U.S. Chamber of Commerce

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October 17, 2024

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

Re: Regulations Implementing the Change in Bank Control Act (RIN 3064-AG04)

Dear Mr. Sheesley:

The U.S. Chamber of Commerce ("Chamber") submits these comments in response to the proposed rulemaking issued by the Federal Deposit Insurance Corporation ("FDIC") that would expand the FDIC's Change in Bank Control Act ("CBCA") approval authority regarding changes to direct or indirect control of an FDIC-supervised institution ("Proposal").[1] The Chamber is concerned with several aspects of the Proposal that would impact passive investments in bank holding companies.[2] The FDIC's approach is further troubling given the separate actions taken outside of the public purview that have already changed policy by unraveling passivity commitments with asset managers.

In April 2024, the Chamber submitted comments to Director McKernan on a reported proposal that would develop a plan to regularly examine large asset managers which hold a 10% or greater stake in FDIC-regulated banks.[3] In that letter, the Chamber called on the FDIC to employ care in considering changes to its processes, recognizing that modifications to any of the array of interagency rulemakings, statements, agreements, and other guidance could have unintended consequences for both asset managers and investors. We further urged the FDIC to closely coordinate with other regulators – including the Federal Reserve Board (FRB), Office of the Comptroller of the Currency (OCC) and Securities and Exchange

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[1] Federal Deposit Insurance Corporation, Regulations Implementing the Change in Bank Control Act, available at https://www.govinfo.gov/content/pkg/FR-2024-08-19/pdf/2024-18187.pdf.

[2] For simplicity, this letter refers to bank and savings and loan holding companies as "bank holding companies" and their FDIC-insured subsidiaries as "banks."

[3] U.S. Chamber of Commerce, Letter to FDIC Director Jonathan McKernan, April 22, 2024, available at https://www.uschamber.com/finance/letter-to-fdic-on-monitoring-of-investment-funds-passivity-agreements.

Commission (SEC) – as the underlying subject matter involved some issues that are beyond the scope of the FDIC's statutory remit.

Regrettably, the FDIC has moved forward with a Proposal to re-write its approval authority over acquisitions of a bank holding company of an FDIC-supervised bank based on a novel interpretation of its own authority, and without conducting the necessary analysis or interagency coordination the Chamber previously recommended. The Proposal also fails to substantiate with clear arguments and data why the proposed amendments to the FDIC's CBCA procedures are necessary, and as a result appears arbitrary and capricious. Further, the Proposal is based upon questionable assertions of the FDIC's statutory authority.

It is essential that capital markets remain competitive and capital flows freely. Asset managers play an important role in supporting the efficient flow of investment capital into publicly traded banking organizations. Yet, the FDIC's proposed interference into purchases of banking shares will create significant consequences for banks, asset managers, and investors. A restriction of capital inflow to banks would be particularly harmful to smaller and mid-size banks.[4] Although it is unclear whether the FDIC seeks to delay transactions or require asset managers to set limits on equity investments in banks, neither aim is in the interest of banks that rely on stable, long-term investment capital. Investors would also be worse off as funds attempt to navigate unnecessary obstacles to acquiring the securities they need to pursue their stated investment strategy.

We encourage the FDIC to withhold further consideration of the Proposal until it has more fully examined its limits under CBCA and has publicly released for additional review and comment any data and other supporting evidence that reasonably demonstrates that the rule amendments are both necessary and rationally connected to the issue the FDIC is purporting to address.

Overview and General Concerns with the Proposal

Asset managers structure their investment portfolios to align with the goals of their investors, which in many cases today include strategies that attempt to mirror the composition and returns of major stock indices. To effectively execute these strategies for their investors, asset managers often must acquire shares of publicly traded bank holding companies. Although asset managers must necessarily include

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[4] For example, small or family-owned banks could be affected if estate planning leads to filings under the CBCA. See e.g. S&P Global at https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/fdic-proposal-on-change-in-control-notices-has-potential-ripple-effects-on-m-a-83040607.

bank shares in their portfolios, they neither seek nor in practice exercise a controlling influence over the banks in which they invest.

In recognition of the natural tension between the need for asset managers to hold bank shares and the understanding that asset managers do not intend to exercise "control" over these banks for regulatory purposes, the FDIC, FRB, and OCC maintain longstanding rules and guidance governing the passivity commitments into which they enter with asset managers. These commitments allow those asset managers who have entered into an agreement with the appropriate federal banking agency ("AFBA")to invest in a bank up to a certain threshold without being deemed to "control" that bank.[5] Asset managers are currently required to self-certify that they comply with their passivity commitments and, to date, the FDIC has not indicated that any party to a passivity commitment has failed to adhere to its terms.

