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Via Electronic Mail – comments@fdic.gov October 11, 2024
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20529
Attention: James P. Sheesley, Assistant Executive Secretary

Re: Parent Companies of Industrial Banks and Industrial Loan Companies (RIN 3064-AF88)

Ladies and Gentlemen:

Ford Motor Credit Company LLC (Ford Credit), is pleased to comment on the FDIC's notice of proposed rulemaking (NPR)[1] regarding changes to Part 354 of the FDIC's regulations, which include the FDIC's framework for supervising industrial banks[2] and their parent companies. Ford Credit is an indirect, wholly owned subsidiary of Ford Motor Company and offers a variety of financing products, primarily in connection with the purchase or lease of Ford and Lincoln vehicles. Ford Credit has enabled millions of individuals and small businesses to purchase vehicles that are essential to their livelihoods and family well-being.

On July 22, 2022, Ford Credit submitted an application for deposit insurance to the FDIC to establish Ford Credit Bank, a proposed industrial bank and subsidiary of Ford Credit. Ford Credit's application remains pending over two years later and is apparently the sole pending application to establish an industrial bank. The proposed rule not only would affect negatively existing industrial banks and have a chilling effect on future applicants, but also effectively would result in a denial of Ford Credit's industrial bank application more than two years after it was filed.

For the reasons discussed in this letter, the presumptions relating to so-called "shell and captive industrial bank business models" that the FDIC proposed in the NPR are inappropriate and represent an overreach by the FDIC in an attempt to override, without authority or evidence, the clear statutory scheme implemented by Congress. Many industrial banks have operated successfully—some for decades—under business models similar to those that the FDIC now

[1] FDIC, Notice of Proposed Rulemaking: Parent Companies of Industrial Banks and Industrial Loan Companies, 89 Fed. Reg. 65556 (Aug. 12, 2024).

[2] These institutions may be called "industrial banks", "industrial loan companies", "ILCs" and other terms that are based on definitions in the chartering state's laws. Consistent with the NPR, we refer to these institutions collectively as "industrial banks" in this letter.

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broadly asserts are contrary to a finding that an application for deposit insurance satisfies the statutory criteria for approval. These assertions, by the FDIC's own admission, are not supported by data or the FDIC's experience supervising industrial banks.[3]

In addition, the NPR does not explain in any detail how the "shell or captive nature" of an industrial bank would "weigh heavily against favorably resolving" the different statutory criteria. Indeed, the NPR effectively would supplant the statutory criteria with a single criterion regarding the nature of an industrial bank applicant's proposed business model. This runs counter to clear statutory authority to establish industrial banks and ignores criteria the FDIC is required to consider in connection with each industrial bank application. Accordingly, the NPR should be withdrawn.

I. Background

The legislative history relating to the treatment of industrial banks confirms that industrial banks are the result of an intentional decision by Congress to permit commercial firms to own insured depository institutions, subject to specific limitations. In 1956, Congress enacted the Bank Holding Company Act (the BHC Act). Under the BHC Act, any company that controls a "bank" (as defined in the BHC Act) is subject to consolidated supervision by the Board of Governors of the Federal Reserve System and must limit its activities to those that are "closely related to banking".[4] Originally, the BHC Act defined "bank" as "any national banking association or any State bank, savings bank, or trust company".[5] In 1966 and 1970, Congress amended the BHC Act to define "bank" as an institution that accepts demand deposits *and* makes commercial loans.[6] Congress intentionally defined "bank" in this manner to exclude certain institutions, *including industrial banks*.[7] In 1982, Congress again expressly acknowledged its decision to allow ownership of industrial banks by granting industrial banks eligibility for FDIC insurance.[8]

In 1987, through the Competitive Equality Banking Act, Congress closed the so-called "non-bank bank" authorization created by the 1966 and 1970 amendments to the BHC Act, which previously had allowed commercial firms to avoid becoming bank holding companies by obtaining commercial bank charters for institutions that refrained from *either* accepting demand deposits or making commercial loans. However, at the same time, Congress expressly continued to exclude certain institutions, including industrial banks, from the definition of "bank" in the BHC Act, subject to important restrictions designed to limit the ability of industrial banks to

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3 *See infra* note 20 and accompanying text.

4 12 U.S.C. § 1843.

