SUBMITTED ELECTRONICALLY VIA www.FDIC.gov

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

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

Dear Mr. Sheesley:

Celtic Bank, a Utah industrial bank, (the "**Bank**") and its parent company, Celtic Investment, Inc. ("**Celtic Investment**"), appreciate the opportunity to comment on the proposed rule approved by the Board of Directors of the Federal Deposit Insurance Corporation (the "**FDIC**") on July 30, 2024, to amend the FDIC regulations governing FDIC-insured industrial banks and their parent companies, 12 C.F.R. Part 354 (the "**Proposed Rule**").[1]

Celtic Bank is a Utah state-chartered industrial bank headquartered in Salt Lake City, Utah, with total consolidated assets of approximately $3.4 billion as of June 30, 2024. Celtic Bank is supervised by the Utah Department of Financial Institutions, as its chartering authority, and by the FDIC, as its primary federal regulator. The Bank provides financing to a broad range of small businesses on a nationwide basis across their working capital, expansion, acquisition, construction, equipment financing, and real estate needs. The Bank also offers a full range of equipment financing and leasing, commercial solar financing, and asset-based lending solutions. The Bank is a top SBA lender servicing clients across the United States.

The Bank is concerned that the Proposed Rule's modifications to the definitions in Part 354 provide the FDIC authority to subject any company that controls an FDIC-insured industrial bank to the Part 354 requirements regardless of how long the company has operated the bank or the date on which the company acquired or formed the industrial bank, in clear contravention of the need for stability and continuity in the FDIC's supervision and regulation of existing insured institutions. Furthermore, the application of the Proposed Rule fails to adhere to the well-established principle that new rules should be directed to the future as a matter of fairness and due process. This principle informed the FDIC's original promulgation of Part 354 in 2021, which established an effective date prospectively.

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

The Bank and Celtic Investment support the comment letter submitted by the National Association of Industrial Bankers ("**NAIB**"). This comment letter further objects to the Proposed Rule on the bases that it (a) does not comply with the Administrative Procedure Act insofar as the Proposed Rule is not supported by the FDI Act or by the FDIC's supervisory record for industrial banks, (b) fails to explain why the Proposed Rule is necessary in light of the fact that Part 354 was finalized less than 4 years ago on February 23, 2021, and (c) is unclear and vague in its application to existing industrial banks inasmuch as it would allow for retroactive application of the Part 354 requirements.

Section 354.2 of the current rule defines the term "covered company," to which the requirements in Part 354 apply, as:

> "[A]ny company that is not subject to Federal consolidated supervision by the [Federal Reserve Board] and that controls an industrial bank:
>
> (1) As a result of a change in bank control pursuant to section 7(j) of the FDI Act;
>
> (2) As a result of a merger transaction pursuant to section 18(c) of the FDI Act; or
>
> (3) That is granted deposit insurance by the FDIC pursuant to section 6 of the FDI Act, in each case on or after April 1, 2021."[2]

Under the current rule, Celtic Investment is not a "covered company" and neither it nor Celtic Bank is subject to Part 354. The Part 354 requirements and restrictions are not necessary for effectively supervising the Bank or Celtic Investment, as the framework of federal and state laws that apply to them today is robust and well supports their continued operation in a safe and sound manner.

The Proposed Rule would make substantial changes to this definition, so that the definition of "covered company" in section 354.2 would read:

> "(a) In each case on or after April 1, 2021, any company that is not subject to Federal consolidated supervision by the [Federal Reserve Board] and that controls an industrial bank:
>
> (1) As a result of a change in bank control pursuant to section 7(j) of the FDI Act;
>
> (2) As a result of a merger transaction pursuant to section 18(c) of the FDI Act;

[2] 12 C.F.R. § 354.2.

(3) As a result of a conversion pursuant to section 5(i)(5) of the Home Owners' Loan Act;

(4) That is granted deposit insurance by the FDIC pursuant to section 6 of the FDI Act; or

(5) As determined by the FDIC after providing the company an opportunity to present its views in writing as to why the provisions of this part should not apply; or

(b) A company that controls an industrial bank, if, on or after [the effective date of the final rule]:

(1) The control of such company changes, requiring a notice subject to section 7(j) of the FDI Act; or

(2) The company is the resultant entity following a merger transaction."[3]

As drafted, Section 354.2(a)(5) of the definition would empower the FDIC to determine, on an arbitrary basis without any standard, that any parent company of an FDIC-insured industrial bank – regardless of when the bank was formed or acquired – is subject to application of the requirements and restrictions in Part 354. The FDIC, in fact, emphasizes in the Proposed Rule's preamble that this gives the FDIC authority to apply Part 354 to "any other situation where an industrial bank ***would become*** a subsidiary of a company that is not subject to Federal consolidated supervision."

