American Bankers Association
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July 1, 2020

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Proposed Rule: Parent Companies of Industrial Banks and Industrial Loan Companies (RIN 3064-AF31)

Ladies and Gentlemen:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Federal Deposit Insurance Corporation (FDIC) on a proposal that would codify into regulation the FDIC's existing supervisory policies and practices that apply to a company that owns or controls an industrial bank or industrial loan company (individually, ILC, and collectively, ILCs), where such company is not subject to consolidated supervision by the Board of Governors of the Federal Reserve System (Federal Reserve or Fed).[2] Specifically, the FDIC is soliciting public comment on a proposed new rule (Proposal) that would require any company not subject to the Fed's consolidated supervision to enter into certain commitments with the FDIC and an ILC in connection with the FDIC's approval of any deposit insurance application, non-objection to a change in control notice, and merger application that would result in the ILC becoming, after the effective date of any final rule (Effective Date), a subsidiary of such company (Parent Company). The Proposal also would require the Parent Company's ILC subsidiary to obtain the FDIC's written approval prior to making ILC board and executive appointments and engaging in certain business activities or operations.

We note at the outset that ABA is committed to charter choice. Our members include banks of all sizes and charter types, including ILCs. We have significant concerns, however, over the possibility that a non-financial company may attempt to charter (or acquire ownership or control

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[1] The American Bankers Association is the voice of the nation's $20.3 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $15.8 trillion in deposits, and extend nearly $11 trillion in loans. Learn more at www.aba.com.

[2] *See* 85 *Fed. Reg.* 17,771 (2020). The proposal excludes ILC parent companies that already are subject to consolidated supervision by the Federal Reserve. This would include bank holding companies, savings and loan holding companies, and foreign banking organizations that are regulated as bank holding companies under the International Banking Act due to their operations in the United States. ABA supports this exclusion for parent companies that already are subject to the Fed's consolidated supervision.

of) an ILC that would raise troubling questions of inappropriate commingling of banking and non-financial activity, such as affiliate data-sharing.

Consequently, we strongly believe that if the FDIC chooses to go forward with the Proposal, that it should incorporate our recommendation[3] that expressly sets out the circumstances under which the FDIC would be required to disapprove an ILC deposit insurance application, a change in control application for an industrial bank, or any merger application where the surviving institution is an ILC (collectively, ILC transactions). We believe that adoption of this recommendation should mitigate affiliation, competitive, consumer protection, and other concerns raised by non-financial firms seeking an improper extension of their corporate business model and commercial practices into the business of banking. In addition, we have made a number of recommendations as described below which involve modifications to the Proposal and which, if implemented, would promote transparency, clarity, and the sound and functional regulation of ILC subsidiaries and their Parent Companies.

I. The Proposal.

According to the FDIC, the Proposal would move toward formalizing the agency's framework for its supervision of ILCs, thereby providing transparency for market participants and mitigating the risk to the Deposit Insurance Fund (DIF). Specifically, the Proposal would require a Parent Company to enter into one or more agreements with the FDIC and with the ILC that the Parent Company owns or controls. These agreements would contain a number of specified commitments, including (i) consenting to FDIC examination, (ii) filing various reports with the FDIC, and (iii) agreeing to maintain the ILC subsidiary's capital and liquidity levels as the FDIC deems appropriate.[4] The FDIC further may require the Parent Company to establish a contingency plan that would include strategies for the orderly disposition of the ILC without requiring the appointment of a receiver or conservator.[5] The Proposal also contains a series of restrictions that would require the ILC subsidiary to obtain the FDIC's prior written approval for the appointment of a person to the ILC's board of directors or for employment of a senior executive officer, or for a material change to the ILC's business plan or for any contract involving an affiliate's services that are material to the ILC's operations.[6] The FDIC would retain the authority to require additional commitments from the Parent Company and impose restrictions on the activities or operations of the ILC subsidiary.[7] As a result, the Proposal sets in place requirements that are intended to ensure the safety, soundness, and stability of an ILC subsidiary.

