November 18, 2024

Via Electronic Mail

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: Comments-RIN: 3064-AG04

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

Ladies and Gentlemen:

The Bank Policy Institute[1] is filing this comment letter in response to the notice of proposed rulemaking issued by the FDIC entitled *Regulations Implementing the Change in Bank Control Act* (the "NPR").[2] We recognize the importance of appropriate oversight over changes of control of banking organizations. The NPR, however, not only exceeds the FDIC's statutory authority in seeking to exercise jurisdiction over investments in the voting stock of bank holding companies ("BHCs"), but also introduces complexities and potential adverse impact on bank capital and financial stability without offsetting benefit. The NPR should be withdrawn and any further action on this issue should be pursued in a coordinated and collaborative interagency process.

Executive Summary

We recommend that the FDIC withdraw the NPR for the following reasons:

- In the NPR, the FDIC proposes action that exceeds its statutory authority. The Change in Bank Control Act of 1978 (the "CBCA") grants authority to a single Federal banking

---

1 BPI is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

2 FDIC, Regulations Implementing the Change in Bank Control Act, 89 Fed. Reg. 67,002 (Aug. 19, 2024).

agency to review a change of control of an insured depository institution—explicitly defined to include both depository institutions and holding companies of depository institutions. The FDIC does not have authority to review investments in the voting stock of holding companies that are already subject to the CBCA jurisdiction of the Board of Governors of the Federal Reserve System.

- The FDIC's position contradicts the statute's text, structure, and history, as well as common sense, and is inconsistent with longstanding interagency practice in implementing the CBCA, which has never required duplicate (or even triplicate)[3] review of a single transaction by multiple Federal banking agencies.

- The FDIC has not articulated a practical benefit to be derived from its novel extension of CBCA jurisdiction to investments in BHC voting stock,[4] but we submit that the harms to banking organizations are clear. They include threats of introducing redundant agency action, the potential for inconsistent applications of the same statutory standard to the same transaction, and creating uncertainty in the equity markets for certain BHCs and their potential loss of access to the capital markets and market liquidity on normal terms.

Any future action must, at a minimum, undergo a coordinated, interagency process.

- Even setting aside the FDIC's lack of statutory authority, as noted by the members of the FDIC board of directors (the "FDIC Board"), this NPR should have undergone an interagency review and joint rulemaking process. Indeed, both the NPR itself and FDIC Board members at the open meeting when it was announced claim to be committed to a joint interagency process regarding the CBCA regime.[5]

- We strongly recommend that the FDIC withdraw the NPR and that any future action regarding CBCA oversight be pursued in a coordinated and collaborative joint process with the Federal Reserve and the Office of the Comptroller of the Currency that recognizes the respective distinct roles that Congress assigned to the three agencies and accords with sound policy.

The Bank Policy Institute member banks have an abiding interest in the NPR because, if adopted, it would threaten the liquidity of the market for the stock of banking organizations and their access to the capital markets. With due respect, rather than advancing

---

[3] The FDIC would presumably also assert jurisdiction if a bank holding company had both a national bank subsidiary supervised by the Office of the Comptroller of the Currency and a smaller state nonmember bank subsidiary. In other words, under the FDIC's position, an investment in 10% or more of the stock of such a bank holding company—triggering the regulatory presumption of control established by each of the three Federal banking agencies—would involve three separate reviews by the three Federal banking agencies. *See* 12 C.F.R. §§ 5.50(f)(2)(iii), 215.2(c)(2), 303.82(b)(1).

[4] The analysis in this comment letter also applies to changes of control of savings and loan holding companies.

[5] Acting Comptroller of the Currency Michael J. Hsu, who voted in favor of the NPR, maintained that the rule should be implemented on an interagency basis. Transcript of FDIC Board Open Meeting at 130:3-6 (July 30, 2024) ("FDIC Transcript"). "*Should the agencies agree upon an approach*," the Acting Comptroller said, "*I would expect them to issue an interagency NPR prior to finalizing.* So based on this commitment, I support that proposal." *Id.* (emphasis added).

safety and soundness, the NPR would undermine it. The Bank Policy Institute member banks also believe strongly that confidence in the banking system is diminished if the Federal banking agencies upend long-established practice and reject statutory mandates.

Introduction

In enacting the CBCA, Congress assigned jurisdiction for making control determinations (both decisions on notices seeking control and on rebuttals of control, "CBCA Determinations") to "the appropriate Federal banking agency."[6] The requirement to submit a CBCA notice arises when a person acquires control of an insured depository institution ("IDI") through a particular means specified in the statute. Namely, the CBCA notice requirement is triggered only upon a "purchase … or other disposition of *voting stock of such insured depository institution*."[7] The CBCA explicitly departs from the normal meaning of "insured depository institution" to include within that term a "depository institution holding company,"[8] which is defined to include a BHC.[9] IDI as defined in the CBCA also reaches "any other company which controls an insured depository institution and is not a depository institution holding company."[10]

As a result, the question of which Federal banking agency is responsible for making a CBCA Determination in the context of any particular transaction in IDI "voting stock" turns on the issuer of the "voting stock" the investor is seeking. Under Congress's division of responsibilities, the OCC is the "appropriate Federal banking agency" for acquisitions of voting stock of national banks and Federal savings associations; the FDIC is the "appropriate Federal banking agency" for acquisitions of voting stock of state nonmember banks and State savings associations; and the Federal Reserve is the "appropriate Federal banking agency" for acquisitions of voting stock of state member banks, savings and loan holding companies, and BHCs.[11]

The FDIC's current implementing regulations explicitly recognize this statutory scheme by not requiring a notice for "cases where … the [Federal Reserve] reviews a [CBCA] notice for the proposed transaction," codified at 12 C.F.R. § 303.84(a)(8).[12] No one objected to this exemption when it was proposed in a 2002 rulemaking, presumably because it was understood to be merely a restatement of the statutory mandate. In fact, there were no comments

---

6 12 U.S.C. § 1817(j)(1).

7 *Id.* § 1817(j)(1) (emphasis added).

8 *Id.* § 1817(j)(18)(A). In other contexts, "insured depository institution" includes only "any bank or savings association the deposits of which are insured by the [FDIC]." *See, e.g.*, *id.* § 1813(c)(2).

9 *Id.* § 1813(w)(1).

10 *Id.* § 1817(j)(18)(B).

11 *Id.* § 1813(q).

12 Filing Procedures, Corporate Powers, International Banking, Management Official Interlocks, Golden Parachute and Indemnification Payments, 68 Fed. Reg. 50,457, 50,458 (Aug. 21, 2003); Filing Requirements and Processing Procedures for Changes in Control with Respect to State Nonmember Banks and State Savings Associations, 80 Fed. Reg. 65,889 (Oct. 28, 2015).

on this provision at all.[13] There is no record of the FDIC—or, for that matter, the OCC or the Federal Reserve—asserting authority under the CBCA in a manner that purported to require a second agency to review the same transaction. As a result, the question of multiple agency review under the CBCA has not been presented for review and challenge before the issuance of the present NPR proposing to repeal Section 303.84(a)(8) and the FDIC's commentary regarding the resulting implications in the release.