Notwithstanding this description, the preamble acknowledges that the change would give the FDIC authority to apply Part 354 to a "legacy" parent company and industrial bank subsidiary that are not currently subject to Part 354 due to the effective date of April 31, 2021. The preamble proffers no justification for this substantial expansion in the scope of the definition of "covered company" and instead offers an affected company the opportunity to present views in writing if the company disagrees with the FDIC determination, albeit without any standards, timeframe, or process to govern the ultimate determination of whether the company and its subsidiary would be subject to Part 354.

The effect of this expansion in scope would be to introduce significant uncertainty into the supervisory framework for the 24 FDIC-insured industrial banks that were chartered or acquired prior to April 31, 2021. The FDIC could require significant and immediate changes in such a bank's board of directors and senior management, capitalization, corporate governance, and intercompany operations by simply determining that Part 354 applies. Neither the Proposed Rule preamble nor its text establish standards that would guide or inform the FDIC's determination that Part 354 should apply, thereby preventing such legacy industrial banks from planning or operating their business in a manner to avoid an FDIC determination that Part 354 applies. This change in the Proposed Rule, and the FDIC's application of Part 354 in this manner if the

[3] 89 Fed. Reg. at 65567-65568 (emphasis added).

Proposed Rule is adopted as proposed, would force legacy parent companies and industrial banks into the untenable position of needing to challenge FDIC action in order to preserve stability in their regulatory framework. Further, this FDIC action would be arbitrary and capricious based on the administrative record underlying the Proposed Rule because the FDIC has offered no supervisory evidence to support extension of Part 354 to legacy companies and because the process established in Part 354 for the FDIC to use this authority – i.e., providing the FDIC blanket authority with an affected company having only an opportunity to respond in writing – lacks any standards to guide the agency's decision or to challenge it. .

In addition, in the FDIC rulemaking process that led to promulgation of Part 354 in 2021, the FDIC specifically requested comment on the extent to which the part's requirements and restrictions should apply to legacy companies and industrial bank subsidiaries or should apply only prospectively.[4] The FDIC received comments in favor of each approach but ultimately decided to apply Part 354 ***prospectively***:

> After considering these comments regarding the scope of the proposed rule, the final rule will apply only prospectively as of the effective date of the rule, to industrial banks that become subsidiaries of companies that are Covered Companies. The FDIC must consider the requirements of the [Administrative Procedure Act] and the Riegle Community Development and Regulatory Improvement Act (RCDRIA) in determining the effective date of new regulations, and both of these statutory schemes generally provide for an effective date that follows the date on which the regulations are published in final form. Thus, the final rule will be effective on April 1, 2021.[5]

Commenters had expressed concerns in response to the FDIC's proposed rule for Part 354 that "applying the rule retroactively would violate the [Administrative Procedure Act] as parent companies of existing industrial banks had no opportunity to consider these requirements in their decision to establish or acquire an industrial bank."[6] This same concern under the Administrative Procedure Act remains applicable for legacy companies and industrial banks, and

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[4] FDIC Proposed Rule, Parent Companies of Industrial Banks and Industrial Loan Companies, 85 Fed. Reg. 17771, 17777 (Mar. 31, 2020) ("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?").

[5] See FDIC Final Rule, Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10703, 10715 (Feb. 23, 2021).

[6] See 5 U.S.C. § 551(4) (defining the term "rule" in the Administrative Procedure Act ("APA") as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.").

the Proposed Rule's opportunity to present views in writing (again, without any standards that inform the FDIC's determination) is not responsive to the concern. [7]

For these reasons, the FDIC should withdraw the Proposed Rule and evaluate further whether there is any justification for maintaining the authority to apply Part 354 to legacy parent companies and industrial banks and thereby subjecting them to significant uncertainty in supervision and regulation and, if so, whether the application of Part 354 to such entities would comply with the Administrative Procedure Act.

* * *

Celtic Bank and Celtic Investment, Inc., appreciate the opportunity to provide commentary, and respectfully request that the FDIC withdraw the Proposed Rule for the reasons set forth in this letter and the NAIB comment letter. If you have any questions concerning this comment letter or would like the Bank to provide additional information, please do not hesitate to contact us.

Respectfully submitted,

[redacted]
Todd Boren
President, Celtic Bank

[redacted]
Reese Howell, Jr.
President, Celtic Investment Inc.

[7] In Greene v. United States, , the U.S. Supreme Court refused to apply an administrative regulation retroactively where doing so would have deprived a party of rights that matured under a prior regulation. The Court stated that, in respect of the regulation, which functioned as a legislative rule under the APA, "(T)he first rule of construction is that legislation must be considered as addressed to the future, not the past ... (and) a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." 376 U.S. 149, 84 S.Ct. 615, 621-22, 11 L.Ed.2d 576 (1964). The FDIC affirmatively concluded in the original promulgation of Part 354 that its requirements should not have retroactive effect, and the FDIC's reversal on this position without justification exacerbates the concerns expressed by commenters for the original rule and for this Proposal Rule that retroactive effect would violate the APA.