflicts of interest, or any other

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140 Id. at 76; see H.R. 1375, 108th Cong. § 401(b) (2d. Sess. 2004). In response to Wal-Mart’s ILC application and the threat of ILCs having the ability to engage in de novo branching, several states enacted legislation prohibiting an ILC chartered under the law of another state from establishing an office on the premises or property of the ILC’s affiliate if that affiliate engages in “commercial” activities. A representative example is Virginia H.B. 1995, passed on April 6, 2006. VA. CODE ANN. § 6.1-232.2 (Supp. 2007) (repealed effective Feb. 5, 2007, Acts 2007, c.1, cl. 2).

141 GAO REPORT, supra note 12, at 76.
policy concerns. Yet, ultimately, this policy decision is one that falls on the shoulders of Congress, not the Board of Directors of the FDIC.

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143 Statement of John C. Dugan, Chairman, Office of the Comptroller of the Currency, Regarding the ILC Moratorium Extension at the Meeting of the FDIC Board of Directors (January 31, 2007) available at http://www.occ.treas.gov/ftp/release/2007-9a.pdf. The Federal Deposit Insurance Act, 12 U.S.C. §§ 1815 et seq., sets forth the seven factors the FDIC may consider in determining whether to extend insurance to a particular institution. These Factors include: (1) “[t]he financial history and condition of the depository institution”; (2) “[t]he adequacy of the . . . institution's capital structure”; (3) “[t]he future earnings prospects of the . . . institution”; (4) “[t]he general character and fitness of the management of the . . . institution”; (5) “[t]he risk presented by . . . [the] institution to the Bank Insurance Fund or the Savings Association Insurance Fund”; (6) “[t]he convenience and needs of the community to be served by . . . [the] institution”; and (7) “[w]hether the . . . institution's corporate powers are consistent with the purposes of [the FDI Act].” 12 U.S.C. § 1816 (2006). These factors expressly mention nothing as to commercial affiliation. Thus, the only factor where the commercial nature of an applying entity might plausibly be
The GAO Report offered three alternative courses of action that Congress could pursue in order to address the ILC controversy.\textsuperscript{144} First, it suggested that Congress could “eliminate the current exception from consolidated supervision.”\textsuperscript{145} Second, it could “alternatively grant the FDIC similar examination authority as a consolidated supervisor.”\textsuperscript{146} Third, “it could leave the oversight responsibility of small, less complex ILCs with the FDIC and transfer oversight of large, more complex ILCs to a consolidated supervisor.”\textsuperscript{147} Yet, as has been demonstrated by the legislative actions (or inaction as the case may be) in the previous section, it appears that Congress is either unable or unwilling to plausibly consider implementation of these last two alternatives.

The most drastic legislative reform to the ILC industry undoubtedly is the complete elimination of ILC exception from the BHC Act and consolidated supervision. Yet, with many of America’s largest and most prolific corporations—commercial giants General Electric and General Motors as well as financial services leaders Merrill Lynch and Morgan Stanley\textsuperscript{148}—already owning ILCs, complete elimination of the ILC industry is now likely to be too far out of

\textsuperscript{144} GAO \textsc{report}, \textit{supra} note 12, at 81.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{See} cited statistics \textit{supra} note 37.
legislative reach. Further, it is also unlikely that ILC supervision would move between the FDIC and one of the other consolidated regulators such as the Federal Reserve Board based only on the relative size of the ILC. The legislative trail leads toward a compromise, between complete elimination of the ILC exception to the BHC Act on the one hand and unrestricted commercial affiliation on the other, to the ILC controversy.

Congress must not only decide the fate and future of ILCs owned by commercial entities but also the proper regulatory structure, including both the level of supervision and which federal or state regulatory entity can best administer that supervision. These decisions, however, ultimately will depend upon the weight the long-standing public policy requiring the separation of banking and commerce is given in the future. The remainder of this Section will address first, in Part III.A, the viability of the argument that ILCs affiliated with commercial entities pose special risks to themselves as institutions and the banking industry as a whole and second, in Part III.B, the effects of the proposed legislative amendment—House Bill 698—on the ILC industry and Utah in particular.

