October 24, 2024

James P. Sheesley
Assistant Executive Secretary
Attn: Change in Bank Control Act — RIN 3064-AG04
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Submitted via email to comments@fdic.gov

Re: Amendment to Regulations Implementing the Change in Bank Control Act — RIN 3064-AG04

Dear Mr. Sheesley:

BlackRock, Inc. (together with its affiliates, "**BlackRock**")[1] respectfully submits its comments to the Federal Deposit Insurance Corporation ("**FDIC**") in response to the FDIC's proposed amendment to the regulations governing change in control notices filed under the Change in Bank Control Act of 1978[2] ("**CBCA**") and related request for information (collectively, the "**Proposal**").[3] The Proposal would remove the exemption from the FDIC's CBCA notice requirements for acquisitions for which the Board of Governors of the Federal Reserve System ("**FRB**") reviews a CBCA notice. It also announces that the FDIC is "reconsider[ing] its policies under the CBCA" in certain other respects, and requests information and comment regarding the FDIC's approach to CBCA notices.[4]

Our letter proceeds in four parts. Part I provides an overview of the current CBCA framework and its benefits for investors, the banking system, and the broader economy. Part II describes the FDIC's proposed changes to the CBCA regime and its stated aims in proposing to revise the framework. Part III explains BlackRock's passivity under the CBCA framework, and the ways our investment stewardship approach and compliance with relevant legal and regulatory frameworks reinforces this passivity. Part IV sets forth BlackRock's comments on the Proposal.

BlackRock strongly opposes the Proposal, which we believe would harm investors, disrupt the flow of capital to the economy, and undermine the efficacy of the CBCA framework.

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[1] BlackRock is one of the world's leading asset management firms. We manage assets on behalf of individual and institutional clients across equity, fixed-income, liquidity, real estate, alternatives and multi-asset strategies. We manage retirement funds on behalf of millions of Americans. BlackRock is a minority, non-controlling shareholder in the public companies we invest in on behalf of our clients.
[2] 12 U.S.C. 1817(j).
[3] Regulations Implementing the Change in Bank Control Act, 89 Fed. Reg. 67002 (Aug. 19, 2024), available at: https://www.govinfo.gov/content/pkg/FR-2024-08-19/pdf/2024-18187.pdf
[4] 89 Fed. Reg. 67002, 67004.

Part IV describes how the Proposal would lead to these negative consequences by creating regulatory and market uncertainty and discouraging investments in bank securities. It first explains how the Proposal would harm individual investors and banks' access to capital, and then raises discrete concerns with the Proposal that exacerbate these effects.

BlackRock recommends that the FDIC promptly withdraw the Proposal, in light of the significant risks that it poses for investors, banks and the U.S. economy. As our letter describes, we believe the current CBCA framework works well for investors and the banking industry, and that changes to the framework are not necessary. If, however, the agencies jointly determine that revisions to the CBCA framework are appropriate, we recommend that they pursue any related changes through a public notice-and-comment rulemaking that is jointly issued by the FRB, FDIC and Office of the Comptroller of the Currency ("**OCC**").

I. The Current CBCA Framework Serves Investors, Banks and the Real Economy

A. The Current CBCA Framework

1. CBCA "Change in Control" Review

The CBCA establishes a framework for the federal banking agencies (the FRB, FDIC and OCC) to review potential changes in control of insured depository institutions and their holding companies (which we refer to, for simplicity's sake, as "banks"). The statute generally provides that no person, acting directly or indirectly, may acquire control of a bank unless the person has provided the "appropriate federal banking agency" prior notice of the proposed transaction and the agency has not disapproved the transaction.[5] "Control" in this context means the power, directly or indirectly, to (i) "direct the management or policies" of the institution or (ii) vote 25% or more of any class of the institution's voting securities.[6] Under each federal banking agency's regulations, "control" under prong (i) is presumed if a person owns, controls, or holds the power to vote 10% or more of any class of the institution's voting securities and the institution has registered securities with the SEC.[7] A person may rebut this presumption of control in writing, including (at the agency's discretion) by entering into a "passivity agreement" with the appropriate federal banking agency.

For acquisitions in publicly traded banks that would result in a person holding 10% to 25% of a class of voting securities in such institution, that person must either: (i) provide notice to the appropriate banking agency by filing a "CBCA Notice" with that agency and not receive objection from the agency; or (ii) rebut the presumption of control. Each agency's regulations set forth its filing requirements and processing procedures for CBCA Notices. They generally require the person to file a notice with the agency that provides

[5] 12 USC 1817(j).
[6] 12 USC 1817(j)(8)(B).
[7] Each federal banking agency's regulations also presume control if a person owns, controls or holds the power to vote 10% or more of any class of voting securities of the institution and no other person will own, control, or hold a greater percentage of that class of voting securities after the transaction.

details about the proposed acquisition and the person (including their financial and other background information) in advance of the proposed transaction.[8] The person must also publish an announcement seeking public comment on the proposed acquisition.[9] The agency then has the opportunity to disapprove the transaction. If the agency has not disapproved the transaction within 60 days (or such longer period if extended by the agency), the acquisition can proceed.[10] In BlackRock's experience, the timeline for an agency's review of a CBCA Notice can range from several months to well over a year. The CBCA Notice process is thus time- and resource-intensive, subject to delays and potential disapproval, and provides authorization for an acquisition in only a single issuer's securities at a time.

