



January 4, 2021

Via Electronic Mail

Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, DC 20219

Re: Fair Access to Financial Services (RIN 1557-AFO5)

Ladies and Gentlemen:

The Bank Policy Institute¹ appreciates the opportunity to comment on the Office of the Comptroller of the Currency's notice of proposed rulemaking regarding fair access to financial services.² Given the Proposal's serious substantive and procedural deficiencies, which we describe below, we strongly urge the OCC to withdraw the Proposal. The Proposal would create a unique, far-reaching precedent in instructing national banks—under threat of enforcement action—to make or not make certain loans and provide other financial services. Under the Proposal, national banks could no longer consider the range of factors they have traditionally taken into account, both in the context of applying their own sound risk management practices and meeting the OCC's supervisory expectations, when deciding whether and how to provide a customer with financial services. Given these critical deficiencies and their serious consequences, it is only appropriate that the Proposal is withdrawn.

I. Executive Summary

The stated goal of the Proposal is to ensure that national banks provide fair access to financial services. However, the Proposal's approach to promoting fair access is impractical, unworkable and inconsistent with safe and sound banking practices. The Proposal would impose a series of requirements that are vague and overbroad, going well beyond any purported concerns over businesses' and consumers' access to financial services. Instead, by providing for the government to dictate the business and risk management decisions of the banking industry, the Proposal would fundamentally alter the manner in which banks conduct their business. It would also appear to prohibit banks from using subjective judgment and qualitative considerations, including reputational risk, in

¹ The BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

² See Office of the Comptroller of the Currency, *Fair Access to Financial Services*, 85 Fed. Reg. 75261 (Nov. 25, 2020) (proposed rule).

deciding whether to provide a financial service, which is entirely inconsistent with how the OCC has historically expected banks to make risk management decisions. For example, the Proposal would appear to require banks to provide credit or other financial services to industries or industry segments where the bank lacks the requisite expertise or resources to provide those services in a safe and sound manner. The Proposal would not only have a sweeping impact on banks' domestic U.S. operations but, because there is nothing in the Proposal that limits its territorial scope, it would also create significant constraints on the business and risk management strategies that U.S. banks may employ when competing abroad, and the business and risk management strategies that foreign banking organizations may employ within the U.S. market.

Taken together, the Proposal's requirements would effectively replace the traditional business of American banking—a market in which credit and other financial services are allocated on the basis of each bank's own business and risk management decisions and the free and fair operation of the highly competitive market in which banks compete—with one in which the OCC would directly intervene in the market to dictate to whom financial services must be provided, on what terms and with what competitive effect. We believe that such an approach would undermine the safety and soundness of the U.S. banking system and would impair the system's ability to support businesses and consumers, ultimately *reducing* Americans' access to financial services, not improving it.

The Proposal's fundamental practical problems are compounded by its basic legal deficiencies. As a threshold matter, the OCC has invoked, as statutory authority for the Proposal, the language of the agency's statutory mission statement in section 1(a) of the National Bank Act. Yet nothing in this hortatory provision confers upon the OCC the authority to issue rules regarding fair access or any other topic. And as a substantive matter, the Proposal is arbitrary and capricious in several respects, as the OCC has failed to offer a reasoned explanation for the rule, has not provided any analysis of the costs and benefits of the Proposal and has not explained why the Proposal adopts an approach at odds with the OCC's current supervisory guidance and policy regarding how banks evaluate to which persons they offer their products and services. Moreover, the Proposal relies on unfounded assumptions and unsound reasoning for several of its core elements and fails to consider several important aspects of those elements and the problems they would create, including how the OCC determined the small subset of banks that would be subject to this rule. If the Proposal's goal is to ensure that national banks provide fair access to financial services, that requirement should apply to all national banks and not just the "largest banks." The way the scope of application was determined is premised on assertions on "market power" that are not supported by the Proposal and are contrary to law and fact, as there is no rational basis for the presumptions of the power of large banks.

Aside from the sweeping practical implications of the Proposal and the faulty legal reasoning underpinning it, the Proposal also suffers from several procedural deficiencies. The underlying data and analysis on which the Proposal is based was not provided in the Proposal as required by the Administrative Procedure Act ("APA"), nor has it been provided in response to BPI's request under the Freedom of Information Act. In addition, the unusually short comment period, which ran over three major holiday periods in the United States and ultimately gave commenters only 25 business days in which to review, analyze and respond to the Proposal after its publication in the Federal Register, did not provide interested persons with a meaningful opportunity to participate in the rulemaking. There are additional procedural deficiencies in relation to the assertions with respect to burden. The OCC asserts that the requirements under the Proposal will not result in an expenditure of \$157 million or more annually by the private sector for purposes of the Unfunded Mandates Reform Act. This analysis has not been supported and is likely incorrect because the Proposal would result in expenditures from

compliance costs and other administrative costs that have not been identified by the OCC and therefore not quantified. The Proposal also violates the Paperwork Reduction Act in that it does not consider the documentation that will be required in connection with decisions regarding whether to extend financial services, which is an information collection under the PRA.

Given these very serious practical, legal and procedural problems and the serious impact they would have, the OCC should withdraw the Proposal.

II. The Proposal suffers from serious overarching legal deficiencies.

No provision of the National Bank Act or any other statute authorizes the OCC to issue the Proposal. Moreover, the Proposal's approach is fundamentally inconsistent with longstanding OCC policy, and is arbitrary and capricious.

A. The Proposal exceeds the authority delegated to the OCC by Congress, as the "fair access" language in the National Bank Act is a mission statement for the agency and not a grant of rulemaking, regulatory or enforcement authority.

Section 1(a) of the National Bank Act clearly summarizes the OCC's purpose, rather than granting it powers:

There is established in the Department of the Treasury a bureau to be known as the 'Office of the Comptroller of the Currency' which is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.³

The Proposal relies on a single phrase of this section that charges the OCC with "assuring ... fair access to financial services," a concept that appears nowhere else in the National Bank Act. The larger statutory text and context make clear that section 1(a)'s "charging" language, which was added by Section 314(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, is a mission statement, not a delegation of authority. The language of section 1(a) is introductory, general, and hortatory. As the Proposal itself admits, section 1(a) is a "revised statement of the mission" of the Office.⁴

Nowhere in this mission statement does Congress grant the OCC authority to issue rules regarding fair access, or any other topic. It is well established that such prefatory language "cannot enlarge or confer powers, nor control the words of [a statute]."⁵ The National Bank Act creates a detailed scheme governing the OCC's exercise of its congressionally delegated authority. Prefatory language such as that contained in section 1(a)'s "charging" clause is, *at most*, useful to resolving ambiguities in those operative provisions. "[A]part from that clarifying function," however, such "a

³ 12 U.S.C. § 1.

⁴ Proposal at 75262.

⁵ *Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889).

prefatory clause does not limit or expand the scope of the operative clause[s].”⁶ Instead, such prefatory clauses merely announce the “objective[s] that Congress hoped that the [OCC] would achieve,” but “d[o] not change the plain meaning of the [National Bank Act’s] operative clause[s],”⁷ or implicitly grant limitless authority to do whatever the Office decides might promote “fair access” or advance other broadly defined statutory purposes.

If anything, this language constrains the OCC by requiring it to consider certain factors in its exercise of the authorities granted to it by Congress elsewhere in the National Bank Act and in other federal statutes. The plain language of the mission statement states that the OCC is “charged with assuring” certain objectives. Nowhere does section 1(a) impose obligations or a “mandate” of any kind on *supervised institutions*.

The Proposal’s reading of section 1(a) as an open-ended and far-ranging grant of legislative power would also render surplusage a range of other statutes. For example, the prefatory language of section 1(a) also charges the OCC first and foremost with “assuring the safety and soundness of” the institutions it regulates. The Proposal’s apparent reading of section 1(a)—that is, that it authorizes the OCC to do whatever the agency deems helpful to accomplishing the goals identified in the statute’s “charging clause”—would make existing law requiring the OCC to prescribe safety and soundness standards for various aspects of regulated banks’ operations unnecessary and duplicative.⁸ It is highly improbable that the Congress that enacted the Dodd-Frank Act intended to render this existing framework essentially moot simply by expressly making safety and soundness part of the OCC’s statutory mission statement.

