STANFORD GRADUATE SCHOOL OF BUSINESS | Corporations and Society Initiative

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Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, S.W.
Suite 3E-218
Washington, D.C. 20219
Docket ID OCC– 2020–0042

Re: Fair Access to Financial Services

Dear Acting Comptroller Brooks:

The question of who is granted access to the U.S. banking system, and on what terms, has been a critical issue of economic, racial, and social policy for much of our nation's history. Experience clearly demonstrates that marginalized groups traditionally lack access to credit on fair and affordable terms, while powerful groups enjoy ample access, not to mention favorable treatment. Within this context, the Office of the Comptroller of the Currency (OCC)'s so-called "fair access" rule is counterproductive because it claims to be one thing – an effort to further justice in banking – when it is in fact the opposite. It purports to help the vulnerable and disfavored while actually aiding the powerful.[1] It assails banks for being overly political when the rule itself is motivated by politics and little else.[2]

In addition, this rule:

1) Rests on a dubious legal foundation;
2) Is based upon a false premise regarding banks' credit decisions; and

[1] While the rule cites a variety of businesses that would potentially benefit, and, problematically, attempts to situate this effort in the tradition of fair lending laws, its intended beneficiaries are quite clear. The industry most discussed in the rule's preamble is the oil and gas sector, the Acting Comptroller mentioned only the oil and gas sector in a letter responding to inquiries from members of Congress in which the "fair access" provision was cited, and the Acting Comptroller likewise exclusively cited oil and gas when raising this issue in congressional testimony in November of 2020. Far from being "cut off" from the banking system, analysis from the Rainforest Action Network has found that, since 2016, 35 large global banks have provided $2.7 trillion in lending and underwriting to the fossil fuel industry.

[2] This is not the first time that the Acting Comptroller has sought to utilize the banking sector for political purposes. In June, the OCC sent letters to state and local leaders arguing that mask mandates, an important and effective public health measure meant to help contain the spread of COVID-19, could threaten the safety and soundness of the banking system, including by increasing the risks of bank robberies.

3) Is vaguely worded and risks significant unintended consequences.

For these reasons, discussed more below, the OCC should not proceed any further with this proposed rule, and instead the proposal should be rescinded.

The rule rests on a dubious legal foundation.

First, the proposed rule cites as its legal basis a reference to "fair access" in 12 U.S.C. § 1(a). This language, while imposing a laudable goal upon the OCC, is not a grant of legal authority. Instead, it is a general statement of the agency's purpose, one that serves as a reference to other laws that the OCC is responsible for enforcing, most notably fair lending laws. The rule's preamble does indeed make note of these laws, but then incorrectly argues that these laws "reinforced" this aspect of OCC's mission. To the contrary, it is these specific authorities, among other provisions, that enable the OCC to carry out its general mission of fair access.

That this provision cannot serve as the basis for this rule should be clear because it applies solely to the OCC and imposes no unique legal obligation upon national banks to behave in a particular manner. The same is true of the other goals contained in 12 U.S.C. § 1(a), including ensuring safety and soundness and compliance with laws and regulations. These concepts, like "fair access," are represented elsewhere in our banking laws. It would be nonsensical to read this provision as creating additional, redundant obligations for banks to engage in safe and sound behavior or otherwise comply with the law.[3]

The proposal also cites previous agency guidance regarding the provision of banking services to specific industries, namely money services businesses and foreign correspondent banks. Unfortunately for the OCC, these rules do not serve as useful precedent for the "fair access" rule. The prior rules were issued in response to a perception, however misguided, that the OCC was forcing banks to terminate business with specific customers or industries, in an effort to clarify that this was not the case and to outline certain relevant risk factors related to such customers. Here, there is no accusation that the OCC is singling out any particular disfavored classes of companies. Quite the opposite, the OCC is attempting to limit banks' discretion to terminate business relationships, of their own accord, in the hopes of benefitting a specific set of well-connected industries. The two situations are simply not analogous.

The rule is based upon a false premise regarding banks' credit decisions.

Nest, the proposal asserts that banks are denying credit and services to fossil fuels and other industries based solely on reputational risks and political considerations. This representation of

[3] Should the OCC find my opinion unpersuasive, consider instead the words of former Federal Reserve Governor Daniel Tarullo, who states in a recent draft article on bank supervision: "Bootstrapping a general charge of the OCC into an obligation by individual banks to lend to all comers seems a bit of a stretch. Where Congress has been concerned with discrimination against borrowers, it has said so clearly."

banks' decisionmaking process is inaccurate. As the Comptroller's handbook on oil and gas lending demonstrates in voluminous detail, there are many factors that banks must take into account when evaluating the creditworthiness of oil and gas-related companies and projects.