As noted above, the federal banking agencies have permitted persons to rebut the presumption of control under their respective regulations by entering into a "passivity agreement." A passivity agreement is a written agreement between the acquiring person and the appropriate federal banking agency, in which the person undertakes commitments to demonstrate that they will not control the banks in which they hold 10% or more of a class of voting securities. For example, a person may commit not to have any employee or officer interlocks with the banks covered by the agreement, not to influence certain bank policies, and not to acquire additional securities beyond a set threshold without agency approval. In light of these commitments, the agency agrees that it will *not* treat the person's future acquisitions that fall within the parameters of the letter as triggering "control" under CBCA.

Asset managers that do not seek to control banks, including BlackRock, commonly comply with CBCA by entering into a passivity agreement with the appropriate agency. Doing so allows them to acquire bank shares on behalf of clients in the ordinary course of business, without encountering the uncertainty and delays of the CBCA Notice process for every investment that could breach the 10% threshold. Part I.B. describes this practice further.

2. *"Appropriate Federal Banking Agency"*

The agency responsible for reviewing an acquisition under CBCA depends on the type of banking institution in which the investment is made. The FRB is the "appropriate federal banking agency" for (among other categories) bank holding companies, savings and loan holding companies, and state banks that are members of the Federal Reserve System.[11] The OCC is the "appropriate federal banking agency" for national banks, federal savings associations, and federal branches and agencies of foreign banks.[12] The FDIC is the "appropriate federal banking agency" for state nonmember banks, state savings associations, and foreign banks with insured branches.[13] The term "appropriate federal banking agency" is defined by statute, not by agency regulation.[14]

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[8] 12 U.S.C. 1817(j)(6); 12 CFR § 303.85. In this letter we refer to the FDIC's CBCA regulations; the FRB and OCC have analogous regulations.
[9] *See* 12 CFR § 303.87.
[10] *See* 12 CFR § 303.86.
[11] 12 U.S.C. 1813(q)(3).
[12] 12 U.S.C. 1813(q)(1).
[13] 12 U.S.C. 1813(q)(2).
[14] *See* 12 U.S.C. 1813(q).

It is common for U.S. banking institutions (like many companies) to have an organizational structure that includes multiple corporate entities—specifically, a holding company parent that owns various subsidiaries. Almost all (95%) U.S. publicly-traded banks have such a holding company, for which the FRB is the "appropriate federal banking agency."[15] These holding companies typically own one or more bank subsidiaries. Any one of the three banking agencies may be the "appropriate federal banking agency" for a particular bank subsidiary, according to the definitions above.

The FDIC has said it holds the view that "[b]ecause the CBCA applies to direct or indirect acquisitions of control," the FDIC may "review Notices for an acquisition of control of any company that directly or indirectly controls" an FDIC-supervised institution.[16] This reading of CBCA suggests the FDIC may conduct its own review of a potential change in control of a bank holding company that owns an FDIC-supervised bank, in addition to the FRB's review of the acquisition of shares in the holding company. The FDIC's reading of the CBCA statute is not universally shared.[17] Some question whether the FDIC has the statutory authority to exercise a second level of approval authority, with the FRB, over investments in FRB-supervised holding companies that have FDIC-supervised bank subsidiaries.[18]

Regardless of the debate around the scope of the FDIC's jurisdiction, persons acquiring 10% or more of the voting securities of an FRB-supervised holding company have historically complied with CBCA by either filing a CBCA Notice or entering into a passivity agreement with *only* the holding company's "appropriate federal banking agency"—i.e., the FRB. For example, various asset managers, including BlackRock, have entered into passivity agreements with the FRB to govern these holdings. They have not separately been required to file CBCA Notices or enter into a passivity agreement with the FDIC or OCC for purchases of bank stocks issued by holding companies, even when the holding company owns an FDIC- or OCC-supervised bank. The Proposal would change this framework and lead to duplicative reviews (and, potentially, conflicting findings between agencies), as described in Part II.

B. Benefits of the Current CBCA Framework

The established CBCA framework ensures robust agency review of potential changes in bank control, while preserving a clear path for purchases of bank securities by those, like BlackRock, that neither exercise control over banks, nor seek to. This framework allows individual investors to gain cost-effective economic exposure to U.S. bank stocks, provides these banks with access to long-term, stable shareholder capital, and facilitates the flow of capital through the U.S. economy.

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[15]Acting Comptroller Issues Statement on the FDIC's Proposals Related to Change in Bank Control Act (April 25, 2024). https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-43.html
[16] 89 Fed. Reg. 67003.
[17] *See, e.g.*, Sullivan & Cromwell, FDIC Proposes to Expand Change-in-Bank-Control Review (July 31, 2024). https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/FDIC-Proposes-Expand-Change-in-Bank-Control-Review.pdf
[18] *Id.*

The ability for asset managers to maintain CBCA compliance by entering into a passivity agreement with the FRB is central to the framework's efficacy. Asset managers must be able to acquire securities on clients' behalf quickly and with certainty in order to execute investment strategies efficiently and without incurring unnecessary costs. Filing a CBCA Notice for every transaction that could implicate the CBCA framework would be impracticable. For example, the management of an index strategy may require frequent portfolio rebalancing to track the benchmark index—awaiting agency approval for months or over a year is not a viable option. A passivity agreement authorizes multiple, future securities purchases pursuant to clear, legally-binding terms, so asset managers may efficiently execute transactions on clients' behalf. The clarity and certainty afforded by these agreements is further strengthened by asset managers' ability to rely on a single passivity agreement with the agency that supervises the entity in whose stock the manager's funds and accounts have invested.