A. Separation of Banking and Commerce: Does Commercial Affiliation as Currently Permitted by the ILC Holding Structure Create a Measurable Risk to the Banking Industry or Institution Itself

The chief criticism of the ILC exception to the BHC Act and consolidated supervision is that America has a longstanding precedent—a commitment to a
quasi form of legislative stare decisis—erecting a wall of separation between banking and commerce. Indeed, some have referred to this metaphorical wall as the “linchpin of the financial and economic system of the United States.” They further argue that the “walls separating banking and commerce prevent conflicts of interest and undue concentration of resources, and ensure the impartial allocation of credit so vital to the economic growth and development and to a safe and sound financial system.” Yet, how impenetrable is this wall? Is it erected between banking and all commercial entities or are there some particular types of commercial institutions, such as retail giants Wal-Mart or Home Depot that might require heightened fortifications and generate greater need for a distinct division? Or is the separation of banking and commerce merely a protectionist partition behind which bankers, seeking to thwart unwanted competition, retreat to relatively unquestioned safety from unwanted expansion into the banking industry and new competition for the consumers’ banking business?

149 BLACK’S LAW DICTIONARY 1443 (8th ed. 2004) (defining stare decisis as follows: “[Latin ‘to stand by things decided’]. The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”).

150 Fine, supra note 61, at 3.

151 Id.
Proponents of the wall of separation between banking and commerce posit three central justifications. First, “affiliation of commercial entities with banks could spread the federal bank safety net to these commercial affiliates and thereby make banks susceptible to the reputational, operational, and financial risks of their affiliates.” Second, “credit allocation could be distorted if banks were affiliated with commercial firms; with unduly favorable loans to related companies and denial of credit to their competitors.” Third, allowing industrial or financial conglomerations between commercial and banking entities would lead to excessive concentration of resources, with large companies wielding too much power. What all three arguments lack, however, is any empirical support evincing statistically-significant, industry-specific risks posed to both the banking industry and the deposit insurance fund by ILCs generally or ILCs controlled by commercial companies specifically.

152 See GAO REPORT, supra note 12, at 71; Industrial Loan Companies: Hearing on H.R. 698 before H. Comm. on Financial Services, 110th Cong. at 3 (1st Sess. 2007) (statement of Donald L. Kohn, Vice Chairman of the Board of Governors of the United States Federal Reserve System).

153 Kohn, supra note 152, at 7.

154 Id.

155 Id.
1. Increased Exposure to Reputational, Operational, and Financial Risks of ILC Affiliates

John C. Dugan, Comptroller of the Currency and member of the board of directors of the FDIC, said in a statement regarding the extension of the first ILC moratorium by the FDIC that “the record before us simply does not establish that commercial affiliations present an undue risk to the [deposit insurance] fund” and that “the comments [that the board of directors of the FDIC] received during the last six months have provided virtually no empirical evidence to support the proposition that commercially[-]owned ILCs are more risky than non-commercially[-]owned ILCs.”156 He continued by acknowledging that when reviewing ILC applications the “FDIC may take into account hypothetical or potential risk,” but that “it seems to me that the very best evidence of risk in this area is the FDIC’s own [twenty]-year experience in supervising ILCs owned by commercial companies.”157

In a report created for the FDIC documenting the twenty-one ILC failures over the past two decades, it is statistically significant that none of the twenty-one failed ILCs failed because of commercial affiliation.158 The GAO Report noted that “from an operations standpoint, ILCs do not appear to have a greater risk of

156 Dugan, supra note 143, at 3–4.

157 Id. at 3.

158 West, supra note 58, at 11–13.
failure than other types of insured depository institutions.” 159 As one industry analyst noted, troubles “have not stemmed from issues pertaining to permissible activities or commercial affiliations or from the regulatory structure under which they operate, but from faulty strategic and tactical decisions.” 160 Thus, like all other failed banks, the ILC failures resulted from bad management not risky affiliation.

An excellent example of this is the 2002 bankruptcy of Conseco Inc. 161 Conseco Inc. was primarily an insurance company until it acquired Green Tree Financial Services in 1998; an acquisition which included Green Tree’s Utah ILC that it renamed Conseco Bank. 162 Despite the financial troubles and impending insolvency of its parent, “Conseco Bank’s corporate firewalls and the regulatory supervision provided by both the Utah DFI and FDIC proved adequate as the ILC” was sold to GE Capital for its book value as part of the Conseco, Inc. bankruptcy sale of assets. 163 The example of Conseco Bank illustrates the

159 GAO REPORT, supra note 12, at 23. The Future of Banking in America—The Mixing of Banking and Commerce: Current Policy Issues


161 Id.

162 Id.

163 Id. $323 million of the $1.04 billion received in the bankruptcy sale were for the ILC. Id.
effectiveness of the FDIC’s regulatory supervision and is evidence that ILCs can
be steered clear of the troubled waters of their parent company’s financial storms.

