• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The Regulatory Issue Summary 2020–XX, Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants is available in ADAMS under Accession No. ML20008D562.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2020–0073 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

The NRC, in collaboration with the Department of Homeland Security, has identified several instances where a licensee has failed to appropriately verify, in the case of foreign nationals seeking UA and/or UAA, that the claimed non-immigration status that the individual has provided is correct. Consequently, foreign nationals have been granted UA and UAA at United States nuclear power plants for the purpose of work using visa categories that do not permit foreign nationals to work in the United States.

The NRC issues RISs to communicate with stakeholders on a broad range of matters. This may include communication and clarification of NRC technical or policy positions on regulatory matters that have not been communicated to or are not broadly understood by the nuclear industry.

As noted in 83 FR 20858 (May 8, 2018), this document is being published in the Proposed Rules section of the **Federal Register** to comply with publication requirements under 1 CFR chapter I.

Proposed Action

The NRC is requesting public comments on the draft RIS. The NRC staff will make a final determination regarding issuance of the RIS after it considers any public comments received in response to this request.

Dated at Rockville, Maryland, this 24th day of March 2020.

For the Nuclear Regulatory Commission.

Lisa M. Regner,

Branch Chief, Operating Experience Branch, Division of Reactor Oversight, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–06473 Filed 3–30–20; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 354

RIN 3064–AF31

Parent Companies of Industrial Banks and Industrial Loan Companies

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking with request for public comment.

SUMMARY: The Federal Deposit Insurance Corporation is seeking comment on a proposed rule that would require certain conditions and commitments for each deposit insurance application approval, non-objection to a change in control notice, and merger application approval that would result in an insured industrial bank or industrial loan company becoming, after the effective date of any final rule, a subsidiary of a company that is not subject to consolidated supervision by the Federal Reserve Board. The proposed rule also would require that before any industrial bank or industrial loan company may become a subsidiary of a company that is not subject to consolidated supervision by the Federal Reserve Board, such company and the industrial bank or industrial loan company must enter into one or more written agreements with the Federal Deposit Insurance Corporation.

DATES: Comments will be accepted until June 1, 2020.

ADDRESSES: You may submit comments on the notice of proposed rulemaking using any of the following methods:

• *Agency Website: https://www.fdic.gov/regulations/laws/federal.* Follow the instructions for submitting comments on the agency website.

• *Email: comments@fdic.gov.* Include RIN 3064–AF31 on the subject line of the message.

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

• *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

• *Public Inspection:* All comments received, including any personal information provided, will be posted generally without change to *https://www.fdic.gov/regulations/laws/federal.*

FOR FURTHER INFORMATION CONTACT: Mark Flanigan, Senior Counsel, (202) 898–7426, *mflanigan@fdic.gov;* Catherine Topping, Counsel, (202) 898–3975, *ctopping@fdic.gov;* Gregory Feder, Counsel, (202) 898–8724, *gfeder@fdic.gov;* Joyce Raidle, Counsel, (202) 898–6763, *jraidle@fdic.gov;* Merritt Pardini, Counsel, (202) 898–6680, *mpardini@fdic.gov;* Kayce Seifert, Senior Attorney, (202) 898–3625, *kseifert@fdic.gov,* Legal Division; Don Hamm, Special Advisor, (202) 898–3528, *dhamm@fdic.gov;* Scott Leifer, Senior Review Examiner, (508) 698–0361, Extension 8027, *sleifer@fdic.gov,* Division of Risk Management Supervision.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The Federal Deposit Insurance Corporation (FDIC) monitors, evaluates, and takes necessary action to ensure the safety and soundness of State nonmember banks,[1] including industrial banks and industrial loan companies (together, industrial banks).[2] In granting

[1] *See* 12 U.S.C. 1811, 1818, 1821, 1831*o*–1, 1831*p*–1.

[2] Herein, the term ''industrial bank'' means any insured State-chartered bank that is an industrial bank, industrial loan company, or other similar institution that is excluded from the definition of ''bank'' in the Bank Holding Company Act pursuant to 12 U.S.C. 1841(c)(2)(H). State laws refer to both industrial loan companies and industrial banks. For purposes of this proposed rule, the FDIC is treating the two types of institutions as the same.

deposit insurance, issuing a non-objection to a change in control, or approving a merger, the FDIC must consider the factors listed in sections 6,[3] 7(j),[4] and 18(c),[5] respectively, of the Federal Deposit Insurance Act (FDI Act). As deposit insurer and as the appropriate Federal banking agency for industrial banks, the FDIC supervises industrial banks. A key part of its supervision is evaluating and mitigating the risks arising from the activities of the control parties and owners of insured industrial banks to ensure they do not threaten the safe and sound operations of those industrial banks or pose undue risk to the Deposit Insurance Fund (DIF).

Existing State and Federal laws allows both financial and commercial companies to own and control industrial banks. Congress expressly adopted an exception to permit such companies to own and control industrial banks, without becoming a bank holding company (BHC) under the Bank Holding Company Act (BHCA), as part of the Competitive Equality Banking Act of 1987 (CEBA).[6] The purpose of the proposed rule is to codify existing practices utilized by the FDIC to supervise industrial banks and their parent companies, to mitigate undue risk to the DIF that may otherwise be presented in the absence of Federal consolidated supervision [7] of an industrial bank and its parent company, and to ensure that the parent company that owns or controls an industrial bank serves as a source of financial strength for the industrial bank, consistent with section 38A of the FDI Act.[8]

In recent years, there has been renewed interest in establishing *de novo* institutions, including industrial banks. Proposals regarding industrial banks have presented unique risk profiles compared to traditional community bank proposals. These profiles have included potential owners that would not be subject to Federal consolidated supervision, affiliations with organizations whose activities are primarily commercial in nature, and non-community bank business models.[9] Some public comments regarding these proposals have argued that the current use of the charter inappropriately mixes banking and commerce and raises risk to the DIF as a result of a lack of Federal consolidated supervision over the parent company. Some commenters have requested that the FDIC impose a new moratorium on deposit insurance applications involving industrial banks.[10] Other commenters have supported the industrial bank charter citing the benefits of increased competition and the provision of financial services to underserved markets. These commenters further argue the charter poses no increased risk to the DIF.

Given the continuing evolution in the use of the industrial bank charter, the unique nature of applications seeking to establish *de novo* industrial banks, and the legitimate considerations raised by interested parties—both in support of and opposed to the industrial bank charter—the FDIC believes a rule formalizing and strengthening the FDIC's existing supervisory processes and policies that apply to parent companies of industrial banks that are not subject to Federal consolidated supervision is timely and appropriate. The proposed rule would also provide interested parties with transparency regarding the FDIC's practices when making determinations on filings involving industrial banks.

II. Background: Regulatory Approach and Market Environment

A. History

Industrial banks began as small State-chartered loan companies in the early 1900s to provide small loans to industrial workers. The industrial bank charter developed as an alternative to a traditional commercial bank charter because commercial banks generally were unwilling to offer uncollateralized loans to factory workers and other wage earners with moderate incomes. Industrial banks became the leading providers of consumer credit to this underserved market through the 1920s and 1930s. Over time, commercial banks expanded their consumer lending business and by the post-World War II period, industrial banks represented only a small segment of the consumer lending market.

Initially, many industrial banks did not accept any deposits and funded themselves instead by issuing investment certificates. However, the Garn-St. Germain Depository Institutions Act of 1982,[11] among other effects, made all industrial banks eligible for Federal deposit insurance. This expanded eligibility for Federal deposit insurance brought industrial banks under the supervision of both a State authority and the FDIC.[12] The chartering States gradually expanded the powers of their industrial banks so that today industrial banks generally have the same commercial and consumer lending powers as commercial banks.

Under the FDI Act, industrial banks are ''State banks'' [13] and all of the existing FDIC-insured industrial banks are ''State nonmember banks''.[14] As a result, their primary Federal regulator is the FDIC.[15] Each industrial bank is also regulated by its respective State chartering authority. The FDIC generally exercises the same supervisory and regulatory authority over industrial banks as it does over other State nonmember banks.

B. Industrial Bank Exclusion Under the BHCA

In 1987, Congress enacted CEBA, which exempted industrial banks from the definition of ''bank'' in the BHCA. As a result, parent companies that control industrial banks are not BHCs under the BHCA and are not subject to the BHCA's activities restrictions or FRB supervision and regulation. The industrial bank exemption in the BHCA therefore provides an avenue for commercial firms to own or control a bank. By contrast, BHCs and savings and loan holding companies are subject to Federal consolidated supervision by

[3] 12 U.S.C. 1816.

[4] 12 U.S.C. 1817(j).

[5] 12 U.S.C. 1828(c).

[6] Public Law 100–86, 101 Stat. 552 (Aug. 10, 1987).

[7] In the context of the proposed rule, ''Federal consolidated supervision'' refers to the supervision of a parent company and its subsidiaries by the Federal Reserve Board (FRB). Consolidated supervision of a bank holding company by the FRB encompasses the parent company and its subsidiaries, and allows the FRB to understand ''the organization's structure, activities, resources, and risks, as well as to address financial, managerial, operational, or other deficiencies before they pose a danger to the BHC's subsidiary depository institutions.'' *See* SR Letter 08–9, ''Consolidated Supervision of Bank Holding Companies and the Combined U.S. Operations of Foreign Banking Organizations'' (Oct. 16, 2008).

[8] 12 U.S.C. 1831*o*–1(b).

[9] *See* FDIC Deposit Insurance Applications, Procedures Manual Supplement, Applications from Non-Bank and Non-Community Bank Applicants, FIL–8–2020 (Feb. 10, 2020).

[10] In 2010, the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) imposed a three-year moratorium on new industrial bank charters that were owned or controlled by a commercial firm. This moratorium expired in July 2013. Historical information regarding moratoria on industrial bank filings is discussed later in this preamble in section II.

[11] Public Law 97–320, 96 Stat. 1469 (Oct. 15, 1982).

[12] Prior to 1982, the FDIC had allowed some industrial banks to become Federally insured, but FDIC insurance was typically limited to those industrial banks chartered by States where the relevant State's law allowed them to receive ''deposits'' or to use ''bank'' in their name. For additional historical context regarding industrial bank supervision, see *The FDIC's Supervision of Industrial Loan Companies: A Historical Perspective,* Supervisory Insights (2004).

[13] 12 U.S.C. 1813(a)(2).

[14] 12 U.S.C. 1813(e)(2).

