FDIC
Federal Deposit Insurance Corporation
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May 21, 2013

MEMORANDUM TO: Board of Directors

FROM: Arleas Upton Kea
Director
Division of Administration

Richard J. Osterman, Jr.
Acting General Counsel

SUBJECT: Delegation of Authority from the FDIC Board of Directors Regarding Order of Succession During Emergency Situations

RECOMMENDATION

We recommend that the Board of Directors ("Board") adopt the attached resolution delegating all powers, duties, and authority of the Board on a temporary basis to those officials designated in the resolution in the event of a significant emergency situation. This delegation of authority will be triggered in the event of an emergency so significant that it would render the Board unable to conduct business. The delegation specifies the order of succession and authorizes the designated official (in accordance with such order) to act as Manager of the Corporation on the Board's behalf to facilitate the continuity of critical operations at the Federal Deposit Insurance Corporation ("Corporation" or the "FDIC").

BACKGROUND

The terrorist attacks of September 11, 2001 on the Pentagon and New York City, the unexpected August 2011 earthquake in Washington, D. C., and more frequent severe weather events across the country have highlighted the need to preserve the government's capability to perform essential functions under emergency conditions. Critical to such capability is having in place a delegation of authority that establishes an order of succession to ensure business continuity in the absence of the governing body of an agency. The Board's resolution delegating such authority was last updated in 2002 and does not reflect the change in composition of the Board mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") or the FDIC's current organizational structure.

In addition, since 2002 the Department of Homeland Security ("DHS") has issued extensive guidance to federal agencies for use in developing contingency plans for the continuity of operations ("COOP") during an emergency. DHS's guidance identifies as an essential element of agency COOP capability a succession plan for key positions.[1] Like earlier guidance,

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[1] See Federal Continuity Directive 1 (FCD 1), dated October 2012. Available at http://www.fema.gov/library/viewRecord.do?fromSearch=fromsearch&id=6888

the current DHS guidance states that it is applicable to executive departments, independent establishments, and Government corporations.

Although the Federal Deposit Insurance Act ("FDI Act") and the FDIC's Bylaws cover the contingencies of a vacancy, absence, or disability of one of the Board Members, the FDI Act does not directly provide a plan for the continuity of operations for the FDIC's management in the event of an emergency. In particular, the FDI Act does not cover an emergency situation or crisis where no member of the Board is able to conduct business with the other members in the event, for example, that communication systems have been rendered and may remain inoperable for an unknown time and the Board members are otherwise unable to convene or act as a governing body.

Specifically, the FDI Act (section 2(b)(3)) addresses vacancies among internal directors. It provides that "[in] the event of a vacancy in the position of the Chairperson of the Board of Directors or during the absence or disability of the Chairperson, the Vice Chairperson shall act as the Chairperson." This provision is further developed in the FDIC Bylaws, which provide that, in the absence or disability of Chairperson and Vice Chairperson, the Appointive Director shall act as Chairperson. FDIC Bylaws further provide (Article IV, section 6(d)) that one member of the Board of Directors will constitute a quorum for purposes of transacting business in the event there is only one member in office. However, nothing covers a situation where Board members are simply incapable (due to emergency conditions) of forming a quorum to transact agency business.

Similarly, the FDI Act (section 2(d)(2)) and the FDIC Bylaws (Article IV, section 1) address the events of an absence, disability, or vacancy of one of the *ex officio* FDIC Directors, i.e., the Comptroller of the Currency ("Comptroller") or the Director of the Consumer Financial Protection Bureau ("CFPB Director"). In such event, the Acting Comptroller or Acting CFPB Director (once validly appointed), as the case may be, shall be a member of the FDIC Board. Again, however, these provisions do not address succession in the situation of inability to form a quorum due to emergency.

