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VIA ELECTRONIC MAIL [*comments@fdic.gov*]

Mr. Robert E. Feldman
Executive Secretary
Attn: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Parent Companies of Industrial Banks and Industrial Loan Companies; RIN 3064-AF31

Dear Mr. Feldman:

Arnold & Porter Kaye Scholer LLP ("Arnold & Porter") is submitting this letter on behalf of a client in response to the Notice of Proposed Rulemaking published by the Federal Deposit Insurance Corporation (the "FDIC") in the *Federal Register* on March 31, 2020, 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 (together, "ILC") becoming, after the effective date of any final rule, a subsidiary of a company that is not subject to consolidated supervision by the Board of Governors of the Federal Reserve System (the "Proposed Rule").[1] We appreciate having this opportunity to comment on the Proposed Rule.

I. Introduction

ILCs, which have their roots in the Morris Plan banks of early 20th century, have evolved over the years from providing small loans to industrial workers to allowing commercial and financial firms to offer a range of banking services. Perhaps the greatest controversy surrounding ILCs has been the debate over separation of banking and commerce - that is, commercial firms engaging in banking activities through their ownership of ILCs.

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[1] Parent Companies of Industrial Banks and Industrial Loan Companies, 85 Fed. Reg. 17,771 (March 31, 2020) (hereinafter the "Proposing Release").

Critics argue that ownership of ILCs by commercial firms leads to a number of suboptimal public policy results, ranging from threats to the banking and financial system to adverse impacts on competition and consumers. However, it is noteworthy that Congress for decades has consistently acted to empower ILCs. For instance, in 1982 Congress enacted Garn-St Germain Depository Institutions Act wherein all ILCs were made eligible for FDIC deposit insurance. Then in 1987, Congress passed the Competitive Equality Banking Act that continued to allow a firm, whether commercial or financial, to own an ILC without becoming subject to consolidated supervision by the Federal Reserve as a bank holding company.

Indeed, even in the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress merely imposed a three-year moratorium on ILC applications by commercial firms[2] and required a study instead of mandating any substantive restrictions on ILCs or their parent firms. Therefore, as the FDIC has previously noted, ILCs remain permissible under the law of the land unless and until Congress takes action to prohibit ownership of ILCs by commercial firms.

While there is certainly merit in debating the public policy question of whether commercial firms should be allowed to own ILCs, we respectfully suggest that the proper venue to resolve that question is the Congress. That said, while the FDIC does not make the law, it is charged with implementing the law and must apply the relevant statutory factors in evaluating and acting upon applications related to ILCs. And in its implementation of the law, the FDIC of course retains discretion in how it evaluates the applications from commercial and financial firms under those statutory factors depending on the different types of risks posed by different types of firms.

Given that absent Congressional action the FDIC is tasked under the current law with processing ILC applications, we support the effort by the FDIC in the Proposed Rule to codify existing, informal practices surrounding ILC applications that have developed over time. Regardless of one's view of ILCs, promulgating a clear rule under the Administrative Procedures Act on how the FDIC will interact with, and what the FDIC would require from, the owners of ILCs should be considered a laudable objective.

II. Discussion

We are generally in agreement with the Proposed Rule and its underlying principles. The Proposed Rule would largely formalize the existing practice of the FDIC

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[2] This statutory moratorium followed a temporary regulatory moratorium that the FDIC first imposed in 2006, which applied to deposit insurance applications and change in control notices for ILCs that would be owned by commercial firms. Similar to the statutory moratorium, this moratorium by the FDIC did not apply to ILCs that would be owned by financial firms which do not raise the same concerns as commercial firms. *See* Proposing Release at 17775.

to require entities seeking control of an ILC to commit to serve as a source of financial strength for the ILC and submit to certain supervisory and enforcement authorities of the FDIC. These principles are consistent with the longstanding practice of the FDIC in its consideration and approval of ILC applications.

Formalizing the FDIC's approach to ILCs would be of benefit to all industry participants. By articulating the FDIC's expectations and requirements in the form of a rulemaking, the Proposed Rule would bring greater clarity and consistency to the process of acquiring and chartering insured ILCs. Those who would seek to obtain an ILC would be in a better position to address FDIC interests early in the acquisition or chartering process. Establishing clear guidelines would additionally remove much of the uncertainty currently surrounding the ILC acquisition process. In short, the Proposed Rule would allow the FDIC to extract itself from the policy debate surrounding ILCs in favor of its proper role of observing and implementing existing and well-established law.

We additionally support the FDIC's proposal to grandfather existing owners of ILCs. As noted above and acknowledged by the Proposing Release, the Proposed Rule would largely codify existing informal FDIC practice with respect to the requirements imposed on ILC owners as a condition of approval of insurance applications or changes in control. Requiring current ILC owners to submit to a new round of technical compliance mandates when there is no evidence to suggest that the current regulatory regime is insufficient would be an inappropriate use of both public and private resources. Any concerns that may arise on a case-by-case basis involving current ILCs can be addressed by the FDIC using its existing Title 12 authorities.

Finally, in response to Question #9 of the Proposing Release, we submit that it would be appropriate for Covered Companies and any subsidiaries and affiliates of Covered Companies that are themselves functionally regulated entities to be carved out of the scope of the required commitments contemplated by section 354.4 of the Proposed Rule. Such a limitation would be consistent with the jurisdictional boundaries contemplated by the Gramm-Leach-Bliley Act of 1999 and noted in the Proposing Release. The limitation in scope would likewise avoid the burdens and inefficiencies of duplicative or overlapping supervision by multiple regulatory bodies.[3]

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[3] Functionally regulated entities are engaged in activities that are financial in nature or closely related thereto. As noted above, financial firms do not raise the types of concerns that commercial firms do with regard to their affiliation with ILCs, and functionally regulated entities by definition are already regulated. Therefore, excluding functionally regulated entities from duplicative supervision should not frustrate the intent of the Proposed Rule.

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Thank you for your consideration of our comments. We appreciate the hard work by the FDIC staff in promulgating the Proposed Rule and encourage the FDIC to move expeditiously to finalize the rule. Should the FDIC have questions or request additional information, please contact the undersigned at *christopher.allen@arnoldporter.com.*

Sincerely,

[redacted]

Christopher L. Allen
Partner