5 BHC Act, Pub. L. No. 84-511, § 2(c), 70 Stat. 133, 133 (1956).

6 *See* Act of July 1, 1966, Pub. L. No. 89-485, § 3(c), 80 Stat. 236, 236 (1966) (codified as amended at 12 U.S.C. § 1841 (c); Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101(a), 84 Stat. 1760, 1760 (1970).

7 *See* S. Rep. No. 89-1179 at 7 (1966) (noting that the definition was adopted "*so as to exclude institutions like industrial banks*") (emphasis added).

8 Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 703, 96 Stat. 1538 (1982).

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compete with "banks" as defined in the BHC Act (in particular, precluding industrial banks with more than $100 million in total assets from accepting demand deposits).[9]

The legislative history is clear: Congress intentionally granted commercial organizations a lawful option to own certain limited insured depository institutions without subjecting their parent companies to the BHC Act. Notwithstanding this clear Congressional intent, the FDIC now proposes a rule that effectively would eliminate this statutory exception for many, if not nearly all, industrial bank applicants. Perhaps even more concerning is that the FDIC would do so without providing any discernible justification. The FDIC makes only vague and conclusory assertions regarding "supervisory concerns" as the rationale for its proposed changes. The proposed rule is not the result of any change in law or of any new facts to demonstrate that industrial banks—including those the proposed rule would categorize as "shell" or "captive" institutions—now pose a greater risk to safety and soundness than they previously did. Rather, the proposed rule appears to be little more than an arbitrary and capricious attempt by the FDIC's current Board to supplant Congress's clear policy decisions with the FDIC's own negative, unsubstantiated views of industrial banks.

II. The Impropriety of the Proposed Rule

The FDIC *must* consider enumerated statutory factors when evaluating an application for deposit insurance.[10] These factors are: (1) the financial history and condition of the depository institution; (2) the adequacy of the depository institution's capital structure; (3) the future earnings prospects of the depository institution; (4) the general character and fitness of the management of the depository institution; (5) the risks presented by the depository institution to the Deposit Insurance Fund; (6) the convenience and needs of the community to be served by the depository institution; and (7) whether the depository institution's corporate powers are consistent with the purposes of the Federal Deposit Insurance Act.[11]

The proposed rule would add a number of "pre-condition" criteria the FDIC will consider as part of its review of an application for deposit insurance for a proposed industrial bank. Most troubling is that "in every case" the FDIC will now consider "the degree to which the industrial bank will have . . . [a] business model that is viable on a standalone basis and that has franchise value independent of the parent organization".[12] Under the proposed rule, an industrial bank's business model would only be deemed viable on a standalone basis and to have franchise value "if the main business functions of the industrial bank will not be reliant on the parent organization, including the industrial bank's operations, loans and investments, deposits and other funding sources, client sourcing, and any other primary business activities".[13]

In addition, the proposed rule would establish two related presumptions. First, an industrial bank that exhibits one or more of the following characteristics would be presumed to

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[9] *See* 12 U.S.C. § 1841(5)(c)(2)(H).

[10] 12 U.S.C. § 1816.

[11] *Id.*

[12] Proposed 12 C.F.R. § 354.6(b)(2).

[13] *Id.*

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be a "shell or captive industrial bank": (1) the industrial bank "could not function independently of the parent company"; (2) the industrial bank "would be significantly or materially reliant on the parent company or its affiliates"; or (3) the industrial bank "would serve only as a funding channel for an existing parent company or affiliate business line".[14] Second, if an industrial bank is a "shell or captive" industrial bank, the FDIC will presume that "the shell or captive nature of [the] industrial bank weighs heavily against favorably resolving one or more statutory factors".[15, 16]

The NPR provides scant explanation for how or why the "shell or captive" nature of the industrial bank would automatically and presumptively weigh heavily against favorably resolving the statutory factors. Indeed, the only statutory factor the FDIC addresses in any detail is the "convenience and needs" factor. However, the FDIC's discussion lacks the justification or analysis required of a regulator in promulgating new rules and is replete with conclusory statements that are not based in the statutory mandate to consider each of seven different factors. In particular, the NPR states that the convenience and needs factor requires a consideration of whether the industrial bank "will serve the convenience and needs of the community *broadly*" and that "if the target market is such that the institution's products are only available to customers of an affiliated company or a narrow segment of the community, this would weigh heavily against favorably resolving the convenience and needs statutory factor".[17] This represents a significant departure from the statutory language, which does not contain the word "broadly",[18] and would disregard significant benefits industrial banks can provide to their communities, including Community Reinvestment Act plans and increased competition.[19] It also disregards decades of contrary precedent in which the three federal prudential regulators have approved numerous *de novo* banks under a business plan that is directed and limited in nature.

