October 11, 2024

Via Electronic Mail

James P. Sheesley
Assistant Executive Secretary
Attention: Comments—RIN 3064–AF88
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

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

Ladies and Gentlemen:

GM Financial writes to express serious concerns with the Federal Deposit Insurance Corporation's ("FDIC") notice of proposed rulemaking to amend its regulation (12 C.F.R. Part 354) governing parent companies of industrial banks and industrial loan companies (the "Proposed Rule").[1] While GM Financial appreciates the FDIC's commitment to ensuring that industrial banks are operated in a safe and sound manner and in compliance with applicable laws and regulations, we urge the FDIC to withdraw the Proposed Rule. Changes to Part 354 are unwarranted given the FDIC's supervisory history with respect to industrial banks and industrial loan companies, and the changes contemplated in the Proposed Rule would be at significant risk of legal challenge for the reasons set forth in this letter.

As detailed further below, the FDIC's Proposed Rule, if finalized in its current form, is deficient for several reasons, including because (a) the FDIC has not developed a record to support the requirements that it seeks to impose on parent companies of certain industrial banks; (b) the Proposed Rule exceeds the FDIC's authority under the Federal Deposit Insurance Act ("FDI Act") by importing extraneous factors to determine whether the FDIC will grant deposit insurance to certain applicants; (c) the proposed consideration of "franchise value" lacks a well-reasoned basis; (d) the Proposed Rule is vague in its application in order to give the FDIC unchecked discretion to approve or reject deposit insurance applications for industrial banks; (e) the FDIC relies on a narrow interpretation of how a bank may serve the convenience and needs

[1] Parent Companies of Industrial Banks and Industrial Loan Companies, 89 Fed. Reg. 65556 (Aug. 12, 2024) [hereinafter "Proposed Rule"].

of its community; and (f) the Proposed Rule is motivated by a desire to make it more difficult for certain companies to submit applications for deposit insurance and not by any legitimate policy or other interest that the FDIC may take into account in promulgating regulations.

I. The FDIC has not developed a record to support the requirements that it seeks to impose on parent companies of certain industrial banks.

The Proposed Rule would codify a concept of a "shell" or "captive" institution as one that "could not function independently of the parent company; would be significantly or materially reliant on the parent company or its affiliates; or would serve only as a funding channel for an existing parent company or affiliate business line."[2] Under the Proposed Rule, a shell or captive institution would be subject to an adverse rebuttable presumption that its "shell or captive nature . . . weighs heavily against favorably resolving one or more applicable statutory factors" guiding the FDIC's decision-making.[3] The Proposed Rule "will afford any company seeking to rebut [the presumption] an opportunity to present its views in writing. While the FDIC is considering any such materials, the FDIC will suspend consideration of any related filings, time periods will be tolled, and transactions will not be consummated."[4]

The FDIC fails to provide the level of support for the Proposed Rule that is required by the Administrative Procedure Act to impose such an adverse presumption.[5] Strikingly, the preamble to the Proposed Rule describes existing captive and shell institutions in a positive light and fails to explain why supervisory experiences that predated the Part 354 rulemaking in 2021[6] now warrant an official shift in policy and presumption against deposit insurance for captive and shell institutions.[7]

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[2] Proposed Rule at 65568, Proposed 12 C.F.R. § 354.6(c)(1).

[3] Proposed Rule at 65568, Proposed 12 C.F.R. § 354.6(c)(2).

[4] Proposed Rule at 65568, Proposed 12 C.F.R. § 354.6(c)(3).

[5] *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("The agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.") (citation omitted) (emphasis added).

[6] Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10703 (Feb. 23, 2021).

[7] *See* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. ***Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account***.") (citations omitted) (emphasis added).