The Proposal, therefore, recognizes the ILC charter option while ensuring that corporate owners of an ILC are subject to regulatory oversight. We further believe that the FDIC's efforts contribute meaningfully to the goal of regulatory transparency, clarity, and compliance certainty. Nevertheless, although ABA welcomes the FDIC's efforts to implement a regulatory scheme for the supervision of ILC subsidiaries and their parent companies and affiliates, we remain

[3] Described in Section II.B., *infra.*
[4] *See* 12 C.F.R. Part 354 (proposed), 85 *Fed. Reg.* at 17,786.
[5] *See id.*
[6] *See id.*
[7] *See id.*

concerned that non-financial businesses would still be able to charter or own an ILC that would create significant issues involving integration with the activities of non-financial affiliated entities, competitive concerns within the communities that would be served, and consumer protection issues raised by the gathering and use of customer data. Therefore, we believe it is critical that the FDIC set the appropriate boundaries in a new regulation that is intended to respond effectively and appropriately to these issues and concerns.

II. Recommendations for Proposal.

We support the FDIC's efforts to codify a regulatory framework for the regulation of ILC subsidiaries and their Parent Companies. Our comments include recommendations that are intended to address pertinent concerns while preserving the FDIC's underlying goal of transparency. For comments A through C, we have provided consolidated proposed language in Appendix A (attached) to show how these additions may be incorporated into a finalized FDIC regulation.

A. Add to Proposal that, the FDIC may condition approval of an ILC transaction on a Parent Company's compliance with one or more requirements that would be (i) tailored to the ILC's business plan and to the size and risk profile of the Parent Company, and (ii) consistent with bank safety and soundness and maintaining the deposit insurance fund.

We believe the FDIC should reiterate in a final regulation its authority to impose conditions for approval of an ILC transaction. This includes the FDIC's authority to impose "non-standard" conditions on a case-by-case basis.[8] This provision could read as follows:

> *"Approval. In approving an industrial bank transaction, the FDIC may condition such approval on a Covered Company's compliance with one or more requirements that shall be tailored to the business plan of the industrial bank and to the size and risk profile of the Covered Company and shall be consistent with bank safety and soundness and maintaining the deposit insurance fund."*

As described in the recommended language, the compliance requirements would be tailored to the ILC's business plan and to the Parent Company's size and risk profile. This is consistent with the FDIC's current practices when imposing non-standard conditions on an ILC transaction.

[8] *See* FDIC, Deposit Insurance Applications Procedures Manual Supplement: Applications from Non-Bank and Non-Community Bank Applicants (Dec. 2019), p. 10 ("In addition to standard conditions, the FDIC may impose non-standard conditions on a case-by-case basis. Non-standard conditions are used when the FDIC determines that additional controls are appropriate or necessary to mitigate risks unique to the proposal.")

B. **Add to Proposal express language that describes the bases for the FDIC to disapprove an ILC transaction.**

As part of the FDIC's expressed goal to "[p]rovide transparency to future applicants and the broader public as to what the FDIC requires of parent companies of covered industrial banks,"[9] it is critical that a final regulation expressly describe the basis upon which the FDIC will disapprove an ILC transaction. We believe that each basis for disapproval contained in our recommended language below is consistent with the statutory authority conferred on the FDIC and on the analysis that would be undertaken and applied by FDIC staff in any bank application, including each type of ILC transaction.[10] This provision further would preserve the ability for applicants to charter or own or control an ILC consistent with FDIC supervisory policies and practices. The provision could read as follows:

> *"Disapproval. The FDIC shall disapprove an industrial bank transaction in any of the following circumstances:*
>
> *(i) The industrial bank transaction would have a significant adverse impact on competition in any relevant market that is not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;*
>
> *(ii) The industrial bank transaction would likely result in significant safety and soundness risk, reputation risk, or other risks as specified by the FDIC;*
>
> *(iii) The industrial bank transaction could result in a scale and concentration such that the failure of the industrial bank could cause widespread disruption to other parts of the financial system or to the economy more broadly;[11] or*

[9] *See* FDIC Fact Sheet: Notice of Proposed Rulemaking: Parent Companies of Industrial Banks and Industrial Loan Companies (2020) (FDIC Fact Sheet).