[15] 12 U.S.C. 1813(q)(2).

the FRB and are generally prohibited from engaging in commercial activities.[16]

More specifically, CEBA redefined the term ''bank'' in the BHCA to include: (1) Any FDIC-insured institution, and (2) any other institution that accepts demand or checkable deposit accounts and is engaged in the business of making commercial loans.[17] This change effectively closed the so-called ''non-bank bank'' exception implicit in the prior BHCA definition of ''bank''. The CEBA created explicit exemptions from this definition for certain categories of Federally insured institutions, including industrial banks, credit card banks, and limited purpose trust companies. The exclusions from the definition of the term ''bank'' remain in effect today. To be eligible for the CEBA exemption from the BHCA definition of ''bank,'' an industrial bank must have received a charter from one of the limited number of States eligible to issue industrial bank charters, and the law of the chartering State must have required Federal deposit insurance as of March 5, 1987. In addition, an industrial bank must meet one of the following criteria: (i) Not accept demand deposits; [18] (ii) have total assets of less than $100 million; or (iii) have been acquired prior to August 10, 1987.[19]

Industrial banks are currently chartered in California, Hawaii, Minnesota, Nevada, and Utah. Under CEBA, these States were permitted to grandfather existing industrial banks and continue to charter new industrial banks.[20] Generally, industrial banks offer limited deposit products, a full range of commercial and consumer loans, and other banking services. Most industrial banks do not offer demand deposits. Negotiable order of withdrawal (NOW) accounts [21] may be offered by industrial banks.[22] Industrial banks have branching rights, subject to certain State law constraints.

C. Industry Profile

The industrial bank industry has evolved since the enactment of CEBA. The industry experienced significant asset growth between 1987 and 2006 when total assets held by industrial banks grew from $4.2 billion to $213 billion.[23] From 2000 to 2006, 24 industrial banks became insured.[24] As of January 30, 2007, there were 58 insured industrial banks with $177 billion in aggregate total assets.[25] The ownership structure and business models of industrial banks evolved as industrial banks were acquired or formed by a variety of commercial firms, including, among others, BMW, Target, Pitney Bowes, and Harley Davidson. For instance, certain companies established industrial banks, in part, to support the sale of the manufactured products (*e.g.* automobiles) or other services, whereas certain retailers established industrial banks to issue general purpose credit cards. In addition, certain financial companies also formed or acquired industrial banks to provide access to Federal deposit insurance for brokerage customers' cash management account balances. The cash balances their customers maintain with the securities affiliate are swept into insured, interest-bearing accounts at the industrial bank subsidiary, thereby providing the brokerage customers with FDIC-insured deposits.

Since 2007, the industrial bank industry has experienced contraction both in terms of the number of institutions and aggregate total assets. As of December 31, 2019, there were 23 industrial banks [26] with $141 billion in aggregate total assets. Four industrial banks reported total assets of $10 billion or more; eight industrial banks reported total assets of $1 billion or more but less than $10 billion. The industrial bank industry today includes a diverse group of insured financial institutions operating a variety of business models. A significant number of the 23 existing industrial banks support the commercial or specialty finance operations of their parent company and are funded through non-core sources.

The reduction in the number of industrial banks from 2007 to 2019 was due to a variety of factors, including mergers, conversions, voluntary liquidations, and the failure of two small institutions.[27] For business, marketplace, or strategic reasons, several existing industrial banks converted to commercial banks and thus became ''banks'' under the BHCA. Four industrial banks were approved in 2007 and 2008; however, none of those institutions exist today.[28] No other industrial banks have been established since 2008, largely due to moratoria imposed by the FDIC and Congress (as discussed below).

Since the beginning of 2017, the FDIC has received nine Federal deposit insurance applications related to proposed industrial banks. Of those, four have been withdrawn and five are pending.[29] None of the potential parent

[16] Section 4 of the BHCA generally prohibits a BHC from acquiring ownership or control of any company which is not a bank or engaging in any activity other than those of banking or of managing or controlling banks and other subsidiaries authorized under the Act. *See* 12 U.S.C. 1843(a)(1) and (2). The Home Owners' Loan Act (HOLA) governs the activities of savings and loan holding companies, as amended by the Dodd-Frank Act, which generally subjects these companies to the permissible financial holding company activities under 4(k) of the BHCA (12 U.S.C. 1843(k), activities that are financial in nature or incidental to a financial activity). *See* 12 U.S.C. 1467a(c)(2)(H).

[17] 12 U.S.C. 1841(c)(1).

[18] Regulation D implements the reserve requirements of section 19 of the Federal Reserve Act and defines a demand deposit as a deposit that is payable on demand, or issued with an original maturity or required notice period of less than seven days, or a deposit representing funds for which the depository institution does not reserve the right to require at least seven days' written notice of an intended withdrawal. Demand deposits may be in the form of (i) checking accounts; (ii) certified, cashier's, teller's, and officer's checks; and (iii) traveler's checks and money orders that are primary obligations of the issuing institution. Other forms of accounts may also meet the definition of ''demand deposit''. *See* 12 CFR 204.2(b)(1).

[19] 12 U.S.C. 1841(c)(2)(H).

[20] Colorado was also grandfathered but it has no active industrial banks and has since repealed its industrial bank statute.

[21] A NOW account is an interest-earning bank account whereby the owner may write drafts against the money held on deposit. NOW accounts were developed when certain financial institutions were prohibited from paying interest on demand deposits. The prohibition on paying interest on demand deposits was lifted when the FRB repealed its Regulation Q, effective July 21, 2011. *See* 76 FR 42015 (July 18, 2011). Many provisions of the repealed Regulation Q were transferred to the FRB's Regulation D. *See* 12 CFR part 204.

[22] 12 U.S.C. 1832(a). Only certain types of customers may maintain deposits in a NOW account. 12 U.S.C. 1832(a)(2).

[23] Most of the growth during this period is attributable to financial services firms that controlled industrial banks offering sweep deposit programs to provide Federal deposit insurance for customers' free cash balances and to American Express moving its credit card operations from its Delaware-chartered credit card bank to its Utah-chartered industrial bank.

[24] During this time period, the FDIC received 57 applications for Federal deposit insurance for industrial banks, 53 of which were acted on. Also during this time period, 21 industrial banks ceased to operate due to mergers, conversions, voluntary liquidations, and one failure.

[25] Of the 58 industrial banks existing at this time, 45 were chartered in Utah and California. The remaining industrial banks were chartered in Colorado, Hawaii, Minnesota, and Nevada.

[26] Of the 23 industrial banks, 14 were chartered in Utah, four in Nevada, three in California, one in Hawaii, and one in Minnesota.

[27] Security Savings Bank, Henderson, Nevada failed in February 2009 and Advanta Bank Corporation, Draper, Utah failed in March 2010.

[28] In each case, the institution pursued a voluntary transaction that led to termination of the respective institution's industrial bank charter. One institution converted to a commercial bank charter and continues to operate, one merged and the resultant bank continues to operate, and two terminated deposit insurance following voluntary liquidations. Such transactions generally result from proprietary strategic determinations by the institutions and their parent companies or investors.

[29] Decisions to withdraw an application are made at the discretion of the organizers and can be attributed to a variety of reasons. In some cases, an

Continued

companies of the pending industrial bank applicants would be subject to Federal consolidated supervision. The FDIC anticipates potential continued interest in the establishment of industrial banks, particularly with regard to proposed institutions that plan to pursue a specialty or limited purpose business model.

D. Supervision

Because industrial banks are insured State nonmember banks, they are subject to the FDIC's Rules and Regulations, as well as other provisions of law, including restrictions under the Federal Reserve Act governing transactions with affiliates,[30] anti-tying provisions of the BHCA,[31] insider lending regulations, consumer protection laws and regulations, and the Community Reinvestment Act. Industrial banks are also subject to regular examination, including examinations focused on safety and soundness, Bank Secrecy Act and Anti-Money Laundering compliance, consumer protection, information technology (IT), and trust services, as appropriate. Pursuant to section 10(b)(4) of the FDI Act, the FDIC has the authority to examine the affairs of any industrial bank affiliate, including the parent company, as may be necessary to determine the relationship between the institution and the affiliate, and the effect of such relationship on the depository institution.[32]

As part of the Dodd-Frank Act,[33] Congress adopted section 38A of the FDI Act, which imposes a ''source of financial strength'' requirement on any company that directly or indirectly controls an insured depository institution and is otherwise exempt from the BHCA or the HOLA.[34] Consistent with section 38A and other authorities under the FDI Act, the FDIC has historically required capital and liquidity maintenance agreements and other written agreements between the FDIC and controlling parties of industrial banks as well as the imposition of prudential conditions when granting deposit insurance to an industrial bank or issuing a nonobjection to a change in control notice involving an industrial bank. Such written agreements provide required commitments for the parent company to provide financial resources and a means for the FDIC to pursue formal enforcement action under sections 8 and 50 of the FDI Act[35] should a party fail to comply with the agreements.

E. GAO and OIG Reports

Beginning in 2004, the FDIC Office of Inspector General (OIG) conducted two evaluations and the Government Accountability Office (GAO) conducted a statutorily mandated study regarding the FDIC's supervision of industrial banks, including its use of prudential conditions.[36] An OIG evaluation published in 2004 focused on whether industrial banks posed greater risk to the DIF than other financial institutions, and reviewed the FDIC's supervisory approach in identifying and mitigating material risks posed to those institutions by their parent companies. A July 2006 OIG evaluation reviewed the FDIC's process for reviewing and approving industrial bank applications for deposit insurance and monitoring conditions imposed with respect to industrial bank business plans. A September 2005 GAO study cited several risks posed to banks operating in a holding company structure, including adverse intercompany transactions, operations risk, and reputation risk. The GAO study also discussed concerns about the FDIC's ability to protect an industrial bank from those risks as effectively as the Federal consolidated supervisory approach under the BHCA.[37]

These reports acknowledged the FDIC's supervisory actions to ensure the independence and safety and soundness of commercially owned industrial banks. The reports further acknowledged the FDIC's authorities to protect an industrial bank from the risks posed by its parent company and affiliates. These authorities include the FDIC's authority to conduct examinations, impose conditions on and enter into agreements with an industrial bank parent company, terminate an industrial bank's deposit insurance, enter into agreements during the acquisition of an insured depository institution, and pursue enforcement actions.

F. FDIC Moratorium and Other Agency Actions

In 2005, Wal-Mart Bank's application for Federal deposit insurance generated considerable debate. The FDIC received more than 13,800 comment letters regarding Wal-Mart's proposal. Most of the commenters were opposed to the application. Commenters also raised broader concerns about industrial banks, including the risk posed to the DIF by industrial banks owned by holding companies that are not subject to Federal consolidated supervision. Similar concerns were expressed by witnesses during three days of public hearings held by the FDIC in the spring of 2006 concerning the Wal-Mart application. Also in 2006, The Home Depot filed a change in control notice in connection with its proposed acquisition of EnerBank, a Utah-chartered industrial bank. The FDIC received approximately 830 comment letters regarding this notice, almost all of which expressed opposition to the proposed acquisition. Ultimately, the Wal-Mart application and The Home Depot's notice were withdrawn.

