XIII. Regulatory and Legislative Developments as FinTech Companies Attempt to Morph into Industrial Loan Companies

Pursuant to Section 23A and 23B of the Federal Reserve Act, banks are limited in the transactions they can engage in with affiliates, including non-bank parent companies.[1] Such a restriction is justified, in part, as a result of their FDIC-insured status.[2] Further, parent companies that own banks are regulated by the Bank Holding Company Act, which prohibits those parent companies from engaging in non-banking activities and acquiring securities of non-bank companies.[3] In contrast, an Industrial Loan Company (ILC) is exempt from the Bank Holding Act while maintaining FDIC-insurance.[4] Similar to some banks, ILCs are regulated by state bank regulators and the Federal Deposit Insurance Corporation (FDIC).[5] However ILCs do not fit the Federal Deposit Insurance Act's definition of a "bank" and thus, parent companies of ILCs, unlike parent companies of banks, do not face regulation by the Federal Reserve with respect to permissible activities, reporting requirements, examination requirements, and capital requirements.[6] Consequently, ILCs have the benefit of attracting customers based on their FDIC-insured status, but without the more stringent regulatory requirements that banks face as a result of that FDIC-insured status. However, both the regulatory oversight and the applicability of ILCs rules are broad enough that entities that are not

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[1] 12 U.S.C. § 371c (2018) (restricting the transactions that member banks may engage in with affiliates); 12 U.S.C. § 371c-1 (2018) (restricting the transactions that member banks may engage in with subsidiaries).

[2] *See* 12 U.S.C. 1828(j) (2018) (restricting transactions with affiliates and insiders as a part of the regulations governing insured depository institutions).

[3] 12 U.S.C. § 1841 et seq. (2018) (defining bank holding company as "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this chapter").

[4] Bank Holding Company Act, P.L.84-511 (defining bank holding company and listing circumstances under which no bank shall be a bank holding company).

[5] Federal Deposit Insurance Act, 12 U.S.C. § 1813(u) (2018) (defining institution-affiliated party).

[6] *Id.* (excluding by definition ILCs as banks in its statutory language).

traditionally industrial loan companies are, nevertheless, qualifying for ILCs status.[7]

This article will discuss the origins of ILCs and their special status as well as how government regulatory changes allowed nonconventional entities to apply for ILC licenses. This article will also explore the potential benefits and challenges of that change as more nonconventional entities, such as FinTech companies, stealthily apply for ILCs licenses. Finally, this article will explore the government's regulatory response to criticism of changes in the process of granting ILCs licenses and public policy rationales for allowing a moderate approach to the regulation of ILCs licensing.

A. Introductory Historical Overview

Since the 1910s, states enacted laws that permitted the formation of ILCs and each state created a variety of diverging regulations to regulate ILCs.[8] Then, in 1933, the FDIC began granting ILC deposit insurance on a case-by-case basis.[9] The FDIC evaluated, among other factors, the robustness of ILC regulations in each state when evaluating granting deposit insurance and that created inconsistent treatment of ILCs nationwide. In 1982, the United States Congress passed the Garn-St. Germain Depository Institutions Act to make FDIC insurance widely available for ILCs.[10] Then, in 1987, Congress passed the Competitive Equality Banking Act, which exempts parent companies of ILCs from the Banking Holding Act.[11] The unique benefits ILC

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[7] *See* Julia Kagan, *Industrial Bank: Criticism of Industrial Banks*, INVESTOPEDIA (Aug. 29, 2020), https://www.investopedia.com/terms/i/industrial-bank.asp#:~:text=Industrial%20banks%20accept%20customer%20deposits, industrial%20banks%20in%20the%20U.S. (discussing attempts by entities that are not traditional industrial loan companies to qualify for industrial bank status).

[8] David W. Perkins, *Industrial Loan Companies: Background and Policy Issues*, EVERYCRSREPORT.COM 1, 7–8 (Sept. 9, 2020), https://www.everycrsreport.com/reports/R46489.html.

[9] *Id.* (explaining the historical progression of ILCs as entities analogous to banks).

