Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 354

RIN 3064–AF88

Parent Companies of Industrial Banks and Industrial Loan Companies

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is seeking comments on proposed amendments to its regulation governing parent companies of industrial banks and industrial loan companies. This regulation, which was adopted in December 2020, requires certain conditions and written commitments in situations that would result in an industrial bank or industrial loan company becoming a subsidiary of a company that is not subject to consolidated supervision by the Federal Reserve Board. The proposed amendments would revise the definition of ''Covered Company'' to include conversions involving a proposed industrial bank or industrial loan company under section 5 of the Home Owners' Loan Act, or other transactions as determined by the FDIC; ensure that a parent company of an industrial bank subject to a change of control, or a parent company of an industrial bank subject to a merger in which it is the resultant entity, would be subject to the FDIC's regulation; and provide the FDIC the regulatory authority to apply the regulation to other situations where an industrial bank would become a subsidiary of a company that is not subject to Federal consolidated supervision. Additionally, the proposed amendments would clarify the relationship between written commitments and the FDIC's evaluation of the relevant statutory factors. The proposed amendments also would set forth additional criteria that the FDIC would consider when assessing the risks presented to an industrial bank or industrial loan company by its parent company and any affiliates and evaluating the institution's ability to function independently of the parent company and any affiliates.

DATES: Comments will be accepted until October 11, 2024.

ADDRESSES: Interested parties are invited to submit written comments, identified by RIN 3064–AF88, by any of the following methods:

- *Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications/.* Follow the instructions for submitting comments on the agency website.
- *Email: comments@fdic.gov.* Include RIN 3064–AF88 in the subject line of the message.
- *Mail:* James P. Sheesley, Assistant Executive Secretary, Attention: Comments—RIN 3064–AF88, 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 NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m.
- *Public Inspection:* Comments received, including any personal information provided, may be posted without change to *https://www.fdic.gov/resources/regulations/federal-register-publications/.* Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of the proposed rule will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

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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] Through 12 CFR part 354 of the FDIC Rules and Regulations (part 354),[3] the FDIC formalized its framework to supervise industrial banks and mitigate risk to the Deposit Insurance Fund (DIF) that may otherwise be presented in the absence of Federal consolidated supervision[4] of an industrial bank and its parent company.

Industrial banks are exempted from the definition of ''bank'' for purposes of the Bank Holding Company Act (BHCA). As a result, both financial and commercial companies can control an industrial bank without being subject to

[1] *See, e.g.,* 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. The amended rule would not apply to limited purpose trust companies and credit card banks that also are exempt from the definition of ''bank'' pursuant to section 1841(c)(2).

[3] 12 CFR part 354. *See* 86 FR 10703 (Feb. 23, 2021).

[4] In the context of this 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 (BHC) 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).

the BHCA's activities restrictions or Federal Reserve Board (FRB) supervision and regulation. Some of the companies recently pursuing an industrial bank charter engage in commercial activities or have diversified business operations and activities that would not otherwise be permissible for bank holding companies (BHCs) under the BHCA and applicable regulations. There has been continuing interest in the establishment of industrial banks, particularly with regard to proposed institutions that plan to implement specialty or limited purpose business models, including those where the operations of the proposed industrial bank would be interconnected with, or reliant on, the operations of the parent company or its affiliates. The FDIC is concerned about increased risk to the DIF in situations where there is a significant degree of dependence on the parent company or affiliates, particularly with respect to the primary business functions of the proposed institution. The FDIC is also focused on ensuring that such business models would appropriately serve the convenience and needs of the community.

Dependent relationships raise supervisory concerns because the industrial bank's operations and condition may be vulnerable to any financial distress or operational disruptions at the parent organization. In such circumstances, there may be undue pressures or influences from the parent organization that impair the industrial bank's ability to maintain independent oversight and decision-making at the bank level. Further, where financial distress is experienced across the organization, concerns may develop that negatively impact capital and liquidity levels, earnings prospects, and the capacity of affiliates to fulfill their service commitments or other obligations to the industrial bank.

In addition, significant resolution concerns may be presented if the industrial bank's parent company fails or otherwise faces significant financial difficulty that impairs its ability to perform under the agreements required by part 354. An industrial bank could have its business operations disrupted if critical support services provided by a parent company or its affiliates are lost. Additionally, overreliance on parent company support for daily operations could leave the industrial bank with little independent franchise value in the event of a failure. In such a case, the FDIC as receiver potentially would be faced with limited and more costly resolution options, such as establishing a bridge bank or employing a deposit payout.

In light of these concerns, the FDIC has identified a number of changes to part 354 that are warranted to clarify and enhance the supervisory framework with respect to industrial banks. The proposed rule addresses the FDIC's concerns regarding the potential risk presented to an industrial bank subsidiary from its parent organization, including the relevant interdependencies, operational risks, and other circumstances or events that could create safety and soundness concerns and attendant risk to the DIF. The proposed amendments would incorporate criteria that the FDIC will consider in assessing the overall impact of a parent company and its affiliates on its industrial bank subsidiary and would provide notice and transparency to those companies that would seek to establish or acquire an industrial bank.

The FDIC has received a limited number of filings where the parent company would control an industrial bank as a result of a conversion pursuant to section 5(i)(5) of the Home Owners' Loan Act (HOLA).[5] Such proposed conversions from a Federal savings association to an industrial bank, although infrequent, raise similar issues to those raised by the filings currently triggering the applicability of part 354, namely that such conversions also would result in an industrial bank becoming a subsidiary of a company that is not subject to Federal consolidated supervision.[6] Consequently, the FDIC is proposing to amend the definition of ''Covered Company'' to include filings made pursuant to section 5(i)(5) of the HOLA.

The FDIC is also proposing to amend the definition of ''Covered Company'' in order to ensure that if a parent company of an industrial bank organized before April 1, 2021, is subject to a change of control, or such parent company is subject to a merger in which it is the resultant entity, it would be subject to part 354. Finally, the FDIC is proposing an amendment that would provide the FDIC the regulatory authority to apply part 354 to other situations where an industrial bank would become a subsidiary of a company that is not subject to Federal consolidated supervision.

[5] 12 U.S.C. 1464(i)(5).

[6] The FDIC considers the statutory factors applicable to each filing it receives. However, as a general matter, when the purpose for a filing is to avoid the application of requirements imposed by another Federal banking agency, such a purpose will be viewed negatively within the context of the FDIC's consideration of the relevant factors.

II. Background

A. 2020–2021 Rulemaking—Part 354

On February 23, 2021, the FDIC published a final rule governing the parent companies of industrial banks, codified at part 354.[7] Part 354 took effect on April 1, 2021. The rule requires certain conditions and written commitments for each deposit insurance application approval, non-objection to a change in control notice, and merger application approval that would result in an industrial bank becoming a subsidiary of a company that is not subject to Federal consolidated supervision by the FRB. The rule also requires that, before any industrial bank may become a subsidiary of a company that is not subject to Federal consolidated supervision, such industrial bank and company must enter into one or more written agreements with the FDIC. The rule additionally requires the FDIC's prior written approval for certain actions proposed by the industrial bank, such as making a material change in its business plan. The rule applies to any industrial bank that becomes a subsidiary of a company not subject to Federal consolidated supervision as a result of a change in bank control or merger, or that is granted deposit insurance, on or after April 1, 2021.

B. The Industrial Bank Charter

Under the Federal Deposit Insurance Act (FDI Act), industrial banks are ''State banks'' [8] and all of the existing FDIC-insured industrial banks are ''State nonmember banks.'' [9] As a result, the FDIC is the appropriate Federal banking agency for industrial banks.[10] Each industrial bank is also regulated by its respective State chartering authority. The FDIC exercises the same supervisory and regulatory authority over industrial banks as it does over other State nonmember banks and State savings associations.

The Competitive Equality Banking Act of 1987 exempted industrial banks from the definition of ''bank'' in the BHCA.[11] 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. Industrial banks today are owned by both financial firms and commercial firms.

[7] 86 FR 10703 (Feb. 23, 2021).

[8] 12 U.S.C. 1813(a)(2).