A. The Preamble describes the existing industrial bank landscape positively.

Despite the fact that the Proposed Rule introduces a punitive presumption against captive or shell banks, the preamble to the Proposed Rule (the "Preamble") cites no FDIC guidance or guidance from any other federal or state banking agency describing concerns with the captive or shell industrial bank business model. The Preamble instead reflects that existing "captive" industrial banks are generally low-risk, well-run institutions that demonstrate comparable risk profiles as other FDIC-insured depository institutions. The Proposed Rule states:

> Some of the existing 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.[8]

Corroborating the FDIC's positive conclusions regarding industrial banks, a 2021 study found that, in the aggregate, both financially and commercially owned industrial banks had higher equity capital-to-asset ratios and better financial performance ratios than non-industrial bank, FDIC-insured institutions.[9] In the preamble to the final Part 354 rule in 2021, the FDIC also described how "industrial banks have experienced, by most key measures of performance and condition, comparable results to other insured institutions."[10]

The captive industrial bank should not be viewed as a presumptively weaker business model under the FDI Act. Even though such industrial banks faced pressure during the Financial Crisis in 2008 and 2009, such pressure was attributable to factors unrelated to their parents such as undue exposure to mortgage lending, rather than concentration risk and reliance on the parent. The Financial Crisis posed a serious challenge to banks of all charter types, not just industrial banks.[11]

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[8] Proposed Rule at 65562.

[9] James R. Barth, Yanfei Sun, "Source of Strength and Consolidated Supervision: A Comparative Assessment of Industrial Banks and Commercial Banks" (July 2021), https://stena.utah.edu/wordpress/wp-content/uploads/2023/07/2021-Barth-Analysis-Final-071521.pdf.

[10] Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10703, 10712 (Feb. 23, 2021).

[11] In its preamble to the final Part 354 rule promulgated in 2021, the FDIC noted that "commenters also observed that several large corporate owners of industrial banks experienced stress during the 2008–09 financial crisis. In some cases, the parent organizations ultimately filed bankruptcy, while others pursued strategies to resolve the stress, including through access to government programs intended to alleviate the effects of the crisis within the financial services sector. . . However, it is important to note that . . . the types and degree of stress were also experienced by many other insured depository institutions and

B. The Proposed Rule fails to explain why supervisory experiences and findings for industrial banks now warrant an official shift in policy from the original Part 354 rulemaking and presumption against captive and shell institutions.

The FDIC fails to explain why supervisory experiences that predated promulgation of the final Part 354 rule in 2021 – including the experiences of the 2008-2009 Financial Crisis – now warrant an official shift in policy and presumption against captive and shell institutions. The FDIC stated in the Part 354 rulemaking in 2021:

> "[I]t is important to note that some industrial banks experienced stress during the 2008–09 financial crisis. The circumstances experienced by industrial banks during the crisis were not dissimilar from the circumstances confronting other insured institutions and were not the result of factors related to the industrial bank charter. In general, the FDIC's supervision helped to isolate the insured industrial bank from the stress of the parent organization, which helped in ***managing the potential risk to the industrial bank and the [Deposit Insurance Fund or "DIF]***."[12]

After recounting various observations related to the Financial Crisis in its preamble to the 2021 Part 354 final rule, the FDIC states that its "experience with supervision in the industrial banking space informs the present rulemaking. The heightened source of strength requirements, along with other regulatory requirements included in the final rule, are examples of how the FDIC is applying lessons learned in this rulemaking process."[13]

Insomuch as no industrial banks have failed since Part 354 was enacted, the supervisory basis for the changes in the Proposed Rule is unclear unless the agency has reached new factual findings regarding the risk profiles of industrial banks.

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banking companies, some of which also sought participation in [Temporary Liquidity Guarantee Program] and/or [Troubled Asset Relief Program], failed, or pursued transactions to restructure the organization, merge, or raise capital to alleviate stress or avert failure. As such, the circumstances involving the companies highlighted in the comments were not dissimilar to those facing other banking companies, including companies subject to Federal consolidated supervision." Parent Companies of Industrial Banks and Industrial Loan Companies 86 Fed. Reg. 10703, 10710-11 (Feb. 23, 2021). The Financial Crisis of 2008-2009 was a period of severe financial stress for and was associated with the failure of hundreds of financial institutions across different charter types. *See* FDIC, "Bank Failures in Brief – Summary," https://www.fdic.gov/resources/resolutions/bank-failures/in-brief/index.html.

[12] Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10703, 10713 (Feb. 23, 2021) (emphasis added).

[13] Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10703, 10713 (Feb. 23, 2021).

II. The Proposed Rule exceeds the FDIC's authority under the FDI Act by importing extraneous factors to determine whether the FDIC will grant deposit insurance to certain applicants.