In this comment letter, we explain why the FDIC does not have statutory authority to make CBCA Determinations that Congress has designated for review by the Federal Reserve, and this makes all other issues raised by the FDIC superfluous. The predicate question is not whether the FDIC should make CBCA Determinations for BHCs but whether the FDIC has the statutory authority to do so. The FDIC does not.

Specifically, the text of the CBCA grants only the Federal Reserve the power to review a change in control of a BHC. Statutory structure, statutory history, and almost five decades of unbroken agency practice, as well as policy considerations, reinforce that textual reading. Moreover, even if the FDIC had the statutory authority to engage in duplicative regulation, it should not take such a counterproductive course. We also outline the practical and safety and soundness problems that the FDIC's proposal presents.

To avoid confusion, we urge the FDIC to withdraw the NPR and coordinate any future action on this issue through an interagency process with the Federal Reserve and the OCC.

Discussion

Under the Administrative Procedure Act, agency rulemaking must "not … extend the scope of the [authorizing] statute beyond the point where Congress indicated it would stop."[14] Nor can rulemaking be arbitrary and capricious or otherwise contrary to law.[15] And, as the Supreme Court has made clear, an agency's interpretation of its authorizing statute is not entitled to deference.[16] Indeed, the courts are particularly skeptical about an agency's efforts to expand its jurisdiction.[17]

For the reasons discussed below, we submit that if the FDIC adopts the NPR and asserts jurisdiction over investments in BHCs, the FDIC will exceed its authority under the CBCA. Further, we believe that the FDIC's position articulated in this NPR would threaten the availability of capital for the banking industry. It will waste resources of investors and the FDIC itself without benefit. We urge the FDIC to withdraw the NPR and strongly recommend that any future action in this area be pursued through a joint interagency process.

---

13 *See* 68 Fed. Reg. at 50,458 (explaining that only three comment letters were received on the proposed rulemaking, and they involved an unrelated provision).

14 *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (internal quotation marks omitted); *see also* 5 U.S.C. § 706(2)(C).

15 5 U.S.C. § 706(2)(A).

16 *See Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2273 (2024).

17 *See West Virginia* v. *EPA*, 597 U.S. 697, 725 (2022) (citing *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)).

I. The CBCA Does Not Give FDIC Authority to Review Investments in BHCs

The CBCA's plain text does not grant the FDIC authority to review transactions in the voting stock of BHCs. Instead, the statute assigns that authority to the Federal Reserve. The FDIC's position cannot be reconciled with the statutory language of the CBCA, its structure, or its history.

A. Statutory Language

The plain meaning of the language Congress chose for the CBCA is that there is a single Federal banking agency—the Federal Reserve—responsible for CBCA Determinations for BHCs. That plain meaning is controlling.[18]

As described above, notice under the CBCA arises only in connection with a "purchase … or other disposition of *voting stock of such insured depository institution*." Congress could have drafted the CBCA more broadly to require a notice whenever a person acquires "control of any IDI" through any means—or could have declined to address or specify a means of acquiring control at all. Instead, the statutory text of subsection 1817(j)(1) is keyed specifically to acquisitions of control effected through some transaction in an IDI's "voting stock." The CBCA's uniquely broad definition of IDI encompasses both "any depository institution holding company" (a category that, as noted, includes BHCs) and "any other company which controls an insured depository institution and is not a depository institution holding company."[19] These two elements of the CBCA's text operate with combined effect to ensure that (i) a transaction in voting stock giving rise to a change in control of an IDI *always* triggers a CBCA notice requirement; and (ii) such notice is directed to a single Federal banking agency—namely, "the appropriate Federal banking agency" of the issuer of the voting stock subject to the transaction.

When a person acquires control of a BHC through the purchase or other disposition of the BHC's voting stock, there is no "purchase" or "other disposition" of the voting stock of the BHC's *subsidiaries*. In other words, the only "voting stock" being acquired or disposed of in this context are shares of the BHC. Because there is no disposition of the "voting stock" of a depository institution subsidiary of such BHC, the import of the plain language of subsection 1817(j)(1) is that no CBCA notice requirement arises with respect to that depository institution subsidiary. Instead, a CBCA notice is due to "the appropriate Federal banking agency" of the holding company, *i.e.*, the Federal Reserve.

The statutory language suggests in other express ways that a purchaser must submit *one* CBCA notice to *one* Federal banking agency—not two, or even three, for the same transaction. The CBCA's statutory provisions laying out a framework for the notice submission and review process are uniformly written in the singular. Subsection 1817(j)(1) requires that a notice be filed with "*the appropriate* Federal banking *agency*."[20] It is a well-recognized rule of statutory construction that when Congress modifies a noun with the definite article, "the," that

---

[18] *See Henson* v. *Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) ("[T]he legislature says … what it means and means … what it says.") (quoting *Dodd* v. *United States*, 545 U.S. 353, 357 (2005)).

[19] 12 U.S.C. § 1817(j)(18).

[20] *Id.* § 1817(j)(1) (emphasis added).

conveys singularity—here, one agency.[21] The term "the" demonstrates a single agency, as does the term "appropriate," even more so when the two are combined.[22] So, too, does the use of the singular form for "agency."

In multiple other provisions of the CBCA, references are made to "the," "appropriate," and "agency." In no provision of the CBCA is there language suggesting more than a single agency has jurisdiction over a CBCA Determination. This is even more meaningful because, in other provisions of the Federal Deposit Insurance Act, within which the CBCA is located, Congress used indefinite articles and plural nouns to refer to multiple Federal banking agencies.[23] Indeed, as noted below, the plural form of agency (*i.e.*, agencies) is used in the CBCA itself when Congress intended that multiple "agencies" be involved.[24]

Thus, the plain meaning of the language adopted by Congress in the CBCA is that CBCA Determinations arising from transactions in the voting stock of BHCs are to be made only by the Federal Reserve, as the single appropriate Federal banking agency of BHCs.

B. Statutory Structure

i. The Structure Reinforces the Text

The CBCA's statutory structure confirms its plain meaning in several ways.[25] First, the plain meaning of the statute is confirmed by subsection 1817(j)(11) of the CBCA. This subsection provides that "[t]he Federal banking agency receiving a notice … shall immediately furnish to the *other* Federal banking agencies a copy of such notice."[26] Congress therefore expressly delineated the role of the "other agencies" in the CBCA. That role is to receive a notice copy and presumably be free to offer comment to the appropriate Federal banking agency; it is not one of an independent decision-maker. If, instead, the FDIC had direct jurisdiction over the transaction, there would be no purpose in providing for it to receive a copy of the notice submitted to the Federal Reserve.