[10] Perkins, *supra* note 8 at 8–9 ("Congress passes the Garn-St. Germain Act in 1982, and Section 703 made ILCs and their certificates of investment eligible for FDIC insurance"); Pub. L. No. 97-320.

[11] Perkins, *supra* note 8, at 9 ("The CEBA also enacted the exemption for ILCs … that is the root of much of today's policy debate"); Pub. L. No. 100-86.

status escaped significant public scrutiny until the mid-2000s when Walmart and The Home Depot attempted to form ILCs as a means of engaging in banking-related activities without the traditional restrictions and capital requirements imposed on banks.[12] However, based on criticism and public scrutiny, the FDIC imposed moratoriums on granting FDIC insurance to ILCs from 2006 to 2008.[13] Congress then passed legislation to mandate by law an extension of that moratorium on granting ILCs FDIC-insurance from 2010 to 2013.[14]

A brief history of ILCs supports the public scrutiny that Walmart and The Home Depot faced after seeking to own ILCs with FDIC insurance, since their business models starkly contrast with entities that lawmakers originally envisioned to obtain ILC status. In 1910, when ILCs first were established, commercial banks catered to businesses while savings and loans institutions catered to home purchasers.[15] A gap existed in the market for financial institutions to serve underprivileged populations, such as industrial workers.[16] Consequently, some states enacted legislation to encourage the formation of ILCs. Yet, the organizational purposes of Walmart and The Home Depot starkly contrast the purpose of early ILCs. Hence, governmental and public scrutiny of large institutions and FinTech companies obtaining ILCs status and privileges is understandable, and the aforementioned moratoriums reflect that uneasiness. Nevertheless, after many years of moratoriums and inaction, on March 18, 2020, the FDIC approved the FDIC-insurance applications of ILCs owned by

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[12] *See* Michele Heller, *Bids by Wal-Mart, Home Depot to Own Banks Draw Scrutiny*, MCCLATCHY NEWSPAPERS (Sept. 2, 2006), https://www.mcclatchydc.com/latest-news/article24457381.html (discussing Wal-Mart and Home Depots attempts to establish their own industrial banks).

[13] *See* Press Release, FDIC, Moratorium on Certain Industrial Loan Company Applications and Notices, (July 26, 2006), https://www.fdic.gov/news/press-releases/2006/pr06073a.html (announcing a moratorium on ILC applications effective January 31, 2007).

[14] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 603 ("Moratorium and study on treatment of credit card banks, industrial loan companies, and certain other companies under the Bank Holding Company Act of 1956").

[15] James R. Barth, Tong Li, et al., *Industrial Loan Companies: Supporting America's Financial System*, MILKEN INST. 1, 11 (Apr. 2011) https://assets1b.milkeninstitute.org/assets/Publication/ResearchReport/PDF/ILC.pdf ("[A]t the time, commercial banks primarily catered to businesses, while savings and loan associations focused on home loans").

[16] *Id.* (explaining the historical need for financial institutions like ILCs).

two large FinTech companies—Square, Inc. and Nelnet, Inc.[17] However, along with a lift on moratoriums, the FDIC enacted a Final Rule to impose conditions (such as control, capital, and liquidity requirements) on ILCs seeking to obtain FDIC insurance.[18] This article will next discuss the Proposed Rule that preceded the aforementioned Final Rule in more detail, including main regulatory changes and the benefits and challenges those changes could bring to the banking sector.

B. FDIC's Proposed Rule and Its Impact on Fintech Companies

Almost immediately after the FDIC's approval of FDIC insurance for Square, Inc. and Nelnet, Inc., the FDIC in 2020 published a Notice of Proposed Rulemaking to commence the process of enacting uniform rules that would govern subsequent applications for FDIC insurance.[19] In doing so, the FDIC appears to be balancing the need for more Federal oversight of ILCs with the desire to allow broader application of ILC licensing and banking insurance. In the Proposed Rule, the FDIC requires that parent companies of ILCs submit annual reports disclosing in detail their financial condition and operational risks as well as their levels of compliance with FDIC-related laws and regulations.[20] Further, the Proposed Rule limited parent company

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[17] *See* Thomas Curry, *Fintech in Brief: FDIC Approves Two ILC Deposit Insurance Applications*, JD SUPRA (Mar. 19, 2020) https://www.jdsupra.com/legalnews/fintech-in-brief-fdic-approves-two-ilc-78849/ ("On March 18, the Board of directors of the FDIC approved the deposit insurance applications of Square, Inc. and Nelnet, Inc. to create two de novo industrial loan companies").

