October 24, 2024

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

VIA EMAIL

Re.: *Regulations Implementing the Change in Bank Control Act/RIN 3064-AG04*

Dear Mr. Sheesley:

The Committee on Capital Markets Regulation (the "Committee") offers these comments to the Federal Deposit Insurance Corporation ("FDIC") on its proposal "Regulations Implementing the Change in Bank Control Act" (the "Proposal").[1]

Founded in 2006, the Committee is dedicated to enhancing the competitiveness of US capital markets and ensuring the stability of the US financial system. Our membership includes thirty-seven leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by R. Glenn Hubbard (Emeritus Dean, Columbia Business School) and John L. Thornton (Former Chairman, The Brookings Institution) and is led by Hal S. Scott (Emeritus Nomura Professor of International Financial Systems at Harvard Law School and President of the Program on International Financial Systems). The Committee is an independent and nonpartisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

The Proposal would amend the regulations under the Change in Bank Control Act ("CBCA") to allow the FDIC to require non-banks that acquire, directly or indirectly, 10% or more of the voting stock of bank holding companies with an FDIC-supervised subsidiary to submit the proposed acquisition for FDIC review even though the Federal Reserve has already reviewed the acquisition.[2] Although the FDIC cites increased investment by index funds in bank equity as the sole rationale for this change, the Proposal would apply to all non-bank acquirers of 10% or more of the voting stock of bank holding companies with FDIC-supervised subsidiaries.

Our letter proceeds in two parts.

Part I describes the Proposal. We highlight how the Proposal would unilaterally alter a statutorily mandated division of responsibility among three federal banking agencies that has been recognized

[1] FEDERAL DEPOSIT INSURANCE CORPORATION ["FDIC"], *Regulations Implementing the Change in Bank Control Act* 89(160) FED. REG. 67,002 (Aug. 19, 2024), https://www.federalregister.gov/documents/2024/08/19/2024-18187/regulations-implementing-the-change-in-bank-control-act [the "Proposal"].
[2] *Id*. at 67,002.

in FDIC regulations for over 20 years. As a result, acquisitions of more than 10% of the voting stock of bank holding companies with FDIC-supervised subsidiaries that the Fed has already reviewed for compliance with the CBCA would be potentially subject to a duplicate review by the FDIC.

Part II assesses the Proposal's alteration of the regulatory structure and identifies four significant flaws. The Proposal: (1) fails to substantiate any policy rationale for requiring FDIC review of acquisitions that the Fed has already reviewed for compliance with the CBCA, (2) fails to consider the significant costs it would create for asset managers, banks, and US markets, (3) lacks statutory authorization and (4) was developed through a flawed process.

For these reasons, we believe that the FDIC must withdraw the Proposal.

I. Summary

The Change in Bank Control Act ("CBCA") prohibits any person, acting directly or indirectly, from acquiring "control" of an insured depository institution, which for this purpose includes a bank holding company, unless the acquirer provides 60 days' prior written notice to the "appropriate Federal banking agency" and the agency does not disapprove of the transaction.[3] The requirement was enacted to support the stability of the US banking system by ensuring that persons who direct the management and policies of a US bank have sufficient competence, experience, and financial capacity and that acquisitions do not reduce competition in the US banking industry.[4] In practice, the CBCA requirement primarily applies to non-bank acquirers.[5]

The CBCA provides that a party acquires "control" of a bank if it acquires 25% or more of any class of voting stock of the bank or otherwise acquires the power to "direct the management or policies" of the bank.[6] Regulations provide that anyone who acquires 10% to 25% of any class of voting stock is presumed to have the power to direct the management or policies of the bank unless the acquirer demonstrates to the reviewing agency that it will not use its shares for this purpose.[7]

Neither the statute nor the regulations provide further clarity as to what constitutes the power to direct the management or policies of a bank. However, the federal banking agencies often accept a legal commitment from the acquirer not to use its acquired shares to influence the bank's management or policies (a "passivity agreement") as rebutting the presumption of control that arises from the acquisition of a 10% to 25% stake. The contents of these agreements provide some indication of the criteria that the federal banking agencies use to assess whether an acquirer has

[3] 12 USC § 1817(j)(1). In this letter, we use the term "bank" to refer to insured depository institutions within the meaning of the CBCA.