[10] *See, e.g.,* 12 U.S.C. § 1816 (FDIC may disapprove an ILC's application for deposit insurance based on, among other things ,"[t]he risk presented by [the ILC] to the DIF"; 12 U.S.C. § 1817(j)(7)(B) disapproval of a change in bank control application may occur if the transaction "may be to substantially lessen competition . . . [that is] not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served"); 12 U.S.C. § 1817(j)(7)(F) (disapproval of a change in bank control application may occur if "[FDIC] determines that the proposed transaction would result in an adverse effect on the Deposit Insurance Fund"; 12 U.S.C. § 1828(c)(5)(B) (bank merger transaction may not be approved "whose effect in any section of the country may be substantially to lessen competition" unless the anticompetitive effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served"). Although anti-competitive effects are explicitly a criterion in change-in-bank-control and merger applications, we believe it may be applied also to deposit insurance applications as part of evaluating the "convenience and needs of the community to be served," given that such approval may alter the competitive landscape. *See* 12 U.S.C. § 1816(6).

[11] *See* Financial Stability Board Report: Big Tech in Finance: Market Developments and Potential Financial Stability Implications (Dec. 9, 2019) at 25, available at *https://www.fsb.org/wp-content/uploads/P091219-1.pdf*.

(iv) *The industrial bank* transaction *does not adequately address consumer protection concerns raised by the potential collection, use, privacy, security, or safeguarding of customer information by and among the banking and non-financial businesses of the Covered Company and its subsidiaries."*[12]

C. <u>Add to Proposal that FDIC, pursuant to its statutory authority, may examine any banking or nonbanking affiliate of an ILC as may be necessary to disclose fully (i) the relationship between the ILC and any such affiliate, and (ii) the effect of such relationship on the ILC</u>.

As part of providing transparency to an ILC's and Parent Company's regulatory expectations, the FDIC should codify into regulation the statutory authority conferred upon the FDIC to examine ILC affiliates. This will help ensure that companies considering an ILC charter, or ownership or control of an ILC, understand the extent of the FDIC's statutory examination authority. Drawing from the language in the applicable federal law, 12 U.S.C. Section 1820(b)(4), the new provision could read:

> *"FDIC examination authority over industrial bank affiliates. Pursuant to its statutory authority under 12 U.S.C. § 1820(b)(4), the FDIC may examine any banking or nonbanking affiliate of an industrial bank whose parent is a Covered Company as may be necessary to disclose fully (i) the relationship between the industrial bank and any such affiliate, and (ii) the effect of such relationship on the industrial bank."*

D. <u>Adopt FDIC's position that grandfathers existing ILC subsidiaries and their parent companies from the Proposal</u>.

The Proposal, if finalized as drafted, would apply to Parent Company organizations and their ILC subsidiaries. The Proposal grandfathers (excludes) from coverage any company, not subject to the Fed's consolidated supervision, that owns or controls an ILC on or before the Effective Date.[13] The ILC subsidiary of such company, if organized on or before the Effective Date, likewise would be excluded from the Proposal's requirements. The Proposal thus is intended to apply to a company that is not subject to the Fed's consolidated supervision and that acquires ownership or control of an ILC after the Effective Date, and to an ILC that is organized as a subsidiary of such company after the Effective Date.

In the preamble to the Proposal, the FDIC poses a series of questions on possible additions or revisions to the Proposal. The first question asks whether the Proposal should apply only prospectively (as the Proposal is currently drafted), or whether it should apply to all ILCs that are subsidiaries of parent companies that are not subject to the Fed's consolidated supervision, as

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[12] In evaluating the safeguarding of customer information, the FDIC among other things could peruse the information security and privacy requirements under the Gramm-Leach-Bliley Act. *See* 15 U.S.C. § 6801 *et seq*.