This framework has benefited individual investors by allowing them to gain economic exposure to bank stocks in an efficient and cost-effective manner. For example, investors in index funds may gain low-cost exposure to a range of U.S. bank stocks that are included in a particular index. The current CBCA framework helps to maximize investor returns by, *inter alia*, facilitating the timely execution of transactions in these stocks and minimizing expenses for regulatory filings. In doing so, the CBCA framework reinforces the broader benefits that index investing has provided for retail investors, such as lower fund expense ratios (and associated higher returns net of expenses) and greater diversification (which generally reduces unsystematic risk).[19] Notably, scale economies in asset management have contributed to these benefits—for example, fund expenses are strongly negatively related to fund size.[20]

The current CBCA framework also facilitates banks' access to stable, long-term capital, which supports their resilience and ability to provide financing to the U.S. economy. Index funds and other long-term investors comprise a stable shareholder base, which can help modulate banks' cost of capital. This helps banks maintain prudent capital levels to support their lending to households and small businesses. Investments by index funds and other long-term investors can therefore foster prudent risk management and help promote safety and soundness in the banking system through the exercise of market discipline.

The impacts of the Proposal for individual investors, U.S. banks, the existing CBCA framework, and the broader economy are further discussed in Part IV.

II. The Proposal and Related FDIC Actions

A. Stated Aims of the Proposal

As described below, the Proposal would revise the FDIC's CBCA regulations to expand the agency's review of certain bank investments. According to the Proposal, this expanded

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[19] Adiraju, S., D. Blass, S. Cohen, A. Madhavan & S. Ramji, "On the Benefits of Scale Economies in Asset Management" (April 2022), The Journal of Portfolio Management at 3.
[20] *See id*. at 4-6; 15.

FDIC review is necessary in light of index funds' increased ownership stakes in FDIC-supervised institutions and the purported risks of this shareholder composition.

In particular, the Proposal expresses concern that "fund complexes" (*i.e.*, companies that manage, advise, or sponsor multiple index funds) could "exercise significant influence or control over management, business strategies, or major policy decisions" at FDIC-supervised institutions, which "could increase the risk profile at such institutions and lead to excessive risk-taking to enhance profits, investor returns, or stock price."[21] The Proposal also posits that continued purchases of bank stocks by index funds could potentially "create a concentration of ownership that may result in such investors having excessive influence or control over the banking industry as a whole."[22]

The Proposal does not present empirical support for these concerns or further detail the correlation between index fund growth and the risks that it identifies. Yet the FDIC states that changes to the CBCA framework are warranted due to "the widespread impacts resulting from growth in, and changes to the nature of, passive investment strategies."[23]

B. Summary of the Proposal

The Proposal would expand the FDIC's review of indirect investments in banks that it supervises by removing a key exemption in the FDIC's regulations implementing the CBCA. Under this provision, acquisitions of voting securities of a holding company for which the FRB reviews a CBCA Notice are currently exempt from the requirement to file a CBCA Notice with the FDIC. This exemption is implicated, for instance, when a person acquires shares in a bank holding company that controls a state nonmember bank. The FDIC adopted this exemption in 2002 to codify its longstanding practice not to require a CBCA filing under such circumstances.[24] In adopting the exemption, the FDIC noted that it would be an "unnecessary duplication" for an acquirer to file a CBCA Notice with the FDIC if the FRB had reviewed a CBCA Notice for the same transaction.[25]

Removing this exemption would subject certain transactions to duplicative CBCA Notice reviews. For example, a person acquiring shares of a bank holding company that owns an FDIC-supervised bank could be required to file two CBCA Notices, one with the FRB and one with the FDIC. The FDIC has stated it would "independently review" the notice regarding the FDIC-supervised bank, meaning the FDIC could theoretically block an investment in an FRB-supervised holding company even if the FRB had permitted the investment.[26]

The Proposal also states that the FDIC is "reconsider[ing] its policies under the CBCA and implementing regulations" in related respects.[27] In particular, the Proposal indicates that

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[21] 89 Fed. Reg. 67004-67005.
[22] 89 Fed. Reg. 67005.
[23] 89 Fed. Reg. 67005.
[24] 67 Fed. Reg. 79272, available at: https://www.fdic.gov/federal-register-publications/fdic-federal-register-citations-9238
[25] 67 Fed. Reg. 79272, available at: https://www.fdic.gov/federal-register-publications/fdic-federal-register-citations-9238
[26] 89 Fed. Reg. 67005.
[27] 89 Fed. Reg. 67004.

the FDIC will enhance its review of "indirect" acquisitions of FDIC-supervised institutions in situations where the FRB has accepted a passivity agreement in lieu of a CBCA Notice. The FDIC notes that the exemption it proposes to remove does not apply to such situations—when the FRB accepts a passivity agreement instead of a CBCA notice, the FDIC instead "evaluates the facts and circumstances to determine whether a Notice is required to be filed with the FDIC."[28] However, the FDIC has typically declined to require CBCA Notices in these circumstances. According to the Proposal, the FDIC is reconsidering "the facts and circumstances under which it will require a Notice" and the agency "believes it is appropriate to review proposed acquisitions under the CBCA more closely."[29] This indicates that the FDIC intends to apply greater (and duplicative) scrutiny to indirect acquisitions of FDIC-supervised institutions, regardless of the FRB's review of a CBCA Notice or acceptance of a passivity agreement.

