October 18, 2024

Comment Intake- 2024 NPRM Regulations Implementing the Bank Control Act
James P. Sheesley, Assistant 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, RIN 3064-AG04

Dear Director McKernan,

I appreciate this opportunity to respond to the Federal Deposit Insurance Corporation's (the "FDIC") Notice of Proposed Rulemaking seeking information and comment regarding its approach to change in control notices under the Change in Bank Control Act (CBCA) with regards to persons who may be directly or indirectly exercising control over an FDIC-supervised institution.

Background

The Change in Bank Control Act specifies that no person acting either directly or indirectly with one or more persons shall acquire control of any FDIC insured depository institution unless the appropriate Federal banking agency (AFBA) has been given notice of the acquisition and the agency does not issue a notice disapproving of the proposed acquisition or extending the period of review.[1] The CBCA defines control broadly—as "the power, directly or indirectly, to direct the management or policies of an insured depository institution or to vote 25 per centum or more of any class of voting securities of an insured depository institution."[2] A rebuttal presumption exists that once the a 10 percent voting power threshold is reached. An AFBA may disapprove of an acquisition if any one of several factors enumerated by the CBCA are unresolved.[3] The FDIC is the AFBA for any State nonmember insured bank and any State savings association.[4]

Importantly, the current rules and regulations of the FDIC implementing the CBCA enumerate exemptions from the FDIC notice requirement.[5] One of the exemptions applies to the acquisition of a depository institution holding company for which the Federal Reserve Board

[1] Section 7(j) of the Federal Deposit Insurance Act (FDI Act)
[2] 12 U.S.C. 1817(j)(8)(B).
[3] 12 U.S.C. 1817(j)(7).
[4] 12 U.S.C. 1813(q).
[5] 12 CFR 303.8 through 303.88.

(FRB) reviews a notice pursuant to the CBCA.[6] So long as the FRB reviews the acquisition, current rules do not require an additional notice filing to and review by the FDIC. This proposed FDIC rule repeals this exemption—upending current practice by subjecting any acquisition reaching the 10 percent control threshold to FDIC notice requirements and potential review.

I. The FDIC arbitrarily and capriciously removes its notice exemption for acquisitions already subject to FRB notice review.

The FDIC accurately notes that "fund complexes…have continued to increase their ownership percentages at more institutions" and that this "may create situations where the investor can have an outsized influence over the management of an institution." The FDIC also notes the possibility of fund complexes increasing the risk profile of these institutions and of the "potential to create concentration of ownership that may result in such investors having excessive influence or control…"

The FDIC wisely provides an exemption from FDIC notice and review for those acquisitions already subject to FRB notice. The FDIC arbitrarily—with no supporting evidence—claims that the exemption is "no longer warranted in light of the widespread impacts resulting from growth in, and changes to the nature of, passive investment strategies." The FDIC references "new risks" stemming from "outsized control over and concentration of FDIC-supervised institutions."[7] But these concerns are not unique to ownership by passively managed index funds and "fund complexes." These are the same risks mitigated by existing FRB review of acquisitions in accordance with existing CBCA regulations. In fact, FDIC Board of Directors member Rohit Chopra in July actually suggested the FDIC is still in search of evidence proving additional risk: "The proposed rule seeks comment on risks associated with this concentrated ownership, including with respect to conflicts of interest, financial stability, the effect on competition, and the efficacy of "passivity" agreements."[8]

The FDIC removes from the FRB the ability to solely decide whether to permit an acquisition in those instances where the FRB already chooses to review a notice. This creates needless redundancy of oversight. The Bureau's failure to "cogently explain why it has exercised its discretion in a given manner" violates the Administrative Procedure Act and is thus arbitrary and capricious.

II. The Proposed Rule may Limit Access to Capital—a Concern Unaddressed by the FDIC

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[6] 12 CRE 303.84(a)(8).

[7] Proposed Rule, Regulations Implementing the Change in Bank Control Act, RIN 3064-AG04, p 67005.https://www.govinfo.gov/content/pkg/FR-2024-08-19/pdf/2024-18187.pdf

[8] 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. 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/

If a passively managed investment fund complex owned more than 10 percent of a depository institution along with more than 10 percent of another publicly traded company, the investment fund could be considered a "principal shareholder" of the bank and an "insider" of the company. Existing regulations would have triggered lending limitations and other restrictions on these banks.[9] Furthermore, deterring passive index funds from investing in banks limit access to needed capital even as capital requirements are heightened. Less available capital for banks inevitability results in higher borrower costs for consumers and businesses.[10] [11]

Recognizing the unintended consequences of applying this regulation to passively managed index funds, the FRB agreed to engaged in "no-action" for these violations as a rework of the regulation ensues. The FRB is already working considering whether to amend existing regulations related to "fund complexes"—multiple passive investment funds that "have the same company or related companies that sponsor, manage, or advise them."[12] The FRB clearly recognizes the danger of needlessly classifying the acquisition by passively managed index funds as akin to other types of transactions.

The FDIC's proposed rule arbitrarily and capriciously threatens to circumvent the FRB's attempt to modernize existing regulations in effort to avoid irrationally placing limitations on lending simply because a passively managed index fund holds a stake in both a banking institution and a client (or potential client) of that firm. The end result is effectively capping the amount of capital some asset managers may be able to invest in banks.

III. <u>The proposed Rule Harms Small Investors—a Concern Unaddressed by the FDIC</u>

The CBCA clearly designates the FRB as the primary regulator for bank holding companies. In recent years, passive index funds increasingly play this role. The FDIC prudently chose to defer to the FRB in its evaluation of risks posed by acquisitions by these holding companies. The FRB has proven to be adept and responsive to changing market conditions as passive index funds became more prominent.

The existing exemption from FDIC notice and review of those acquisitions already subject to FRB review has prevented needless redundancy in bureaucratic approvals. Small investors have benefited greatly from the option to invest in lower-risk passively managed funds diversified across multiple sectors of the economy. These investors increasingly benefit from the efficiencies of scale from funds with more assets under management. If the FDIC uses this proposed rule to limit investments by these fund managers either in depository institutions or

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[9] Section 22(h) of the Federal Reserve Act, 12 U.S.C. 375b, and Regulation O, 12 CFR part 215 (made applicable to insured nonmember banks by 12 U.S.C. 1828(j)(2))

[10] https://www.sifma.org/resources/news/sifma-amg-statement-on-fdic-consideration-of-changes-to-bank-control-rules/

[11] https://www.ici.org/news-release/24-fdic-rule-bank-control-act

[12] Proposed Rule, Regulations Implementing the Change in Bank Control Act, RIN 3064-AG04, p 67004.https://www.govinfo.gov/content/pkg/FR-2024-08-19/pdf/2024-18187.pdf

companies serviced by them, small investors may be harmed in two ways: higher risk resulting from less diversification and higher fees as fully market diversified, low-cost index funds may be less available.

Sincerely,

Joel Griffith