It is telling that the FDIC does not address the actual statutory language, this contrary precedent or the other statutory factors it is required to consider when evaluating a deposit insurance application. In fact, the FDIC acknowledges, but disregards, its lengthy history regulating industrial banks and the fact that they have operated in a manner that would result in favorably resolving the statutory factors. For example, after discussing at length purported

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14 Proposed 12 C.F.R. § 354.6(c)(1).

15 Proposed 12 C.F.R. § 354.6(c)(2). We note that these factors are not specified in the proposed rule. As discussed below, the FDIC generally does not provide any specific explanation for how or why the presumption will be applied to the different statutory factors.

16 In this context, "weighs heavily against" is a euphemism for preclusion. No potential applicant would devote the time and resources necessary for an application if the FDIC has stated that approval is disfavored and highly unlikely to be granted.

17 89 Fed. Reg. at 65562.

18 *See* 12 U.S.C. § 1816(6); *see also* 12 U.S.C. §§ 1828(c)(5) and 1842(c), and 12 C.F.R. §§ 5.33(e)(ii)(C) and 225.13(b)(3), none of which requires a determination that the convenience and needs of the community will be served "broadly" in connection with approvals required under the BHC Act or the Bank Merger Act.

19 As one example, the FDIC would not even consider the convenience and needs benefits that could be provided by our proposed industrial bank's financing for consumers and small businesses.

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supervisory concerns around industrial banks that would be "shell or captive" institutions under the proposed rule, the FDIC then notes that:

> [E]xisting industrial banks rely to a significant extent on their parent companies or affiliates for business generation, operational aspects, and/or a variety of corporate support services. *While many of the industrial banks are closely integrated with their parent organizations, they typically maintain adequate capital, have sufficient liquidity, and reflect satisfactory overall risk profiles*. For the most part, the existing industrial banks are seasoned in nature (all but two were established between 1984 and 2006), *and fared similarly to other types of financial institutions during previous banking crises*.[20]

Although the FDIC asserts that certain vague supervisory concerns justify the proposed sweeping changes to its regulation, it then notes that its own decades of supervising existing industrial banks—many of which have the *same* characteristics the FDIC now claims should weigh against favorably resolving statutory factors—demonstrate that industrial banks have operated in a safe and sound manner. In this regard, the FDIC's concerns are unfounded, and indeed are in disregard of the FDIC's own supervisory experience. Even the pejorative terms "shell" and "captive", which ordinarily are used to refer to companies with no assets or a company controlled by and operated for the benefit of a parent company, respectively, seem purposely selected to obfuscate the fact that even industrial banks that are closely integrated with their parent companies operate independently and with sufficient capital and liquidity. Moreover, industrial banks, although not "banks" for BHC Act purposes, are subject to a comprehensive regulatory regime that applies to all insured depository institutions, including Sections 23A and 23B of the Federal Reserve Act,[21] which prohibit industrial banks from operating in a manner that unduly benefits its parent company and other affiliates. Put simply, the regulatory regime applicable to industrial banks, the findings of the Government Accountability Office and the FDIC's own statements belie the FDIC's purported supervisory concerns.

Although the FDIC attempts to frame its proposed rule as clarifying how it will review the statutory factors, the FDIC is in fact rejecting its statutory responsibility to consider all the

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[20] 89 Fed. Reg. at 65562 (emphasis added). The FDIC's own experience comports with other significant evidence. For example, Section 603 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 placed a moratorium on new industrial bank applications by commercial firms and required the Government Accountability Office to complete a study regarding to determine whether it would be necessary to eliminate exceptions from the "bank" definition in the BHC Act, including the industrial bank exception. The Government Accountability Office released its study in January 2012. United States Government Accountability Office, Study, *Bank Holding Company Act: Characteristics and Regulation of Exempt Institutions and the Implications of Removing the* Exemptions, GAO-12-160 (Jan. 2012) (the "2012 Study"). The 2012 Study did not recommend removal of the exception for industrial banks and the moratorium on new applications expired in July 2013. The 2012 Study notes that the FDIC itself acknowledged that any risks relating to increases in the size, types or number of commercial industrial banks "represent important public policy issues *that are most appropriately addressed by Congress*". 2012 Study at 31. The proposed rule thereby once again would impermissibly override a Congressional decision because Congress has repeatedly elected to retain the exception for industrial banks without imposing any additional limitations on the size or type of commercial firm that is permitted to own an industrial bank.