ILC critics as well as the GAO Report believe “[t]he potential transfer of
risks among insured banks and uninsured commercial affiliates could result in
inappropriate risk-taking, misallocation of resources, and uneven competitive
playing fields in other industries.”164 These critics cite the increased risks
resulting from commercial affiliation, yet, as many have acknowledged,165 over
the twenty-year history of FDIC supervision, these increased risks have not
materialized. As one author notes, the evidence suggests that with adequate
safeguards—corporate firewalls and regulatory supervision—“the careful mixing
of banking and commerce can yield benefits without excessive risk.”166 Further,
refuting the threat of systemic risk and unfair competition posed by ILCs, at year-
end 2002, ILCs held just over $120 billion in assets.167 This represented only 1.4

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164 GAO REPORT, supra note 12, at 72.

165 MANDATE FOR CHANGE: RESTRUCTURING THE BANKING INDUSTRY, FDIC
(1987) [hereinafter MANDATE FOR CHANGE]; Blair, supra note 160, at 115; Rose

166 Blair, supra note 160, at 117.

167 Donald E. Powell, Chairman, FDIC, Remarks Before the Conference of
State Bank Supervisors: The ILC Debate: Regulatory and Supervisory Issues
percent of the total assets held by all FDIC-insured institutions. Thus, in terms of total market share and leverage, ILCs pose very little threat to the banking industry when considered on the whole.

As the remarks of former FDIC Chairman Donald Powell accurately highlight, “[the] risk posed by any depository institution depends on the appropriateness of the institution’s business plan and model, management’s competency to run the bank, the quality of the institution’s risk-management processes, and, of course, the institution’s level of capital.” These are risk characteristics of every insured institution—not solely commercially-affiliated ILCs. Further, he concludes that “[t]he FDIC believes the ILC charter, per se, poses no greater safety and soundness risk than other charter types.”

2. Distortion of Credit Allocation by Commercially-Affiliated ILCs

The second rationale behind the separation of banking and commerce—greater potential for conflicts of interest and favoritism of affiliates—also appears to be founded on a protectionist footing when considered in light of the existing regulatory framework. A conflict of interest exists “whenever an entity that serves

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168 Id. at 4.

169 Id.

170 Id.
more than one interest is in a position to favor one of those interests over the
other[s].” 171 For example, “an ILC affiliated with a commercial firm may choose
to deny loans to the affiliate’s competitors, may choose to lend preferentially to its
commercial affiliates, or may illegally tie loans to the purchase of an affiliate’s
goods or services.” 172

Studies have cited, however, no example of conflicts of interest that are
unique to bank-commercial affiliations. 173 As has been documented, “[s]ections
23A and 23B of the Federal Reserve Act apply to all FDIC-insured institutions
and, among other things, restrict the amount and terms under which banks can
lend to their affiliates, require transactions between affiliates to be at arm’s length
and on market terms, and also serve to prohibit certain tying arrangements.” 174
Thus, ILCs, like other supervised banking institutions, are restricted in the both in
the type and terms of credit that they can extend to affiliates and must deal with
them at arm’s length.

These regulatory restrictions, when combined with entity-internal firewalls,
show that the “principal potential conflicts of interest posited in defense of the
separation of banking and commerce are unlikely to pose significant risks to the

171 See Blair, supra note 160, at 103.
172 Id.
173 See id. at 103–04.
174 Id. at 104.
safety and soundness of the bank or to the federal safety net.”\textsuperscript{175} As former FDIC Chairman Powell noted, “the firewalls and systems of governance safeguarding ILCs from misuse by their parent companies are, in many cases, more stringent than what exists in many affiliates of bank holding companies.”\textsuperscript{176} Additionally, former FDIC Chairman Powell stated that “[d]epending on the purpose and placement of the [ILC] within the organizational structure, mandated safeguards include: on-site management rather than management from distant corporate headquarters, independent boards of directors, strict guidelines to ensure arms-length transactions with the parent and other affiliates, and so on.”\textsuperscript{177} Lastly, and I believe most importantly, “refusing to lend to the competitors of nonbank affiliates or granting credit to affiliates on favorable terms runs counter to market forces because it serves only to reduce the bank’s income.”\textsuperscript{178}

3. Excessive Concentration of Resources from Conglomeration Between Banking and Commercial Entities

Remembering back to Wal-Mart’s corporate statistics it is easy to see why many ILC critics are intensely concerned with concentration of resources and

\textsuperscript{175} See id.

