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FDIC proposes to expand its reach over some investments in bank holding companies

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The FDIC's proposed amendment to its CIBCA regulations would give the FDIC greater oversight of investments by non-bank investors in holding companies of FDIC-supervised institutions.

The Federal Deposit Insurance Corporation (FDIC) recently proposed and published a Federal Register notice for a proposed rule that would revise the agency's Change in Bank Control Act (CIBCA) regulations. Specifically, the proposed rule would add a second layer of review to any acquisition of securities of a holding company of an FDIC-supervised institution (i.e., state non-member banks and insured state savings associations) that would require notice to the Federal Reserve Board under the CIBCA. The FDIC also requested comment on 20 questions that cover topics ranging from interagency coordination to the use of passivity commitments to rebut the presumption of control under its CIBCA regulations.

Comments on the proposal must be received by October 18, 2024.

The proposed rule

The FDIC's proposed rule would eliminate the existing exemption for any acquisition of voting securities of a depository institution holding company for which the Federal Reserve Board reviews a CIBCA notice.

The effect of these proposed changes would be to provide the FDIC with discretion to require a CIBCA notice in addition to any CIBCA notice required by the Federal Reserve Board. The investors affected by the FDIC's proposed rule would be non-bank investors (i.e., investors other than bank holding companies (BHCs) or savings and loan holding companies (SLHCs)) that would trigger the requirement to file a CIBCA notice with the Federal Reserve Board in connection with the proposed acquisition of voting securities of an FDIC-supervised institution.

Under the CIBCA, a person that acquires control of an insured depository institution (IDI) or IDI holding company (a banking institution), either directly or indirectly or in concert with others, through a purchase of the banking institution's voting securities must provide the appropriate federal banking agency with 60 days' prior notice, during which the agency can disapprove the transaction. The appropriate federal banking agency for a state non-member bank or a state savings association is the FDIC, while the Federal Reserve Board is the appropriate federal banking agency for state member banks, BHCs and SLHCs, and the Office of the Comptroller of the Currency (OCC) is the appropriate federal banking agency for national banks and federal savings associations. The relevant agency then determines whether to deny the transaction. Each of the federal banking agencies has adopted CIBCA regulations that provide for a presumption of control—and therefore require a CIBCA notice to be filed—if, after the transaction, the acquiring person would (1) own, control or hold with power to vote 10 percent or more of any class of voting securities of the banking institution and (2) either:

(i) The banking institution is a public company (i.e., has securities registered under Section 12 of the Securities Exchange Act of 1934); or

(ii) No other person will own, control or hold the power to vote a greater percentage of that class of voting securities.

The CIBCA specifically defines the term "insured depository institution" to include any depository institution holding company (i.e., a BHC or SLHC) and any other company that controls an IDI and is not a depository institution holding company (e.g., the parent company of an industrial loan bank or industrial loan company). The CIBCA exempts, however, any transaction that is subject to Section 3 of the Bank Holding Company Act of 1956, the Bank Merger Act, or Section 10 of the Home Owners' Loan Act of 1933.

The FDIC's proposal generally would align the FDIC's CIBCA regulations with the OCC's current CIBCA regulations. The OCC's CIBCA regulations do not contain an explicit exemption from its CIBCA notice requirements for transactions where the Federal Reserve Board also reviews a CIBCA notice.[1] In practice, however, the OCC usually does not require a separate CIBCA notice if one is filed with the Federal Reserve Board.

The proposed rule means that the FDIC could request a CIBCA notice for the same transaction where the Federal Reserve Board also reviews a CIBCA notice. The proposed rule even would allow the FDIC to disapprove a transaction that the Federal Reserve Board otherwise would have allowed to occur. The possibility for interagency misalignment led Acting Comptroller of the Currency Michael Hsu to voice his disagreement with the proposed rule when it was originally put forward in April. Mr. Hsu, though, voted in favor of issuing the proposed rule at the July meeting after the preamble to the proposed rule was amended to state that the FDIC "recognizes the importance of interagency collaboration and consistency with respect to the review of transactions under" the CIBCA. The FDIC also committed in the preamble to "following standard notice and comment rulemaking practices should an interagency approach be developed and adopted." FDIC Chairman Marty Gruenberg confirmed that the FDIC "is committed to engaging in dialogue and coordination with the Federal Reserve and the [OCC] to develop an interagency approach to these issues."

In proposing these changes, the FDIC focuses on the distinction between transactions in which the Federal Reserve Board actually requires the filing and review of a CIBCA notice for prior approval of an acquisition of shares of a BHC or SLHC that owns an FDIC-supervised institution and transactions in which the Federal Reserve Board foregoes a CIBCA notice and permits an investor to rebut the presumption of control under the CIBCA regulations through, for example, entering into passivity commitments. In the preamble to the proposed rule, the FDIC noted that the current exemption under its CIBCA regulations "codifies the FDIC's policy that it does not require a notice when the [Federal Reserve Board] actually reviews a notice to acquire the voting securities of a depository institution holding company under the [CIBCA]. However, the exemption does not extend to [Federal Reserve Board] determinations to accept passivity commitments in lieu of a notice. In such cases, the FDIC evaluates the facts and circumstances to determine whether a notice is required to be filed with the FDIC for the indirect acquisition of control of an FDIC-supervised institution."[2]

