



February 25, 2026

Regional Director Paul Worthing  
Federal Deposit Insurance Corporation  
San Francisco Regional Office  
25 Jessie Street at Ecker Square  
Suite 2300  
San Francisco, CA 94105-2780

**RE: Comment re: Affirm Bank’s Application for Deposit Insurance**

Dear Director Worthing,

The Bank Policy Institute<sup>1</sup> (“BPI”) and the Independent Community Bankers of America (“ICBA”)<sup>2</sup> write regarding Affirm Holdings, Inc.’s (“Affirm”) application on behalf of its proposed Nevada industrial bank, Affirm Bank, for Federal Deposit Insurance Corporation (“FDIC”) insurance. Affirm is a nonbank fintech company that offers buy now, pay later payment plans for online and in-store purchases at hundreds of thousands of merchants. If approved, Affirm asserts that Affirm Bank “would complement Affirm’s current business and bank partnership models, including by providing greater flexibility and diversification, to help advance responsible innovation in financial services. If approved, it would also spur opportunities to introduce new products and services over time.”<sup>3</sup>

Industrial banks, also referred to as industrial loan companies (“ILCs”), offer banking products and services functionally indistinguishable from those that banks provide. However, the parent companies of ILCs are exempt from the requirements of the Bank Holding Company Act (“BHCA”).<sup>4</sup> Therefore, they can avoid regulation and supervision by the Board of Governors of the Federal Reserve

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<sup>1</sup> The Bank Policy Institute is a nonpartisan public policy, research, and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

<sup>2</sup> The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation’s community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America’s community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers’ financial goals and dreams. For more information, visit ICBA’s website at [icba.org](https://www.icba.org).

<sup>3</sup> See Affirm Press Release, “Affirm submits applications to establish industrial loan company” (January 23, 2026) ([link](#)).

<sup>4</sup> 12 U.S.C. § 1841(c)(2)(H) (“The term “bank” does not include [...] [a]n industrial loan company, industrial bank, or other similar institution[.]”).

System and need not confine their activities to those “closely related to banking.”<sup>5</sup> Thus, the ILC exemption effectively serves as a loophole through which firms, such as commercial and tech firms, can own insured banks but not be subject to the federally mandated regulatory and supervisory framework intended to promote a safe, sound and stable U.S. banking system. Therefore, as we have long advocated, and for the reasons discussed herein, Congress should close this loophole—and, until such time, the FDIC should not issue deposit insurance to any ILC applicant, including Affirm Bank.

The ILC loophole violates the longstanding U.S. policy that banking and commerce should remain separate. For example, the BHCA limits the affiliation of banks and non-banking businesses by generally prohibiting bank holding companies from owning more than five percent of the voting stock of non-financial companies, with limited exceptions.<sup>6</sup> This prohibition addresses several potential problems that could lead to consumer harm and financial stability risk, including:

- A concentration of economic power;
- Less stringent credit standards for and higher risk exposures to affiliates;
- Less attractive credit terms to unaffiliated non-financial businesses; and
- Other similar conflicts of interest.

Under the BHCA, the activities of affiliates of a bank are subject to “consolidated supervision.”

Furthermore, the ILC exemption was not intended to provide an avenue for commercial, retail, or tech firms to enter into banking. ILCs were first established in the early 1900s to make small loans to industrial workers and, until recently, were not generally permitted to accept deposits or obtain deposit insurance. Moreover, the ILC industry has changed dramatically since 1987 when this statutory exemption was created as part of the Competitive Equality in Banking Act (“CEBA”). At that time, the size, nature, and powers of ILCs were limited.<sup>7</sup>

However, the loophole allows large national and international financial and commercial firms to acquire an ILC, which is an FDIC-insured depository institution, and gain access to the federal safety net available to insured depository institutions. Indeed, ILCs are a particularly attractive avenue for firms to

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<sup>5</sup> 12 U.S.C. § 1843(k)(4)(F). We have long recognized that parents of ILCs that are subject to consolidated supervision by the Federal Reserve do not pose additional risks to the system and need not be included in any limitation on ILC parent companies. These include both bank holding companies and foreign banking organizations with operations in the United States that are already regulated as bank holding companies under the International Banking Act.