[9] 12 U.S.C. 1813(e)(2).

[10] 12 U.S.C. 1813(q)(2).

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

C. Industry Profile

As of June 27, 2024, there were 23 industrial banks [12] with $232 billion in aggregate total assets. Six industrial banks reported total assets of $10 billion or more; seven industrial banks reported total assets of $1 billion or more but less than $10 billion. The industrial bank sector today includes a diverse group of insured financial institutions operating a variety of business models. A significant number of the existing industrial banks support the commercial or specialty finance operations of their parent company and are funded through sources other than core deposits.

Since 2008, there have been two newly established industrial banks: Nelnet Bank, Draper, Utah, and Square Financial Services, Inc., Salt Lake City, Utah, which became FDIC-insured in November 2020 and March 2021, respectively. The applications for Nelnet Bank and Square Financial Services, Inc. were approved in March 2020.[13] As part of the approvals, the FDIC required each industrial bank and their parent companies to enter into written agreements with the FDIC that contained provisions consistent with the requirements of part 354.

When part 354 was finalized on February 23, 2021, there were six pending industrial bank deposit insurance applications. Since that time, the FDIC received three additional industrial bank deposit insurance applications. Of the nine applications received since March 2020, one was approved, six have been withdrawn,[14] one was returned as substantially incomplete, and one remains pending. 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 Framework

Because industrial banks are insured State nonmember banks, they are subject to the FDIC Rules and Regulations, as well as other provisions of law, including restrictions under the Federal Reserve Act governing transactions with affiliates,[15] anti-tying provisions of the BHCA,[16] and insider lending regulations.[17] Industrial banks are also subject to regular examination, including examinations focused on safety and soundness; anti-money laundering and countering the financing of terrorism compliance; consumer protection, including fair lending; Community Reinvestment Act; information technology; 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.[18]

In addition, under section 38A of the FDI Act,[19] 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.[20] Subsection (d) of section 38A 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.[21]

Part 354 conforms to the FDIC's historical practice of requiring capital and liquidity maintenance agreements (CALMAs) and other written agreements between the FDIC and controlling parties of industrial banks as well as the imposition of prudential conditions when approving or non-objecting to certain filings involving an industrial bank.

III. Rulemaking Authority

The FDIC amends its regulations under the general rulemaking authority prescribed in section 9 of the FDI Act [22] and under specific authority granted by the FDI Act and other statutes.[23] These include section 5 of the FDI Act, which authorizes the FDIC to grant deposit insurance, based on the factors in section 6 of the FDI Act; these factors generally focus on the safety and soundness of the proposed institution, any risk it may pose to the DIF, and the convenience and needs of the community.[24] The FDIC is also authorized to permit or deny various transactions by State nonmember banks, including merger and change in bank control transactions.[25] Conversions from a Federal savings association to an industrial bank, pursuant to section 5(i)(5) of the HOLA,[26] are also subject to review and approval by the FDIC, as the resulting institution would be an industrial bank that is not subject to Federal consolidated supervision. While the statutory factors differ by filing type, safety and soundness considerations and other risk attributes are commonly addressed. In addition, section 39 of the FDI Act charges the FDIC with ensuring that the institutions it supervises operate in a safe and sound manner by prescribing standards through regulations or guidelines.[27] Finally, section 38A of the FDI Act empowers the FDIC to ensure that a company that controls an industrial bank serves as a source of financial strength for that institution.

IV. Description of the Proposed Amendments to Part 354

A. Revisions to the Scope of Part 354's Application

1. Amending the Definition of ''Covered Company'' To Expressly Include Filings Made Pursuant to Section 5(i)(5) of the HOLA

Part 354 applies to Covered Companies and industrial banks controlled by a Covered Company. ''Covered Company'' is defined in part 354 to mean, in each case on or after April 1, 2021, any company that is not subject to Federal consolidated supervision by the FRB 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.[28] The effect of this definition,

[12] Of the 23 industrial banks existing as of June 27, 2024, 15 were chartered in Utah, three in Nevada, three in California, one in Hawaii, and one in Minnesota.

[13] The FDIC Board approved an industrial bank deposit insurance application for Thrivent Bank, subject to conditions and written agreements, on June 20, 2024. The bank has not yet commenced operations.

[14] 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 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.

[15] *See* 12 U.S.C. 1828(j)(1)(A); 12 CFR part 223.

[16] 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(h)(1).

[17] *See* 12 CFR 337.3.

[18] 12 U.S.C. 1820(b)(4).

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

[20] 12 U.S.C. 1831*o*–1(b).

[21] 12 U.S.C. 1831*o*–1(d).

[22] 12 U.S.C. 1819.

[23] *See, e.g.*, 12 U.S.C. 1811, 1815, 1816, 1817, 1818, 1819(a) (Seventh) and (Tenth), 1820(g), 1831o–1, 3108, 3207.

[24] 12 U.S.C. 1816.

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

[26] 12 U.S.C. 1464(i)(5).

[27] FDI Act section 39, 12 U.S.C. 1831p–1.

[28] 12 CFR 354.2.

together with the scope provisions of § 354.1, is that industrial banks organized on or after April 1, 2021, are subject to part 354, while those organized prior to April 1, 2021 (legacy institutions), are not subject to part 354 unless a Covered Company comes to control such an industrial bank through one of the three enumerated routes. As a result, a company that controls an industrial bank that has converted from a Federal savings association charter would not be a Covered Company.

Section 354.6 currently [29] makes it clear that the adoption of part 354 does not impair the FDIC's authority to address supervisory concerns. Accordingly, even if part 354 does not apply to a legacy institution or to an industrial bank or its parent company that does not satisfy one of the three prongs of the Covered Company definition, the FDIC may impose some or all of the requirements of part 354 on a given institution as warranted. Such an approach makes sense because the requirements of part 354 reflect the supervisory practices of the FDIC with respect to industrial banks and their parent companies, codified to provide notice and transparency to those companies that would seek to establish or acquire an industrial bank.

As noted above, the FDIC has received a limited number of filings where the parent company would control an industrial bank as a result of a conversion pursuant to section 5(i)(5) of the HOLA.[30] Section 5(i)(5) allows a Federal savings association to convert to a State bank with the approval of the appropriate State bank supervisor and the appropriate Federal banking agency if the resulting State bank will meet all financial, management, and capital requirements applicable to the resulting national or State bank.[31] Such proposed conversions from a Federal savings association to an industrial bank, although infrequent, raise similar issues to those raised by the filings currently triggering application of part 354, namely that such conversions also would result in an industrial bank becoming a subsidiary of a company that is not subject to Federal consolidated supervision. As a result, the FDIC has determined that such conversions, if approved, should be subject to the provisions of part 354, as if part 354 applied.

Consequently, the FDIC is proposing to amend the definition of ''Covered Company'' to expressly include filings made pursuant to section 5(i)(5) of the HOLA. While § 354.6 preserves the FDIC's authority to impose such conditions as it may deem necessary in connection with a conversion under section 5(i)(5) of the HOLA to an industrial bank, the FDIC believes specific regulatory language is appropriate.

2. Change in Control or Merger Involving the Parent Company of an Industrial Bank

The FDIC is proposing a second amendment to the definition of ''Covered Company'' to include companies that control an industrial bank if, on or after the effective date of the amendment to the definition of ''Covered Company,'' there is a change in control at the parent company or there is a merger transaction in which the parent company is the resultant entity. The proposed amendment would fill an unintended gap that results from the construction of the current definition of ''Covered Company.'' Currently, industrial banks and their parent companies would not be subject to part 354 unless the parent company controls the industrial bank as a result of one of three triggering events enumerated in the ''Covered Company'' definition, in each case after the effective date of part 354. This approach divides industrial banks into (1) legacy institutions to which part 354 does not apply, on the one hand and (2) legacy institutions that become subject to part 354 as a result of one of the three triggers, or new institutions, on the other, and (3) de novo industrial banks.