Second, this reading is reinforced by the scope of the review required by the Federal Reserve if the investment is in a BHC. Under subsection 1817(j)(7), Congress instructed that "[t]he appropriate Federal banking agency may disapprove any proposed acquisition" of stock in an IDI if one or more of six factors are met.[27] The statutory factors are exactly the same as would apply if the appropriate Federal banking agency were the FDIC or OCC. As a result,

---

21 *See FDIC* v. *Belcher*, 978 F.3d 959, 962–63 (5th Cir. 2020) ("When Congress modified 'Federal functional regulator' [in 15 U.S.C. § 7215(b)(5)(B)(ii)(II)] with the definite article 'the' and the adjective 'appropriate,' it made clear that there can only be *one* appropriate Federal functional regulator . . . .") (citing *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004)).

22 *Id.*

23 *See, e.g.*, 12 U.S.C. § 1820(d)(6)(A)(ii) (instructing agencies to "coordinate with the other appropriate Federal banking agencies in the conduct of … examinations").

24 *See id.* § 1817(j)(11).

25 *See Snyder* v. *United States*, 144 S. Ct. 1947, 1955-56 (2024) (using statutory structure as one of several signals to analyze the statutory text).

26 12 U.S.C. § 1817(j)(11) (emphasis added).

27 *Id.* § 1817(j)(7).

separate FDIC review is not necessary. Rather, the FDIC can express its views if it has concerns through the designated statutory process.

The NPR expresses a particular concern about whether "the appropriate Federal banking agency determines that the proposed transaction would result in an adverse effect on the Deposit Insurance Fund" ("DIF").[28] Notably, Congress did not limit consideration of the DIF to the FDIC.[29] We appreciate the important role that the FDIC plays as the agency that administers the DIF. However, regardless of any "particular interest" the FDIC may have in evaluating a transaction's adverse effect on the DIF, Congress was clear that "the appropriate Federal banking agency" must perform this analysis, which will only be the FDIC in the cases assigned to it.[30] Had Congress intended to bestow a special role upon the FDIC with respect to the DIF in the context of CBCA reviews, it would have said so.

ii. The FDIC's Approach Raises Structural Questions

The FDIC's interpretation of the aspects of the CBCA addressed by the NPR leads to knock-on implications that are difficult to square with the CBCA's underlying statutory design and that raise procedural questions that the FDIC does not answer (and about which the CBCA itself is conspicuously silent).

Had Congress contemplated that multiple agencies may make a CBCA Determination, one would expect there to be indicia somewhere in the detailed procedures written into the statute itself. Congress provided instructions regarding the information to be included in CBCA notices, the copies to be sent to other agencies, the various timelines for the procedural steps, and possible extensions of the review period. Yet, there is no language that implies a need for—or even the possibility of—a second reviewing agency for the same transaction.[31] To the contrary, the last sentence of subsection 1817(j)(1) provides that "[a]n acquisition may be made prior to expiration of the disapproval period if the agency issues written notice of its intent not to disapprove the action."[32] That instruction—written with "agency" in the singular—seems to preclude review of the transaction by a second agency—let alone a third.

---

28 89 Fed. Reg. at 67,003; *see also* 12 U.S.C. § 1817(j)(7)(F).

29 This absence of a direct exclusive role for the FDIC is meaningful especially in comparison to other contexts where Congress *has* made special reference to the FDIC and its role regarding the DIF. *See, e.g.*, 12 U.S.C. § 371c(f) (providing the FDIC with an opportunity to veto the Federal Reserve's issuance of an exemption under Section 23A of the Federal Reserve Act if the FDIC makes "a determination that the exemption presents an unacceptable risk to the [DIF]").

30 89 Fed. Reg. at 67,005; 12 U.S.C. § 1817(j)(1). For this reason, it is not clear how, as the FDIC claims, the NPR would "reduc[e] the likelihood that certain transactions would result in an adverse effect on the DIF." 89 Fed. Reg. at 67,006. Similarly, because the FDIC receives a copy of notices filed with the other Federal banking agencies, it is also not clear how the FDIC currently lacks "the information necessary to quantify such effect." *Id.*

31 In comparison, Congress is very clear in other contexts when it intends for multiple agencies to act jointly. For example, Section 23A(f)(4) of the Federal Reserve Act grants the Federal Reserve the authority to issue regulations regarding the manner in which the amount of an affiliate transaction is calculated. 12 U.S.C. § 371c(f)(4). In the same subsection, Congress also expressly instructed that "[a]n interpretation under this paragraph *with respect to a specific member bank, subsidiary, or affiliate shall be issued jointly with* [*the Federal Reserve and*] *the appropriate Federal banking agency* for such member bank, subsidiary, or affiliate." *Id.* (emphasis added). There is no indication of any such instruction here.

32 *Id.* § 1817(j)(1).

Moreover, there is no indication as to what would occur if one agency (or even two agencies) approved a notice, but another agency did not.

A similar situation arises with respect to the powers of investigation and enforcement under the CBCA, which are, again, assigned to "*the appropriate* Federal banking agency."[33] It is seemingly inconceivable that Congress could have assigned investigation and enforcement authority over the same transaction to multiple Federal banking agencies without a clear statement that the singular form of the language used was to be disregarded.

In addition to this unnecessary and wasteful concept of duplicative (or triple) approvals, control rebuttals, investigations, and enforcement actions, the FDIC's approach would produce a number of anomalous results. As noted above, the reviewing agency must send copies of the CBCA notice to its peer agencies;[34] the FDIC's approach would result in two agencies sending each other copies of the same notice. Further, two Federal agencies would forward the same notice to the relevant State agency (subsection 1817(j)(2)(A)),[35] two agencies would investigate the notice and prepare a report on it (subsections 1817(j)(2)(B), (C)), and two agencies would publish a notice and solicit public comment (subsection 1817(j)(2)(D)). In addition, the civil monetary penalties associated with a CBCA violation could double if a BHC's subsidiary bank were a nonmember bank as compared to a member bank.

None of these complications arises with a single agency reviewing transactions in BHC voting stock. What is more, the assignment of CBCA responsibility to the Federal Reserve for BHCs is logical and appropriate because of the Federal Reserve's continuous oversight of the acquisition of voting stock of BHCs. Every BHC is required to file annual reports with the Federal Reserve, and each report includes a list of securities holders that own, control, or hold the power to vote 5 percent or more of any class of voting securities of the holding company.[36] As the General Counsel of the Federal Reserve recently wrote, "[t]his information allows Federal Reserve staff to monitor ownership levels in Board-regulated banking entities (including ownership by asset managers) and ensure compliance with filing obligations under the [Bank Holding Company] Act and the [CBCA]."[37]

C. Statutory History

The statutory history of the CBCA further confirms this plain meaning reading.[38] The drafting history of the CBCA recognizes that Congress intended for only the Federal Reserve to be the banking agency for determinations regarding BHCs. Before the enactment of

---

33 *Id.* § 1817(j)(15)(A), (B) (emphasis added).

34 *Id.* § 1817(j)(11).

35 Relatedly, because many states have their own change in bank control regimes, there may already be a parallel review process of a transaction by the applicable state banking regulator. This only compounds the concern that multiple *Federal* agency review of the same transaction would be unnecessary and wasteful.

