FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

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| In the Matter of<br><br>HENRY L. KLEIN, individually, and as an institution-affiliated party of<br><br>BANK OF LOUISIANA<br>NEW ORLEANS, LOUISIANA<br><br>(INSURED STATE NONMEMBER BANK) | DECISION AND ORDER DENYING APPLICATION TO MODIFY ORDER OF PROHIBITION FROM FURTHER PARTICIPATION<br><br>FDIC-12-154e |

STATEMENT OF THE CASE

INTRODUCTION

On March 19, 2013, Henry L. Klein ("Respondent"), through a letter ("Application") addressed to the Associate Director for the Division of Risk Management made application to the Federal Deposit Insurance Corporation ("FDIC") for written consent to a modification of the Order of Prohibition from Further Participation ("Order of Prohibition") to continue to act as legal counsel to the Bank of Louisiana, New Orleans, Louisiana ("Bank"), an institution regulated by the Louisiana Office of Financial Institutions and the FDIC. This application arises under 12 U.S.C. §1818(e)(7) and 12 U.S.C. §1818(j).

BACKGROUND

Respondent served as a director of Bank of Louisiana, New Orleans, Louisiana ("Bank") from December 2004 until January 2011. On July 25, 2012, Respondent, without admitting or denying any unsafe or unsound banking practices or breaches of fiduciary duty, consented to the issuance of an Order of Prohibition by the FDIC. On October 31, 2012, the FDIC issued the Order of Prohibition against Respondent pursuant to 12 U.S.C. §1818(e). The Order of

Prohibition prohibited Respondent from participating in the conduct of the affairs of the Bank or any other FDIC insured institution without the prior written consent of the FDIC and the appropriate Federal banking regulator pursuant to 12 U.S.C. §1818(e)(7).

On November 14, 2012, Respondent, through a letter addressed to the Acting Associate Director of the FDIC's Division of Risk Management Supervision, sought confirmation that the Bank and Respondent could continue their previously existing attorney/client relationship notwithstanding the FDIC's October 31, 2012, Order of Prohibition.

On March 12, 2013, the Associate Director of the FDIC's Division of Risk Management Supervision informed Respondent that a lawyer who is under an Order of Prohibition From Further Participation is precluded from acting as a lawyer for certain enumerated financial institutions, including any insured depository institution, in the absence of a special exception granted under 12 U.S.C. §1818(e)(7).

## THE APPLICATION

By letter dated March 19, 2013, Respondent made application to the FDIC for written consent to a modification of the Order of Prohibition. By his application, Respondent sought to continue to act as legal counsel to the Bank. In support of his application to serve in this position, Respondent stated that his role as an attorney for the Bank would be limited to the defense of cases brought against the Bank "for a myriad of reasons not involving legal advice as to any aspect of management or policy decisions." He described his role as services performed "in the courtroom, but not in the boardroom."

## FINDINGS OF FACT

In his application for modification of the Order of Prohibition, Respondent sets forth several grounds for requesting such relief. He states that the work he is requesting to do would be limited and that there would be a benefit to the Bank to maintain its legal counsel that has years of experience and who can charge lower fees. Respondent states the litigation he proposes to conduct for the Bank does not involve legal advice as to any aspect of management or policy decisions. Respondent provides no detail and no examples of such litigation. Nor does Respondent provide any support from Bank management confirming his opinion.

The FDIC finds that the facts are insufficient to support the requested relief. The FDIC finds that Respondent has not articulated an appropriate basis for modifying the Order. He has provided no details regarding the pending proposed litigation. Additionally, Respondent has submitted his request for a modification less than five months after issuance of the Order. Respondent has not demonstrated any material changes that would justify a modification after a brief period of time. He has not provided any facts or evidence demonstrating that he is now fit to participate in the conduct and affairs of the Bank.

## DECISION AND ORDER

Upon review of the record as a whole, the FDIC finds that Respondent has failed to present evidence or persuasive argument that meets the burden for obtaining consent from the FDIC to participate, in any manner, in the conduct of the affairs of an insured depository institution pursuant to 12 U.S.C. §1818(e)(7).

To support a consent by the FDIC for Respondent to participate in the conduct of affairs of an insured institution, Respondent must demonstrate: (1) [his/her] fitness to participate directly or indirectly in the conduct of the affairs of an insured depository institution; (2) that his participation would not pose a risk to the institution's safety and soundness; and (3) that his participation would not erode public confidence in the institution. See: In re Charles E. Floyd, FDIC-87-178e, 1992 WL 812871 (FDIC Apr. 16, 1992); In re Frederick M. Pfeiffer, FDIC-87-61e (FDIC Feb. 28, 1991); In re *** Bank *** ***, FDIC-83-153e (FDIC Aug. 9, 1988). Respondent has not provided evidence to meet this burden. The only evidence that Respondent has provided in connection with his application is a brief statement regarding his belief that his proposed participation would not harm the Bank and a copy of his resume.

This evidence is not sufficient. In issuing the Notice of Intention to Prohibit from Further Participation, the FDIC made *a prima facie* finding that Respondent had breached his fiduciary duties and engaged in unsafe or unsound practices. The FDIC found that Respondent engaged in concealment of material facts and misrepresentations to Bank officials and Bank examiners in addition to engaging in transactions that caused the Bank to violate certain laws and regulations, all for his personal gain.

Banking depends upon the commitment to the highest standards of fiduciary duty long required by law for bankers. See: Briggs v. Spaulding, 141 U.S. 132 (1891); In re ***, FDIC-85-291k, 1986 WL 379638 (FDIC Aug. 12, 1986); In re ***, FDIC-85-356e, 1988 WL 583064 (FDIC Mar. 1, 1988); See Also: American Bankers Association, *Focus on the Bank Director*, 97-125 (1984); Schlichting, Rice & Cooper, *Banking Law*, 6.04 (1984).

Respondent proposes to serve in a position as legal counsel to the Bank in order to provide advice, counsel, and litigation services on litigation matters that could have negative impacts on the Bank. Such services include ultimate responsibility for gathering, verifying, and presenting information to the Bank in addition to making decisions on what information is material and therefore necessary for actual disclosure, in order for the Bank and its officers and directors to make fully informed decisions about courses of action that would be in the Bank's best interest.

Although Respondent has detailed how this modification would benefit him, he has provided insufficient evidence regarding his fitness to participate and why he would not pose a risk to the institution or erode the public confidence in the institution.

In conclusion, the FDIC has long recognized that an attorney representing a financial institution, like the institution's officers and directors, occupies a position of trust and has important obligations to the institution. As the Board stated in *Stoller*, at p. A-2082:

> Because of this position, attorneys have a significant opportunity to harm the institution if they are so inclined. . . . A bank officer, however, depends upon his attorney to exercise the utmost loyalty and fidelity to the bank's interest. He does not have the expertise to police the attorney's conduct and should be able to assume that the attorney is zealously representing the bank's interests.

*Id.* at A-2085.

Accordingly, the FDIC finds that Respondent's request to obtain approval to provide legal services for litigation matters should be denied. Respondent's March 19, 2013, request to modify the Order of Prohibition is hereby denied.

Pursuant to delegated authority.

Dated at Washington, D.C., this 22nd day of August, 2014.

/s/

Christopher J. Newbury
Associate Director
Division of Risk Management Supervision