[18] FDIC Parent Companies of Industrial Banks and Industrial Loan Companies, 12 C.F.R. Part 354 (2020) ("The Federal Deposit insurance Corporation is adopting a final rule that requires certain conditions and commitments for each deposit insurance application").

[19] Jeffrey L. Hare et al., *Industrial Banks and Industrial Loan Companies—Recent FDIC Actions; Implications for Parent Companies*, DLA PIPER PUBLICATIONS (Apr. 6, 2020) https://www.dlapiper.com/en/us/insights/publications/2020/04/industrial-banks-and-industrial-loan-companies-recent-fdic-actions-implications-for-parent-companies/ ("Almost simultaneously with its approval of the two new ILCs, the FDIC published a Notice for Proposed Rulemaking seeking comment on proposed rules outlining its approach to regulation of ILC parent companies").

[20] Parent Companies of Industrial Banks and Industrial Loan Companies, 85 Fed. Reg. 62 (proposed Mar. 31, 2020) (to be codified at 12 C.F.R. pt. 354)

representation of the Board of Directors to up to 25 percent of the members of the Board.[21] Such a restriction appears to reflect the FDIC's uneasiness with allowing significant control of a non-banking institution of an entity that performs banking-related functions. Next, the FDIC's Proposed Rules required that the ILC maintain capital and liquidity requirements that the FDIC deemed appropriate for the entity.[22] Such a broad rule, rather than a fixed number or formula, provides the FDIC with a high level of flexibility to evaluate, assess, and dictate capital and liquidity requirements that protect the safety and soundness of both ILCs entities and the financial system as a whole in the United States. However, the Proposed Rule provided an additional level of flexibility for the FDIC to ensure the safety and soundness of ILC entities as well as the whole financial system. The Proposed Rule also dictates that the FDIC in its sole discretion may impose additional commitments on both the parent company of the ILC and any controlling shareholder of the parent company of the ILC.[23] Such a broad rule provides the FDIC significant power to indirectly engage in oversight and enforcement activities with respect to the parent company of the ILC. Consequently, the FDIC appears to attempt to impose similar oversight powers to those that the Federal Reserve has over banks, its affiliates, and its parent companies through the Bank Holding Act.

Moreover, the Proposed Rule imposes further restrictions and limitations on ILCs that seek FDIC-insurance status. The Proposed Rule requires that ILCs obtain pre-approval from the FDIC before *materially* changing its business plan.[24] Ostensibly, such a rule prevents FinTech companies, like Square, Inc. and Nelnet, Inc., from significant deviations from ILC-related and banking-related activities. Even more intrusive, the Proposed Rule requires that ILCs obtain pre-approval from the FDIC before adding or replacing board members or executive officers, or entering into service contracts related to the

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(requiring prospective Covered Companies to submit annual reports on the Covered Company and its subsidiaries).

[21] *Id.* (describing limitations in the Proposed Rule when ILCs seek FDIC insurance).

[22] *Id.* (explaining the rationale for the limitations in the Proposed Rules).

[23] *Id.* (describing the broad discretionary powers that the Proposed Rule give to the FDIC).

[24] *Id.* (describing additional limitations that the Proposed Rule impose on ILCs seeking FDIC insurance).

operations of the ILC.[25] Both personnel decisions and service-related arrangements are integral functions of business and consequently, the aforementioned Proposed Rule inevitably bestows significant power on the FDIC to influence and dictate key business decisions of ILCs. Of additional significance, the Proposed Rule contains a "catchall provision" wherein the FDIC in its sole discretion may impose additional restrictions on activities and operations of ILCs that obtain FDIC insurance.[26] This "catchall provision" may be an overly-broad construction of the regulatory framework that addresses the possibility of any unintended loopholes related to oversight and enforcement functions of the FDIC. Overly-broad regulations may be unconstitutional when they exceed the Congressional authority bestowed on an administrative agency.[27] This concept will be further analyzed in the comparative analysis with the FDIC's Final Rule.

