April 23, 2024
Via E-Filing
Board of Directors
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: ***Potential reevaluation of certain asset managers' passive investments in FDIC-supervised institutions***

Dear Chairman Gruenberg, Vice Chairman Hill, and Directors McKernan, Hsu and Chopra:

The Asset Management Group of the Securities Industry and Financial Markets Association (SIFMA AMG)[1] understands that members of the board of directors of the Federal Deposit Insurance Corporation (FDIC) are considering various proposals to revise the FDIC's approach to the framework it uses to assess noncontrolling investments in state nonmember banks and state savings associations (FDIC-supervised institutions) and their parent holding companies. We understand that this may include additional monitoring for compliance with passivity commitments made to the FDIC as well as a more general evaluation of how these passive investments fit into the "control" framework for FDIC-supervised institutions for purposes of relevant banking laws.

SIFMA AMG has engaged with interested members of the FDIC's board of directors and their staff and, as explained in section I below, continues to believe that the FDIC's current approach

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. SIFMA's broker-dealer members comprise 80% of U.S. market share by revenues and 70% of financial advisors managing $18 trillion of client assets. On behalf of our industry's nearly one million employees, we advocate on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA AMG, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS, and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

to passive investments by asset managers has worked well and is not in need of reevaluation. We ask that the FDIC better articulate the perceived harm and its concerns that it's looking to address before proceeding. Further, if the FDIC does decide to proceed, we strongly advocate for a transparent, thoughtful process—such as a request for information or rulemaking—that allows for the industry to weigh in on the potential consequences of any changes under consideration. More specifically, such a process needs to fully explore the implications of modifying or rescinding passivity commitments, which we believe could result in investment restrictions that may unintentionally limit banks' access to important sources of capital. We discuss this and other significant risks below.

I. Background on SIFMA AMG Members' Investments in Depository Institutions and Their Parent Holding Companies

Although SIFMA AMG has a broad membership, we are writing today on behalf of members and the funds they advise that are, and are intended to be, passive investors in their portfolio companies, including depository institutions and their parent holding companies. This includes index funds (i.e., funds that track the performance of equity indices) as well as actively managed funds (i.e., funds that have other performance goals that advisors actively manage to meet). In both types of funds, investments are typically made exclusively for investment purposes and not to exercise a controlling influence over the management of policies of (or to otherwise control) the portfolio company. While our members exercise voting rights in, and engage with, portfolio companies, they do so on behalf of their clients and not to control how a company is managed and operated. For example, our members make voting decisions pursuant to broad-based voting guidelines that are designed to drive long-term value for investors in our members' funds.

The ability for asset managers to make noncontrolling investments in FDIC-supervised institutions and their parent holding companies on behalf of their clients, including in amounts greater than 10% of the bank's voting securities without the FDIC's prior nonobjection, provides such institutions with valuable access to capital. Collectively, the investments by our members on behalf of their clients play an important role in fostering deep and liquid capital markets for banks and other companies throughout the economy.

Asset managers' ability to make noncontrolling investments in FDIC-supervised institutions also redounds to the benefit of retail and other investors. For index funds, direct investments in the companies on the index is generally the least expensive and most accurate way to track the index. For actively managed funds, the ability to directly invest in bank stocks similarly provides investors exposure to such stock in the most efficient and cost-effective manner.

In other words, it seems clear to us that the FDIC's approach has worked well and has benefited both the investing public and FDIC-supervised banks. Given this starting point, we are naturally concerned that additional monitoring requirements or restrictions on such investments in FDIC-supervised institutions may significantly reduce these benefits. We strongly believe that any reevaluation of asset managers' investment of client assets in FDIC-supervised banks must be designed to ensure that depository organizations continue to have ready access to capital and that investors continue to be able to meet their financial objectives through investing in commonplace mutual funds and ETFs.

II. Design of Any Reevaluation

As noted above, we question whether any changes to the FDIC's current practices and interpretation of banking laws are necessary. Should the FDIC decide to proceed with amending current practices, any such changes should be carefully considered and designed to address identified risks while reducing the potential for unintended consequences, as discussed in section III below. At a minimum,

- Unless there is clear evidence of a violation or potential violation of applicable passivity commitments, FDIC's monitoring should:
  - be limited to a review of compliance with the discrete obligations under existing passivity commitments based on targeted information requests,
  - allow the asset manager to continue to make investments under the passivity commitments through this process, and
  - not involve a determination of whether the asset manager's activities amounted to the exercise of, or an attempt to exercise, a "controlling influence" under the commitments or "control" under applicable banking law.
- Any review of the definition of "control" under the Change in Bank Control Act (CIBCA or the Act) should be conducted on an interagency basis, begin with a request for information, and seek to harmonize the approaches of the banking agencies (as well as those of other agencies that have "control" frameworks applicable to asset managers) to noncontrolling investments for asset managers through a notice-and-comment process that properly accounts for the significant likely costs of any such requirements to banks, retail investors and other stakeholders.
- Any revisions to the approach taken by the banking agencies with respect to their joint no-action letters for Regulation O and the FDIC's Part 363 regulations regarding certain investment funds' portfolio investments should be conducted pursuant to notice-and-comment rulemaking, as contemplated by such no-action letters.