The gap results where there is a change in control or merger that occurs at or above the level of the parent company that results in a change in the person that controls the parent company but does not result in a change in the relationship between the industrial bank and its parent company. Similarly, if the parent company were a party to a merger in which it is the resultant entity, then new management with a new plan for the industrial bank could be installed. The parent company would continue to control the industrial bank, but not as a result of one of the trigger events, thus failing to make the parent company a Covered Company subject to part 354.

The FDIC has an interest in being able to review changes that impact the parent's control of the industrial bank. This interest is recognized specifically in the Change in Bank Control Act, which requires the prior FDIC approval of the acquisition of direct or indirect control of a State nonmember bank.[32] The proposed amendment would ensure that a parent company subject to such a change of control, or a parent company subject to a merger in which it is the resultant entity, would be subject to part 354.

3. Applying Part 354 to Situations in Which an Industrial Bank Would Become a Subsidiary of a Company That Is Not Subject to Federal Consolidated Supervision

Finally, the FDIC is proposing an amendment that would provide the FDIC the regulatory 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. The FDIC recognizes that such an amendment could potentially lead to the application of this part to a legacy institution, despite the April 2021 effective date of part 354. Accordingly, the FDIC proposes to allow a filer of an application or notice, or participant in a transaction, an opportunity to present its views in writing if the company does not agree with the FDIC's determination to apply part 354 to a particular filing. The proposed amendments to part 354 would make clear that such a written filing should be submitted in accordance with part 303 of the FDIC Rules and Regulations.[33]

This type of provision, with the opportunity for a filer to express its views regarding the FDIC's determination, is not without precedent in the FDIC Rules and Regulations.[34] The FDIC believes the proposed amendment properly balances the FDIC's need for the flexibility to be able to respond to situations that it cannot foresee with a filer's need for an avenue to react and respond to the FDIC's determinations.

Question 1: What situations—other than those that require a notice subject to section 7(j) of the FDI Act or an application subject to sections 5 or 18(c) of the FDI Act or section 5(i)(5) of the HOLA—present similar risks such that they should also subject the industrial bank and its parent company to part 354?

[29] As proposed, § 354.6 would be renumbered to § 354.7.

[30] 12 U.S.C. 1464(i)(5).

[31] 12 U.S.C. 1464(i)(5)(A), (B).

[32] 12 U.S.C. 1817(j)(1).

[33] *See* 12 CFR part 303.1 to 303.19.

[34] *See* 12 CFR 324.5 and 329.2 (allowing notice and opportunity to respond to FDIC determination that additional capital or liquidity is required). The Office of the Comptroller of the Currency (OCC) and FRB have similar provisions. *See* 12 CFR 3.404 and 50.2 (OCC); 12 CFR 249.2 and 263.202 (FRB).

B. Clarifying the Relationship Between Written Commitments and the FDIC's Evaluation of Statutory Factors

The FDIC has the responsibility to consider filings based on statutory criteria. For example, when reviewing an application for deposit insurance, the FDIC must consider the factors enumerated in section 6 of the FDI Act.[35] These factors generally focus on the safety and soundness of the proposed institution, any risk it may pose to the DIF, and the convenience and needs of the community. The FDIC is also authorized to permit or deny other types of transactions by State nonmember banks, including those proposed in merger applications and change in bank control notices, as well as in HOLA conversion applications, based on an evaluation of the applicable statutory factors relevant to the underlying filing.[36] While the specific statutory factors differ by filing type, safety and soundness considerations and the convenience and needs of the community are commonly addressed.

Generally, if all statutory factors are favorably resolved, FDIC staff will recommend approval of or non-objection to the filing, subject to prudential conditions and written commitments for filings involving an industrial bank. If FDIC staff finds unfavorably on one or more statutory factors based on the filing review, staff generally will recommend denial of or objection to the filing. Upon taking action on a filing, or if a proponent withdraws their filing during the review process, the FDIC Board of Directors may release a statement addressing the Board's views regarding the transaction if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants.[37]

Per § 354.3, the FDIC requires written agreements among a Covered Company and the FDIC and the subsidiary industrial bank. These agreements include commitments by the Covered Company to comply with each of paragraphs (a)(1) through (8) in § 354.4, and such other written agreements, commitments, or restrictions the FDIC deems appropriate, when approving or non-objecting to certain filings involving an industrial bank. Section 354.4 requires each party to a written agreement to comply with paragraphs (a)(1) through (8). These required commitments are intended to provide the safeguards and protections that the FDIC believes are prudent to impose in order to maintain the safety and soundness of industrial banks that are controlled by Covered Companies. The FDIC included these required commitments in part 354 to provide transparency to current and potential industrial banks, the companies that control them, and the general public.

Moreover, under its general supervision, examination, and enforcement authorities (as reserved by § 354.6), the FDIC may require additional unique commitments from a Covered Company or a controlling shareholder of a Covered Company when the FDIC determines it is necessary to address specific elements of a filing or circumstances related to the filer. Additional commitments may be derived, for instance, from elements of the business model presented, including the nature and scope of activities conducted, the risk characteristics of the activities, or the complexity of operations. The proposed relationships and transactions with the parent organization that may impact the industrial bank could also be taken into consideration in determining commitments.

In considering recent industrial bank filings, the FDIC has become concerned that applicants may be misinterpreting part 354 and the effects of the written commitments required under the rule as they relate to the FDIC's assessment of the applicable statutory factors. While part 354 permits the FDIC to condition the approval of an application or non-objection to a notice on the Covered Company and industrial bank entering into written agreements and making required commitments, and the written agreements will be taken into account as part of the FDIC's consideration of the underlying filing, they do not replace any statutory factor applicable to the filing and will not necessarily lead to the favorable resolution of any statutory factor where the facts and circumstances are otherwise unfavorable. This is a longstanding tenet of FDIC's applications processing policy and procedures.[38]

CALMAs and parent company agreements are intended to protect the industrial bank and mitigate potential risks to the DIF, as well as to provide a means for the FDIC to pursue a formal enforcement action under sections 8 and 50 of the FDI Act if a party fails to comply with the agreements. Such agreements also capture in writing the Covered Company's obligation to serve as a source of financial strength to the industrial bank. However, such agreements do not in and of themselves resolve any given statutory factor. If a filing presents material concerns and fundamental weaknesses with respect to any statutory factor, the written agreements will not compensate for such weaknesses for purposes of resolving the statutory factor. For example, a written agreement would not be appropriate if the situation involves weak or questionable earnings projections, an unacceptable or opaque control structure, insufficient capital levels, weak or marginal management or director candidates, apparent violations of a statute or regulation, a higher-risk business model, or a failure to meet the convenience and needs of the community.

Consequently, the FDIC proposes to amend § 354.4 to clarify the FDIC's implementation of part 354 to expressly address and make clear, consistent with long-standing applications processing policy, that written agreements will be taken into account as part of the FDIC's consideration of the underlying filing, but do not replace any statutory factor applicable to the filing and will not necessarily lead to the favorable resolution of any statutory factor where the facts and circumstances are otherwise unfavorable. This applies to the required commitments and provisions within any written agreements, the industrial bank subsidiary restrictions that are also included within part 354, and any other conditions that may be imposed as part of the FDIC's approval of, or non-objection to, a filing.

Question 2: What other clarifications, if any, to part 354 and its relationship to the FDIC's evaluation of the applicable statutory factors should the FDIC consider?

[35] 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.

[36] *See* 12 U.S.C. 1817(j), 1828(c), and 1464(i)(5).

[37] Such a statement would be in addition to any statements individual Board members might choose to make addressing their personal views regarding the transaction.

[38] Applications Procedures Manual (hereinafter APM), Applications Overview, 1.1, *https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/index.html;* APM, Standard and Non-Standard Conditions, 1.11; and Deposit Insurance Applications Procedures Manual Supplement—Applications from Non-Bank and Non-Community Bank Applicants, *https://www.fdic.gov/regulations/applications/depositinsurance/procmanual-supplement.pdf.*

C. Shell and Captive Industrial Bank Business Models

1. Supervisory Concerns

Shell and captive bank business models create potentially significant supervisory concerns for industrial banks. The level of concern with these business models is inherently heightened due to the substantial reliance on the parent company or its affiliates, particularly with respect to the primary business operations of the industrial bank. This may include total or nearly exclusive reliance on the parent organization for sourcing business, conducting key operational elements (*e.g.,* underwriting, administering, or servicing customer accounts or relationships), and obtaining a wide range of critical business support services.

