James P. Sheesley
Assistant Executive Secretary
Attention: Comments/Legal OES (RIN 3064–AG04)
Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429

October 30, 2024

Via Email to: comments@FDIC.gov

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

Dear Mr. Sheesley and members of the Corporation:

The 38 undersigned organizations appreciate the opportunity to comment on the proposal by the Federal Deposit Insurance Corporation (FDIC) regarding implementation of the Change in Bank Control Act (CBCA). We strongly support the FDIC's proposal to remove the exemption from the notice requirement for acquisitions of voting securities of a holding company with an FDIC-supervised subsidiary institution for which the Board of Governors of the Federal Reserve System reviews a notice under the CBCA.

In this comment, we focus on: 1) providing background on the role large asset managers play in the governance of public companies, 2) addressing some of the questions in the Notice of Proposed Rulemaking regarding the presumption of control triggered when an entity owns, controls, or holds the power to vote 10 percent or more of any class of voting securities,[1] and 3) making the case for the Financial Stability Oversight Council (FSOC) to holistically address the financial stability threats posed by asset manager concentration and power.

The growth and concentration of the asset management industry has fundamentally changed the structure of our financial and corporate governance systems as they relate to public companies—including public banking institutions. At the end of 2021, the three largest asset managers—BlackRock, Vanguard, and State Street—collectively held nearly 22 percent of shares and voted nearly 28 percent of shares voted in the S&P 500.[2] This voting power—exercised on key issues like board composition, executive pay, and risks related to climate change, racial inequity, and lack of respect for labor rights—translates into influence that asset managers can also exert behind closed doors with little to no transparency. This outsized say over corporate decision-making, which essentially makes asset managers de facto regulators

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[1] 12 C.F.R. § 303.82(b).
[2] Bebchuk, Lucian, and Scott Hirst. "Big Three Power, And Why It Matters." Boston University Law Review, Vol. 102:1547 (2022) at 1560.
https://www.bu.edu/bulawreview/files/2022/10/BEBCHUK-HIRST.pdf

of public companies,[3] is poised to continue growing. In 2019, academics projected these asset managers would control 34.3 percent of S&P 500 votes in ten years and 40.8 percent of S&P 500 votes in twenty years.[4]

The largest asset managers, particularly BlackRock and Vanguard, hold significant ownership stakes in many banking institutions. This gives them considerable influence over decisions that impact the policy concerns of the CBCA, including the financial stability of banking institutions, the interests of depositors and the public, the integrity of the Deposit Insurance Fund, and competition.

Despite their legal obligations to act in the best interest of their clients, asset managers are increasingly prioritizing their own private, short-term interests in retaining and gaining assets under management and avoiding government regulation over the interest of their clients and the public in mitigating risks to individual companies and risks that affect the financial system as a whole. Indeed, their voting behavior has shown a strong tendency to favor management recommendations, often at the expense of other shareholders' efforts to press companies to address important risks that can affect corporate performance, the safety and soundness of depository institutions, and financial stability.

There is no principled way for asset managers that have the power to vote 10 percent or more of any class of voting securities to rebut the presumption of control under FDIC regulations. It is asset managers' ability to vote a significant portion of proxies in support of or opposition to directors and other kinds of proxy ballot items that gives them control. Laws governing asset managers including the Investment Advisers Act and the Employee Retirement Income Security Act try to direct asset managers to exercise shareholder rights (including proxy voting) in the best interest of their clients. Asset managers cannot fully nullify their responsibility to vote in the best interest of their clients by entering into any agreement with the FDIC or other banking agency without running afoul of one or more of these laws. This means that managers cannot rebut the presumption of control when they have the power to vote 10 percent or more of a class of securities.

Voting with management is not passive and triggers policy concerns. Asset management proxy votes that are in line with management recommendations are not "passive." It is the same exercise of control as voting any other way. Notably, the investment time horizons of corporate

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[3] Lund, D. S. (2023). "Asset Managers as Regulators." University of Pennsylvania Law Review, Vol. 171: 77. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9797&context=penn_law_review ("regulators of last resort");
DeLong, J. (2023, September 12). "Are Index Funds Making the Economy Less Fair?" The New York Times. https://www.nytimes.com/2023/09/12/books/review/taming-the-street-diana-henriques-the-problem-of-twelve-john-coates.html ("rule by index fund")
[4] Bebchuk, L. A., & Hirst, S. (2019). "The Specter of the Giant Three." Boston University Law Review, Vol. 99:721 at 737-740 https://www.bu.edu/bulawreview/files/2019/06/BEBCHUK-HIRST-1.pdf

executives tend to be significantly shorter than those of passive shareholders,[5] and studies show that executive pay incentives at financial institutions rewarded short-term performance in the years leading up to the 2008 financial crisis and incentivized executives to take excessive risks.[6] There have been many other examples of excessive risk-taking at financial institutions tied to executive pay in subsequent years.[7] Voting with management could amplify the effects of these shorter-term incentives while stifling the voices of shareholders who are pressing companies to address important risks, including systemic risks that depress market performance or threaten financial stability.