The most recent Board Resolution on emergency succession, bearing Seal No. 070737, which was adopted on April 9, 2002, was designed to provide a line of succession when no Board member can act due to a significant emergency. That 2002 resolution delegates all Board authority to the most senior official at any site of FDIC operations in the following order: the Chairperson; Vice Chairperson; Director Appointive; Comptroller of the Currency; Director, Office of Thrift Supervision; Deputy to the Chairperson and Chief Operating Officer; Deputy to the Chairperson and Chief Financial Officer; Deputy to the Chairperson; General Counsel; Director, Division of Supervision; Director, Division of Insurance; Director, Division of Resolutions and Receiverships; Regional Directors (Supervision) at New York, San Francisco, Chicago, Dallas, Kansas City and Atlanta (in that order); Director, Division of Administration; Director, Division of Information Resources Management; and Director, Division of Finance. The 2002 Resolution does not reflect either the structural changes to the Board made by the Dodd-Frank Act or the current Division and Office structure of the Corporation. Accordingly, we recommend the Board adopt the attached resolution that reflects such statutory and organizational changes to supersede the FDIC's existing emergency order of succession, as summarized below in more detail.

PROPOSED RESOLUTION DELEGATING BUSINESS CONTINUITY AUTHORITY

1. General Recommendations

To adequately plan for a continuity of FDIC operations in the event of a significant emergency, we recommend that the FDIC Board rescind the April 9, 2002, Board Resolution (Seal No. 070737), and replace it with an updated resolution delegating all powers, duties, and authority of the Board to designated officials in a new specified order.

The delegation of authority would be triggered in the event a sudden and usually unforeseen situation that poses an immediate threat to life, causes serious damage to property, or adversely affects a Corporate mission and renders the Board temporarily unable to perform its normal management function.

Consistent with past practice, we recommend that certain positions be designated in a proposed order, without naming the specific persons who currently hold such positions, so as to avoid the issue of whether the successor to the position is covered by the delegation. The recommended resolution makes clear that whoever holds the designated position at the time of the emergency is in the line of succession. Also, if any title or organizational changes take place after the date of adoption of this resolution, such that any title listed in the line of succession would become obsolete, the resolution deems the functional successor or the official of equivalent authority and responsibility to be in the line of succession. This is intended to avoid having to update the resolution every time there is an organizational change.

2. Recommendations Regarding the Order of Delegation for the Proposed Succession Order

Based on discussions with executive managers, we recommend that the current emergency delegation of the Board's authority be modified to substitute the Director of the CFPB for the Director of the Office of Thrift Supervision, substitute the Chief of Staff for the Deputy to the Chairperson, update position titles, and designate the order of succession of the Regional Directors based on each Regional Director's length of service as a Regional Director rather than on geographic location.

The order of succession starts with the Chairman and thereafter the Vice Chairman and the Director Appointive, consistent with the Federal Deposit Insurance Act. Following the internal Board members and then the *ex officio* Board members, the resolution delegates emergency authority in the following order: (1) Deputy to the Chairperson and Chief Operating

Officer[2]; (2) Deputy to the Chairperson and Chief Financial Officer; (3) Chief of Staff; (4) General Counsel; (5) Director, Division of Risk Management Supervision; (6) Director, Division of Insurance and Research; (7) Director, Division of Resolutions and Receiverships; (8) Director, Division of Depositor and Consumer Protection; (9) Director, Office of Complex Financial Institutions; (10) Regional Directors (in order of seniority based on length of service as an FDIC Regional Director as documented in official personnel files); (11) Director, Division of Finance; (12) Director, Division of Administration; and (13) Director, Division of Information Technology. The resolution provides that these officials may waive or decline the responsibility (e.g., due to personal circumstances, work load, or other good reason) to serve as "Manager of the Corporation" during the emergency and must communicate the waiver or declination to other Corporation officials as appropriate.

