October 29, 2024

VIA ELECTRONIC SUBMISSION

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

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

Dear Mr. Sheesley:

The Investment Company Institute[1] and ICI Southwest[2] appreciate the opportunity to submit this joint letter to the Federal Deposit Insurance Corporation ("FDIC") on its proposal (the "Proposal") to amend its regulations implementing the Change in Bank Control Act ("CBCA").[3] Our members include mutual funds, ETFs, and closed-end funds registered and regulated under the Investment Company Act of 1940 ("regulated funds") that invest in equity securities, including those issued by publicly-traded banking organizations.

We are concerned that through the Proposal, the FDIC seeks unilaterally to upset the decades-long interagency administration of the CBCA by the federal banking agencies (the "Agencies"). The FDIC would do so without any demonstration of need to alter long-established practices and in a manner that would impose costs and burdens for regulated funds, their investors and the US economy, and potentially restrict flows of capital to US banking organizations, all without discernable benefits. Specifically:

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[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $37.1 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.7 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

[2] ICI Southwest is located in Austin, Texas. The association supports regulation that strengthens the foundation of regulated investment funds and asset managers for the ultimate benefit of the long-term individual investor.

[3] Regulations Implementing the Change in Bank Control Act, 89 Fed. Reg. 67002 (Aug. 19, 2024).

- **The Proposal is inconsistent with the statutory structure of the CBCA and the FDIC's decades-long policies and practices with respect to the CBCA.** We believe Congress's intent in drafting the CBCA, the resulting statutory structure, and the FDIC's longstanding policies and practices in carrying out the CBCA clearly demonstrate that the FDIC should not require a duplicative CBCA notice when an investor files a notice with the Federal Reserve Board ("FRB").
- **The Proposal does not accord with the FDIC's historical interagency approach to implementing the CBCA**. The FDIC has, since the CBCA's enactment, generally taken an interagency approach to CBCA issues. Based on this history, and because each of the Agencies has responsibility for questions of bank control, we do not believe the FDIC's decision to release the Proposal on its own and its other unilateral actions with respect to passivity agreements are appropriate. Rather than altering the current regulatory exemption for transactions in which the FRB reviews a CBCA notice, the FDIC should retain the exemption. Similarly, the FDIC should codify its longstanding practice not to require CBCA notices for transactions for which the FRB has determined a CBCA notice is not required, such as pursuant to passivity commitments entered into by an investor.
- **The Proposal does not serve any regulatory purpose; rather, it is a solution in search of a problem**. The Proposal's motivations related to passive investing are unfounded, and the FDIC already has visibility into indirect investments in FDIC-supervised institutions.[4] As such, the Proposal would create a duplicative regulatory process with no apparent benefit.
- **The Proposal's costs outweigh its benefits**. The Proposal would impose significant costs by (1) discouraging investments in FDIC-supervised institutions, thus harming those institutions and the economy; (2) raise compliance costs and lower returns for investors in banking institutions; and (3) require an extensive reallocation of labor within the FDIC to handle duplicative work. These costs significantly outweigh any potential benefits associated with the Proposal, which benefits have not been explained in the Proposal.

For these reasons, we strongly urge the FDIC to refrain from adopting a final rule based on the Proposal and, instead, (i) retain its current regulatory exemption for transactions in which the FRB reviews a CBCA notice; and (ii) codify in its regulations the FDIC's longstanding practice not to require CBCA notices for transactions for which the FRB has determined a CBCA notice is not required, including pursuant to passivity commitments.

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[4] 12 U.S.C. § 1817(j)(11). In this letter, "FDIC-supervised institutions" refers to insured state nonmember banks and insured state savings associations.

I. Background on Regulated Funds

Although applicable to all investors, the Proposal specifically arises from the FDIC's concerns that indirect investments by regulated fund complexes in FDIC-supervised institutions "may create situations where the investor can have an outsized influence over the management or policies of an institution."[5] As described in greater detail throughout this letter, these concerns are unfounded.

We begin by briefly discussing the regulatory framework to which regulated funds adhere and how investment intent can be discerned from current reporting to the Securities and Exchange Commission ("SEC").

A. Substantive requirements and regulatory protections distinguish regulated funds from other investors.

Each regulated fund is a separate legal entity, organized under state law usually as a corporation or a business trust. Regulated funds have officers and directors (or trustees, if the fund is a trust), including a minimum percentage of independent directors. The regulated fund's board oversees the management and operations of the fund, and the independent directors serve as "watchdogs" for the interests of fund shareholders.[6]

Regulated funds are subject to a comprehensive regulatory scheme under federal securities and other laws. These laws impose substantive requirements on the management and operations of regulated funds and the oversight function of fund directors, as well as extensive disclosure and reporting requirements.