[4] Mark B. Greenlee & Brian P. Knestout, *Acquisition of Control of a State Member Bank, Bank Holding Company, or Savings and Loan Holding Company Pursuant to the Change in Bank Control Act* 38 REV. OF BANKING & FINANCE LAW 210 (2018-2019), https://www.bu.edu/rbfl/files/2021/02/Greenlee-Knestout.pdf.

[5] *See, e.g.*, WACHTELL, LIPTON, ROSEN & KATZ, Financial Institutions M&A 2024: Seizing Opportunities, Navigating Pitfalls 69 (Feb. 2023), https://www.wlrk.com/docs/FIGMemo2024.pdf.

[6] 12 USC § 1817(j)(8)(B).

[7] 12 CFR § 303.82(b)(1).

the power to direct the management or policies of a bank. Passivity agreements may require, for example, that the acquirer not seek representation on the bank's board of directors, sell shares to induce bank management to take certain actions, or solicit proxy votes.[8] These agreements are commonly entered into with the managers of investment funds (e.g., mutual funds and exchange-traded funds ("ETFs")), whose funds frequently hold in the aggregate 10% or more of the voting stock of one or more banks as part of their investment strategies, without intending to influence the banks' management or policies. If the reviewing agency determines that a proposed 10%-25% acquisition is not an acquisition of control because the acquirer has entered into a passivity agreement, the agency does not need to review the acquisition further and the acquisition is permitted to occur.

Alternatively, if the agency determines that the acquirer of a 10%-25% stake will direct the management or policies of the bank, the appropriate agency must then assess the acquisition under six statutory criteria. The agency may block the proposed acquisition if (1) the acquisition would result in a monopoly in the US banking industry; (2) the acquisition would substantially lessen competition or otherwise result in a restraint of trade in the US banking industry; (3) the financial condition of the acquirer or the future prospects of the institution might jeopardize the financial stability of the bank or prejudice the interests of depositors; (4) the "competence, experience, or integrity" of the acquirer or management personnel indicates that it would not be in the best interest of depositors or the public to permit such a person to control the bank; (5) the acquirer fails to provide the agency with the information the agency requires to assess the proposed acquisition; or (6) the acquisition would adversely affect the Deposit Insurance Fund ("DIF").[9]

The CBCA provides that the "appropriate federal banking agency" is (1) the Board of Governors of the Federal Reserve System ("Fed") in the case of acquisitions of the shares of bank holding companies and state-chartered banks that are members of the Federal Reserve system, (2) the FDIC in the case of acquisitions of the shares of state-chartered banks that are not members of the Federal Reserve system, and (3) the Office of the Comptroller of the Currency ("OCC") in the case of acquisitions of the shares of federally chartered banks.[10] In cases where the acquirer enters into a passivity agreement, the acquirer enters into the agreement with the appropriate federal banking agency. Thus, in the case of acquisitions of the shares of bank holding companies, the acquirer enters into an agreement with the Fed. The Fed website lists nine passivity agreements with nine asset management companies.[11] In the case of direct acquisitions of the shares of an FDIC-

[8] FDIC, Bank Examinations, Change in Control, https://www.fdic.gov/bank-examinations/change-control (last visited Oct. 24, 2024).
[9] 12 USC § 1817(j)(7).
[10] *Id*. at § 1813(q).
[11] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Supervision & Regulation, Legal Interpretations, Bank Holding Company/Savings and Loan Holding Companies/Change in Control, https://www.federalreserve.gov/supervisionreg/legalinterpretations/bhc_changeincontrol_archive.htm (last visited Oct. 22, 2024).

supervised institution, the acquirer enters into the agreement with the FDIC. The FDIC currently has in force four passivity agreements with three asset management companies.[12]

In 2003, the FDIC issued a regulation to avoid "duplicate regulatory review."[13] This regulation applies to instances where the Fed determines that an acquisition of a bank holding company is a change in control. In such instances, the FDIC is not required to conduct an additional assessment of whether there has been a change in control for the FDIC-supervised depository institution, as doing so would be duplicative.

