

A Breath of Fresh Air at the FDIC: The "Trust through Transparency" Initiative

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FDIC Chairman Jelena McWilliams has announced a "Trust through Transparency" initiative that is remarkable and well worth a read. In our view, there are three main takeaways. One is the importance of transparency to public trust in a Democracy, the second is how important it is that the government be accountable to the governed, which in the banking sector translates as consistency in the supervisory environment, and the third is a rethinking of what should be treated as confidential supervisory information.

As she had in her nomination hearings, Chairman McWilliams began by stating her appreciation for a democratic system of government built upon public trust and accountability to the People as opposed to the opaque and unaccountable system of government she experienced until age 18 in the former Yugoslavia. In these troubled and divided times, we do well to listen to this message of appreciation for our Republic from a first-generation immigrant who has lived, as many of us have not, in an authoritarian regime. Chairman McWilliams linked trust in Democracy with the FDIC's core mission of instilling public confidence in the financial system through its role as insurer, supervisor and receiver of failed banks.¹ Neither the FDIC nor the federal government more generally can succeed in its mission without the public's trust. Unfortunately, public trust may be at an all-time low.² Her "Trust through Transparency" initiative at the FDIC, which ought to be followed by all the other federal agencies, is designed to help combat recent signs of declining trust in public institutions.³ Key first steps in the "Trust through Transparency" initiative include publishing FDIC performance metrics, such as turnaround times for examinations and applications, on the FDIC website on a regular basis. The goal is to provide data that anyone, not just technical experts, can understand and find useful.⁴

Another part of the initiative is rebuilding trust in the FDIC as a supervisor through an examination process that is well communicated and consistent so that it satisfies fundamental principles of due process and accountability of the government to the governed. It is worth quoting the Chairman's own words here as they mark an intent to change the supervisory culture from one of secrecy and discretion to one of accountability and consistency:

"Trust in the FDIC as a supervisor means that banks are confident that our examination process is fair and free of outside influence. The trust between bank and examiner is unlikely to survive a process that is opaque, poorly communicated, and riddled with inconsistencies. On the other hand, open and responsive communication with supervised institutions helps them understand what is expected so they can decide how best to comply given their unique circumstances."

This goal is in keeping with the recent Interagency Statement on Supervisory Guidance, in which the prudential banking agencies also attempted to change supervisory culture by reminding examiners that guidance is not binding and cannot be "violated."⁵ Our view on that guidance can be found [here](#).

A third and quite important point is to limit the tendency of agencies to do too much behind closed doors because that undermines public confidence and allows the government to escape accountability for its actions and omissions. To reverse the tendency of agencies to do too much in secret, Chairman McWilliams stated that the FDIC has begun a systematic review of the information it has deemed confidential supervisory information, a long overdue process at the FDIC and the other banking agencies. The review will include a fresh look at the FOIA process, including how exemptions are applied, in order to strike the right balance between "protecting confidential information and providing public access." As one of us has written, the questions that ought to guide such a fresh look include:

- Why is this topic being treated confidentially?

- Who or what is being protected by the confidentiality?
- Why is this policy choice or regulatory interpretation being made under the rule of discretion rather than the rule of law?⁶

Chairman McWilliams is a breath of fresh air, a modern-day Hamilton whose perspective fuels an ambitious agenda on transparency and public accountability with the right goals. In the meantime, she is embarking on a nationwide listening tour intended to “reverse the long-standing trend of having those affected by our regulators come to Washington to be heard.”

Law Clerk Alba Baze contributed to this post.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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- ¹ The birth of the FDIC is, of course, forever associated with President Roosevelt's Fireside Chat and the actions he took in his first weeks as President to restore trust in the banking system.
- ² Chairman McWilliams cites, in part, a Pew Research Center poll which shows that, over the past decade, only roughly 20% of Americans trust the federal government to do the right thing "always" or "most of the time."
- ³ We note that the Vice Chairman for Supervision at the Federal Reserve, Randal Quarles, has also made speeches in favor of transparency and accountability, identifying them as guiding principles along with efficiency and simplicity of regulation.
- ⁴ For more, see Press Release, FDIC, "FDIC Chairman McWilliams Announces Transparency and Accountability Initiative" (Oct. 3, 2018) ([link](#)).
- ⁵ As Federal Reserve Vice Chairman for Supervision Quarles has [said](#), "our role as supervisors should not be to play 'gotcha' with our banks, but to support their compliance efforts." This means clearly articulating the rules and guidelines the banks will be subject to, giving the banks a fair opportunity to challenge them so that the supervisors can refine their rules and guidelines to avoid unintended consequences and then giving the banks a reasonable period of time to comply before penalizing them for noncompliance.
- ⁶ Margaret E. Tahyar, Are Bank Regulators Special?, TCH Banking Perspectives (Quarter 1 2018) ([link](#)) (looking at the history of confidentiality in banking supervision and suggesting a rethink in light of New Deal principles of securities regulation).