Based on the foregoing Proposed Rules, the impact of the FDIC's intended regulatory framework on FinTech companies appears to be two-fold: (1) imposition by the FDIC of significant oversight and enforcement of FinTech's ILC subsidiaries to ensure their structure and operations are significantly independent from their FinTech parent companies, and (2) imposition of broad and loosely defined powers of the FDIC so that the regulatory effects of ILCs' exemption from the Bank Holding Act are abated significantly in relation to both the ILC and its parent company.

Pursuant to the Administrative Procedure Act, administrative agencies are required to hold a public comment period to receive and consider input from the public at large on proposed rules.[28] The next section will provide a comparative analysis of the aforementioned Proposed Rules with the Final Rules. This analysis will provide inferences as to the effects of that public comment period on curtailing the FDIC's desire for overly-broad powers to regulate ILCs, especially those affiliated with FinTech companies, that sought FDIC-insurance.

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[25] *Id*. (highlighting the intrusive effect of the Proposed Rule on the operations of ILCs).

[26] *Id*. (depicting additional broad discretionary power the Proposed Rule gives the FDIC).

[27] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

[28] *See* Office of the Federal Register, *A Guide to the Rulemaking Process*, FED. REG. 1, 4–5 (Feb. 14, 2020) www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (discussing the role of public comments in the rule making process).

C. FDIC's Final Rule and Its Expected Impact on Fintech

On December 15, 2020, the FDIC adopted its Final Rule on conditions and requirements to approve FDIC-insurance applications, which is set to take effect on April 1, 2021. While the actual effects of the Final Rule on FinTech companies are not yet ripe for assessment, this section of the article will provide a comparative analysis of the Final Rule in relation to the Proposed Rule as well as a discussion of its possible impact on FinTech companies. Overly-broad proposed rules that were weakened or narrowed in their final rule form may strongly suggest that public comment influenced that outcome.

First, the Final Rule significantly reduces the scope of the regulation by narrowing which entities will be subject to the FDIC's new mandate. The Proposed Rule imposed its mandate on all ILCs without distinguishing grandfathered ILCs, but the Final Rule states that grandfathered ILCs will not be subject to the FDIC's new Final Rule unless a parent company acquires control of the grandfathered ILC after the effective date of the new Final Rule.[29] While the FDIC's Final Rule still requires that parent companies of ILCs submit annual disclosure and compliance reports to the FDIC, it augments those reporting requirements to include the implementation of security systems to protect nonpublic customer information.[30] By adding this requirement, the FDIC sought to ensure parent companies and ILCs were protecting against customer information risks in both their financial and nonfinancial activities.[31] These reporting requirements may serve their purpose if the FDIC implements proper auditing of reports, but how they might specifically influence the behavior and activities of FinTech companies is speculative at this juncture since the effective date of the Final Rule is forthcoming.

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[29] FDIC Parent Companies of Industrial Bans and Industrial Loan Companies, 12 C.F.R. 354 (2020), available at https://www.fdic.gov/news/press-releases/2020/pr20031a.pdf.

[30] *Id*. (highlighting an important aspect in which the Final Rule is still similar to the Proposed Rule).

[31] *FDIC—ILC Final Rule—Changes and Potential Impacts*, DELOITTE CENTER FOR REGULATORY STRATEGY 1, 3 (Dec. 2020), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us-changes-and-potential-impacts.pdf (comparing the proposed and final rules' considerations and approaches to protecting nonpublic consumer information).