Pass-through voting is an incomplete solution. There is no reason to believe that most individual or even institutional investors in passive funds have the incentives, interest, or resources to vote proxies at the large number of companies in which such funds invest. One proxy solicitor estimates that only 20 percent of retail investors cast proxy votes and even a "steady cadence of solicitation" can only boost proxy voting to 40 to 45 percent.[8] Pass-through voting uptake among institutional investors has not been strong. At the end of 2023, only about a quarter of BlackRock's $2.6 trillion in eligible institutional index equity assets participated in BlackRock's voting choice pass-through voting program.[9] A significant proportion of participating assets in 2022 were "legacy" separate account clients that "have always controlled their own voting."[10]

Asset managers that wish to rebut the presumption of control should be required to use an independent[11] proxy voting service provider (an "IPVSP") to make recommendations about voting the shares and to abstain from engagements, if the FDIC wishes to study the issue

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[5] According to BlackRock, index funds invest in companies for, on average, 25 years. BlackRock, It's all about choice, at 6 https://www.blackrock.com/corporate/literature/publication/its-all-about-choice.pdf (hereinafter, "It's all about choice")

[6] *See* Bebchuk, L. (2012, January 31). "Executive Pay and the Financial Crisis." World Bank Blogs.(citing studies) https://blogs.worldbank.org/en/allaboutfinance/executive-pay-and-the-financial-crisis;
Bebchuk, L. et al., (2009) "The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000-2008," at 4
http://www.law.harvard.edu/faculty/bebchuk/pdfs/BCS-Wages-of-Failure-Nov09.pdf

[7] Naylor, B., & Brown, Z. (2022, September 9). "Inappropriate." Public Citizen. https://www.citizen.org/article/inappropriate/;
Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank. (2023, April 28). Federal Reserve Board at 74-75
https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf

[8] Stebbins, A. B., Gerber, M. S.,et al., (2023, March 15). "Pass-Through Voting: Empowering Shareholders or Increasing the Influence of Proxy Advisors?" Skadden, Arps, Slate, Meagher & Flom LLP. https://www.skadden.com/insights/podcasts/2023/03/pass-through-voting

[9] BlackRock, "Investment Stewardship Annual Report Jan. 1-Dec. 31, 2023," at 14 (https://www.blackrock.com/corporate/literature/publication/annual-stewardship-report-2023-summary.pdf); It's all about choice, supra note 5, at 4, 6

[10] BlackRock, It's all about choice, supra note 5, at 4

[11] "Independent" should be defined to exclude any proxy advisory service the asset manager has previously engaged to provide other recommendations and/or vote execution services, as well as any proxy advisory service that has the banking institution as a client.

further before deciding the control presumption is not rebuttable. Specifically, we advocate that an asset manager, in order to rebut the presumption of control, be required to do the following for all votes cast at shareholder meetings held by FDIC-supervised institutions and depository institution holding companies with an FDIC-supervised subsidiary institution:

1. Include provisions in its proxy voting guidelines that mandate consideration of whether the action the asset manager is being asked to approve would jeopardize the financial stability of the institution, prejudice the interests of the institution's depositors, not be in the interest of the public, substantially lessen competition, or adversely affect the Deposit Insurance Fund (the "Guideline Provisions");
2. Engage an IPVSP with expertise in FDIC-supervised institutions to provide voting recommendations for matters presented for a shareholder vote, and ensure that the contract requires the IPVSP to apply the Guideline Provisions; and
3. Vote in accordance with the IPVSP's recommendations unless the asset manager concludes that doing so would violate applicable laws or regulations, a conclusion which must be supported by a written opinion of counsel.

To permit the FDIC to monitor an asset manager's adherence to these commitments, robust reporting to the FDIC should be mandated, in addition to annual certifications of asset manager compliance.