<sup>6</sup> 12 U.S.C. § 1843(a)(2) and (c)(6).

<sup>7</sup> At the time of CEBA’s enactment, most ILCs were small, locally owned institutions that had only limited deposit-taking and lending powers under state law. At the end of 1987, the largest ILC had assets of only approximately \$410 million, and the average asset size of all ILCs was less than \$45 million. The relevant states also were not actively chartering new ILCs. At the time CEBA was enacted, for example, Utah had only 11 state-chartered ILCs and had a moratorium on the chartering of new ILCs. Moreover, interstate banking restrictions and technological limitations made it difficult for institutions chartered in a grandfathered state to operate a retail banking business regionally or nationally; these factors do not inhibit regional or national expansion today.

gain access to the federal safety net *without* being subject to the activity restrictions and prudential framework that Congress established for the corporate owners of other full-service commercial banks.

In the relatively recent past, commercial firms and tech companies like Wal-Mart, Home Depot, Rakuten, and PayPal have sought to access the benefits offered through FDIC insurance and access to the federal safety net by the establishment or acquisition of an ILC. These firms are subject to market and other incentives that are distinct from, and may conflict with, serving as a source of financial strength for a subsidiary bank.

If approved, Affirm Bank would have a large and complex parent, not subject to consolidated supervision. Because of Affirm's large scale and existing customer base, it has the potential to quickly grow if it is granted deposit insurance. Indeed, as of December 31, 2025, Affirm had 25.8 million customers and 478 thousand active merchants.<sup>8</sup> The disparate regulatory and supervisory treatment of Affirm Bank could pose a disproportionate risk of loss to the Deposit Insurance Fund ("DIF") and create unnecessary systemic risk. Furthermore, its substantial size could amplify losses to the DIF in the event of failure.

In addition to these risks, Affirm Bank could leverage its parent company's relationships with consumers and merchants to gain an unfair competitive advantage to attract customers. Banks support innovation and welcome competition provided that those competitors are subject to the same prudential supervisory framework and activity restrictions that Congress has established for the corporate owners of full-service insured banks. Unfair competition from a less regulated and rapidly growing financial institution like Affirm Bank could attract deposits from fully-regulated banking organizations and thereby could pose risks to those banks and to the financial system more broadly.

Despite BPI and ICBA's repeated calls to close the ILC loophole, the creation of new ILCs remains permitted by statute. Should the FDIC proceed with considering applications for deposit insurance from ILCs, such as Affirm Bank, we respectfully request that the FDIC pause such consideration until it has issued rules or otherwise provided greater transparency regarding the "FDIC's policy approach to industrial bank filings" as the FDIC has represented it would do, as described further below.

In addition, the FDIC should not proceed with approving deposit insurance applications by any such entities without first studying and reporting publicly on whether it has an adequate number of sufficiently trained and qualified examiners to identify and address these supervisory risks and if not, how it proposes to hire and train such examiners. ILCs with commercial or tech parent companies can present risks that are far more varied and complex than those associated with traditional banks, and the bank regulators generally and FDIC examiners specifically do not have extensive experience assessing how these risks may affect the DIF and financial stability. Questions about the FDIC's ability to examine these ILCs effectively are even more pressing in light of the FDIC's increasing focus on smaller, less complex banking institutions.<sup>9</sup>

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<sup>8</sup> See Affirm Second Fiscal Quarter 2026 Shareholder Letter (Feb. 6, 2026) at 5 ([link](#)). The Shareholder Letter provides that Affirm "defines an active merchant as a merchant which has a relationship with Affirm, or a platform or wallet partner, and engages in at least one Affirm transaction during the twelve months prior to the measurement date." *Id.* at 16.