To evaluate the concerns and issues raised with respect to the Wal-Mart and The Home Depot filings and industrial banks generally, on July 28, 2006, the FDIC imposed a six-month moratorium on FDIC action with respect to deposit insurance applications and change in control notices involving industrial banks.[38] The FDIC suspended agency action in order to further evaluate (i) industry developments; (ii) the various issues, facts, and arguments raised with respect to the industrial bank industry; (iii) whether there were emerging safety and soundness issues or policy issues involving industrial banks or other risks to the DIF; and (iv) whether statutory, regulatory, or policy changes should be made in the FDIC's oversight of industrial banks in order to protect the DIF or important Congressional objectives.[39]

In connection with this moratorium, on August 23, 2006, the FDIC published a Notice and Request for Comment on

application is withdrawn and then refiled after changes are incorporated into the proposal. In such cases, the new application is reviewed by the FDIC without prejudice. In other cases, the applicant may, for strategic reasons, determine that pursuing an insured industrial bank charter is not in the organizers' best interests.

[30] *See* 12 U.S.C. 1828(j)(1)(A).

[31] For purposes of section 106 of the BHCA, an industrial bank is treated as a ''bank'' and is subject to the anti-tying restrictions therein. *See* 12 U.S.C. 1843(f)(1).

[32] 12 U.S.C. 1820(b)(4).

[33] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[34] 12 U.S.C. 1831*o*–1(b).

[35] *See* 12 U.S.C. 1818 and 1831*aa.*

[36] *See* OIG Evaluation 04–048, *The Division of Supervision and Consumer Protection's Approach for Supervising Limited-Charter Depository Institutions* (2004), *https://www.fdicig.gov/reports04/04-048.pdf;* OIG Evaluation 06–014, *The FDIC's Industrial Loan Company Deposit Insurance Application Process* (2006), *https://www.fdicig.gov/reports06/06-014.pdf;* U.S. Gov't Accountability Office, GAO–05–621, *Industrial Loan Corporations: Recent Asset Growth and Commercial Interest Highlight Differences in Regulatory Authority* (Sept. 2005).

[37] U.S. Gov't Accountability Office, GAO–05–621, *Industrial Loan Corporations: Recent Asset Growth and Commercial Interest Highlight Differences in Regulatory Authority* (Sept. 2005).

[38] *See* Moratorium on Certain Industrial Loan Company Applications and Notices, 71 FR 43482 (Aug. 1, 2006).

[39] *Id.* at 43483.

a wide range of issues concerning industrial banks.[40] The FDIC received over 12,600 comment letters in response to this Notice.[41] The substantive comments related to the risk profile of the industrial bank industry, concerns over the mixing of banking and commerce, the FDIC's practices when making determinations in industrial bank applications and notices, whether commercial ownership of industrial banks should be allowed, and perceived needs for supervisory change.

The moratorium was effective through January 31, 2007, at which time the FDIC extended the moratorium one additional year for deposit insurance applications and change in control notices for industrial banks that would be owned by commercial companies.[42] This moratorium was not applicable to industrial banks to be owned by financial companies.

G. 2007 Notice of Proposed Rulemaking—Part 354

In addition to extending the moratorium for one year with respect to commercial parent companies, the FDIC published for comment a proposed rule designed to strengthen the FDIC's consideration of applications and notices for industrial banks to be controlled by financial companies not subject to Federal consolidated bank supervision, identified as Part 354 (2007 NPR).[43] The 2007 NPR would have imposed requirements on applications for deposit insurance, merger applications, and notices for change in control that would result in an industrial bank becoming a subsidiary of a company engaged solely in financial activities that is not subject to Federal consolidated bank supervision by either the FRB or the then-existing Office of Thrift Supervision (OTS). The rule would have established safeguards to assess the parent company's continuing ability to serve as a source of strength for the insured industrial bank, and identify and respond to problems or risks that may develop in the company or its subsidiaries.

In response to the 2007 NPR, the FDIC received 18 comment letters. The majority of commenters argued that the 2007 NPR should have also excluded parent companies supervised by other Federal regulators that provide similar oversight as the FRB and OTS, such as the Securities and Exchange Commission, to reduce the amount of duplicative regulation over these parent companies. Similarly, the commenters uniformly suggested that, to reduce the regulatory burden, the FDIC should defer to a parent company's primary regulator, which the commenters argued would be better suited to regulate the entity and better positioned to obtain relevant information. The majority of commenters also voiced opposition to limiting parent company representation on the industrial bank subsidiary's board of directors to 25 percent, and instead advocated for codifying the FDIC's informal standard of requiring a majority of directors to be independent.

Though the 2007 NPR did not affect industrial banks that would be controlled by companies engaged in commercial activities, several commenters addressed the distinction between industrial banks owned by financial and nonfinancial companies. Two commenters contended that the FDIC lacked authority to draw a distinction between financial and nonfinancial industrial bank owners absent a change in law. Several commenters argued that drawing such a distinction would essentially repeal the exemption of industrial banks from the definition of ''bank'' in the BHCA. There was little consensus among commenters as to whether commercially owned industrial banks pose unique safety and soundness issues.

Similar to this proposed rule, the 2007 NPR would have required a parent company to enter into a written agreement with the FDIC containing required commitments related to the examination of, and reporting and recordkeeping by, the industrial bank, the parent company, and its affiliates. The majority of commenters did not oppose these requirements, noting the FDIC already has authority to collect such information under section 10(b)(4) of the FDI Act.[44] The majority of commenters stated that the FDIC should not impose capital requirement commitments as contemplated in the 2007 NPR on commercial parents of industrial banks because of the idiosyncratic business models and operations of such companies.

H. Dodd-Frank Act and Industrial Banks

As discussed above, the Dodd-Frank Act amended the FDI Act by adding section 38A.[45] Under section 38A, for any insured depository institution that is not a subsidiary of a BHC or savings and loan holding company, the appropriate Federal banking agency for the insured depository institution must require any company that directly or indirectly controls such institution to serve as a source of financial strength for the institution.[46] As a result, the FDIC is required to impose a requirement on companies that directly or indirectly own or control an industrial bank to serve as a source of financial strength for that institution. In addition, subsection (d) of section 38A of the FDI Act provides explicit statutory authority for the appropriate Federal banking agency to require reports from a controlling company to assess the ability of the company to comply with the source of strength requirement, and to enforce compliance by such company.[47]

Through the Dodd-Frank Act, Congress also imposed a three-year moratorium on the FDIC's approval of deposit insurance applications for industrial banks that were owned or controlled by a commercial firm.[48] The Dodd-Frank Act moratorium also applied to the FDIC's approval of any change in control of an industrial bank that would place the institution under the control of a commercial firm.[49] The

[40] *See* Industrial Loan Companies and Industrial Banks, 71 FR 49456 (Aug. 23, 2006). The Notice included questions concerning the current risk profile of the industrial bank industry, safety and soundness issues uniquely associated with ownership of such institutions, the FDIC's practice with respect to evaluating and making determinations on industrial bank applications and notices, whether a distinction should be made when the industrial bank is owned by an entity that is commercial in nature, and the adequacy of the FDIC's supervisory approach with respect to industrial banks.

[41] Approximately 12,485 comments were generated either supporting or opposing the proposed industrial bank to be owned by Wal-Mart or the proposed acquisition of Enerbank, also an industrial bank, by The Home Depot. The remaining comment letters were sent by individuals, law firms, community banks, financial services trade associations, existing and proposed industrial banks or their parent companies, the Conference of State Bank Supervisors, and two members of Congress.

[42] *See* Moratorium on Certain Industrial Bank Applications and Notices, 72 FR 5290 (Feb. 5, 2007).

[43] *See* Industrial Bank Subsidiaries of Financial Companies 72 FR 5217 (Feb. 5, 2007); *see also https://www.fdic.gov/news/news/press/2007/pr07007.html.*

[44] *See* 12 U.S.C. 1820(b)(4).

[45] *See* 12 U.S.C. 1831*o*–1.

[46] 12 U.S.C. 1831*o*–1(b). This amendment also requires the appropriate Federal banking agency for a BHC or savings and loan holding company to require the BHC or savings and loan holding company to serve as a source of financial strength for any subsidiary of the BHC or savings and loan holding company that is a depository institution. 12 U.S.C. 1831*o*–1(a).

[47] *See* 12 U.S.C. 1831*o*–1(d).

[48] Public Law 111–203, title VI § 603(a), 124 Stat. 1597 (2010). Section 603(a) also imposed a moratorium on FDIC action on deposit insurance applications by credit card banks and trust banks owned or controlled by a commercial firm. The Dodd-Frank Act defined a ''commercial firm'' for this purpose as a company that derives less than 15 percent of its annual gross revenues from activities that are financial in nature, as defined in section 4(k) of the BHCA (12 U.S.C. 1843(k)), or from ownership or control of depository institutions.

[49] *Id.*

moratorium expired in July 2013, without any action by Congress.

In addition, the Dodd-Frank Act directed the GAO to conduct a study of the implications of removing all exemptions from the definition of ''bank'' under the BHCA. The GAO report was published in January of 2012.[50] This report examined the number and general characteristics of exempt institutions, the Federal regulatory system for such institutions, and potential implications of subjecting the holding companies of such institutions to BHCA requirements. The GAO report noted that the industrial bank industry experienced significant asset growth in the 2000s and, during this time, the profile of industrial banks changed: Rather than representing a class of small, limited-purpose institutions, industrial banks became a diverse group of insured institutions with a variety of business lines.[51] Ultimately, the GAO found that Federal regulation of the exempt institutions' parent companies varied, noting that FDIC officials interviewed in connection with the study indicated that supervision of exempt institutions was adequate, but also noted the added benefit of Federal consolidated supervision. Finally, data examined by the GAO suggested that removing the BHCA exemptions would likely have a limited impact on the overall credit market, chiefly because the overall market share of exempt institutions was, at the time of the study, small.

III. Need for Rulemaking and Rulemaking Authority

As discussed above, the 2007 NPR would have imposed certain conditions and requirements for approval of certain deposit insurance applications and nonobjections to change in control notices involving industrial banks. However, the FDIC did not finalize the 2007 NPR. Although multiple factors contributed to the FDIC's decision to not advance a final rule, the most significant factor was the onset of the financial crisis. With the advent of the crisis, applications to form *de novo* insured institutions, or to acquire existing institutions, declined significantly, including with respect to industrial banks. Further, provisions included in the 2007 NPR, which reflected the FDIC's practices beginning in 2005 with respect to proposed *de novo* industrial banks, were being tested in an adverse economic environment for the first time. As such, embodying the provisions in a final rule would have been premature without knowledge of the consequences of the rule's requirements and restrictions.