[13] As noted above, ABA supports the exemption in the Proposal of any company that owns or controls an ILC and that *is* subject to the Fed's consolidated supervision. *See* 85 *Fed. Reg.* at 17,776-77 and n. 2, *supra*. As the FDIC notes, however, grandfathered ILCs and their grandfathered parent companies "will remain subject to FDIC supervision, including but not limited to examinations and capital requirements." 85 *Fed. Reg.* at 17,777.

well as to the parent companies themselves. In response, we believe that the Proposal should apply only to Parent Companies (and their ILC subsidiaries) that obtain FDIC approval to establish or acquire an ILC on or after March 15, 2020. Parent Companies that establish or acquire an ILC on or after this date were on notice that the FDIC was contemplating the establishment, by regulation, of prudential standards for the Parent Companies of ILCs.[14] As a matter of equity, however, we believe it is appropriate not to apply the additional proposed regulatory requirements to the Parent Companies that had already acquired or established an ILC prior to March 15, 2020.

E. Permit the Parent Company to use its relevant SEC filings to satisfy the annual report requirement regarding its (i) financial condition, and (ii) systems for identifying, measuring, monitoring, and controlling financial and operational risks.

The Proposal further would require the Parent Company to submit to the FDIC an annual report describing the Parent Company's operations and activities, and such other reports as may be requested by the FDIC describing, among other things, the Parent Company's: (i) financial condition, and (ii) systems for identifying, measuring, monitoring, and controlling financial and operational risks. For publicly traded companies, some of this information could be found in reports filed with the Securities and Exchange Commission (SEC). We recommend, therefore, that the FDIC include in the Proposal that reports filed with the SEC (*e.g.*, 10-K) may be used to satisfy the reporting requirements for items (i) and (ii) described above to the extent they include the information required to be reported to the FDIC.

F. Apply the Proposal's requirements to an ILC subsidiary during the de novo period (*i.e.*, the first three years of the ILC's operation). After such period, allow the FDIC – through the non-objection process – the discretion to continue or discontinue application of requirements regarding board and senior executive officer appointments.

As drafted, the Proposal would apply throughout the life of Parent Companies and their ILC subsidiaries. We believe that the FDIC should allow for greater flexibility in regulating board and senior executive officer appointments for those Parent Companies and ILC subsidiaries that have clearly demonstrated safe and sound operation and successful implementation of the ILC's business plan during the ILC's *de novo* period (*i.e.*, the first three years of operation). We recommend, therefore, that the FDIC apply the Proposal's requirements during the *de novo* period of the ILC's operation, after which the Parent Company and/or ILC may request that the

[14] As early as November 1, 2018, FDIC Chairman Jelena McWilliams indicated that she expected the FDIC to consider which prudential standards should be applied to the Parent Companies of ILCs to help limit the potential for regulatory arbitrage. *See* Joe Adler, "FDIC Chief Adds Dose of Caution about Nontraditional Bank Owners," *American Banker* (Nov. 1, 2018) ("We are trying not to create a regulatory arbitrage by allowing some companies that do banking services to be regarded differently than banks, even though their business profile and risk profile are different. . . . [and] we are taking a holistic look to the extent that any of those companies apply for an industrial loan corporation and deposit insurance."). Moreover, on March 13, 2020, the FDIC published notice pursuant to the Government in the Sunshine Act indicating that the FDIC Board expected to consider a proposal to regulate the Parent Companies of ILCs. *See* 85 *Fed. Reg.* at 14,679.

FDIC, on a non-objection basis, waive or modify one or more of the following Proposal's requirements:

- Adding or replacing a member of the board of directors, board of managers, or a managing member, as the case may be, of the ILC subsidiary.

- Adding or replacing a senior executive officer of the ILC subsidiary.