Furthermore, any argument that section 1(a) is anything more than a mission statement is repudiated by a reading of the section as a whole. As noted, the rewriting of section 1 in the Dodd-Frank Act also includes references to the Comptroller’s responsibility for safety and soundness and legal and regulatory compliance. The OCC’s long record, prior to 2010, of issuing regulations to accomplish these responsibilities makes clear that it is not section 1 that provides the requisite authority.

Similarly, and with respect to section 1(a)’s “fair access” language in particular, the Proposal’s interpretation also implies that in enacting the Dodd-Frank Act, Congress implicitly rendered various other laws that impose certain standards and requirements for access to financial services, including the Equal Credit Opportunity Act (“ECOA”) and the Community Reinvestment Act, unnecessary and surplusage. For example, ECOA is highly specific as to what protected classes fall within its protections,

⁶ *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008); cf. *New York v. F.E.R.C.*, 535 U.S. 1, 22 (2002) (defining prefatory language as “a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose”) (internal quotation marks and citation omitted).

⁷ *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977–78 (2016); see also, e.g., *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (stating that “no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law”).

⁸ See 12 U.S.C. § 1831p-1; 12 C.F.R. Part 30 (implementing regulations).

and there is considerable jurisprudence on its scope.⁹ Yet the OCC's reading of "fair access" effectively repeals any limits of ECOA, as every business and person would be in a class to be protected by the OCC. Congress clearly did not intend such results.

Moreover, and as further described in Part II.B below, other provisions of the Dodd-Frank Act created the Consumer Financial Protection Bureau ("CFPB") and tasked that agency with "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws."¹⁰ It is highly unlikely that Congress established an entirely new regulatory framework for consumer financial protection outside the OCC's control yet simultaneously, in the same legislation—without anyone remarking on it at the time—conferred upon the OCC the limitless and discretionary authority to dictate access to the entire bank financial system by including an undefined two-word phrase within the OCC's mission statement.¹¹ Stated simply, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."¹² If Congress had intended to grant the OCC with such sweeping authority, it would have done so clearly and conspicuously.¹³ Indeed, the OCC's need to extrapolate authority from prefatory and broad language in itself reveals a demonstrable lack of congressional intent to confer that authority.¹⁴

B. Nothing in the legislative history of the 2010 amendment of section 1(a) suggests that it was intended to be anything other than hortatory and prefatory in nature.

The Proposal's preamble suggests that the Dodd-Frank Act's amendments to section 1(a) "recognized a broad and longstanding . . . principle that individuals are entitled to be treated fairly by national banks and Federal savings associations," and "implies a right of individual bank customers . . . to have access to financial services based on their individual characteristics and not on their membership in a particular category of customers" that ultimately forms a "mandate of fair access to financial services."¹⁵ That assertion is incorrect. As described above, the plain language of section 1(a) is clearly hortatory and prefatory in nature, and nothing in the legislative history of section 1(a)'s amendment suggests otherwise. Indeed, there is little legislative history at all—for example, no floor statement, committee reports or other history addresses the Dodd-Frank Act's change to section 1(a)—and what does exist plainly contradicts the OCC's reading.

⁹ See *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 754 (6th Cir. 2014) ("The ECOA prohibits creditors from discriminating against any credit applicant with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex, or marital status") (internal quotation marks and citation omitted); see also 15 U.S.C. §§ 1691–1691f.

¹⁰ 12 U.S.C. § 5491.

¹¹ *FDA v. Brown & Williamson Corp.*, 529 U.S. 120, 133 (2000) (explaining that statutory interpretation is guided by "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency"); *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (rejecting interpretation ascribing great significance to statutory amendment, where neither the statutory text nor legislative history signaled awareness of the supposed change).

¹² *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

¹³ See e.g., *Utility Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2444 (2014).

¹⁴ See *Brown & Williamson*, 529 U.S. at 133.

¹⁵ Proposal at 75262.

As the Proposal notes, section 1(a) was amended by Title III of Dodd-Frank, which addresses the technical and other changes required to transfer regulatory oversight of thrifts and thrift holding companies from the now-defunct Office of Thrift Supervision to the various federal banking agencies. The relevant amendment was made in subtitle A of Title III, entitled “Transfer of Powers and Duties,” and in particular in section 314 of the Dodd-Frank Act, entitled “Amendments to the Revised Statutes”; this hardly suggests an intent to enshrine a new statutory “mandate of fair access to financial services.” As the federal courts have observed, Congress does not “hide elephants in mouseholes,”¹⁶ and Congress must speak clearly if it intends to empower an agency to resolve an issue of major social or economic importance, as the OCC now proposes to do.¹⁷

Of course, Congress did effect major changes in the substance of bank regulation in *other* parts of Dodd-Frank, including the addition of an entire title (Title VI) dedicated to improving the regulation of banks and their holding companies, and another entire title (Title X) dedicated to creating a new federal agency responsible for consumer financial protection (the CFPB) which, among other things, granted the CFPB “exclusive rulemaking authority” over all Federal consumer financial laws and “exclusive authority” to supervise and examine every national bank and federal savings association that would be subject to the Proposal for compliance with Federal consumer financial laws.¹⁸ Given the extensive and direct treatment in the Dodd-Frank Act of such issues, it defies credulity to suggest that, in the same statute in which Congress created a comprehensive new scheme for consumer financial protection and divested the OCC of both rulemaking authority and supervisory authority over larger banks for the purposes of that scheme, that Congress also intended to establish, via two words in the agency’s statutory mission statement, a new “mandate of fair access to financial services” and gave the OCC exclusive and unbounded authority to interpret and police that mandate.

C. Nothing in section 93a of the National Bank Act empowers the OCC to issue the Proposal or otherwise regulate “fair access to financial services.”

The Proposal also references, as another authority for its issuance, Section 93a of the National Bank Act, which authorizes the OCC “to prescribe rules and regulations to carry out the responsibilities of the office.”¹⁹ At most, Section 93a can be read as a congressional attempt to clarify the OCC’s rulemaking authority with respect to statutory provisions it administers and implements that may lack an express grant of rulemaking authority. It cannot be construed as granting the OCC with an open-ended power to issue any rule it sees fit. Such a reading would effectively empower the OCC to make law on its own without limit.²⁰ That prospect is implausible as a matter of congressional intent.

¹⁶ *Whitman*, 531 U.S. at 468.

¹⁷ *See, e.g., Utility Air Regulatory Grp.*, 134 S.Ct. at 2444.

¹⁸ *See* 12 U.S.C. § 5491; 12 U.S.C. § 5514 (granting the CFPB with “exclusive authority to require reports and conduct examinations” for compliance with Federal consumer financial laws as applies to insured depository institutions with more than \$10 billion in total assets).

¹⁹ 12 U.S.C. § 93a.

²⁰ Section 93a was added by Congress in 1980, when it amended the National Bank Act and conferred rulemaking authority to the OCC as a part of the Depository Institutions Deregulation and Monetary Control Act (“DIDMCA”). The legislative history associated with the passage of the DIDMCA confirms that this conferral of rulemaking authority cannot be read as a new grant of substantive powers. The Conference (continued...)

Moreover, if accepted, this reading would call into question whether the delegation of authority to the OCC is so devoid of an “intelligible principle” as to run afoul of Article I’s Vesting Clause.²¹

D. The Proposal would fundamentally alter, not codify, OCC policy.

The Proposal asserts that the policy and requirements that it would establish are consistent with past OCC statements that “repeatedly stated that while banks are not obligated to offer any particular financial service to their customers, they must make the services they do offer available to all customers except to the extent that risk factors particular to an individual customer dictate otherwise.”²² As support for this proposition, the proposal references (i) two Comptroller speeches, (ii) one OCC staff member’s testimony to Congress, (iii) two OCC reports, (iv) two OCC bulletins, and (v) a Government Accountability Office Report.²³ The two bulletins, in particular, discuss the need for “individualized” assessments of a customer’s risk profile in two specific contexts—money service business and foreign correspondent banking—in generic terms that fall substantially short of the prescriptive mandates that the Proposal would impose. Reminding banks that Bank Secrecy Act compliance does not *require debanking* money-transfer businesses is a far cry from *requiring* banks to service any and all categories of counterparties.

