Regulations Implementing the Change in Bank Control Act

COMMENT LETTER

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James P. Sheesley, Assistant Executive Secretary
Attention: Change in Bank Control Act – RIN 3064-AG04
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Regulations Implementing the Change in Bank Control Act

Dear Sir:

The Conference of State Bank Supervisors[1] ("CSBS") provides the following comments on the Federal Deposit Insurance Corporation's ("FDIC") notice of proposed rulemaking entitled "Regulations Implementing the Change in Bank Control Act" ("proposal" or "proposed rule").[2] The proposal would alter the FDIC's longstanding approach to the Change in Bank Control Act ("CBCA") notice requirement when the Federal Reserve Board ("FRB") reviews a notice under the CBCA.[3]

State regulators urge the FDIC to refrain from adopting a final rule based on the proposal. Instead, the FDIC should explore its questions and concerns regarding matters of bank control, influence, and passivity through an interagency request for information ("RFI") or advanced notice of proposed rulemaking ("ANPR") with the FRB and Office of the Comptroller of the Currency ("OCC"). Any subsequent CBCA rulemaking should only be pursued on an interagency basis, and it should seek to harmonize the federal banking agencies' views on matters of control, influence, and their respective approaches to passivity commitments.

Our comments on the proposal are organized as follows:

- Novel questions regarding asset managers' holdings of bank equity have broad implications and should be examined through an iterative, interagency process.
- The FDIC's proposal is premature and lacks both factual and legal support.
- The FDIC has the ability to raise any concerns over change in control notices filed with the FRB under existing processes.

- Duplicative CBCA reviews and potential agency divergence could delay transactions and frustrate banks' access to capital.

I. Novel questions regarding asset managers' holdings of bank equity have broad implications and should be examined through an iterative, interagency process.

The proposal is primarily motivated by the FDIC's concerns that large asset managers may exercise influence or control over banking organizations when they amass sizeable equity positions in those banks or their holding companies. These positions are often acquired through index funds sponsored or managed by passive investors ("fund complexes"). Specifically, the FDIC appears skeptical that existing passivity commitments, and the current monitoring framework around these commitments, effectively guard against large asset managers exerting influence or control over banking organizations.[4] These issues implicate virtually all banking organizations (especially those that are publicly traded), state and federal bank regulators, securities regulators, asset managers, and the investing public.

Given the wide-ranging implications and novel questions posed by these issues, it is critical that any potential regulatory changes be considered and developed through a more thorough, iterative process and on an interagency basis. Indeed, at the FDIC Board's ("Board") April 2024 meeting,[5] Acting Comptroller Hsu outlined how the FDIC and the other federal banking agencies should proceed:

- Conduct further research, analysis, input, and debate before moving forward with a proposed rulemaking, including through an interagency RFI or ANPR; and
- Address these issues on an interagency basis, with the goal of achieving a shared understanding and approach to bank control, notices, and passivity agreements.[6]

Unfortunately, none of these steps were followed between the April and July FDIC Board meetings, when the Board approved issuing the current proposal for comment. While the FDIC references pursuing an interagency process through "dialogue and coordination" in the proposal,[7] that reference provides no guarantee that coordination will occur or that interagency consistency will actually be achieved. If the FDIC proceeds without a coordinated interagency process, it risks "creating more process and opportunities for turf battles or fragmentation" through a premature proposal and unilateral agency action.[8]

II. The FDIC's proposal is premature and lacks both factual and legal support.

The FDIC provides no evidence that any of the asset managers with passivity agreements in place with either the FRB or FDIC have actually violated the terms of, or are in noncompliance with, these agreements. The FRB does not appear to have alleged any such violations either,[9] and the proposal makes no mention of whether the FDIC consulted the FRB about asset managers' history of compliance. While state regulators agree inappropriate control or influence are issues worth examining jointly, it is premature to depart from longstanding policy and practice absent any data, concrete risks, or reasonable evidence of asset managers violating the terms of their passivity agreements.

Further, the CBCA requires the "appropriate Federal banking agency" be given 60-days' notice prior to acquisition, whereupon the agency can disapprove of the transaction.[10] The "appropriate Federal banking agency," in the case of a bank holding company, is the FRB.[11] By removing the "exemption" applied to "acquisition of voting securities of a depository institution holding company for which the Board of Governors of the Federal Reserve System reviews a notice pursuant to the CBCA," the FDIC is creating a second-level review not required by Congress.

III. The FDIC has the ability to raise any concerns over change in control notices filed with the FRB under existing processes

The current CBCA framework strikes an appropriate balance (and important distinction) between each agency's discrete review authority, specific to its supervised entities, and state and federal agencies' broad ability to share their views on a change in control transaction. When Congress passed the CBCA in 1978,[12] it provided each of the federal banking agencies with authority over changes in control specific to their supervised entities. In the case of bank holding companies, that authority explicitly rests with the FRB. At the same time, Congress recognized that other state and federal regulators' views would be valuable to an agency when reviewing a change in control transaction. Therefore, CBCA requires the reviewing federal agency to solicit the views and recommendations of the appropriate state regulator, and to send a copy of the CBCA notice to the other federal banking agencies.[13] Over the intervening 45+ years, the federal banking agencies' respective CBCA regulations [14] have been largely aligned in how they review CBCA notices for their supervised entities. This approach requires the agencies to solicit the views of other state and federal regulators and avoid redundant or duplicative reviews by another agency.