The FDIC now seeks to disrupt this longstanding and effective practice through a novel interpretation of its own authority. The CBCA specifically requires that entities provide advance notice to "the appropriate federal banking agency" prior to an acquisition of voting securities that would constitute "control" of an insured depository institution. In the case of bank holding companies, that regulator is the FRB. Under current FDIC regulations, there are eight exemptions available to entities for providing advance notice to a regulator. One of these exemptions stipulates that an entity need not notify the FDIC of its acquisition of voting securities in an FDIC-supervised institution if the FRB has already reviewed the transaction pursuant to its role as "the appropriate federal banking agency" under the CBCA.

The FDIC has raised concern in the Proposal that fund complexes that own a high percentage of voting securities in FDIC-supervised institutions may have outsized influence over the management or policies of an institution. Although it presents no data to support its view, the FDIC seeks to address this speculative concern by proposing to remove the exemption from FDIC review for an entity that has already undergone a review with the FRB. Investors that propose to acquire voting securities of a depository institution holding company in transactions for which the Federal Reserve reviews a notice would no longer automatically be exempt from providing the FDIC prior notice and would instead be subject to a duplicative, costly, and time-consuming review by the FDIC.

By removing the exemption, the FDIC aims to act in excess of its statutory authority under the CBCA to require and subsequently approve or disapprove a notice of purchase of a banking institution's voting securities after the FRB has approved the

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[5] These comments depend on the specific facts and circumstances of the acquisition, but commonly include commitment to refrain from making shareholder proposals, nominating directors or threatening to sell securities to induce a specific board action.

transaction. By proposing a novel statutory interpretation to grant itself the authority to second guess the FRB's work, the FDIC is also making an implicit assertion that the FRB is failing at its job of reviewing transactions that are relevant under the CBCA. In fact, the CBCA does not provide the FDIC this additional authority and, even if it did, the Administrative Procedure Act requires the FDIC to establish that the FRB is failing at its job to substantiate the purpose and benefits of this amendment. There does not appear to be any current evidence to support that assertion. However, if the FDIC believes the FRB's process has shortcomings, the appropriate next step is to work with the FRB to investigate any perceived gaps, and/or work with Congress to amend its statutory authority, not by proposing amendments that both reinterpret the scope of the CBCA and encroach upon the FRB's responsibility to review CBCA notices.

<u>The FDIC's Process is Flawed and not Supported by Data</u>

The Proposal is replete with several broad assertions about the potential risks of fund complex investment in FDIC-supervised institutions, but provides no data or evidence that mutual fund and exchange-traded fund ("ETF") holdings of banks has harmed these institutions, their shareholders, or their customers. The Proposal also contains speculative and unsubstantiated theories about potential risks associated with fund complex investment in banks.

For example, the Proposal states that the "potential for fund complexes to exercise significant influence or control over management, business strategies, or major policy institutions at FDIC-supervised institutions could increase the risk profile at such institutions and lead to excessive risk-taking to enhance profits, investor returns, or stock price."[6] There is no evidence whatsoever – in either the proposal or real-world experience – that fund complex investment in banks has a direct correlation to excessive risk taking. Further, it is unclear how such risk-taking would be incentivized if a fund is investing only for the purpose of providing its investors with economic exposure to a security rather than to exercise control.

Director Chopra's statement at the July meeting presents additional process concerns and indicates that the FDIC is already effectively making changes to its implementation of the CBCA at the staff level. Director Chopra stated:

> "In addition to the proposed rule…the FDIC has determined that it is appropriate to notify certain firms that, going forward, they can no longer rely on existing passivity agreements for direct or indirect investments in additional FDIC-supervised institutions that trigger the presumption of control."[7]

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[6] Proposal, 89 FR 67004-67005.
[7] Statement of CFPB Director Rohit Chopra, Member, FDIC Board of Directors, on a Proposed Rule to Strengthen Oversight of Large Asset Managers and Other Investors, July 30, 2024, available at

At the same time as the FDIC has a notice-and-comment rule proposal out for comment that expands its review process under the CBCA, the FDIC is also changing passivity agreements outside of the public view. Certainly, whatever actions the FDIC is taking at the staff level could help inform public comments on the proposal. Yet the FDIC is keeping that information out of the public eye and thus undermining the public's ability to comment on the FDIC's rulemaking effort. By pre-emptively acting to change passivity agreements, while simultaneously asking respondents to the Proposal to comment on whether the FDIC should enter into passivity agreements with investors,[8] the FDIC is inappropriately prejudging the comments it will receive related to this Proposal.

The cost-benefit analysis contained in the Proposal is cursory and does not properly reflect the magnitude of change in the regulatory approval process that the Proposal would precipitate. The FDIC does not explain how exactly the Proposal would be implemented and what actions investors with an already 10% or more stake in banks would have to take under new rules. Would these investors be mandated or incentivized to divest and decrease their stakes below 10%? Would the FDIC's process delay transactions that enable the fund to invest in a timely manner to correspond to the index? The costs to both asset managers and investors could be substantial. The cost-benefit analysis also does not discuss at length the benefit side of the equation, in particular how long-term capital provided by institutions can improve bank performance over time. And the FDIC must establish how it can uniquely provide value over the existing FRB approval process these transactions are already subject to. These are fundamental considerations, yet they have not been evaluated in the Proposal.