A number of regulated funds may each engage a single investment adviser, an arrangement commonly referred to as a fund "complex." It is important to recognize, however, that each fund must have its own agreement with the investment adviser, and that the adviser is required to manage each fund's portfolio in accordance with the fund's own stated investment objectives and strategies. The adviser, which itself is registered with the SEC, acts as a fiduciary to each regulated fund and, in this capacity, owes *each fund* a duty of care and a duty of loyalty.

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[5] 89 Fed. Reg. at 67004 (footnote omitted).

[6] *Burks v. Lasker*, 441 U.S. 471, 484 (1979).

Regulated funds and their advisers are also subject to certain proxy voting requirements.[7] In their capacity as shareholders in portfolio companies, regulated funds must disclose their proxy voting policies and procedures and publicly report their proxy votes. Specifically, a regulated fund must (i) describe in its registration statement the policies and procedures that it uses to determine how to vote proxies relating to its portfolio securities; and (ii) publicly report to the SEC how the fund voted proxies relating to its portfolio securities, requirements that the SEC further enhanced in 2022.[8] Regulated funds are unique in this regard—no other type of institutional investor must file with the SEC and publicly disclose how it voted each of its proxies. Accordingly, SEC regulation of regulated funds and their advisers distinguishes them from private equity firms and other types of investors in banking organizations.

B. Investment intent can be discerned from current reporting to the SEC.

Regulated funds typically invest in securities (including those issued by banking organizations) for equity exposure and with the expectation of resale, not to control companies. This investment-only intent is evident from the beneficial ownership filings that regulated funds—both actively managed funds and index funds alike—make with the Securities and Exchange Commission ("SEC"). Under SEC rules, any person who beneficially owns more than five percent of any class of equity securities must file a publicly available report.

Regulated funds typically disclose their beneficial ownership on Schedule 13G under the Securities Exchange Act of 1934 ("Exchange Act"), which is reserved for investors that acquire securities "in the ordinary course of . . . business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect . . ."[9] Schedule 13G filers are often referred to as "passive" investors.

In contrast, if an investor acquires the securities of a company with an intent to influence the management or control of the company, the investor must file on Schedule 13D under the Exchange Act, which requires additional and more timely reporting.

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[7] *See, e.g.,* Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Rel. Nos. IA-5325, IC-33605 (Aug. 21, 2019) ("To satisfy its fiduciary duty in making any voting determination, the investment adviser must make the determination in the best interest of the client and must not place the investment adviser's own interests ahead of the interests of the client.").

[8] *See* Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, SEC Release Nos. 33-11131; 34-96206; IC-34745 (Nov. 2, 2022).

[9] 17 CFR 240.13d-1(b).

This SEC framework is well developed and broadly recognized. Investors, including regulated funds, must adhere to the framework or face legal liability.

II. The FDIC should not finalize a rule based on the Proposal because the Proposal is misguided.[10]

A. The Proposal violates the CBCA's statutory structure and would upend decades of FDIC precedent without justification.

The FDIC's current CBCA regulations state that an investor is exempt from providing a CBCA notice to the FDIC for transactions in which the FRB reviews a CBCA notice.[11] This exemption, which the Proposal would remove, reflects the FDIC's decades-long approach to the CBCA. In addition to upending the FDIC's own precedent, this removal would be counter to the statutory structure of the CBCA.

In drafting the CBCA, Congress rejected an early proposal that would have "require[d] the advance approval of the FDIC to any acquisition of control of an insured bank." This decision was based in part on feedback from the Agencies and the Department of the Treasury observing that "it [was] not clear why a veto power should be lodged in the FDIC in case of institutions that are otherwise primarily regulated by the" Office of the Comptroller the Currency ("OCC") and the FRB.[12] As a result, the CBCA requires notice only to an institution's appropriate federal banking agency ("AFBA"). Further, as originally enacted, the CBCA was clear that "the [AFBA] in the case of bank holding companies shall be the [FRB]."[13] Thus, to our view, the Proposal would subvert Congress's express intent by requiring CBCA notices for investments in bank holding companies that may in turn control FDIC-supervised institutions.

Following the 1978 enactment of the CBCA, the Agencies appropriately divided up responsibility for reviewing change in control notices consistent with the statute's structure. At the time, the FDIC itself recognized that investors in bank holding companies should submit

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[10] This section is responsive to Questions 1 and 2.