\textsuperscript{176} Powell, supra note 167, at 3.

\textsuperscript{177} Id.

\textsuperscript{178} Blair, supra note 160, at 105.
Wal-Mart’s ability to first enter, then dominate, yet another market. Indeed, the conglomeration argument, when combined with the critics’ concerns under the conflict of interest argument addressed above, packs a fair amount of punch.

When the BHC Act was enacted, the concern was that the growth of unregulated bank holding companies could lead to “undue concentration of control of banking activities.” The BHC Act’s mission has been two-fold: “prevent banking monopoly power from proliferating into nonbanking businesses and discourage the growth of large entities.”

Yet again, in today’s competitive banking market, this threat has failed to materialize. “Conglomerate integration—the combination of banks and nonbanks under a holding company—” is unlikely to “result in monopoly rents because . . . markets for bank loans are competitive” and, therefore, “it is difficult for the bank to extend market power from banking to nonbanking lines of business.” Further, “attempts by a bank to engage in predatory pricing”—a practice Wal-Mart has been accused of engaging in other markets—“by cross-subsidizing the operations of its affiliates, would only work if there were considerable barriers to entry into the market.” As is, although consolidation in banking has increased

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179 Id. at 104.

180 Id.

181 Id.

182 See Fine, supra note 61, at 4.

183 Blair, supra note 160, at 105.
over the past decade, interstate banking and competitive markets for small or community banks continue to make it unlikely that monopoly power will spread from banking to non-banking business.

In sum, the arguments raised in support of the supposed long-standing policy requiring the separation of banking and commerce, while sounding of grave risks and far-reaching consequences, ultimately lack corroborating factual confirmation. As the GAO Report candidly concedes, “generally the magnitudes of these risks are uncertain and may depend, in part, upon existing regulatory safeguards and how effectively banking regulators monitor and enforce these safeguards.” The issue lies, therefore, not within the industry but rather in the ability of the regulation to ensure the safety and soundness of the institutions.

4. Conclusion—Mixing of Banking and Commerce May Be Beneficial

\[184\] Id. at 99–100 (noting that the separation of banking and commerce has merely been a function of the demands of the marketplace, level of technology, and the state of development of organization and business structures and that significant linkages between banking and commerce have existed and continue to exist despite regulation or prohibition). See also Leary Remarks, supra note 32, at 10 (noting that “the experience of the conventional banking industry shows that the wall of separating banking and commerce is elastic” and has moved and changed over time).

\[185\] GAO REPORT, supra note 12, at 71.
This debate is not new; neither is the political policy question facing lawmakers. Twenty years ago the FDIC’s then-Chairman L. William Seidman testified before Congress: “[t]he pivotal question . . . is: can a bank be insulated from those who might misuse it or abuse it? Is it possible to create a supervisory wall around banks that insulates them and makes them safe and sound, even from their owners, affiliates[,] and subsidiaries?” 186 If this analysis is correct, then the banking and commerce debate should focus on how affiliations should be regulated so that the public interest, i.e. the greatest possible good for the greatest possible number of individuals, 187 is met. The public interest can only be determined by considering both sides of the mixed banking and commerce debate with respect to the ILC controversy.

Industry observers have stated that there are many potential benefits from mixed banking and commerce. 188 First, cost efficiencies “may result from increased economies of scale (when increasing the scale of operations lowers the average cost of production) or from economies of scope (when the costs of

186 Leary, supra note 32, at 14.


188 See Blair, supra note 160, at 101.
production are lowered by the production of products that share inputs).”  

Although these advantages may be difficult to support based on concrete empirical data, ample evidence can be shown by the heightened interest commercial entities have shown in owning banking institutions in recent years. Second, there are also “informational efficiencies” and product synergies that may result from affiliation.  

For example, “a bank with an equity position in a start-up company can use the position to acquire information about, and the ability to exercise control over, the commercial firm.”  

Third, banking and commerce affiliation could also enhance the global competitiveness of U.S. banks because “many other countries do not place similar restrictions on the affiliation of banks with commercial entities.”  

For evidence of these potential benefits, one need only look to exponential growth of the ILC industry over the past decade. Industry advocates note that “these potential savings and revenues may then be passed on to consumers through lower prices for banking or commercial services.”  

Thus, it is the consumer who ultimately reaps the benefit of the commercial affiliation.

In the media, these potential upsides to mixing banking and commerce go almost without mention; however, they are essential to the debate. When the

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189 Id. See also GAO REPORT, supra note 12, at 73.