III. Considerations for Any Reevaluation

We appreciate that the FDIC has a valid interest in ensuring that asset managers entering into binding commitments with the FDIC regarding their investment activities honor the terms of those commitments. We also appreciate that the substance of any commitments can be tailored to appropriately reflect the nature of the asset manager's investment activities. Moreover, we appreciate the FDIC's consideration of alternative methods beyond self-certification. However, designing any such additional review raises a number of important considerations that should be considered together with the public before proceeding. A few such considerations are discussed below.

Proposes Concrete Parameters and Controls. Any monitoring program has a wide breadth of possible design options, including who does the monitoring, what types of materials and evidence an asset manager is expected to provide, what criteria will be used to assess asset manager practices, how concerns are identified and resolved, what controls would be put in place, and how changes to the process would be handled over time. The specifics of how each aspect would work will have a meaningful impact on how a monitoring program would operate and its potential impacts on markets and the financial system. The abstract vision of a monitoring program must be translated into concrete parameters in order to be properly considered by the agency as well as the public. Without clear parameters outlining a specific scope and the information or documentation required to demonstrate compliance, the contemplated monitoring steps could go well beyond monitoring for compliance with the discrete obligations under the asset manager's passivity commitments (e.g., documents other than policies and procedures directly related to the passivity commitments, such as the commitments' specific restrictions regarding engagement with management, the ability to assume roles with companies at a management or board level, and proxy voting) and penalize actions without prior notice that certain such actions could raise control issues. Moreover, without proper controls, there is the risk that the scope and intrusiveness of examinations would expand well beyond what was originally intended for these monitoring programs and could serve as *de facto* limits on otherwise permissible activities.

Appropriately Tailored to Agency Jurisdiction and Expertise. Any monitoring program or reevaluation of asset managers' investments in FDIC-supervised institutions and their parent holding companies should also be appropriately tailored to the relevant agency's jurisdiction and expertise. In this context, we note that asset managers are already rigorously regulated and examined by the Securities and Exchange Commission. Congress has at times contemplated whether prudential regulators, including the FDIC, should play a role in the regulation of asset managers and declined, given significant differences in structure and activities. Therefore, any FDIC monitoring program should be designed to ensure the program does not lead to duplicative regulation or examination, conflicting requirements, or disruptions in the capital markets. Likewise, any monitoring program should also be tailored to the discrete investigative authorities of the FDIC under CIBCA related to violations or potential violations of the Act[2]; a broad monitoring program that operates without any reasonable indication of a violation of passivity commitments or the Act would break new ground.[3] Moreover, many of the activities and policies of asset managers are conducted in fulfilment of their fiduciary duties or other legal obligations that have legal sources of authority elsewhere; FDIC review of such activities without fully understanding the legal framework and requirements under which they are conducted could result in the FDIC penalizing asset managers for satisfying their fiduciary duties or otherwise imposing conflicting legal obligations on asset managers.

Maintains Consistent Administration of Banking Laws and a Level Playing Field. Any new initiative to revisit asset managers' ownership of publicly traded bank equity implicates statutes administered by the other federal banking agencies and therefore risks inconsistent application and enforcement of those laws. CIBCA gives each banking agency rulemaking and enforcement authority with respect to the agency's supervised entities. Soon after the Act was passed into law, the relevant banking agencies issued common regulations implementing the Act, which have only slightly diverged from each other in the past 45 years. Notably, the FDIC's definitions and presumptions regarding control and concerted action still are substantively the same as those of the Federal Reserve's and OCC's CIBCA regulations. Differing interpretations of CIBCA risks creating an unlevel playing field among insured depository organizations in the United States, and the additional complexity for investing in

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[2] *See* 12 U.S.C. § 1817(j)(15)(A).

[3] *Cf.* Commissioner Mark T. Uyeda, *Statement on Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers* (Feb. 8, 2024), https://www.sec.gov/news/statement/uyeda-statement-form-pf-reporting-reqs-020823.

banks could chill such investment. Similarly, although the FDIC does not have unilateral authority to amend or interpret Regulation O, varying enforcement of Regulation O among the banking agencies would likewise create an unlevel playing field among banks and could disrupt their ability to extend loans to unrelated companies that are listed in an index or otherwise partially owned by certain investment companies.

IV. Recommendation & Conclusion

As explained, we believe that the FDIC's current approach has worked well, and that any effort to reevaluate asset manager compliance with passivity commitments and banking laws should be carefully considered. Because a fundamental element of an agency's consideration is a review of public comment, if the FDIC decides to move forward with any reevaluation, the FDIC must do so through a formal rulemaking process, together with other relevant agencies, rather than proceed with changes that do not have the benefit of industry input. Moreover, the process would greatly benefit from additional information about the harms the FDIC is seeking to address and better data on current industry practices, and therefore we also request the FDIC issue a request for information before proceeding.

SIFMA AMG would welcome an opportunity to discuss these issues further and to offer a deeper industry perspective on asset managers' noncontrolling investments in FDIC-supervised depository institutions. Please feel free to contact Lindsey Keljo at 202-962-7312 or lkeljo@sifma.org.

Respectfully submitted,

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Cc: Hon. Janet Yellen, Secretary of the Treasury, U.S. Department of the Treasury
Hon. Jerome H. Powell, Chair, Board of Governors of the Federal Reserve System
Hon. Gary Gensler, Chair, U.S. Securities and Exchange Commission
Hon. Rostin Behnam, Chairman, Commodity Futures Trading Commission
Sandra Lee, Deputy Assistant Secretary for the Financial Stability Oversight Council, U.S. Department of the Treasury