[11] 12 CFR 303.84(a)(8).

[12] Prepared Statement of Robert Carswell, Deputy Secretary of the Treasury (Sept. 29, 1977).

[13] Change in Bank Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3683 (Nov. 10, 1978). Congress amended the CBCA in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and this statement was removed as part of those revisions. Pub. L. 101-73, 103 Stat. 213 (Aug. 9, 1989). Based on legislative history, it appears that the amendment simply arose from the combination of the CBCA and the similar Change in Savings and Loan Control Act for savings associations and was not intended to modify the FRB's (or FDIC's) authority with respect to bank holding companies. Joint Explanatory Statement of the Committee of Conference (Aug. 1, 1989).

CBCA notices to the FRB.[14] Since then, and until now, the FDIC has consistently maintained a focus on preventing duplication and undue regulatory burden. For example, in its initial policy statement on the CBCA, the FDIC explained its "intention to administer the [CBCA] in a manner that will minimize delays and government regulation of legitimate private sector transactions."[15]

Building on this precedent, the FDIC, in 2002, codified its regulation "not to require a change in control notice in those cases where . . . the [FRB]. . . reviews a change in control notice for the proposed transaction," and reaffirmed this position as recently as 2015.[16] Both times, the FDIC echoed its earlier intention "to avoid duplicate regulatory review of the same acquisition of control by both the [FRB] and the FDIC."[17] Consistent with its objective of avoiding duplicative review of the same transaction, the FDIC also has a longstanding practice not to require a CBCA notice when the FRB accepts that an investor is taking a passive investment stake and, thereby, does not need to submit a CBCA notice for an investment in the holding company of an FDIC-supervised institution.

This established division of labor between the FDIC and FRB reflects the fundamental structure of US banking regulation. It promotes an efficient process that both ensures CBCA notices are carefully and appropriately reviewed and avoids the unnecessary costs to investors and American taxpayers from paying two federal agencies to do the same job.

The Proposal, however, would thwart the efficiencies of this decades-long process. Instead, by requiring a duplicative CBCA process for both the FDIC and the FRB, the Proposal would directly undermine the FDIC's stated goals to "minimize delays and government regulation of legitimate private sector transactions,"[18] which goals ultimately benefit American investors, the FDIC-supervised institutions themselves and the US economy.

Moreover, because the "the longstanding practice of the government—like any other interpretive aid—can inform a court's determination of what the law is," the FDIC's exemption and practice itself suggest that the CBCA is best interpreted as not requiring notices with the FDIC for

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[14] Change in Control of Insured Nonmember Banks, 44 Fed. Reg. 7226 (Feb. 6, 1979).

[15] *Id.*

[16] Filing Procedures, Corporate Powers, International Banking, Management Official Interlocks, 67 Fed. Reg. 79271, 79272 (Dec. 27, 2002); Filing Requirements and Processing Procedures for Changes in Control With Respect to State Nonmember Banks and State Savings Associations, 80 Fed. Reg. 65889, 65897 (Oct. 28, 2015).

[17] 80 Fed. Reg. 65889; 67 Fed. Reg. at 79272 ("where a person proposes to acquire control of a bank holding company that controls a state nonmember bank, and the [FRB] 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.") (Emphasis added.)

[18] *See supra* note 14. A duplicative process also could result in contradictory regulatory responses, such as situations in which one agency issues a non-objection while the other objects or fails to respond.

transactions that the FRB has reviewed pursuant to a CBCA notice or has determined do not warrant a CBCA notice because the investor is passive (and is subject to FRB passivity commitments).[19]

B. The Proposal does not sufficiently ensure interagency coordination.[20]

The FDIC's unilateral release of the Proposal is at odds with the FDIC's consistently cooperative approach to the CBCA since the statute's enactment more than 45 years ago. In particular, the FDIC's initial CBCA policy statement and regulations "were developed on an interagency basis and [were] consistent with those of the other Federal bank supervisory agencies."[21] Moreover, the FDIC's most recent revisions to its CBCA regulations "adopt[ed] the best practices of the related regulations of the [OCC]" and FRB.[22]

By contrast, the Proposal is not a product of interagency coordination. This unilateral approach is both inappropriate and impractical as Congress explicitly rejected giving the FDIC an effective veto under the CBCA. Rather, the Agencies share responsibility for enforcing and implementing the CBCA and as such are "inextricably linked" on issues of bank ownership and control.[23] This linkage "effectively requires interagency coordination and . . . a shared understanding and approach to bank control, notices, and passivity agreements."[24] The FDIC's unilateral actions, therefore, risk creating regulatory fragmentation and uncertainty that would increase costs and burdens for funds investing in holding companies of FDIC-supervised institutions and reduce returns to shareholders, with no offsetting benefit.