190 Blair, supra note 160, at 101–02.

191 Id. at 101.

192 Id. at 102.

193 GAO REPORT, supra note 12, at 73.
benefits of ILC commercial affiliation are weighed against the opposition’s lack of any evidence of increased risk to either institution or the federal safety net because of commercial affiliation, the conclusion should be that mixed banking and commerce as permitted by the ILC structure is not, in and of itself, a risk to the banking industry and against public policy or the public’s interest. Thus, the question should not be whether ILCs create a greater risk to the safety and soundness of the banking industry but rather should be the same question the FDIC asks with every deposit insurance applicant: can the risk of a particular ILC applicant be effectively managed by properly-authorized regulators?\textsuperscript{194} Such a question should be answered on a case by case basis as the FDIC and Utah DFI have successfully been able to do for the past two decades.\textsuperscript{195} Deference should be given to regulators with experience and a long history of effective supervision.

When asked to comment on Wal-Mart’s Utah ILC application, Sheldon Woods, president of the Association of Financial Services (the association representing ILCs), declined to comment on the application itself but stated that “if the FDIC and the state of Utah can’t effectively manage the risk associated

\textsuperscript{194} See Blair, supra note 160, at 116–17. Blair’s extensive analysis of the ILC industry concludes with a question: “[d]oes the mixing of banking and commerce constitute good public policy? The evidence suggests that the answer is a qualified yes: with adequate safeguards in place, the careful mixing of banking and commerce can yield benefits without excessive risk.” \textit{Id.} at 117.

\textsuperscript{195} See \textit{supra} note 54 and accompanying text.
with any [ILC applicant], then that is where the question lies. . . . If that risk cannot be effectively managed, then the [Association of Financial Services’s] position would be we support the regulatory environment and [that particular ILC application] should not be approved.”

This is the correct analysis. If the FDIC were to conclude that the risks—both to the banking institution and to the industry—posed by a Wal-Mart ILC could not be effectively managed through FDIC and Utah DFI supervision, then that individual application should not be approved. But an entire industry with a proven and stable regulatory track record should not be eliminated because the risk posed by one commercially-affiliated ILC cannot be effectively managed by the FDIC and Utah DFI.

A decision to mix or not to mix banking and commerce by eliminating the ILC exception to the BHC Act should also not be a knee-jerk reaction. It should not be made in response to national hostility or animosity toward Wal-Mart or a


197 See supra notes 151–58 and accompanying text.

one-sided protectionist reaction to appease lobbyists\textsuperscript{199} and constituents without actually weighing the issues and the impacts. Ultimately, this is a public policy question that must be made by Congress and should result in whatever action is best for the public interest. The remainder of this Note is dedicated to analysis of the legislative amendments to the ILC exception from the BHC Act on the horizon and their impact on the industry and Utah in particular.

\textit{A. House Bill 698: The Industrial BankHolding Company Act of 2007}

On May 21, 2007, the House of Representatives voted by a margin of over ninety-six percent to pass House Bill 698.\textsuperscript{200} And while the legislative process for H.R. 698 has really only just begun, a look at the bill’s provisions indicates that if Congress appears to agree on anything, it’s that some form of restriction on the ILC industry needs to be passed to curb the escalating growth of commercially-affiliated ILCs.

House Bill 698 is a compromise as to mixed banking and commerce but still calls for a ban preventing future ILCs from being held by holding companies that

\textsuperscript{199} \textit{See} Fine, \textit{supra} note 61, at 1.

\textsuperscript{200} H.R. 698, 110th Cong. (as passed by the House of Representatives, May 21, 2007). The vote consisted of 371 ayes and only sixteen nays, amongst whom all three Utah Congressmen were numbered. 153 \textsc{Cong. Rec.} H5513 (daily ed. May 21, 2007).
are “commercial” in nature.\footnote{See supra notes 128–37 and accompanying text.} In addition, it establishes the FDIC as the consolidated supervisor of ILCs by granting it power equivalent to that of the Federal Reserve Board.\footnote{H.R. Rep. No. 110-155, at 9 (2007).} Finally, it places restrictions on grandfathered-in commercially-affiliated ILCs preventing them from engaging in activities in which they did not participate before January 28, 2007 and from acquiring or establishing any banking branch.\footnote{H.R. 698 110th Cong. § 2(b) (FDIA § 51(f)(4)) (2007).} Each of these three provisions will be addressed individually.