The Proposed Rule lists unique "Additional Considerations" that the FDIC will evaluate when determining whether to approve the application for deposit insurance for an industrial bank.[14] These additional considerations, however, are not found anywhere in section 6 of the FDI Act, 12 U.S.C. § 1816; and the FDI Act does not authorize the FDIC to impose new blanket criteria for an industrial bank application for deposit insurance.

A. The additional criteria are not authorized by statute.

The FDI Act sets forth statutory criteria for approving deposit insurance applications, including applications for state-chartered industrial banks. The FDIC is a creature of statute, which "possess[es] only the authority that Congress has provided."[15] The FDIC's authority, including the authority under which it can promulgate rules, derives from its statutory authority, which in this context is Section 6 of the FDI Act. In evaluating whether to grant deposit insurance to a proposed institution, the FDIC is required by section 6 of the FDI Act, 12 U.S.C. § 1816, to consider seven factors: (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 risk presented by such depository institution to the Deposit Insurance Fund; (6) the convenience and needs of the community to be served by such depository institution; and (7) whether the depository institution's corporate powers are consistent with the purposes of this chapter.[16]

Section 5 of the FDI Act makes clear that these factors form the foundation of any deposit insurance decision, stating that the Board of Directors of the FDIC "***shall consider the factors*** described in section 1816 of this title in determining whether to approve [an] application for insurance," and requiring the Board to state its reasoning for any denial in "reference to the factors described in section 1816 of this title."[17]

Until this proposed rule, it appears that the FDIC has never issued a proposed rule that rewrites the approval criteria for industrial banks and imposes new rigid requirements for FDIC approval. For example, as discussed below, the Proposed Rule includes a requirement for an applicant to demonstrate that the proposed bank will have "franchise value," which is not one of the factors in section 6 of the FDI Act.[18] Yet, the FDIC proposes to require the consideration of

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[14] Proposed Rule at 65568, Proposed 12 C.F.R. § 354.6.
[15] NFIB v. Dep't of Lab., 595 U.S. 109, 117 (2022).
[16] 12 U.S.C. § 1816.
[17] 12 U.S.C. § 1815.
[18] *See* Brown v. Gardner, 513 U.S. 115, 117 (1994) ("Despite the absence from the statutory language of so much as a word about fault on the part of the VA, the Government proposes two interpretations in attempting to reveal a fault requirement implicit in the text of § 1151, the first being that fault inheres in

"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."[19]

Although the FDIC attempts to justify the new factors as reflecting the risk presented to the industrial bank from its parent company and affiliates, Congress already set forth criteria for this evaluation in 12 U.S.C. § 1816. The Proposed Rule exceeds the FDIC's statutory authority through the imposition of new factors not found in the FDI Act,[20] most notably the requirement to evaluate an institution's franchise value as well as a requirement to evaluate whether the bank would serve unmet needs of a community. Congress knew how to enumerate the criteria for the FDIC to approve deposit insurance applications from industrial banks, and the FDIC cannot add new criteria to expand the text of the statute.

B. The Proposed Rule's additional criteria raise nondelegation concerns.

Moreover, reading the FDI Act to confer the FDIC with such unconstrained authority to add criteria for the approval of industrial bank deposit insurance applications raises nondelegation concerns. Under the nondelegation doctrine, "Congress … may not transfer to another branch 'powers which are strictly and exclusively legislative.'"[21] A statutory delegation of authority to an agency is constitutional only if Congress provides an "intelligible principle" to cabin the agency's discretion.[22] "Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer."[23]

As the Proposed Rule demonstrates, the FDIC has asserted the authority to rewrite the FDI Act and include new binding criteria that will impact all industrial bank applicants. For example, the Proposed Rule states that the FDIC will consider "[t]he novelty of the parent company's primary businesses, and the extent to which new or innovative processes are being implemented or utilized."[24] Taken to the extreme, the FDIC could determine that any parent company with some novel technology presents a de facto risk to the industrial bank, notwithstanding the size and structure of the parent company or risk from the actual technology. Yet, nothing in the statute delegates to the FDIC the authority to change its evaluation of an industrial bank application solely based on the parent company's type of business. If the FDIC's assertion of authority is correct, nothing would stop the FDIC from imposing criteria that

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the concept of compensable 'injury.' We think that no such inference can be drawn in this instance, however.").