After setting forth the proposed rule and policy changes, the Proposal presents twenty questions for public comment. The questions are intended to inform the FDIC's "comprehensive review of its overall regulatory and supervisory approach" to issues arising under CBCA.[30] They address issues such as the use of passivity agreements, appropriate terms to incorporate into such agreements, and the monitoring of change in control-related issues.[31]

The Proposal would substantively impact the FRB's review of transactions under CBCA—for example, the FDIC would be able to delay or prevent a transaction that the FRB had otherwise approved. However, the Proposal is structured as an FDIC rulemaking rather than a joint rulemaking, and it does not specify whether or how the FDIC will coordinate with the FRB in conducting duplicative CBCA reviews. Although the FDIC states in the Proposal that it "recognizes the importance of interagency collaboration and consistency with respect to the review of transactions under the CBCA and is committed to engaging in dialogue and coordination with the FRB and [OCC] to develop an interagency approach to the issues discussed in this proposal,"[32] it does not provide any further details on the FDIC's efforts to coordinate with the other agencies.

C. The FDIC's Actions Outside of the Rulemaking Process

In his July 30 remarks introducing the Proposal, FDIC Director Rohit Chopra announced that "as a companion to the Proposal," the FDIC would be "notifying firms about additional oversight with respect to so-called 'passivity' agreements on future acquisitions and changes in control."[33] He elaborated that, going forward, "certain firms" would need to either file a CBCA Notice or rebut the presumption of control with respect to any direct or indirect investment in an FDIC-supervised bank. The FDIC would be "open to negotiating

[28] 89 Fed. Reg. 67003.
[29] 89 Fed. Reg. 67004, 67005.
[30] 89 Fed. Reg. 67006.
[31] 89 Fed. Reg. 67006, 67007.
[32] 89 Fed. Reg. 67002.
[33] 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). https://www.consumerfinance.gov/about-us/newsroom/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/

new agreements" to rebut the presumption of control, but "any new agreements should not rely on 'self-certification' as the exclusive or primary means of ensuring compliance." Director Chopra's statements echo a view originally articulated by FDIC Director Jonathan McKernan that the FDIC should "monitor [asset managers'] compliance with…passivity commitments."[34] In his July 30 remarks, Director Chopra also announced that the FDIC would "seek information from other firms regarding their current investments and stewardship activities."

On August 2, BlackRock received the letter that Director Chopra described. One other asset manager reportedly received a similar letter. As anticipated, the letter to BlackRock requests information regarding BlackRock's holdings and investment stewardship activities with respect to FDIC-supervised institutions and their FRB-supervised holding companies. It also notifies BlackRock that, as of a specified date, the FDIC will require submission of a CBCA Notice, or the rebuttal of the presumption of control, with respect to any acquisition by BlackRock of voting securities of any FDIC-supervised institution (or its holding company) that gives rise to a presumption of control under the FDIC's regulations implementing CBCA. The letter states:

> The FDIC will consider accepting passivity commitments from BlackRock in connection with any rebuttal of the presumption of control. However, we expect to incorporate provisions that will enable the FDIC to verify that BlackRock is abiding by its passivity commitments on an ongoing basis.

BlackRock has been engaging with the FDIC to respond to its information request and to ensure our continuing compliance with CBCA, although it is not clear how this FDIC process relates to or will be informed by the information the FDIC has requested on the same issues in the Proposal described above.

III. BlackRock's Passivity under CBCA

BlackRock purchases shares in banks on our clients' behalf, in order to provide them with economic exposure to bank stocks in accordance with their investment objectives. BlackRock does *not* make these investments in order to exercise control over banks' management or operations. As a minority shareholder, BlackRock does not direct the day-to-day management or policies of these banks. In this Part III, we explain how our investment stewardship activities and compliance with legal and regulatory frameworks reinforce our role as a passive investor under the CBCA framework.

A. Investment Stewardship at BlackRock

BlackRock's fiduciary responsibilities to our clients include making proxy voting determinations, on behalf of clients who have delegated voting authority to us, in a

[34] *See, e.g.*, Remarks by Jonathan McKernan, Director, FDIC board of Directors, at the Session on Financial Regulation at the Annual Meeting of the Association of American Law Schools (Jan. 5, 2024); Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on His Proposal to Enhance Monitoring of Compliance with Passivity Commitments and Other Conditions in FDIC-Control Comfort (April 25, 2024). https://www.fdic.gov/news/speeches/2024/statement-jonathan-mckernan-director-fdic-board-directors-his-proposal-enhance

manner that is consistent with their investment objectives. As part of these fiduciary responsibilities, BlackRock's investment stewardship team encourages sound corporate governance practices at portfolio companies that, in its experience, protect investors' interests and long-term financial value creation. The stewardship team does this through engagement with companies and, for those clients that have given BlackRock voting authority, through voting proxies on their behalf. As one of many minority shareholders, Blackrock cannot – and does not try to – direct a company's strategy or its implementation.