<sup>9</sup> Only two of the top 40 U.S. banks are primarily supervised by the FDIC ([link](#)).

Finally, should the FDIC proceed with reviewing Affirm Bank’s application for insurance despite the reasons articulated above, the agency must consider several statutory factors.<sup>10</sup> Below, we describe concerns regarding Affirm Bank’s application in light of certain of those factors.

**I. The FDIC should pause processing ILC deposit insurance applications until the agency provides guidance regarding its approach to considering those applications.**

In July 2025, the FDIC issued a Request for Information (“RFI”) “seeking to review the nature and structure of companies that have applied, or may in the future apply, for an industrial bank charter and Federal deposit insurance” in order to “inform how the agency evaluates the statutory factors applicable to each filing given the unique aspects of industrial bank business plans and the issues presented by the range of companies that may seek to establish an industrial bank . . . .”<sup>11</sup> BPI and ICBA both submitted detailed comments in response to the RFI.<sup>12</sup>

Indeed, the FDIC stated that the agency was actively reviewing concerns regarding the potential anti-competitive effects of certain ILC applications, ILCs owned by foreign parents, and ILCs whose successful operation is wholly dependent on its parent.<sup>13</sup> The FDIC articulated that it intended to “comprehensively review the nature and structure of companies that have applied or may apply for an industrial bank charter and Federal deposit insurance and the issues those applications could present in the context of the FDIC’s evaluation of the applicable statutory factors” and the public “comments [on the RFI] will inform the FDIC’s policy approach to industrial bank filings.”<sup>14</sup>

However, the FDIC has not yet provided the public with further insight into its consideration of the comments received in response to the RFI or its policy approach to reviewing ILC filings or considering the risks presented by different types of such applications. We urge the FDIC to provide transparency regarding these issues before proceeding with any potential deposit insurance approvals for any ILCs, including Affirm Bank.

Promulgating a rule (or guidance, at a minimum) articulating the FDIC’s approach to reviewing both the potential risks and benefits of approving new deposit insurance applications by ILCs would provide greater transparency into the process and would provide the public with greater insight regarding the type of information that would be helpful to the FDIC in evaluating ILC applications, which would foster a more meaningful process for public comment.

In addition, the FDIC should further strengthen the requirements applicable to ILCs before proceeding with considering any ILC deposit insurance applications, including Affirm Bank’s. We have previously recommended that the FDIC establish more robust requirements and greater oversight over

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<sup>10</sup> 12 U.S.C. § 1816.

<sup>11</sup> FIL-33-2025, “Request for Information (RFI) on Industrial Banks and Industrial Loan Companies and Their Parent Companies” (July 15, 2025) ([link](#)).

<sup>12</sup> See BPI, “Re: Request for Information on Industrial Banks and Industrial Loan Companies and Their Parent Companies (RIN 3064–ZA48)” (Sept. 19, 2025) ([link](#)); ICBA, “RE: Request for Information on Industrial Banks and Industrial Loan Companies and Their Parent Companies” (Sept. 19, 2025) ([link](#)).

<sup>13</sup> 90 Fed. Reg. 34271 (July 21, 2025).

<sup>14</sup> *Id.*

ILC parent companies to ensure that they do not pose undue risks to the DIF or the broader financial system. We reiterate those recommendations here and respectfully request that the FDIC issue such requirements before proceeding with reviewing insurance applications from ILCs. At a high level, we recommend that:

- **ILC parent companies should comply with privacy and data protection requirements.**
- **ILCs and their parent companies should be subject to more stringent affiliate transaction limitations.**
- **ILCs and their parent companies should be subject to periodic reporting requirements that are comparable to the reporting requirements that apply to bank holding companies.**
- **The FDIC should impose conditions and constraints on non-financial activities of covered companies, including:**
  - ILC parent companies should be required to describe all their activities and the activities of each of its subsidiaries.
  - The FDIC should coordinate with the Department of Justice Antitrust Division and the Federal Trade Commission's Bureau of Competition, as appropriate, to monitor any potentially anti-competitive developments in the marketplace.
- **The FDIC should establish standards and requirements related to the activities of ILC holding companies and their subsidiaries that would support the safety and soundness of the subsidiary ILC and facilitate the FDIC's oversight. For example, the FDIC should:**
  - Require an ILC holding company to demonstrate that its and its subsidiaries' non-financial activities do not have an adverse effect on the ILC;
  - Establish concentration limits that would prohibit an ILC holding company from having a non-financial business line (including through a subsidiary) that accounts for more than a maximum percentage (*e.g.*, 10 percent) of the ILC holding company's total assets or revenues; and
  - Require an ILC holding company to obtain FDIC approval to acquire a subsidiary engaged in non-financial activities or to engage in new non-financial activities.
- **ILC parent companies engaged in non-financial activities, and any company of which the parent owns or controls more than 5 percent of such company's voting shares, assets, or ownership interests, should be prohibited from cross-marketing the products and services of the ILC and its subsidiaries, and vice versa.**
- **ILCs and their parent companies and affiliates should be subject to consolidated capital requirements that are comparable to those that apply to their commercial bank and bank holding company counterparts.**
- **ILC parent companies not otherwise subject to Federal Reserve supervision should be subject to at least one annual examination, which should include review of the entity's:**
  - Enterprise-wide risk management and risk governance framework that requires

- board of directors oversight, a broad risk assessment, and implementation of risk controls;
- Information security program that complies with the safeguards rule under the Gramm-Leach-Bliley Act and Federal Financial Institutions Examination Council IT requirements; and
- Enterprise-wide review for compliance with the Volcker Rule across a Covered Company's U.S. and non-U.S. operations.

Therefore, the FDIC should pause the review of all existing ILC applications, including the application of Affirm Bank, until it can complete a rulemaking that (i) establishes a framework for evaluating ILC applications that appropriately considers the risks presented by such applications to the DIF and the safety and soundness of the financial system and financial stability more broadly, and (ii) establishes more robust requirements applicable to ILCs and their holding companies to help mitigate risks to the DIF and the financial system.

**II. Affirm Bank's application raises significant questions regarding certain factors the FDIC is required to consider in evaluating deposit insurance applications.**

In considering applications for deposit insurance for a proposed depository institution, the FDIC must evaluate each application in relation to the factors prescribed in section 6 of the Federal Deposit Insurance Act ("FDIA").<sup>15</sup> Those factors include—

1. The financial history and condition of the depository institution;
2. The adequacy of the depository institution's capital structure;
3. The future earnings prospects of the depository institution;
4. The general character and fitness of the management of the depository institution;
5. The risk presented by such depository institution to the DIF;
6. The convenience and needs of the community to be served by such depository institution; and
7. Whether the depository institution's corporate powers are consistent with the purposes of the FDIA.

Applications for deposit insurance from ILCs owned or affiliated with certain companies in particular, such as commercial and tech companies, raise significant questions concerning at least two of the statutory factors: (i) the risk presented by the affiliated ILC to the DIF; and (ii) the convenience and needs of the community to be served by the affiliated ILC, which, taken together, suggest inconsistency with the purposes of the FDIA.

**A. Affirm Bank May Present Significant Risk to the DIF.**

Section 6 of the FDIA requires that the FDIC consider the risk an applicant presents to the DIF.<sup>16</sup> According to FDIC policy, in order to resolve this factor favorably, the FDIC must be assured that the proposed institution does not present an undue risk to the DIF, based on any information available to

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<sup>15</sup> 12 U.S.C. § 1816.