Nothing over the nearly half century since the CBCA was enacted suggests to us that the FDIC should abandon its interagency approach and commitment to minimizing the regulatory burden associated with carrying out the CBCA. Accordingly, we think that any new proposal relating to the CBCA should set forth the agencies' "shared understanding" of the statute following a joint rulemaking by the FDIC, FRB and OCC.[25]

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[19] *Loper Bright Enterprises v. Raimondo* 603 U.S. __ (2024) (cleaned up).

[20] This section is responsive to Question 19.

[21] FDIC, Annual Report at 8 (1979), available *here*.

[22] 80 Fed. Reg. at 65889.

[23] OCC, Acting Comptroller Issues Statement on the FDIC's Proposals Related to Change in Bank Control Act (Apr. 25, 2024) ("Hsu April Statement"), available *here*.

[24] *Id.*

[25] *Id.*

Indeed, in the preamble to the Proposal, the FDIC professes a desire to follow an interagency process. Regrettably, its brief mention of "engaging in dialogue and coordination" does not ensure that the FDIC will do so. In fact, the agency's recent actions surrounding passivity commitments have already undermined this stated intention.[26] The same ambivalence is reflected in FDIC Director Chopra's statement on the Proposal, which states that "[i]t will be important to coordinate with the [FRB] and the [OCC] as we revise our approach" to reviewing changes in bank control, even as it proceeds to announce the FDIC has unilaterally "determined that it is appropriate to notify certain firms that, going forward, they can no longer rely on existing passivity agreements."[27]

Since releasing the Proposal—and without soliciting or considering any public input—the FDIC has sent these notifications. Not only does this call into question the FDIC's commitment to interagency coordination, but it also appears to pre-judge the outcome of the Proposal's request for information. As such, these notifications, which suspend the FDIC's existing passivity agreements and call into question the adequacy of passivity commitments entered into by investors with the FRB, introduce uncertainty and create needless barriers for investors seeking to make passive investments in banking organizations. This, in turn, could artificially depress the market for bank securities.

C. The Proposal is a solution in search of a problem.[28]

The Proposal arises only from the FDIC's vague concerns that the rise of passive investing and the resulting indirect investment by fund complexes in FDIC-supervised institutions may create "possible outsized control over and concentration of ownership of FDIC-supervised institutions."[29] To address these ambiguous and groundless concerns (as to which the FDIC has provided no data or evidence), the FDIC would discard its decades-long approach to the CBCA by requiring a parallel process to the FRB's.

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[26] 89 Fed. Reg. at 67002.

[27] Consumer Financial Protection Bureau, 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 *here*.

[28] This section is responsive to Question 4.

[29] 89 Fed. Reg. at 67005.

1. Regulated fund investments do not affect banking sector competition.

The FDIC's concerns about "concentrated ownership" of FDIC-supervised institutions are specious. In fact, numerous studies have refuted the notion that companies reduce competition due to common ownership by retail investment funds such as those advised by our members.[30]

2. The FDIC already receives CBCA notices filed with the FRB.

Moreover, the FDIC already has a role in the FRB's process. When an investor submits a CBCA notice to the FRB, the FRB is required immediately to furnish a copy to the FDIC (and the OCC).[31] In addition, the FRB may also solicit the FDIC's views when considering CBCA notices.[32] As such, the FDIC already has significant visibility and input into CBCA notices filed with respect to investments in holding companies of FDIC-supervised banks.

3. Passivity commitments entered into by regulated fund complexes effectively rebut a presumption of control.

The Proposal would also upend the decades-long approach to passivity commitments that effectively ensure investments in banking organizations pursuant to these commitments are non-controlling. In particular, the FRB has allowed an investor to rebut the presumption of control that may apply under the CBCA by entering into a set of passivity commitments with the FRB designed to ensure that the investor does not control or exercise any inappropriate influence over the banking organization. These commitments typically include prohibitions on, for example, the investor soliciting proxies, allowing its representatives to serve as employees of the banking organization, or proposing directors in opposition to nominees proposed by the banking organization's board or management.

