

(Slip Opinion)

## **Authority of a Majority of the FDIC Board to Present Items for Vote and Decision**

The Chairperson of the Federal Deposit Insurance Corporation does not have the authority to prevent a majority of the FDIC Board from presenting items to the Board for a vote and decision.

July 29, 2022

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL FEDERAL DEPOSIT INSURANCE CORPORATION

You have asked for our opinion regarding whether the Chairperson of the Federal Deposit Insurance Corporation (“FDIC” or “Corporation”) has the authority to prevent a majority of the FDIC Board (“Board”) from presenting items to the Board for a vote and decision. Letter for Christopher H. Schroeder, Assistant Attorney General, Office of Legal Counsel, from Harrel M. Pettway, General Counsel, FDIC (Mar. 10, 2022) (“FDIC Letter”).<sup>1</sup> Although the Board’s former Chairperson contended that the FDIC’s Bylaws gave her the authority to preclude a majority of Board members from placing an item on a meeting agenda or circulating an item for a notational vote, *see id.* at 3-4, a majority of the current FDIC Board contends that a majority of members may do so. *See* E-mail for Neil Kinkopf, Office of Legal Counsel, from Harrel M. Pettway, FDIC, *Re: FDIC Board* (June 11, 2022, 11:01 AM); FDIC Memorandum at 1.

The Federal Deposit Insurance Act of 1950 (“Act”), as amended, 12 U.S.C. § 1811 *et seq.*, vests the substantive and procedural powers of the FDIC in the Board, not the Chairperson, and the best reading of the FDIC’s Bylaws prescribed pursuant to the Act is that they preserve the power of a Board majority to present items for Board decision and vote. The internal FDIC documents you have provided to us describe a longstanding practice and informal management of the FDIC that is consistent with this conclusion. For the reasons we explain below, we

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<sup>1</sup> The FDIC Letter states that “the FDIC will conform its conduct on this matter to the OLC’s conclusion.” FDIC Letter at 1; *see* Memorandum for Martin J. Gruenberg, Acting Chairperson, FDIC, from Harrel M. Pettway, General Counsel, FDIC, *Re: Setting the Agenda for FDIC Board Meetings* (Mar. 10, 2022) (“FDIC Memorandum”).

conclude that the Chairperson lacks the authority to prevent a majority of the Board from presenting items to the Board for a vote and decision.

## I.

We begin with the statute. The Act establishes the FDIC and provides that “management of the Corporation shall be vested in a Board of Directors.” 12 U.S.C. § 1812(a)(1). The Board is composed of five directors: the Comptroller of the Currency, the Director of the Consumer Financial Protection Bureau, and three directors appointed by the President, by and with the advice and consent of the Senate. *Id.* The President designates one of the appointed directors as Chairperson and another as Vice Chairperson. *Id.* § 1812(b). The Act vests the substantive and procedural decision making of the FDIC in the Board by explicitly empowering the Board to exercise “all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary to carry out the powers so granted.” *Id.* § 1819(a).<sup>2</sup>

In contrast to the broad governance and decision-making authority vested in the Board, the Act grants the Chairperson only a few specific and limited functions. *See, e.g., id.* § 1820(k)(5) (authorizing the Chairperson to grant waivers on a case-by-case basis of certain post-employment restrictions of FDIC employees who previously served as federal examiners of financial institutions); *id.* § 1831o(h)(3)(C)(ii) (providing an exception to the requirement to appoint a receiver for a critically undercapitalized institution if, *inter alia*, the Chairperson certifies that the institution is viable and not expected to fail); *id.* § 1831z(b) (requiring the Chairperson to submit a bi-annual report to Congress on the FDIC’s survey regarding the unbanked); *id.* § 1834a(d)(2) (providing that the Chairperson is a member of the Community Enterprise Assessment

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<sup>2</sup> Additionally, the Act specifically authorizes the Board to exercise the various substantive responsibilities of the FDIC. *See, e.g., id.* § 1815 (authorizing the Board to approve or deny applications for insured depository institutions); *id.* § 1817 (authorizing the Board to impose requirements, establish a risk-based assessment system, and set assessments for insured depository institutions); *id.* § 1818(a) (authorizing the Board to hold hearings and to terminate the insured status of depository institutions); *see also id.* § 1820(a) (requiring the Board to “administer the affairs of the Corporation fairly and impartially and without discrimination”). These provisions confirm that the Act vests the overall governance of the FDIC in the Board.

Credit Board). There is no general or specific source of authority in the Act that can be read as permitting the Chairperson to prevent a majority of the Board from exercising its statutory responsibilities or otherwise making decisions for the FDIC.

