CONSUMER BANKERS ASSOCIATION

Via electronic submission

January 4, 2021

The Honorable Brian Brooks
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, NW
Washington, D.C. 20219

RE: Fair Access, Notice of Proposed Rulemaking – Docket ID OCC-2020-0042

Dear Acting Comptroller Brooks,

On behalf of the Consumer Bankers Association ("CBA"),[1] I write in response to the Office of the Comptroller of the Currency's ("OCC") Notice of Proposed Rulemaking ("Proposal") to ensure that national banks and Federal savings association offer and provide fair access to financial services. CBA believes the OCC should reconsider the Proposal and pursue a more balanced approach to give banks the ability to manage off of their risks.

The Proposal sets forth the obligations of large banks to provide fair access to financial services and is designed to prevent large banks from using "category-based risk evaluations to deny customers access to financial services."[2] The OCC stated that the Proposal is a response to campaigns by political advocates who seek to achieve policy objectives by pressuring banks to stop providing financial services to customers (engaged in a lawful business) in certain industries or geographic regions. The preamble to the Proposal specifically points to campaigns that have targeted bank lending to firearm manufacturers, family planning organizations, private prisons, and energy companies.[3]

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[1] The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

[2] *Proposed Rule Would Ensure Fair Access to Bank Services, Capital, and Credit* (Nov. 20, 2020), https://occ.gov/news-issuances/news-releases/2020/nr-occ-2020-156.html.

[3] In particular, the Proposal cites to a June 2020 letter to federal financial regulators from the Alaskan congressional delegation on the decisions of several major financial institutions not to lend to new energy projects in the Arctic and the impact such refusal to lend could have on US national security, the US economy, and on Native Alaskan communities.

While we understand the intent of the Proposal is to address concerns that banks will be scrutinized for servicing controversial, but legal, industries, we believe the Proposal raises questions about its impact on long-standing and well-established bank risk management practices. Specifically:

- The Proposal undermines safety and soundness evaluation/determinations by banks,
- The Proposal is not operationally feasible, as it appears to require banks to have staff expertise and experience in every industry,
- The Proposal's requirements could slow the underwriting process and would impose a significant burden in terms of the increased documentation, and
- The Proposal only applies to OCC regulated institutions, setting up competitive disadvantages.

Accordingly, CBA urges the OCC to withdraw the Proposal and allow banks to calculate the risks associated with serving any industry, particularly those that may threaten an institution's safety and soundness due to associated reputational risks. The Proposal would seriously impact a banks risk profile.

Discussion

1) Safety and Soundness Evaluation and Determinations

Reputation is important to all businesses, but it is especially important to banks. Unlike other risks that banks must manage — credit, market, operational, liquidity, etc. — reputational risk is intangible and hard to measure but if mismanaged can cause great damage to a bank's brand and reputation. It affects an institution's ability to establish new relationships or services or continue servicing existing relationships.

Bank regulators began to focus closely on reputation risk in the mid-1990s, defining for the first time the concept of "reputation risk" and focusing on whether negative publicity can be harmful, true or not. According to the OCC, reputation risk is the risk to earnings or capital arising from negative public opinion.[4] In fact, the OCC has specifically warned that "[l]ending to companies found or perceived by the public to be negligent in preventing environmental damage, hazardous accidents, or weak fiduciary management can damage a bank's reputation."[5]

Under the guise of reputational risk, we have seen the concept of banking unsavory entities taken too far. We are all too familiar with Operation Choke Point, a program designed to force banks to sever ties to politically unfavored industries. In 2011 the Federal Deposit Insurance Corporation ("FDIC") placed a number of legal business categories on its "high-risk" list. One of

[4] OCC Bulletin 1998-3: Technology Risk Management: Guidance for Bankers and Examiners (February 1998).
[5] Comptroller's Handbook: Oil and Gas Exploration and Production Lending (October 2018).

these was payday lending, an industry that is often maligned for preying on a low-income clientele. Internal FDIC emails showed intent to limit financial services to payday lending companies. After several payday lenders sued the FDIC for violating their due process rights, the FDIC admitted that "certain [FDIC] employees acted in a manner inconsistent with FDIC policies." The FDIC subsequently issued a statement reiterating that carrying out its responsibilities rests on "laws and regulations, not on personal beliefs or political motivations."[6] As a result, Operation Choke Point was discontinued.

Operation Choke Point was misguided and an abuse of regulatory authority by any objective standard. CBA agrees that enforcement of laws and regulations should not be inappropriately subverted by individual, personal beliefs and political motivations that undermine due process. At the same time, banks should be allowed to make decisions based on complex corporate strategies and risk management tools to address risks to their reputation. The Proposal raises questions about its impact on these long-standing and well-established bank risk management practices.

For example, the Proposal would apparently prohibit a bank from setting caps on its lending to a particular geographic region or industry, and any denials of credit must be made solely on the creditworthiness of an individual client regardless of economic conditions in one regional market versus another. The Proposal also does not define the geographic market served by a covered bank, which could make compliance challenging for banks that offer different financial services in different markets (e.g., local deposit taking and national mortgage lending) or through different channels (e.g., consumer loans online and commercial loans from certain offices). Further, the Proposal would apparently prevent a bank from denying credit even to a customer who otherwise would be denied credit based on its individual risk profile if the denial of credit would hinder the customer's ability to compete in a market (which presumably would occur with a customer who has a sufficiently high-risk profile that no bank would otherwise lend to the customer).