The crisis demonstrated that the FDIC's supervisory approach with respect to industrial banks was effective. Only two industrial banks failed during the crisis, and both failures were of small industrial banks that did not present circumstances raising concern with respect to industrial banks proposed prior to the crisis. Several industrial banks and their parent companies pursued conversions to commercial banks and BHC structures for financial and strategic reasons.

Recently, a number of companies have considered options for providing financial products and services through establishing an industrial bank subsidiary. Many companies have publicly noted the benefits of deposit insurance and establishing a deposit-taking institution. Although many interested parties operate business models focused on traditional community bank products and services, others operate unique business models, some of which are focused on innovative technologies and strategies.

Some of the companies recently exploring an industrial bank charter engage in commercial activities or have diversified business operations and activities that would not otherwise be permissible for BHCs under the BHCA and applicable regulations. Given the continuing evolution of the industrial bank charter, the utility of codifying certain supervisory requirements for industrial banks, the nature of entities interested in *de novo* industrial banks, the statutory changes enacted in the Dodd-Frank Act that clearly address the source of financial strength obligations of any company that controls an industrial bank, as well as the legitimate considerations raised by interested parties, the FDIC believes a rule is appropriate to provide necessary transparency for market participants. Through the proposed rule, the FDIC would formalize its framework to supervise industrial banks and mitigate risk to the DIF that may otherwise be presented in the absence of Federal consolidated supervision of an industrial bank and its parent company.

The FDIC has the authority to issue rules to carry out the provisions of the FDI Act,[52] including rules to ensure the safety and soundness of industrial banks and to protect the DIF. Moreover, as the only agency with the power to grant or terminate deposit insurance, the FDIC has a unique responsibility for the safety and soundness of all insured institutions.[53] In granting deposit insurance, the FDIC must consider the factors in section 6 of the FDI Act;[54] these factors generally focus on the safety and soundness of the proposed institution and any risk it may pose to the DIF. The FDIC is also authorized to permit or deny various transactions by State nonmember banks, including merger and change in bank control transactions, based to a large extent on safety and soundness considerations and on its assessment of the risk to the DIF.[55]

The FDIC has the responsibility to consider filings based on statutory criteria and make decisions. The proposed rule generally would codify the FDIC's current supervisory processes and policies with respect to industrial banks that would not be subject to Federal consolidated supervision. The proposed rule also includes additional safeguards the FDIC believes are appropriate based on its experience, such as requiring a tax allocation agreement.

IV. Description of the Proposed Rule

A. Section 354.1—Scope

This section describes the industrial banks and parent companies that would be subject to the proposed rule. The proposed rule would apply to industrial banks that, as of the effective date, become subsidiaries of companies that are Covered Companies, as such term is defined in § 354.2. Industrial bank subsidiaries of companies that are subject to Federal consolidated supervision by the FRB would not be covered by the proposed rule. An industrial bank that, on or before the effective date, is a subsidiary of a company that is not subject to Federal consolidated supervision by the FRB (a grandfathered industrial bank) generally

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[50] *See* U.S. Government Accountability Office, GAO–12–160, *Characteristics and Regulation of Exempt Institutions and the Implications of Removing the Exemptions* (Jan. 2012).

[51] *Id.* at 13.

[52] ''[T]he Corporation . . . shall have power . . . [t]o prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency).'' 12 U.S.C. 1819(a)(Tenth).

[53] *See* 12 U.S.C. 1815, 1818(a).

[54] Such factors are the financial history and condition of the depository institution, the adequacy of the depository institution's capital structure, the future earnings prospects of the depository institution, the general character and fitness of the management of the depository institution, the risk presented by such depository institution to the DIF, the convenience and needs of the community to be served by such depository institution, and whether the depository institution's corporate powers are consistent with the purposes of the FDI Act. *See* 12 U.S.C. 1816.

[55] *See* 12 U.S.C. 1817(j), 1828(c), and 1828(d).

would not be covered by the proposed rule.[56] A grandfathered industrial bank could become subject to the proposed rule following a change in control, merger, or grant of deposit insurance occurring after the effective date in which the resulting institution is an industrial bank that is a subsidiary of a Covered Company. Thus, a grandfathered industrial bank would be subject to the proposed rule, as would its parent company that is not subject to Federal consolidated supervision, if such a parent company acquired control of the grandfathered industrial bank pursuant to a change in bank control transaction that closes after the effective date, or if the grandfathered industrial bank is the surviving institution in a merger transaction that closes after the effective date. Industrial banks that are not subsidiaries of a company, for example, those wholly owned by one or more individuals, would not be subject to the proposed rule.

Question 1: Should the proposed rule apply only prospectively, that is, to industrial banks that become a subsidiary of a parent company that is a Covered Company? Or should the proposed rule also apply to all industrial banks that, as of the effective date, are a subsidiary of a parent that is not subject to Federal consolidated supervision by the FRB? What are the concerns with each approach?

Question 2: Should the proposed rule apply to industrial banks that do not have a parent company? How should the rule be applied in such a case?

Question 3: Should the proposed rule apply to industrial banks that are controlled by an individual rather than a company?

Question 4: If an individual controls the parent company of an industrial bank, should the individual be responsible for the maintenance of the industrial bank's capital and liquidity at or above FDIC-specified levels? Should an individual who controls a parent company be responsible for causing the parent company to comply with the written agreements, commitments, and restrictions imposed on the industrial bank? How should the rule be applied in such a case?

B. Section 354.2—Definitions

This section lists the definitions that would apply to part 354. Terms that are not defined in the proposed rule that are defined in section 3 of the FDI Act have the meanings given in section 3 of the FDI Act.[57]

The term ''control'' would be defined to mean the power, directly or indirectly, to direct the management or policies of a company or to vote 25 percent or more of any class of voting securities of a company and specifically would include the rebuttable presumption of control at 12 CFR 303.82(b)(1) and the presumptions of acting in concert at 12 CFR 303.82(b)(2) in the same manner and to the same extent as if they applied to an acquisition of securities of a company instead of a ''covered institution''. These definitions are nearly the same as the definitions of ''control'' in the Change in Bank Control Act (CBCA)[58] and the FDIC's regulations implementing the CBCA except that they broaden the term to apply to control of a company and not solely insured depository institutions so that the definition can accurately describe the relationship between the parent company of an industrial bank and any of its nonbank subsidiaries, which also would be affiliates of the industrial bank.

The term ''Covered Company'' means any company that is not subject to Federal consolidated supervision by the FRB and that, directly or indirectly, controls an industrial bank (i) as a result of a change in bank control under section 7(j) of the FDI Act,[59] (ii) as a result of a merger transaction pursuant to section 18(c) of the FDI Act,[60] or (iii) that is granted deposit insurance under section 6 of the FDI Act,[61] in each case after the effective date of the rule.

Under these provisions, a company would control an industrial bank if the company would have the power, directly or indirectly, (i) to vote 25 percent or more of any class of voting shares of any industrial bank or any company that controls the industrial bank (*i.e.,* a parent company), or (ii) to direct the management or policies of any industrial bank or any parent company. In addition, the FDIC presumes that a company would have the power to direct the management or policies of any industrial bank or any parent company if the company will, directly or indirectly, own, control, or hold with power to vote at least 10 percent of any class of voting securities of any industrial bank or any parent company, and either the industrial bank's shares or the parent company's shares are registered under section 12 of the Securities Exchange Act of 1934, or no other person (including a company) will own, control, or hold with power to vote a greater percentage of any class of voting securities. If two or more companies, not acting in concert, will each have the same percentage, each such company will have control. As noted above, control of an industrial bank can be indirect. For example, company A may control company B which in turn may control company C which may control an industrial bank. Company A and company B would each have indirect control of the industrial bank, and company C would have direct control. As a result, the industrial bank would be a subsidiary of companies A, B, and C.

Question 5: Would there be any benefit in having or requiring a Covered Company that conducts activities other than financial activities to conduct some or all of its financial activities (including ownership and control of an industrial bank) through an intermediate holding company similar to what a grandfathered unitary savings and loan holding company may be required to do pursuant to section 626 of the Dodd-Frank Act? What other approaches may be appropriate?

The term ''FDI Act'' would be defined to mean the Federal Deposit Insurance Act, 12.U.S.C. 1811 *et seq.*

The term ''filing'' would mean an application, notice, or request submitted to the FDIC. This is the definition used in the FDIC's rules of procedure and practice[62] and allows the use of one term to describe the different documents submitted to the FDIC.

The term ''FRB'' would be defined to mean the Board of Governors of the Federal Reserve System and each Federal Reserve Bank.

The term ''industrial bank'' would be defined to mean any insured State bank that is an industrial bank, industrial loan company or other similar institution that is excluded from the BHCA definition of ''bank'' pursuant to section 2(c)(2)(H) of the BHCA.[63] The effect of section 2(c)(2)(H) is that the parent company of an industrial bank need not be a BHC.[64]

Question 6: Should the proposed rule also apply to other institutions that are excluded from the BHCA definition of ''bank'' pursuant to section 2(c)(2), such

[56] Although generally not subject to the proposed rule, grandfathered industrial banks and their parent companies that are not subject to Federal consolidated supervision by the FRB will remain subject to FDIC supervision, including but not limited to examinations and capital requirements. *See also* the discussion of the reservation of authority in section IV.F, of this **SUPPLEMENTARY INFORMATION**, *infra.*

[57] 12 U.S.C. 1813.

[58] 12 U.S.C. 1817(j)(8)(B).

[59] 12 U.S.C. 1817(j).

[60] 12 U.S.C. 1828(c).

[61] 12 U.S.C. 1816.

[62] *See* 12 CFR 303.2(s).

[63] *See* 12 U.S.C. 1841(c)(2)(H).

[64] Section 2(a)(1) of the BHCA provides that ''bank holding company'' means any company which has control over any bank or over any company that is or becomes a BHC by virtue of the BHCA. 12 U.S.C. 1841(a)(1).

as credit card banks and trust banks? For example, the CEBA amended the BHCA to exempt certain other institutions from the requirement that the parent company of a bank must be a BHC,[65] meaning that the parent companies of such institutions are not subject to Federal consolidated supervision. Explain what types of institutions should be addressed by the proposed rule and why.

The term ''senior executive officer'' would have the meaning given to it in the FDIC's regulations on changes in senior executive officer at 12 CFR 303.101(b). Thus, the term ''senior executive officer'' would mean a person who holds the title of president, chief executive officer, chief operating officer, chief managing official (in an insured State branch of a foreign bank), chief financial officer, chief lending officer, or chief investment officer, or, without regard to title, salary, or compensation, performs the function of one or more of these positions. ''Senior executive officer'' also would include any other person identified by the FDIC, whether or not hired as an employee, with significant influence over, or who participates in, major policymaking decisions of the industrial bank.

Question 7: Are the definitions clear in their meaning and application? Should any other terms used in the proposed rule be defined?