[19] Proposed Rule at 65568, Proposed 12 C.F.R. § 354.6(b)(2).

[20] *See* 5 U.S.C. §§ 706(2)(A), (C); Luminant Generation Co. v. U.S. EPA, 675 F.3d 917, 932 (5th Cir. 2012) (citation omitted) (concluding that "replicability" is not a factor which Congress intended the agency to consider).

[21] Gundy v. United States, 588 U.S. 128, 135 (2019) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

[22] *Gundy*, 588 U.S. at 135 (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

[23] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 473 (2001).

[24] Proposed Rule at 65568, Proposed 12 C.F.R. § 354.6(a)(5).

preemptively prevent certain industrial banks from receiving approval because the FDIC disfavors (without any substantiation) the parent company's line of business.

Any remaining doubt as to whether the FDIC has the authority to impose new criteria on industrial banks is resolved by the major questions doctrine, which requires Congress to "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[25] Industrial banks play an important role in the economy in providing financial products and services to diverse customer bases that include individual depositors and borrowers, small businesses, and commercial companies. As of June 27, 2024, the 23 existing industrial banks maintained over $230 billion in aggregate total assets.[26]

In 1982, through the passage of the Garn-St. Germain Depository Institutions Act, Congress elected to make all industrial banks eligible for deposit insurance.[27] Congress has had several opportunities in recent years to reconsider its position on the risks and benefits of federally insured industrial banks and their exemption from the definition of "bank" in the Bank Holding Company Act. However, Congress has not prescribed (or granted the FDIC the authority to prescribe) new criteria for deposit insurance on particular industrial bank business models. In the wake of the Great Financial Crisis, Congress enacted a temporary moratorium on the provision of deposit insurance for new industrial banks owned by commercial firms and required the preparation of a Government Accountability Office study on regulatory exemptions for various financial institutions, including industrial banks.[28] However, the moratorium was allowed to sunset in 2013 without further action from Congress.[29] Congress also has considered bills that would eliminate the exemption for industrial banks in the Bank Holding Company Act but has not passed any such legislation.[30]

III. The Proposed Rule's requirement that the FDIC consider a bank's "franchise value" lacks a well-reasoned explanation.

Not only does the Proposed Rule's additional consideration of "franchise value" lack statutory support, but the Proposed Rule also has no reasoned basis for including franchise value as a consideration. As an initial and important matter, the FDIC offers no definition of the term "franchise value" in the regulatory text. Because the term is not in the FDI Act approval criteria

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[25] West Virginia v. EPA, 597 U.S. 697, 716 (2022).
[26] Proposed Rule at 65558.
[27] Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 703, 96 STAT. 1469, 1538 (1982), https://www.congress.gov/97/statute/STATUTE-96/STATUTE-96-Pg1469.pdf; *see also* Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10703, 10704 (Feb. 23, 2021) (discussing the act).
[28] Dodd-Frank Act, Pub. L. 111-203, § 603, 124 STAT. 1376, 1597 (2010), https://www.congress.gov/111/statute/STATUTE-124/STATUTE-124-Pg1376.pdf; U.S. Government Accountability Office, GAO–12–160, Bank Holding Company Act: Characteristics and Regulation of Exempt Institutions and the Implications of Removing the Exemptions (Jan. 2012), https://www.gao.gov/products/GAO-12-160.
[29] *See* FDIC, "Parent Companies of Industrial Banks and Industrial Loan Companies," 86 Fed. Reg. 10703, 10707 (Feb. 23, 2021).
[30] *See* H.R. 5912, 117th Cong. (2021); S. 5189, 117th Cong. (2022); S. 3538, 118th Cong. (2023).

and not defined in the Proposed Rule, the FDIC's treatment of franchise value would give the agency considerable discretion to deny deposit insurance applications without any foundation in the FDI Act. If the FDIC intends for the term "franchise value" to mean the ability to market and sell a failing institution as a single entity – notwithstanding the fact that there are other lawful and acceptable means of resolution – such an interpretation is not a reasonable interpretation of the FDI Act or any statutory factor, including risk to the DIF.