<sup>16</sup> 12 U.S.C. § 1816(5).

the FDIC, including, but not limited to, the applicant's business plan.<sup>17</sup> As a general matter, the FDIC "interprets this factor very broadly."<sup>18</sup>

As noted, ILC parent companies are not subject to consolidated supervision or the activities restrictions of the BHC Act. Affirm provides a variety of services to consumers and merchants, and its platform comprises three core elements: point-of-sale payment solutions for consumers, merchant commerce solutions, and a consumer-focused app.<sup>19</sup> According to Affirm's application, Affirm Bank's business plan is to serve consumers nationally by providing access to consumer-friendly banking products through online channels. The Bank will focus on unsecured consumer installment loans for its lending strategy as well as retail deposit and virtual card products."

While the application mentions that Affirm Bank wants to attract new customers who do not have an existing relationship with Affirm, the application indicates that a key aspect of Affirm Bank's strategy will be to market its lending products to "existing Affirm consumers." Although the application states that Affirm Bank's "consumer base for its lending products is expected to be new and existing Affirm consumers," the application also notes that the bank intends to "leverage Affirm's existing brand awareness and engaged customer base while pursuing its own marketing strategies focused on building core retail deposits and long-term franchise value." Therefore, it appears likely that Affirm Bank intends to rely significantly on its parent company's existing relationships in seeking customers for its own products.

This business model appears to reflect an inherent conflict of interest. Affirm Bank may be less able to act as a neutral underwriter because its parent company has an interest in preserving its relationships with its existing customer base that uses Affirm's products and services. Affirm identifies its competitors as providers of legacy payment methods, such as credit and debit cards; technology solutions provided by payment companies; mobile wallets provided by other companies; and other pay-over-time solutions offered by other companies and new pay-over-time offerings by legacy financial and payments companies.<sup>20</sup> Moreover, Affirm notes that it benefits "from self-reinforcing network effects, which are advantages that compound with each additional consumer and merchant that joins our network."<sup>21</sup> In other words, the more consumers that use Affirm's platform, the larger its consumer ecosystem will become, and the more valuable it is to merchants, who will then choose to offer Affirm as a payment option, and the more merchants that join Affirm's network, the more consumers will be attracted to shop using Affirm's platform. Thus, Affirm has a very clear interest in retaining its existing customer base and increasing participation on both the consumer and merchant sides of its platform. Affirm Bank may therefore be more willing to make riskier loans to customers that may not qualify for

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<sup>17</sup> FDIC, Statement of Policy, "Applications for Deposit Insurance," 63 Fed. Reg. 44752 (Aug. 20, 1998).

<sup>18</sup> 63 Fed. Reg. 44759-60.

<sup>19</sup> See, e.g., Affirm Form 10-K for the fiscal year ended June 30, 2024 ([link](#)). For example, with respect to consumer products, among other products, Affirm offers "Affirm at Checkout," which allows consumers, "[w]hen purchasing from one of our partner merchants, consumers can choose Affirm as a payment method, giving them the option to pay over time with terms ranging from weeks to months." *Id.* at 6. For merchants, among other products, merchants "can offer either one or a combination of 0% APR and interest-bearing pay-over-time offerings," which "is a compelling revenue accelerator for merchants, who are able to solve affordability for their customers without resorting to discounts." *Id.* at 7.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* at 8.

credit or may be subject to less favorable terms from an unaffiliated lender to ensure that they keep using Affirm’s platform and to attract new consumers, which, in turn, will attract additional merchant adoption of its platform, which will benefit its parent company. This could increase the risk of Affirm Bank’s failure and subsequent losses to the DIF. In addition, Affirm may be able to use data from its parent company’s massive payments business to set pricing for loan terms or other products, potentially giving Affirm an anti-competitive pricing advantage. Indeed, Affirm touts its “expertise in sourcing, aggregating, protecting, and analyzing data” as “a core competitive advantage of [its] platform.”<sup>22</sup>

If Affirm Bank were to become insolvent, it may not be attractive to potential buyers at a failed institution sale, because it is heavily dependent on the operations of its parent company to source loans and deposits. This would make it less valuable as a failed institution and increase losses to the DIF.