The FDIC's policy has also generally been not to review 10%-25% acquisitions where the Fed enters into a passivity agreement with the acquirer and thereby rebuts the presumption of control. Although this policy is not codified in regulation, the supporting logic is the same: If the Fed obtains a commitment from an acquirer not to influence the management or policies of a bank holding company, including its FDIC-supervised subsidiaries, it would be an unnecessary duplication for the FDIC to negotiate another agreement with the acquirer providing for the same commitment and redundantly rebutting the same presumption of control.

The Proposal would eliminate this regulatory exception and reverse the FDIC's related policy. It would therefore allow the FDIC to require any non-bank that holds or intends to acquire 10% or more of the voting stock of any bank holding company with an FDIC-supervised subsidiary to submit the acquisition for FDIC review or negotiate a passivity agreement with the FDIC notwithstanding that the Fed has already approved the acquisition of control or negotiated a passivity agreement with the acquirer.

The Proposal states that its objective is to "ensure appropriate review" of indirect acquisitions of FDIC-supervised subsidiaries of bank holding companies.[14] The Proposal acknowledges that the Fed already reviews these acquisitions. But it claims that the current objective of avoiding duplicate regulatory review by assigning sole review responsibility to the Fed is "no longer warranted" in light of "recent developments" in the equity markets.[15]

In particular, the Proposal claims that groups of investment funds managed by a common manager and pursuing passive index strategies ("fund complexes") have "continued to increase their ownership percentages" of FDIC-supervised banks both directly and indirectly through Fed-

[12] Proposal at 67,003, citing FDIC, Bank Examinations, Change in Control https://www.fdic.gov/regulations/applications/resources/change-in-control.html.
[13] *Id*. at 67,005; *see also*, FDIC, Filing Procedures, Corporate Powers, International Banking, Management Official Interlocks, Golden Parachute and Indemnification Payments (Aug. 21, 2003), https://www.federalregister.gov/documents/2003/08/21/03-20451/filing-procedures-corporate-powers-international-banking-management-official-interlocks-golden ("[W]here a person proposes to acquire control of a bank holding company that controls a state nonmember bank, and the [Fed] reviews a change in control notice for the same transaction, the FDIC considers it an unnecessary duplication for the acquirer to also file a change in control notice with the FDIC.").
[14] Proposal at 67,002.
[15] *Id*. at 67,005.

supervised bank holding companies.[16] The Proposal claims that increased ownership by these fund complexes may be contributing to "elevated risk of excessive indirect control or concentration of ownership in FDIC-supervised institutions" and the potential for fund complexes to exercise "outsized influence" on the management of banks.[17] The Proposal also states that the FDIC has observed "more frequent requests for relief" to show that acquisitions of 10% or more of a bank's stock is not an acquisition of control.[18] The Proposal claims these developments necessitate FDIC review of acquisitions of shares of bank holding companies with FDIC-supervised subsidiaries in addition to Fed review.[19] This is the sole policy rationale the Proposal offers.

II. Analysis

There are four significant flaws with the Proposal, which together require its withdrawal.

