

October 11, 2024

Comenity Capital Bank
12921 Vista Station Blvd., Suite 100
Draper, UT 84060

Bread Financial
3095 Loyalty Circle
Columbus, OH 43219

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:

Comenity Capital Bank, a Utah industrial bank, (the “**Bank**”)¹ and its parent company, Bread Financial Holdings, Inc. (“**Bread Financial**”), 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**”).²

The Bank and Bread Financial are 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 the date on which the company acquired or formed the industrial bank, in clear contravention of the need for stability and continuity in supervision and regulation and the FDIC’s original approach to establishment of an effective date in Part 354. Moreover, the Proposed Rule is critical of industrial banks and their parent companies and establishes a presumption of not approving regulatory applications involving such entities even though the FDIC does not have a supervisory record or factual basis to support this presumption and even though there is no statutory basis in the Federal Deposit Insurance Act (“**FDI Act**”) or other federal banking laws for the presumption.

The Bank and Bread Financial support the comment letter submitted by the National Association of Industrial Bankers (“**NAIB**”). This comment letter provides comprehensive information explaining that industrial banks provide much-needed financial services to the customers and communities they serve, have long histories of operating safely and soundly with strong capital and liquidity levels, and operate in accordance with federal banking laws that have existed for decades without amendment despite numerous opportunities for change. The letter also contains analyses showing that the Proposed Rule does not comply with the Administrative Procedure Act insofar as the Proposed Rule is not supported by

¹ Comenity Capital Bank is a Utah-chartered industrial bank headquartered in Draper, Utah, with total consolidated assets of approximately \$12.6 billion as of June 30, 2024. Comenity Capital Bank is supervised by the Utah Department of Financial Institutions, as its chartering authority, and by the FDIC, as its primary federal regulator. Bread Financial Holdings, Inc. is a publicly traded financial services company that provides personalized payment, lending and saving solutions through its insured depository institution subsidiaries, Comenity Capital Bank and Comenity Bank, a Delaware commercial bank operating as a credit card bank under the Competitive Equality Banking Act (CEBA).

² Parent Companies of Industrial Banks and Industrial Loan Companies, 89 Fed. Reg. 65556 (Aug. 12, 2024).

the FDI Act or by the FDIC's supervisory record for industrial banks, 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 is unclear and vague in its application to existing and proposed industrial banks.

The Bank and Bread Financial write separately in this comment letter to emphasize certain issues that are unique to industrial banks that were chartered and/or acquired prior to the effective date of April 1, 2021, and the FDIC's broad assertion of power over these banks in the Proposed Rule based on a change to one of the part's definitions.

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."³

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;
- (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."⁴

³ 12 C.F.R. § 354.2.

⁴ 89 Fed. Reg. at 65567-65568 (emphasis added).

As drafted, Section 354.2(a)(5) of the definition would empower the FDIC to determine that any parent company of an FDIC-insured industrial bank – regardless of when the bank was formed or acquired – is subject to 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 1, 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 1, 2021. The FDIC could effect 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.

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.⁵ 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, 2021.⁶

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.” This same concern under the Administrative Procedure Act remains applicable for legacy companies and industrial banks, and 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.

⁵ 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?”).

⁶ See FDIC Final Rule, Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10703, 10715 (Feb. 23, 2021).

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.

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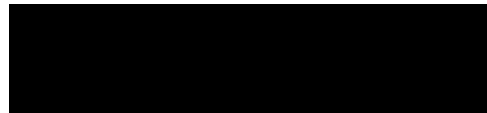
Comenity Capital Bank and Bread Financial appreciate the opportunity to provide commentary, and respectfully request that the FDIC consider withdrawing the Proposed Rule for the reasons set forth in this letter and the NAIB comment letter. If you have any questions concerning this comment letter or would like the Bank or Bread Financial to provide other information, please do not hesitate to contact us.

Respectfully submitted,



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Bruce Bowman
President, Comenity Capital Bank



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Joseph Motes, EVP, CAO, GC and Secretary
Bread Financial Holdings, Inc.