Additionally, the FDIC must consider a complete ban on asset manager firms engaging with FDIC-supervised depository institutions and holding companies with FDIC-supervised bank subsidiaries. The scale of asset manager ownership and shareholder voting power means that any engagement between asset managers and managers of banks would be tantamount to exercising control. Anything short of a complete engagement ban should not be sufficient to rebut the presumption of control. Any other parameters short of a complete ban would only be a way to shape that control, not give it up. If the FDIC does not want to require a ban to rebut the presumption, another possibility is to require the asset manager to pre-clear engagement topics and recommendations with the FDIC prior to engaging with the banking institution and publicly disclose them afterwards. When evaluating proposed engagement topics and recommendations for pre-clearance, the FDIC must consider whether the engagements may trigger any of the factors listed in the CBCA as reasons to disapprove of a proposed acquisition, including whether the recommendations might jeopardize the financial stability of the bank or not be in the interest of depositors or the public.[12]

The way to most holistically address the financial stability concerns posed by asset manager concentration and power is through the Financial Stability Oversight Council. While we commend the FDIC for the important action it is taking through this proposed rule, action by the FSOC is necessary to address concentrated asset manager power that can pose

[12] 12 U.S.C. 1817(j)(7).

financial stability concerns. The largest asset managers' outsized influence over public companies means they have the power to either compel public companies to address financial stability risks, or conversely, to serve as a veto point when other shareholders seek to do so. The conflict of interest inherent in their business model—whereby they prioritize maintaining and expanding assets under management and avoiding regulation instead of addressing risks to their fund investors—has resulted in their opting for the latter.

FSOC was created for the very purpose of monitoring and addressing financial stability risks and has a powerful tool to use in its efforts: the authority to designate nonbank financial institutions as systemically important, which triggers consolidated supervision by the Federal Reserve and enhanced regulatory safeguards.

FSOC can designate a nonbank as systemically important if it "determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States."[13] Past analyses of the financial stability risks posed by asset managers have focused on the risks that would result from "material financial distress" of the asset managers,[14] but the risks that result from the largest asset managers' significant, often decisive power—due to their nature, scope, size, scale, and concentration—over whether and how public companies address financial stability risks have been underexplored.

FSOC identified climate change as a financial stability risk in 2021,[15] and issued a progress report that continued to stress the priority of addressing the systemic risks posed by the climate crisis to the financial system in 2023.[16] There is also mounting evidence that economic inequality poses financial stability risks of its own, due in part to the resulting overextension of risky consumer debt, and inequality can exacerbate other financial stability risks like those related to

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[13] Dodd-Frank Act § 113.

[14] Office of Financial Research. (2013, September). "Asset Management and Financial Stability." https://www.financialresearch.gov/reports/files/ofr_asset_management_and_financial_stability.pdf; Gruenberg, M. (2023, September 20). "Remarks by FDIC Chairman Martin J. Gruenberg at the Exchequer Club on the Financial Stability Risks of Nonbank Financial Institutions." FDIC. https://www.fdic.gov/news/speeches/2023/spsept2023.html

[15] U.S. Department of the Treasury. (2021, October 21). "Financial Stability Oversight Council Identifies Climate Change as an Emerging and Increasing Threat to Financial Stability." https://home.treasury.gov/news/press-releases/jy0426

[16] U.S. Department of the Treasury. (2023, July 28). "Climate-related Financial Risk: 2023 Staff Progress Report." https://home.treasury.gov/system/files/261/FSOC-2023-Staff-Report-on-Climate.pdf

climate change.[17] Other compelling analyses point to racial inequity as a systemic risk[18] and demonstrate the role it plays in enabling financial instability to take hold and spread widely.[19]

The largest asset managers are currently exacerbating rather than ameliorating these financial stability risks. In 2023, for example, large asset managers overwhelmingly supported the directors of U.S.-based companies with operations and business models that were most misaligned with 1.5°C pathways, failing to exercise their power to address the risks posed by climate change to the financial system.[20] They also showed very low support for proposals seeking to enhance labor rights, which decrease inequality,[21] and effectively blocked shareholder action on vital racial equity issues.[22] While the largest asset managers had already routinely obstructed investor efforts to compel public companies to address financial stability risks, an unpopular campaign seeking to force financial actors to ignore a slew of financial risks and weaken tools of corporate accountability has only made matters worse.[23]