36 *See* Instructions for the Preparation of the Annual Report of Holding Companies, Reporting Form FR Y-6, Report Item 3: Securities Holders, GEN-9 (effective Dec. 2022), *available at* https://www.federalreserve.gov/reportforms/forms/FR_Y-620180228_i.pdf.

37 Letter from Mark Van Der Weide to Hon. James Comer, House Chairman of Committee on Oversight and Accountability (Mar. 12, 2024).

38 *See Snyder* v. *United States*, 144 S. Ct. 1947, 1955 (2024) (using statutory history as a signal to "reinforce[] … textual analysis").

the CBCA, Congress did not designate any appropriate Federal banking agency in the Federal Deposit Insurance Act for BHCs.[39] Thus, when the CBCA was enacted, Congress included in subsection 1817(j)(1) the following provision:

> For purposes of this subsection (j), the term "insured bank"[40] shall include any "bank holding company," as that term is defined in section 2 of the Bank Holding Company Act, which has control of any such insured bank, and the appropriate Federal banking agency in the case of bank holding companies shall be the Board of Governors of the Federal Reserve System.[41]

In 1989, when Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Congress relocated the two parts of this sentence. The first part, the inclusion of BHCs in the definition of "insured bank," was moved to subsection 1817(j)(18)(A) of the CBCA by broadening the definition of "insured depository institution" to include depository institution holding companies (defined as BHCs and savings and loan holding companies), as well as any other company that controls an insured bank.[42] The second part was moved to the definition of "appropriate Federal banking agency" in subsection 1813(q).[43] Specifically, Congress clarified that the appropriate Federal banking agency was the Federal Reserve for "any [BHC] and any subsidiary of a [BHC] (other than a bank)."[44] There is no indication in either the statutory text or in FIRREA's drafting history to suggest that Congress intended to change the appropriate Federal banking agency or to add an additional Federal

---

39 Pub. L. 89-695, 80 Stat. 1028, 1046, S. 3158, enacted October 16, 1966. The text of the definition provided only:

"The term 'appropriate Federal banking agency' shall mean

(1) the Comptroller of the Currency in the case of a national banking association or a District bank,

(2) the Board of Governors of the Federal Reserve System in the case of a State member insured bank (except a District bank), and

(3) the Federal Deposit Insurance Corporation in the case of a State nonmember insured bank (except a District bank)."

40 At the time of the CBCA's enactment, "insured bank" was the language used instead of "insured depository institution." Change in Bank Control Act of 1978, Pub. L. 95-630, 92 Stat. 3683, H.R. 14,279, enacted November 10, 1978.

41 *Id.*

42 *See* 12 U.S.C. § 1817(j)(18)(B). In the comparatively rare case where the holding company of an insured bank does not meet the definition of a "depository institution holding company"—*i.e.*, is not a BHC or savings and loan holding company, as in the case of a company that owns a credit card bank or industrial loan company—the "appropriate" Federal banking agency is the regulator of the bank. This result occurs because, in contrast to the case where there is a BHC or savings and loan holding company present, there would otherwise be no banking agency with CBCA approval authority with respect to shares that are acquired or disposed of at the parent company level.

43 Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183, 192, H.R. 1278, enacted August 9, 1989.

44 *Id.*

banking agency for BHCs. Rather, this was a simple housekeeping change to consolidate definitional language.

Finally, the early stages of the CBCA's drafting indicate that Congress considered—but rejected—a scheme in which the FDIC would have had a broader role. Specifically, these early versions of the CBCA contemplated a regime in which the FDIC would have had primary review of all CBCA notices.[45] That approach was not adopted.[46]

This statutory history confirms that the CBCA bestows authority on only one appropriate banking agency for any CBCA Determination.

D. Consistent Regulatory Practice and Legal Implications

Historical practice by the Federal banking agencies further supports this reading. As the U.S. Supreme Court has articulated, "the want of assertion of power by those who presumably would be alert to exercise it[] is … significant in determining whether such power was actually conferred."[47]

We are not aware of any CBCA notice relating to a BHC where notices have been filed by a notificant with both the Federal Reserve and the primary supervisor for the BHC's subsidiary bank. This unbroken line of practice over almost 50 years, without disagreement or challenge from the regulatory agencies, provides further confirmation that two separate notices—one to the Federal Reserve for a BHC and one to the primary supervisor of the BHC's IDI subsidiary—were not intended by Congress. Likewise, we are unaware of any case where there has been a rebuttal determination request for a BHC that was filed with two different agencies. Nor have we identified any enforcement actions filed or joined by the FDIC against investors for failing to comply with the CBCA with respect to acquisitions of shares of BHCs with state nonmember bank subsidiaries. This is consistent with the fact that neither the CBCA regulations of the Federal Reserve[48] nor those of the OCC seem to contemplate multiple agency review of transactions.[49]

---

45 *See, e.g.*, Change in Bank Control Act, H.R. 8767, 95th Cong. § 2 (Aug. 4, 1977); Safe Banking Act, H.R. 9086, 95th Cong. § 602 (Sept. 13, 1977).

46 In response to H.R. 9086, Chairman of the FDIC George LeMaistre stated that "[a]lthough the FDIC would not object to undertaking this responsibility vis-à-vis all insured banks, *I believe it would be more appropriate to vest this responsibility in the bank's primary regulator*." *Hearings on H.R. 9086 Before the Subcomm. on Banking, Fin. & Urb. Affs.*, 95th Cong. 2331 (1977) (statement of George LeMaistre, Chairman, FDIC) (emphasis added). The Deputy Secretary of the Treasury expressed similar reservations, remarking that "it [was] not clear why a veto power should be lodged in the FDIC in the case of institutions that are otherwise primarily regulated by the Comptroller of the Currency or the Federal Reserve Board." *Id.* at 2656 (statement of Robert Carswell, Deputy Sec'y, U.S. Dep't of Treasury). These comments do not expressly contemplate an investment in a bank holding company, and they predate the bill that became the CBCA. But they indicate a contemporaneous skepticism about the need for the FDIC to review a change in control of an institution that has a different primary regulator.

47 *West Virginia* v. *EPA*, 597 U.S. 697, 725 (2022) (quoting *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)).

48 *See generally* 12 C.F.R. Part 225, Subpart E.

49 *See generally* 12 C.F.R. Part 5.50.

At the very least, the lack of any record of dual CBCA notices, rebuttal determination requests, or related enforcement actions is inconsistent with the FDIC's prior assertion that it has a "longstanding practice" of recognizing its regulatory exemption under the CBCA only when the Federal Reserve actually reviews a CBCA notice, not when it accepts passivity commitments in lieu thereof.[50] The FDIC's own Applications Procedures Manual also belies the FDIC's assertion, as it indicates in a paragraph about passivity commitments that the FDIC evaluates the extent of control at the parent company level *only when a parent company is not supervised by the Federal Reserve*.[51] In any event, this issue was settled by Congress, without according discretion to the FDIC.