BlackRock's stewardship team has been an industry leader in providing transparency relating to its activities. To supplement the disclosures required under law and regulation, the team voluntarily publishes additional information on its voting and engagement records, describes its engagement priorities, and provides detailed rationales for many of the high-profile votes cast on BlackRock's clients' behalf.

BlackRock's investment decisions and our stewardship engagement and voting are governed strictly by our fiduciary duties to clients. BlackRock does not coordinate our voting, engagements, or investment decisions with other asset managers, asset owners or external groups or organizations. BlackRock participates in industry initiatives to contribute to a dialogue on matters that BlackRock believes could impact the long-term economic value of our clients' portfolios. BlackRock does not make any commitments or pledges that impact our ability to make independent decisions about how to carry out our fiduciary duties to our clients.

BlackRock has also taken measures to provide clients with greater choice when it comes to proxy voting through BlackRock Voting Choice. BlackRock Voting Choice is a proprietary offering that provides eligible clients with opportunities to participate in proxy voting where legally and operationally viable. We launched BlackRock Voting Choice in 2022 for select institutional clients and expanded it in 2024 to over three million U.S. retail shareholder accounts invested in iShares Core S&P 500 ETF (IVV). As of March 31, 2024, $2.8 trillion assets under management are eligible for Voting Choice, representing nearly half of BlackRock's index equity assets under management.

BlackRock Voting Choice makes the proxy voting process easier and more accessible for eligible clients. Eligible clients may choose one of four options: (1) clients may choose and implement their preferred voting policy; (2) clients can direct votes; (3) clients may choose from a slate of third-party policies; or (4) clients can rely on BlackRock's stewardship team for all of their voting decisions. This program underscores BlackRock's client-first approach to investment stewardship and our commitment to a future where every investor can participate in the proxy voting process if they so choose.

B. The Role of Legal and Regulatory Passivity Frameworks

BlackRock's passive investments in banks are governed by a robust legal and regulatory structure, including the framework established under Section 13 of the Securities Exchange Act of 1934. These rules generally require investors to disclose 5% and greater ownership positions in U.S. public companies. Investors that intend to control companies must file these disclosures on Schedule 13D; those that do not intend to control companies may report on Schedule 13G.

BlackRock files Schedules 13G with respect to its holdings in publicly-traded banks because BlackRock is a passive investor in these stocks, and our eligibility to report on this form hinges on us remaining one. Indeed, in filing these Schedules 13G, BlackRock must certify that the securities we hold on behalf of clients "were acquired and are held in the ordinary course of business and were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities."[35] Notably, BlackRock has never taken the kinds of actions that would require the filing of a Schedule 13D with respect to any financial institution supervised by any of the federal banking agencies, including the FDIC.

BlackRock also complies with extensive legal and regulatory requirements that specifically govern investments in U.S. banking institutions, including the CBCA and its implementing regulations. As described in Part I, BlackRock has entered into a passivity agreement with the FRB to rebut the presumption of control under CBCA with respect to its 10% or greater holdings in bank holding companies or other FRB-regulated institutions. BlackRock's passivity agreement is publicly available on the FRB's website.[36] The agreement sets forth a number of commitments that BlackRock makes to limit its ability to control these institutions. For example, BlackRock agrees not to: (i) acquire more than 15% of any such institution's voting securities without the FRB's prior nonobjection; (ii) have or seek to have any representative serve as an officer, agent or employee of any such institution; (iii) propose a director or slate of directors in opposition to those proposed by the institution's management or board of directors; (iv) solicit or participate in soliciting proxies with respect to any matter presented to shareholders; (v) attempt to influence the institution's loan, credit, or investment decisions or policies, personnel decisions, or similar activities or decisions; or (vi) exercise or attempt to exercise a controlling influence over the management or policies of such institutions, among other commitments and conditions.[37]

BlackRock maintains robust compliance programs to ensure we adhere to our commitments to the FRB and other passivity requirements. For example, we hold a mandatory live training session on the FRB passivity commitments for all stewardship team members who have proxy voting and engagement responsibilities. All stewardship team members are required to attest that they attended the training session, understand the covered material, and have escalated any possible or suspected breaches to the appropriate parties. BlackRock's stewardship team must also annually attest that they are in compliance with our commitments to the FRB. BlackRock also conducts annual training for its stewardship team regarding other passivity standards applicable across industries, such as the SEC framework described above.

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[35] *See* 17 CFR § 240.13d-102 Schedule 13G.

[36] Letter from Mark Van Der Weide, FRB, to William J. Sweet, Skadden, Arps, Slate, Meagher, and Flom LLP (Dec. 3, 2020). https://www.federalreserve.gov/supervisionreg/legalinterpretations/blackrock-letter-20201203.pdf

[37] *Id.*

IV. BlackRock's Comments on the Proposal

BlackRock strongly opposes the Proposal, which would harm investors, disrupt the flow of capital to the economy, and undermine the efficacy of the CBCA framework. Part IV describes how the Proposal would lead to these negative consequences by creating regulatory and market uncertainty and discouraging investments in bank securities. We begin by explaining how the Proposal would harm individual investors and banks' access to capital. We then raise discrete concerns with the Proposal that exacerbate these effects.