In a 2024 proposed rulemaking, the FDIC acknowledged the risks of ILCs that depend on their parent companies to source new business, stating that “[t]he FDIC’s experience during the 2008–2009 Financial Crisis showed that business models involving an insured depository institution 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.”<sup>23</sup>

The FDIC further stated that, “[s]hell 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.”<sup>24</sup>

In that proposed rulemaking, the FDIC stated that a deposit insurance application from a “shell or captive industrial bank” would weigh “heavily against favorably resolving one or more applicable statutory factors.”<sup>25</sup> While the 2024 rulemaking was never finalized, it reflects the FDIC’s acknowledgement of the risks posed by ILCs that materially rely on their parent companies to source loans and deposits like Affirm Bank. Because it appears that Affirm Bank will rely materially on its parent company for business, Affirm Bank appears to reflect the concerns the FDIC has previously articulated regarding shell and captive industrial banks.

In addition, as noted, the FDIC does not impose capital or liquidity requirements on the ILC parent company on an entity or consolidated basis. Absent consolidated capital and liquidity requirements and consolidated supervision at the holding company level, the FDIC may not be able to easily assess the ability of the parent companies of ILCs like Affirm to act as a source of strength to its depository institution subsidiary. The FDIC likely lacks the supervisory resources and expertise

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<sup>22</sup> *Id.* at 9.

<sup>23</sup> 89 Fed. Reg. 65561.

<sup>24</sup> 89 Fed. Reg. 65562.

<sup>25</sup> 89 Fed. Reg. 65568.

necessary to monitor the health of Affirm’s business and its ability to provide additional capital or liquidity to Affirm Bank in times of financial stress.

In short, approving this application could expose the DIF to outsized losses from potential conflicts of interest, impaired underwriting neutrality, and limited recovery value in a failure scenario. For these reasons, the application could present significant risks to the DIF, and therefore, the FDIC should not approve Affirm Bank’s application, at least not until it has taken the steps outlined above.

**B. There is insufficient information to determine whether Affirm Bank will serve the convenience and needs of its community.**

Section 6 of the FDIA also requires that the FDIC consider whether an applicant serves the convenience and needs of its community.<sup>26</sup> According to FDIC policy, essential considerations in evaluating this factor are the deposit and credit needs of the community to be served, the nature and extent of the opportunity available to the applicant in that location, and the willingness and ability of the applicant to serve those financial needs.<sup>27</sup>

Banks perform a valuable credit intermediation role in their communities by accepting deposits and making loans on an impartial basis. The Application states that Affirm Bank will operate as a branchless, online bank, although it will have one office in Henderson, Nevada, and the bank’s Assessment Area for Community Reinvestment Act purposes will be in the Las Vegas – Henderson – North Las Vegas Metropolitan Statistical Area. The Application asserts that Affirm Bank will meet the needs of low-and-moderate income households through the offering of affordable small-dollar loans. The Application states that Affirm Bank is in the process of surveying community organizations in the Assessment Area to further determine community needs and will submit additional information regarding the survey instrument, the results of the survey, and Affirm Bank’s plan to address those needs. However, because this portion of the application is incomplete at this time, it is difficult to determine whether Affirm Bank would meet the convenience and needs of the community in which its single office would be located.

Furthermore, while Affirm Bank will operate one office as noted above, Affirm Bank’s application asserts that Affirm Bank will primarily operate nationwide through an online presence and that it will leverage Affirm, Inc.’s scale, merchant insights, and digital capabilities to help broaden access to financial services, promote economic resilience, and support community development. However, as noted above, Affirm Bank’s business plan appears to involve relying substantially on its parent’s business relationships and marketing primarily to the existing Affirm customer base, which could create risks to the DIF. These same risks lead to uncertainty as to the ongoing viability of Affirm Bank and, in turn, its ability to serve the community that it proposes to serve. Further, to the extent that a substantial portion of customers of Affirm Bank are also customers of Affirm Bank’s parent, services may not be available on an impartial basis. For these reasons, the application presents serious perils of harming, rather than serving, the public interest and does not support the criterion that the applicant would serve the convenience and needs of its community.

