

## MEMORANDUM

**To:** Interested parties  
**From:** Public Citizen  
**Re:** Unlawful action by FDIC Chair Jelena McWilliams  
**Date:** Dec. 10, 2021

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### Background

On December 9, 2021, two members of the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) announced that the FDIC had approved a request for information (RFI) on the regulatory framework around bank mergers.<sup>1</sup> Public reports state that a majority of the FDIC Board approved the RFI by written vote, commencing November 23 and closing December 7.<sup>2</sup>

Soon, a press release was posted on the FDIC website disclaiming the RFI, arguing that it was not “approved by the FDIC” and there was “no valid vote by the Board.”<sup>3</sup> FDIC Board Chair Jelena McWilliams is reportedly blocking the agency’s Executive Secretary from transmitting the document for official publication.<sup>4</sup>

There is apparently no dispute that a majority of FDIC Board members support and voted to approve the RFI. The release posted on the FDIC website claims only that the vote was not “valid.”<sup>5</sup>

### Questions Presented

These facts give rise to the following questions:

1. Is authority over FDIC actions vested in the Chair or the FDIC Board?

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<sup>1</sup> Joint Statement of Martin J. Gruenberg and Rohit Chopra, Members, FDIC Board of Directors Request for Public Comment on the Bank Merger Act, Dec. 9, 2021, [https://files.consumerfinance.gov/f/documents/cfpb\\_bank-merger-act-rfi\\_joint-statement\\_2021-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_bank-merger-act-rfi_joint-statement_2021-12.pdf).

<sup>2</sup> Jon Hill, *FDIC Board Falls Into Disarray Over Bank Merger Review Vote*, Law360, Dec. 9, 2021, <https://www.law360.com/competition/articles/1447449/fdic-board-falls-into-disarray-over-bank-merger-review-vote>.

<sup>3</sup> Press Release, FDIC, Dec. 9, 2021, <https://www.fdic.gov/news/press-releases/2021/pr21101.html>.

<sup>4</sup> Jon Hill, *FDIC Board Falls Into Disarray Over Bank Merger Review Vote*, Law360, Dec. 9, 2021, <https://www.law360.com/competition/articles/1447449/fdic-board-falls-into-disarray-over-bank-merger-review-vote>.

<sup>5</sup> Press Release, FDIC, Dec. 9, 2021, <https://www.fdic.gov/news/press-releases/2021/pr21101.html>.

2. If the Board controls the agency, does it act by majority vote?
3. If the Board operates by majority vote, can a majority lawfully exercise the Board's authority even when the Chair does not consent to a vote? Put another way, can the Chair effectively block a majority of the Board from governing the FDIC by preventing it from voting?

### **Summary of Analysis**

The answers to these questions all affirm that the FDIC's action was valid. Chair McWilliams has no legal basis for attempting to override the Board by blocking staff from carrying out its decision.

The Federal Deposit Insurance Act (FDI Act) vests FDIC authority in a five-member Board. The FDIC's bylaws, in turn, state that a majority of the Board controls the agency's actions. Finally, the bylaws establish procedures by which a majority of the Board can hold a valid, legally binding vote without the Chair's consent to vote.

### **Analysis**

The law is clear that a majority of FDIC Board members control the agency and that a valid Board vote may be held without the support of the Chair. Below, this memorandum discusses each of the questions presented in turn.

1. *Is authority over FDIC actions vested in the Chair or the FDIC Board?*

*Answer: The Board.*

The FDI Act vests the FDIC's authority in a five-member board. It states, "The management of the Corporation shall be vested in a Board of Directors consisting of 5 members."<sup>6</sup> The agency's Bylaws follow the statute, stating as follows:

The management of the Corporation [the FDIC] shall be vested in the Board of Directors, which shall have all powers specifically granted by the provisions of the Federal Deposit Insurance Act and other laws of the United States and such incidental powers as shall be necessary to carry out the powers so granted.<sup>7</sup>

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<sup>6</sup> 18 U.S.C. § 1812(a)(1).

<sup>7</sup> Bylaws of the FDIC (hereinafter "Bylaws") art. IV, § 5, available at <https://www.fdic.gov/about/governance/bylaws.pdf>.

Chair McWilliams does not appear to dispute that FDIC authority is vested in the Board. The release disputing the RFI did not claim that the Board was unable to authorize it over the Chair's dissent, but rather that a valid Board vote had not occurred.

*2. Does the Board exercise its authority by majority vote?*

*Answer: Yes.*

The bylaws establish that a majority vote of the Board "shall be the act of the Board of Directors."<sup>8</sup>

Chair McWilliams also does not appear to dispute that the Board makes decisions on a majoritarian basis. Again, she has claimed only that there was no valid Board vote, not that other Board members are incapable of outvoting her.

*3. Can a majority lawfully exercise its authority even when the Chair does not consent to a vote? Put another way, can the Chair effectively block a majority of the Board from governing the FDIC by preventing it from voting?*

*Answer: Yes, it can. And no, the Chair cannot.*

Typically, the FDIC Board votes on matters at meetings called by the Chair.<sup>9</sup> However, the Bylaws establish that the Board may vote on a matter in writing, without need for a meeting. To conduct a valid vote without a Board meeting, written materials must be circulated to all Board members who can be contacted with "reasonable effort and sufficient time to permit action where a majority of members participate."<sup>10</sup> Further, any member may block the written vote by requesting in writing that the relevant business be conducted at a Board meeting.<sup>11</sup>

There is no suggestion that Chair McWilliams requested that the Board vote on the RFI at a meeting. There are two good reasons why she would not have bothered with such a request: First, the three other Board members plainly would have outvoted her at a Board meeting just as they could in writing. Second, if she attempted to block a vote by refusing to hold a meeting, other Board members could have called a meeting on their

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<sup>8</sup> Bylaws art. V, § 6(d).

<sup>9</sup> See Bylaws art. V, § 6.

<sup>10</sup> Bylaws art. IV, § 6(g).

<sup>11</sup> *Id.*

own. The Bylaws establish that a special meeting may be held “upon the written request of any two Board members.”<sup>12</sup>

Moreover, all of the above establishes that, even if there were some procedural defect in how the RFI vote was conducted, the Board members who support it could simply hold another vote in which they correct the errors.

### **Conclusion**

The FDIC Board majority’s decision to issue the RFI was valid. Chair McWilliams has no lawful basis for attempting to override it or preventing staff from carrying it out.

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<sup>12</sup> Bylaws art. IV, § 6(b).