We recommend that the FDIC promptly withdraw the Proposal in light of the significant risks that it poses for investors, banks and the U.S. economy. As described in Part I, we believe the current CBCA framework works well for investors and the banking industry, and that changes to the framework are not necessary. If, however, the agencies jointly determine that revisions to the CBCA framework are appropriate, we recommend that they pursue any related changes through a joint notice-and-comment rulemaking that conforms with the requirements of the Administrative Procedure Act, which necessarily must include a full evaluation of the impacts we describe in this letter as well as alternative means for achieving the agencies' policy objectives relative to the FDIC's Proposal.

A. The Proposal Would Impose Significant Costs and Risks on Individual Investors

The Proposal provides two potential paths for an asset manager to indirectly acquire 10% of any class of voting securities of an FDIC-supervised bank or FRB-supervised holding company that controls an FDIC-supervised bank: filing transaction-by-transaction CBCA Notices or entering into a passivity agreement with the FDIC that likely would be duplicative of an existing agreement with the FRB. Both paths are fraught with uncertainty and practical limitations that could discourage investment in bank stocks and harm investor outcomes.

Requiring asset managers to file a CBCA Notice for any transaction that could breach the 10% threshold would introduce untenable delays, costs, and uncertainty that would harm outcomes for end investors. Such a requirement would materially delay funds' ability to execute their investment strategies, likely harming fund performance and shareholder returns. For example, the need to file a CBCA Notice could postpone an index fund's implementation of an index rebalancing event. This occurs when an index provider updates its index to ensure that the index's composition adequately reflects its stated methodology. Such index rebalances occur regularly—when they do, a fund that tracks that index will seek to expeditiously reconfigure its portfolio holdings to match the rebalanced index, in accordance with its investment objectives. Delays in executing these transactions could result in the fund holding such securities in a smaller proportion relative to its benchmark over time. This could not only increase the amount of cash in the fund's portfolio, which would earn less than if it were invested in the market ("cash drag"), but also result in the fund deviating from its investment objective.

More fundamentally, the FDIC has created significant uncertainty as to whether a particular proposed acquisition above 10% would be permitted at all. The FDIC may choose to disapprove any or all CBCA Notices, and it has wide latitude in determining the contours of any passivity agreements that it will accept. This creates significant risk for fund managers to surpass the 10% threshold, and meaningfully increases the costs of

such transactions for fund shareholders. In the face of such uncertainty, it may be difficult for fund advisers to determine that purchases of covered bank stocks above the regulatory threshold would be consistent with their fiduciary duties to clients. They may instead reasonably conclude that such acquisitions would not be in the best interest of fund shareholders, and treat the 10% threshold as a *de facto* regulatory cap.

By constraining fund investments in this manner, the FDIC's actions would create substantial risks and costs for individual investors. For example, if an index fund is unable to hold an index component or to hold it at a weight that aligns with its weight in the index, the fund will experience tracking error. Tracking error increases overall portfolio risk and can negatively impact investor returns. In addition, if a fund cannot gain the proper exposure to a security directly, it may instead seek indirect exposure to the security by, for instance, using derivatives where available. The use of derivatives to replicate index exposure is associated with distinct costs, risks, and tax consequences from purchasing securities directly. Artificial constraints on a fund's index replication method may lead to suboptimal outcomes for the fund and its end investors.

B. The Proposal Could Disrupt the Flow of Capital to the Economy and Undermine Bank Safety and Soundness

The FDIC's actions could also distort and potentially depress bank securities markets, to the detriment of FDIC-supervised banks (or their holding companies) that raise capital in the U.S. stock market. As described above, the risks and uncertainty associated with holdings in FDIC-supervised bank stocks could discourage asset managers from holding positions in those securities above the 10% level. This decrease in buy-side demand could impair the liquidity of these bank stocks and drive down their prices. This would limit these banks' ability to raise capital in the U.S. stock markets and increase their cost of capital more generally.

Shareholder capital comprises a critical element of banks' capital structure—it supports their ability to extend credit to the real economy, provides a buffer to absorb potential losses, and promotes their resolvability. Measures that restrict investments in bank stocks can thus disrupt the flow of capital to the real economy and undermine bank safety and soundness. The FDIC's proposal to restrict its supervised institutions' access to capital is difficult to square with its mission to maintain stability and public confidence in the nation's financial system.

Notably, these effects would be broadly and unevenly distributed across banks, exacerbating the market distortions and economic consequences. The universe of impacted U.S. banks could be large—based on data sourced from the leading commercial provider of bank regulatory data, we estimate that nearly 200 FDIC-supervised banks have a publicly-traded bank holding company. However, stock issued by banks with only FRB- and OCC-supervised entities would not experience a similar decline in price and liquidity. This disparate access to stable investment capital among banks would not only competitively disadvantage certain banks, but it could impact their ability to lend to customers. Communities that rely on FDIC-supervised institutions could experience less favorable credit terms and greater exposure to a potential bank failure. Over time, the negative consequences of FDIC supervision would likely grow more pronounced, as the

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trading discount for these banks deepened. This could inform banks' decisions, such that fewer will opt for a charter that results in FDIC supervision.[38]

Measures like the Proposal that would destabilize banks' access to shareholder capital run counter to the FDIC's mandate. Indeed, FDIC board members have emphasized the importance of the banking industry's access to investment capital. For example, Acting Comptroller of the Currency and FDIC Director Michael Hsu recently stated:

> The [CBCA] assigns jurisdiction over CBCA notices to each of the OCC, FDIC, and FRB based on which agency is the appropriate federal banking agency for the affected institution. Regulators should work to ensure a level playing field where all institutions subject to the CBCA have equal access to investment capital.[39]

In declining to support an earlier version of the Proposal, FDIC Vice Chairman Travis Hill also warned against the "consequences of actions that could discourage capital from coming into the banking industry," noting that "the willingness of outside capital to invest in banks is critical to our capital framework and financial stability."[40] In our view, the Proposal directly undermines the interests highlighted by Directors Hsu and Hill—it would not only restrict banks' access to outside capital, but would affect certain banks more acutely than others.