Most of the changes between the Proposed Rules and the Final Rules appear to narrow the applicability and the limitations that the FDIC will impose on ILCs that obtain FDIC-insurance. For instance, among the most significant changes in FDIC-imposed limitations is that the parent companies of ILCs may now have more flexibility in the structure and composition of their directors and managers. Under the Final Rule, parent companies may have representation on the board of directors of their ILCs that is less than 50 percent of the total composition of the board members.[32] Moreover, the Final Rule requires FDIC pre-approval to add or change directors, managers, and senior executive officers only for the first three years that the ILC is a subsidiary of a parent company.[33] The restrictions in the Proposed Rules were overly broad in that the FDIC placed no time limit or scope restrictions on the rules concerning ILC management changes. The Final Rule also removed the provision granting the FDIC sole discretion to require additional commitments from the parent companies of ILCs.[34] Similarly, the Final Rule removed the provision that granted the FDIC the sole discretion to impose restrictions on the activities or operations of ILCs that obtain FDIC-insurance.[35]

One key provision from the Proposed Rule that remains unchanged in the Final Rule is that the FDIC has discretion to maintain capital and liquidity requirements of ILCs at levels that the FDIC deems appropriate.[36] Such a provision is crucial to a bank regulator's ability to ensure the safety and soundness of the institutions it oversees as well as to ensure the safety and soundness of the financial system as a whole. Thus, maintaining the FDIC's ability to dictate capital and liquidity levels of ILCs is expected to integrate FinTech companies that become ILCs further into the banking sector. With limitations on capital and liquidity requirements that restrict the risks that ILCs of FinTech companies can take, those FinTech companies may be forced to limit and segregate risks in order to comply with such capital and liquidity needs. To what extent the FDIC's new Final Rule actual reins

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[32] FDIC, *supra* note 29.

[33] *Id.* (contrasting the management time-limited restrictions of the Final Rule with the broader restriction in the Proposed Rule).

[34] *Id.* (describing how the Final Rule gives less discretionary power to the FDIC than the earlier Proposed Rule).

[35] *Id.* (highlighting the ways that the Final Rule gives less broad authority to the FDIC than the Proposed Rule).

[36] *Id.* (providing an essential example of how certain key provisions in the Final Rule remain unchanged from the Proposed Rule).

in the riskier activities of FinTech companies is still a speculative assessment and time is required to determine whether this expected impact on FinTech companies actually materializes. This assessment is even more speculative in light of Congress's recent interest in modifying and/or eliminating the FDIC's aforementioned regulatory framework. The next section of this paper will discuss those Congressional developments.

D. Congressional Response to FDIC's Final Rule

In an attempt at tempering FinTech companies' pursuit of morphing into ILCs, the FDIC has implemented the aforementioned Final Rule. However, Congress is considering legislation that would significantly curtail FDIC's rules. On November 13, 2019, United States Senator John Kennedy filed the *Eliminating Corporate Shadow Banking Act of 2019*, which aims to eliminate ILCs' ability to offer banking services without the oversight of the Federal Reserve and eliminate exemptions that allow ILCs to offer traditional banking services without the imposition of regulations placed on banks traditionally.[37] Specifically, the proposed legislation is propelled by the fear of lawmakers that that the mixture of commerce and banking can threaten the safety and soundness of banking entities and the banking system as a whole.[38] By analogy, Senator Kennedy illustrated the perilous road of allowing such a mixture: "it is just a bad idea for commerce and banking to mix. Not only is it unfair to community banks who have to play by different rules, it's bad for customers. Companies like Google and Facebook already are so big that they're countries. If they're allowed to handle your banking services, they're going to turn into continents."[39] Ostensibly, both the FDIC and Congress share the viewpoint that such a mixture is bad for companies.

[37] Press Release, John Kennedy, Sen. John Kennedy Files Legislation to Protect Consumers and Community Banks (Nov. 13, 2019), https://www.kennedy.senate.gov/public/2019/11/sen-john-kennedy-files-legislation-to-protect-consumers-and-community-banks#:~:text=filed%20the%20Eliminating%20Corporate%20Shadow,lend%20money%20to%20industrial%20workers (noting that the Eliminating Corporate Shadow Banking Act of 2019 was filed to close loopholes that would allow commercial companies to offer banking services without oversight by the Federal Reserve).