If the FDIC injects itself in such a manner into bank transactions, it could very likely chill investors' desire to engage in these transactions and delay the approval process for these transactions when they do occur. Restricting the flow of capital into banks – in particular smaller and mid-size banks – would do nothing but harm these institutions and their customers and could lead to greater concentration within the industry.

As the Supreme Court recently noted in *Ohio v. EPA*, an agency action qualifies as "arbitrary" or "capricious" if it is not "reasonable and reasonably explained." 144 S.Ct. 2040, 2053 (2024) (quoting *FCC v. Prometheus Radio Project*, 592 U. S. 414, 423 (2021)). Thus, the agency must offer "a satisfactory explanation for its action[,]

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https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-member-fdic-board-of-directors-on-a-proposed-rule-to-strengthen-oversight-of-large-asset-managers-and-other-investors/

[8] Proposal, 89 FR 67007.

including a rational connection between the facts found and the choice made" and cannot simply ignore "an important aspect of the problem." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. In this case, however, the FDIC is proposing to solve a problem that it fails to demonstrate exists. Proposing an action based on pure speculation unsupported by facts, data, or other evidence is the opposite of drawing a rational connection between the facts found and the choice made and is almost necessarily arbitrary and capricious.

The Proposal is Based Upon Questionable Assertions of Legal Authority

The FDIC's exemption that waives FDIC review of an investor transaction if the transaction has already been reviewed by the FRB was never necessary because it merely enacted a statutory requirement. Under the CBCA, a review notice must be filed with *"the"* appropriate federal banking agency (i.e. it need not be filed with "all" appropriate federal banking agencies). Where an investor is acquiring shares of a bank or savings and loan holding company, the CBCA clearly defines "the" AFBA as the FRB, not the FDIC.[9] In other words, the FDIC is asserting jurisdiction over a range of activities and institutions where it does not have statutory jurisdiction.

The FDIC is arguing that it can enforce a transaction review for any FDIC-supervised entity, regardless of whether the FRB has already reviewed and approved the transaction. That is inconsistent with the plain text of the CBCA and does not recognize the FRB as *the* appropriate regulator for bank holding companies, regardless of whether an FDIC-supervised entity lives within the bank holding company's corporate structure. Even more troubling, the Proposal asserts that the FDIC has jurisdiction over transactions where there is already a passivity agreement in place with the FRB.[10] This is a strained and novel interpretation of the FDIC's authority, contradicts decades of past practice, and, as noted previously, seems to indicate the FDIC's view that the FRB is failing in its obligation to properly review transactions. Such a strained interpretation is certainly not "the best reading of the statute." *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2266 (2024).

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[9] Where a person or group acting in concert would acquire control of an insured depository institution ("IDI") through the acquisition of voting stock of an IDI, the CBCA requires prior notice to "the" appropriate federal banking agency ("AFBA") of "the" IDI. Thus, the CBCA requires notice to the AFBA for the IDI that's shares are to be acquired. 12 U.S.C. § 1817(j)(1). As the CBCA also defines IDI to include bank and savings and loan holding companies (12 U.S.C. § 1817(j)(18) and 12 U.S.C. § 1813(w)(1)-(3)) and the AFBA for such companies is the FRB (12 U.S.C. § 1813(q)(3)(F)-(G)), the CBCA makes clear that "the" AFBA for acquisitions of shares of such holding companies is the FRB.

[10] Proposal, 89 FR 67003, specifically "However, the exemption does not extend to FRB determinations to accept a passivity commitment in lieu of a notice. In such cases, the FDIC evaluates the facts and circumstances to determine whether a notice is required to be filed with the FDIC for the indirect acquisition of control of an FDIC-supervised institution."

The FDIC Should Withhold Further Consideration of the Proposal Until it has More Fully Examined its Limits Under CBCA and Whether Further Rule Amendments are Necessary

As the Chamber stated in our April 2024 letter, the FDIC must take extreme care when considering such wholesale changes for the regulatory review process under the CBCA. Issuing a rule proposal before an agency has fully examined the potential costs and benefits of a rule change is a deeply flawed, arbitrary approach that does not help the regulatory process and leaves banks and investors in a state of uncertainty as to what action the FDIC may or may not take in the future. The Chamber recommends that the FDIC continue public outreach and consider public roundtables before contemplating any new regulations or removal of existing exemptions to the review process.

Additionally, it is clear that the FDIC has not properly coordinated with the FRB, OCC, and SEC prior to issuing this proposed rulemaking. Pledging engagement with other regulators after a rule has been issued is not the same as receiving the proper input from those regulators *before* a rule proposal is released. The Chamber suggests that the FRB, OCC, and SEC be included as part of any public forums that discuss this topic in the future.

Thank you for your consideration of these comments. The Chamber looks forward to further discussing these critical issues with the FDIC and all relevant regulators.

Sincerely,

Tom Quaadman
Senior Vice President
Economic Policy
U.S. Chamber of Commerce