C. The FDIC's Unsound Administrative Process Exacerbates the Proposal's Potential Negative Consequences for Investors, Banks, and the Economy

As outlined above, we believe the Proposal, in principle, is misguided and likely to harm investors, banks, and the economy. We strongly recommend that the FDIC withdraw it. In addition, we find that discrete elements of the Proposal could exacerbate its potential negative consequences. This section reviews these concerns and sets forth BlackRock's recommendations regarding the appropriate interagency process to govern potential changes to the CBCA framework.

1. The Proposal Insufficiently Reflects Interagency Coordination.

The Proposal is an independent FDIC action that would alter an inherently multi-agency framework—this unilateral approach is likely to exacerbate the Proposal's negative consequences. As described in Part I, each of the three federal banking agencies has a role in administering the CBCA, and they have historically sought consistency and coordination in their CBCA reviews. Although the Proposal professes a "commit[ment]" to interagency coordination, the Proposal and the FDIC's related actions do not demonstrate sufficient coordination with either the FRB or OCC. On the contrary, the Proposal is designed to enable the FDIC to review transactions that the FRB already reviews under the

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[38] For example, state nonmember banks could apply for FRB membership to be regulated by the FRB or convert to a national charter to be regulated by the OCC.
[39] Letter from Michael Hsu, Acting Comptroller of the Currency, to the Honorable Patrick McHenry, Chairman of the Committee on Financial Services, U.S. House of Representatives (July 25, 2024).
[40] Statement by Vice Chairman Travis Hill on Proposals Related to Change in Bank Control Act (April 25, 2024).

current CBCA framework. It therefore lays the groundwork for duplicative and potentially inconsistent CBCA reviews, rather than a coordinated interagency process.

The Proposal's potential to cause inconsistent applications of CBCA by the agencies would exacerbate the market uncertainty that the Proposal could create. It would lead to situations where a person may need to file two CBCA Notices, one with the FRB and one with the FDIC, to exceed the 10% threshold in a stock issued by an FRB-supervised holding company with an FDIC-supervised subsidiary. Each agency's review would likely occur "independently" and on a different timeline. One agency would also be able to disapprove and prevent a transaction that the other would have permitted. This potential for divergent approaches could lead to volatility in impacted banks' securities and generally discourage investment in these banks. And, of course, it is hard to understand any justifying rationale that a single statute could lead to two different outcomes by two agencies reviewing the same factors, which underscores the deficiency of the FDIC's Proposal.

The Proposal's suggestion that the FDIC will review acquisitions governed by a passivity agreement with the FRB is particularly concerning. Moreover, the FDIC's letter to BlackRock confirms that the agency will, in certain cases, independently review such transactions. As the Proposal notes, the FDIC has typically not required asset managers with FRB passivity agreements to file a CBCA Notice or rebut the presumption of control with respect to investments in FRB-supervised holding companies that control FDIC-supervised subsidiaries. We are unaware of any situations when the FDIC has done so. But going forward, the FDIC would likely encourage asset managers to either file a CBCA Notice or enter into a separate passivity agreement with the FDIC to rebut the presumption of control for their indirect holdings in FDIC-supervised banks.

As a result, asset managers may need to enter into two distinct passivity agreements—one with the FDIC and one with the FRB—to rebut the presumption of control for acquisitions of securities of FRB-supervised holding companies with FDIC-supervised subsidiaries. A landscape where multiple passivity agreements govern the same transaction does not evince interagency coordination or a rational administration of a statute with a single set of standards for all investments conducted within the statute's scope; on the contrary, it lays the foundation for divergent agency interpretations and terms. For example, the FDIC has expressed an interest in "monitor[ing] compliance" with passivity commitments, and its letter to BlackRock states that it "expect[s] to incorporate provisions that will enable the FDIC to verify that BlackRock is abiding by its passivity commitments on an ongoing basis" into a potential passivity agreement with BlackRock.[41] We are unaware of any such "monitoring provisions" in FRB passivity agreements. The FDIC's likely departure from the FRB's approach in this regard would thus apply novel substantive requirements to transactions already governed by FRB agreements, undercutting the certainty and clarity afforded by those FRB agreements.

The FDIC states that it is "committed" to pursuing an interagency process, and FDIC board members have recognized the importance of doing so. In his remarks on the Proposal, Director Chopra noted that it would be "important to coordinate with the [FRB and OCC] as we revise our approach" and acknowledged that "[t]he banking industry and the public

[41] Letter from the FDIC (Aug. 2, 2024) at 2.

would benefit from a consistent and uniform approach to this law."[42] And importantly, Acting Comptroller Hsu explicitly premised his support for the Proposal on the FDIC's coordination with the other federal banking agencies:

> Notably, the NPR includes a commitment by the FDIC to work with the [FRB] and the OCC to develop an interagency approach to what constitutes a change in control and how the notice and rebuttal processes should work. Should the agencies agree upon an approach, I would expect them to issue an interagency NPR prior to finalizing. Based on this commitment, I support the proposal.