In shell or captive structures, the industrial bank's operations and condition may be vulnerable to any financial distress or operational disruptions at the parent company or any affiliates that provide key services to the industrial bank. The heavily integrated relationship between the industrial bank and the parent organization results in significant concentration risks that are typically not present in traditional community bank operating structures. Further, the industrial bank generally has limited or no ability to operate independently from the parent organization and, as discussed below, lacks franchise value on a standalone basis.

The FDIC expects an industrial bank to have a sufficiently independent board of directors and management team, a sustainable financial structure with appropriate capital and liquidity maintained at the bank level, and a business model that is viable on a standalone basis (as defined in the proposed § 354.6(b)). Some industrial bank proposals involving shell or captive structures have lacked one or more of these elements, causing managerial concerns (due to the lack of independent oversight and decision-making or fully dedicated officers/staff at the industrial bank), as well as financial concerns (due to inadequate capital and liquidity levels, and earnings prospects that depend on maintaining internal organizational relationships).

The existing part 354 addresses some of the aforementioned concerns by requiring any Covered Company to enter into written agreements including specific provisions and commitments intended to ensure that the Covered Company supports the industrial bank and its ability to operate in a safe and sound manner. Among other items, the written agreements address board independence, capital and liquidity maintenance and support, and if required by the FDIC, contingency planning.[39] In the absence of Federal consolidated supervision, written agreements provide the FDIC information and ongoing access to information needed to assess and monitor the impact the parent organization may have on an industrial bank. The FDIC uses written agreements to mitigate risk to the industrial bank and to the DIF. However, as noted above in section IV.B of this **SUPPLEMENTARY INFORMATION**, the required commitments, written agreement provisions, and industrial bank subsidiary restrictions of part 354 will be taken into account as part of the FDIC's consideration of the underlying filing, but do not replace any statutory factor applicable to the filing and will not necessarily lead to the favorable resolution of any statutory factor where the facts and circumstances are otherwise unfavorable. In addition, where the primary business purpose and operations of the industrial bank are highly dependent upon the parent company, such agreements may have limited value if the parent company experiences operational or financial difficulties. Similarly, the managerial restrictions of part 354 intended to ensure the independence of the industrial bank's management may not be effective where the business purpose of the industrial bank is to support the parent company's operations because there may be direct or indirect organizational influences on business decisions from outside the industrial bank that would impact consideration of the relevant statutory factors.

The FDIC's experience during the 2008–2009 Financial Crisis showed that business models involving an insured depository institution (IDI) inextricably tied to and reliant on the parent and/or its affiliates creates significant challenges and risks to the DIF, especially in circumstances where the parent organization experiences financial stress and/or declares bankruptcy.[40] Where an industrial bank is significantly reliant on and interconnected with its parent organization to generate business on both sides of the balance sheet (*e.g.,* for funding and for lending), as well as operational systems and support, financial difficulties at the parent organization could be transmitted to the dependent industrial bank. Such a captive model creates material concerns about the viability of the industrial bank's proposed business model on a standalone basis and the industrial bank's franchise value in the event the parent organization experiences financial difficulty or failure. These concerns are so significant that the FDIC is proposing a rebuttable presumption that certain characteristics, if present, will cause an industrial bank to be a shell or captive institution and a presumption that the shell or captive nature of an industrial bank will weigh heavily against favorably resolving one or more of the applicable statutory factors.

The proposed revisions to part 354 would renumber the existing § 354.6 to § 354.7 and at § 354.6 would incorporate additional considerations that the FDIC would undertake to determine the degree of risk presented to the industrial bank from the parent company and its affiliates when considering the relevant statutory factors. These considerations address the business purpose for establishing or acquiring control of the industrial bank, intercompany relationships, the regulatory and consumer compliance history and supervisory record of each relevant entity, the novelty of the parent company's primary businesses (including any new or innovative processes), accessibility of information, and any plans or processes that mitigate risks presented by the parent company.[41] Expanding part 354 to include these considerations provides increased transparency regarding how the FDIC evaluates potential risks and concerns presented in an industrial bank filing.

In addition, the proposed revisions to part 354 include considerations aimed at identifying shell or captive structures and presumptions the FDIC would apply as a consequence of such identification. The FDIC would review each filing covered by the rule on a case-by-case basis, on the facts and circumstances presented within the context of the applicable statutory factors to determine the degree to which the industrial bank would have an independent board and management team, a business model that is viable on a standalone basis, and franchise value that is independent of the parent company and its affiliates.[42] The proposed revisions to part 354 include factors that would focus this inquiry on identifying organizational structures in which the industrial bank is overly dependent on the parent. The results of

[39] *See* 12 CFR 354.4.

[40] *See, e.g.,* n.57 and n.59, *infra* (discussion of NextBank and Advanta).

[41] *See* proposed § 354.6(a).

[42] *See* proposed § 354.6(b).

this inquiry would give rise to the presumptions the FDIC would apply as a consequence of such identification.

The proposed revisions would provide in § 354.6(c)(1) that an industrial bank would be presumed to be a shell or captive institution if it (a) could not function independently of the parent company, or (b) would be significantly or materially reliant on the parent company or its affiliates, or (c) would serve only as a funding channel for an existing parent company or affiliate business line. The FDIC would presume that the shell or captive nature of an industrial bank would weigh heavily against favorably resolving one or more of the applicable statutory factors.[43]

The proposed amendment to the scope of the definition of ''Covered Company'' would allow any company subject to a determination that a transaction would result in the application of part 354 to contest the determination in writing. Additionally, proposed § 354.6(c)(2) would afford any company seeking to rebut a presumption described in paragraph (c)(1) an opportunity to present its views in writing. Section 354.6(c)(3) also would establish that a company's decision to provide written views regarding the applicability of part 354 or a presumption would place all related filings and transactions on hold so that the threshold applicability determinations can be resolved before further proceedings. Such a suspension would prevent the consummation of a transaction or transactions that may be difficult or costly to unwind.

2. Convenience and Needs Concerns

As noted above, under the FDI Act, the FDIC must consider the convenience and needs of the community to be served when evaluating a deposit insurance or merger application. For some industrial bank proposals involving shell or captive structures, the primary deposit and credit products are both highly dependent upon the parent company and would target the customers of the parent company. Where a proposal for an industrial bank is presumed to be a shell or captive institution under the presumptions in proposed § 354.6(c)(1), if the target market is such that the institution's products are only available to customers of an affiliated company or a narrow segment of the community, this would weigh heavily against favorably resolving the convenience and needs statutory factor.

The public purpose of a bank charter with deposit insurance is that the bank will serve the convenience and needs of the community broadly. Business models that are not generally available to the members of the community absent purchasing a product by an affiliated entity raise serious questions as to whether the general community is sufficiently served to merit the grant of deposit insurance. Similar to the other presumption in proposed § 354.6(c)(1), the FDIC would review each filing on a case-by-case basis and filers may present facts to demonstrate that the community is effectively served notwithstanding the fact that the product offerings would be limited to customers of the affiliated entity or to a narrow segment only.

The evaluation of the convenience and needs of the community is a broad inquiry and would not be limited to strategies or plans under the Community Reinvestment Act. In assessing whether the convenience and needs of the community are met in industrial bank proposals, the FDIC would consider the customer base that the applicant intends to serve with its deposit and credit products and the market need filled through those products. The FDIC would also consider the convenience and benefits to the community that would not otherwise occur absent the creation of the industrial bank with deposit insurance. For instance, if there is a demonstrated lack of credit availability or competition (*e.g.,* existing firms have not met the market demand), this may support a favorable finding on convenience and needs. On the other hand, if there are existing non-bank captive finance firms serving the proposed community, the FDIC would evaluate the additional benefits of an industrial bank in meeting the convenience and needs of the community, and if the benefits of the insured bank (such as lower cost funds) accrue primarily the parent rather than to the community, this may weigh against favorably resolving the convenience and needs statutory factor. The FDIC also would consider whether there would be any negative consequences to the community resulting from the ownership of the industrial bank by the parent company.