[21] 12 U.S.C. §§ 371c and 371c-1.

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enumerated factors. The proposed rule would do little more than disqualify new industrial bank applicants from FDIC insurance coverage for no other reason than the fact they are industrial banks. The message to potential applicants is clear: any effort to obtain deposit insurance for an industrial bank will fail. The FDIC's assertions that the proposed rule would address "potentially significant supervisory concerns for industrial banks",[22] notwithstanding decades of experience to demonstrate that those same "potential" concerns have never manifested as actual supervisory problems represent a disregard of the FDIC's own experiences and statutory mandate. None of the FDIC's purported justifications is sufficient to support the FDIC's efforts effectively to rewrite legislation and to eliminate the industrial bank charter for new applicants. For the foregoing reasons, the NPR is an improper use of the FDIC's rulemaking authority and should be withdrawn.

III. Any Final Rule Should Not Be Applied to Ford

Although the presumptions set forth in the proposed rule would improperly override the statutory criteria established by Congress, if, nevertheless, the FDIC determines to finalize the proposed rule, the FDIC should not apply the proposed rule's considerations and presumptions to our pending industrial bank application for several reasons.

First, if the proposed rule is adopted, it would make permanent a disadvantage Ford has to its non-U.S. competitors. In particular, BMW and Toyota each own an industrial bank through which they are able to finance purchases and leases of their vehicles from independent dealerships. Although these banks have operated safely under what the FDIC would now classify as a "shell" or "captive" business model, the proposed rule would effectively bar Ford Credit from competing effectively through a similar industrial bank subsidiary.[23] These competitive effects demonstrate that Congress, and not the FDIC, is the appropriate body for introducing the types of changes the FDIC seeks to implement through the proposed rule. Indeed, as noted above, the FDIC itself has acknowledged that even the risks relating to increases in the size, types or number of commercial industrial banks, much less additional considerations that are not within the FDIC's purview, "represent important public policy issues that are most appropriately addressed by Congress".[24]

Second, as discussed above, the proposed rule would apply to the community and needs factor in a manner that is inconsistent with the statutory language. Under the proposed rule, the "shell" or "captive" nature of an industrial bank would weigh heavily against resolving the community and needs factor favorably based on the industrial bank applicant's focus on a specific, even if broad, sector of the community, *i.e.*, the needs of individuals and small businesses for automobile financing on fair and reasonable terms. As a result, the proposed rule would disregard many important benefits to the industrial bank's community. This is particularly true of Ford Credit's proposed industrial bank. In particular, representatives from the United States federal banking regulators and non-U.S. banking regulators have expressed the

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[22] 89 Fed. Reg. at 65561.

[23] As one recent example, during COVID, Ford Credit was not able to offer Paycheck Protection Program loans, including to assist independent, franchised automobile dealers, while Ford Credit's non-U.S. competitors with industrial bank subsidiaries were able to do so.

[24] 2012 Study at 31.

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urgent need to take action to fight climate change and its potential threat to financial stability.[25] Ford Credit's application makes abundantly clear that its proposed industrial bank is an integral part of Ford's electric and hybrid vehicle strategy. Ford believes it can play a critical role in broad electric vehicle adoption in the U.S. and that the proposed industrial bank will be a critical component to fulfilling Ford's electric vehicle goals. This goal is particularly relevant to individuals who reside in low- and moderate-income and rural areas.[26] By increasing access to credit for purchases of electric vehicles and related services, Ford Credit's proposed industrial bank would be in the public interest and would serve the needs of low- and moderate-income communities. However, these beneficial effects of Ford Credit's proposal would be disregarded