1. The “Commercial Bucket”

As introduced, House Bill 698 called for a restriction on ILC charters to holding companies deriving fifteen percent of gross, consolidated revenues from activities that can be described as “non-financial.”\footnote{H.R. Rep. No. 110-155, at 9 (2007).} Thus, despite the lack of evidence of any excess risk to banking institutions or the deposit insurance fund created by ILC commercial affiliation, Congress appears to be intent on continuing what it reaffirmed in 1999 under Gramm-Leach by closing yet another door that permitted the melding of banking and commerce.
The House Report notes that “only seven states charter entities identified as ILCs by the FDIC: Utah, California, Colorado, Minnesota, Hawaii, Indiana, and Nevada.” Of these seven states, Utah, Nevada, and Hawaii are the only states still chartering new ILCs controlled by commercial companies because “Indiana no longer charters new ILCs” and “Minnesota, California, and Colorado no longer permit commercial companies to acquire or establish ILCs.” Further, Hawaii has not chartered any new ILCs in over fifteen years. Thus, Utah and Nevada are the only remaining states which will be impacted by this aspect H.R. 698.

(a) Impact on the ILC Industry and Utah

205 Id.

206 Id. at 9–10.

207 Id. at 10.

208 Much has been mentioned as to Utah’s ILC industry but it should also be noted that Nevada, home to Harley Davidson’s Eaglemark Savings Bank as well as Toyota’s Financial Savings Bank, also has a growing ILC industry despite the relatively limited percentage of total ILC assets and will likely be adversely impacted by House Bill 698. Valerie Miller, Industrial Strength: ILC Banks Under Microscope, LAS VEGAS BUS. PRESS, Apr. 24, 2006, at 2, available at http://www.lvbusinesspress.com/articles/2006/04/24/news/news03.txt (last visited Oct. 30, 2007).
The impact of House Bill 698 will be immediately felt by commercial entities that either did not get their ILC applications approved for FDIC deposit insurance before the grandfathering provisions of House Bill 698 took effect or had plans to file an ILC application with the FDIC but had not done so before the law’s enactment. Among those companies with ILC applications pending before the FDIC when the first moratorium was enacted in July 2006 that will most likely be banned by the “commercial bucket” are: “Wal-Mart, The Home Depot, Ford Motor Company, Berkshire Hathaway, DaimlerChrysler Corporation, Ceridian Corporation, CapitalSource, Incorporated, Marlin Business Services Corporation, Cargill Financial Services, BlueCross/ Blue Shield, Security National Master Holding Company, Compu-Credit, WESCOM Credit Union, and Cerberus.”

These corporations, unlike some of their competitors such as automakers General Motors, BMW, and Toyota, will not be able to yield the additional level of profits that would result from being able to conduct the entire transaction—from design to manufacturing to selling to financing—under the same corporate umbrella.

However, as have been previously noted, over ninety percent of ILC assets and deposits are held by ILCs controlled by holding companies that are financial in nature. So while much ado has been made about the disproportionate


\footnote{210 See supra notes 32–34 and accompanying text.}
concentration of resources and monopolistic market control by commercial companies controlling an ILC, ILCs in general are home to only 1.4 percent of all FDIC-insured assets.\textsuperscript{211} When these two statistics are combined, ILCs controlled by non-financial holding companies, i.e. commercial entities, make up only one tenth of 1.4 percent of the total market for banking assets. Thus, the impact of the “commercial bucket” of House Bill 698 may not be as significant for the ILC industry as a whole and the states that charter them as it is on the commercial companies themselves.

As for the state of Utah, the full impact of the “commercial bucket” of House Bill 698 may never be known because it restricts charters that were never granted by the FDIC. Going forward, however, besides the number of quality jobs that would have developed in Utah as the banned commercial companies received charters, the biggest likely impact will be felt by Utah’s communities that benefit from the Community Reinvestment Act (“CRA”).\textsuperscript{212} As one author summarized, “the CRA is intended to encourage depository institutions to meet the credit needs of the communities in which they operate, including low- and moderate-income neighborhoods” by requiring banks to contribute to their respective communities by either creating lending programs for low-income individuals or investing in municipal bonds, housing projects, or educational developments.\textsuperscript{213} ILCs are not

\begin{footnotesize}
\begin{enumerate}
\item Powell, \textit{supra} note 167, at 2.
\item Nolan, \textit{supra} note 84, at 195. See 12 C.F.R. § 563e.11(b) (2007).
\end{enumerate}
\end{footnotesize}
exempt from the CRA and Utah is one of the few remaining states that continues to examine its banks for CRA compliance.\textsuperscript{214} ILCs contribute significantly through the CRA and any future limitations on the growth of the ILC industry will impact Utah’s communities as well as its economy.\textsuperscript{215}