1. The Proposal fails to substantiate any policy rationale.

First, the Proposal provides no evidence that review by the Fed no longer suffices to ensure that relevant acquisitions of bank holding company shares with an FDIC-subsidiary comply with the CBCA. The Proposal cites no past examples where Fed review led to any of the harms that the CBCA is intended to protect against with respect to an FDIC-supervised institution, including a lessening of competition in the banking industry or harm to the DIF. The Proposal claims without evidence that duplicate review by the FDIC will "increas[e] the likelihood that all the statutory factors in the CBCA are met, and reduc[e] the likelihood that certain transactions would result in an adverse effect on the DIF," despite expressly acknowledging that the FDIC "does not have the information necessary" to substantiate or quantify these claimed benefits.[20]

Second, the Proposal does not document any examples of fund complexes making efforts to direct the management or policies of a bank in conflict with a passivity agreement or the CBCA. Nor does the Proposal explain why increased ownership by fund complexes pursuing passive index strategies specifically creates risks that warrant fundamentally altering the current regulatory structure.

Third, the Proposal bases its rationale on unsubstantiated concerns about the potential impact of increased indirect ownership by passive index funds of FDIC-supervised subsidiaries of bank holding companies. But the Proposal would apply to all non-bank acquirers of 10% or more of the voting shares of bank holding companies with FDIC-supervised subsidiaries, not just index funds. The Proposal does not justify this disconnect between its narrow rationale and the unbounded scope of its changes.

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[16] *Id*. at 67,004.
[17] *Id*. at 67,006.
[18] *Id*. at 67,004.
[19] *Id*. at 67,005.
[20] *Id*. at 67,006.

The Proposal also states that the FDIC has observed more frequent requests from acquirers to demonstrate that 10%-25% acquisitions are not acquisitions of control. To the extent these requests relate to acquisitions that only the Fed currently reviews, the Proposal does not explain why the increased frequency of these requests means that Fed review is insufficient or warrants requiring separately negotiated passivity agreements with another federal banking agency. This development therefore does not justify requiring acquirers that have a passivity agreement with the Fed to negotiate another agreement with the FDIC.

2. The Proposal would impose significant costs on US markets and market participants.

The Proposal's estimation of its costs is limited to an estimate of a narrow set of compliance costs that is unsubstantiated and likely to be a significant underestimate.[21] More importantly, however, the Proposal completely fails to acknowledge the far more significant costs it would impose on US markets by reducing regulatory certainty, impeding index funds and other market participants in the pursuit of their investment strategies, and restricting banks' access to equity capital.

First, the Proposal would reduce regulatory certainty for participants in US equity markets by increasing the probability that an acquisition of bank shares will be delayed or blocked. More specifically, asset managers and other market participants seeking to buy the shares of a bank holding company in a transaction that previously was reviewable only by the Fed may now be required also to submit the acquisition for FDIC review. The transaction would therefore potentially be delayed and there would be an increased risk that the transaction will be blocked due to an adverse determination or inability to negotiate a passivity agreement with one of the two reviewing agencies. Furthermore, the Proposal does not specify how the FDIC would determine whether to exercise its review right, or whether or how the methodologies or criteria the FDIC would employ to assess these acquisitions or negotiate passivity agreements would differ from those the Fed uses. The Proposal also indicates that the FDIC intends to reconsider "how to monitor compliance with passivity commitments" without specifying how the monitoring process could change.[22] These factors will compound the uncertainty stemming from the Proposal.

These new risks and costs would disincentivize the purchase and sale of shares of bank holding companies, reducing liquidity in the market for bank equity. Furthermore, the FDIC's intention to require separate FDIC-specific passivity agreements with respect to existing ownership stakes may cause fund managers and other market participants that hold 10% or greater positions in the equity of banks to reduce their ownership stakes in order to avoid this additional process, which could create dislocation in equity markets and reduce the market value of bank equity.[23] More generally,

[21] *Id*. at 67,006 (estimating total market-wide aggregate costs at $227,517).

[22] *Id*. at 67,004.