[38] *Id.* (explaining the rationale for the proposal of Eliminating Corporate Shadow Banking Act of 2019).

[39] *Id.* (quoting Senator John Kennedy's reasons for pushing for the passage of the Eliminating Corporate Shadow Banking Act of 2019).

Such fears are clearly illustrated by the hurdles the FDIC placed on Rakuten as the Japanese FinTech company as the commerce giant attempted to obtain ILC status and FDIC insurance in the United States.[40] While the FDIC attempts to curtail the effects of that mixture through regulatory limitations, the Congressional response consists of prohibiting most conduct that is currently permissible for parent companies and ILCs. If Congress passes the *Eliminating Corporate Shadow Banking Act of 2019*, such a response may have profound effects for the future of FinTech companies seeking to enter the banking sector through ILCs.

First, the bill would eliminate the special status that ILCs enjoy with respect to complying with traditional banking laws and regulations. Specifically, the bill would no longer exempt ILCs from the definition of "bank."[41] Consequently, parent companies of the ILCs would have to completely abide by the restrictions and limitations imposed on them by the Bank Holding Company Act.[42] Thus, at that juncture, FDIC's Final Rule would be immaterial since the Congressionally enacted law would supersede and eliminate the piecemeal rules that the FDIC is currently seeking to implement. Instead, under the bill, parent companies of ILCs would be subject to oversight and supervision of the Federal Reserve, pursuant to the Bank Holding Company Act.[43] Further, the parent company as the owner and controlling entity of the ILC would be subject to the fundamental restriction that the parent company could only engage in activities closely related to banking or financial transactions.[44]

Second, the bill would require existing ILC parent companies to register with the Federal Reserve and file financial disclosures with

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[40] *See* Anna Hrushka, *Rakuten to Continue ILC Charter Pursuit, Subsidiary CEO Says*, BANKING DIVE (Feb. 15, 2021) www.bankingdive.com/news/rakuten-to-continue-ilc-charter-pursuit-subsidiary-ceo-says/584189/ (discussing Rakuten's struggles to gain approval for the formation of an ILC).

[41] Eliminating Corporate Shadow Banking Act of 2019 S. 2839, 116th Congress (2019), available at https://www.congress.gov/bill/116th-congress/senate-bill/2839/all-info (amending the definition of "bank" in the Bank Holding Company Act of 1956).

[42] *See* Bank Holding Company Act, 12 U.S.C. ch. 17 § 1841 et seq. (2018) (imposing restrictions on banks).

[43] Eliminating Corporate Shadow Banking Act of 2019, *supra* note 41.

[44] *Id*. (explaining restrictions in the Act that are more limiting on ILCs than either the Proposed Rule or Final Rule).

the Federal Reserve.[45] Based on a comparative analysis, the reporting requirements in the bill are not as stringent as those in the FDIC's Final Rule. However, this difference may be because the bill removes special treatment exceptions for ILCs whereas the FDIC's Final Rule is designed with the realization that the special treatment is still in existence for ILCs.

Third, similar to the FDIC's Final Rules, having parent companies of ILCs that are grandfathered in to the new legislation, but fall outside of the exemption under the bill means that commercial companies cannot be parent companies of ILCs.[46] Further, under the bill, only ILCs that became FDIC-insured before October 1, 2019, would be grandfathered in and allowed to continue their commercial affiliation with their non-banking institution parent companies.[47] Such a restrictive definition of "grandfathered in" under the bill places FinTech companies that already own and control FDIC-insured ILCs under a significant competitive advantage over those FinTech companies that are still pending approval. Yet, since this bill is still under consideration, Congress ought to revise the "grandfathered-in" date to reflect the period of time that the bill has remained dormant in Congress while committees review its potential passage into law.

Fourth, under the bill, foreign bank entities may not own or control ILCs.[48] This restriction would hinder the ability of FinTech companies, like Rakuten, to operate banking or financial institutions in the United States through the ILC business model. While the bill is still under consideration in Congress, it appears that the bill, as written in its final form, provides a countermeasure to ILC deregulation that may be too restrictive and that eliminates some benefits that FinTech companies would bring to the banking and financial sectors. The next section considers some of the public policy implications for allowing FDIC's Final Rule to be implemented, rather than continuing to pursue the alternative of enacting the *Eliminating Corporate Shadow Banking Act of 2019*.