Critically, this is not just a question of precedent, but it demonstrates what must have been the legal position of the Federal banking agencies. If, in fact, the Federal Reserve believed there were dual clearance authorities, it could not, as a legal matter, have *sub silentio* cleared transactions involving BHCs to proceed without clearance from the primary regulator of the BHC's bank subsidiary (if a national bank or state nonmember bank). Likewise, the OCC could not have *sub silentio* ignored a CBCA transaction involving a BHC with a national bank subsidiary, if the OCC believed that it had the legal obligation to clear the transaction. Stated differently, the FDIC's position can only be correct if the Federal Reserve and OCC—and, for that matter, the FDIC—have abdicated their legal responsibility for many decades.

E. No Persuasive Alternative Reading

i. There Are Fatal Flaws in the FDIC's Reading of the CBCA

Although the FDIC has not clearly articulated its rationale for its assertion of jurisdiction, it appears to be relying on the reference to "indirectly" in 12 U.S.C. § 1817(j)(1).[52] At the outset, any such argument is based on a basic misreading of this section. The phrase "directly or indirectly" applies to the investor ("any person") "acting directly or indirectly through or in concert with one or more other persons." In other words, the adverb "indirectly" describes the actions of the investor relative to its acquisition of voting stock in the IDI entity whose stock is being acquired (which, as defined, may be a BHC), not the potential organizational structure of that entity which in turn could have a subsidiary IDI. As we have discussed, the CBCA notice requirement is keyed to a "purchase … or other disposition of voting stock" of the IDI (which again, as defined, may be a BHC).[53] If a purchaser acquires control of a BHC through a purchase of the BHC's voting stock, the required CBCA notice runs to "the appropriate Federal banking agency" of the BHC.

---

50 80 Fed. Reg. at 65,897.

51 FDIC, Applications Procedures Manual, Standard and Non-Standard Conditions at 1.11-4 (emphasis added), *available at* https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-01-11-newconditions.pdf.

52 *See* 89 Fed. Reg. at 67,003 ("Because the CBCA applies to direct or indirect acquisitions of control, for purposes of the CBCA, the FDIC also may review a notice for an acquisition of control of any company that directly or indirectly controls an insured State nonmember bank or an insured State savings association."). This conclusory statement is unaccompanied by any legal analysis of the statutory language or other aspects of statutory analysis discussed above.

53 12 U.S.C. § 1817(j)(1).

Moreover, if Congress intended to grant dual (or triple) agency review over acquisitions of voting securities in BHCs to both the Federal Reserve and the federal regulator(s) of their bank subsidiary(ies), it would have said so expressly.[54] Such an extraordinary approach cannot be read into the single word, "indirectly." As the Supreme Court has colorfully, but aptly, put it: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[55] This is particularly the case where all the other statutory language, statutory structure and history, as well as policy, read against such a "hide and seek" approach.

Likewise, any such argument would fail to explain why Congress departed from the normal meaning of "insured depository institution" to include a "depository institution holding company" in subsection 1817(j)(18). There is no evidence that Congress added this provision to impose a duplicative level of oversight on BHCs.

The FDIC cannot rescue the fallacy of such a position by turning to subsection 1817(j)(8), which defines control 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." In the first place, this is not the operative provision of the CBCA, which applies only to control acquired "through a purchase, assignment, transfer, pledge, or other disposition of voting stock."[56] Further, this argument also fails under the "elephants in mouseholes" doctrine of statutory interpretation and in view of all the other sources of a contrary reading.[57]

The FDIC may also attempt to rely on a "catch-all" sentence at the end of the definition of "appropriate Federal banking agency" in subsection 1813(q), a provision outside the CBCA. This sentence provides that "[u]nder the rule set forth in this subsection, more than one agency may be an appropriate Federal banking agency with respect to any given institution." This language, however, is inapposite, as the FDIC is not arguing that it is an appropriate Federal banking agency *for the BHC* ("any given institution"), but that it is the appropriate Federal banking agency for the IDI subsidiary. Moreover, this catch-all language applies to the entirety of the Federal Deposit Insurance Act. There is no reason to believe that this general language is designed to override, by implication, the more specific plain meaning of the CBCA.

---

54 *See Henson* v. *Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017).

55 *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

56 12 U.S.C. § 1817(j)(1).

57 Nor can this argument be resuscitated by the claim that, absent this expansive reading, no agency would have authority over a change of control of a company that is not a BHC but owns an insured bank (*e.g.*, an industrial loan company or a so-called "credit card bank"). Because there is no appropriate federal regulator for that institution (*see* 12 U.S.C. §§ 1813(q), 1817(j)(18)(B)), the default regulator must be the appropriate Federal banking agency of the industrial loan company or credit card bank subsidiary. That does not apply in the case of a BHC, for which the statute provides an appropriate Federal banking agency—the Federal Reserve. If Congress meant otherwise, it could have said so, as it has in other contexts. For instance, a different approach was explicitly delineated in the statutory source of strength provision added in the Dodd-Frank Act. 12 U.S.C. § 1831o-1(b) ("If an insured depository institution is not the subsidiary of a bank holding company or savings and loan holding company, the appropriate Federal banking agency for the insured depository institution shall require any company that directly or indirectly controls the insured depository institution to serve as a source of financial strength for such institution.").

Further, the statutory history demonstrates the absence of any connection between this language and the CBCA. The background against which the CBCA was enacted makes clear that the phrase "more than one agency" in subsection 1813(q) has no bearing on the CBCA and was designed for a different purpose. This language predated the CBCA by a few weeks; Congress clarified that "more than one agency may be an appropriate Federal banking agency" when it enacted the International Banking Act (the "IBA").[58] The stated purpose of the IBA was to "provide for Federal regulation of participation by foreign banks in domestic financial markets."[59] To that end, among other things, Congress clarified that the appropriate Federal banking agency was the OCC for a Federal branch or agency of a foreign bank, the FDIC for "a foreign bank having an insured branch," and the Federal Reserve for "any branch or agency of a foreign bank" in certain circumstances.[60] Therefore, certain foreign banks may be regulated by "more than one agency."

ii. There Are Fatal Flaws in the FDIC's Defense of the NPR

There are a number of other fatal flaws in the NPR's attempted justification of the FDIC's efforts to expand its CBCA jurisdiction. At the very outset, the NPR attempts to justify its approach with the following syllogism:

> While the CBCA does not describe what constitutes the *power to direct* the management or policies of a covered institution, the Federal banking agencies have determined that a shareholder who owns or controls a significant block of voting securities generally will have *influence* in a banking organization.[61]

But "power to direct" and "influence" are very different standards. *Black's Law Dictionary* defines to "direct" as "[t]o cause (something or someone) to move on a particular course."[62] Meanwhile, to "influence" connotes a less forceful action, without direct causal effect: to "influence" means to "[u]se … pressure, authority, or power, indirectly, to induce action or change the decisions or acts of another."[63] Indeed, both courts and the federal agencies differentiate between the "power to direct" and mere "influence." For instance, in the context of control person liability under the Securities Exchange Act of 1934, it is well established that mere "[a]llegations of influence *are not the same* as the power to direct the management and policies."[64] Further, any possible question as to whether Congress meant the same thing by "direct" and "influence" is eliminated by the revised, and expanded, definition of control adopted

---

58 International Banking Act of 1978, Pub. L. 95-369, 92 Stat. 607, 615, H.R. 10,899, enacted September 17, 1978.

59 *Id.* at 92 Stat. 607.