Moreover, the Proposed Rule's preamble states that "[t]he FDIC's experience during the 2008–2009 Financial Crisis showed that business models involving an insured depository institution (IDI) inextricably tied to and reliant on the parent and/or its affiliates creates significant challenges and risks to the DIF, especially in circumstances where the parent organization experiences financial stress and/or declares bankruptcy"[31] and "that the franchise value of an IDI has implications for the resolution options that may be available to the FDIC."[32] However, the key case studies provided in the Preamble regarding NextBank, N.A. (or "NextBank"), Advanta Bank Corp. (or "Advanta"), and Lehman Brothers Holdings Inc. (or "Lehman Brothers") fail to support adequately the FDIC's conclusions regarding resolution costs, captive and shell institutions, and the concept of franchise value.

A. NextBank, N.A.

NextBank, N.A.[33] was actually a *national bank*,[34] not an industrial bank, that failed in 2002 after a period of rapid and unmanaged growth.[35] NextBank was the OCC's first Internet-only credit card bank, and it was shuttered by the OCC following a determination that the bank's unsafe and unsound practices had substantially dissipated assets and that insolvency was imminent without Federal assistance.[36] As described by the OCC Material Loss Review report, the bank was "[b]ased on an unproven technology-based business strategy," "lacked the systems, controls, and expertise to properly support its excessive growth in a safe and sound manner," and suffered "deficient accounting practices."[37]

While it is true that NextBank was considered a shell bank,[38] NextBank suffered from numerous other severe risk management and operational deficiencies that contributed to its failure, likely impeded efforts to sell the bank prior to failure,[39] and likely hindered its resolution

[31] Proposed Rule at 65561.
[32] Proposed Rule at 65563.
[33] *See* Proposed Rule at 65564 at n. 59.
[34] *See* OCC, Material Loss Review of NextBank, NA, OIG-03-024 (Nov. 26, 2002), https://www.govinfo.gov/content/pkg/GOVPUB-T72-PURL-LPS81581/pdf/GOVPUB-T72-PURL-LPS81581.pdf ("OCC Material Loss Review of NextBank").
[35] *See* OCC Material Loss Review of NextBank.
[36] *See* OCC Material Loss Review of NextBank.
[37] *See* OCC Material Loss Review of NextBank.
[38] *See* OCC Material Loss Review of NextBank.
[39] *See* OCC, "OCC Closes NextBank and Appoints FDIC Receiver" (Feb. 7, 2002), https://www.occ.gov/news-issuances/news-releases/2002/nr-occ-2002-9.html.

process. It is not representative of the current or prospective industrial banking sector, including captive or shell industrial banks.

B. Advanta Bank Corp.

Advanta Bank Corp. is one of two industrial banks to fail in the past 20 years,[40] and its supervisory posture and condition were unique. It is highly likely that failure would have been avoided if Part 354 (in its current form, without the changes in the Proposed Rule) was in place since the FDIC would have required capital and liquidity maintenance agreements ("CALMAs") and other written agreements between the FDIC and controlling parties of industrial banks.[41]

The FDIC material loss report for Advanta notes how the Utah Department of Financial Institutions ("UDFI") had described Advanta as "a unique industrial bank, in that its parent holding company did not engage in any commercial (mercantile) operations, did not generate a diverse revenue stream, and relied heavily on the success of the bank to support its own profitability."[42] If anything, the *holding company* was a shell, not the bank. Further, the report describes how "UDFI senior management stated that a significant weakness existed due to the lack of Capital and Liquidity Maintenance Agreements between the bank, the holding company, and the regulatory agencies. The UDFI officials stated that had these agreements been in place, Advanta Corp. could not have refused to provide additional support to Advanta, which could have mitigated the loss to the DIF. The UDFI stated that these agreements are currently formulated and placed on all new charters; however, this practice was not in place when Advanta was established."[43]

Based on the FDIC's own prior report on Advanta Bank Corp., which the FDIC even cites in the Preamble to the Proposed Rule, the FDIC's statement in the Preamble that "Advanta's parent company, Advanta Corp., filed for Chapter 11 Bankruptcy protection in November 2009 and refused to provide capital support to Advanta"[44] appears to be a gross oversimplification and poor support for the FDIC's position regarding the likely sequence of events for an industrial bank in distress.