- Employing a senior executive officer who is associated in any manner (*e.g.*, as a director, officer, employee, agent, owner, partner, or consultant) with an affiliate of the ILC subsidiary.[15]

The FDIC, in its discretion, then can decide whether a full or partial waiver/modification is appropriate and respond within 90 days of the application. If the FDIC does not respond within the 90-day timeframe, then the requested waivers/modifications on board and senior executive officer appointments as described above would be deemed approved. As a matter of prudential supervision, if at a later time such waivers or modifications are no longer appropriate, then the FDIC would be free to exercise its authority under the Proposal to re-impose one or more of these Proposal's requirements, together with any additional restrictions or limitations on the ILC's activities or operations.[16] Reservation of the FDIC's examination authority further would facilitate the practical implementation of this agency power.

G. <u>Base the requirements of the contingency plan/living will on the size and complexity of the Parent Company, consistent with bank living will requirements under Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and implementing regulations</u>.

The Proposal gives the FDIC the option to condition approval/non-objection of an ILC deposit insurance application, change in bank control notice, or merger application on the Parent Company's and ILC subsidiary's commitment to provide to the agency a contingency plan that sets forth recovery actions to address significant financial or operational stress that might threaten the ILC's safety and soundness.[17] The contingency plan is subject to the FDIC's approval and must be implemented and followed according to the terms of the plan. The contingency plan also must include strategies for the orderly disposition or liquidation of the ILC, without requiring the appointment of a receiver or conservator. The FDIC believes that requiring a contingency plan would lead the agency "to a better understanding of the interdependencies, operational risks, and other circumstances or events that could create safety and soundness concerns for the [ILC] and attendant risk to the DIF."[18]

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[15] *See* 12 C.F.R. § 354.5(a)(2), (3), and (4) (proposed), 85 *Fed. Reg.* at 17,786.
[16] *See* 12 C.F.R. § 354.5(b) and § 354.6 (proposed), 85 *Fed. Reg.* at 17,786.
[17] In the preamble, the FDIC states that the contingency plan is not intended to be a resolution plan, but rather a description of the steps the Parent Company and ILC could take to mitigate the impacts of financial/operational stress outside the receivership process. *See* 85 *Fed. Reg.* at 17,779.
[18] *Id.*

In the preamble, the FDIC states that, in requiring a contingency plan, it may "take into account the size, complexity, interdependencies, and other factors relevant to the [ILC] and [Parent] Company."[19] We agree that the FDIC should consider these and other factors in requiring, reviewing, and approving a contingency plan, similar to the "living will" requirements under section 165(d) of the Dodd-Frank Act,[20] in which the Federal Reserve has tiered various requirements for banks based on their asset sizes.[21] We recommend, however, that the FDIC expressly lay out these considerations in the contingency plan provision of the finalized Proposal so that the FDIC's expectations are formalized by regulation.[22]

H. Define more clearly the proposed regulatory term, "material change" to an ILC subsidiary's business plan so that it becomes clear when the ILC needs to obtain the FDIC's written approval before effecting such change (such as the ILC introducing a new product or business line). This may be done through providing examples of what constitutes a "material change," coupled with examples that do not constitute a "material change."

Under the Proposal, an ILC subsidiary is required to obtain the FDIC's prior written approval in order for the ILC to "[m]ake a material change in its business plan."[23] The word "material" is not defined. It is therefore unclear when and under which circumstances the ILC would need to approach the FDIC for advance approval of a change in its business plan. For example, we believe that offering a new consumer product or service, or undertaking a new line of business, would not necessarily involve a "material" change to an ILC's business plan. In order to provide clarity and transparency on what amounts to a "material" change to the business plan, it would be helpful in a finalized regulation for the FDIC to include specific examples of what types of activities would constitute a "material" change (thus triggering the need to obtain the FDIC's prior written approval) and those that would not constitute a "material" change. This would further assist ILC subsidiaries in planning the timeframes, labor, and resources for new or expanded activities or operations.

I. Do not revise the Proposal to require a Parent Company's controlling shareholders to act as guarantors of the ILC subsidiary's capital and liquidity levels, or as guarantors of the Parent Company's compliance with FDIC-imposed written agreements, commitments, and restrictions.