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<sup>26</sup> 12 U.S.C. § 1816(6).

<sup>27</sup> 63 Fed. Reg. 44760.

Finally, we note that Affirm Bank and other non-traditional deposit insurance applicants, such as those from ILCs, present questions that earlier ILC businesses did not regarding the appropriate “community” or “communities” to consider in the context of this type of business model and how the proposed ILC will serve the needs of that community. These novel issues further underscore the need for the FDIC to issue regulations or guidance providing insight into the FDIC’s approach to evaluating ILC applications.

**III. An ILC significantly reliant on an affiliate presents heightened risk of noncompliance with important laws governing affiliate transactions, which are essential to protect the DIF.**

As noted, the application indicates that a key aspect of Affirm Bank’s strategy is to market loan products to existing Affirm customers. Thus, the proposed business model of Affirm Bank would rely significantly on existing customer relationships of its parent company, Affirm. These activities raise important questions about the bank’s compliance with affiliate transaction laws designed to protect the bank and the DIF. The FDIC should not approve Affirm Bank’s application until these legal questions are fully addressed, including through changes to Affirm Bank’s proposed business model if necessary to bring the bank into compliance with these requirements.

Sections 23A and 23B of the Federal Reserve Act and the Federal Reserve’s implementing regulation, Regulation W, are designed to prevent the misuse of a bank’s resources through “non-arm’s-length” transactions with its affiliates and to limit the ability of a bank to transfer its federal subsidy to its affiliates.<sup>28</sup> The Federal Reserve has stated that these provisions are two of the most important statutory protections against a bank suffering losses because of its transactions with affiliates.<sup>29</sup> Section 18(j) of the FDIA makes these requirements applicable to state non-member banks, including ILCs.<sup>30</sup>

Section 23A of the Federal Reserve Act prohibits a bank from engaging in covered transactions—including a loan or extension of credit by the bank—with an affiliate unless the bank limits the aggregate amount of such transactions to that particular affiliate to 10 percent of the bank’s capital stock and surplus. Section 23A also limits the aggregate amount of all covered transactions between a bank and all its affiliates to 20 percent of the bank’s capital stock and surplus. Under the “attribution rule,” a bank must treat transactions with any person as a transaction with an affiliate for purposes of these limitations to the extent that the proceeds of the transaction are used for the benefit of, or transferred to, an affiliate.<sup>31</sup>

Section 23B of the Federal Reserve Act provides that most transactions between a bank and its affiliates must be on terms and under circumstances, including credit standards, that are substantially the same or at least as favorable to the bank as those prevailing at the time for comparable transactions with or involving nonaffiliated companies. Section 23B also prohibits a bank and its affiliate from advertising or entering into an agreement suggesting that the bank is in any way responsible for the obligations of the affiliate.

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<sup>28</sup> 12 U.S.C. §§ 371c & 371c-1; 12 CFR part 223.

<sup>29</sup> 67 Fed. Reg. 76620 (Dec. 12, 2002).

<sup>30</sup> 12 U.S.C. § 1828(j).

<sup>31</sup> 12 CFR 223.16.

Affirm Bank's intended business strategy raises complex questions about compliance with these important protections designed to protect the bank and, by extension, the DIF. For example, with respect to section 23A's limits on covered transactions, would the bank's extension of credit to a customer of Affirm Bank's parent, Affirm, be considered a covered transaction to the extent Affirm receives proceeds from the loan because the customer uses the loan to purchase products or services using Affirm's platform or to obtain other products offered by Affirm? Federal Reserve legal interpretations of Regulation W make clear that the attribution rule applies broadly to circumstances in which an affiliate benefits from the bank's extension of credit to another party.<sup>32</sup> With respect to 23B's market terms requirement, how will Affirm Bank ensure that it is not offering below-market rates and terms to customers of Affirm and thereby subsidizing its affiliate, at its own and the DIF's expense?

