

## Power Struggle at the FDIC Board Becomes Public

### WRITTEN BY

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In a CFPB blog post from December 9, the CFPB stated that the FDIC Board of Directors (FDIC Board) had promulgated a request for information (RFI) regarding a review of the Bank Merger Act criteria for approving bank mergers subject to the FDIC's jurisdiction. Rohit Chopra, the head of the CFPB and, as a result of that position, FDIC Board member, wrote in part as follows:

*"As agencies across the government are rethinking their approach to combat anticompetitive consolidation and practices, the FDIC's Board has voted to launch a review of the agency's Bank Merger Act policies and invites the public to weigh in. We will accept comments for 60 days from the publication in the Federal Register".*

The posting was unusual because it did not originate with the FDIC and, in fact, the FDIC indicated in its own post that the RFI had not been approved for publication by the FDIC. On December 9, the same day the blog post on the CFPB website appeared, the FDIC rebutted the validity of the purported action by stating as follows:

*"Earlier today, the Consumer Financial Protection Bureau (CFPB) posted on its website a document, purportedly approved by the FDIC, requesting comment on bank mergers. No such document has been approved by the FDIC.*

*The FDIC has longstanding internal policies and procedures for circulating and conducting votes of its Board of Directors, and for issuing documents for publication in the Federal Register. In this case, there was no valid vote by the Board, and no such request for information and comment has been approved by the agency for publication in the Federal Register.*

*The FDIC has a proud 88-year history of Board members working together in a collegial manner. This history has spanned many Presidential administrations, and countless philosophical differences on substantive issues among Board members over the years. Notwithstanding the actions taken today, the FDIC expects this time-honored tradition of collegiality and comity to continue."*

By way of background, the FDIC Board currently has four members: FDIC Chairwoman Jelena McWilliams, Chopra, former FDIC Chairman Martin Gruenberg, and Acting OCC Comptroller Michael Hsu. The fifth board position is currently vacant.

How we got here is unclear. On December 14, Chopra released a statement in advance of the December open meeting of the FDIC Board, outlining from his standpoint the events that led to this schism. In a December 16 opinion piece in the *Wall Street Journal*, McWilliams responded to Chopra's statement with her description of

what happened. Here is what they said:

Chopra	McWilliams
In late October, Chopra and the other directors sent the RFI draft to McWilliams. The group said it never received a response from McWilliams based on the assertion by the FDIC's general counsel that the FDIC chairwoman had veto power over such board actions.	On October 31, Chopra presented the RFI draft. McWilliams said that the original draft RFI was "filled with omissions, misrepresentations, and technical inaccuracies" that showed a lack of understanding of the FDIC's merger-approval process. However, McWilliams expressed to the other board members her willingness to work with them on a similar document prepared by the FDIC staff and would do so on an expedited basis.
On November 16, Chopra, Gruenberg, and Hsu wrote a letter asking the FDIC's executive secretary to circulate the draft of the original RFI to the agency's key divisions for technical and legal review, but the RFI was not circulated. Then, on November 18, the group made a direct request to the heads of those key divisions, but received no feedback.	On November 16 as she was about to board a nine-hour flight, McWilliams told Hsu that a new staff-drafted RFI document would be available to the FDIC Board by December 6. Seventy-five minutes later, the other members of the Board instructed McWilliams' staff to revise the original draft RFI rather than draft a new one.
On November 26, Chopra moved for a vote to publish the original RFI with a closing date of December 6.	On November 26, Chopra sent an email to the FDIC Board asking for a vote on the original RFI rather than having the FDIC executive secretary ask for a vote of the Board. The FDIC general counsel immediately notified the Board that any vote conducted in this way was not a valid FDIC Board action.
On December 3 and December 6, Chopra, Gruenberg and Hsu voted on the original draft RFI and posted it on the CFPB's website on December 9.	On December 6, the FDIC staff produced the new staff-drafted RFI. On December 9, the FDIC released a statement that said the original RFI posted to the CFPB website that day was not legitimate.

Law360 reported that it has obtained a copy of an eight-page undated legal memorandum purportedly authored by the CFPB, concluding that the FDIC Board could make decisions by majority vote without the approval of the FDIC chairman. The CFPB argues that "to prevent the majority of the FDIC [B]oard from making decisions for the corporation would be contrary to the statute, effectively providing the [FDIC Chairman] ultra vires authority to control the FDIC". As of the writing of this alert, the memorandum has not been released to the public.

While there is some language in the FDIC's bylaws that gives the Board the power to act by majority consent outside of a meeting, there are other considerations that need analysis such as how certain provisions of the bylaws are read in the context of other provisions, fiduciary duties, and the policies and procedures of the FDIC

Board that have been followed for many years. As a result, it is unclear whether the FDIC and Chopra, Gruenberg and Hsu can resolve these differences and whether legal action will ensue to determine who is right and who is wrong.

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