60 *Id.* at 92 Stat. 615.

61 89 Fed. Reg. at 67,003 (emphases added).

62 *Direct*, Black's Law Dictionary (12th ed. 2024).

63 *Influence*, Black's Law Dictionary (12th ed. 2024).

64 *In re Tronox, Inc. Sec. Litig.*, 769 F. Supp. 2d 202, 207–08 (S.D.N.Y. 2011) (internal quotation marks omitted) (emphasis added); *accord H & H Acquisition Corp.* v. *Fin. Intranet Holdings, Inc.*, 669 F. Supp. 2d 351, 361 (S.D.N.Y. 2009) ("[E]xercise of influence, without power to direct or cause the direction of management and policies through ownership of voting securities ... is not sufficient to establish control.").

by Congress in the Bank Holding Company Act Amendments of 1970, eight years before the CBCA.[65] There, Congress used the term "*controlling* influence," which is a true control-based standard as opposed to mere influence.[66] In the Federal Reserve's own interpretive regulations under the CBCA, the Federal Reserve adopts that same language, specifying that control includes "the power to exercise a *controlling* influence over the management or policies of the company or bank,"[67] not just mere influence.

The NPR acknowledges that it presents a basic departure from longstanding policy and precedent, but then seeks to justify its "reconsider[ation]" of its CBCA position on the basis of an asserted recent increase in "requests for relief to rebut the presumptions of control."[68] This attempted rationalization fails for each of five reasons.

First, a request for acceptance of passivity commitments does not represent a "request for relief" from any statutory presumption of control, but rather a legitimate effort to rebut the extra-statutory presumption of control that the Federal banking agencies have established by regulation. This misconception of asset managers' actions pervades the entire NPR and undermines its rationale. Further, any regulatory effort to restrict a person's ability to rebut the regulatory presumption of control should be viewed with particular skepticism in view of the provenance of the presumption itself. The term "control" is explicitly defined in the CBCA as either 25% stock ownership or the "power, directly or indirectly, to direct the management or policies" of an insured depository institution. The CBCA did not authorize the regulators to establish a presumption at a lower level of share ownership or, more generally, to otherwise define "control." Given the absence of any such statutory authorization, the standards for rebuttal of a presumption of control at 10%, a level 60% below the statutory standard, should be reasonable and carefully calibrated to be consistent with the high statutory standard. The adoption of a dual-agency and potentially more stringent approach toward rebuttal would raise a new question as to whether the 10% presumption can now be regarded as consistent with the statute.[69]

Second, there is no logic in tying the standards for non-control to the frequency with which non-control determinations are sought. What matters is whether those standards are

---

65 An Act to Amend the Bank Holding Company Act of 1956, and for Other Purposes, Pub. L. No. 91-607, 84 Stat. 1760, enacted Dec. 31, 1970.

66 *Id.* at 84 Stat. 1761 (emphasis added). Specifically, the 1970 amendments specified that a condition sufficient for a finding of control is that "the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company." *Id.*

The NPR uses at least four different descriptions of "influence." In the first case, the term is used without any modifier; in another, it is used with the modifier "significant"; in still a third with the modifier "outsized"; and finally with the modifier "excessive." 89 Fed. Reg. at 67,003-06. As noted, however, the NPR nowhere uses the more stringent standard of "controlling influence" that Congress adopted in the Bank Holding Company Act. It is not possible to comment on a fully informed basis when commenters do not know what type of influence is of concern to the FDIC.

67 12 C.F.R. § 215.2(c)(1)(iii) (emphasis added).

68 89 Fed. Reg. at 67,004.

69 *See Corner Post, Inc.* v. *Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2447–48 (2024) (holding that a claim under the Administrative Procedure Act begins to accrue "when the plaintiff is injured by final agency action," not when a regulation is first promulgated).

met and not how frequently the question arises. If an investment involves a combination of an investment strategy and commitments that successfully rebut a control presumption, it should make no difference whether such a combination occurs at one banking organization, ten banking organizations or 100 banking organizations. Likewise, it should make no difference whether a similar investment is made by one fund complex or multiple fund complexes.

Third, it is striking that the NPR refers frequently to the need for the FDIC to review certain investments without any reference to the Federal Reserve's review of them.

Fourth, as the NPR acknowledges, the proposal would result in "duplicate regulatory review."[70] There is, however, no suggestion in the NPR as to why Congress would have wanted duplicative review or why duplicative review is necessary or even appropriate, or any recognition of the cost, burden, or waste that it would produce.[71]

Fifth, the NPR frequently notes that "increasingly large ownership" and the "evolution of the economic landscape" present "new risks."[72] But there is no detail as to what those risks may be or any clear correlation between the factors cited and the risks themselves. We appreciate that the regulators should anticipate risk and that risks need not actually be realized before regulations are adopted to minimize them. At the same time, however, regulation is not appropriate for risks that are at most speculative and the relationship between the regulatory action taken and the asserted risk is at most tenuous, even more so when the regulator fails to provide any explanation.

In a closely related context, congressional drafting sessions recognized the criticism that duplicative agency review is "undesirable."[73] As just described, certain foreign banks may be subject to the jurisdiction of more than one agency. In discussing a proposed amendment to the IBA, which would have established the Federal Reserve rather than the FDIC as the only "appropriate Federal banking agency" for foreign banks and their state branches, the Senate Report included the following explanation: "[T]his change … would minimize the undesirable situation where more than one Federal agency would be designated as the appropriate Federal banking agency for an institution."[74]

A dual notice requirement for the CBCA would foster the same "undesirable" outcome. It would also raise the question as to whether the FDIC has ignored, much less abided

---

70 89 Fed. Reg. at 67,006. It is worth noting that in prior discussion about the exemption the FDIC now seeks to remove, the FDIC expressed concern about exactly this kind of duplication, stating that it intended "to avoid duplicate regulatory review of the same acquisition of control by both the [Federal Reserve] and the FDIC." 80 Fed. Reg. at 65,897.

71 This silence is not limited to the potential burden on investors. The FDIC fails to address the burden that this duplicate review would impose on FDIC resources.

72 89 Fed. Reg. at 67,005.

73 124 Cong. Rec. 18024, 18148 (June 19, 1978) (statement of Mr. Stephen Gardner).