In addition, the OCC does not reference or attempt to reconcile the Proposal’s approach to OCC supervisory policy that *is* longstanding and directly conflicts with the Proposal’s insistence that banks may not “deny any person a financial service the bank offers except to the extent justified by such person’s quantified and documented failure to meet quantitative, impartial, risk-based standards established in advance by the covered bank.” For example, the OCC has long insisted that banks must carefully evaluate “reputational risk” in their activities, which it has defined as “[t]he risk to current or projected financial condition and resilience arising from negative public opinion.”²⁴ Yet this Proposal would make what was once a supervisory expectation – considering the public opinion repercussions of dealing with certain customers – a violation of law. Similarly, the OCC’s “Rating Credit Risk” Comptroller’s Handbook contains an entire section addressing the “qualitative considerations” that are

Report from 1980 describes section 93a as authorizing the Comptroller to “issue rules governing unsafe or unsound banking practices,” subject to a list of caveats. This piece of legislative history confirms that Congress did not intend to grant the OCC with new jurisdiction. In fact, the caveats listed reveal Congress’s intent to dissuade the OCC from employing further expansionary interpretations of the National Bank Act all together. As with Dodd-Frank’s legislative history, the legislative history of Section 93a supports our assertion that generalized statements of agency missions cannot be viewed as expansionary grants of agency power or jurisdiction.

²¹ U.S. Const., art. I, § 1, cl. i; *compare Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019), *with id.* at 2136–37 (Gorsuch, J., dissenting).

²² Proposal at 75262.

²³ None of these documents, of course, has the force and effect of law. *See* Role of Supervisory Guidance, 85 Fed. Reg. 70512 (proposed Nov. 5, 2020) (to be codified at 12 C.F.R. pt. 4, 262, 302, 791, and 1074) (affirming that supervisory guidance does not create binding enforceable legal obligations).

²⁴ *See, e.g.*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC BULL. NO. 2017-43, NEW, MODIFIED, OR EXPANDED BANK PRODUCTS AND SERVICES: RISK MANAGEMENT PRINCIPLES (2017).

an important part of the credit risk evaluation process, one of which is the industry of the borrower.²⁵ Yet the Proposal would suddenly change this well-established element of prudent underwriting—a qualitative, business judgment consideration of the borrower’s management team and industry—make it a violation of law. Because this change of position is not addressed, and the OCC neither explains nor reconciles the purported factual findings on which the Proposal is based with those of its prior policy, this fundamental aspect of the Proposal is void.²⁶

Moreover, the Proposal’s far-reaching non-denial requirement is not salvaged by the very limited exception to it. The exception itself twice uses the term “quantitative” and therefore would not provide for the consideration of qualitative factors. As illustrated above, however, the OCC has long held that, in addition to *quantitative* factors, certain *qualitative* factors—e.g., reputational risk and an assessment of a borrower’s management and industry—should be assessed in any decision to extend credit or provide other financial services.²⁷ In summary, this is a case of the exception being swallowed by the rule.

E. The Proposal is overly broad and arbitrary and capricious because it fails to adequately explain the choices made, relies on incorrect assumptions and faulty reasoning, and upends established agency practice without explanation.

Apart from the core problem that the Proposal exceeds the authority delegated to the OCC by Congress, it is also overbroad, arbitrary and capricious for a number of reasons, several of which are discussed in substantial detail in Parts III and IV below.

First, the OCC has failed to offer any reasoned explanation for the rule it is adopting. The preamble to the Proposal focuses on one supposed problem: Some banks have declined to do business with some controversial industries. But the Proposal sweeps far more broadly (e.g., apparently prohibiting banks from ever considering qualitative risks and requiring banks to provide customers with financial services whenever failure to provide such businesses would “disadvantage” the customer in “entering or competing in a market”). The Proposal does not explain how it got from the asserted problem to the sweeping and multi-faceted “solution” proposed, nor why the Proposal is necessary to address the unsubstantiated problem articulated by the agency.

Second, the OCC has failed to make public any analysis of the costs and benefits of the Proposal, and it is not clear whether such analysis was even conducted. The APA requires reasoned decision-

²⁵ See Office of the Comptroller of the Currency, Rating Credit Risk: Comptroller’s Handbook (April 2001), at 25, <https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/rating-credit-risk/pub-ch-rating-credit-risk.pdf>.

²⁶ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) (“To be sure, the requirement [under the APA] that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position”); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015) (an agency’s change in policy may be “arbitrary and capricious” where it “rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account”).

²⁷ Another factor a bank may consider in determining whether or not to provide a financial service to certain types of borrowers or in certain geographies (or both) is a bank’s realistic evaluation of its own capabilities. That evaluation is grounded in safety and soundness but is not truly quantitative.

making, which entails at least some consideration of the costs and benefits of a proposed rule; otherwise, the agency has not considered “an important aspect” of the problem at hand.²⁸ Similarly, the Riegle Community Development and Regulatory Improvement Act requires federal banking regulators in particular to consider the “benefits” and “administrative burdens” associated with a rule when imposing additional requirements on insured depository institutions.²⁹ The Proposal only asserts that a problem exists and then, without discussion, concludes that the Proposal addresses the problem. The Proposal does not consider, for example, the extent of the problem; the costs to banks (both in terms of compliance costs and harm to safety and soundness and potential damage to reputation) from compliance; why and how a final rule would benefit customers (many of whom may prefer to do business with institutions that reflect their societal, environmental, and other priorities); and whether alternatives could more effectively and less expensively achieve the agency’s goals. Not only is the lack of a cost-benefit analysis a procedural defect, but, in the context of the Proposal, it is a substantive defect as well given the broad and significant impacts the proposal would have across the business of banking. The OCC has provided no analysis of how this proposal might impact the real economy and the products that large banks may choose to provide or not provide going forward and the potential impact that could have on the economy.

Third, as we describe above, the Proposal purports to codify existing guidance, but does no such thing; rather, it would effect a major change in the OCC’s position. The Proposal does not attempt to explain how the provisions in the Proposal—for example, prohibiting consideration of qualitative underwriting criteria—are consistent with existing agency practice, nor does it provide any explanation for its drastic change in policy.

Fourth, the Proposal relies on unfounded assumptions and unsound reasoning for several core substantive elements of the Proposal and fails to consider a number of important aspects of those elements and the problems they would create. Given the magnitude and importance of these substantive deficiencies, we address them in detail in Parts III and IV below.

III. The OCC’s “single-out” approach is arbitrary and capricious.

In implementing a purported statutory requirement of fair access, the OCC has singled out only a small subset of “OCC-regulated institutions”—variously referred to in the Proposal as “large banks” and the “largest banks”—to which this requirement would presumptively be applied.³⁰ These banks are defined in the proposed rule as banks with \$100 billion or more in assets (“covered bank”).³¹

This approach is arbitrary and capricious for three fundamental reasons. First, if a national bank is obligated, as the OCC argues, to provide fair access, that obligation must be universal and not limited

²⁸ See *Utility Air Regulatory Group v. Environmental v. Environmental Protection Agency*, 573 U.S. 302 (2014).

²⁹ See 12 U.S.C. 4802(a).

³⁰ Proposal at 75264.

³¹ *Id.* at 75265. Within the category of covered banks, there is a wide disparity, as the differential between the largest and smallest bank in the group is approximately 28 times as of June 30, 2020.

to a small subset of national banks.³² Second, the Proposal provides no rational basis for the distinction it attempts to manufacture through a single-out approach and the proposed asset threshold, which is premised on assertions regarding “market power” and “dominant market position” that are unsupported in the Proposal and contrary to law and fact. Third, the supplemental attempt to base the single-out approach on “fair[ness]” is flawed by the lack of relationship between fairness among banks and fair access for bank customers, as well as the absence of a factual basis for the fairness argument.

