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December 4, 2018

By electronic submission to comments@FDIC.gov

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

Re: Comment Letter in Response to Request for Information on FDIC Communication and Transparency (RIN 3064-ZA02)

Ladies and Gentlemen:

This letter is written in strong support of the plans by the FDIC to modernize its methods of communication and to become more transparent.¹ In this comment letter, we will concentrate on ways in which we believe that the FDIC could improve its website. In the digital era, banking agency websites have become the first stop for many who are seeking information about the laws, regulations and guidance that form the legal framework governing the behavior of banking organizations. The expansion of materials on banking agency websites over the last few years has been welcome and, as lawyers, providing advice to clients, we regularly use the FDIC site.

Unfortunately, however, reliance on internet searching has led to confusions both among younger, digitally native lawyers and regulatory readers² about the hierarchical

¹ Davis Polk Partner Margaret E. Tahyar has previously written on the principles that we believe should guide how banking agencies think about transparency in the digital era. See Margaret E. Tahyar, *Are Banking Regulators Special?* (Jan. 1, 2018).

² This letter draws heavily from another article recently published by Margaret E. Tahyar entitled *Legal Interpretation is Not Like Reading Poetry – How to Let Go of Ordinary Reading and Interpret the Legal Framework of the Regulatory State*, available at

structure of the legal framework.³ Some of these confusions could be easily fixed in any revamp of the website and some are more challenging.

1. Confusion Caused by the Simplified English Phrase “Laws & Regulations”

Regulations are part of the law. Astoundingly, confusion has arisen among some who claim that the “law” is for lawyers and “regulations” are for supervision, risk and compliance. This misapprehension is an unintended and unfortunate side effect of the banking agencies’ admirable use of the elegant and simplified phrase “law and regulations”⁴ as a subheader on their websites and in public and confidential documents too numerous to name. The phrase has led some to mistakenly believe that “regulations” are somehow separate from “law” and that the interpretation of regulations does not involve the norms of legal interpretation. Nothing could be further from the truth. The FDIC could help change this mindset by providing background materials regarding the legal framework of the regulatory state on its website and in examination manuals, without giving up the elegance of the simplified phrase. Enhanced training about the legal framework and the norms of legal interpretation for supervisory and examination staff might also be helpful.

2. Confusion Caused by the Lack of Markers About the Hierarchy of the Legal Framework

The legal framework and its hierarchy are a core knowledge base in the interpretation of any legal text, be it a statute, a court case, a regulation or other agency document. When interpreting a legal text, it is critical to know where it sits in the hierarchy. In the age of internet searching, however, confusion often arises when the most detailed and precise text is instantly found by the search terms. The most detailed and precise text may not sit in the right place within the hierarchy of the legal framework of the regulatory state to provide the definitive answer. If there is a conflict, the text higher in the hierarchy controls. To interpret an FDIC communication requires the backdrop of the legal framework of laws, regulations and public guidance, and, currently, the FDIC’s website is not structured in such a way so as to clearly indicate the proper place of the material in the hierarchy of the legal framework. For example, “Important Banking Laws”—that is, the statutes—are hierarchically located as a subset of “Policy” when in reality policy is subject to the statute from which it derives. As another example, enforcement decisions and orders are currently embedded under the heading of “Examinations,” which is part of supervision and not

https://www.davispolk.com/files/legal_interpretation_is_not_like_reading_poetry.pdf [hereinafter “Legal Interpretation”]. In this comment letter, we use the term regulatory readers to refer to readers and interpreters of the legal framework and its legal texts who have specialized knowledge or expertise but are not trained as lawyers. The concept of the regulatory reader is introduced in *Legal Interpretation*.

³ *Id.*

⁴ A more technically precise but less useful legal wording would be “the Constitution, all applicable statutes, whether federal or state, all relevant judicial interpretations and regulations.”

enforcement. Enforcement is a legal proceeding or consent to the settlement of a legal proceeding.

The FDIC should restructure its website to embed the hierarchy of the legal framework in how it presents materials. As a basic first step, the nature of the legal framework and its hierarchy could be described on the website. Structurally, documents could be grouped by where they sit in the hierarchy. A more complex, later stage step would be to provide links to other materials that control or are derived from a document within a document. The FDIC could use color-coded banners throughout the website to signify the level of authority. Color coding could also signify whether a communication is legally binding or informational, or proposed or final.⁵

3. Confusion Caused by the Absence of Other Statutes and Legal Sources

Additional confusion exists about what the “law” is that might apply to banking organizations, because the banking agencies’ websites often do not include the grounding statutes upon which the regulations, guidance and supervisory letters are based. The FDIC is to be commended because it, alone among all of the banking agencies, posts all the banking statutes in Title 12 of the U.S. Code on its website. The FDIC is also to be commended for going a step further and posting many other important federal statutes that are applicable to banking law, such as the Administrative Procedure Act and applicable federal criminal statutes.

