September 19, 2025

Submitted Electronically

Ms. Jennifer Jones, Deputy Executive Secretary
Federal Deposit Insurance Corporation
550 17th St NW
Washington, DC 20429

RE: Request for Information on Industrial Banks and Industrial Loan Companies and Their Parent Companies, RIN 3064-ZA48

To the Board and Staff of the Federal Deposit Insurance Corporation:

Nelnet, Inc. (NYSE:NNI) is a publicly traded diversified financial services and technology company headquartered and Lincoln, Nebraska. A subsidiary of Nelnet, Inc., is Nelnet Bank, an industrial loan company chartered in Utah, that provides financial products and services to customers throughout the United States. On behalf of Nelnet, Inc., and Nelnet Bank (together herein, "Nelnet"), thank you for the opportunity to submit these comments in response to the Federal Deposit Insurance Corporation's (FDIC) *Request for Information on Industrial Banks and Industrial Loan Companies and Their Parent Companies* published in the Federal Register on July 19, 2025 (the "RFI").

The RFI is a refreshing change in approach from the FDIC's 2024 Notice of Proposed Rulemaking (the "2024 NPRM"), which would have erected unnecessary roadblocks in the ability of ILCs to conduct normal business operations and would likely have had a negative existential impact on one of the strongest, most resilient, and most diverse forms of banking in the United States today.[1] And the FDIC would have done so only four years after the implementation of its 2021 reforms to the regulation of ILCs, which essentially eliminated all but a formal distinction between ILCs, community banks, and their respective parent organizations.[2] Nelnet submitted comments in response to that proposed rulemaking and incorporates those comments by reference to the extent that the FDIC will (and indeed, should) review them as part of its present research into the ILC landscape.[3]

At the outset of these present comments, three points stand out from the 2024 NPRM exercise that now bear repeating:

- ILCs have been, and today remain, some of the best performing and most well-capitalized banks in the banking ecosystem. If one strained to imagine a premise upon

[1] *See* FDIC, Parent Companies of Industrial Banks and Industrial Loan Companies, 89 Fed. Reg. 65,556 *et seq.*, Aug. 12, 2024 (notice of proposed rulemaking).
[2] *See* FDIC, Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10,703 *et seq.*, Feb. 23, 2021 (final rule).
[3] Nelnet Comment Letter, Oct. 10, 2024, https://www.fdic.gov/federal-register-publications/nelnet-inc-and-nelnet-bank-timothy-tewes-and-andrea-moss-rin-3064.

which to impose greater regulation on ILCs than the present regime, it could not be the poor performance or failure of ILCs, at least (but especially) compared to other traditional depository institutions. And it is a postulate of the American financial services ecosystem—especially in an era, like the present, when *de novo* bank charters are virtually nonexistent—that the market is stronger and less systemically risky, and customers are better served, when policy maximizes plenitude and diversity among suppliers of financial services products and services.

- Recognizing the critical but modest role ILCs play in the overall banking landscape, Congress has, over the span of decades, repeatedly affirmed, either expressly or implicitly, its desire to preserve the ILC business model. While the American system of bank regulation is characterized by a fair degree of deference from the lawmaking branch to the administrative state, the latter is advised (and required) to take cues on major questions from the political branch from which its power is devolved. Thus the FDIC is not statutorily authorized, and should not invent license *sua sponte*, to deprive the public of the benefits of the ILC charter (neither operators or customers of ILCs) through regulatory erosion. If anything, the strength of the ILC sector could be used to model managerial responsibility and innovation in the commercial bank sector.

- Regulatory stability, certainty, and predictability are key drivers for the ability of ILCs (and indeed all banks) to serve their customers. The 2021 reforms to the regulations governing ILCs and their parent companies—specifically, the creation of new part 354 in title 12 of the Code of Federal Regulations—have been highly successful in aligning the FDIC's expectations of ILCs with the conduct expected of traditional community banks. The FDIC should give this new regulation time to breathe before it undertakes further surgery. Nelnet Bank, whose charter was approved following the precepts of the 2021 reforms, can attest first-hand that these rules have strengthened its charter. Any legacy claims alleging that ILCs benefit from "regulatory arbitrage" must be discarded now that the only relevant distinctions between how an ILC and a community bank are regulated are purely formal.

