

Change Has Arrived

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We have written in prior *Cabinet News & Views* articles that, since the November elections, the U.S. federal banking regulators have been signaling significant changes in approach. This week, the FDIC kicked off the changes by sweeping away several significant actions taken under prior leadership. It withdrew, or revoked authority for staff to publish for comment, four important proposed rules, rescinded an important policy statement, and deferred certain compliance dates of a different rule. The withdrawn proposals were those addressing (i) brokered deposits, (ii) corporate governance, and (iii) the FDIC's interpretation of the Change in Bank Control Act ("CBCA"). In the same *Federal Register* notice, the FDIC also advised that it has decided not to publish for comment a proposal called for under the 2010 Dodd-Frank Act relating to incentive-based compensation arrangements.

These actions largely represent a return to long-standing FDIC policies, and a turn away from the agency's trend under prior leadership toward stricter regulation. The FDIC's notice in respect of these actions stated the FDIC is withdrawing the proposals because it no longer intends to issue final rules with respect to them. Interestingly, in an oblique recognition of past criticisms of rule-making by informal means, the FDIC stated that, should it decide to pursue regulatory action in any of these areas, it would do so by publishing a new proposed rule or other issuance consistent with the requirements of the Administrative Procedure Act.

Brokered Deposits. The proposal, published in the *Federal Register* on August 23, 2024, was the latest in several adjustments of the brokered deposit rule over the last several years. This proposal would have tightened the conditions for permitting banks to accept brokered deposits. According to the FDIC, the "proposal failed to account for the myriad of ways in which deposit arrangements have evolved over the years." Among other controversial changes, it would have limited the so-called the primary purpose exception in a manner "inconsistent with the plain meaning of the law."

Corporate Governance. This proposal was another controversial measure, published for comment in the *Federal Register* on October 11, 2023. Intended to establish enforceable guidelines on corporate governance as a counterpart to the OCC's Heightened Standards and the Federal Reserve's Enhanced Prudential Standards, it was criticized by the industry on numerous grounds, including being unduly prescriptive, confusing commonly understood roles of boards and management, and establishing unprecedented obligations of the board to consider "the interests of all stakeholders."

Change in Bank Control Act. In yet another controversial action, the FDIC proposed to remove from its regulations an exemption from FDIC review for investments in bank holding companies that are reviewed by the Federal Reserve as holding company regulator. The authority for underlying regulation itself has been questioned as beyond the FDIC's authority. Notably, the FDIC's rescission statement did not address the authority question, focusing instead on the likely consequences that removing the exemption would "have required a wide range of bank investors to file duplicative notices with both the FDIC and the Federal Reserve System and could have discouraged capital investments in FDIC-supervised banks." The proposal was published for comment in the *Federal Register* on August 19, 2024.

Incentive-based Compensation Arrangements. Section 956 of the Dodd-Frank Act requires the FDIC, the OCC, the Federal Housing Finance Agency, the National Credit Union Association, the Federal Reserve and the SEC to *jointly* prescribe regulations or guidelines covering incentive-based compensation at covered financial institutions. The FDIC

approved its participation in a joint proposal on May 3, 2024, and the other required agencies, excluding the Federal Reserve and the SEC, on other dates. Although the FDIC's March 3 press release announcing the withdrawal did not expressly state why the proposal was withdrawn, the press release noted that the FDIC board authorized publication of the proposal in the *Federal Register* only if all six agencies statutorily required to issue the rule approved the proposal. It appears that the FDIC considered the failure of the Federal Reserve and the SEC to adopt corresponding proposals as a basis for withdrawal.