This construct provides the FDIC with considerable opportunity to share recommendations with the FRB on change in control transactions involving the parent holding company of a state nonmember bank. Indeed, the FRB's CBCA regulation states that it shall consider[15] any views or recommendations that the FDIC provides on a change in control application.

IV. Duplicative CBCA reviews and potential agency divergence could delay transactions and frustrate banks' access to capital.

By altering its current regulatory approach for FRB-reviewed CBCA notices, the FDIC would require investors to submit a duplicative notice with the FDIC. The FDIC would then have up to 180 days to review and decide whether to disapprove the transaction, all while the FRB conducts its own parallel review.[16] This duplicative review would primarily impact active investors (i.e., those investing for control purposes), but it seems to serve little purpose since the FDIC already holds significant sway over change in control transactions involving parent holding companies of state nonmember banks. State regulators are concerned that these separate CBCA reviews would serve little purpose and simply delay the consummation of transactions, or in worst case scenarios, lead to irreconcilable regulatory divergence between the FDIC and FRB.

The FDIC's proposed changes would also set the stage for the agency to exert greater control over passive investors (i.e., investors seeking only equity exposure). Indeed, the FDIC appears to be seeking to negotiate its own passivity agreements with asset managers even when they already have one in place with the FRB.[17] It has hinted at abandoning its current practice of not requiring asset managers to file a CBCA notice with the FDIC when those investors have a passivity agreement with the FRB to acquire shares of a bank holding company that owns a state nonmember bank.[18]

Collectively, the FDIC's actions could severely complicate index funds' ability to invest in state nonmember banking organizations. State regulators are concerned by the serious safety and soundness implications of complicating and disrupting certain banks' access to a critical source of reliable equity capital – a concern that should be shared by the FDIC. State regulators request that the FDIC avoid any further "actions that could discourage capital from coming into the banking industry."[19]

Conclusion

State regulators urge the FDIC to refrain from adopting a final rule based on its unilateral proposal. The proposal would create unnecessary regulatory redundancies and uncertainties for active investors, passive investors, and their state nonmember banking organization targets. The changes could make it more difficult for state nonmember banks with a parent holding company to access capital.

The FDIC should issue an interagency RFI or ANPR with the FRB and OCC on issues regarding bank control, influence, and passivity. Any potential CBCA rulemaking should only be pursued on an interagency basis and should harmonize the three federal banking agencies' views on matters of control, influence, and their respective approaches to passivity commitments.

Sincerely,
/s/
Karen K. Lawson
Executive Vice President, Policy & Supervision

Endnotes

1 CSBS is the nationwide organization of state banking and financial regulators from all 50 states, the District of Columbia, and the U.S. territories.

2 FDIC, Notice of Proposed Rulemaking, *Regulations Implementing the Change in Bank Control Act*, 89 Fed. Reg. 67002 (Aug. 19, 2024).

3 12 C.F.R. § 303.84(a)(8).

4 *See* *Remarks by Jonathan McKernan, Director, FDIC Board of Directors, at the Session on Financial Regulation at the Annual Meeting of the Association of American Law Schools* (Jan. 5, 2024); *see* also Minority Staff of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, *The New Emperors: Responding to the Growing Influence of the Big Three Asset Managers* (Dec. 2022).

5 *See* FDIC Board Meeting (April 25, 2024).

6 *See* *Acting Comptroller Issues Statement on the FDIC's Proposals Related to Change in Bank Control Act* (April 25, 2024).

7 *Supra* note 2, at 67002.

8 *Supra* note 6.

9 In congressional testimony, FRB Chair Powell stated that the FRB has no "reason to think [asset managers are not] in compliance" with existing passivity commitments. *See* U.S. House Financial Services Committee, *The Federal Reserve's Semiannual Monetary Policy Report*, at 2:57:10 (June 21, 2023).

10 12 U.S.C. § 1817(j)(1).

11 12 U.S.C. § 1813(q)(3)(F).

12 P.L. 95-630.

13 12 U.S.C. § 1817(j)(2)(A), (j)(11).

14 *See* 12 C.F.R. § 5.50, § 225 Subpart E, § 303 Subpart E.

15 12 C.F.R. § 225.43(g).

16 The reviewing agency has 60 days to disapprove the change in control, which may be extended by another 30 days at the agency's discretion, as well as up to two additional 45-day windows in certain circumstances. See 12 U.S.C. § 1817(j)(1).

17 See *Statement by Martin J. Gruenberg Chairman, FDIC Notice of Proposed Rulemaking Amending Regulations Implementing the Change in Bank Control Act* (July 30, 2024) ("The proposed regulatory change would… [give] the FDIC the ability to… negotiate passivity commitments with a proposed acquirer, *notwithstanding* whether the Federal Reserve Board reviews a notice or accepts passivity commitments pursuant to its legal authority with respect to depository institution holding companies.").

18 *Supra* note 2, at 67004.

19 See *Statement by Vice Chairman Travis Hill on Proposals Related to Change in Bank Control Act* (April 25, 2024).

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