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[40] *See* James Barth and Yanfei Sun, "Industrial banks: Challenging the traditional separation of commerce and banking," The Quarterly Review of Economics and Finance, at 225 (2019) (summarizing industrial bank closures between 2004 and 2017). No industrial banks have failed since 2017. *See* FDIC, "Bank Failures in Brief – Summary, https://www.fdic.gov/resources/resolutions/bank-failures/in-brief/index.

[41] *See* 12 C.F.R. § 354.3; Proposed Rule at 65558 ("Part 354 conforms to the FDIC's historical practice of requiring capital and liquidity maintenance agreements (CALMAs) and other written agreements between the FDIC and controlling parties of industrial banks as well as the imposition of prudential conditions when approving or non-objecting to certain filings involving an industrial bank.").

[42] FDIC Office of Inspector General, Material Loss Review of Advanta Bank Corp., Draper, Utah (Oct. 2010), https://www.fdicoig.gov/sites/default/files/reports/2022-08/11-002.pdf.

[43] FDIC Office of Inspector General, Material Loss Review of Advanta Bank Corp., Draper, Utah (Oct. 2010), https://www.fdicoig.gov/sites/default/files/reports/2022-08/11-002.pdf.

[44] Proposed Rule at 65563 n. 57.

C. Lehman Brothers Holdings Inc.

The FDIC cites to the 2008 bankruptcy of Lehman Brothers Holdings Inc. for the proposition that an industrial bank's franchise value would be diminished if service agreements with the parent company are terminated as a result of bankruptcy proceedings.[45] The FDIC then states that "[t]his situation could leave the FDIC in a position where it has no choice but to conduct resolution methods that are more disruptive and expensive."[46] However, the citation to the Lehman Brothers example is inadequate for a number of reasons.

Of particular note, as the FDIC has explained, it "could have structured an orderly resolution of Lehman Brothers Holdings Inc. under the orderly liquidation authority of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act had that law been in effect in advance of Lehman's failure."[47] The FDIC explained how this orderly liquidation "would have been vastly superior for systemic stability and achieved better recoveries for creditors than the bankruptcy process while protecting taxpayers from any loss."[48]

Further – and perhaps more importantly insomuch as the Lehman Brothers example is cited in relation to the risk posed by captive and shell institutions to the DIF – as the FDIC notes in its *Crisis and Response: An FDIC History, 2008-2013*, both of Lehman's insured depository institutions were ultimately wound down, undergoing "an orderly process of voluntarily selling assets, paying off depositors and other creditors, and ultimately ***ceasing operations without loss to the DIF***."[49]

Besides the fact that the case studies do not directly support a proposition regarding franchise value and captive or shell institutions, it is strange that the FDIC cites primarily to examples that preceded the publication of the initial Part 354 rulemaking in 2021. The FDIC does not adequately explain the sudden need for a shift in policy based on events that are decades old and that were presumably taken into account by the FDIC when Part 354 was originally promulgated.

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[45] *See* Proposed Rule at 65563-64 n. 58.
[46] *See* Proposed Rule at 65563-64.
[47] FDIC, "The Orderly Liquidation of Lehman Brothers Holdings under the Dodd-Frank Act," https://www.fdic.gov/laws-and-regulations/orderly-liquidation-lehman-brothers-holdings-under-dodd-frank-act; *see also* FDIC Office of Inspector General Semiannual Report to the Congress (Apr. 1- Sept. 30, 2012), https://www.fdicoig.gov/sites/default/files/reports/2022-08/2012OIGSemiOct.pdf ("Prior to the crisis, the FDIC did not have the authority to place either the parent company of a bank or the nonbank affiliates within the holding company into receivership. It also lacked the authority to resolve large, nonbank holding companies, like Lehman Brothers Holdings Inc. Title II of the Dodd-Frank Act changed that, enabling the FDIC to resolve the insured depository institution, its parent holding company, and any affiliate and other non-bank systemically important financial institutions.").
[48] FDIC, "The Orderly Liquidation of Lehman Brothers Holdings under the Dodd-Frank Act," https://www.fdic.gov/laws-and-regulations/orderly-liquidation-lehman-brothers-holdings-under-dodd-frank-act.
[49] *See* FDIC, *Crisis and Response—An FDIC History, 2008-2013*, 134 (2017) at p. 134, https://www.fdic.gov/sites/default/files/2024-03/crisis-response.pdf (emphasis added).