The FDIC should be mindful of at least these three points if and as it considers whether to pivot from a solicitation of responsive commentary from the public in this RFI to a more formalized rulemaking. Any consideration of whether and how to further amend the regulatory framework for ILCs and their parent companies further should (as a matter of good government) and must (to satisfy the Administrative Procedure Act) begin with a clear set of goals that identify current lapses in the regulatory regime (including a clear assessment of why those were not sufficiently problematic to warrant solving just four years ago). If nothing is broken—and certainly if, to the contrary, ILCs are performing well compared to the traditional peer group and posing only marginal risk to the DIF—then there is nothing to be fixed. A brief hat-tip to "renewed interest in the [ILC] charter" is not compelling enough to launch a new notice of proposed rulemaking at an agency with finite resources, especially just four years after the very successful creation of Part 354. The FDIC should always prefer maximum regulatory stability and certainty, using regulation only when there is a compelling case and when enforcement is insufficient.

At the most basic level, the FDIC's operation in the banking sector is designed principally to protect depositors through the provision of insurance, the regulation of banks whose deposits are so insured, the resolution of failing or failed banks, and the "back-up" supervision of federal depository institutions for which it is not the primary regulator. The FDIC's statutory authorities should always be deployed in service of the agency's statutory finite mission. If Congress had wanted federal regulators to exercise plenary control over the banking sector—the tone and tenor of the European market—it would have done so over the course of our nation's history. But it has not. Instead, it has created and equipped a handful of federal regulators each to perform a specific, limited function in our diverse sector of national and state banks, both members nonmembers of the Federal Reserve System, and left a fair amount of supervisory jurisdiction to the several states. Whatever its drawbacks from the perspective of a hypothetical European-style unitary regulator, the diversity in the regulatory environment has allowed America's banking sector to flourish and become the envy of the developed world. If something is "working" better for some regulated banks, the question should be how to lower the regulatory burden on other banks so they too can prosper, not how to smother success and innovation with unnecessary regulation.

These observations should encourage the FDIC to articulate, as a first principle, what success looks like in the prudential regulation of ILCs and calibrate only thereafter. If success is measured by the historical performance, capital sufficiency, and innovativeness of ILCs, then by every measure the sector and its regulatory structure are already resoundingly successful, made even more so by the tailoring enabled by Part 354. But if success is defined more coarsely as "making ILC regulation look like Bank Holding Company Act bank regulation"—indeed a political metric—then Sisyphus will continue to push his boulder up the regulatory hill until it appears he has Congress-sized muscles.

The RFI is comprehensive in its subject matter and the questions it poses. Below, Nelnet offers some thoughts and observations in response to those questions, grouped along their topical contours.

A. Information Relevant to Evaluation of Applicable Statutory Factors

Whether for a new charter or for a filing that requires reassessment of the Federal Deposit Insurance Act's (FDIA) six statutory factors, the FDIC should apply the statutory factors of the FDI Act to industrial banks in exactly the same manner as it does to other types of applicants. As a legal matter, there is no basis upon which to modify the manner in which the factors are applied based on the *type* of bank applicant. To do so would presumably admit the possibility of modifying factor application based on the identity or political affiliation of applicants as well. To the contrary, application of the statutory factors should be as consistent, formulaic, and *predictable* as possible. Application decisions should be much faster than they have been in the modern era and should not be held up for exogenous regulatory demands. As a prudential matter, a nondiscrimination principle is especially important at this point in America's financial services history when there is a dearth of de novo bank charters, a decrease in branch banking, and an increasing concentration of banking services in a shrinking number of banks.

Moreover, Congress did not design the FDIA to be at odds with other statutes that expressly allow and encourage the formation of industrial banks. The FDIC must presume that Congress, whenever it considers ILC policy, changes what it wishes to change and tacitly affirms what it does not change. Congress did not amend the FDIA to provide an alternative framework for application of the statutory factors when it passed the Competitive Equality Banking Act of 1987, which excused ILCs from key requirements of the Bank Holding Company Act, or even the Dodd-Frank Act's moratorium on new ILC formation. If Congress had intended the factors to apply differently to ILCs, it would have said so.