A. Universal Application

If the Comptroller’s concept of “fair access” were correctly grounded in section 1(a) of the National Bank Act, then that requirement must apply to all OCC-regulated institutions. The OCC lacks the authority to say that it would not enforce a broadly applicable statutory requirement for the vast majority (over 97 percent) of national banks; in effect, asserting that those banks do not need to pay heed to a statutory requirement that does not itself expressly exempt them.³³ Section 1(a) does not contain any suggestion that its application, even as a mission statement, is limited to only a small number of institutions above a certain size.³⁴ When Congress elects to legislate in the area of customer protection and decides to distinguish based on bank size, it does so explicitly. In the same statute in which the “fair access” language was added in section 1(a), Congress transferred authority over consumer protection from the federal banking agencies to the CFPB, but explicitly limited that transfer to banks with assets of \$10 billion or more.³⁵

³² See Proposal at 75262 (Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) “charged the OCC with assuring” the “fair access to financial services” by the “institutions and other persons subject to its jurisdiction”).

³³ As of Nov. 30, 2020 there were 816 national banks. See OCC, National Banks & Federal Branches and Agencies active as of 11/30/2020 (Nov. 30, 2020) <https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html>.

³⁴ Indeed, the very same title of the Dodd-Frank Act that added its section 1 mission statement charges the OCC to “ensure the fair and appropriate supervision of each depository institution, *regardless of the size or type of character of the depository institutions.*” 12 U.S.C. § 5401 (emphasis added).

³⁵ Dodd-Frank Act, §1025.

B. No Rational Basis

The OCC provides no rational basis for the Proposal's critical presumption that every OCC-regulated entity with \$100 billion or more in total assets has "the ability to (A) Raise the price a person has to pay to obtain an offered financial service from the bank or from a competitor; or (B) Significantly impede a person, or a person's business activities, in favor of or to the advantage of another person."³⁶ The OCC asserts that "[l]arge banks exercise sufficient market power to influence the price of financial services" and goes on to cite two statistics about the collective nationwide holdings of "the large bank population" to support that claim, one dealing with the collective assets and deposits of large banks, the other dealing with their collective loans and leases.³⁷

The sweeping conclusion that every bank with \$100 billion or more in assets has market power because of the aggregate position of all such banks in a putative national market is fundamentally wrong. There is not a single case cited where any bank has, in fact, demonstrated that it possesses such market power, and no economic justification for basing market power analysis on the aggregated market share of individual competitors. It is unsurprising that the OCC provides no economic or other fact-based analysis in support of its conclusion, because it is contrary to OCC, Federal Reserve, Federal Deposit Insurance Corporation and Department of Justice precedent and guidance, case law and economic logic.

1. *No national market*

As an initial matter, the OCC provides no justification to support its departures from precedent and posit the existence of a national market for "financial services." Because the OCC defines size by nationwide assets, it is inherently assessing market power in a putative national market.³⁸ But the Federal Reserve, the Federal Deposit Insurance Corporation, the Department of Justice and (heretofore) the OCC have all rejected the existence of a single national market and instead relied on local and regional markets when analyzing competition in the industry and assessing whether an individual entity possesses market power.³⁹ In addition, these same agencies have traditionally turned to deposits, not

³⁶ Proposal at 75266.

³⁷ *Id.* at 75264. In the Proposal, the OCC refers to the collective share of the "large bank population" to which its Proposal would apply, although the Proposal would apply to not only national banks but also (i) thrifts and (ii) the federal branches and agencies of foreign banks. The statistics that the OCC cites in support of the presumptions in its Proposal appear to derive from 19 national banks based on June 30, 2020 total-asset data reported by the FDIC. *See id. n.17.* For consistency, BPI also discusses in this submission those 19 national banks.

³⁸ A further demonstration of the conclusion that the OCC is assuming a national market is that many (albeit not all) of the industries the Proposal asserts are affected operate in a national market.

³⁹ *See* Office of the Comptroller of the Currency, *Comptroller's Licensing Manual: Business Combinations* 59 (2018), <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/bizcombo.pdf>; U.S. Department of Justice, *Bank Merger Competitive Review – Introduction and Overview* (last updated Sept. 2000), <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf>; Board of Governors of the Federal Reserve System, *How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank* (continued...)

to assets, as a proxy for a cluster of banking products, in order to measure market concentration and market power. The long-standing foundations for those sub-national competitive analyses have principally been the individual geographic markets that the Federal Reserve defines and refines on an ongoing basis, based on population density, commuting patterns and other considerations. The Federal Reserve makes those definitions available through the CASSIDI website, which “includes up-to-date information about Federal Reserve banking markets.”⁴⁰ Currently, the Federal Reserve defines 1,419 local markets.⁴¹ The OCC, the Federal Reserve, the Federal Deposit Insurance Corporation and the Department of Justice have relied on those definitions in their competitive analyses for years. As set forth in the following table, no “large bank” has a branch presence in even two-fifths of these local geographic markets, making the OCC’s presumption that every individual large bank is exercising market power in every one of these areas particularly erroneous.⁴²

Merger Act and the Home Owners Loan Act? FAQ 12 (last updated Oct. 2014), <https://www.federalreserve.gov/bankinfo/competitive-effects-mergers-acquisitions-faqs.htm>; FDIC, FDIC Statement of Policy on Bank Merger Transactions (2008), <https://www.fdic.gov/regulations/laws/rules/5000-1200.html#fdic5000fdicso2>. The agencies all look to deposits, not assets, as a proxy to assess market power, and the OCC provides no justification in the Proposal for instead inferring market power from assets.

⁴⁰ Board of Governors of the Federal Reserve System, *How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners Loan Act?* FAQ 7(2014), <https://www.federalreserve.gov/bankinfo/competitive-effects-mergers-acquisitions-faqs.htm>

⁴¹ See S&P Global Market Intelligence, U.S. Deposit Market Share Summary Report (December 14, 2020) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/largest-banks-keep-winning-market-share-as-deposits-soar-60407300>. Those S&P data are derived from CASSIDI, FEDERAL RESERVE BANK OF ST. LOUIS, <https://cassidi.stlouisfed.org/>.

⁴² The 19 banks included in this chart were identified using the FDIC’s June 30, 2020 report on the assets and liabilities of all FDIC-insured institutions (referenced by the OCC in footnote 17 of the Proposal). Specifically, this list of 19 national banks was derived by (1) applying a filter to the Assets and Liabilities report to identify all OCC-regulated institutions (“regagnt” = “OCC”), (2) applying a second filter to the identified OCC-regulated institutions to further identify those OCC-regulated institutions with total assets of at least \$100 billion, and (3) listing the resulting institutions that are either a “National Association” or “National Bank.” FDIC, Quarterly Financial Data—SDI: Assets and Liabilities (June 30, 2020), https://www7.fdic.gov/sdi/download_large_list_outside.asp. Two pairs are affiliated: (1) Capital One, N.A. and Capital One Bank (USA), N.A. and (2) Morgan Stanley Bank, N.A. and Morgan Stanley Private Bank, N.A.

	<i>Number of the 1,419 geographic markets in which the bank has a branch</i>	<i>Percent of geographic markets in which the bank has a branch</i>	<i>Percent of geographic markets in which the bank does not have a branch</i>
American Express National Bank	1	0.07%	99.93%
Bank of America, N.A.	237	16.70%	83.30%
BMO Harris Bank, N.A.	47	3.31%	96.69%
Capital One Bank (USA), N.A.	1	0.07%	99.93%
Capital One, N.A.	30	2.11%	97.89%
Citibank, N.A.	30	2.11%	97.89%
Citizens Bank, N.A.	70	4.93%	95.07%
Fifth Third Bank, N.A.	99	6.98%	93.02%
HSBC Bank USA, N.A.	8	0.56%	99.44%
JPMorgan Chase Bank, N.A.	276	19.45%	80.55%
KeyBank, N.A.	111	7.82%	92.18%
Morgan Stanley Bank, N.A.	1	0.07%	99.93%
Morgan Stanley Private Bank, N.A.	2	0.14%	99.86%
MUFG Union Bank, N.A.	44	3.10%	96.90%
PNC Bank, N.A.	205	14.45%	85.55%
TD Bank, N.A.	101	7.12%	92.88%
The Huntington National Bank	72	5.07%	94.93%
U.S. Bank, N.A.	354	24.95%	75.05%
Wells Fargo Bank, N.A.	481	33.90%	66.10%

The OCC fails to provide any rationale for jettisoning decades of precedent, and its underlying rationale, and conjuring the existence of a single, national market or tying a concept of market power to an arbitrary measure of assets. There is simply no basis for assuming that a large bank with a small—much less no—presence in a local market can exercise market power there. The absence of any rational basis for the OCC’s putative national market is further demonstrated by its own list of organizations that purportedly have been denied fair access, including “family planning” organizations.⁴³ Family planning organizations are typically small and local, and do not need the services and loan capacity provided only by large banks. If such organizations have been denied fair access to financial services, there is no reason to believe that they were denied those services by only large banks (or large banks at all) in their local markets.