For decades, the FRB has entered into passivity commitments with various types of investors including to allow banking organizations to access capital during times of financial stress.[33] Since at least 2002, the FRB has also entered into passivity agreements with fund complexes in

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[30] *See, e.g.*, Serafin Grundl and Jacob Gramlich, Assessing the Common Ownership Hypothesis in the US Banking Industry, FRB Finance and Economics Discussion Series (*rev'd* July 2024), available *here*; *see generally*, Eric Pan, US retail investment under attack from bunk 'common ownership' theory, Financial Times (July 19, 2024), available *here*. This discussion is responsive to Question 15.

[31] 12 U.S.C. § 1817(j)(11).

[32] 12 CFR 225.43(g) (the FRB "may solicit information or views from any person, including . . . any appropriate . . . federal . . . governmental authority.").

[33] *E.g.,* 95 Fed. Res. Bull. B35 (2009) (discussing passivity commitments made by MUFG in connection with investment in Morgan Stanley); *see also* American Express, 10-Q Ex. 10.1 (passivity commitments made by Berkshire Hathaway in connection with investment in American Express) (Sept. 30, 1995).

recognition of the "nature" of these investors and the fact that these fund complexes do not seek to operate or control banking organizations.[34] Importantly, there is strong evidence that the FDIC itself has agreed for many years that passivity agreements effectively and appropriately rebut a presumption of control because, as the Proposal notes, "[i]n recent years . . . the FDIC typically has not determined that [CBCA] notices must be filed with the FDIC when the FRB accepts a passivity commitment in lieu of a notice."[35]

Through these passivity agreements with certain regulated fund complexes, the Agencies have provided regulatory relief in consideration of commitments by those regulated funds and their investment advisers to remain passive investors. This approach has allowed regulated funds to gain economic exposure to banking entity-issued equity securities, has benefited banking organizations by allowing them to raise capital, and has provided regulators with assurance that funds remain passive investors in those banking organizations. In addition to relief by individual Agencies, the Agencies collectively have provided relief regarding the requirements of Regulation O, conditional on similar passivity criteria.[36]

The Proposal's assertions around funds' "influence" on banking organizations run counter to the commitments made by regulated funds in the course of those regulatory determinations and to regulated funds' actual compliance with those commitments. Rather, all evidence suggests that regulated funds that have these commitments in place or that rely on the Regulation O relief take very seriously their commitments and the periodic certifications they make regarding compliance with the commitments.

As noted above, fund complexes also comply with the securities law requirements for Schedules 13D and 13G filings, and the vast majority of fund complexes file as passive 13G filers; violating these passivity requirements would carry consequences under the securities laws as well. As such, to the extent an investor, including a fund complex, has entered into passivity commitments with respect to a banking organization, we do not believe the investor can exercise control over the organization.[37]

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[34] *See, e.g.*, Letter from FRB General Counsel to James P. Ryan (Aug. 13, 2002), available *here*.

[35] 89 Fed. Reg. at 67004.

[36] FRB, OCC and FDIC, Extension of the Revised Statement Regarding Status of Certain Investment Funds and Their Portfolio Investments for Purposes of Regulation O and Reporting Requirements under Part 363 of FDIC Regulations (Dec. 15, 2023), available *here*.

[37] This paragraph is responsive to Questions 6 and 12. Moreover, in response to Question 18 as to whether the FDIC should limit the voting power of persons who acquire 10 percent or more of a class of voting securities, we believe that the FDIC and FRB have appropriately considered the restrictions that should apply to passive investors that wish to acquire 10 percent or more of a class of voting securities of an FDIC-supervised institution or an institution supervised by the FRB, and have implemented these limits as passivity commitments with individual fund complexes.

There are no indications of regulated funds violating the passivity agreements into which they have entered, nor has the FDIC offered any such evidence. Further, the FRB, which entered into the passivity agreements with numerous fund complexes, has not expressed any concerns regarding compliance. In congressional testimony last year, FRB Chair Powell stated that the Federal Reserve "[didn't] have any reason to think that [asset managers are] not in compliance" with the passivity agreements they entered into with the FRB.[38]

To the extent the FRB, as the regulator of a holding company, has determined an investor does not control a holding company pursuant to these passivity commitments, it strains credulity to suggest the investor may indirectly control any FDIC-supervised institution subsidiary of the holding company. A CBCA notice to the FDIC then would serve no regulatory purpose. Further, the FDIC and other Agencies retain ample authority to address any potential concerns about violations of the passivity agreements, further obviating the need for this Proposal.[39]