In considering the convenience and needs of the community, the FDIC may require commitments or conditions from a Covered Company when the FDIC determines it is necessary to address specific elements of a filing, which may be derived from the business model.

Given the unique nature of industrial banks and the facts and circumstances of a particular transaction, the FDIC may also consider whether public hearings would be an appropriate means to obtain further public input on whether a specific application meets the convenience and needs of the community.

3. Existing Industrial Banks—Structure and Supervision

As noted previously, the universe of industrial banks is relatively small, with only 23 existing institutions. Several of the institutions primarily or entirely provide banking products and services to customers of affiliated entities within the parent organization (in general, these industrial banks do not broadly serve the general public, customers of unaffiliated businesses, or geographic markets that differ from those of the parent company or its affiliates). These include, but are not limited to, industrial banks established or acquired by commercial companies to support the sale or lease of manufactured products (*e.g.,* postage meters, automobiles or motorcycles), by retailers to issue general-purpose credit cards, and by financial companies in order to enable brokerage customer funds to be swept into insured deposits at the industrial bank.

Some of the existing industrial banks rely to a significant extent on their parent companies or affiliates for business generation, operational aspects, and/or a variety of corporate support services. While many of the industrial banks are closely integrated with their parent organizations, they typically maintain adequate capital, have sufficient liquidity, and reflect satisfactory overall risk profiles. For the most part, the existing industrial banks are seasoned in nature (all but two were established between 1984 and 2006), and fared similarly to other types of financial institutions during previous banking crises.[44] Additionally, because part 354 was based on the FDIC's supervisory practice, written agreements are in place for five industrial banks: two are subject to capital maintenance agreements, one is subject to a CALMA, and two are subject to both CALMAs and parent company agreements.[45]

[43] *See* proposed § 354.6(c)(2).

[44] During the 2008–09 Financial Crisis, several parent companies pursued conversions of an industrial bank to a commercial bank, which required approval of the parent company to become a BHC subject to regulation and supervision by the FRB. The conversions allowed the respective companies to access programs such as the FDIC's Temporary Liquidity Guarantee Program and the Troubled Asset Relief Program administered by the Department of the Treasury.

[45] Previously 10 other industrial banks (that have since merged, converted, or voluntarily liquidated) were also subject to CALMAs and/or parent company agreements. The FDIC began imposing

Importantly, industrial banks are subject to all of the same restrictions and requirements, regulatory oversight, and safety-and-soundness and consumer compliance examinations—including compliance with fair lending laws and regulations, and the Community Reinvestment Act—as any other kind of insured state nonmember bank. This includes examining the industrial bank for compliance with laws and regulations, including affiliate transaction limits and capital maintenance requirements. The FDIC also has the authority and capacity to regulate industrial banks and their parent companies.[46] This framework of supervision, coupled with part 354 in its amended form as proposed,[47] is expected to continue to protect industrial banks and the DIF from potential risks related to parent company and affiliate relationships.

4. Resolution Considerations

In addition to the supervisory concerns described above, an FDIC-insured industrial bank with a shell or captive business model presents the risk of costly and delayed resolution in the event of the industrial bank's failure.[48] The proposed amendments to part 354 address the risks that captive or shell business models may present to the DIF. Addressing these risks will facilitate the FDIC's accomplishment of its statutory mandates, including as the receiver for a failed IDI.

As with any failed IDI, an FDIC-insured industrial bank must be resolved under the FDI Act.[49] When the FDIC is appointed as the receiver for a failed IDI (FDIC–R), it succeeds, by operation of law, to all of the IDI's rights, titles, powers, and privileges, including the rights of stockholders, depositors, officers, and directors with respect to the failed IDI and its assets.[50] The FDIC–R has the power to wind up a failed IDI's operations and transfer its assets and liabilities to third parties.[51] Once appointed, FDIC–R's objectives are to (1) ensure that depositors receive access to their insured deposits as quickly as possible; (2) marshal and sell the IDI's assets; (3) determine claims; and (4) distribute net recoveries from asset liquidations by issuing dividends to the FDIC as subrogee to insured depositors, uninsured depositors, and creditors in accordance with the priority scheme set out in the FDI Act.[52]

The most common method of resolution is a purchase and assumption transaction where a significant portion of a failed IDI's assets is sold to a healthy financial institution in exchange for its assumption of part or all of the failed IDI's deposit liabilities. Other resolution methods include direct payouts to depositors, the creation of a bridge bank that will perform certain functions of the failed bank and operate as an interim IDI, or the organization of a deposit insurance national bank. The FDIC–R's resolution options may be limited by the statutory requirement to use whichever option will be the least costly to the DIF.[53] The FDIC's experience in resolving failed IDIs, including during the 2008–2009 Financial Crisis,[54] shows that the franchise value of an IDI has implications for the resolution options that may be available to the FDIC, as discussed below.

In some industrial bank proposals that the FDIC has received, the viability and operations of the bank are dependent on ongoing support from the parent organization. In such cases, financial or operational stress at the parent company or any of its affiliates reduces the franchise value of the industrial bank in the event of failure and complicates its resolution. The underlying value of such an industrial bank lies in its connection with the parent organization, which may provide benefits including, but not limited to, name recognition, clients or referrals, personnel and back-office support, and/or specific product offerings that complement the parent company's or affiliates' lines of business. If such connections were to be severed, the FDIC likely would find it more difficult to facilitate a resolution with a healthy bank, and it likely would be forced to employ less efficient resolution methods that are more lengthy, cumbersome, and costly, such as depositor payouts and piecemeal loan (or other asset) sales.[55]

Similarly, the loss of critical support services previously provided to the industrial bank by its parent organization or affiliates would pose a potentially significant challenge in a resolution scenario, as the parent or affiliated entities may no longer be able to fulfill their obligations under existing service agreements. If the parent company or its affiliates remain open and operating, the FDIC–R would have the authority to enforce the failed IDI's arrangements in accordance with the contractual terms.[56] However, if the parent organization becomes a debtor under the Bankruptcy Code (either before or after the FDIC–R's appointment), uncertainty likely would exist with regard to the parent's or the affiliates' willingness or ability to fulfill such obligations.[57] If such arrangements are terminated, the industrial bank's franchise value would be significantly diminished.[58] This situation could leave

additional prudential requirements in Orders granting Federal deposit insurance in March 2004. The FDIC described its imposition of additional prudential requirements in *FDIC: The FDIC's Supervision of Industrial Loan Companies: A Historical Perspective—Summer 2004 Vol. 1, Issue 1.* GAO further described the FDIC's approach in pages 41–44 of its 2005 audit, Industrial Loan Corporations: Recent Asset Growth and Commercial Interest Highlight Differences in Regulatory Authority, available at *https://www.gao.gov/products/gao-05-621.*

[46] *See, e.g.,* 12 U.S.C. 1820(b)(4)(A) (in making a bank examination, an FDIC examiner shall have the power to examine the affairs of any affiliate of any depository institution as may be necessary to determine the relationship between such depository institution and any such affiliate and the effect of such relationship on the depository institution.); 12 U.S.C. 1831*o*–1(b).

[47] Part 354 applies prospectively to Covered Companies and is not applicable for existing industrial banks, absent any new filing related to the industrial bank that would be subject to the rule.

[48] In this context, ''resolution'' means not only the initial phase of the FDIC's receivership process for a failed IDI, but also the various responsibilities that fall to the FDIC to liquidate assets that are not purchased by a third party in that receivership process. This includes necessary bookkeeping, accounting, reporting, identifying and verifying claims, paying claims, determining whether to bring actions against parties responsible for the institution's failure, and monitoring ongoing agreements with asset purchasers, etc. *See* FDIC, Crisis and Response—An FDIC History, 2008–2013, 176–77 (2017) (Crisis and Response). Additionally, resolution is distinct from ''recovery'' (*i.e.,* the steps the industrial bank and the Covered Company could take to mitigate the impacts of financial and operational stress outside of the receivership process), which is the focus of part 354's provisions regarding contingency planning. 12 CFR 354.4(b). In addition, the FDIC as receiver of a state-chartered bank has the rights and powers that a state banking authority would have under applicable state law. 12 U.S.C. 1821(c)(3)(B).