IV. The Proposed Rule is vague in its application in order to give the FDIC unchecked discretion.

The Proposed Rule is unconstitutionally vague for its failure to clarify which statutory factors[50] are implicated by the presumption against captive or shell business models. A "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[51] As the Supreme Court has explained, "the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[52]

Under the Proposed Rule, the "FDIC will presume that the shell or captive nature of an industrial bank involved in a filing weighs heavily against favorably resolving ***one or more applicable statutory factors***."[53] However, the proposed rule text does not actually enumerate a particular factor that will be presumptively unmet or explain how a shell or captive structure speaks negatively to a particular statutory factor.

The lack of specificity would fail to sufficiently guide prospective applicants and will also fail to allow applicants to proffer the rebuttal that is contemplated in the proposed text. If shell or captive bank status is tantamount to a denial, the regulation does not provide fair notice of what is required or prohibited.

V. The FDIC relies on a narrow interpretation of how a bank may serve the convenience and needs of its community, reading in new requirements to serve unmet needs not filled by nonbanks and a policy against certain business models.

Through the Preamble, the Proposed Rule articulates a new interpretation of the "convenience and needs" statutory factor in the FDI Act, which requires consideration of "the convenience and needs of the community to be served by such depository institution."[54] In the Proposed Rule's preamble, the FDIC categorically concludes that "[b]usiness models that are not generally available to the members of the community absent purchasing a product by an affiliated entity raise serious questions as to whether the general community is sufficiently served

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[50] Additionally, because the proposed language refers broadly to "filings" without any reference to a particular set of statutory factors, it is even unclear whether the presumption is meant to inform evaluation of the seven statutory factors used to decide deposit insurance applications under section 6 of the FDI Act or, for example, the various factors underlying the evaluation of a merger proposal under section 18(c) of the FDI Act.

[51] F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012). The void for vagueness doctrine has been applied in the context of denial or revocation of business licenses, which is analogous to a deposit insurance application. See, e.g. Peekay, Inc. v. City of Lacey, No. C03-5664RSM, 2005 WL 8173379, at *4 (W.D. Wash. Mar. 21, 2005); Housworth v. Glisson, 485 F. Supp. 29, 38 (N.D. Ga. 1978).

[52] FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

[53] Proposed Rule at 65568, Proposed 12 C.F.R. § 354.6(c)(2) (emphasis added).

[54] 12 U.S.C. § 1816(6).

to merit the grant of deposit insurance."[55] The Preamble implies that the FDIC will use this new interpretation of the "convenience and needs" factor as a "presumption" against approval akin to the presumption against shell and captive institutions, with the FDIC stating that "[s]imilar to the other presumption in proposed § 354.6(c)(1), the FDIC would review each filing on a case-by-case basis and filers may present facts to demonstrate that the community is effectively served notwithstanding the fact that the product offerings would be limited to customers of the affiliated entity or to a narrow segment only."[56] The FDIC purports to establish this presumption through the Preamble without any corresponding changes to the text of Part 354.

The FDIC also seems to establish through the Preamble a policy that "if there are existing non-bank captive finance firms serving the proposed community, the FDIC would evaluate the additional benefits of an industrial bank in meeting the convenience and needs of the community, and if the benefits of the insured bank (such as lower cost funds) accrue primarily [to] the parent rather than to the community, this may weigh against favorably resolving the convenience and needs statutory factor."[57]

While sales connected to affiliate products and competition from nonbank entities impact banks of all charters, the FDIC appears to announce a shift in policy that will create uneven expectations for applications from industrial banks versus banks with other charters.

The FDIC's current approach to evaluating the "convenience and needs" factor involves a review of the applicant's proposed approach to performance under the Community Reinvestment Act and other aspects of the applicant's proposed business plan.[58] If the Proposed Rule is finalized as written, the "convenience and needs" factor will have two very different interpretations depending on whether the applicant is an industrial bank with a shell or captive charter versus any other institution applying for deposit insurance. This disadvantage is not required or permitted in the FDI Act and discriminates against industrial banks with no valid supervisory or legal justification.