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[45] *Id.* (describing the information disclosure requirements that are included in the Act).
[46] *Id.* (contrasting how "grandfather" clause application would work in the Act versus the Final Rule).
[47] *Id.* (differentiating the "grandfathered" timing application in the Act versus the Final Rule).
[48] *Id.* (describing the prohibitions for foreign bank entities with respect to ILCs).

E. Policy Argument: Consumers and Small Businesses Benefit from Fintech Companies in the Banking Sector

With respect to FinTech companies, Congress and bank regulators ought to impose laws and regulations that resemble those governing banks, but some flexibility is advantageous to allow FinTech companies to morph into ILCs as a means of entering the banking sector. There are numerous advantages to allowing FinTech companies to more robustly enter the banking sector, including benefits for both consumers and small businesses. First, FinTech companies typically have a faster rate of approval than traditional brick-and-mortar banks.[49] FinTech companies typically employ new and more innovative technology than traditional banks and this translates into faster and more convenient service for consumers. Second, innovative technology employed by FinTech companies allow consumer to benefit from more personalized service and advanced security features in their banking services.[50] Third, FinTech companies employ more advanced technology and communication means to reach their customers than traditional banks. Such innovation translates into reduced overhead costs, and this in turn allows FinTech companies to charge their customers reduced fees for banking services.[51] These potential benefits of FinTech companies in the banking sector have been supported by Federal Reserve Governor Lael Brainard, who stated that FinTech innovations have the potential to benefit both consumers and small businesses. These benefits could include expanding access to financial services, reaching underserved consumers, reducing transaction costs, offering greater convenience and efficiency, and enabling better controls over spending and budgeting."[52]

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[49] *5 Ways That FinTech Can Benefit You,* BESURE (Nov. 29, 2018), https://besure.com/blog/5+Ways+FinTech+Can+Benefit+You+/30 ("FinTech has the potential to increase accessibility and greatly speed up the rate of approval for finance or insurance").

[50] *Id*. (highlighting an essential benefit to banking sector consumers that would be further protected with the advancement of FinTech companies in the banking sector).

[51] *Id*. (explaining how benefits to FinTech companies turn into benefits for banking sector consumers in the long-term).

[52] Tim Marder et al., *FinTech for the Consumer Market: An Overview*, CONSUMER COMPLIANCE OUTLOOK (2016), https://consumercomplianceoutlook.org/2016/third-issue/fintech-for-the-consumer-market-an-overview/ (quoting Federal Reserve Board Governor Lael Brainard).

Based on the foregoing, Congress, the FDIC, and other bank regulators benefit consumers more by properly overseeing the entry of FinTech companies into the banking sector, rather than outright prohibiting FinTech's entry or making such entry overly burdensome and costly.

F. Conclusion

To promote the healthy entry of FinTech companies into the world of banking, the FDIC's Final Rules are ostensibly better equipped than the *Eliminating Corporate Shadow Banking Act of 2019*. The banking world, consumers, and small businesses could continue to benefit from modernization in its business model and expansion of advanced technology to serve a diverse group of consumers and business entities. Eliminating FinTech companies and other shadow banks from the bank world ignores the realities of how consumers utilize the banking sector today. While the FDIC's Final Rule may not be perfect in its language or upcoming implementation and enforcement, the FDIC's Final Rule sets regulatory benchmarks for FinTech companies and other parent companies engaged in shadow banking, that both create more equitable treatment between traditional banks and ILCs and allow FinTech's to enter and compete in the bank sector. Granted, ILCs do not enter the banking sector as equals with traditional banks under the FDIC's Final Rule, because ILCs still enjoy exemptions from the Bank Holding Company Act. Yet, the FDIC's Final Rule provides a foundation upon which bank regulators can build to regulate, rather than eliminate FinTech entirely. Such a foundation, based on the foregoing policy considerations, merits protection.

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