The preamble to the Proposal includes two questions (Questions 4 and 12) that concern the ownership or control of an ILC's Parent Company by one or more individuals. Question 4 asks whether such individuals, in their personal capacity, should be held responsible for: (i) maintaining the ILC subsidiary's capital and liquidity at or above FDIC-specified levels, and (ii) causing the Parent Company to comply with the written agreements, commitments, and restrictions imposed on the ILC.[24] Question 12 asks whether an individual who is a "dominant"

[19] *Id.*
[20] *Codified at* 12 U.S.C. § 5365(d).
[21] *See* 12 C.F.R. § 243 (2020).
[22] *See* 12 C.F.R. § 354.4(b) (proposed), 85 *Fed. Reg.* at 17,786.
[23] *See* 12 C.F.R. § 354.5(a)(1) (proposed), 85 *Fed. Reg.* at 17,786.
[24] *See* 85 *Fed. Reg.* at 17,777.

shareholder of the Parent Company should be required to commit to the maintenance of the ILC's appropriate capital and liquidity levels.[25]

We do not believe an individual who owns or controls a Parent Company should be held "responsible" (which we interpret also to mean personally liable) for maintaining the ILC subsidiary's capital or liquidity. We believe that this requirement would substantially impair the ability of a Parent Company to attract shareholders and capital if the Parent Company's controlling shareholders were held to this regulatory standard. Moreover, the FDIC's experience with existing ILCs and their parent companies indicate that this has never been a source of concern (*i.e.*, the need to reach beyond a controlling company's assets and look to the company's controlling shareholders to maintain the ILC's capital and liquidity levels). The FDIC further retains authority under the Proposal to monitor the Parent Company's financial condition and take action at any time to prevent or mitigate any situation that would compromise a Parent Company's ability to serve as a continuing source of financial strength to the ILC subsidiary. We therefore do not believe that individual controlling shareholders (including the dominant shareholder) of a Parent Company should be accountable for maintaining the ILC's capital and liquidity levels.

Thank you for your consideration of our views and recommendations. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,

Timothy E. Keehan

Timothy E. Keehan
Vice President & Senior Counsel

[25] *See* 85 *Fed. Reg.* at 17,779.

APPENDIX A

ABA Proposed Language for FDIC Regulation

Part 354: Industrial Banks

12 C.F.R. Section 354.2 – Definitions.

"Industrial bank transaction" means (i) any industrial bank deposit insurance application, (ii) any change in bank control application for an industrial bank, or (iii) any merger application where the surviving institution is an industrial bank.

12 C.F.R. Section 354.3 (*New/Insert*) – FDIC Policies and Practices.

(a) Industrial bank transactions: FDIC review and decision.

(1) Approval. In approving an industrial bank transaction, the FDIC may condition such approval on a Covered Company's compliance with one or more requirements that shall be tailored to the business plan of the industrial bank and to the size and risk profile of the Covered Company and shall be consistent with bank safety and soundness and maintaining the deposit insurance fund.

(2) Disapproval. The FDIC shall disapprove an industrial bank transaction in any of the following circumstances:

(i) The industrial bank transaction would have a significant adverse impact on competition in any relevant market that is not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(ii) The industrial bank transaction would likely result in significant safety and soundness risk, reputation risk, or other risks as specified by the FDIC;

(iii) The industrial bank transaction could result in a scale and concentration such that the failure of the industrial bank could cause widespread disruption to other parts of the financial system or to the economy more broadly; or

(iv) The industrial bank transaction does not adequately address consumer protection concerns raised by the potential collection, use, privacy, security, or safeguarding of customer information by and among the banking and non-financial businesses of the Covered Company and its subsidiaries.

(b) *FDIC examination authority over industrial bank affiliates.* Pursuant to its statutory authority under 12 U.S.C. § 1820(b)(4), the FDIC may examine any banking or nonbanking affiliate of an industrial bank whose parent is a Covered Company as may be necessary to disclose fully (i) the relationship between the industrial bank and any such affiliate, and (ii) the effect of such relationship on the industrial bank.