The statutory factors must be distinguished from ongoing examination and supervision of banks subject to the FDIC's jurisdiction. The factors are assessed in a snapshot in time; compared to meeting supervisory criteria, the factors should be easy to satisfy—especially, for ILCs, in light of the existence of Part 354, by which the FDIC can exercise regulatory authority to tailor the capitalization and/or supervision of specific banks as part of their ontological fiber.

The FDIC's 2024 notice of proposed rulemaking sought to hijack the statutory factors to effectively shut down the ILC sector by imagining a broader set of concerns for "convenience and needs of the community." (The NPR never actually made the case for this in a level of detail that would have enabled the public to comment on it intelligently, but this is what many inferred from the invention of a new category of "shell" or "captive" ILCs and the assertion that they would struggle to meet the statutory factors.) This factor in particular, if applied unscrupulously, could become so elastic as to encompass policy concerns that might be at odds with banking laws (e.g. viewpoint discrimination, loans to fossil fuel companies, etc.). The statutory factors should apply to ILCs in the same manner as they apply to other banks, including applications for community banks that seek to meet the needs of a community not by branch banking in a geographic footprint but by partnering with fintech companies or becoming involved in cryptocurrency transactions.

Tailoring the statutory factors based on the size, complexity, or nature of the parent risks creating a landscape where each institution's regulatory plan is bespoke. The FDIC should carefully weigh what benefits inure to the bank regulatory system from uniform regulation and what drawbacks could creep in (e.g. viewpoint discrimination disguised as "tailoring") if and as regulators move away from uniformity toward a more bespoke model. While the "nature of the parent" will always, by definition, be unique in the context of applying the factors to ILCs, the FDIC should be mindful that satisfaction of the factors should be rooted in its mission to protect the DIF and ensure the viability of the bank and should be no more searching than the application of the factors to a bank holding company.

For ILCs, capital adequacy should be assessed in the context of Part 354, including the capital and liquidity maintenance agreement (CALMA) and the parent company's resolution plan for the ILC. Resolution planning and capital adequacy depend upon a measure of regulatory stability and predictability that should not be eroded by new rulemakings every three years. We also note that today, 14 years after enactment of the Dodd-Frank Act, there is still no genuine implementing regulation for Section 616 thereof, which requires BHCs and non-BHCs to serve as sources of strength for their insured depository institution (IDI) subsidiaries. Arguably, Part 354 CALMAs offer *stronger* capital adequacy between an ILC parent company and the ILC than a BHC offers to its subsidiary bank. If a bespoke structure is needed to preposition capital in the case of a foreign parent company, the FDIC can and should consider that circumstance on a case-by-case basis as it undertakes the Part 354 process with an applicant.

When addressing the risk that any bank poses to the DIF, the FDIC should consider what factors are likely to cause deposit flight from that bank (e.g. the extent of uninsured deposits) and the deposit quality; in this regard, the type of charter (whether an ILC or a community bank) is irrelevant. While these factors are important in the application of the statutory factor, they are not made unique because an ILC parent company might be heavily involved in deposit generation—at least not more than BHCA-covered activity in which a nonbank subsidiary cross-sells deposits at the IDI subsidiary. The FDIC should carefully examine the incentives that animate deposit viscosity and whether there is any experiential basis to conclude there is a material difference in the stickiness of affiliate-generated deposits. For context, ILCs have performed extremely well compared to other small banks and have thus posed considerably less risk to the DIF than other banks and business models. One explanation for this observation is that the quality and reliability of bail-in capital from a diversified parent company, whether financial or nonfinancial in nature, in the event of distress at the ILC is a *benefit* of the ILC structure that is not found in the traditional BHC model. Any unique risk to the DIF presented by an ILC can be addressed in the context of the Part 354 negotiation among the FDIC, ILC, and the parent company (e.g. concerning capital adequacy, resolution planning, etc.). No evidence suggests that, in the four years since the implementation of Part 354, any new or special requirements are warranted or needed.