2. The FDIC as Consolidated Supervisor

House Bill 698 also grants the FDIC additional supervisory powers (equivalent to those of the Federal Reserve).\textsuperscript{216} It would also establish the FDIC as the consolidated supervisor of ILC holding companies not already subject to consolidated regulation by another federal regulator.\textsuperscript{217} Such supervisory authority would empower the FDIC to require either a regulatory agency or a holding company that controls an ILC to provide any information necessary to: (1) assess the risk to the ILC; or (2) determine its condition.\textsuperscript{218} The GAO Report

\textsuperscript{214} Telephone Interview with Darryle Rude, Supervisor of Industrial Banks, Utah DFI, in Salt Lake City, Utah (June 21, 2007). The Utah DFI conducts its CRA compliance reviews between every three to five years. \textit{Id.}

\textsuperscript{215} \textit{Id.}

\textsuperscript{216} H.R. \textsc{Rep. No.} 110-155, at 9 (2007).

\textsuperscript{217} H.R. 698, 110th Cong. § 2(b) (FDIA § 51) (2007); H.R. \textsc{Rep. No.} 110-155, at 9, 14, 16.

\textsuperscript{218} H.R. 698 § 2(b) (FDIA § 51(e)(3)(4)); H.R. \textsc{Rep. No.} 110-155 at 17–18.
“advocates that ILCs and their holding companies be regulated in a similar manner as other insured depository institutions and their holding companies.”  

Therefore, Congress is merely implementing policy that the Federal Reserve Board and other industry observers championed as necessary to ensure the FDIC, once it became the consolidated regulator of ILCs, could supervise its banking institutions adequately.  

\[\text{(a) Impact on the ILC Industry and Utah}\]

The FDIC repeatedly has emphasized and other industry analysts have chronicled the FDIC’s supervisory track record, which indicates that the FDIC already possesses adequate supervisory power to regulate the risks of ILCs. Consequently, it is unclear what additional effects or restrictions the added regulatory powers will place on ILCs. In response to criticisms of the FDIC’s oversight of parent companies of ILCs, former FDIC Chairman Powell stated that “[the FDIC] can and do[es] visit the parent companies—and other affiliated entities, for that matter—to look over issues or operations that could impact the insured institution. Congress has given [the FDIC] the power to protect the

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\[219\text{ GAO REPORT, supra note 12, at 10.}\]

\[220\text{ Id. at 9.}\]

\[221\text{ See supra notes 154–63 and accompanying text.}\]
integrity of those relationships. We have exercised that power . . . “222 If the FDIC has already supervised ILC holding companies and their non-banking affiliates, it is unlikely that this provision of House Bill 698 will have any substantial impact on the ILC industry. Further, because of the Utah DFI’s preexisting regulatory relationship with the FDIC, it is unlikely that its local examination procedures and operations will be significantly altered by this provision.

3. Activity and Branching Limitations

House Bill 698’s activity and branching limitations apply to commercially-affiliated ILCs grandfathered in under the legislation.223 First, the restrictions prevent a grandfathered-in commercial ILC from engaging in any activities in which it was not engaged as of January 28, 2007.224 Second, a commercial ILC cannot “acquire, establish, or operate any branch, deposit production office, loan production office, automated teller machine, or remote service unit in any state other than the home State of the [ILC]” unless the ILC had branched into that state prior to January 28, 2007.225 Third, it authorizes a federal supervisor to order

222 Powell, supra note 167.

223 H.R. 698 § 2(b) (FDIA § 51(f)(4)(B)).

224 Id. § 2(b) (FDIA § 51(f)(4)(B)(i)).

225 Id. § 2(b) (FDIA § 51(f)(4)(B)(ii)).
a holding company or a non-bank subsidiary to terminate an activity or its
ownership of the non-bank subsidiary if the activity or ownership of the
subsidiary represents a serious risk to the depository institution.226

(a) Impact on the ILC Industry and Utah

The activity and branching limitations are a direct protection of community
banks and are designed to prevent further expansion by ILCs—either through
branching or marketing new products—into markets where, in Congress’s
opinion, their presence is undesired. Former FDIC Chairman Powell quite
accurately stated that “fear of competition should not be the compelling argument
in formulating good public policy.”227 Further, as the Utah DFI noted, placing
restrictions on the activities of commercial ILCs “is unnecessary, anti-
competitive, not in the best interest of consumers[,] and stifles innovation in the
market place.”228

The possible impacts of the activity and branching limitations are significant
for both commercial ILCs and their customers. Some of the major advantages to

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226 Id. § 2(b) (FDIA § 51(g)(3)(A)).

