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FDIC Proposes To Exercise Now-Dormant Authority Under the Change-in-Bank Control Act

August 8, 2024

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The board of directors of the Federal Deposit Insurance Corporation ("FDIC") recently proposed a rule change that would reassert its now-dormant authority to review changes in bank control involving bank holding companies. Under the Change-in-Bank Control Act (the "CIBCA"), 12 USC 1817(j), the FDIC has statutory authority to review and approve or reject proposals that would result, directly or indirectly, in changes of bank control, as defined in the CIBCA.

Under the CIBCA, an investor (excluding those that would be captured by the Bank Holding Company Act), may not acquire "control" (generally defined as the "power, directly or indirectly, to direct the management or policies [of a bank] or to vote 25 per cent or more up of any class of voting securities of a bank]") without submitting prior written notice of the transaction. In practice, a rebuttable presumption of control is triggered at a 10 percent voting securities ownership position, and the federal banking agencies require the notice at that level.

The statute's reference to indirect changes in control entitles the FDIC to review changes in control of bank holding companies that own or control banks principally supervised by the FDIC. However, the FDIC has long ceded that authority to the Federal Reserve, which has authority to review changes in bank control in respect of bank holding companies.

If adopted as proposed, this rule would reverse that concession. The proposal is a response to the FDIC's perception of the influence of large asset managers on the banking system as a result of their investment in bank holding companies. As the preamble to the notice of the proposal states, the FDIC is concerned that "recent development in the equity markets may be contributing to elevated risk of excessive indirect control or concentration of ownership in FDIC-supervised institutions." See FDIC Press Release **PR 63-2024**, Notice of Proposed Rule, Amendment to Regulations Implementing the Change in Bank Control Act, July 30, 2024 (the "Proposal Release".)

The FDIC's concern is two-fold. First, it notes that large asset managers have been acquiring and hold significant interests in many bank holding companies partially as a result of the growth of passive investment vehicles, such as mutual funds and exchange-traded funds that track popular indices. Second, while the positions often are subject to the Federal Reserve's review under the CIBCA, the Federal Reserve, has, in the case of holdings below the 25 percent trigger, often dispensed with the notice process in favor of negotiated agreements with the investors, whereby the investors commit to remaining passive by abiding by a set of generally standardized commitments.

In light of the increasing number of such agreements, the FDIC has reconsidered its prior concession policy in favor of a proposal to subject such investments to its review under the CIBCA, in addition to the review of the Federal Reserve, in order that the FDIC "may more appropriately assess the effects of any control exerted over [the target and its subsidiary FDIC-supervised banks]. See the Proposal Release **here**. The proposal would effectuate this policy change by deleting section 303.84(a)(8) of its regulations, 12 C.F.R § 303.84(a)(8). That section currently exempts bank holding companies, and therefore indirectly any FDIC-supervised subsidiary bank, from the FDIC's scope of authority under the CIBCA.

As a result, asset managers acquiring triggering positions in bank holding companies that own or control banks principally supervised by the FDIC would be required to submit a prior notice to the FDIC. Under the CIBCA, a subject transaction may be completed only if the applicant receives written notice that the appropriate federal banking agency does not object, or the agency fails to decline to approve within the statutory time period. The banking agency will decline to approve a notice if the proposal fails to satisfy the CIBCA's statutory analysis factors, which include competition, financial condition of the proposed investors, future prospects of the target, and the competence, experience and integrity of the investors and managers. The proposal would also direct FDIC examiners to monitor

compliance with any relevant passivity commitments, a significant change from the Federal Reserve's approach of company self-certification.

The proposed policy change can be expected to add a level of uncertainty to the timing and reception of subject investments. It remains to be seen if, and how, the Federal Reserve will respond to the FDIC's proposal. More broadly, the FDIC's action also reinforces the recent signals of a lack of harmony between the FDIC and the Federal Reserve. This has been evident in recent FDIC actions in which it has asserted a more stringent position than the Federal Reserve in matters as to which the agencies have similar or overlapping authority. The FDIC's approach can be seen in its recent proposal to substantially modify its policy on the **Bank Merger Act** to impose much different standards than those applied by the Federal Reserve, and its application of more stringent resolution planning standards to certain bank holding companies, a matter in which the agencies have joint authority.

Public comment on the proposal will be open for 60 days following publication of the proposal in the Federal Register, which has not yet occurred as of the date of this note.