⁴³ Proposal at 75265.

2. *No showing that individual banks possess market power*

Even if the OCC had offered any support for the existence of a national “financial services” market—which it did not—the OCC has not substantiated that every large bank, or indeed, any large bank, has market power in such a market. Three independent errors in the OCC’s analysis separately foreclose the OCC’s finding that each large bank possesses market power.

First, rather than focus on the share of any individual institution, the OCC attempts to use the aggregate assets of some “large” banks as the basis upon which to calculate market power for individual entities.⁴⁴ An aggregation of assets or competitors, however, is not a legitimate, indeed not even a theoretical, basis upon which to calculate an individual firm’s market position or power.⁴⁵ The bedrock of the competitive framework shared by the Federal Reserve, the Federal Deposit Insurance Corporation, the Department of Justice, and (heretofore) the OCC has always been the shares of individual institutions.⁴⁶ As a matter of antitrust law, banks must reach their lending and other financial services decisions independently.⁴⁷ There is even a special statute designed to prevent director and officer interlocks at banking institutions.⁴⁸ On this basis alone, the entire premise of the Proposal is so mistaken that it must be withdrawn.

Second, the OCC cites no support for its claim that nominal asset size alone is determinative of market power. To the contrary, market power, in a given market, is a function of a competitive dynamic—how many other competitors are in the relevant markets, what competitive presence and prowess do they have, and what potential there might be for firms to engage in anti-competitive, collusive behavior.⁴⁹ The OCC is silent in the Proposal on this fundamental aspect of competitive analysis. Even if a national market share based on assets made sense,⁵⁰ not even the largest single institution among those with \$100 billion or more in total assets possesses anywhere near a 30 percent share of assets—which is the market-share threshold below which courts only “rarely” find that market power exists⁵¹—of the putative national market that the OCC defines. A bank with \$100 billion in assets

⁴⁴ Proposal at 75264 (citing the holdings of large banks viewed “[t]ogether”).

⁴⁵ Courts infer that an entity has market power from the individual entity’s individual share of properly defined market. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (1984); *Flegal v. Christian Hosp.*, 4 F.3d 682, 689 (8th Cir. 1993).

⁴⁶ *See supra* note 40.

⁴⁷ *See e.g., Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674, 681 (6th Cir. 1988); *Smado v. Bank Austria AG*, 174 F. Supp. 2d 159 (S.D.N.Y. 2001), *aff’d*, 378 F.3d 210 (2d. Cir. 2004).

⁴⁸ *See* Depository Institutions Management Interlocks Act, 12 U.S.C. §§ 3201-08.

⁴⁹ *See generally* HERBERT HOVENKAMP & PHILLIP AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 515 (4th ed. 2011 & Supp. 2020) (observing that “the power of a firm with a dominant market share might be very high or negligible, depending upon the intensity of demand, the responsiveness of existing rivals, and the height of barriers to entry by other firms.”).

⁵⁰ In the Proposal, the OCC provides no justification for relying on asset size and departing from its historical use of deposits as a proxy for share. The Department of Justice, Federal Reserve, Federal Deposit Insurance Corporation, and (heretofore) the OCC all historically have relied on the relative share of deposits in a properly defined geographic market to assess the competitive significance of any particular institution. *See supra* note 40.

⁵¹ 1 AM. BAR ASS’N, ANTITRUST LAW DEVELOPMENTS 71 (8th ed. 2017).

and an assumed \$70 billion in loans has only about 0.56 percent of the total U.S. loans of lenders, even if the competitive set of lenders were artificially limited to commercial banks, savings institutions and credit unions.⁵² The comparable percentage for this subset of the U.S. total lending market for any bank is under 10 percent. The Federal banking agencies provide no support or economic analysis to argue that such small market positions constitute market power, and therefore there is no rational basis for the distinctions that the OCC has drawn.

Third, even if there were a national financial-services market, the OCC has failed to account for all the competitors in it. The OCC claims that large banks account for “approximately 55 percent of the dollar value of outstanding loans and leases in the United States.”⁵³ But the cited authority makes clear that this calculation is based solely on the loans of insured banks,⁵⁴ thus ignoring the very substantial lending and leasing done by a wide variety of other competitors. As has been widely recognized, lending markets have many competitors in addition to insured banks, including foreign banks, credit unions, licensed nonbank lenders and private equity funds.⁵⁵ Numerous observers have estimated that banks as a whole hold less than one-half of the lending market and perhaps as little as one-third (which would translate into a share of between 18-28 percent for all “large” banks).⁵⁶ And shares in some significant segments are even lower; for instance, as of Dec. 28, 2020 only 9 percent of multifamily residential mortgages, and 26 percent of non-consumer, non-residential loans are collectively held by these large banks.⁵⁷ Accordingly, the market share calculation on which the Proposal is based exaggerates by perhaps at least double the actual market positions. Moreover, many firms have access to sources of financing other than loans. For instance, those looking to develop new oil and gas infrastructure in the Arctic can turn to the debt capital markets and both public and private equity funds to fund their projects. Thus, the OCC fails to take into account that other lenders and financing sources are

⁵² See S&P Global Market Intelligence, *Assets and Loans & Leases for All US Commercial, Savings Bank; Savings & Loan Associations; and Credit Unions* (Sept. 30, 2020), <https://www.spglobal.com/marketintelligence/en/campaigns/snl-financial>.

⁵³ Proposal at 75264.

⁵⁴ See *id.* at 75264 n.17.

⁵⁵ Just three months ago, the OCC recognized the competitive significance of “non-traditional banks” and “special purpose financial institutions whose focus does not include traditional deposit-taking activities” when assessing competitive effects in the industry. See OCC, Comment Letter on Dep’t of Justice Antitrust Division’s Request for Public Comments on Updating Bank Merger Review Analysis (Oct. 1, 2020), <https://www.justice.gov/atr/page/file/1330161/download>.

⁵⁶ FDIC, *Bank and Nonbank Lending Over the Past 70 Years*, 13 FDIC Quarterly 31, 32 (2019), available at <https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-4/fdic-v13n4-3q2019-article1.pdf>; see also *When it comes to credit provision, banks play second fiddle to capital markets; Shadow banking*, THE ECONOMIST (July 25, 2020), available at <https://www.economist.com/finance-and-economics/2020/07/25/banks-lose-out-to-capital-markets-when-it-comes-to-credit-provision> (discussing the rise of non-bank financial firms, including in lending and capital markets). In the second quarter of 2020, total loans and leases of OCC-regulated institutions with \$100 billion or more in assets amounted to \$5.6 trillion, representing 47.6 percent of the \$11.8 trillion of total loans and leases made by all depository institutions in the United States, and 19.3 percent of the \$29.1 trillion of total outstanding loan liabilities in the United States as measured in the Flow of Funds. See Federal Reserve, *Financial Accounts Guide: Loans*, <https://www.federalreserve.gov/apps/fof/DisplayTable.aspx?t=l.214>.]

⁵⁷ See Federal Reserve, *Financial Accounts Guide: Loans*, <https://www.federalreserve.gov/apps/fof/DisplayTable.aspx?t=l.214>.

accessible. The OCC provides no reasoned justification for ignoring the competitive significance of these other participants in the national “financial services” market it defines.

3. *Fair assessment*

The Proposal also argues that the single-out approach is “fair” because large banks’ “systemic importance often results in their receiving assistance and favorable treatment from the government during periods of financial distress.”⁵⁸ This argument is invalid as a matter of both premise and fact. First, the Proposal fails even to suggest, much less demonstrate, any relationship between “fair access” for bank customers and fairness among banks. There is none, and, absent such a relationship, the question of fairness is irrelevant.