The power to present matters for Board vote and decision is not explicitly addressed by the Act. The Act, however, is perfectly clear that the Board, not the Chairperson, has the authority to determine how the FDIC should exercise its substantive powers, as well as the authority to prescribe procedures for making such substantive decisions—an “incidental power[] . . . necessary to carry out the powers so granted.” *Id.* § 1819(a). The Board could not exercise its power to impose reporting requirements on insured depository institutions, *id.* § 1817, for example, without first presenting such action to the Board for a vote and decision. *See Chatham Ventures, Inc. v. Fed. Deposit Ins. Corp.*, 651 F.2d 355, 359 (5th Cir. Unit B July 1981) (holding that the “incidental powers” conferred on the FDIC by 12 U.S.C. § 1819 encompassed FDIC actions “which are necessary to carry out the specific powers” explicitly granted to the FDIC by the Act). Nothing in the Act can be read as authorizing the Chairperson to prevent a majority of the Board from presenting items to the Board for a vote and decision, and, as far as we are aware, no one has ever taken the position that the Act authorizes the Chairperson to do so.

## II.

The Act authorizes the Board to prescribe bylaws “regulating the manner in which its general business may be conducted” and to prescribe “such rules and regulations as it may deem necessary.” 12 U.S.C. § 1819(a). Pursuant to this statutory authority, the Board has promulgated bylaws regulating the manner in which FDIC business may be conducted. *See* Bylaws of the FDIC (Feb. 18, 2022) (“Bylaws”). The Bylaws permit the Board “[w]ithin the limitations of the law” to “delegate any of its specific or incidental powers to any standing or special committee of the Corporation or to any officer or agent of the Corporation upon such terms and conditions as it shall prescribe, except the power to amend the[] Bylaws or to adopt new bylaws.” Bylaws art. IV, § 5. The Board, therefore, is authorized to delegate at least some of its statutory responsibilities, and it has done so in the Bylaws. Although the Bylaws do not directly address the authority to present items to the Board, our under-

standing is that the Board has historically construed them—without controversy—to give the Chairperson the authority to set the agenda for meetings. The authority to set the agenda of a business meeting is distinct, however, from the authority to prevent the Corporation’s Board from voting on FDIC business by unilaterally blocking Board consideration of certain items entirely. The question here is whether the Bylaws prescribed by the Board, which are silent on this question of the Chairperson’s power to thwart the will of a Board majority, have somehow implicitly ceded this substantial authority to the Chairperson or whether, instead, the Bylaws are best read as preserving the power of a Board majority to present items for Board decision and vote.<sup>3</sup>

We note at the outset that “this Office is neither well-suited nor sufficiently well-versed, as a practical matter, in the internal workings of the [Board] to provide more than a general response” regarding the best interpretation of its own Bylaws. *Division of Powers and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole*, 24 Op. O.L.C. 102, 103 (2000) (“*Chemical Safety Board*”) (quoting Memorandum for Reese K. Taylor, Jr., Chairman, and Heather Gradison, Commissioner, Interstate Commerce Commission, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 1 (Dec. 8, 1983) (“Olson Memorandum”)). “Nevertheless, we believe that our discussion of the Board’s organization and of the background principles governing deliberative bodies against which it operates should be sufficient to guide you in resolving disagreements about the proper balance of authority in the Board’s affairs.” *Id.* And, of course, the Board itself can at any time amend its Bylaws to eliminate any uncertainty about questions such as the one at issue here.

The Bylaws mirror the Act in providing that “[t]he management of the Corporation 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.” Bylaws art. IV, § 5. The Bylaws provide that “[w]ithin the limitations of the

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<sup>3</sup> We will assume, without deciding, that the Act might permit the Board to delegate to the Chairperson the authority to deny a Board majority the ability to present items for a Board vote—at least as long as the Board does not completely divest itself of the capacity to reclaim such authority.

Federal Deposit Insurance Act and other laws of the United States, the Chairperson shall manage and direct the daily executive and administrative functions and operations of the Corporation” and that the Chairperson shall have “the general powers and duties usually vested in . . . the chief executive officer of a corporation.” *Id.* art. VI, § 4(a). Pursuant to the Bylaws, the Board may conduct business in three ways. First, “[r]egular meetings of the Board of Directors shall be held at such times as the Chairperson shall direct, after reasonable notice is given to each member of the Board of Directors by the Executive Secretary in such manner as the Chairperson shall direct.” *Id.* art. IV, § 6(a). Second, “[s]pecial meetings of the Board of Directors may be called by the Chairperson or, upon the written request of any two members of the Board of Directors, by the Executive Secretary,” provided that “[r]easonable notice of any such special meeting shall be given to all members of the Board of Directors who can be contacted after a reasonable effort and in sufficient time to permit their attendance or participation.” *Id.* § 6(b). Finally, the Board may transact business without a meeting “by the circulation of written items” to members of the Board for their written “disposition of each item of business,” unless any Board member “request[s] to transact said business at a meeting of the Board of Directors.” *Id.* § 6(g). The Bylaws specify that the Chairperson presides at Board meetings when the Chairperson is able to attend and participate in such meetings. *Id.* § 6(e). “A majority of the members of the Board of Directors in office shall constitute a quorum for the transaction of business,” and a “vote of the majority of the members present and voting at a meeting at which a quorum is present shall be the act of the Board of Directors.” *Id.* § 6(d).