[23] *See, e.g.*, Mark Mitchell et al., *Slow Moving Capital* NBER Working Paper 12877 5 (2007), https://www.nber.org/system/files/working_papers/w12877/w12877.pdf; Andrew Ellul et al., *Regulatory Pressure and Fire Sales in the Corporate Bond Market* AFA 2011 Denver Meetings Paper (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1362182; Joshua D. Coval & Erik Stafford, *Asset Fire Sales*

regulatory certainty is a key factor in the strength of US capital markets. Empirical research has demonstrated a quantifiable relationship between the degree of a jurisdiction's regulatory certainty and lower costs of capital.[24] By reducing regulatory certainty with respect to acquisitions of bank equity, the Proposal thus threatens to raise the cost of capital in US markets.

Increasing the regulatory cost of investing in bank shares would be particularly disruptive for index funds. Index funds seek to track the performance of an index of stocks by investing in the shares of the companies constituting the index and adjusting their holdings as the relative values of those companies change. They are one of the most common methods for retail investors to access equity markets.[25] As of 2022, approximately 1 in 4 US households had some amount invested in index funds.[26] The largest and most commonly tracked equity indices include bank holding companies that are within the Proposal's scope. But if an index fund cannot acquire the shares of these banks as necessary to track the index accurately because of the regulatory impediments outlined above, the fund would be unable to achieve its investment objective. Furthermore, because these impediments would cause an index fund to underweight the banking sector relative to its benchmark index, the retail investors in the fund would not benefit from the potential outperformance of the bank equity included in the index.

By increasing the uncertainty of the acquisition of large equity interests in bank holding companies, the Proposal would potentially lessen banks' access to equity capital. Recent empirical studies show that liquid equity markets are an important source of stable long-term capital for banks and a driver of bank stability and lending activity. For example, He et al. (2024) found that banks seek to raise equity capital even above regulatory minimums and tend to invest newly raised equity capital in additional loan assets.[27] Samarasinghe (2023) analyzed banks in 39 countries over the period 1999-2014 and found that increased stock market liquidity boosts bank stability.[28]

Reducing banks' access to equity capital increases the risk of instability in the banking system. Indeed, FDIC Director Hill noted how requiring acquirers of bank shares to file duplicative notices with the Fed and FDIC would "discourage capital from coming into the banking industry" and how the ability of banks to attract capital is "critical to our capital framework and financial

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(and Purchases) in Equity Markets J. OF FIN. ECON. (2007), https://www.sciencedirect.com/science/article/abs/pii/S0304405X07001158.

[24] Wolfgang Dobretz, et al., *Policy Uncertainty, Investment, and the Cost of Capital*, 39 J. FIN. STABILITY 28 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2980918.

[25] Gareth Parker, *Remember the Retail Investor*, Morningstar Indexes (April 23, 2024), https://indexes.morningstar.com/insights/perspective/bltc7af124870b73607/remember-the-retail-investor.

[26] INVESTMENT COMPANY INSTITUTE, THE CHARACTERISTICS OF MUTUAL FUND INVESTORS (2023), https://www.ici.org/system/files/2023-10/per29-11.pdf.

[27] *See, e.g.*, Liangliang He et al., *Why Do Banks Issue Equity*, 69 RSCH. INT. BUS. & FIN. (2024), https://doi.org/10.1016/j.ribaf.2024.102256; Chip MacDonald, *Private Equity Investments in Financial Services Firms: Threading the Regulatory Needle*, Bloomberg Law Report (Feb. 2011), https://www.jonesday.com/en/insights/2011/02/private-equity-investments-in-financial-services-firms-threading-the-regulatory-needle-ibloomberg-law-reporti.

[28] Ama Samarasinghe, *Stock Market Liquidity and Bank Stability*, 79 PACIFIC-BASIN FIN. J. (2023), https://doi.org/10.1016/j.pacfin.2023.102028.

stability."[29] In this regard the Proposal would work against the FDIC's mandate to preserve the safety and soundness of the banking system. Moreover, restricting banks' access to capital is likely to cause banks to curtail their lending activities, which empirical research has demonstrated slows economic growth.[30]

3. <u>The Proposal lacks statutory authority</u>.