Second, the Proposal fails to discuss the most recent period of financial distress—that is, the severe market turbulence and economic downturn caused by the COVID-19 pandemic.⁵⁹ Indeed, the “favorable treatment” was targeted for smaller banks (those with less than \$10 billion in assets), which received accommodations relating to recognition of loan losses (CECL).⁶⁰ Further, the large banks, which the OCC asserts received “favorable treatment,” were alone subject to restrictions on capital distributions.⁶¹ At the same time, large banks have been expected to serve as a particular source of strength and stability throughout the pandemic, and have done so successfully—as Federal Reserve Vice Chair Quarles recently noted when releasing the December 2020 stress test results, “[t]he banking system has been a source of strength during the past year and today's stress test results confirm that large banks could continue to lend to households and businesses even during a sharply adverse future turn in the economy.”⁶² Accordingly, the actual record repudiates the OCC’s position.

4. *Possible Rationalizations*

The OCC may attempt to justify its novel single-out approach on several bases, none of which, however, can mitigate, much less cure, the lack of a rational basis. First, the OCC might refer to the statement in the Proposal that “all banks have the responsibility to provide fair access to financial services.”⁶³ That generalized statement, however, cannot reduce the actual discriminatory impact of the single-out approach.⁶⁴ Unlike the OCC’s prior policy statements cited in the proposal, which apply to

⁵⁸ Proposal at 75264.

⁵⁹ Although several of the 19 banks included in the OCC’s large bank “population” did receive assistance in the 2008 financial crisis, this was over 12 years ago, and the more recent experience is far more relevant.

⁶⁰ Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁶¹ Board of the Governors of the Federal Reserve System, *Federal Reserve Board announces it will extend for an additional quarter several measures to ensure that large banks maintain a high level of capital resilience* (Sept. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200930b.htm>; see also Andrew Ackerman, *Fed Caps Big Banks’ Dividends, Halts Share Buybacks in Fourth Quarter*, WALL STREET JOURNAL (Sept. 30, 2020), available at <https://www.wsj.com/articles/fed-caps-big-banks-dividends-halts-share-buybacks-in-fourth-quarter-11601497050>.

⁶² Federal Reserve Press Release, *Federal Reserve Board releases second round of bank stress test results* (Dec. 18, 2020), available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20201218b.htm>.

⁶³ Proposal at 75264.

⁶⁴ Notably, it is not included in the proposed rule itself.

all national banks, only the 19 large banks defined as “covered banks” would be subject to the actual rule that “would have the force and effect of law and enable the agency to take supervisory or enforcement action.”⁶⁵ The differentiation and the consequences could not be clearer, as the OCC itself acknowledges.

Nor is the impact of the single-out approach meaningfully reduced by the possibility that a bank could “seek” to “rebut the presumption” of being a “covered bank.”⁶⁶ Not only are there no criteria listed for rebutting the presumption, but there is no timetable, and the conclusion is left solely to “the agency’s judgment.”⁶⁷ Based on the assertions in the Proposal, it seems inconceivable that many of the covered banks could rebut the presumption.

Finally, the OCC may seek to justify its single-out approach based on a footnote maintaining that “[t]he \$100 billion threshold is a commonly used threshold for large banks.”⁶⁸ That threshold, however, has nothing to do with fair access or any other statute relating to a bank’s responsibilities with respect to customers. Nor is it based on perceived market position or power. Instead, it relates to safety and soundness considerations and, therefore, is not relevant.⁶⁹

IV. The Proposal’s core substantive requirements are seriously flawed.

A. The Proposal’s core requirements are arbitrary and capricious because they are inappropriately vague, would create practical and conceptual problems that the Proposal fails to consider, produce results that are wholly unrelated to the purported objectives of the Proposal, and are inconsistent with sound banking practices.

To operationalize its new mandate that certain banks “provide fair access to financial services,” the Proposal would impose four broad and sweeping requirements, all of which suffer from profound flaws. These core requirements generally utilize key terms and concepts that are vague and undefined, meaning that we can only speculate as to what these terms might mean, and how they might apply in practice. These core requirements are also overbroad in critical respects; giving rise to sweeping impacts, serious practical problems and consequences that the Proposal fails to consider, producing results that have no reasonable relationship to the Proposal’s stated goals. And in numerous cases, the Proposal would impose requirements that would directly undermine the safe and sound provision of financial services by national banks. We describe many of these flaws in detail below, but their aggregate effect is unequivocally clear: the substantive reasoning and logic of the Proposal is fundamentally unsound.

1. *Proposed section 55.1(b)(1), which would require covered banks to “make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms,” is vague and unreasonable, would create practical*

⁶⁵ Proposal at 75264.

⁶⁶ *Id.* at 75265.

⁶⁷ *Id.*

⁶⁸ *Id.* at 75265 n.20.

⁶⁹ *See id.*

problems and produce results that the Proposal fails to identify and consider, and would undermine safety and soundness.

This aspect of the Proposal, which would appear to effectively obligate banks to provide credit and other financial services to *anyone* in a “geographic market” it serves on “proportionally equal terms,” is excessively vague and suffers from numerous conceptual and practical flaws.

First, both the term “geographic market” and “proportionally equal terms” are undefined, leaving the most significant operative elements of the requirement ambiguous and unknowable. For example, the undefined and unexplained use of these terms leaves unanswered the basic question of whether a geographic market for this purpose would be measured at local, state, national or some other level. Yet the nature and extent of the obligation imposed by section 55.1(b)(1) would vary enormously depending on how this key term is construed. Similarly, it leaves unanswered the basic question of what would and would not constitute “proportionally equal terms” for these purposes. “Equal” as to what – the price of the service, the tenure of the service, the quantum of the service, and/or the other commercial and legal terms of the service (e.g., termination or choice of law provisions)? And “proportional” to what – the size of the customer, the risk of the customer, the relative market share of the customer, and/or some other metric?⁷⁰ These are, of course, challenging questions and policy choices. Indeed, the inherent difficulty in acting as a “central planner” that sets prices is why there is no general duty to deal under the antitrust laws.⁷¹ But these crucial terms, the interpretation of which would have enormous practical impact, remain entirely ambiguous, and the Proposal is devoid of guidance.

Second, the requirement would appear to give rise to results that the Proposal does not identify, explain or justify, and that would be wholly unreasonable. For example, it is possible that the requirement could be construed as an effective “most favored nation” mandate, whereby any service offered to any customer must be offered to all other customers on precisely the same terms, disincentivizing price competition among banks and thereby harming customers. Such a result would reflect an unprecedented, direct intervention by the OCC into the economics of the banking markets, for which no rationale is offered or identified. Similarly, the phrase “proportionally equal terms” could be viewed as implying an affirmative duty of banks to manage their portfolios in a manner that ensures they are not in practice lending more to one sector than another or accepting more deposits from one sector than another. This would ignore important factors like market demand, and perversely could be read to require banks to reduce the provision of services to some sectors and at the expense of some consumers to achieve proportionality with others. For example, public welfare investments (e.g., low-income housing finance) are typically structured very differently from other commercial financing (e.g., through equity investments in real estate). The Proposal would require these products to be offered to

⁷⁰ To the extent the Robinson Patman Act attempts to impose an obligation to price on “proportionally equal term” it is limited to commodities, which are easier to compare, yet is criticized as dampening competition. See Antitrust Modernization Commission Report and Recommendations, 311-12 (April 2007) (finding that the law protects competitors over competition, discouraging price competition and innovation, without any corresponding benefit for customers).

⁷¹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Where a duty to deal has been found by a court it applies to dealing with a *competitor* not a customer. See e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)

all customers, which would likely limit this type of funding going forward, as it is not appropriate for non-public welfare investments. Clearly such an outcome is not the desired intent of the OCC; however, the requirements in the Proposal are so broad that they would result in these and similar unintended consequences.