C. Section 354.3—Written Agreement

This section would prohibit any industrial bank from becoming a subsidiary of a Covered Company unless the Covered Company enters into one or more written agreements with the FDIC and its subsidiary industrial bank. In such agreements, the Covered Company would make certain required commitments to the FDIC and the industrial bank, including those listed in paragraphs (a)(1) through (8) of § 354.4, the restrictions in § 354.5, and such other provisions as the FDIC may deem appropriate in the particular circumstances. When two or more Covered Companies will control (as the term ''control'' is defined in § 354.2), directly or indirectly, the industrial bank, each such Covered Company would be required to execute such written agreement(s). This circumstance could occur, for example, (i) when two or more Covered Companies will each have the power to vote 10 percent or more of the voting stock of an industrial bank or of a company that controls an industrial bank, the stock of which is registered under section 12 of the Securities Exchange Act of 1934, or (ii) when one Covered Company will control another Covered Company that directly controls an industrial bank.

In certain instances, the FDIC may, in its sole discretion, require, as a condition to the approval of or nonobjection to a filing, that a controlling shareholder of a Covered Company join as a party to any written agreement required in § 354.3. In such cases, the controlling shareholder would be required to cause the Covered Company to fulfill its obligations under the written agreement, through voting his or her shares, or otherwise.

In addition to the written agreements, commitments, and restrictions of the proposed rule, the FDIC may, and likely will, condition an approval of an application or a nonobjection to a notice on one or more actions or inactions of the applicant or notificant.[66] The FDIC may enforce conditions imposed in writing in connection with any action on any application, notice, or other request by an industrial bank or a company that controls an industrial bank,[67] so it is not necessary to include provisions regarding conditions in the proposed rule.

D. Section 354.4—Required Commitments and Provisions of Written Agreement

The FDIC historically has included conditions in deposit insurance approval orders for industrial banks that are intended to create a sufficient supervisory structure with respect to a Covered Company. The commitments that the FDIC has required industrial banks and their parent companies to undertake in written agreements have varied on a case-by-case basis, depending on the facts and circumstances and the particular concerns the FDIC has identified during the review of the application materials.

This section would require each party to a written agreement to comply with subsections (a)(1) through (8) of § 354.4. These required commitments are intended to provide the safeguards and protections that the FDIC believes are prudent to impose to maintain the safety and soundness of industrial banks that are controlled by Covered Companies. These required commitments and other provisions are intended to establish a level of information reporting and parent company obligations similar to that which would be in place if the Covered Company were subject to Federal consolidated supervision. The requirements reflect commitments and additional provisions that, for the most part, the FDIC has previously required as a condition of granting deposit insurance to industrial banks. The FDIC is proposing to include these required commitments in the rule to provide transparency to current and potential industrial banks, the companies that control them, and the general public.

In order to provide the FDIC with more timely and more complete information about the activities, financial performance and condition, operations, prospects, and risk profile of each Covered Company and its subsidiaries and affiliates, the proposed rule would require that each Covered Company must furnish to the FDIC an initial listing, with annual updates, of all of the Covered Company's subsidiaries (commitment (1)); consent to the FDIC's examination of the Covered Company and each of its subsidiaries to monitor compliance with any written agreements, commitments, conditions, and certain provisions of law (commitment (2)); submit to the FDIC an annual report on the Covered Company and its subsidiaries, and such other reports as the FDIC may request (commitment (3)); maintain such records as the FDIC deems necessary to assess the risks to the industrial bank and to the DIF (commitment (4)); and cause an independent audit of each subsidiary industrial bank to be performed annually (commitment (5)).

Question 8: For purposes of transparency and identifying any potential risks to the industrial bank, we have included commitments requiring examination and reporting. Is this approach the best way to gain that transparency, or is there a better way? To what extent, if any, is the FDIC's supervision enhanced by requiring a Covered Company to consent to examination of the Covered Company and each of its subsidiaries as proposed? Is there another way to identify any potential risks?

Question 9: The Gramm-Leach-Bliley Act of 1999 imposed certain restrictions on the extent to which a Federal banking agency may regulate and supervise a functionally regulated affiliate of an insured depository institution.[68] Conversely, the Federal banking agencies, including the FRB, impose various periodic reporting requirements on depository institutions and their parent companies. In view of

[65] Public Law 100–86, 101 Stat. 552 (Aug. 10, 1987). *See also* 12 CFR 225.145 (limitations established by the CEBA on the activities and growth of nonbank banks).

[66] *See* 12 CFR 303.11(a) (''The FDIC may approve, conditionally approve, deny, or not object to a filing after appropriate review and consideration of the record.''). *See* 12 CFR 303.2(dd) for a list of standard conditions.

[67] 12 U.S.C. 1818(b); 1831aa(a).

[68] *See* section 45 of the FDI Act, 12 U.S.C. 1831*v*.

these restrictions and requirements, are the commitments and requirements appropriately tailored to adequately carry out the purpose and intent of the proposed rule?

Question 10: The proposed rule would require a Covered Company to disclose to the FDIC the subsidiaries of the Covered Company. Should the proposed rule also require disclosure to the FDIC of certain additional affiliates or portfolio companies of the Covered Company, given that such entities could engage in transactions with, or otherwise impact, the subsidiary industrial bank?

In order to limit the extent of each Covered Company's influence over a subsidiary industrial bank, each Covered Company would commit to limit its representation on the industrial bank's board of directors to 25 percent of the members of the board, or if the bank is organized as a limited liability company and is managed by a board of managers, to 25 percent of the members of the board of managers, or if the bank is organized as a limited liability company and is managed by its members, to 25 percent of managing member interests (commitment (6)). For example, if company A, which has 15 percent representation on the subsidiary industrial bank's board, controls company B, then the companies' representation would be aggregated and limited to no more than 25 percent. Thus, company B's representation would be limited to no more than 10 percent.

Question 11: The proposed rule would limit board of directors (or similar body) representation to 25 percent of the members of the board of directors (or similar entity). The FDIC has chosen this threshold with the idea that 25 percent is a key threshold for control purposes. Is another threshold more appropriate? If so, what and why?

Additionally, in order to ensure that a subsidiary industrial bank has available to it the resources necessary to maintain sufficient capital and liquidity, each party to a written agreement would commit to maintain each subsidiary industrial bank's capital and liquidity at such levels as the FDIC deems necessary for the safe and sound operation of the industrial bank, and to take such other actions as the FDIC finds appropriate to provide each subsidiary industrial bank with the resources for additional capital or liquidity (commitment (7)).

Question 12: If there is an individual who is the dominant shareholder of a Covered Company, should that individual be required to commit to the maintenance of appropriate capital and liquidity levels?

Lastly, the proposed rule includes a requirement that each Covered Company and its subsidiary industrial bank(s) enter into a tax allocation agreement that expressly recognizes an agency relationship between the Covered Company and the subsidiary industrial bank with respect to tax assets generated by such industrial bank, and that all such tax assets are held in trust by the Covered Company for the benefit of the subsidiary industrial bank and promptly remitted to such industrial bank (commitment (8)). Companies and their subsidiaries, including insured depository institutions and their holding companies, will often file a consolidated income tax return. A 1998 interagency policy statement issued by the Federal banking agencies and the U.S. Department of the Treasury, and an addendum thereto [69] (collectively, Policy Statement), acknowledges such practices, noting that a consolidated group may prepare and file Federal and State income tax returns as a group so long as the interests of any insured depository institution subsidiaries are not prejudiced. Given the potential harm to insured subsidiary institutions, the Policy Statement encourages holding companies and their insured depository institution subsidiaries to enter into written, comprehensive tax allocation agreements, and notes that inconsistent practices regarding tax obligations may be viewed as an unsafe and unsound practice prompting either informal or formal corrective action. The proposed rule similarly seeks to avoid potential harm to the insured subsidiary institution by requiring such a written tax allocation agreement.

In addition to the eight commitments discussed above, pursuant to proposed § 354.4(b), the FDIC may condition the approval of an application or nonobjection to a notice on the Covered Company and industrial bank committing to adopt, maintain, and implement an FDIC-approved contingency plan that presents one or more actions to address potential significant financial or operational stress that could threaten the safe and sound operation of the insured industrial bank. The plan also would reflect strategies for the orderly disposition of the industrial bank without the need for the appointment of a receiver or conservator. Such disposition could include, for example, sale of the industrial bank to, or merger with, a third party. The proposed rule describes this contingency plan commitment in general terms, thereby preserving the FDIC's supervisory discretion to tailor the contents of any contingency plan to a given Covered Company and its insured industrial bank subsidiary. The FDIC's ability to tailor the contents of a contingency plan for a given Covered Company and its industrial bank minimizes the burden of developing and implementing the plan. In the case where a contingency plan commitment is included as a condition to approval of an application or nonobjection to a notice, the FDIC may take into account the size, complexity, interdependencies, and other factors relevant to the industrial bank and Covered Company. The FDIC is of the view that requiring a contingency plan would lead the FDIC, as well as the Covered Company and its subsidiary industrial bank, to a better understanding of the interdependencies, operational risks, and other circumstances or events that could create safety and soundness concerns for the insured industrial bank and attendant risk to the DIF. The contingency plan would not be a resolution plan, but rather, an explanation of the steps the industrial bank and Covered Company could take to mitigate the impacts of financial and operational stress outside of the receivership process.

While the contingency plan is one type of commitment that the FDIC would be able to require of Covered Companies and their industrial bank subsidiaries, there may be other commitments that the FDIC may determine to be appropriate given the business plan, capital levels, or organizational structure of a Covered Company or its subsidiary industrial bank. Section 354.4(c) would provide, then, that the FDIC may require such additional commitments in addition to those described in § 354.4(a) or (b) in order to ensure the safety and soundness of the industrial bank and reduce potential risk to the DIF.

Question 13: Some of the provisions include continuing commitments, such as to maintain capital. Should the proposed rule include a cure period in the event that the industrial bank or its parent company initially comply with these commitments, but later fall out of compliance? If so, should such a cure period be provided for all commitments or certain commitments (please specify)? Alternatively, should the FDIC rely on its enforcement authorities under sections 8 and 50 of the FDI Act to take action as appropriate?

[69] *See* Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 63 FR 64757 (Nov. 23, 1998); Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 79 FR 35228 (June 19, 2014).

Question 14: In order to ensure that each Covered Company can serve as a source of financial strength to its industrial bank subsidiary and fulfill its obligations under a capital maintenance agreement, should the FDIC include a commitment that the parent company will maintain its own capital at some defined level on a consolidated basis in all circumstances? How should the FDIC determine the level?