The CBCA specifies that its requirements apply regardless of whether the acquirer acts "directly or indirectly" to acquire shares of the insured depository institution. The Proposal claims that the reference to "acting directly or indirectly" should be read to encompass indirect acquisitions of an FDIC-supervised subsidiary via the acquisition of the shares of its bank holding company parent. Therefore, according to the Proposal, the FDIC has the underlying statutory authority to review these acquisitions. But there is no indication that Congress intended for two agencies to share review responsibilities for these acquisitions. Instead, the CBCA states the opposite: Congress intended the supervisor of the bank holding company – that is, the Fed – to be the sole agency responsible for review of the acquisition of bank holding company shares.[31] This is evident from the language of the statute and the overall statutory structure.

First, the CBCA requires that, in the case of any relevant acquisition of control, notice must be provided to "*the* appropriate federal banking agency" (emphasis added). The related provisions of the CBCA refer consistently to a single "appropriate federal banking agency" for each relevant acquisition. Congress could have referred to "each applicable appropriate federal banking agency" or included provisions contemplating review by multiple agencies if it had intended for two or more agencies to review a single transaction, but it did not do so. This language therefore indicates that there is one reviewing agency per acquisition, which is inconsistent with reading "directly or indirectly" to imply that there are two reviewing agencies in some acquisitions.

Second, the CBCA applies to a transfer of control of an insured depository institution, which for this purpose includes a bank holding company, that is accomplished through the sale or other disposition "of voting stock *of such insured depository institution*" (emphasis added). In other words, the CBCA applies the review requirement exclusively to the insured depository institution in which shares are transferred, including when there are subsidiaries below the transferred entity that are also insured depository institutions. The reference to acquisitions accomplished "directly or indirectly" should therefore be read to refer to the use of agents or other third parties or legal

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[29] FDIC, Statement by Vice Chairman Travis Hill on Proposals Related to Change in Bank Control Act (Apr. 25, 2024), https://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-proposals-related-change-bank-control-act.

[30] *See, e.g.*, BASEL COMMITTEE ON BANKING SUPERVISION, BANK FOR INTERNATIONAL SETTLEMENTS, *Assessing the Macroeconomic Impact of the Transition to Stronger Capital and Liquidity Requirements* (2010), https://www.bis.org/publ/othp12.pdf

[31] MORRISON FOERSTER, *FDIC Proposes Broader Role Under the Change in Bank Control Act* (Aug. 27, 2024), https://www.mofo.com/resources/insights/240827-fdic-proposes-broader-role-under-the-change ("The FDIC is not the "appropriate Federal banking agency" under the statute in these circumstances. 12 U.S.C. § 1813(q). This raises the question of whether the [Proposal], if adopted, will be subject to judicial challenge.").

arrangements by the acquirer to transfer the stock of the bank holding company. The transactions to which the Proposal would apply are outside the scope of this language: Even though there is an indirect change in control of the FDIC-supervised subsidiary, there is no sale or disposition of the stock of the subsidiary.

Third, the Supreme Court has stated that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[32] A court must therefore interpret a statute "as a symmetrical and coherent regulatory scheme,"[33] and "fit, if possible, all parts into a[] harmonious whole."[34] There is an inherent logic to the approach reflected in the language of the CBCA discussed above, because it allows a single review process to cover all insured depository institutions in a multi-tiered structure instead of repeating the same process for every entity in the structure. By contrast, the Proposal's reading of the statutory language contemplates duplicate responsibilities for the review of one acquisition under the same set of statutory criteria. The FDIC itself recognized this when it enacted the regulation that the Proposal would abrogate, concluding that FDIC review of these acquisitions would be "unnecessary" and "duplicative." The Proposal's reading would also entail the possibility of agencies reaching different conclusions under those criteria despite the absence of any aspect of the statutory structure that contemplates such conflicts or methods for their resolution. The Proposal's reading of "directly or indirectly" is thus inconsistent with a "symmetrical and coherent" statutory structure existing as a "harmonious whole."