Third, the requirement could undermine the safety and soundness of covered banks. For example, the preamble states: “[W]hile the rule would not require a covered bank to provide asset-based lending services collateralized by accounts receivable, if the bank provides this service to some customers, *then it would be impermissible for the bank to categorically deny access to this service to firms in a particular sector*, given that the risks attendant to this type of lending reflect the risks of the firm’s customers’ accounts payable and would not change based on the sector in which the firm operates.”⁷² But an important aspect of banks’ safety and soundness is their ability to choose whether and when to enter certain markets on the basis of their risk management expertise and broader business and commercial strategy. For example, national banks, like many companies in the service sector, frequently develop specialties, both as a matter of risk management and commercial strategy, in certain sectors (e.g., industry verticals) that are based on deep expertise in the relevant industry (e.g., Oil & Gas, Retail, Healthcare) and offer services targeted to those areas of expertise. It is possible, however, that this aspect of the proposed rule might be read to require a covered bank that has expertise in one industry to also provide credit or services to other industries—even if the bank does not have the expertise or resources necessary to extend credit or provide such services in a safe and sound way. For example, a bank that has developed commercial real estate lending expertise in Texas, but does not lend to the health care industry, would appear to be required to engage in the latter under the Proposal, or vice versa. Forcing banks to do business in areas in which they do not have the requisite expertise and resources would be inherently unsafe and unsound, and could result in serious investor harm to banks, which the Proposal ignores.

Fourth, this requirement would be inconsistent with existing OCC policy. For example, this requirement, and the specific example cited in the Proposal cannot be reconciled with the OCC’s own bulletin on Asset-Based Lending, which provides that banks engaged in asset-based lending must carefully scrutinize and understand the borrower’s industry *precisely because the risk of an asset-based loan differs based on the borrower’s industry*.⁷³ As a matter of risk management, the underwriting analysis for asset-based lending must properly take into account the nature of the client’s business, which affects the creditworthiness of the lending structure. For example, the advance rate for an asset-based loan based on the accounts receivable from a payday lender would likely be significantly different than the advance rate for receivables from a well-established supplier of essential goods (e.g., electricity).⁷⁴ This is indeed why the OCC’s Asset-Based Lending Handbook has an entire Risk

⁷² Proposal at 75266 (emphasis added).

⁷³ The Comptroller’s Handbook, Safety and Soundness, *Asset-Based Lending* (Jan 2017)(“ABL Handbook”) (emphasis added).

⁷⁴ The Comptroller’s Handbook on Accounts Receivable and Inventory Financing provides: “Because the quality of an ARIF loan depends so much on the collateral, *lenders should thoroughly analyze the borrower’s business and industry, the borrower’s position within the industry, and the types of customers with whom the borrower does business*. Understanding the borrower’s customer base will help the lender determine the quality of the receivables and level of third-party credit risk.” (p. 14, emphasis added); “The lender’s knowledge of the (continued...) ”

Management section entitled, “Assessing the Borrower’s Industry,” which starts with the following statement: “Credit performance and the value of collateral can be significantly affected by the conditions in the borrower’s industry.”⁷⁵ Similarly, the Proposal conflicts with the OCC’s existing policies regarding reputational risk and qualitative evaluation of credit risk, as described in Part II.D above. The Proposal does not acknowledge any of this existing policy, let alone make any attempt to harmonize it with the Proposal’s flatly inconsistent assertions here.

2. *Proposed section 55.1(b)(2), which would prohibit a covered bank from “deny[ing] any person a financial service the bank offers except to the extent justified by such person’s quantified and documented failure to meet quantitative, risk-based standards established in advance by the covered bank,” is overbroad, conflicts with numerous other statutory and regulatory obligations, and would undermine bank safety and soundness.*

The Proposal would create a sea change in the regulation of national banks and their provision of services by prohibiting a covered bank from denying a financial service for *any reason* other than a “quantified and documented failure to meet quantitative, risk-based standards established in advance.” The Proposal’s preamble explains that the function of this requirement is to ensure that covered banks do not, when making decisions about when and to whom to provide financial services, consider “the bank’s opinion (or the opinion of its employees) of customers.”⁷⁶ Stated another way, it would flatly prohibit the use of subjective judgment in deciding whether to provide a financial service. Such a requirement runs counter to the fundamental way in which the OCC has historically expected banks to make risk management decisions, where such judgment is crucial. Simply put, there are numerous appropriate qualitative reasons for why a bank might choose not to provide a particular financial service to a particular customer in a particular circumstance. Effective lending consistent with bank safety and soundness cannot be encapsulated within a purely quantitative, metric-driven and uniform formulaic approach. Rather, most loan decisions must be based on a wide variety of factors, some of which are quantitative and some of which are qualitative, and some of which are general in nature, some of which are industry- or class of customer-specific and some of which are specific to the individual borrower. The formulaic approach that the Proposal would require represents a direct threat to the bank safety and soundness that the more multi-faceted and flexible loan approval approach is designed to protect.

borrower’s operating cycle enables it to structure a loan that fits the borrower’s needs and protects its own interests. ... *Operating cycles vary from industry to industry* depending on the length of the manufacturing process and the credit terms offered. A business must take into account how long after purchasing goods and services (cash outflow) it is able to convert its own goods and services into cash (cash inflow).” (p. 15, emphasis added); “Assessing the Borrower’s Industry-- *A borrower’s performance and collateral value are affected by conditions in the borrower’s industry.* For example, when the domestic automobile industry is in a downturn, the business of the parts manufacturers that supply it may slow, too. Although such a manufacturer may have an acceptable balance sheet, it may have to adjust for declining auto sales at the same time the auto manufacturers are putting pressure on its margins. During a downturn, an entire industry will often extend the receivables collection period. By analyzing the industry, both the lenders and the examiners are better able to understand whether changes in a borrower’s financial condition and operating cycle are due to the changes in the industry in general.” (p. 17, emphasis added).

⁷⁵ ABL Handbook at 12-15.

⁷⁶ Proposal at 75265.

The impact of such a requirement is sweeping, unreasonable, and would inherently produce imprudent lending. For example, this requirement would appear to:

- Require a covered bank to make a loan to a customer that is engaged in a novel business or would use loan proceeds in a novel way (or at least novel to the bank in question), as denial must be based on quantitative, impartial risk-based standards *established in advance*. In such circumstances, it is unlikely that any concerns the bank might have regarding the customer's business prospects or risks would have been documented in advance.
- Prohibit a covered bank from declining to provide a service due to operational, resource or other constraints at the bank itself. For example, a bank that has a large book or backlog of business may rightfully "pass" on new business because the bank's resources are already fully deployed. Similarly, a bank might prefer to decline new business because it is attempting to manage its exposure to certain businesses or portfolios for any number of reasons. The Proposal, however, would appear to require the national bank to take on the new business, regardless of such constraints.
- Require a national bank to provide services that would result in an undue concentration of credit risk, in direct conflict with OCC supervisory guidance on credit concentrations.⁷⁷ The OCC has historically indicated that a bank should avoid making loans that would result in the bank having an undue concentration of credit. But under the Proposal, if a bank denied a customer a loan on such basis, it would appear to violate the rule as it would not be based on the risk-based characteristics of the proposed borrower; rather the denial would be based on the bank's existing credit exposures to it and other borrowers in the aggregate.
- Prohibit a covered bank from deciding not to make a loan because it believes doing so would undermine its ability to manage its capital adequacy under risk-based capital rules, or from accepting a deposit because it believes doing so would undermine its ability to manage capital adequacy under leverage-based capital rules.
- Prohibit a covered bank from deciding not to accept certain types of deposit funding because it believes doing so would undermine its management of quantitative liquidity requirements or brokered deposit limits, or its asset and liability management strategy more generally.
- Prohibit a covered bank from deciding not to make a loan because it believes doing so would give rise to undue aggregate interest rate risks in its banking book.

Apart from this over-breadth, the requirement would also be exceptionally burdensome as a practical matter. The requirement that *every* decision by a covered bank to deny credit or another product or service to a potential customer be based on a *quantified and documented* failure by the customer to meet quantitative, uniform risk-based standards creates costly and burdensome documentation requirements. For example, given the sheer volume of credit decisions in certain businesses, such as merchant acquiring and credit cards, banks automate certain credit and pricing decisions using systems that consider risk factors related to industry and geographic categories. By

⁷⁷ See Comptroller's Handbook, Concentrations of Credit (October 2020), p. 5.

effectively barring these more efficient forms of underwriting and decision-making, the Proposal's requirement would significantly slow this process and likely make the provision of credit more expensive for low margin accounts.