74 *Id.* This part of the amendment was not adopted. Today, as described above, the OCC is the appropriate Federal banking agency for Federal branches and agencies of foreign banks, the FDIC is the agency for foreign banks with insured branches, and the Federal Reserve is the agency for branches and agencies of foreign banks in certain circumstances. *See* 12 U.S.C. § 1813(q).

by, Congress's instruction that it "work jointly" with the other Federal banking agencies to eliminate duplicative requests for information.[75]

II. Multiple Agency Review of CBCA Notices Contradicts Sound Policy

A. The NPR Does Not Articulate the Benefit of Redundancy

The FDIC states that the NPR's policy objective "is to ensure appropriate review of transactions that would result in control over FDIC-supervised institutions."[76] However, the FDIC does not provide any explanation as to how the NPR would advance that objective. In particular, the NPR nowhere attempts to explain why the Federal Reserve's review of transactions where the FDIC-supervised institution is owned by a BHC is not appropriate, inadequate, or ineffective. We are unaware of any basis for concluding that Congress intended that a CBCA applicant could be approved by one agency and rejected by another, or that one agency could conclude that the presumption of control has been rebutted by an investor, but another could conclude that the investor must instead file a notice. We seriously question the need for dual—or triple—agency review of transactions under the CBCA to ensure appropriate review of transactions. To the contrary, we believe this approach would waste the resources of investors and the Federal banking agencies themselves.[77]

The Federal banking agencies review acquisitions of control under identical statutory standards.[78] It is not clear how the FDIC's duplicative review would be superior to that of the Federal Reserve, its peer agency, particularly because the FDIC is provided with a copy of any relevant Federal Reserve notice. As explained above, the CBCA entrusts the appropriate Federal banking agency, which will vary depending on the transaction, to assess, among other things, whether the proposed acquisition would result in an adverse effect on the DIF.[79] So it is not persuasive for the FDIC to justify a duplicative review by reference to its particular role in administering and protecting the DIF.

The FDIC's approach would also raise difficult questions for potential investors in BHCs that, the FDIC would claim, are subject to multiple agency review. For instance, how should a would-be investor proceed if one Federal banking agency approves a proposed transaction and another Federal banking agency disapproves it?[80] How should such an investor proceed if one Federal banking agency approves a transaction but another Federal banking agency extends its review period, or fails to respond? Presumably, the FDIC would assert that

---

75 12 U.S.C. § 4804(1). Although the NPR recognizes that the proposed rule change would result in a duplicative regulatory process, Section 4804 is nowhere mentioned.

76 89 Fed. Reg. at 67,002.

77 *See Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Amendments to the Change in Bank Control Act Framework* (July 30, 2024), *available at* https://www.fdic.gov/news/speeches/2024/statement-jonathan-mckernan-director-fdic-board-directors-proposed-amendments (warning against mandating "duplicative regulatory notices" and the potential to "add undue regulatory burden").

78 *See supra* Section I.B.

79 12 U.S.C. § 1817(j)(7)(F).

80 The FDIC recognizes, but does not address, the threat of "inconsistent approaches across the Federal banking agencies." 89 Fed. Reg. at 67,006.

the investor may proceed only upon the absence of disapproval from all relevant Federal banking agencies. Yet, the possibility of conflicting agency outcomes could result in litigation, uncertainty in the market, and, at the very least, increase the cost and duration of agency reviews under the CBCA.

As discussed below, the NPR purports to address issues that have arisen due to the increase in assets held by index funds. However, the applicability of the NPR is by no means limited to these investors, and the FDIC's position regarding multiple agency review under the CBCA would apply to any type of transaction, including efforts to raise fresh capital from a wide array of standard sources. As a result, all investments in BHCs with subsidiaries for which the FDIC is the appropriate Federal banking agency could be subject to duplicative CBCA Determinations. For example, if a BHC with an FDIC-supervised subsidiary wanted to sell a 10% or greater stake to raise capital, the investor would, under the NPR, need approval (or a CBCA Determination of non-control) from the FDIC as well as the Federal Reserve.

In addition, in response to the NPR's non-specific concerns about violations, there is already in place a legislative and regulatory structure that protects against exercise of control after the appropriate Federal banking agency has accepted passivity commitments from an investor in connection with a rebuttal of control. As the NPR recognizes, these commitments "constitute a 'written agreement' … enforceable under sections 8 and 50 of the [Federal Deposit Insurance Act]."[81] In addition, the investor would be violating federal securities law because it would have filed as a passive investor on Schedule 13G of the Securities Exchange Act (rather than Schedule 13D).[82]

B. Creating Uncertainty with Respect to a Stable Source of Capital

The FDIC claims that its NPR is motivated by "recent developments in equity markets[, which] may be contributing to elevated risk of excessive indirect control or concentration of ownership in FDIC-supervised institutions."[83] However, the FDIC provides no analysis or detail or any explanation for its speculation, especially with respect to mutual fund complexes.

Passive index funds "invest[] proportionally across stocks in the desired index or sector of the national economy," meaning that, as investments in the index funds grow, the index fund manager "must continue to invest those funds in the universe of stocks that comprise the index."[84] So, unlike other investors, a passive index fund is not able to sell—or credibly threaten to sell—its position to influence a portfolio company. It is telling in these circumstances that the FDIC provides no support for its theory that fund complexes can "exercise significant influence or control" over banking organizations.[85] At most, passive index fund managers may be better placed to seek board representation or management interlocks as an indirect result of their voting

---

81 *Id.* at 67,003.

82 *Cf.* 17 C.F.R. § 240.13d-1(b)(1)(i).

83 89 Fed. Reg. at 67,002.

84 *Id.* at 67,004.

85 *Id.*

position; however, as the FDIC notes, such actions can be—and have historically been—restricted by asset managers' passivity commitments to the Federal banking agencies.[86]

Further, because index funds cannot simply exit their positions, they are incentivized to prioritize long-term shareholder value when proxy voting, contrary to the FDIC's assertion that these investments could "lead to excessive risk-taking to enhance profits, investor returns, or stock price."[87] To the contrary, limiting the voting power of passive index funds may have unintended consequences, such as elevating the voting power of activist investors, who are more likely to be motivated by short-term financial interests involving higher risk or social goals, and proxy advisory firms, whose voting decisions and recommendations are not tied to an economic interest in the organization.

The NPR is silent about these potential consequences and instead focuses on the risk of "significant influence" that index funds may exercise over banking organizations. However, it is not clear what the FDIC means by use of this phrase and similar references—"outsized control" and "outsized influence"—as they depart from the statutory definition of "control" under the CBCA.[88] More importantly, however, the NPR does not clearly articulate any actual harm posed by this supposed "excessive control," particularly in light of the mitigating factors outlined above, much less cite any specific examples.[89]

Moreover, the NPR ignores another important mitigating factor: there is already a strong disincentive (virtually a prohibition) for passive index funds to exert control over banks. A BHC is "any company which has control over any bank," meaning, among other things, that the Federal Reserve determines that the company "directly or indirectly exercises a controlling influence over the management or policies of the bank or company."[90] Becoming a BHC imposes a host of new regulatory obligations, compliance costs, and business limitations that would materially impact a mutual fund complex's business. As a result, these complexes are sufficiently deterred from attempting to exercise control of banking organizations.