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[55] Proposed Rule at 65562.
[56] Proposed Rule at 65562.
[57] Proposed Rule at 65562.
[58] *See* FDIC, Deposit Insurance Applications: Procedures Manual Supplement: Applications from Non-Bank and Non-Community Bank Applicants (Dec. 2019) at p. 9, https://www.fdic.gov/sites/default/files/2024-03/procmanual-supplement.pdf. The FDIC statement of policy regarding deposit insurance applications explains that "[t]he essential considerations in evaluating [the convenience and needs] factor are the deposit and credit needs of the community to be served, the nature and extent of the opportunity available to the applicant in that location, and the willingness and ability of the applicant to serve those financial needs." *See* Applications for Deposit Insurance, 63 Fed. Reg. 44752, 44760 (Aug. 20, 1998). The FDIC describes that Community Reinvestment Act documentation forms an "important part of the FDIC's evaluation of the convenience and needs of the community to be served." *Id.*

VI. The Proposed Rule makes it more difficult for certain companies to submit applications for deposit insurance without any legitimate policy or other interest that the FDIC may take into account in promulgating regulations.

The FDIC has approved only three industrial bank deposit insurance applications in the years following 2008.[59] The Proposed Rule states that "[o]f the nine applications received since March 2020, one was approved, six have been withdrawn, one was returned as substantially incomplete, and one remains pending."[60] The Proposed Rule's preamble also observes the "continuing interest in the establishment of industrial banks, particularly with regard to proposed institutions that plan to implement specialty or limited purpose business models, including those where the operations of the proposed industrial bank would be interconnected with, or reliant on, the operations of the parent company or its affiliates."[61]

Against this backdrop – new industrial bank applications are rarely approved yet there remains continuing interest in deposit insurance applications – there are questions about whether the FDIC is processing such applications in accordance with applicable law and regulation. To this end, members of Congress have sent three different letters in the past three years imploring the FDIC to review and consider industrial bank applications in accordance with the law.[62]

The FDIC's reliance in the Proposed Rule on case studies to justify the changes to part 354 – case studies which predate the original publication of the Part 354 rulemaking – begs the question of why the FDIC is seeking to amend part 354 at this time. The plain reason is that the FDIC is codifying the approach that it has adopted informally to discourage industrial bank applications so that it can better justify the determinations that lead applicants to withdraw their applications, even if these determinations are not founded in the FDI Act, supported by its stated reasoning, or consistent with the FDIC's part 354 rulemaking.[63]

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[59] Proposed Rule at 65558.
[60] Proposed Rule at 65558.
[61] Proposed Rule at 65557.
[62] *See* Letter from Senators Romney, Cortez Masto, Blackburn, King, Collins, Peters, Hagerty, Rosen, Lee, Sinema, Ricketts, and Stabenow to The Honorable Martin J. Gruenberg, FDIC, The Honorable Jonathan McKernan, FDIC, The Honorable Travis Hill, FDIC, The Honorable Michael J. Hsu, FDIC, The Honorable Rohit Chopra, FDIC (Mar. 13, 2024); Letter from Congressmen Barr, Meeks, Luetkemeyer, Gonzalez, Huizenga, Torres, Loudermilk, Veasey, and Moore to The Honorable Martin J. Gruenberg, FDIC, The Honorable Jonathan McKernan, FDIC, The Honorable Travis Hill, FDIC, The Honorable Michael J. Hsu, FDIC, The Honorable Rohit Chopra, FDIC (Aug. 30, 2023); Letter from Senators Romney, Cortez Masto, Blackburn, Blunt, Hagerty, Lee, Rosen, Peters, and Sinema to The Honorable Martin Gruenberg, FDIC (Sep. 15, 2022).
[63] *See* Dep't of Com. v. New York, 588 U.S. 752, 783, 785 (2019) ("It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. . . . And yet, . . . [s]everal points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided. . . [W]e cannot ignore the disconnect between the decision made and the explanation given.").

We respectfully urge the FDIC not to finalize a rule that could impede its ability to fairly evaluate the merits of industrial bank applications in accordance with its statutory obligations.

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GM Financial appreciates the agency's consideration of our comments. If you have any questions, please contact me at [redacted].

Respectfully submitted,

[redacted]

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