October 11, 2024

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20249
Attention: James P. Sheesley, Assistant Executive Secretary

Re: Notice of Proposed Rulemaking, Parent Companies of Industrial Banks and Industrial Loan Companies (RIN 3064-AF88)

Dear Secretary Sheesley:

Founded in 1916, the American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. In 1971, AFSA merged with the American Industrial Bankers Association, an organization of industrial banks, thrift and loan companies, and sales finance companies, and we are proud to continue to represent those banks.[1]

With this long history, AFSA has a keen interest in the outcome of this rulemaking by the Federal Deposit Insurance Corporation (FDIC). Our comments focus on policy issues arising from the proposed rule. While we focus herein on policy issues, we call your attention to the detailed comment letter addressing specific provisions filed by the National Association of Industrial Bankers.

As drafted, the rule is an unwarranted attack on a form of chartered banking that has operated since 1910—predating the establishment of the FDIC by 23 years—while compiling among the best records of capitalization and profitability of any group of banks in the nation.

Industrial banks continue to demonstrate financial strength in meeting the needs of the communities that they serve. Since 1987, the year that industrial banks were permitted by Congress to access federal deposit insurance, industrial banks have been among the best capitalized, most profitable, safest and soundest banks insured by the FDIC. During the financial crisis of 2008 and the subsequent Great Recession, only one industrial bank failed in contrast to the failure of 529 FDIC-insured banks owned by a Federal Reserve-regulated bank holding company.

Further, industrial banks continue to outperform other FDIC-insured banks. At the end of 2023, industrial banks held 10.8% equity to assets, up from 9.9% in 2022, which compares favorably to all banks that held 9.7% equity to assets at the end of 2023 and 9.4% at year end 2022. Similarly, return on assets for industrial banks was 2.10% for 2023 compared to 1.09% for all banks and return on equity in 2023 for industrial banks was 19.5% compared to 11.9% for all banks.

The proposed rule is another chapter in the FDIC's desultory history of attempting to hamstring industrial banks, and it should be withdrawn.

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[1] Depending on definitions in their organic state laws, these institutions are called "industrial banks," "thrift and loans," "Morris Plans," or "industrial loan companies" (ILCs)." To conform with the terminology in the proposed rule, in this letter we will use the term "industrial bank."

The proposed rulemaking attempts to change industrial banks' ownership structure, which has long been permitted by federal law. We believe the legislative history is instructive. When Congress enacted the Bank Holding Company Act of 1956, it exempted several types of FDIC-insured chartered banks, including industrial banks, municipal deposit banks, and trust banks with insured deposits. In the 1982 Garn-St. Germain Depository Institutions Act, Congress authorized deposit insurance for state-chartered industrial banks. In the Competitive Equality Banking Act of 1987, Congress added a new type of exempt charter—the limited-purpose credit card bank—while restricting the chartering of new industrial banks to states that offered the charter before 1987.

The Dodd-Frank Act of 2010 placed a moratorium on the acquisition of industrial banks by commercial firms, directing the Government Accountability Office (GAO) to study how financial institutions that are exempt from the Bank Holding Company Act impact the safety and soundness of institutions or the stability of the financial system. After the GAO found no systemic threat, the moratorium expired in July 2013.

The timing of the proposed rule cannot be worse for the FDIC. In the aftermath of the Supreme Court of the United States decision in *Loper Bright Enterprises v. Raimondo* [2] which overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[3] the FDIC seeks to overturn industrial banks' existing structure and regulation.

In the proposed rule, the FDIC attempts to comply with *Loper* by raising a safety and soundness issue by deeming that an industrial bank whose business plan relies on affiliates or has an undefined, "novel" business plan would effectively be blocked from approval of an application.[4]

Yet, the FDIC offers no discernible justification for this stunning policy change. Congress has not amended the Federal Deposit Insurance Act. The underlying regulation has been in place since 2021, and the proposed rule cites no empirical data relating to industrial bank performance or conduct supporting the changes. This lack of empirical data and justification raises serious concerns about the proposed rule's potential impact.

The proposed rulemaking changes the operation of existing and prospective industrial bank charters. These sweeping policy questions are more appropriately addressed by Congress and the state legislatures that created the existing regime authorizing industrial banks and their current parent-subsidiary structure.