We believe that it is important that the successor to the Board's authority in a crisis situation be intimately familiar with the FDIC's internal operations. Persons holding the positions of Deputy to the Chairperson and Chief Operating Officer[3], Deputy to the Chairperson and Chief Financial Officer, and Chief of Staff all possess the broad corporate perspective needed to carry forward the FDIC's operations. This holds true for persons holding the positions of General Counsel, Director of the Division of Risk Management Supervision and the other designated executive level positions (as well as anyone acting in any of those positions if appointed by the Board or the Board's designee) by virtue of their management and oversight of core corporate functions, which are also essential functions for the continuity needed in an emergency situation.

The resolution also includes in the order of succession officials outside the Washington, D.C., geographic area in order to ensure continuity of operations in the event of a localized emergency adversely affecting the Washington metropolitan area. DHS's guidance on developing contingency plans recommends such geographical dispersion to adequately provide for the continuity of operations.

We recognize that it may be difficult under a significant state of emergency to ascertain whether the Board is able to continue its functions. Under the resolution, officials in the line of succession must first make a good faith effort to contact all Board members, as practicable, in order to consult with them about the circumstances; and if it appears from such contacts as well as from other available information that no Board member or members are able to continue the FDIC's management, one such official shall determine and self-certify that he or she is senior in the line of succession. The proposed order would then authorize the most senior official to carry on the duties of the Board. Such authority would continue until such time as a quorum of the Board is able to reconvene or reestablish communications.

[2] Although the position of Deputy to the Chairperson and Chief Operating Officer is currently vacant, it still appears in the FDIC Bylaws and staffing table and is therefore provided for in the line of succession, in case that position is filled in the future.
[3] See footnote 2.

Currently, the Corporation's Bylaws at Article IV, section 5, Powers of the Board of Directors, apply the standard of a "catastrophic event or national security emergency" to trigger emergency succession and delegation of emergency authority.[4] In light of recent natural disasters including weather extremes, earthquakes and the threat of a pandemic, we believe that a "catastrophic event" standard may not provide sufficient flexibility or guidance for activating a delegation of emergency authority. We recommend that the Board change the standard from "catastrophic event or national security emergency" to a more flexible and adaptive standard of "a sudden and usually unforeseen situation that poses an immediate threat to life, causes serious damage to property, or adversely affects a Corporate mission and renders the Board temporarily unable to perform its normal management function." This recommended standard for activating Board succession is consistent with the general FDIC Circular 1500.5, "FDIC Emergency Preparedness Program" (January 30, 2007).

The Federal Emergency Management Agency ("FEMA") defines a catastrophic event as being one with heightened levels of casualties, damage, or destruction.[5] It should be noted that FEMA and DHS guidance to federal agencies prescribes no specific standard for triggering or activating emergency succession in view of the many different sizes, missions and authorities of federal agencies. We believe the proposed revised standard will permit (but not require) the FDIC to activate emergency succession if, for example, a severe but localized weather event or earthquake disabled the FDIC infrastructure and communications in Washington, D.C.

Finally, we recommend deleting the existing requirement in the 2002 emergency delegation resolution specifying that the senior person in charge must be "present at any site of operations of the Corporation". We believe that improvements in telecommunications, the wide availability of portable communications devices, and the proven ability of FDIC officials to work from home or remote locations obviate the need for the senior official to be physically present at an FDIC operational site (which might itself be non-operative or in danger) in order to manage the Corporation during an emergency.

CONCLUSION

For the reasons discussed above, staff recommends that the Board adopt the attached resolution to adequately plan for a continuity of FDIC operations in the event of a significant emergency and rescind and replace the existing 2002 Board resolution to enhance the Corporation's emergency preparedness posture.

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[4] The last sentence of Article IV, section 5 of the Bylaws currently states: "In addition, the Board of Directors may provide for emergency succession and delegation of emergency authority to ensure the Corporation's ability to continue essential functions in the event a catastrophic event or national security emergency renders the Board temporarily unable to perform its normal management function."

[5] "A catastrophic incident is defined as any natural or manmade incident, including terrorism, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions." Available at http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf.

Concur: Steven O. App 5/21/2013

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Deputy to the Chairman and
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