[49] 11 U.S.C. 109(b)(2), (d); 12 U.S.C. 1821(c)(2)(A)(ii).

[50] 12 U.S.C. 1821(d)(2)(A)(i); (e)(13)(A).

[51] 12 U.S.C. 1821(d)(2)(B), (G).

[52] 12 U.S.C. 1821(d)(11)(A).

[53] 12 U.S.C. 1823(c)(4).

[54] Between 2007 and 2013, the FDIC resolved 489 failed IDIs with total assets over $686 billion. *See* Crisis and Response at 182–83.

[55] *See, e.g.,* Crisis and Response at 185.

[56] 12 U.S.C. 1821(e)(13)(A).

[57] 11 U.S.C. 365(a), (g)(1). This uncertainty exists because a bankruptcy debtor has the power to ''reject'' executory contracts, a process that amounts to a pre-bankruptcy breach of the contract where the debtor no longer performs and the counterparty is left with only a claim for damages. The Bankruptcy Courts apply a business judgment standard when determining whether to approve the rejection of an executory contract. *See, e.g.,* In re Klein Sleep Prods., Inc., 78 F.3d 18 (2d Cir. 1996). *See also* FDIC Office of Inspector General, Material Loss Review of Advanta Bank Corp., Draper, Utah (Oct. 2010), *https://www.fdicoig.gov/sites/default/files/reports/2022-08/11-002.pdf.* The bank failed in March 2010. Advanta's parent company, Advanta Corp., filed for Chapter 11 Bankruptcy protection in November 2009 and refused to provide capital support to Advanta.

[58] The 2008 bankruptcy of Lehman Brothers Holdings Inc. (LBHI) illustrates diminished

Continued

the FDIC in a position where it has no choice but to conduct resolution methods that are more disruptive and expensive.[59]

Importantly, under part 354, the FDIC may require a Covered Company and industrial bank to commit to provide, and thereafter implement and adhere to, a contingency plan.[60] Contingency plans may include one or more strategies for the orderly disposition or dissolution of the industrial bank without the need for the appointment of a receiver or conservator. One objective of such a plan would be to mitigate the disruption and damage the IDI may suffer from significant financial or operational stresses within the parent organization. Such concerns, if not appropriately addressed, could jeopardize the safe and sound operation of the industrial bank.

Question 3: What features or aspects of a shell or captive bank business model (not already discussed above) should affect the FDIC's evaluation of industrial bank filings?

Question 4: Should the FDIC assess the potential risks posed to safety and soundness, consumer protection, and the DIF differently for shell or captive bank business models involving significant or material reliance on the parent organization?

Question 5: Are there other issues or facts that the FDIC should consider in determining whether to strengthen its supervisory framework with respect to industrial banks and in how the FDIC evaluates potential risks and concerns presented in an industrial bank filing?

Question 6: How should the FDIC assess the ''convenience'' and ''needs'' of the ''community'' served by dependent bank business models?

V. Expected Effects

A. Overview of Industrial Banks

As of March 31, 2024, the FDIC supervised 2,920 IDIs, with combined assets of $4.2 trillion.[61] Of these, 24 institutions were industrial banks, comprising 0.8 percent of all FDIC-supervised institutions.[62] The industrial banks held combined assets of $234 billion, comprising approximately 5.6 percent of the combined assets of FDIC-supervised institutions.[63]

The proposed rule would apply prospectively to deposit insurance, change in control, merger, and conversion filings, and other situations as may be determined by the FDIC that result in an industrial bank that is controlled by a Covered Company. It is difficult to estimate the number of potential Covered Companies that would seek to establish, acquire, or convert a Federal savings association to an industrial bank, as such an estimate would depend 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.

According to FDIC administrative data on application submissions, one industrial bank submitted a change in control application and three industrial banks submitted de novo bank applications between April 1, 2021, and December 31, 2023, for a total of four applications, or approximately one-and-a-half applications per year. None of these applications have resulted in an industrial bank being controlled by a Covered Company. For purposes of this analysis, the FDIC assumes that part 354 would apply to two filings per year seeking to establish, acquire, or convert to an industrial bank.

The FDIC anticipates that the proposed rule would benefit the public and the DIF by promoting the safe and sound operation of industrial banks controlled by companies that are not subject to consolidated supervision by the FRB. These public benefits cannot be reliably quantified. Specific proposed requirements and potential costs to filers of complying with these requirements are discussed below.

One amendment in the proposed rule would expand the scope of Covered Companies under part 354. Specifically, the proposed amendment would apply part 354 to HOLA conversion applications as well as any other situation where an industrial bank would become a subsidiary of a company that is not subject to Federal consolidated supervision. The industrial bank and Covered Company in such situations would be required to enter into certain agreements. These agreements include commitments by the Covered Company to comply with each paragraph (a)(1) through (8) in § 354.4, and such other written agreements, commitments or restrictions the FDIC deems appropriate when approving or non-objecting to certain filings involving industrial banks. Section 354.4(b) also includes an optional contingency plan requirement that the FDIC may impose depending on the filer's business plan and other factors.[64]

As discussed in the final rule that established part 354,[65] the FDIC historically has imposed prudential conditions and CALMAs and other written agreements between the FDIC and controlling parties of industrial banks in connection with approving or not objecting to certain industrial bank filings. Further, § 354.6 makes clear that the FDIC may impose some or all of the requirements of part 354 on a given industrial bank or parent company as warranted. Therefore, the FDIC does not believe that the proposed amendment to expand the definition of Covered Company would substantially increase the burden for newly affected industrial banks and Covered Companies. In addition, regarding the number of entities subject to the rule, HOLA conversion applications occur infrequently so the proposed expanded definition of Covered Company would

franchise value concerns. As described in the debtor's Chapter 11 plan, LBHI's two IDI subsidiaries, Woodlands Commercial Bank and Aurora Bank, FSB, both fell to less than well capitalized status and were vulnerable to failure because of their dependence on LBHI. The LBHI organization provided the IDIs with operational services, as well as credit, market, and foreign exchange risk protection provided by a Master Forward Agreement with LBHI. The agreements were repudiated as a result of the bankruptcy filings. Consequently, the IDIs' earnings and capital were fully exposed to changes in credit spreads, interest rates, foreign exchange rates, commodity prices, and equity prices. Market value losses based on mark-to-market accounting depleted the capital base. While the bankrupt parent, LBHI, received court approval to support the two IDIs, notwithstanding the capital support, the two IDIs ultimately voluntarily liquidated. *See* Debtors' Disclosure Statement for Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and Its Affiliated Debtors Pursuant to Section 1125 of the Bankruptcy Code at 71–71, In re: Lehman Bros. Holdings Inc., et al, Ch. 11 Case No. 08–13555 (Bankr. S.D.N.Y. 2010), *https://www.sec.gov/Archives/edgar/data/806085/000110465910020165/a10-8193_1ex99d1.htm.*

[59] The failure of NextBank, N.A., Phoenix, Arizona (NextBank) in 2002 illustrates some of these concerns. In this case, an IDI was dependent on its parent because its role was gathering deposits and booking credit card receivables marketed, screened, originated, and securitized by its sole owner and parent company. NextBank had virtually no staff or facilities at the time of its failure; all bank functions were performed by parent company employees in parent company facilities. The FDIC needed to negotiate with the parent company to continue critical credit card servicing functions for NextBank and to delay its bankruptcy filing so that staff who were knowledgeable about the IDI's operations could assist with the resolution. If NextBank had operated on a standalone basis, it may have been resolved more quickly and at a lower cost.

[60] 12 CFR 354.4(b).

[61] Data provided by the Division of Insurance and Research.

[62] One industrial bank was acquired by an institution supervised by the Office of the Comptroller of the Currency in a voluntary merger on June 1, 2024.

[63] FDIC Call Report Data as of March 31, 2024.