4. The Proposal may violate the APA.

The Proposal raises serious concerns under the Administrative Procedure Act ("APA"). In particular, the disconnect between the FDIC's vague concerns around passive investors and the reality that asset managers are in compliance with their passivity commitments makes clear that the FDIC has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[40] As a result, a rule based on the Proposal may be arbitrary and capricious and therefore violate the APA. Moreover, "when an agency changes course," as the FDIC proposes to do here, "it must be cognizant that longstanding polices may have engendered serious reliance interests that must be taken into account."[41] The Proposal fails to consider such reliance interests for regulated funds

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[38] ProQuest, Hearing Transcript, House Financial Services Committee Hearing on Semiannual Monetary Policy Report (June 21, 2023).

[39] We believe the current well-established approach of not requiring CBCA notices based on the nature of the investor and the passivity commitments/agreements entered into by an investor, including blanket passivity commitments/agreements, are fit for purpose. Moreover, the FDIC itself appears to have held this view as it had recently entered into blanket passivity agreements. That said, the FDIC's current approach to passivity agreements should be improved. As an initial matter, it is unhelpful for the FDIC to unilaterally suspend passivity agreements in which it has entered after years of negotiations with industry participants. Rather than creating more uncertainty both by suspending passivity agreements and through this Proposal, the FDIC should commit to a more transparent and stable approach to passivity agreements and engage with investors in bank equity in an even-handed and reliable manner, such as by (1) adopting a rule that codifies its long-standing practice of waiving any CBCA notice when the FRB, as holding company regulator, has determined that the investor is passive and need not submit such notice; and (2) establishing and adhering to reasonable timelines to review CBCA notices or enter into passivity agreements (including blanket passivity agreements).

[40] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (internal citations omitted).

[41] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 591 U.S. 1, 30 (2020) (cleaned up).

and the millions of American families that rely on these funds to invest for goals such as retirement and college, further suggesting a final rule may be arbitrary, capricious, and unlawful.

D. The Proposal's costs outweigh its benefits.[42]

The Proposal would create three key areas of costs, all of which are understated in the Proposal and not offset by any corresponding benefits.

First, the Proposal would hurt FDIC-supervised institutions. By increasing the costs and barriers to indirectly investing in FDIC-supervised institutions, the Proposal would create market uncertainty and discourage investment (by all investors, and not exclusively regulated funds) in these institutions, hurting the ability of banking organizations to raise capital and creating risks to financial stability.[43]

Second, by upending the current regulatory approach, the Proposal would raise compliance costs and lower returns for investors in banking institutions. In this regard, we note that our experience suggests that the FDIC's estimated compliance costs are unrealistically low and actual compliance costs would be much higher. Higher compliance costs for regulated funds would ultimately be borne by the millions of American families that rely on these funds to invest for retirement, college, or other personal objectives who will experience lower net returns. Accordingly, it is crucial for the FDIC's approach to the CBCA to be thoughtfully calibrated and appropriately scoped to avoid unnecessary costs to regulated fund investors.

Finally, as Acting Comptroller Hsu noted, it is important to consider the significant FDIC resources that implementing the Proposal would require. Because over 95% of publicly traded banks issue voting securities via a holding company, the Proposal would greatly increase the number of CBCA applications the FDIC might review.[44] The Proposal does not consider the costs for the FDIC associated with handling this duplicative work. We think, as Acting Comptroller Hsu mentioned when the FDIC board rejected a substantially similar CBCA proposal that "reallocating FDIC resources away from supervising banks to monitoring asset manager compliance with passivity commitments would be, at best, inefficient."[45]

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[42] This section is responsive to Question 20.

[43] As Vice Chairman Hill noted, "the willingness of outside capital to invest in banks is critical to our capital framework and financial stability." FDIC, Statement by Vice Chairman Travis Hill on Proposals Related to Change in Bank Control Act (Apr. 25, 2024), available *here*.

[44] Hsu April Statement.

[45] *Id.*

Accordingly, we reiterate our recommendation that the FDIC refrain from finalizing a rule based on the Proposal and instead (i) retain its current regulatory exemption for transactions in which the FRB reviews a CBCA notice; and (ii) codify in its regulations the FDIC's longstanding practice not to require CBCA notices for transactions for which the FRB has determined a CBCA notice is not required, including pursuant to passivity commitments.

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We appreciate the opportunity to comment on this significant proposal.

Regards,

Investment Company Institute   ICI Southwest

cc: Federal Reserve Board
Office of the Comptroller of the Currency