E. Section 354.5—Restrictions on Industrial Bank Subsidiaries of Covered Companies

Section 354.5 would require the FDIC's prior written approval before an industrial bank that is a subsidiary of a Covered Company may take certain actions. These restrictions, like the required commitments discussed above, are generally intended to provide the safeguards and protections that the FDIC believes would be prudent to impose with respect to maintaining the safety and soundness of industrial banks that become controlled by companies that are not subject to Federal consolidated supervision. Accordingly, the proposed rule would require prior FDIC approval if the subsidiary industrial bank wanted to take any of five actions set forth in § 354.5(a).

In order to ensure that the industrial bank does not immediately after becoming a subsidiary of a Covered Company engage in high-risk or other inappropriate activities, the subsidiary industrial bank would be required to obtain the FDIC's prior approval to make a material change in its business plan after becoming a subsidiary of a Covered Company (paragraph (1)). In order to limit the influence of the parent Covered Company, the subsidiary industrial bank would have to obtain the FDIC's prior approval to add or replace a member of the board of directors or board of managers or a managing member, as the case may be (paragraph (2)); add or replace a senior executive officer (paragraph (3)); employ a senior executive officer who is associated in any manner with an affiliate of the industrial bank, such as a director, officer, employee, agent, owner, partner, or consultant of the Covered Company or a subsidiary thereof (paragraph (4)); or enter into any contract for material services with the Covered Company or a subsidiary thereof (paragraph (5)). Pursuant to proposed § 354.5(b), the FDIC could, on a case-by-case basis, impose additional restrictions on the Covered Company or its controlling shareholder if circumstances warrant.

Question 15: Should the FDIC further define ''services material to the operations of the industrial bank'' as that phrase is used in the proposed § 354.5(e)? If so, how should the term be defined?

Question 16: Should any of the restrictions in § 354.5 be temporally limited, for example, to the first three years after becoming a subsidiary of such Covered Company?

F. Section 354.6—Reservation of Authority

The FDIC proposes to clarify that it retains the authority to take supervisory or enforcement actions, including actions to address unsafe or unsound practices, or violations of law.

Thus, the FDIC could require grandfathered industrial banks and their parent companies that are not subject to Federal consolidated supervision by the FRB to enter into written agreements, provide commitments, or abide by restrictions if necessary to maintain the safety and soundness of the industrial bank. Similarly, the FDIC retains the authority to require additional commitments from a Covered Company and its subsidiary industrial bank to enter into written agreements, provide commitments, or abide by restrictions if necessary to maintain the safety and soundness of the industrial bank, even if not in the context of a filing.

Question 17: Should the FDIC retain the authority to require additional written agreements, commitments, or conditions on or by an industrial bank or Covered Company after the nonobjection to a change in bank control, approval of a merger transaction, or a grant of deposit insurance by the FDIC? Should the FDIC retain the power to require additional written agreements, commitments, or conditions on or by an industrial bank or parent company of an industrial bank that became a subsidiary of a parent company that is not subject to Federal consolidated supervision by the FRB prior to the effective date?

V. Expected Effects

As previously discussed, the proposed rule would require or impose certain commitments, restrictions, and conditions for each deposit insurance application approval, nonobjection to a change in control notice, and merger application approval that would result in an industrial bank becoming, pursuant to the proposed rule, a subsidiary of a Covered Company. The proposal would require such Covered Company to enter into one or more written agreements with the FDIC and the industrial bank subsidiary.

A. Overview of Industrial Banks

As of December 31, 2019, the FDIC supervised 3,344 insured depository institutions, with combined assets of $3.4 trillion. Of these, 23 institutions were industrial banks, comprising 0.7 percent of all FDIC-supervised institutions. The industrial banks hold combined assets of $150.3 billion, comprising 4.4 percent of the combined assets of FDIC-supervised institutions.[70] The majority of industrial banks are headquartered in Utah and Nevada, and hold nearly all of the combined assets of industrial banks. As of December 31, 2019, 14 industrial banks were headquartered in Utah, four in Nevada, three in California, one in Hawaii, and one in Minnesota.

The proposed rule would apply prospectively to deposit insurance, change in control, and merger transactions involving an industrial bank as the resultant institution that is controlled by a Covered Company. It is difficult to estimate the number of potential Covered Companies that will seek to establish or acquire an industrial bank, as such an estimate depends on considerations that affect Covered Companies' decisions. These considerations, and how they affect decision making, are difficult for the FDIC to forecast, estimate, or model, as the considerations include external parties' evaluations of potential business strategies for the industrial bank as well as future financial conditions, rates of return on capital, and innovations in the provision of financial services, among others. However, during the period of 2017 through 2019, the FDIC received nine industrial bank deposit insurance applications and one change in control application.[71] Consistent with the Paperwork Reduction Act (PRA) estimates presented elsewhere in this notice of proposed rulemaking, for this analysis the FDIC is estimating that the proposed rule, if implemented, would apply to four filings per year seeking to establish or acquire an industrial bank.

The proposed rule could indirectly affect subsidiaries of Covered Companies. Such Covered Companies operate through a variety of structures that include a range of subsidiaries and affiliates. Further, the proposal includes the FDIC's reservation of authority to require any industrial bank and its parent company, if not otherwise subject to part 354, to enter into written agreements, provide commitments, or

[70] December 31, 2019, Call Report data.

[71] During the same period, the FDIC did not receive any merger applications involving industrial banks.

abide by restrictions, as appropriate. Therefore, it is difficult to estimate the number of subsidiaries and affiliates of prospective Covered Companies, based on information currently available to the FDIC. However, based on the FDIC's experience as the primary Federal regulator of industrial banks,[72] the FDIC believes that the number of subsidiaries of the prospective Covered Companies affected by the proposed rule is likely to be small.

B. Analysis of the Commitments

Under the proposal, prospective Covered Companies would be required to agree to the eight commitments, and may be required to agree to additional commitments under certain circumstances, which in summary include commitments by the Covered Company to:

- Furnish an initial listing, with annual updates, of the Covered Company's subsidiaries.
- Consent to the examination of the Covered Company and its subsidiaries.
- Submit an annual report on the Covered Company and its subsidiaries, and such other reports as requested.
- Maintain such records as deemed necessary.
- Cause an independent annual audit of each industrial bank.
- Limit the Covered Company's representation on the industrial bank's board of directors or managers (board), as the case may be, to 25 percent.
- Maintain the industrial bank's capital and liquidity at such levels as deemed appropriate and take such other action to provide the industrial bank with a resource for additional capital or liquidity.
- Enter into a tax allocation agreement.
- Depending on the facts and circumstances, provide, adopt, and implement a contingency plan that sets forth strategies for recovery actions and the orderly disposition of the industrial bank without the need for a receiver or conservator.

The FDIC historically has imposed prudential conditions similar to the commitments listed above in connection with approving or not objecting to certain industrial bank filings. These conditions generally relate to the board and senior management, the business plan, operating policies, financial records, affiliate relationships, and other conditions on a case-by-case basis, depending on the facts and circumstances identified during the review of the respective filings.[73]

The table below presents the FDIC's analysis of the estimated costs to institutions that would be affected by the proposed rule of each required commitment included in the proposal. In each case, the FDIC used a total hourly compensation estimate of $94.15 per hour.[74]

Proposed commitment	Estimated annual compliance hours	Estimated annual compliance costs
Lists of Subsidiaries	4	$376.60
Consent to the FDIC Examination	100	9,415.00
Annual and Such Other Reports as the FDIC may Request	10	941.50
Maintain Such Records as the FDIC Deems Necessary	10	941.50
Independent Audit [Note 1]	100	9,415.00
Limit Membership on Board [Note 2]	0	0.00
Maintain Capital and Liquidity	12	1,129.80
Tax Allocation Agreement [Note 3]	0	0.00
Total	236	22,219.40

[Note 1] The disclosure requirement and time to fulfill it are due to satisfying regulatory inquiries about the audit, and do not include the cost of the audit itself because Covered Companies already conduct audits for other purposes.
[Note 2] Determinations regarding board membership are considered in the normal course of business.
[Note 3] Tax allocation agreements are normal and customary among affiliated corporate entities.

The proposed rule also authorizes the FDIC to require additional commitments, including a contingency plan that sets forth strategies for recovery actions and the orderly disposition of the industrial bank without the appointment of a receiver or conservator. The additional contingency plan commitment would be required only in certain circumstances, based on the facts and circumstances presented and taking into consideration the size, complexity, interdependencies, and other factors relevant to the industrial bank and Covered Company. Because this commitment is an enhancement to the FDIC's historical approach, and because the commitment is not expected to be required in all cases, the FDIC analyzed the estimated burden in greater detail.

It is difficult to estimate the recordkeeping, reporting, and disclosure costs associated with the contingency plan aspect of the proposed rule because it depends on the organizational structure and activities of potential future Covered Companies. The FDIC currently lacks such detailed

[72] Historically, industrial banks have elected not to become members of the Federal Reserve System. The FDIC is the primary Federal regulator for State nonmember banks and the insurer for all insured depository institutions.

[73] *See* FDIC Deposit Insurance Application Procedures Manual Supplement, Applications from Non-Bank and Non-Community Bank Applicants, FIL–8–2020 (Feb. 10, 2020).

[74] Subject matter experts in the FDIC's Division of Risk Management Supervision estimated that time devoted to complying with the commitments is broken down as follows: 25 percent (Executives and Managers), 15 percent (Legal), 15 percent (Compliance Officers), 15 percent (Financial Analysts), 15 percent (IT Specialists), and 15 percent (Clerical). The Standard Occupational Classification System occupations and codes used by the FDIC are: Executives and Managers (Management Occupations, 110000), Lawyers (Lawyers, Judges, and Related Workers, 231000), Compliance Officers (Compliance Officers, 131041), Financial Analysts (Financial Analysts, 132051), IT Specialists (Computer and Mathematical Occupations, 150000), and Clerical (Office and Administrative Support Occupations, 430000). To estimate the weighted average hourly compensation cost of these employees, the 75th percentile hourly wages reported by the Bureau of Labor Statistics (BLS) National Industry-Specific Occupational Employment and Wage Estimates as used for the relevant occupations in the Depository Credit Intermediation sector, as of May 2018. The 75th-percentile wage for lawyers is not reported, as it exceeds $100 per hour, so $100 per hour is used. The hourly wage rates reported do not include non-monetary compensation. According to the September 2019 Employer Cost of Employee Compensation data, compensation rates for health and other benefits are 33.8 percent of total compensation. To account for non-monetary compensation, the hourly wage rates reported by BLS are adjusted by that percentage. The hourly wage is adjusted by 2.28 percent based on changes in the Consumer Price Index for Urban Consumers from May 2018 to September 2019 to account for inflation and ensure that the wage information is contemporaneous with the non-monetary compensation statistic. Finally, the benefit-and-inflation-adjusted wages for each occupation are weighted by the percentages listed above to arrive at a weighted hourly compensation rate of $94.15.

information on potential future Covered Companies. While the contingency plan commitment is meaningfully different from resolution plan requirements for large banks, and while industrial banks that might need to develop such contingency plans are meaningfully different from large banks subject to resolution planning requirements, the FDIC considered prior analyses regarding resolution planning requirements imposed on certain institutions to instruct its analysis.