[64] *See* 12 CFR 354.4.

[65] *See* 86 FR 10703 (Feb. 23, 2021).

not substantially increase the number of filings subject to part 354.[66]

As part of the amendment to expand the definition of Covered Company, the proposed rule would allow any company subject to a determination that a situation would result in the application of part 354 to present its views in writing. The FDIC believes that this proposed amendment would not affect the costs incurred by filers and that this proposed amendment will only serve to provide clarity by codifying existing practice.

Another provision in the proposed rule would amend § 354.4 to expressly address and make clear, consistent with long-standing applications processing policy, that written agreements shall not be used as a means to favorably resolve statutory factors or circumstances on which the FDIC would otherwise make an unfavorable finding. This proposed amendment would mitigate uncertainty and prevent misunderstandings among prospective filers subject to part 354. This improved clarity may reduce the time that the FDIC and a Covered Company may spend discussing and resolving issues with its filing. While the FDIC cannot quantify the time saved, the FDIC believes that an affected entity would not incur a significant cost as a result of this amendment.

As discussed above, the proposed rule would include considerations to be applied in identifying shell or captive structures, and presumptions that the FDIC will apply as a consequence of such identification. The proposed rule would also incorporate additional considerations that the FDIC will undertake to determine the degree of risk presented to the industrial bank from the parent company and its affiliates. The existing part 354 already addresses some of the risks that captive or shell industrial bank business models may present to the DIF. For example, under both the current part 354 and the proposed rule, the FDIC may require a Covered Company and industrial bank to commit to provide to the FDIC, and thereafter adhere to, a contingency plan that sets forth recovery actions to address significant financial or operational stress that could threaten the safe and sound operation of the industrial bank and strategies for the orderly disposition of such industrial bank without the need for the appointment of a receiver or conservator.[67] Filers that are covered under the expanded scope of part 354, as proposed, that commit to providing a contingency plan could therefore incur preparation and submission costs. The FDIC does not have data to estimate these costs, but believes that these costs would be outweighed by the expected benefits to the safety and soundness of the industrial bank and the DIF.

As part of the amendment aimed at identifying shell or captive structures and resulting presumptions, the proposed rule would afford any company seeking to rebut a presumption an opportunity to present its views in writing. While there may be costs incurred in the preparation of such a rebuttal, the FDIC believes that this burden would not be substantially greater than the costs incurred by filers in existing practice, absent this amendment, to respond to and allay FDIC concerns about the characteristics of their structures. Furthermore, filers who opt to prepare a rebuttal likely would believe that the costs of preparation would be outweighed by the expected benefits.

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 proposed rule 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 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, given the FDIC's experience as the primary Federal regulator of industrial banks,[68] the FDIC believes that the number of subsidiaries of the prospective Covered Companies affected by the proposed rule is likely to be small. For these affected subsidiaries, the FDIC believes that the proposed amendments would clarify, provide transparency, and prevent misinterpretation of part 354. To that end, the proposed rule would reduce the time spent by affected subsidiaries discussing and resolving issues related to their affiliated industrial banks and Covered Companies.

VI. Request for Comment

The FDIC is inviting comment on all aspects of the proposed amendments to part 354, in addition to the questions above.

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 the proposed rule on small entities.[69] However, an initial regulatory flexibility analysis is not required if the agency certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $850 million.[70] Generally, the FDIC considers a significant economic impact to be a quantified effect in excess of 5 percent of total annual salaries and benefits or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of one or more of these thresholds typically represent significant economic impacts for FDIC-supervised institutions.

The FDIC has considered the potential impact of the proposed rule on small entities in accordance with the RFA. For the reasons stated below, the FDIC certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

As of March 31, 2024, the FDIC supervised 2,920 institutions, of which 2,198 are considered small entities for purposes of the RFA.[71] Of these 2,920 institutions, 24 were industrial banks,[72] and the FDIC estimates that no more than 10 of these industrial banks would

[66] For purposes of estimating Paperwork Reduction Act burden, the FDIC assumes that the change in scope in this proposed rule increases the estimated respondent counts for certain information collections by one. *See* section VII.B of this document.

[67] 12 CFR 354.4(b).

[68] 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 IDIs.

[69] 5 U.S.C. 601 *et seq.*

[70] The SBA defines a small banking organization as having $850 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 by 87 FR 69118, effective December 19, 2022). 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.'' *See* 13 CFR 121.103. Following these regulations, the FDIC uses an IDI's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the IDI is ''small'' for the purposes of the RFA.

[71] FDIC Call Report Data as of March 31, 2024.

[72] As mentioned previously, one industrial bank was acquired in a voluntary merger on June 1, 2024. This industrial bank was not considered a ''small entity'' for purposes of the RFA as of March 31, 2024.

be considered small industrial banks for purposes of the RFA.[73]

As previously discussed, the requirements under part 354 apply to industrial banks organized on or after April 1, 2021, and industrial banks coming under the control of a Covered Company as a result of a transaction pursuant to either section 7(j) or 18(c) of the FDI Act. The proposed rule would amend the definition of Covered Companies to include prospective conversions[74] pursuant to section 5(i)(5) of the HOLA or any other type of transaction where an industrial bank would become a subsidiary of a company that is not subject to Federal consolidated supervision, as determined by the FDIC.[75] Since September 2019, the FDIC has received only two conversion filings related to HOLA and estimates one or fewer such filing per year going forward. Not all of these filings would involve small entities; for context, only 10 out of 24 existing industrial banks are small entities for purposes of the RFA. Therefore, the FDIC expects the proposed amendment to the definition of Covered Company to affect one or fewer small entities per year. Given this limited number of anticipated filings, the FDIC believes the proposed amendment is unlikely to affect a substantial number of small entities.

Notwithstanding the effect due to the change in the scope of affected entities described above, the FDIC also examined whether the other changes reflected in the proposed rule would have a significant effect on affected small entities. As discussed above, these amendments clarify certain provisions in part 354, provide increased transparency regarding how the FDIC evaluates potential risks and concerns, and serve to prevent any misinterpretation of part 354 that would be inconsistent with the FDIC's long-standing applications processing policy. The proposed rule affords any company seeking to rebut a presumption of a shell or captive institution an opportunity to present its views in writing—such filings should comport with the FDIC's existing rules regarding filing procedures. These amendments may reduce the time that the FDIC and a filer would spend discussing and resolving issues with its filing. While the FDIC cannot quantify the time saved, the FDIC believes that an affected entity would not incur a significant economic effect as a result of these amendments.

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 RFA section. In particular, would this proposed rule have any significant effects on a substantial number of small entities that the FDIC has not identified?

B. Paperwork Reduction Act

Certain provisions of the proposed rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (PRA).[76] In accordance with the requirements of the PRA, 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. The FDIC's OMB control number associated with this proposed rule is 3064–0213 and is titled ''Industrial Banks and Industrial Loan Companies.''

As stated above, the proposed rule would change the scope of the existing regulations by revising the definition of ''Covered Company'' to include conversions involving a proposed industrial bank or industrial loan company under section 5 of the HOLA, or other situations as determined by the FDIC; clarifying the relationship between written commitments and the FDIC's evaluation of the relevant statutory factors; and setting forth additional criteria that the FDIC would consider when assessing the risks presented to an industrial bank by its parent company and any affiliates, and evaluating the industrial bank's ability to function independently of the parent company and any affiliates.

For these reasons, 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 (44 U.S.C. 3507(d)) and § 1320.11 of the OMB's implementing regulations (5 CFR part 1320). Given the change in scope in the proposed rule, the FDIC has increased the estimated respondent count by one in information collections 1–4. 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. Written comments and recommendations for the proposed information collection(s) should also be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Information Collection.

Title: Industrial Banks and Industrial Loan Companies.

OMB Number: 3064–0213.

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

[73] The FDIC uses the assets of an IDI's affiliated and acquired financial institutions to determine whether the IDI is ''small'' for the purposes of RFA. This methodology may over-count the number of industrial banks that are small entities because it does not take into account the size of non-financial institutions that are affiliated with the industrial bank. For purposes of RFA certification, this methodology results in a conservative over-estimate of the number of affected small entities.