If implemented as a final rule, the Proposal would have the force and effect of law, meaning that institutions found not to be making lending and pricing decisions based on "proportionately equal terms" could be subject to examination criticism and potential enforcement action and could potentially provide the basis of new litigation against banks by customers who believe they were improperly denied loans or other financial services.

The Proposal would place all the responsibility upon banks to significantly adjust their risk management practices and would force banks to assume significant legal and reputational risk. Banks should retain the ability to make sound decisions based on a mutually beneficial business relationships, and not be forced into partnerships that would oftentimes be avoided based on many factors, including reputational issues.

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[6] FDIC Resolves Payday Lender Lawsuit - https://www.fdic.gov/news/press-releases/2019/pr19040.html (May 2019).

Accordingly, all banks need to continue to have control over assessment of various types of risks at a client level in conjunction with creditworthiness and, where appropriate, retain the ability to decline services based on any legal consideration it deems appropriate, including safety and soundness considerations.

2) The Proposal creates operational challenges

The Proposal is not operationally feasible because banks do not have staff expertise and experience in every industry. As a strategic matter, many banks focus very narrowly on certain business sectors, offering niche expertise for a specific few. These relationships are tailored to promote benefits for both bank and customer. Forcing an institution to do business based on the terms of Proposal would impose responsibilities on banks that have little knowledge of specific business sectors and, therefore, causing possible harm to the customer and running contrary to the banks' business strategies.

Like specific industries, banks have processes in place that are intended for specific geographies (e.g., product documents or related processes are standardized for certain markets.) Forcing a bank from Maine to execute a mortgage agreement for an entity in California, where the bank otherwise does not offer such products, but may offer other financial products or services, could be concerning for both bank and customer. In each of these scenarios, banks need to maintain the ability to impose higher prices or other financial terms (e.g., security reserve requirements) without increased liability or potential enforcement action because these requirements are viewed as de facto refusals to provide services based on industry category. Price differences for products could be due to increased documentation costs, credit risk limits or concentration limits, among other factors.

There are also situations that would prohibit a bank form serving a specific company based on contractual terms. For example, a third-party provider may contractually restrict a bank from doing business with other similar third-party providers. Forcing a banking relationship in violation of existing contractual commitments could have legal consequences and may jeopardize a bank's ability to operate in a safe and sound manner.

These operational challenges will not allow banks to compete on a level playing field. Banks could be forced to offer products and services that they are not well equipped or prepared to offer. This may create potential losses that the bank cannot control thus requiring the bank to factor those losses into their strategy which could limit access to credit for consumers.

3) The Proposal is not workable at scale for certain businesses

The Proposal's requirements could slow the underwriting process down on very low margin accounts, introducing unnecessary operational and compliance costs, when implemented across businesses and products and would introduce increased operational costs, legal costs, etc. There are certain businesses (e.g., merchant acquiring and cards) in which the sheer volume of credit decisions require that banks automate credit or pricing decisions; such systems would consider risk factors related to industry or geographic categories.

Additionally, the Proposal would impose a significant burden in terms of the increased documentation that would be required to justify a denial decision. There are quantitative reasons for denials that are not individual to a specific client (as would be required under the Proposal), such as concentration limits. For example, concentration limits by states, and approaches to reduce concentration may include raising prices on the same products in different states.

4) The Proposal disadvantages OCC-regulated institutions

The Proposal only applies to a limited number of "large" institutions regulated and supervised by the OCC causing concern of possible competitive disadvantage for these OCC-supervised institutions. Due to the lack of similar proposals from the Federal Reserve Board ("FRB") and the FDIC, any final rule would unfairly and unnecessarily restrict these OCC institutions' ability to make risk-based assessments and decisions.[7] Accordingly, nationally chartered institutions are concerned with a possible competitive disadvantage that this dichotomy would create.

Due to the high-profile negative implications associated with the Proposal, there is the distinct possibility the customers focused on politically charged issues may choose to find alternate providers. Without the ability to make individualized risk assessments and decisions, OCC-regulated institutions will be defenseless against reputational risks associated with servicing select industries. Similarly, the Proposal has the potential to negatively impact a banks' human capital as talent from all levels may flee to other firms that do not carry the same reputational issues and investors may seek other opportunities given potential for negative impact on environmental, social, and corporate governance issues.

5) Restrictive notice and comment period

The timeframe the OCC has established for finalizing the Proposal is unusually compressed and has not allowed for sufficient time to provide properly informed comment. Notably, the comment period is shorter than the sixty days recommended for proposals. While the OCC has recently argued that publication of a proposal on the agency's website is sufficient for purposes of the public notice requirements of the Administrative Procedures Act, it did not reconcile this position with *Federal Register* publication requirements.[8]

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[8] *See* OCC, Bulletin 2020-100 (Nov. 16, 2020) - "the generally recommended time for comment is 60 days".

CBA greatly appreciates the opportunity to share our views and to work with the OCC as it considers the regulation regarding the Proposed Rule on Fair Access. For the reasons outlined above, we respectfully urge the OCC to withdraw the Proposal.

Should you need further information please do not hesitate to contact the undersigned directly at 202-552-6368 or dpommerehn@consumerbankers.com.

Sincerely,

David Pommerehn
General Counsel & Senior Vice President
Consumer Bankers Association