Before addressing how the Bylaws are best construed, we pause to emphasize that the Board itself has the prerogative to construe the scope of its delegations to the Chairperson as falling short of giving the Chairperson the power to disregard the will of a majority of the Board. The Bylaws, like the Act, vest the Board with “management of the Corporation” and all express and implied powers under the Act, thereby reserving ultimate authority to the Board itself over the interpretation of the allocation of the Board’s own authority. 12 U.S.C. § 1819(a); Bylaws art. IV, § 5. Moreover, as we have previously concluded, “under general principles of corporate common law . . . the Board as a whole, acting reasonably, has the final authority to resolve disputes as to whether a specific matter is within its oversight authority or is an administrative or executive

concern of the chairperson.” *Chemical Safety Board*, 24 Op. OLC at 105. “In disputes over the allocation of authority in specific instances, the Board’s decision controls, as long as it is not arbitrary or unreasonable.” *Id.* at 103. In other words, the ultimate authority to interpret the FDIC’s Bylaws resides not with the Chairperson—nor with the Office of Legal Counsel—but with the Board itself.

We do agree with the current Board majority’s interpretation that the delegations of authority to the Chairperson in the Bylaws are best understood as preserving the power of a Board majority to present items for Board decision and vote.<sup>4</sup> The Board has delegated to the Chairperson the authorities to direct the times of regular meetings of the Board, Bylaws art. IV, § 6(a), and to preside at Board meetings, *id.* § 6(e), which together have been understood within the FDIC to authorize the Chairperson to set the agendas for Board meetings. *See* Memorandum for Shelia Bair, Chairman, FDIC, from Robert E. Feldman, Executive Secretary, FDIC, *Re: Synopsis of Board Procedures* (July 6, 2006) (“Feldman Memorandum”). But neither delegation—nor the inferred authority to set agendas—speaks to the power to block a Board majority from voting to consider an additional item of business or, in the absence of a meeting, from circulating an item for a written vote of the Board.<sup>5</sup> Our Office has previously concluded that a chair’s regulatory authority to control a commission’s calendar did not include the authority to exercise veto power over what substantive matters the commission might consider. *See* Olson Memorandum at 11 (concluding that the authority of the Chairman of the Interstate Commerce Commission to exercise general control over the Commission’s calendar does not on its own authorize the Chairman to preclude the circulation of a draft decision that the Commission wishes to consider for consideration and vote of the Commission). Similarly, under parliamentary law, which the FDIC Board informally refers to for guidance, *see* Feldman Memorandum, presiding officers exercise generally

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<sup>4</sup> We have not been asked, and therefore do not address, whether the Bylaws are best read as authorizing the Chairperson to prevent less than a majority of the Board from presenting an item for Board consideration.

<sup>5</sup> The Board may “transact business by the circulation of written items to all members of the Board” in the absence of a meeting. The only explicit reference in the Bylaws to a means of preventing the Board from transacting business in this manner is in article IV, § 6(g), which provides that any Board member may “request to transact [that] business at a meeting of the Board of Directors.”

ministerial duties that are not understood to include the authority to defeat the will of the majority. See Henry M. Robert et al., *Robert's Rules of Order Newly Revised* 448–51 (11th ed. 2011) (describing the duties of presiding officers); 59 Am. Jur. 2d Parliamentary Law § 8 (2022) (“The duties of a presiding officer are generally ministerial. . . . A presiding officer cannot arbitrarily defeat the will of the majority by refusing to entertain or put motions . . . or by refusing to permit the expression by the majority of its will.”).