In addition to ensuring that Affirm Bank has policies and procedures to help ensure compliance with the laws governing affiliate transactions, the FDIC's supervision and examination of Affirm Bank should focus on this area to reduce risk to the bank and the DIF. The FDIC should require Affirm Bank to have an affiliate transaction monitoring program that includes heightened processes for identifying and appropriately limiting covered transactions between the ILC and its parent, Affirm, and any other affiliates. Furthermore, the FDIC's examination of Affirm Bank should specifically include a review for compliance with the requirements and restrictions set forth in section 23A and 23B and Regulation W.

#### **IV. The FDIC must ensure that ILCs abide by the anti-tying restrictions applicable to banks.**

As noted, Affirm Bank intends to rely significantly on customers of its affiliate, Affirm, as its own customer base. Section 106 of the Bank Holding Company Act Amendments of 1970 (section 106) generally prohibits a bank from conditioning the availability or price of one product on a requirement that the customer also obtain another product from the bank or an affiliate of the bank.<sup>33</sup> The statute also generally prohibits a bank from conditioning the availability or price of one product on a requirement that the customer (i) provide another product to the bank or an affiliate of the bank, or (ii) not obtain another product from a competitor of the bank or a competitor of an affiliate of the bank.<sup>34</sup>

Consistent with longstanding federal banking agency practice, the FDIC should require Affirm Bank to establish and maintain appropriate policies and procedures to ensure compliance with the anti-tying restrictions of section 106.<sup>35</sup> In addition, examiners should conduct more targeted examinations of the marketing programs, anti-tying training materials, internal reports and internal tying investigations of Affirm Bank to ensure that Affirm Bank abides by section 106.<sup>36</sup>

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<sup>32</sup> Federal Reserve Legal Interpretations, Frequently Asked Questions about Regulation W, 12 CFR 223.16, Q1 (last updated March 31, 2021) ([link](#)).

<sup>33</sup> 12 U.S.C. § 1972. An ILC is a "bank" for purposes of section 106. See 12 U.S.C. §§ 1843(f)(9) and (h)(1).

<sup>34</sup> 12 U.S.C. § 1972(1)(C), (D) and (E).

<sup>35</sup> Board of Governors of the Federal Reserve System, proposed interpretation and supervisory guidance, "Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970" 68 Fed. Reg. 52024 (Aug. 29, 2003).

<sup>36</sup> *Id.*

**V. Conclusion.**

If granted insurance, Affirm Bank could pose a significant and unnecessary risk to the DIF and the broader financial system. By exploiting the ILC loophole to avoid consolidated Federal Reserve supervision, relying heavily on its nonbank parent for core operations, and introducing potential conflicts of interest in offering lending and other products to its parent’s existing customer base, this application fails to satisfy key statutory factors under the FDIA.

At a minimum, the FDIC should establish a comprehensive framework for reviewing and supervising ILCs and their parents and affiliates before acting on any ILC deposit insurance applications. As part of this comprehensive framework, the FDIC should study and report on how it will ensure that it has an adequate number of sufficiently trained and qualified examiners to identify and address the unique supervisory risks posed by certain parent companies of ILCs, including, but not limited to, large commercial and tech companies.

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We would welcome the opportunity to discuss the topics set forth in this letter with FDIC staff. If you have any questions, please contact us at [paige.paridon@bpi.com](mailto:paige.paridon@bpi.com) and Michael Emancipator at [michael.emancipator@icba.org](mailto:michael.emancipator@icba.org).

Sincerely,

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