Indeed, the FDIC acknowledges the benefits of index funds. The FDIC recognizes that the growth of passive index funds is a consequence of their "popularity due to lower management fees relative to active funds, the belief that index funds match or outperform active funds more frequently and consistently, and the growth of target-date funds in retirement plans."[91] The Bank Policy Institute does not understand this trend to threaten the safety and soundness of banking organizations, and it is not clear that the NPR furthers any other critical policy objective.

---

86 *Id.*

87 *Id.* at 67,005.

88 *See supra* note 66. *Compare* "outsized control" and "outsized influence," 89 Fed. Reg. at 67,005–06, *with* "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," 12 U.S.C. § 1817(j)(8)(B).

89 89 Fed. Reg. at 67,005.

90 12 U.S.C. § 1841(a)(2)(C).

91 89 Fed. Reg. at 67,004.

In fact, the NPR may have adverse consequences for bank safety and soundness. Index funds provide an important, stable source of investment in banking organizations. At best, the NPR creates uncertainty with respect to these investments. At worst, it may delay this investment or restrict it altogether. If the NPR were to reduce the amount of bank equity included in index funds, that would depress demand for investment in bank stock, which could result in lower bank stock prices and reduced ability for banking organizations to raise capital.[92] In Vice Chairman Travis Hill's remarks about the NPR, he recognized these concerns, asking the FDIC to proceed with caution "about measures that might result in asset managers reducing their investments in banks."[93]

Any proposal that has the potential to impact the banking industry in this manner should be subject to more robust analysis and provide clear evidence that such a proposal would achieve its stated goals, and that the benefits outweigh the costs.

C. Interagency Coordination

Setting aside the FDIC's lack of statutory authority to issue this NPR and its adverse practical considerations, any action regarding CBCA oversight requires interagency coordination. No one disputes that the CBCA is administered by the three Federal banking agencies. To the contrary, in the words of Acting Comptroller of the Currency Michael J. Hsu, the agencies are "inextricably linked" with respect to "this issue of bank ownership and control."[94] Congress has specifically instructed the Federal banking agencies to "work jointly … to eliminate, to the extent practicable, duplicative … requests for information in connection with applications or notices to the agencies."[95] CBCA notices are an obvious candidate for this coordination. Indeed, as further evidence of Congress's desire to avoid potential redundancy, in 1992, Congress instructed the OCC, the Federal Reserve, and the FDIC that, within the next two years, they must "work jointly with the other Federal banking agencies to make uniform all regulations and guidelines implementing common statutory or supervisory policies," among other initiatives."[96]

In light of these considerations and Congress's instruction, the NPR should have undergone joint interagency review. Once the FDIC has withdrawn the NPR, as we strongly recommend, any future legitimate action with respect to CBCA oversight requires an interagency process. The FDIC facially recognized this need specifically, noting its commitment to "the importance of interagency collaboration and consistency with respect to the review of

---

92 In turn, this effect would be unevenly and arbitrarily experienced by banks supervised by the FDIC.

93 FDIC Transcript at 128:16-18.

94 *Acting Comptroller Issues Statement on the FDIC's Proposals Related to Change in Bank Control Act* (Apr. 25, 2024), *available at* https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-43.html.

95 12 U.S.C. § 4804(1).

96 *Id.* § 4803(a)(3). To that end, the FDIC and the other Federal banking agencies adopted guidelines in 1992 whereby they committed to engaging in "interagency consultation before issuing any significant written legal interpretation … regarding a statutory provision administered, applied or enforced by two or more of the agencies," specifically including the CBCA. FDIC FIL-63-92, 1992 WL 714963 (Sept. 9, 1992). One would expect that these guidelines would have led, or should lead, to interagency guidance about how any potential overlapping jurisdiction would work, if it existed.

transactions under the CBCA" in the NPR.[97] Yet, there is no indication that the FDIC coordinated with its peer agencies in developing and releasing this NPR, including the FDIC's assertion of dual jurisdiction. Indeed, both Vice Chairman Travis Hill and Director Jonathan McKernan dissented in part "due to skepticism" about "an FDIC-only rulemaking."[98] Plus, there are signals in both the NPR and in statements from the FDIC Board members at the meeting at which the NPR was announced that the FDIC may intend to act unilaterally, without coordinating with the other Federal banking agencies.[99]

Finally, as a general matter, the questions in the NPR presume that the FDIC has the statutory authority to exercise jurisdiction over certain BHCs. Because, for the reasons discussed above, this presumption is invalid, most of these questions are (i) irrelevant or (ii) relevant only to an FDIC-supervised institution that is not owned by a BHC.

Conclusion

The plain meaning of the CBCA is that there is only a single "appropriate" federal regulator for administering its provisions with respect to any transaction in an IDI's voting stock. That should be the end of the analysis, even more so because it is confirmed by the statutory structure, statutory history, regulatory precedent, and policy considerations. Moreover, any possible argument to the contrary cannot overcome not only all these rules of and aids to statutory construction but the inherent common sense that Congress would not have taken the extraordinary action of providing for multiple regulatory clearances applying the same statutory standard to the same transaction—contrary to its clearly stated statutory goal of eliminating duplication—without stating so expressly.

Thus, we believe that the FDIC's NPR has fundamental legal and policy flaws and should be withdrawn. Even if the FDIC disagrees with this analysis, it should not sidestep its stated commitment to pursuing an interagency process. We strongly recommend that the FDIC withdraw its NPR and pursue any future action in a joint process with the Federal Reserve and the OCC.

* * *

---

97 89 Fed. Reg. at 67,002. In addition, at the meeting at which the NPR was announced, Chairman Martin Gruenberg stated that the FDIC was "committed to engaging in dialog and coordination with the Federal Reserve and the Office of the Comptroller of the Currency to develop an interagency approach to these issues." FDIC Transcript at 123:10-15.

98 FDIC Transcript at 128:11-15; *see also Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Amendments to the Change in Bank Control Act Framework* (July 30, 2024), *available at* https://www.fdic.gov/news/speeches/2024/statement-jonathan-mckernan-director-fdic-board-directors-proposed-amendments ("We don't have ... interagency coordination here, so I am unable to support this proposal.").

99 *See* 89 Fed. Reg. at 67,002 n.2 ("The FDIC's commitment includes following standard notice and comment rulemaking practices *should* an interagency approach be developed and adopted.") (emphasis added); *see also* FDIC Transcript at 126:3-8 ("[T]he NPR asks a number of questions and seeks comments on ways to *potentially* more [sic] forward on an interagency basis to ensure consistency and coordination in the review of notices under the Change in Bank Control Act.").

We appreciate the opportunity to comment on the NPR. If you have any questions, please contact the undersigned by email at Gregg.Rozansky@bpi.com.

Respectfully submitted,

Gregg Rozansky
Senior Vice President
Senior Associate General Counsel
Bank Policy Institute