The Board has also delegated to the Chairperson “the general powers and duties usually vested in . . . the chief executive officer of a corporation” and the authority to “manage and direct the daily executive and administrative functions and operations” of the Board. Bylaws art. VI, § 4(a). The current Board majority’s understanding of this delegation of authority as preserving the power of a Board majority to present items for Board decision and vote is not only reasonable, it is the most natural reading in light of the typical background presumption of majority rule for deliberative bodies with respect to deciding how to exercise their substantive functions. Corporate Chief Executive Officers (“CEOs”) generally do not have the power to countermand a board majority’s will; instead, the functions and duties of CEOs are subject to oversight by their boards. *Chemical Safety Board*, 24 Op. O.L.C. at 107; 1 James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations* § 8:1 (3d ed. 2021). Our Office previously concluded that a statutory delegation of authority to a board chair to serve as “Chief Executive Officer” and to “exercise the executive and administrative functions of the Board” conferred authority only to “carr[y] out the day-to-day activities necessary to effectuate the Board’s substantive decisions.” *Chemical Safety Board*, 24 Op. O.L.C. at 104. There, we reasoned that while “[s]ome degree of managerial discretion is inherent in the concept of an executive or administrative office, . . . any number of Board activities or day-to-day aspects of Board business . . . may involve or affect the Board’s duties and functions in ways that are of legitimate concern to the Board as a whole . . . [and] it is the prerogative of the Board to pass upon such issues in ways appropriate to its function as a policymaking and rule-setting body.” *Id.* at 105. We have similarly relied on the “presumption of majority rule” where no specific rule conferred power on either a board chair or the board to call a special meeting to “conclude that a majority of the Board may act to do so.” Letter for Mason H. Rose V, Chairperson, U.S. Architectural and Trans-

portation Barriers Compliance Board, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel at 4 (Sept. 17, 1981). And, pursuant to a similar rationale, we previously concluded that the circulation of a draft decision that a majority of a commission wished to consider was a “substantive” matter “within the jurisdiction of the Commission” and not the subject of an exclusive “administrative authority” of the commission’s chairman. Olson Memorandum at 11. Collectively, these principles buttress the current Board majority’s understanding of their Bylaws as preserving the power of a Board majority to present items for Board decision and vote.

The Board majority’s current understanding is also consistent with the longstanding practice and management of the FDIC as described in internal FDIC documents you have provided to us. *See, e.g.*, E-mail for John F. Bovenzi, FDIC, from Robert Feldman, FDIC, *Re: Key Points About the Management of the FDIC* (Oct. 4, 2001, 12:38 PM) (“Feldman E-mail”). As a general matter, the Chairperson exercises agenda setting authority. *See* Feldman Memorandum at 2 (“The fact that the bylaws authorize the Chairman to schedule meetings of the Board and preside at those meetings and that they designate her the chief executive officer of the Corporation have been interpreted to stand for the proposition that it is the Chairman who sets the agendas for the meetings of the Board.”). Of course, setting the agenda is distinct from the authority to block the will of a Board majority, and historically “the Board has a well-established tradition of allowing members to make motions without the Chairman calling for one.” *See* Feldman E-mail. In fact, past FDIC practice has been that although the Chairperson sets the agenda for meetings, “informal management of Board meetings always affords the opportunity for new business to be brought up by any Board member.” *Id.* The current Board majority’s interpretation of its Bylaws as preserving the power of a Board majority to present items for Board decision and vote is consistent with this longstanding practice of the FDIC.<sup>6</sup>

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<sup>6</sup> As far as we have been able to determine, prior to 2021 there had never been a dispute between the Chairperson and a Board majority regarding whether to consider an item of FDIC business. There is, therefore, no longstanding practice—or any practice at all—concerning the specific question of whether the Chairperson has authority to block a Board majority from placing an item on a meeting agenda or circulating an item for a notational vote.



We note that the current Board majority’s understanding of its Bylaws may not be the *only* possible interpretation. As we explained in *Chemical Safety Board*, the division of authority in a corporation such as this is mostly “a matter of the development, through collegial practice and over time, of the [corporation’s] own internal policies concerning delegation of authority to the . . . chairperson, the [corporation’s] acquiescence in the chairperson’s assertion of authority over certain substantive areas, and the general evolution of the [corporation’s] current allocation of responsibilities.” 24 Op. OLC at 108. “[T]he Board [is] free to shape and structure the details of its own internal operations in large part as it sees fit, and to do so in a practical matter, over time and on a case-by-case basis as its goals and agenda demand. . . . [T]he Board’s determination of the appropriate division of authority between itself and its chairperson will of necessity turn on considerations of internal administration and practical working arrangements within the Board.” *Id.* at 109. Nevertheless, we conclude that the current Board majority’s interpretation of its Bylaws is the best reading of the scope of the Board’s delegation of its own authority.

### III.

For the foregoing reasons, we conclude that the Chairperson of the FDIC Board does not have the authority to prevent a majority of the Board from presenting items to the Board for a vote and decision. Please let us know if we may be of further assistance.

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