Some investors have rebutted the CIBCA regulations' presumption of control by entering into passivity commitments with the FDIC or Federal Reserve Board. For example, an investor who acquires shares in the holding company of an FDIC-supervised institution would not be required to file a CIBCA notice with the Federal Reserve Board—even if the investment would otherwise trigger a presumption of control—if the investment complies with preexisting passivity commitments with the Federal Reserve Board. In that scenario, however, no CIBCA notice would be reviewed by the Federal Reserve Board, meaning that the FDIC's CIBCA notice exemption would not apply, and the investor could be required to file a CIBCA notice with the FDIC. If the proposal were adopted, an investor that triggers a presumption of control in the holding company under the CIBCA regulations may need to file a CIBCA notice with the FDIC—for an indirect change in control of the FDIC-supervised institution—even if the investor files a notice with the Federal Reserve Board. The Federal Reserve and OCC have not indicated whether they agree with the FDIC's proposed approach, and Mr. Hsu specifically based his approval of the proposal on the FDIC's commitment to pursue an interagency approach to this issue.

Statements made by both Director of the Consumer Financial Protection Bureau Rohit Chopra and Mr. Gruenberg also presage a more active and ongoing role by the FDIC in monitoring compliance with any passivity commitments. The more recent of the FDIC's own precedent passivity commitments contained requirements for the investor to certify its compliance with the passivity commitments on an annual basis. The Federal Reserve Board's practice with respect to passivity commitments is similarly to require an annual certification of compliance to be made to the appropriate Federal Reserve Bank. In his statement, however, Mr. Chopra opined that "any new agreements should not rely on 'self-certification' as the exclusive or primary means of ensuring compliance." In the same vein, Mr. Gruenberg stated, "The FDIC also intends to strengthen its passivity commitments with investors, by ending reliance on self-certifications by investors and ensuring that the FDIC has the ability to obtain the information necessary for examination staff to analyze the ongoing interaction between an investor and the institution."

Mr. Chopra also has argued that the proposed rule would help the FDIC address investments that would otherwise evade FDIC oversight. During an April FDIC Board meeting in which he initially proposed the rule, Mr. Chopra discussed how Alameda Research was able to invest in an FDIC-supervised bank while avoiding FDIC review. Alameda Research did this by investing in the bank's holding company and filing a notice with the Federal Reserve Board, and thus making use

of the FDIC's exemption. Mr. Gruenberg echoed Mr. Chopra's point in his statement about the proposed rule, arguing that "it is important that the FDIC, as the primary federal regulator of state non-member banks, closely review who is exercising direct or indirect control over its supervised institutions."

Request for comments

The FDIC also seeks comment on the following topics:

- **Interagency coordination**.
  - What steps the FDIC could take to avoid duplication of regulatory reviews.
  - Whether the FDIC and other appropriate federal banking agencies should consider establishing specific criteria (e.g., percentage of the assets of the IDI in relation to the consolidated assets of the holding company) that would determine whether notice needs to be filed at the holding company level or the IDI level.
  - What steps the FDIC and other appropriate federal banking agencies can take to ensure consistency in the review of CIBCA filings.
- **Rebuttal of presumption of control**.
  - What methods investors should be allowed to use to rebut the presumption of control (e.g., no-action letters, agency opinions).
  - What the FDIC should consider when determining whether an investor adequately has rebutted the presumption of control.
- **Passivity commitments**.
  - Whether the existing regulatory framework should impose additional requirements or criteria to address concerns of passive investors exerting direct or indirect control over FDIC-supervised institutions.
  - Whether the FDIC should change the requirements it has in place for passivity commitments that are used to rebut the presumption of control.
  - What provisions (e.g., monitoring provisions) should be included in passivity commitments to ensure compliance with the written agreements.
  - Whether an investor should be allowed to enter into blanket passivity commitments or whether an investor should be required to enter into a new passivity commitment each time the investor invests, directly or indirectly, in an FDIC-supervised institution.
- **Concentrated ownership**.
  - Whether the FDIC should monitor more closely the ways in which investors are coordinating voting or otherwise acting in concert.
  - Whether concentrated ownership of FDIC-supervised institutions has affected banking sector competition, corporate governance of FDIC-supervised institutions or other safety and soundness considerations.
- **Limited voting power**.
  - Whether the FDIC should limit the voting power of persons who invest in 10 percent or more of any class of voting securities of an FDIC-supervised institution or its controlling affiliate.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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[1] *See* 12 C.F.R. §§5.50(c)(2)(iii) and (e)(2)(i); *see also* OCC, *Comptroller's Licensing Manual: Change in Bank Control* (Feb. 2023), pp. 3-5.

[2] Regulations Implementing the Change in Bank Control Act, 89 Fed. Reg. 67002, 67003 (proposed Aug. 19, 2024) (footnotes omitted). The description of the FDIC's policy is consistent with how the FDIC explained its interpretation of the exemption in a 2015 final rule that amended its CIBCA regulations to provide for the transfer of supervision of state savings associations from the Office of Thrift Supervision to the FDIC. 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).