Consideration of the convenience and needs of the community has necessarily evolved in the almost 100 years since the enactment of the FDIA. The FDIC is expert in its surveillance of the American consumer banking landscape and knows well the financial challenges of many families. Of course, then, this statutory factor should be assessed in light of the ILC's plans to reduce the cost of consumer credit and serve geographic footprints where financial services are scant or nonexistent. This factor should emphatically not be converted into a catch-all opportunity for regulators to force banks into toeing a political or ideological line in order to receive regulatory approval.

The only deviation Nelnet might suggest with respect to application of the statutory factors is with respect to routine changes in bank control for which a CBCA filing is necessary. The FDIC could offer a streamlined application process when the only factor implicated is the character and fitness of management. CBCA filings, made on an *ad hoc* basis by only certain banks, should not serve as an invitation for a regulator to re-scrutinize a bank as though it were applying for a new charter if the proposed new management certifies that no other factor will be implicated. A streamlined process would have the additional benefit of reducing the burden on regulatory staff.

B. Characteristics of Industrial Bank Parent Companies

The FDIC poses a number of questions in this section of the RFI but their common essence is the question of whether a large technology or retail company should have the ability to establish or acquire an ILC and use its nonbank market power to accelerate the growth of its

ILC. As the RFI details, the question is not hypothetical (Walmart applied for a charter in 2005; Home Depot sought to acquire an ILC in 2006); its ancestors are buried in the Glass-Steagall Act, the Bank Holding Company Act, the Graham-Leach-Bliley Act, the Dodd-Frank Act, and other statutes. As then-Vice Chairman Travis Hill stated in his remarks on the 2024 NPRM, this policy question is the "elephant in the ILC room."[4]

While indeed there are policy and political sensitivities concerning the possibility of a large technology company's acquiring an ILC, Nelnet believes that Congress has been and remains the appropriate policy-setting body on this subject. The extent to which banking and commerce can or should be commingled is indeed a "major question" that has been debated and legislated upon in many public laws over the last century. What may have been appropriate in the years following the Great Depression might not be appropriate (or at least should be reconsidered) in the age of the internet and artificial intelligence. We appreciate the Treasury Department's interest in a wholesale review of the bank regulatory apparatus and banking laws, some of which are over 100 years old, to determine whether they are meeting the needs of a modern society in an international market for banking services.

In the absence of a new congressional pronouncement on the subject, the FDIC is best served to acknowledge the bounds of its statutory authority and, perhaps more important, its expertise in competition law and policy. The FDIC is expert in regulating banks; its expertise in analyzing what are essentially antitrust concerns is limited. These analyses arise most often under the Bank Merger Act or CBCA and involve banking entities. Whether there is an antitrust concern present when a market-dominant technology or retail company seeks to open or acquire an ILC is more appropriately analyzed in a partnership between the FDIC and either the Department of Justice's Antitrust Division or the Federal Trade Commission.

If the chief concern with a possible combination of BigTech and banking is centered around data-sharing, it might be prudent for the FDIC to examine a proposed ILC business plan against the statutory factors in light of special consumer data protections that exist in the banking industry but do not in general commerce. The FDIC should also consider whether such a combination is even feasible given the provisions of the Anti-Tying Act, Regulation W (as amended by the Dodd-Frank Act), and federal and state consumer privacy laws. Hypotheticals and hysteria are not appropriate foundations of federal rulemaking. The FDIC may wish to convene a roundtable to address hypothetical data-sharing concerns to further understand the issue in the context of dialogue rather than a static comment process. It may well be that the proposed model would find sufficient roadblocks under existing law and regulation so as to render further changes to, say, Part 354 unnecessary.

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In closing, Nelnet thanks the FDIC for its candid and refreshing approach to examining the ILC and parent company landscape rather than rushing into a rulemaking. In our view, as one the few ILCs subject to Part 354, the current regulatory framework is working exceptionally

[4] Statement of Vice Chairman Travis Hill re. Notice of Proposed Rulemaking on Industrial Loan Companies, July 30, 2024, https://www.fdic.gov/news/speeches/2024/notice-proposed-rulemaking-industrial-loan-companies.

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well, both in terms of allowing Nelnet Bank to provide excellent customer service on competitive terms and in managing risk at the bank. We welcome further engagement with the FDIC to discuss these comments or any other aspect of ILC law or regulation.

Respectfully submitted,

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