227 Powell, supra note 167.

228 Press Release, Utah Dep’t of Financial Institutions, Response to the
FDIC’s Decision on its Moratorium on Industrial Loan Co. Applications (Jan. 31,
ILC ownership are the economies of scale and scope.\textsuperscript{229} By being able to offer a broader range of banking products and services to preexisting clients, both the ILC holding company and the consumer reap the savings benefits of convenience and efficiency. Further, the activity restrictions prevent marketplace ingenuity and incentives for ILCs to develop improved products that better suit the needs of their consumers—especially as technology changes the future marketplace. These restrictions, if passed, will essentially freeze commercial ILCs in the year 2007 while the rest of the banking industry is allowed to move forward and adapt its products and services to future technological and economic changes.

Additionally, the affiliates of a commercial ILC may also be restricted in the activities they are permitted to engage in or the ILC’s holding company runs the risk of divestment if the activity places the safety and soundness of the banking institution at serious risk.\textsuperscript{230} While this type of activity limitation is precisely what the BHC Act proscribes for bank holding companies,\textsuperscript{231} such a restriction on ILC holding companies and their affiliates could significantly impact an ILC holding company of whose business banking is only a minor portion. Further, activity limitations also run counter to overall holding company stability derived from broad diversification amongst subsidiaries.

\textsuperscript{229} See supra notes 188–90 and accompanying text.

\textsuperscript{230} H.R. 698 § 2(b) (FDIA § 51(g)(3)(A)).

\textsuperscript{231} See supra notes 16–18 and accompanying text.
III. CONCLUSION

In the disastrous wake left by the unprecedented string of corporate scandals and subsequent insolvencies culminated by the collapse of Enron in December, 2001, Congress swiftly passed the Sarbanes-Oxley Act of 2002 (“SOX”).\(^\text{232}\) In hindsight, the “hastily enacted and far-reaching legislation and subsequent regulations, which carry major ramifications for business, productivity, and competitiveness, may ultimately carry costs which far outweigh the supposed benefits.”\(^\text{233}\) Not unlike SOX, House Bill 698 appears to follow the same reactionary legislative vein in response to the massive outcry to Wal-Mart’s ILC application—too much response for too small of a problem.\(^\text{234}\) Although it is


\(^{233}\) Id. at 189, 218–19. A study has shown “that for companies with under $1.0 billion dollars in revenue the costs of sustaining as a public company increased 130% through fiscal year 2003.” Id. at 218. Further, “[s]uch costs are not one-time-only, however, and appear to be reoccurring and increasing.” Id.

\(^{234}\) It is interesting to note that SOX was enacted without amendment by a vote of 423-3 in the House and 99-0 in the Senate. Id. at 189. House Bill 698 passed the House with similar approval by a margin of 371 to sixteen. See supra note 200.
currently politically au courant to oppose all things Wal-Mart, the passage of House Bill 698 would ultimately paralyze the future growth of an industry that provides specialized and evolving financial products clearly in demand by consumers in the marketplace.

Nevertheless, House Bill 698 has cleared only one of several legislative hurdles—by making out of committee and actually being passed by the House—and there remains the likelihood of substantial revision before the bill becomes a law. Senator Bob Bennett (R-UT), a senior member of the Senate Committee on Banking, Housing, and Urban Affairs, among others, will likely lead a charge aimed at toning down the unnecessarily over-reactive legislative impact of House Bill 698. By giving more deference to the supervisory success of the FDIC, the historic stability of commercially-affiliated ILCs, and the benefits conferred upon consumers through the controlled mixing of banking and commerce, Congress could more accurately distinguish between hostility directed at Wal-Mart and the actual supervisory concerns and unmanaged risks created by ILCs generally and commercial ILCs specifically to the federal safety net and banking industry. In the absence of any risk peculiar to commercially-affiliated ILCs and in light of the regulatory success of the FDIC and Utah DFI, a wall of separation should not be

\[235\] See supra note 198.

erected between ILCs and commercial holding companies but rather ILCs should continue receive FDIC insurance provided there is sufficient regulatory framework to manage the risks inherent in the commerce/banking affiliation.