In reality, banks are updating their policies with respect to oil and gas companies as a result of a variety of factors, many of which are financial in nature. Indeed, the fossil fuel industry is in a more precarious financial situation as a result of volatile oil and gas prices; complications regarding permitting and other approval processes related to pipelines and other projects; and significant debt overhang and associated credit rating downgrades. In addition, the incoming administration has signaled a desire to change course from the current administration's climate policies, creating uncertainty for the business community. There is also a growing consensus that climate change poses a threat to individual financial institutions as well as the stability of the entire financial system. Thus, there are ample financial reasons for a bank to decline to provide funding to new oil and gas drilling and other projects.

The incongruity between the reality of the marketplace and the justification for the proposed rule violates a central principle of administrative law, that rules should rest upon a sound evidentiary foundation. A few citations to congressional letters or news articles that provide limited anecdotal examples do not establish a sufficient basis for the OCC to attempt to apply a sweeping new rule to the entire federally chartered banking system. Indeed, manufacturing unsupported justifications for a rule is the definition of "arbitrary and capricious" rulemaking.

The text of the rule is vaguely worded and confusing.

Finally, for a relatively short rule, the text of the "fair access" proposal contains a substantial amount of broad and vague verbiage that, if finalized, would risk many severe, and likely unintended, consequences. For example, in proposed paragraph (b)(1), to serve all persons in a geographic region on "proportionally equal terms." The proposal fails to define what it means by "proportionally equal." Next, the applicability to all "persons" is extremely broad, and potentially conflicts with other OCC guidance. OCC has issued guidance about safe and sound practices related to reserve-based lending to oil and gas companies, which are only applicable to such companies. The rule is not clear as to whether a bank would violate the "proportionally equal" requirement merely by following the reserve-based lending guidance.

In another example, proposed (b)(2) would prohibit a bank from denying a company a product or service absent "quantified and documented failure to meet quantitative, impartial risk-based standards established in advance by the covered bank[.]" Consider the example of a loan application for an oil drilling project, the profitability of which relies upon an assessment of whether the borrower can obtain a permit to build a pipeline to transport oil to a port, at which point the oil will be transported by a tanker ship. It is not clear from the proposed text whether a bank's assessment of the likelihood of a pipeline permit being issued or the potential

catastrophic risks of a tanker spill constitute would constitute permissible "quantitative, impartial risk-based standards" that could be used to evaluate the viability of such a project.[4]

In a final example, proposed (b)(4) would prohibit a bank from denying, "in coordination with others, any person a financial service the bank offers." It is not clear how this provision would apply to syndicated lending, a traditional source of oil and gas financing. In the most expansive reading, any joint decision by members of a loan syndicate to deny a loan would be a violation of this provision because it was made "in coordination with others." These are just a few examples of the proposal's egregious and problematic lack of clarity.

* * *

This nation has a great deal of work to do to address systemic racism and its impact on the very real problem of unfair and unequal access to the banking system, but this rule does absolutely nothing to solve these problems. A cruel irony of this rule is its timing: just a few months after the OCC weakened the Community Reinvestment Act, a bedrock law of banking that attempts to reverse the nation's legacy of lending discrimination, the OCC is now seeking to compel banks to provide financing and services to certain favored corporations. Another irony is the fact that a number of the industries that this rule is meant to assist, as cited in the preamble, have deleterious impacts on the most marginalized communities by perpetuating environmental racism, mass incarceration, and other forms of social injustice.[5] As a result, the proposed rule would actually further many of the harms that it claims to want to remedy. For the foregoing reasons, I urge you to withdraw your proposed rule.

Sincerely,

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[4] Ironically, the Comptroller's handbook on oil and gas lending directs banks to consider such factors as "government policies and legal risk," "operational risk," "compliance risk," and, yes, "reputation risk." Regrettably, the present proposal offers no guidance as to how banks might reconcile the OCC's potentially contradictory directives.

[5] As if to underscore the Orwellian nature of this rule, some of its supporters have referred to the act of banks denying oil and gas companies' requests for financing as "redlining." As Mehrsa Baradaran, a preeminent scholar on the history of racial discrimination in banking, has already observed: "A massive corporation being cut off from a few banks is absolutely nothing like the systematic exclusion and exploitation of black communities for hundreds of years. It displays an unfortunate ignorance about the history of redlining."