Based in part on the FDIC's experience implementing and managing the resolution planning requirements of 12 CFR 360.10, the FDIC estimates that Covered Companies and their industrial banks subject to the contingency plan commitment could incur $326,000 in recordkeeping, reporting, and disclosure compliance costs annually. To put the estimated cost of this commitment into context, the pre-tax net income of the median industrial bank in 2019 was $64,515,000.[75] But, because the FDIC would have the supervisory discretion to tailor the contents of any contingency plan to a given Covered Company and its industrial bank, and because of the unique circumstances of the respective Covered Companies and industrial banks, the compliance costs incurred by Covered Companies would vary on a case-by-case basis, and could be lower.

As illustrated by the preceding analysis, the proposed rule could pose as much as $348,000 in additional recordkeeping, reporting, and disclosure compliance costs for each Covered Company that seeks to establish or acquire an industrial bank.[76] Covered Companies would also be likely to incur some regulatory costs associated with making the necessary changes to internal systems and processes. For context, the estimated $348,000 recordkeeping, reporting, and disclosure costs only comprise 0.8 percent of the median non-interest expense for the 23 existing industrial banks.[77]

The FDIC believes that the proposed rule would benefit the public by providing transparency for market participants and other interested parties. Additionally, the FDIC believes that the proposed rule would benefit the public by formalizing a framework by which the FDIC would supervise industrial banks and mitigate risk to the DIF that may otherwise be presented.

[75] December 31, 2019, Call Report data.

[76] $22,219.40 for all Covered Companies that seek to establish or acquire an industrial bank, and an additional $326,000 for those institutions required to adopt, implement, and adhere to a contingency plan.

[77] December 31, 2019, Call Report data.

It is difficult to estimate whether the proposed rule would serve as an incentive or disincentive for affected parties. Decisions to establish or acquire an industrial bank depend on many considerations that the FDIC cannot accurately forecast, estimate, or model, such as future financial conditions, rates of return on capital, and innovations in the provision of financial services. The proposed rule would enhance transparency in the FDIC's evaluation of filings, which could increase the number of applications received. However, such transparency could also serve to limit the number of applications received.

The FDIC analyzed historical trends in filings that would be subject to the proposal. Based on that analysis, and consistent with the FDIC's PRA analysis, the FDIC assumes four applications: Three deposit insurance applications, and one change in bank control notice per year, on average. Between 2000 and 2009, the FDIC received as many as 12 and as few as two deposit insurance applications from entities seeking to organize an industrial bank; between 2017 and 2019, the FDIC received as many as four and as few as two such applications. Therefore, the FDIC believes it is reasonable to assume an annual deposit insurance application volume of three for the purpose of this analysis. In addition, the FDIC has received three change in bank control notices relating to industrial banks since 2010; therefore, the FDIC believes it is reasonable to assume an annual volume of one for the purpose of this analysis.

C. Safety and Soundness of Affected Banks

The FDIC believes the proposed rule is consistent with supervisory approaches the FDIC has used to insulate industrial banks from risks posed by their parent companies, and that these supervisory approaches have been effective. For example, as previously noted, only two small industrial banks failed during the crisis. The FDIC believes the proposed rule would provide a prudentially sound framework for reaching decisions on industrial bank filings that the FDIC receives from time to time.

D. Broad Effects on the Banking Industry

To the extent that the proposed rule results in higher numbers of industrial banks, the increase could lead to increased competition for depositors and borrowers. The increased competition could result in one or more of: Higher yields on deposit products, lower interest rates on loan products, reduced fees, less restrictive underwriting standards, greater account opening bonuses for new customers, and other benefits. To the extent that the proposed rule does not result in a higher number of industrial banks, this would not be expected to lead to increased competition for depositors and borrowers.

E. Expected Effects on Consumers

To the degree the proposal, once adopted, results in an increase in the number of industrial banks, consumers could benefit from increased competition within the banking industry. These benefits could take the form of higher rates on deposit accounts, improved access to credit with better terms or lower rates, and lower fees for banking services. To the extent that the proposed rule does not result in a higher number of industrial banks, this would not be expected to lead to potential benefits from increased competition within the banking industry.

F. Expected Effects on the Economy

The proposal's effects on the economy are likely to be modest, in line with its potential effects on the banking industry and consumers. If the proposal results in a modest increase in the number of industrial banks or improvement in the provision of banking products and services, the effects on the economy are likely to be modest.

VI. Request for Comment

The FDIC is inviting comment on all aspects of the proposed rule. In addition to the questions above, the FDIC seeks responses to the following additional questions:

Question 18: In evaluating the statutory factors under section 6 of the FDI Act for deposit insurance applications, should the FDIC consider an evaluation of the competitive effects of the parent company's or the parent company's affiliates' provision of consumer products aggregated with the activities of the industrial bank?

Question 19: The current Interagency Charter and Federal Deposit Insurance Application [78] requests information related to two broad categories, Market Characteristics and Community Reinvestment Act Plan, to assist the FDIC in determining whether the convenience and needs of the community to be served by an industrial bank will be met with the overall purpose of maintaining a sound and effective banking system. Are there any

[78] *See https://www.fdic.gov/formsdocuments/interagencycharter-insuranceapplication.pdf.*

other categories of information that the FDIC should consider in evaluating an industrial bank's ability to meet the convenience and needs of the community to be served by such industrial bank where the industrial bank will have a limited physical presence or will rely heavily on technology to deliver products and services?

Question 20: The FDIC has typically required, as conditions for approval, a number of additional commitments when considering applications involving foreign ownership of a proposed insured depository institution. These conditions address matters regarding service of process and access to information on the operations and activities of the parent company and its subsidiaries. Are there additional safeguards, commitments, or restrictions the FDIC should consider for a foreign Covered Company? Should additional capital or liquidity levels be considered?

VII. Regulatory Analysis

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[79] However, an initial regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[80] The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million.[81]

Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC has considered the potential impact of the proposed rule on small entities in accordance with the RFA. Based on its analysis and for the reasons stated below, the FDIC believes that this proposed rule will not have a significant economic impact on a substantial number of small entities.

As of September 30, 2019, the FDIC supervises 3,390 institutions, of which 2,662 are defined as small institutions by the terms of the RFA.[82] Of these 3,390 institutions, 23 are industrial banks.

As previously discussed, a currently chartered industrial bank would be subject to the proposed rule, as would its parent company that is not subject to Federal consolidated supervision, if such a parent company acquired control of the grandfathered industrial bank pursuant to a change in bank control transaction that closes after the effective date of the proposed rule, or if the grandfathered industrial bank is the surviving institution in a merger transaction that closes after the effective date of the proposed rule.

Of the 23 existing industrial banks, eight reported total assets less than $600 million, indicating that they could be small entities. However, to determine whether an institution is ''small'' for the purposes of the RFA, the SBA requires consideration of the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.[83] The FDIC conducted an analysis to determine whether each industrial bank's parent company was ''small'', according to the SBA size standards applicable to each particular parent company.[84] Of the eight industrial banks that reported total assets less than $600 million, the FDIC was able to determine that three of these potentially small industrial banks were owned by holding companies which were not small for purposes of the RFA. However, the FDIC currently lacks information necessary to determine whether the remaining five industrial banks are small. Therefore, of the 23 existing industrial banks, 18 are not small entities for purposes of the RFA, but no more than five, or about 22 percent, may be small entities.

Additionally, the FDIC has received three change in control notices relating to industrial banks since 2010. Of those three, only one was from an industrial bank that could possibly be small for purposes of the RFA.

Therefore, given that no more than five of the 23 existing industrial banks are small entities for the purposes of the RFA, and that no more than one change in control notice received by the FDIC since 2010 may be from a small entity, the FDIC believes the aspects of the proposal relating to change in control notices or merger applications involving industrial banks is not likely to affect a substantial number of small entities among existing industrial banks.

As previously discussed, the proposed rule would apply to industrial banks that, as of the effective date, become subsidiaries of companies that are Covered Companies, as such term is defined in § 354.2. It is difficult for the FDIC to estimate the volume of future applications from entities who seek to own and operate an insured industrial bank, or whether those entities would be considered ''small'' according to the terms of RFA, with the information currently available to the FDIC. Such estimates would require detailed information on the particular business models of institutions, prevailing economic and financial conditions, the decisions of senior management, and the demand for financial services, among other things. However, the FDIC reviewed the firms with industrial bank applications pending before the FDIC as of December 31, 2019. Each publically traded applicant had a market capitalization of at least $1 billion as of March 6, 2020. Each applicant operates either nationally within the United States, or operates worldwide, and none appear likely to be small for purposes of the RFA. Therefore, the FDIC believes that the aspects of the proposal relating to entities who seek to own and operate an insured industrial bank is not likely to affect a substantial number of small entities among existing industrial banks.

Therefore, based on the preceding information, the FDIC certifies that the proposed rule does not significantly affect a substantial number of small entities.

The FDIC invites comments on all aspects of the supporting information provided in this section, and in particular, whether the proposed rule would have any significant effects on small entities that the FDIC has not identified.

[79] 5 U.S.C. 601 *et seq.*

[80] 5 U.S.C. 605(b).

[81] The SBA defines a small banking organization as having $600 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* 13 CFR 121.201 (as amended, effective Aug. 19, 2019). In its determination, the SBA ''counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.'' 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[82] September 30, 2019, Call Report data. In order to determine whether an entity is ''small'' for purposes of the Regulatory Flexibility Act, the FDIC uses its ''affiliated and acquired assets'' as described in the immediately preceding footnote. The latest available bank and thrift holding company reports, which the FDIC uses to determine an entity's ''affiliated and acquired assets,'' are as of September 30, 2019.

[83] 12 CFR 121.103.

[84] For example, if a particular industrial bank's parent company was a motorcycle manufacturer, then the size standards applicable to motorcycle manufacturers were used.

B. Paperwork Reduction Act

In accordance with the requirements of the PRA,[85] the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

As discussed above, the proposed rule imposes PRA reporting and recordkeeping requirements for each industrial bank subject to the rule and its Covered Company. In particular, each industrial bank, and each Covered Company that directly or indirectly controls the industrial bank, must (i) agree to furnish the FDIC an initial listing, with annual updates, of all of the Covered Company's subsidiaries; (ii) submit to the FDIC an annual report on the Covered Company and its subsidiaries, and such other reports as the FDIC may request; (iii) maintain such records as the FDIC deems necessary to assess the risks to the industrial bank and to the DIF; and (iv) in the event that the FDIC has concerns about a complex organizational structure or based on other circumstances presented by a particular filing, the FDIC may condition the approval of an application or the nonobjection to a notice—in each case that would result in an industrial bank being controlled, directly or indirectly, by a Covered Company—on the Covered Company and industrial bank committing to providing to the FDIC, and thereafter adopting and implementing, a contingency plan that sets forth, at a minimum, one or more strategies for recovery actions and the orderly disposition of such industrial bank, without the need for the appointment of a receiver or conservator.

