

July 31, 2024

FDIC Proposes to Expand Change-in-Bank-Control Review

FDIC Adopts Proposed Rule After Prior Version Was Withdrawn in April 2024

Yesterday, the Board of Directors of the Federal Deposit Insurance Corporation (the “FDIC”) held an [open meeting](#) to consider two proposals relating to the Change in Bank Control Act of 1978 (the “CIBCA”). The FDIC considered [similar versions of the two proposals](#) at an open meeting on April 25, 2024. At that time, both proposals were withdrawn. Returning to the issue, the FDIC Board voted 3 to 2 (Vice Chairman Travis Hill and Director Jonathan McKernan dissenting) to adopt one of the proposals, issuing a [notice of proposed rulemaking](#) to amend the FDIC’s regulations under the CIBCA.

The CIBCA generally provides that no person, acting directly or indirectly, may acquire control of an insured depository institution (“IDI”) unless the person has given the appropriate federal banking agency prior notice of the proposed transaction, and the agency has not disapproved the transaction. The FDIC’s CIBCA regulations currently specify eight transactions that are exempt from providing prior notice to the FDIC. The FDIC now proposes to remove one of the exemptions, 12 C.F.R. § 303.84(a)(8), relating to “[t]he acquisition of voting securities of a depository institution holding company for which the Board of Governors of the Federal Reserve System reviews a notice pursuant to the [CIBCA].” As the FDIC describes in the release, a “change in control at the holding company level conveys indirect control over the IDI for which the FDIC is the [appropriate federal banking agency] under” the CIBCA. The FDIC maintains that removing this exemption “would allow the FDIC to exercise its authority under the [CIBCA] to require and approve or disapprove [CIBCA notices] at the IDI level.” In view of “the importance of interagency collaboration and consistency” with respect to CIBCA review, the FDIC pledges to “engag[e] in dialogue and coordination with the [Board of Governors of the Federal Reserve System] and the Office of the Comptroller of the Currency to develop an interagency approach” with respect to the proposal. The FDIC also commits to “follow[] standard notice and comment rulemaking practices should an interagency approach be developed and adopted.”

Although both the current regulation and the proposal refer to an “exemption,” there is considerable question whether the FDIC has the statutory authority to exercise a second level of approval authority, with the Federal Reserve, over investments in bank holding companies that have state nonmember bank subsidiaries.

The implications of this proposal could be substantial. The FDIC is asserting approval authority over not only investments by mutual fund complexes, at which the proposal is apparently directed, but by all investors. Moreover, it remains to be seen whether the Office of the Comptroller of the Currency will take a similar position with respect to national bank subsidiaries of bank holding companies (particularly after the Acting Comptroller Michael J. Hsu, as a member of the FDIC Board, voted in favor of the proposal). In addition, as noted, although the FDIC Board discussion referred to interagency coordination, it is noteworthy that recent FDIC proposals suggest material differences between the FDIC and the other federal bank regulators in such areas as corporate governance and bank consolidation.

Comments on the notice of proposed rulemaking will be due 60 days from the date of its publication in the *Federal Register*.

At the meeting, the FDIC also considered a proposal offered by Director McKernan, which was a similar, but more detailed, version of the Director's prior proposal on the topic at the FDIC Board's April 25th meeting. As described in his cover [memorandum](#), Director McKernan proposed an FDIC Board [resolution](#) that would: (i) require certain large fund complexes, by October 31, 2024, to either: (x) file a CIBCA notice for acquisition of voting securities of any FDIC-supervised institution, or its holding company, that equal or exceed 10 percent of that voting securities class, or (y) rebut the resulting presumption of control under FDIC's CIBCA regulations; (ii) suspend passivity commitments or similar arrangements between the FDIC and a covered fund complex as of October 31, 2024; (iii) send a letter to affected fund complexes regarding the foregoing, substantially in the form of the template letter attached to the memorandum; and (iv) reserve to the FDIC Board the approval of the FDIC's entry into any passivity arrangements with any covered fund complex.

In the discussion of Director McKernan's proposal, FDIC Board members expressed a shared interest in strengthening the FDIC's monitoring processes under the CIBCA, and some FDIC Board members expressed concern over the current use of "self-certification" for monitoring CIBCA compliance. However, Chairman Martin J. Gruenberg, Acting Comptroller Hsu, and Vice Chairman Hill questioned whether a formal resolution was the correct procedure for acting on such concerns and cautioned that more deliberation may be necessary. After these indications that his board resolution lacked majority FDIC Board support, Director McKernan withdrew his proposal for a second time. Notwithstanding this withdrawal, Chairman Gruenberg expressed support for communication to fund complexes on the issue, and Director Rohit Chopra expressed an intent for the FDIC to send such notifications "in short order." Further developments on this issue should be expected.