4. The Proposal was developed through a deficient administrative process.

The Proposal seeks to alter a division of responsibility between the three federal banking agencies unilaterally rather than as a joint proposal among the three relevant agencies.

In particular, the underlying logic of the current division of responsibility has been recognized in the FDIC's regulations since 2003. The Proposal would abandon this framework without any evident input from the Fed or OCC. FDIC board members have recognized the issues with this lack of interagency coordination. In opposing an earlier version of the Proposal promulgated in April 2024 FDIC Director and Acting Comptroller of the Currency Hsu noted that if the federal banking agencies are "not coordinated or aligned on the issue of bank control, reallocating FDIC resources away from supervising banks to monitoring asset manager compliance with passivity commitments would be, at best, inefficient."[35] He therefore called for any proposed rulemaking to be done "on an interagency basis."[36]

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[32] *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 133 (2000) quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).
[33] *Id*. quoting *Gustafson v. Alloyd Co.*, 513 U. S. 561, 569 (1995).
[34] *Id*. quoting *FTC v. Mandel Brothers, Inc.*, 359 U. S. 385, 389 (1959).
[35] OFFICE OF THE COMPTROLLER OF THE CURRENCY, *Acting Comptroller Issues Statement on the FDIC's Proposals Related to Change in Bank Control Act* (Apr. 25, 2024), https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-43.html.
[36] *Id*.

The final Proposal was revised ostensibly to address Director Hsu's concern by repeating a statement affirming the importance of interagency cooperation. But the content of the Proposal and the process by which it was promulgated do not reflect this principle. In particular, the Proposal does not indicate whether the FDIC coordinated with the Fed in designing and promulgating the Proposal. Nor has the Fed indicated publicly whether it supports the Proposal.[37] Indeed, in his remarks opposing the current Proposal, FDIC Director McKernan noted how concerns about interagency coordination have not in fact been addressed, noting that "[s]triking an appropriate balance would require coordination across the three federal bank regulators, including likely changes to each regulator's CBCA implementing rules. We don't have that interagency coordination here."[38]

The potential for discoordination among the three federal banking agencies would continue if the Proposal were adopted by creating the possibility that the Fed and FDIC will reach different conclusions as to whether an acquisition constitutes a change in control or satisfies the relevant criteria under the CBCA.

Furthermore, it has been reported that the FDIC has issued letters to two asset managers that pre-suppose the application of the Proposal to those asset managers' existing stakes in bank holding companies with FDIC-supervised institution by indicating that the asset managers will be required to negotiate new passivity agreements with the FDIC, though it is unclear what terms those agreements will be required to include.[39] Such actions are contrary to the principles of the notice-and-comment rulemaking process, as an agency should not presuppose the application of a proposed rulemaking that has yet to be reviewed or commented on by the public or the other federal banking agencies.

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[37] Zoe Sagalow, *FDIC Proposal on Change-in-Control Notices has Potential Ripple Effects on M&A* S&P GLOBAL (Aug. 29, 2024), 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.

[38] Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Amendments to the Change in Bank Control Act Framework https://www.fdic.gov/news/speeches/2024/statement-jonathan-mckernan-director-fdic-board-directors-proposed-amendments

[39] Katanga Johnson & Silla Brush, *BlackRock, Vanguard's Stakes in Banks Scrutinized as FDIC Demands Details* BNN BLOOMBERG (Aug. 8, 2024), https://www.bnnbloomberg.ca/business/2024/08/08/blackrock-vanguards-stakes-in-banks-scrutinized-as-fdic-demands-details/.

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Thank you for your consideration of the Committee's position. Should you have any questions or concerns, please do not hesitate to contact the Committee's President, Professor Hal S. Scott [redacted]), or its Executive Director, John Gulliver ([redacted]), at your convenience.

Respectfully submitted,

John L. Thornton
Co-CHAIR

Hal S. Scott
PRESIDENT

R. Glenn Hubbard
Co-CHAIR