In their July 10, 2024 letter to Chairman Gruenberg, House Financial Services Committee Chair McHenry and House Oversight Committee Chairman Comer pose a series of questions about current pending rulemaking in the context of the *Loper Bright* decision. Among other things, they ask for information about interpretive rules proposed or issued since January 20, 2021, which would likely lead to an annual effect on the economy of $100 million or more, a major increase in costs to consumers and individual industries, and adverse effects on United States-based enterprises.

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[2] 603 U.S.___(2024) at https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf

[3] 467 U.S. 837 (1984)

[4] We note Chevron deference did not govern the power of agencies to write or interpret regulations. Instead, *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945), spawned the analogous"*Auer* deference." Although narrowed in *Kisor v. Wilkie*, 588 U.S. __(2019), 139 S. Ct. 2400; 204 L. Ed. 2d 841, the Supreme Court did not overturn the cases, but Auer deference will likely be challenged to conform to the standards of *Loper Bright.*

We await the FDIC's reply with interest—for example, the economic impact of limiting automobile or farm implement manufacturers' ability to obtain industrial bank charters easily exceeds the thresholds of the chairs' query.

Though not required to be regulated as federal bank holding companies, owners of industrial banks are subject to many of the same requirements as bank holding companies, such as strict restrictions on transactions with their bank affiliates. They are regulated under state law, they are subject to thorough examination by the FDIC, and to "prompt corrective action" and capital guarantee requirements if the banks they control encounter financial difficulties.

This regime is unchanged, and *no* fact-based finding suggests that this current process needs to be improved or has failed.

The timing of the proposed rule—the comment period ends a scant 25 days before a contentious federal election, which may portend significant shifts in public policy—casts a pall on the necessity for this rulemaking. This is perilously close to "midnight rulemaking," wherein an outgoing Administration seeks to achieve policy goals before leaving office—labeled by the Congressional Research Service and other commentators as the "Cinderella effect."[5] Here, the FDIC Chair, a well-known opponent of the industrial banks charter, has tendered his resignation. While public policy does not solely rest on one appointee, neither should policy changes serve as a parting gift to a departing agency head.

While the drafters of the proposed rule seemingly ignore Article 1 of the Constitution, which vests all "legislative" powers with Congress, which has, as noted above, regularly enacted legislation authorizing industrial banks—they have a thesaurus.

Although the FDI Act uses the term "subsidiary" 16 times, the proposed rule introduces the terms "shell" and "captive" to refer to industrial banks with commercial parent companies—two terms not found in the FDI or the Banking Holding Company Acts.

Notwithstanding the rebranding, the FDIC has invented hitherto-fore undiscovered risks in the operation of industrial banks with parent companies. This suggests that the state banking regulators, considering industrial bank charters, likely ignore the need for a robust business plan and lack the wherewithal to examine the successful execution of those plans.

This view is hardly surprising as the entire rulemaking never references the Nevada Financial Institutions Division or the Utah Department of Financial Institutions—the two agencies that successfully regulate the preponderance of industrial banks.

The FDIC proposes a policy that well-capitalized parent companies are inherently risky stating,

[5] Carey, Maeve P. (October 4, 2016). *Midnight Rulemaking: Background and Options for Congress*. (CRS Report No. R42612).
See also Veronique de Rugy and Antony Davies, (2009), *Midnight regulations and the Cinderella effect*, Journal of Behavioral and Experimental Economics (formerly The Journal of Socio-Economics).

"The heavily integrated relationship between the industrial bank and the parent organization results in significant concentration risks that are typically not present in traditional community bank operating structures."

This ignores the tangible benefits offered by these structures. Along with expertise in specific markets and product lines, these parent organizations are strong sources of support, capital, and strength for the bank, typically much more substantial than any bank holding company. Thus, industrial banks rarely have difficulty obtaining all the capital they need.

We are puzzled as to why the FDIC cites the "traditional community bank" structure as a model. Many of those institutions—while doing fine work in their communities are, like their larger brethren, bank holding companies. Many of these banks are so small that their owners elect to be taxed as individuals under Subchapter S of the Internal Revenue Code. The "parent" bank holding company is closer to a "shell"—although we note that term is not used and the bank is evidently not a "captive." Nomenclature aside, the parent holding company is unlikely to be a source of support, strength, or capital.

We strongly believe that promoting the entry of well-capitalized entities into the banking sector is a more beneficial public policy for consumers and businesses. This reasonable approach would also enable the FDIC to diversify the concentration of risk to the insurance fund, which is currently posed by a few large institutions.

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For the foregoing reasons, we urge the FDIC to withdraw this proposal.

Respectfully submitted,

Celia Winslow
Executive Vice President
American Financial Services Association