The other banking agencies should follow the FDIC’s lead here and we urge the FDIC, in its revamp of its website, not to remove the relevant statutory texts.

4. Confusion Caused by Lack of Information on Legal Interpretive Norms

The FDIC’s website does not contain any of the principles of legal interpretation which make the reading of legal texts different from ordinary reading. There is no mention of the canons of statutory or regulatory construction⁶ or the principles of deference, under which different types of agency interpretations benefit from different levels of judicial deference. When agency websites were first created, no one could have anticipated that they might need to contain the basic elements of legal interpretation. Today, however, when the agency website is the first stop for many who seek knowledge about the laws, regulations and guidance applicable to the situation, we would respectfully submit that it

⁵ The Federal Reserve has a [user friendly treatment of regulations](#), which has an easy to follow banner, on the regulations landing page at the top of the page permitting one to click straight to the regulation. Each regulation also shows whether there is an outstanding proposal to change that regulation.

⁶ See, e.g., Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, THE CONGRESSIONAL RESEARCH SERVICE (September 24, 2014).

has become necessary. One might argue that lawyers should, by their training, already know these principles. But, in today's world where more than trained lawyers are readers of the legal framework, we believe it has become important to communicate the existence of these principles to the many regulatory readers and even to some lawyers. A common understanding of these principles matters because they inform how the text is read, and the lack of understanding of these principles can lead lawyers, risk managers, compliance professionals and sometimes supervisors to talk past one another when a text that is part of the legal framework is the topic.

Another reason these principles matter more than ever today is the cultural shift toward graphical and other visual means of communications using PowerPoint and similar applications as the dominant tool in business communications. We are now in a world where there are many who have spent their entire working life communicating largely through slide presentations.⁷ There has developed a cultural split between those who spend their working life reading texts and those who spend their life in PowerPoint. As most FDIC official documents remain in legal or legally infused text rather than PowerPoint, a cultural shift must sometimes be made by the digital native reader even before engaging with the fact that legal reading requires an appreciation of the hierarchical nature of various sources of law and the norms of how legal texts must be interpreted.

Adding the canons of construction and the principles of deference can be a challenging concept and could not be done on a document by document basis. Furthermore, the concept of the levels of deference to agency decisions is not settled law and, in some instances, is a moving target. Nonetheless, their total absence on the website, exacerbated by the limited training in the legal framework and legal interpretation for many regulatory readers, is leading to confusion. The best option may be for the FDIC to provide a general notation that these concepts exist, and work to enhance training in this area.

5. Confusion Caused – and Remedied – by Technology

After years of experience with testing and implementing website and database functionality in our own knowledge management system, we understand how, even though technology has improved access to information, it can also make finding that information more difficult.⁸ We imagine that you will receive numerous comment letters describing how you can improve your technology from those who have better expertise in the area than we have. We offer just a few recommendations that we hope might have an outsized positive impact for visitors to your website.

⁷ PowerPoint, with its capacity to communicate with visual tools, is a wonderful medium. Davis Polk's Financial Institution Group uses it frequently.

⁸ This section of the letter has benefited greatly from the insights of the Davis Polk Financial Institutions Group's practice resources lawyer and data specialist, Jessica P. Walker.

The best online portals offer a visually streamlined user experience without sacrificing the depth and breadth of information provided, and simplicity is its own form of transparency. We recommend that the FDIC website's landing page offer clear guideposts to lead users logically to the wealth of information provided on appropriate sub-pages.

Relatedly, we encourage the FDIC to focus on improving its search and navigation capabilities. The results produced by the FDIC website's search function are often not relevant or are so inclusive as to be overwhelming and therefore unhelpful. Predictive searching, by contrast, suggests a list of possible search criteria once users begin to enter keywords. The use of predictive searching not only has the potential to point users directly to the appropriate materials or website section to support their analyses, but also identify additional relevant considerations and topics for which the user may not otherwise know to search.

Some types of materials, such as comment letters or requests for information, are hard to locate on the website. We suggest that financial institution letters be sorted both by topic and by year, as is the case with supervision and interpretative letters on the Federal Reserve's [website](#). Of course, better predictive searching might make this sorting unnecessary over time but we find the Federal Reserve's website much more helpful with today's searching capabilities. Additionally, links to related or cross-referenced information should be consistently provided to guide users efficiently among and between the FDIC's range of materials. When an FDIC document references another document, that reference should include a hyperlink.

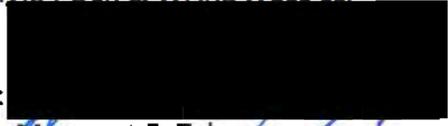
Davis Polk appreciates the opportunity to comment on the FDIC's plans to improve its communication methods. Please do not hesitate to contact Margaret E. Tahyar at margaret.tahyar@davispolk.com or Jessica P. Walker at jessica.walker@davispolk.com if you would like to discuss any of the recommendations in this letter.

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Yours Sincerely,

DAVIS POLK & WARDWELL LLP

By:


Margaret E. Tahyar