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[25] Martin J. Gruenberg, Statement on the Request for Comment on the Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (Mar. 30, 2022), available at https://www.fdic.gov/news/speeches/2022/spmar3022.html. ("The effects of climate change and the transition to reduced reliance on carbon-emitting sources of energy present emerging economic and financial risks to the safety and soundness of financial institutions and the stability of the financial system. . . . Together, these climate-related financial risks pose a clear and significant risk to the U.S. financial system and, if improperly assessed and managed, may pose a threat to safe and sound banking and financial stability. As a result, there is an urgent need [to take action]."); Governor Lael Brainard, Building Climate Scenario Analysis on the Foundations of Economic Research, speech delivered at the 2021 Federal Reserve Stress Testing Research Conference, Federal Reserve Bank of Boston (Oct. 7, 2021), available at https://www.federalreserve.gov/newsevents/speech/brainard20211007a.htm?msclkid=835acb64b38a11ec92018b7b96b3d19c ("Economic analysis suggests that climate change could have profound consequences for the level, trend growth, and variability of economic activity over time and across regions and sectors. Some of these effects could occur gradually, while others could occur relatively quickly in the presence of 'tipping points.' . . . Climate change is projected to have profound effects on the economy and the financial system, and it is already inflicting damage."); Michael J. Hsu, Acting Comptroller of the Currency and FDIC Board member, Five Climate Questions Every Bank Board Should Ask (Nov. 8, 2021), available at https://www.occ.gov/news-issuances/speeches/2021/pub-speech-2021-116.pdf ("Climate change poses significant risks to the financial system. Detailed reports have been published. Eloquent words have been spoken. It is time to convert those words into action."); Sarah Breeden, Executive Director, International Banks Supervision, Avoiding the storm: Climate change and the financial system, speech delivered at the Official Monetary & Financial Institutions Forum, London (Apr. 15, 2019), available at https://www.bankofengland.co.uk/-/media/boe/files/speech/2019/avoiding-the-storm-climate-change-and-the-financial-system-speech-by-sarah-breeden.pdf?la=en&hash=AC28DFEFED7B14A197E6B0CB48044D06F4E38E84 ("Climate change poses significant risks to the economy and to the financial system, and while these risks may seem abstract and far away, they are in fact very real, fast approaching, and in need of action today. . . . [T]he size of [ ] future risks will be determined by the actions we take today. The carbon released today is creating the physical and transition risks of tomorrow. Climate change therefore represents the tragedy of the horizon: by the time it is clear that climate change is creating risks that we want to reduce, it may already be too late to act.").

[26] More specifically, the issue of climate change is particularly acute for individuals in low- and moderate-income and rural areas. For example, "those with low income or no high school diploma are approximately . . . 15% more likely to currently live in areas with the highest projected increases in childhood asthma diagnoses due to climate-driven increases in particulate air pollution. . . ." United States Environmental Protections Agency, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS 7 (2021). In addition, low- and moderate-income residents in the United States have a higher likelihood of living in climate risk-prone areas such as isolated rural areas and areas with failing public infrastructure. USGCRP, IMPACTS, RISKS AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT VOLUME II 406 (D.R. Reidmiller et al. eds., 2018). Research also indicates that climate change has particularly detrimental health consequences for low-income communities, including as a result of carbon emissions. L. Rudolph et al., CLIMATE CHANGE, HEALTH, AND EQUITY: A GUIDE FOR LOCAL HEALTH DEPARTMENTS 57 (2018).

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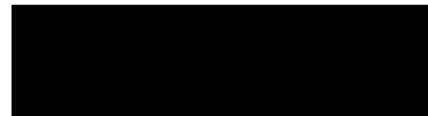
under the proposed rule solely because the industrial bank primarily would provide credit to fund the purchase of Ford electric vehicles. This narrow interpretation of the convenience and needs factor is contrary to the statute, Congressional intent and the FDIC's own existing precedent, and is in fact deleterious to the convenience and needs of the community when applied to Ford Credit's pending application.

Finally, applying the proposed rule to Ford Credit's application would fundamentally be unfair. Ford Credit submitted its application to the FDIC over two years ago and continues to believe that the statutory factors should be resolved in favor of approving Ford Credit's application. The FDIC, however, now proposes to change significantly the manner in which the FDIC would apply the statutory factors to our pending application, after Ford Credit has waited more than two years for its application to be processed and notwithstanding the significant time and resources we have dedicated to our application during that period. In light of these factors, fundamental principles of procedural fairness, at a minimum, would necessitate a grandfathering period that applies to our application. Accordingly, any final rule should include a provision that precludes the FDIC from applying the additional considerations and presumptions set forth in Section 354.6 of the proposed rule to applications that were filed prior to the issuance of the NPR and that remain pending.

For the foregoing reasons, we believe the FDIC's proposed rule is inappropriate and should be withdrawn. However, if the FDIC finalizes the proposed rule, it should not be applied to consideration of Ford Credit's pending application.

Sincerely,



Cathy O'Callaghan
CEO, Ford Motor Credit Company

cc: Marlene Martel, Ford Credit General Counsel
Frank Stepan, Ford Credit Bank (in formation), President