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[17] *See* Tamir, I., Contractor, et al,. (2023). "The Investor Case for Fighting Inequality: How Inequality Harms Investors and What Investors Should Do About It" .https://www.oxfamamerica.org/explore/research-publications/the-investor-case-for-fighting-inequality-how-inequality-harms-investors-and-what-investors-should-do-about-it/;
Committee on Workers' Capital. (2022, November 29). "Shared Prosperity: The Investor Case for Freedom of Association and Collective Bargaining." https://www.workerscapital.org/our-resources/shared-prosperity-the-investor-case-for-freedom-of-association-and-collective-bargaining/;
Lydenberg, S., Musuraca., M., et al. (2018). "Why and how investors can respond to income inequality." PRI. https://www.unpri.org/download?ac=5599

[18] Manley, R. (2023, June 3). "Introduction to Racial Inequity as a Systemic Risk:Why Investors Should Care and How They Can Take Action." The Investment Integration Project. https://tiiproject.com/wp-content/uploads/2023/06/TIIP-RacialEquityBrief-6-14-23-FINAL-Submitted.pdf

[19] Shelby, C. M. (2023, November 12). "Racism as a Threat to Financial Stability" by Cary Martin Shelby. Scholarly Commons: Northwestern Pritzker School of Law. https://scholarlycommons.law.northwestern.edu/nulr/vol118/iss3/7/;
see also Manley, R. (2023, June 3). "Introduction to Racial Inequity as a Systemic Risk:Why Investors Should Care and How They Can Take Action." The Investment Integration Project. https://tiiproject.com/wp-content/uploads/2023/06/TIIP-RacialEquityBrief-6-14-23-FINAL-Submitted.pdf

[20] Majority Action. (2023, November 7). "Climate in the Boardroom 2023." https://www.majorityaction.us/climate-in-the-boardroom-report-2023

[21] Committee on Workers' Capital. (2024, January 11). "Voting for Labour Rights: How the World's Largest Asset Managers Measured Up in Proxy Season 2023." https://www.workerscapital.org/our-resources/voting-for-labour-rights-how-the-worlds-largest-asset-managers-measured-up-in-proxy-season-2023/

[22] Majority Action, SEIU. (2023, February). "Equity In The Boardroom, How Asset Manager Voting Shaped Corporate Action On Racial Justice." https://static1.squarespace.com/static/5d4df99c531b6d0001b48264/t/63ec394a25dc852766ff02a4/1676425549842/MA_EquityintheBoardroom_2022REPORT.pdf

[23] *See* Masters, B., & Bryan, K. (2024, August 21). "BlackRock's support for ESG measures falls to new low." Financial Times. https://www.ft.com/content/2fbd12f2-a2e1-4fa7-ba63-7344ab274b4f;
Masters, B., & Temple-West, P. (2024, August 29). "Vanguard backed no environmental or social measures in 2024 proxy season." https://www.ft.com/content/c49ec5ed-88d0-491c-963f-5b5c8d12550f

FSOC and the U.S. Treasury Department's Office of Financial Research (OFR) must study and address the financial stability risks posed by the nature, scope, size, scale, and concentration of the asset management industry. Designation as systemically important financial institutions would allow the Federal Reserve and other financial regulators to design and implement the supervisory and regulatory interventions necessary to ensure that large asset managers' substantial ownership stakes of public companies ameliorate rather than exacerbate financial stability risks.

We appreciate the FDIC's consideration of our recommendations. For further discussion, please contact Natalia Renta at natalia@ourfinancialsecurity.org.

Sincerely,

Americans for Financial Reform Education Fund
17 Communications
20/20 Vision
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Antimonopoly Counsel
Center for Digital Democracy
Committee for Better Banks
Communications Workers of America (CWA)
Community Capital Advisors
Corpgov.net
Dominican Sisters of Sparkill
Figure 8 Investment Strategies
Green America
Impact Investors, PBC
Interfaith Center on Corporate Responsibility
Just Futures PBC
Majority Action
Missionary Oblates of Mary Immaculate - OIP Trust
National Education Association (NEA)
Natural Investments
Nia Impact Capital
Oxfam America
People Power United
Perigon Wealth Management
Public Citizen

Region VI Coalition for Responsible Investment
School Sisters of Notre Dame Collective Investment Fund
Service Employees International Union (SEIU)
Sierra Club
Sisters of the Humility of Mary
Sisters of St. Francis of Philadelphia
SOC Investment Group
Sustainable Advisors Alliance, LLC
The Shareholder Commons
WV Citizen Action
Zenith Wealth Partners