In spite of these public statements, the Proposal remains a unilateral FDIC action that lacks detail on how an interagency approach will be achieved. Instead, it creates new occasions for potential misalignment or inconsistency among the agencies' approaches.

BlackRock believes that such significant changes to the CBCA framework must only be made through an interagency process that reflects true coordination and alignment among the agencies. This interagency process should govern both an assessment of whether changes are necessary and, if so, any rule or policy changes to implement them. If, after withdrawing the Proposal, the FDIC believes changes to the agencies' administration of CBCA are warranted, the FDIC should first consult with the FRB and OCC to determine whether they concur. Any associated revisions to the regulatory framework should only be pursued via a joint agency rulemaking that conforms with the requirements of the Administrative Procedure Act.

2. The Proposal Is Unjustified.

According to the FDIC, the "[P]roposal is necessary in light of the risks created by possible outsized control over and concentration of ownership of FDIC-supervised institutions."[43] The Proposal connects these putative risks to index funds' increased holdings in FDIC-supervised banks. However, the Proposal lacks evidence showing that such risks exist. It similarly fails to demonstrate how the proposed rule change would mitigate any such risks even if they existed.

As described in Part III, BlackRock does not exercise control over FDIC-supervised institutions, nor does it seek to. Through our passivity agreement with the FRB, BlackRock makes legally binding commitments not to control these banks. BlackRock complies fully with the terms of our passivity agreement and the other legal and regulatory frameworks that govern our passive investments in banks and other companies. We have no reason to believe that any other asset managers are failing to comply with CBCA or other passivity requirements. The Proposal provides no evidence to the contrary.

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[42] 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). https://www.consumerfinance.gov/about-us/newsroom/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/

[43] 89 Fed. Reg. at 67005.

Notably, the FRB has not expressed concern that asset managers are not honoring the terms of their passivity commitments. In fact, FRB Chair Powell testified to Congress last year that the FRB "[did not] have any reason to think that [asset managers are] not in compliance" with the passivity agreements they entered into with the FRB.[44]

The Proposal also fails to explain how the proposed rule change would address the potential risks that the FDIC envisions. It does not identify any deficiencies in the FRB's change in control review, which has governed investments in FRB-supervised holding companies for decades. It also fails to account for the FDIC's existing role in the FRB's review process. Under CBCA, the FRB must "immediately furnish" a copy of any CBCA Notice it receives to the FDIC and OCC.[45] The FRB's CBCA regulations also provide that, in reviewing a CBCA Notice, the FRB may solicit information or views from other "government authorities."[46] The FDIC does not explain why these existing procedures are insufficient to ensure adequate agency review of CBCA Notices.

As described in Part I, the certainty and clarity afforded by key elements of the CBCA framework have been key to its effectiveness. Unjustified changes could upset this certainty and create risks to investors, banks, and the broader economy. BlackRock therefore recommends that the federal banking agencies consider changes to the CBCA framework only if they jointly identify a demonstrated need for agency action and determine that the contemplated change could reasonably be expected to address that need.

3. The FDIC's Administrative Procedures Are Inadequate.

Finally, the FDIC has used unconventional administrative procedures to alter its approach to CBCA, which could breed confusion, disparately impact certain investors, and amplify the market uncertainty that the Proposal could create.

First, the Proposal incorporates both a proposed change to the FDIC's CBCA regulations and a wide-ranging request for information intended to inform the FDIC's regulatory and supervisory approach to CBCA. We appreciate the agency's interest in collecting the information necessary to inform its review of the CBCA framework. However, any Request for Information should precede, and inform, any associated regulatory proposals. Pursuing both in tandem could undermine the utility of the Request for Information or produce an inadequately reasoned rulemaking.

The FDIC's "companion" process to the rulemaking also raises questions. Shortly after releasing the Proposal, the FDIC notified select asset managers, including BlackRock, that the agency would imminently change its CBCA review requirements for those firms. The changes are closely related to the issues addressed in the Proposal, yet the FDIC is applying them to certain firms as a *fait accompli* before reviewing comments on the Proposal. The agency's justification for targeting particular asset managers is not clear.

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[44] The Federal Reserve's Semiannual Monetary Policy Report: Hearing before the House Financial Services Committee (June 21, 2023).
https://democratsfinancialservices.house.gov/events/eventsingle.aspx?EventID=410558
[45] 12 U.S.C. 1817(j)(11).
[46] 12 CFR 225.43(f)(1).

This approach lacks transparency and does not provide an opportunity for public input on the changes. It also applies inconsistent standards across firms without a clear rationale for doing so.

These unconventional procedures to change the FDIC's administration of CBCA may create confusion as to the scope, timing, and substantive requirements of the FDIC's evolving positions on CBCA. This uncertainty could exacerbate the Proposal's negative impacts on bank securities markets. BlackRock therefore recommends that any future changes to the agencies' implementation and interpretation of the CBCA framework be effected only through a joint notice-and-comment rulemaking that conforms with the requirements of the Administrative Procedure Act.

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We thank the FDIC for providing BlackRock the opportunity to comment on the Proposal. Please contact the undersigned if you have any questions or comments regarding BlackRock's views.

Sincerely,

Benjamin A. Tecmire
Head of Regulatory Affairs