[74] The proposed amended definition would only apply to filings involving an industrial bank or Covered Company after the effective date of the proposed rule.

[75] The proposed amendment would also allow any company subject to a determination that a transaction would result in the application of part 354 to present its views in writing.

[76] 44 U.S.C. 3501 *et seq.*

TABLE 1—SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 3064–0213]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
1. Initial Listing of Subsidiaries, 12 CFR 354.4(a)(1) (Mandatory).	Reporting (On Occasion)	3	1	04:00	12
2. Annual Update of Subsidiaries List, 12 CFR 354.4(a)(1) (Mandatory).	Reporting (Annual)	3	1	04:00	12
3. Annual Report of Covered Company and Subsidiaries and Other Reports as the FDIC may require, 12 CFR 354.4(a)(3) (Mandatory).	Reporting (Annual)	3	1	10:00	30
4. Recordkeeping requirements in written agreement, 12 CFR 354.4(a)(4) (Mandatory).	Recordkeeping (Annual)	3	1	10:00	30
5. Contingency Plan, 12 CFR 354.4(b) (Mandatory)	Reporting (Annual)	1	1	345:00	345
Total Annual Burden (Hours):	.....	.....	.....	.....	429

Source: FDIC.

Note: The annual burden estimate for a given collection is calculated in two steps. First, the total number of annual responses is calculated as the whole number closest to the product of the annual number of respondents and the annual number of responses per respondent. Then, the total number of annual responses is multiplied by the time per response and rounded to the nearest hour to obtain the estimated annual burden for that collection. This rounding ensures the annual burden hours in the table are consistent with the values recorded in the OMB's regulatory tracking system. The FDIC has increased the estimated respondent count by one in Information Collections 1–4 to account for the effect in the change in scope in this proposed rule.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act [77] requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC sought to present the proposed rule in a simple and straightforward manner.

- Has the FDIC organized the material to suit your needs? If not, how could it present the proposed rule more clearly?
- Has the FDIC clearly stated the requirements of the proposed rule? If not, how could the proposed rule be more clearly stated?
- Does the proposed 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 proposed rule easier to understand? If so, what changes would make the proposed rule easier to understand?
- What else could the FDIC do to make the proposed rule easier to understand?

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 [78] (RCDRIA), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on IDIs, 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 affected 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 the RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs 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.[79] The FDIC invites comments that further will inform its consideration of RCDRIA.

E. Providing Accountability Through Transparency Act of 2023

The Providing Accountability Through Transparency Act of 2023 [80] requires that a notice of proposed rulemaking include the internet address of a summary of not more than 100 words in length of a proposed rule, in plain language, that shall be posted on the internet.

The FDIC proposes to modify the regulations governing the parent companies of industrial banks in 12 CFR part 354. The amendments would revise the regulation's scope to include conversions involving proposed industrial banks under section 5 of the Home Owners' Loan Act and other situations as determined by the FDIC; clarify the relationship between written commitments and the FDIC's evaluation of relevant statutory factors; and set forth additional criteria the FDIC would consider when assessing the risks presented to an industrial bank by its parent company and affiliates and evaluating the institution's ability to function independently of its parent company and affiliates.

The proposal and the required summary can be found at *https://www.fdic.gov/resources/regulations/federal-register-publications/index.html.*

List of Subjects in 12 CFR Part 354

Bank deposit insurance, Banks, Banking, Finance, Holding companies, Industrial banks, Industrial loan companies, Insurance, Parent company, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation proposes to amend 12 CFR part 354 as follows:

PART 354—INDUSTRIAL BANKS

■ 1. The authority citation for part 354 is revised to read as follows:

Authority: 12 U.S.C. 1464, 1811, 1815, 1816, 1817, 1818, 1819(a) (Seventh) and (Tenth), 1820(g), 1831o 1, 3108, 3207.

■ 2. Amend § 354.2 by revising the definition for *Covered Company* to read as follows:

§ 354.2 Definitions.

* * * * *

Covered Company means.

(a) In each case on or after April 1, 2021, any company that is not subject to

[77] 12 U.S.C. 4809.

[78] 12 U.S.C. 4802(a).

[79] 12 U.S.C. 4802(b).

[80] 12 U.S.C. 553(b)(4).

Federal consolidated supervision by the FRB 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.

* * * * *

■ 3. Amend § 354.4 by revising paragraph (a) introductory text and adding paragraph (c) to read as follows:

§ 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 (a)(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 non-objection to a change in control, each approval of a merger, each approval of a conversion, and each determination of Covered Company status on compliance with paragraphs (a)(1) through (8) of this section by the parties to the written agreement. As required, each Covered Company must:

* * * * *

(c) For each type of filing through which an industrial bank would become subject to this part, the FDIC must evaluate the appropriate statutory factors pursuant to applicable law. The required commitments, written agreement provisions, and industrial bank subsidiary restrictions, as described in this part, will be taken into account as part of the FDIC's consideration of the underlying filing, but do not replace any statutory factor applicable to an underlying filing and will not necessarily lead to the favorable resolution of any statutory factor where the facts and circumstances are otherwise unfavorable.

■ 4. Redesignate § 354.6 as § 354.7, and add a new § 354.6 to read as follows:

§ 354.6 Additional considerations.

(a) *Parent company.* The FDIC will consider the degree of risk presented to the industrial bank from the parent company and its affiliates. In assessing the degree of risk presented from the parent company and its affiliates, the FDIC will consider the following elements:

(1) The parent company's business purpose for establishing or acquiring control of the industrial bank;

(2) The existing and proposed relationships among the parent company and its affiliates;

(3) The parent company's history of regulatory and consumer compliance, including the status of any significant pending or outstanding enforcement actions, investigations, administrative matters, or contingent liabilities;

(4) The supervisory record of the parent company and any affiliates regulated by the Federal banking agencies;

(5) The novelty of the parent company's primary businesses, and the extent to which new or innovative processes are being implemented or utilized;

(6) The accessibility of information, including the books and records of the parent company and any affiliated domestic or foreign entities; and

(7) Any plans or processes that mitigate risks presented by the parent company.

(b) *Industrial bank.* In every case, the FDIC will also consider the degree to which the industrial bank will have:

(1) An independent board and management team; and

(2) A business model that is viable on a standalone basis and that has franchise value independent of the parent organization. A business model is viable on a standalone basis and has franchise value if the main business functions of the industrial bank will not be reliant on the parent organization, including the industrial bank's operations, loans and investments, deposits and other funding sources, client sourcing, and any other primary business activities.

(c) *Rebuttable presumptions regarding shell or captive industrial banks*—(1) *Presumptions.* Any proposal for an industrial bank that presents the following characteristics will be presumed to be a shell or captive industrial bank. The industrial bank—

(i) Could not function independently of the parent company;

(ii) Would be significantly or materially reliant on the parent company or its affiliates; or

(iii) Would serve only as a funding channel for an existing parent company or affiliate business line.

(2) *Impact of the presumptions.* The FDIC will presume that the shell or captive nature of an industrial bank involved in a filing weighs heavily against favorably resolving one or more applicable statutory factors.

(3) *Rebuttal of presumptions.* The FDIC will afford any company seeking to rebut a presumption in this paragraph (c) an opportunity to present its views in writing. While the FDIC is considering any such materials, the FDIC will suspend consideration of any related filings, time periods will be tolled, and transactions will not be consummated.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on July 30, 2024.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2024–17637 Filed 8–9–24; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–2016; Project Identifier MCAI–2024–00111–T]

RIN 2120–AA64

Airworthiness Directives; Saab AB Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2017–21–05, which applies to certain Saab AB Model 340A (SAAB/SF340A) and SAAB 340B airplanes. AD 2017–21–05 requires revising the existing maintenance or inspection program, as applicable, to incorporate airworthiness limitations, including new inspection tasks for the drag brace support fitting of the main landing gear (MLG) and to implement corrosion prevention and control program (CPCP) related tasks. Since the FAA issued AD 2017–21–05, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require the actions in AD 2017–21–05 and would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more