The FDIC will request approval from the OMB for this proposed information collection and the PRA reporting and recordkeeping requirements. OMB will assign an OMB control number. The information collection requirements contained in this proposed rulemaking will be submitted by the FDIC to OMB for review and approval under section 3507(d) of the PRA[86] and section 1320.11 of the OMB's implementing regulations.[87] Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility;

(b) The accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on the collection of information should be sent to the address listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer: By mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; or by facsimile to 202–395–6974; or email to *oira_submission@omb.eop.gov,* Attention, Federal Banking Agency Desk Officer.

Proposed Information Collection

Title: Industrial Banks and Industrial Loan Companies.

OMB Number: 3064–NEW.

Affected Public: Prospective parent companies of industrial banks and industrial loan companies.

SUMMARY OF ANNUAL BURDEN AND INTERNAL COST

	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response	Frequency of response	Total annual estimated burden (hours)
Initial listing of all of the Covered Company's subsidiaries.	Reporting	Mandatory	4	1.00	4	One Time	16
Annual update of listing of all of the Covered Company's subsidiaries.	Reporting	Mandatory	4	1.00	4	Annual	16
Annual report on the Covered Company and its subsidiaries, and such other reports as the FDIC may request.	Reporting	Mandatory	4	1.00	10	Annual	40
Maintain records to assess the risks to the industrial bank and to the DIF.	Recordkeeping	Mandatory	4	1.00	10	Annual	40
Contingency Plan	Reporting	Mandatory	1	1.00	345	On Occasion	345
Total Hourly Burden							457

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[88] requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a Federal banking agency subject to the provisions of this section, the FDIC has sought to present the proposed rule in a simple and straightforward manner.

The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?
- Has the FDIC clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could the FDIC do to make the regulation easier to understand?

[85] 44 U.S.C. 3501 *et seq.*

[86] 44 U.S.C. 3507(d).

[87] 5 CFR 1320.11.

[88] 12 U.S.C. 4809.

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[89] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[90] The FDIC invites comments that further will inform its consideration of RCDRIA.

PART 354—INDUSTRIAL BANKS

Sec.

Authority: 12 U.S.C. 1811, 1815, 1816, 1817, 1818, 1819(a) (Seventh) and (Tenth), 1820(g), 1831*o*–1, 3108, 3207.

§ 354.1 Scope.

(a) In addition to the applicable filing procedures of part 303 of this chapter, this part establishes certain requirements for filings involving an industrial bank or a Covered Company.

(b) The requirements of this part do not apply to an industrial bank that is organized as a subsidiary of a company that is not subject to Federal consolidated supervision by the FRB on or before [EFFECTIVE DATE OF THE RULE]. In addition, this part does not apply to:

(1) Any industrial bank that is or becomes controlled by a company that is subject to Federal consolidated supervision by the FRB; and

(2) Any industrial bank that is not or will not become a subsidiary of a company.

§ 354.2 Definitions.

Unless defined in this part, terms shall have the meaning given to them in section 3 of the FDI Act.

''Control'' means the power, directly or indirectly, to direct the management or policies of a company or to vote 25 percent or more of any class of voting securities of a company, and includes the rebuttable presumptions of control at 12 CFR 303.82(b)(1) and of acting in concert at 12 CFR 303.82(b)(2). For purposes of this part, the presumptions set forth in 12 CFR 303.83(b)(1) and (2) shall apply with respect to any company in the same manner and to the same extent as if they applied to an acquisition of securities of the company.

''Covered Company'' means any company that is not subject to Federal consolidated supervision by the FRB and that controls an industrial bank (i) as a result of a change in bank control pursuant to section 7(j) of the FDI Act; (ii) as a result of a merger transaction pursuant to section 18(c) of the FDI Act; or (iii) that is granted deposit insurance by the FDIC pursuant to section 6 of the FDI Act, in each case after [EFFECTIVE DATE OF THE RULE].

''FDI Act'' means the Federal Deposit Insurance Act, 12 U.S.C. 1811, *et seq.*

''Filing'' has the meaning given to it in 12 CFR 303.2(s).

''FRB'' means the Board of Governors of the Federal Reserve System and each Federal Reserve Bank.

''Industrial bank'' means any insured State bank that is an industrial bank, industrial loan company, or other similar institution that is excluded from the definition of the term ''bank'' in section 2(c)(2)(H) of the Bank Holding Company Act, 12 U.S.C. 1841(c)(2)(H).

''Senior executive officer'' has the meaning given it in 12 CFR 303.101(b).

§ 354.3 Written agreement.

(a) No industrial bank may become a subsidiary of a Covered Company unless the Covered Company enters into one or more written agreements with both the FDIC and the subsidiary industrial bank, which contain commitments by the Covered Company to comply with each of paragraphs (a)(1) through (8) in § 354.4 of this part and such other written agreements, commitments, or restrictions as the FDIC deems appropriate, including, but not limited to, the provisions of §§ 354.4 and 354.5.

(b) The FDIC may, at its sole discretion, condition a grant of deposit insurance, issuance of a nonobjection to a change in control, or approval of a merger on an individual who is a controlling shareholder of a Covered Company joining as a party to any written agreement required by paragraph (a) of this section.

§ 354.4 Required commitments and provisions of written agreement.

(a) The commitments required to be made in the written agreements referenced in § 354.3 are set forth in paragraphs (1) through (8) of this section. In addition, with respect to an industrial bank subject to this part, the FDIC will condition each grant of deposit insurance, each issuance of a nonobjection to a change in control, and each approval of a merger on compliance with paragraphs (1) through (8) of this section by the parties to the written agreement. As required, each Covered Company must:

(1) Submit to the FDIC an initial listing of all of the Covered Company's subsidiaries and update such list annually;

(2) Consent to the examination by the FDIC of the Covered Company and each of its subsidiaries to permit the FDIC to assess compliance with the provisions of any written agreement, commitment, or condition imposed; the FDI Act; or any other Federal law for which the FDIC has specific enforcement jurisdiction against such Covered Company or subsidiary; and all relevant laws and regulations;

(3) Submit to the FDIC an annual report describing the Covered Company's operations and activities, in the form and manner prescribed by the FDIC, and such other reports as may be requested by the FDIC to inform the FDIC as to the Covered Company's:

(i) Financial condition;

(ii) systems for identifying, measuring, monitoring, and controlling financial and operational risks;

(iii) transactions with depository institution subsidiaries of the Covered Company; and

(iv) compliance with applicable provisions of the FDI Act and any other law or regulation.

(4) Maintain such records as the FDIC may deem necessary to assess the risks to the subsidiary industrial bank or to the Deposit Insurance Fund;

(5) Cause an independent audit of each subsidiary industrial bank to be performed annually;

(6) Limit the Covered Company's direct or indirect representation on the board of directors or board of managers, as the case may be, of each subsidiary industrial bank to no more than 25% of the members of such board of directors or board of managers, in the aggregate, and, in the case of a subsidiary

[89] 12 U.S.C. 4802(a).

[90] 12 U.S.C. 4802(b).

industrial bank that is organized as a member-managed limited liability company, limit the Covered Company's representation as a managing member to no more than 25% of the managing member interests of the subsidiary industrial bank, in the aggregate;

(7) Maintain the capital and liquidity of the subsidiary industrial bank at such levels as the FDIC deems appropriate, and take such other actions as the FDIC deems appropriate to provide the subsidiary industrial bank with a resource for additional capital and liquidity including, for example, pledging assets, obtaining and maintaining a letter of credit from a third-party institution acceptable to the FDIC, and providing indemnification of the subsidiary industrial bank; and

(8) Execute a tax allocation agreement with its subsidiary industrial bank that expressly states that an agency relationship exists between the Covered Company and the subsidiary industrial bank with respect to tax assets generated by such industrial bank, and that further states that all such tax assets are held in trust by the Covered Company for the benefit of the subsidiary industrial bank and will be promptly remitted to such industrial bank. The tax allocation agreement also must provide that the amount and timing of any payments or refunds to the subsidiary industrial bank by the Covered Company should be no less favorable than if the subsidiary industrial bank were a separate taxpayer.

(b) The FDIC may require such Covered Company and industrial bank to commit to provide to the FDIC, and, thereafter, implement and adhere to, a contingency plan subject to the FDIC's approval that sets forth, at a minimum, recovery actions to address significant financial or operational stress that could threaten the safe and sound operation of the industrial bank and one or more strategies for the orderly disposition of such industrial bank without the need for the appointment of a receiver or conservator.

(c) The FDIC may, at its sole discretion, require additional commitments by a Covered Company or by an individual who is a controlling shareholder of a Covered Company. Such commitments may be in addition to those set forth in paragraphs (a) and (b) of this section.

§ 354.5 Restrictions on industrial bank subsidiaries of Covered Companies.

(a) Without the FDIC's prior written approval, an industrial bank that is controlled by a Covered Company shall not:

(1) Make a material change in its business plan after becoming a subsidiary of such Covered Company;

(2) Add or replace a member of the board of directors, board of managers, or a managing member, as the case may be, of the subsidiary industrial bank after becoming a subsidiary of such Covered Company;

(3) Add or replace a senior executive officer after becoming a subsidiary of such Covered Company;

(4) Employ 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 industrial bank; or

(5) Enter into any contract for services material to the operations of the industrial bank (for example, loan servicing function) with such Covered Company or any subsidiary thereof.

(b) The FDIC may, at its sole discretion, impose restrictions on the activities or operations of an industrial bank that is controlled by a Covered Company. Such restrictions may be in addition to those required pursuant to paragraph (a) of this section.

§ 354.6 Reservation of authority.

Nothing in this part limits the authority of the FDIC under any other provision of law or regulation to take supervisory or enforcement actions, including actions to address unsafe or unsound practices or conditions, or violations of law.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on March 17, 2020.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2020–06153 Filed 3–30–20; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2019–1102; Notice No. 25–20–03–SC]

Special Conditions: Qantas Airways Limited, Boeing Model 737–800 Airplane; Personal Electronic-Device Straps Installed on Seat Backs

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Boeing Model 737–800 airplane. This airplane, as modified by Qantas Airways Limited (Qantas), will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is personal electronic-device (PED) retention straps installed on the backs of passenger seats. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send comments on or before May 15, 2020.

ADDRESSES: Send comments identified by Docket No. FAA–2019–1102 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket website, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478).

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.