3. *Proposed section 55.1(b)(3), which would prohibit a covered bank from “deny[ing] any person a financial service the bank offers when the effect of the denial is to prevent, limit, or otherwise disadvantage the person from entering or competing in a market or business segment or in such a way that benefits another person or business activity in which the covered bank has a financial interest,” is overbroad, vague, unworkable and inconsistent with safety and soundness.*

This requirement would require that a covered bank provide a financial service or product to a company based solely on the competitive implications of that decision on the customer, and similarly without regard to the risk to the bank associated with such service or product. For example, it would appear to require a bank to make a loan to a borrower who wanted to enter a new market or line of business, even if the borrower has no experience in that market or line of business. Similarly, it would appear to require a bank to provide a financial service to any person that could reasonably assert that, if it did not receive said service, it would “disadvantage the person from ... competing in a business or market segment.” Such a situation could plausibly encompass nearly every instance in which a business customer does not receive a product or service they requested; potential bank customers seek out financial services for the purpose of enhancing their ability to compete.

More generally, and as that over-breadth suggests, the key terms used in this requirement are particularly vague. It is not clear what is meant by “disadvantage the person from entering or competing in a market or business segment,” nor how a bank would measure this *ex ante*. Similarly, the link between denial of service to one customer and either the disadvantage to that customer or benefit to another person or business activity is also ill-defined; it is entirely unclear what level of causality must exist, and how it should be assessed. Similarly, it is not entirely clear whether denying credit “in such a way that benefits another person or business activity in which the covered bank has a financial interest” is separately forbidden or somehow modifies the prohibition on denials that result in a “disadvantage,” nor is it clear what would constitute a “financial interest” for this purpose.⁷⁸ Such a high degree of vagueness of such a key term should invalidate the regulation. Even if such regulatory vagueness were permissible in some limited circumstances, that cannot be the case here where a violation as determined by the OCC would “enable the agency to take supervisory or enforcement actions.”

This requirement also poses substantial problems of practical implementation, as it looks solely to a denial's actual or potential “effect.” This would appear to require, for example, a covered bank to conduct a detailed assessment of the full hypothetical competitive implications of providing (or not) a financial service to a particular customer before it could ascertain whether or not said denial would be prohibited under this section.

⁷⁸ For example, it is not clear whether this refers to a proprietary investment stake in such other person, a mere loan or service relationship with such person, or some other type or threshold of “interest.”

Finally, this requirement would also directly undermine the safety and soundness of covered banks, as it would make the competitive impact *to the customer* the basis on which a decision to provide a financial service is made, while completely disregarding the risks *to the bank* for doing so.

4. *Proposed section 55.1(b)(4), which would prohibit a national bank from “deny[ing], in coordination with others, any person a financial service the covered bank offers, is ambiguous and overbroad.*

The scope of this final requirement is both ambiguous and overbroad. National banks routinely partner with other entities to provide products or services (e.g., through syndicated loans, joint ventures, or marketing and sales arrangements). This provision would appear to suggest that covered banks cannot deny credit or other services to an entity if the bank offers or sells those services in conjunction with a third party. For example, this requirement would appear to prohibit a covered bank that is in a syndicate of lenders from denying the provision of a syndicated loan to a potential borrower.⁷⁹ Similarly, national banks routinely have arrangements with other entities to obtain information for underwriting, risk management and other decision-making processes. Existing antitrust laws permit and encourage pro-competitive business collaborations.⁸⁰ Because “coordination with others” is undefined and unexplained, it is impossible to assess whether such arrangements would be precluded and, if so, the OCC’s rationale for doing so.

B. The Proposal’s impact on foreign operations of U.S. banks and foreign banking organizations’ U.S. banking operations is not identified or addressed and could have unworkable consequences for such banks’ operations.

As outlined above, the Proposal’s four core requirements have innumerable flaws as applicable to a covered bank’s domestic U.S. business. But there is nothing in the Proposal that would limit its application to a covered bank’s domestic activities, and the Proposal does not describe or address how its provisions would work in the context of the activities of a U.S. bank’s foreign branches or a foreign banking organization’s national bank subsidiary.

For example, as drafted, the Proposal would appear to require a covered bank that offers services outside of the United States through its branch network to U.S.-based companies to also offer those services to local foreign companies, even where the U.S. bank’s business strategy and expertise is limited to assisting U.S.-based companies in overseas markets, as is often the case in trade financing. Similarly, a covered bank may intend to offer retail banking services outside of the United States only to U.S. residents abroad but could be required under the Proposal to also serve foreign nationals, regardless of its expertise or business strategy. Likewise, similar issues would be raised for foreign banking organization’s U.S. national bank subsidiaries, which may currently serve a primarily home-

⁷⁹ Indeed, both the substantive flaws and discriminatory impact of the Proposal are well illustrated by the impact on syndicated loans. Assume that a borrower has a syndicated loan with 10 banks, and the borrower seeks a waiver of a covenant so as to enable the borrowing base to be increased. The waiver requires, as is typical, approval of banks holding, in the aggregate, 75% of the borrowing base. The Proposal would appear to preclude any “large bank” in the syndicate from voting against the waivers, but not the banks that are not so classified.

⁸⁰ See generally FED. TRADE COMMISSION AND U.S. DEP’T. OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at <https://www.justice.gov/atr/page/file/1098461/download>.

country-based set of customers in the U.S. Under the Proposal such institutions would no longer be able to limit their activities in this manner. The Proposal may also impose obligations on such foreign banking organizations that directly conflict with home-country laws or regulations that require lending activities to serve certain protected classes of borrowers or to promote certain policy goals.

The Proposal's impact on the foreign activities of a U.S.-based covered bank would also place those banks at a meaningful disadvantage relative to local competitors not subject to similar requirements. Insofar as the Proposal would require a covered bank to offer all its products to all classes of customers in a foreign market it enters, the bank would be required to build expensive, full-scale operations outside of the U.S. in order to enter that market, rather than slowly accessing the market, building relationships with new clients, and competing through specialized services.

V. The Proposal is procedurally deficient and falls well short of providing the meaningful opportunity for public comment required under the APA.

A. Because the Proposal provides little (if any) of the data and analysis on which the Proposal is based, with only a truncated period for public comment, the Proposal fails to provide interested persons with a meaningful opportunity to participate in the rulemaking as required by law.

The Proposal falls well short of satisfying applicable requirements under section 553 of the APA, which requires the OCC to provide interested persons with a meaningful opportunity to participate in the rulemaking. The purpose of the APA's notice-and-comment requirements is to ensure that proposed rulemaking is "sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data and argument,"⁸¹ and the public must be informed of the data and assumptions on which the agency's proposal is based.⁸² Indeed, the courts have observed that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [i]n critical degree, is known only to the agency."⁸³ Yet that is precisely the case here – the Proposal is based on conclusory assertions about the issue it is trying to address and the market power of large banks, the empirical basis relating to both of which has not been disclosed to the public, and indeed may not even exist. Furthermore, as discussed in the preceding sections of this letter, there are a number of terms used in the Proposal that are not defined and vague in their meaning, which has further limited the ability of interested parties to comment meaningfully on the Proposal. Without clarity as to what the Proposal's actual impact may be and what some of its most crucial terms may actually mean, it is exceedingly difficult to provide meaningful input into the rulemaking.

Similarly, and notwithstanding the substantial technical issues raised by the Proposal, the OCC has provided only 40 days after publication of the Proposal in the Federal Register—only 25 of which are business days, given that it runs over the end-of-year holiday period—to respond to the Proposal. We have attempted to persuade the OCC to address these procedural deficiencies by (i) seeking an extension of the comment period, which was summarily denied and (ii) seeking (under the Freedom of Information Act) release of the underlying data and analysis on which the OCC relied in formulating the

⁸¹ Administrative Procedure Act: Legislative History, S. Doc. No. 248 79-258 (1946).

⁸² Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 2014 A.B.A. SEC. ADMIN. LAW REG. PRAC. 274.

⁸³ *Portland Cenet Ass'n v. Ruckleshuas*, 486 F.2d 375, 393 (D.C. Cir. 1973).

Proposal, to which the OCC has not responded. Given these facts, we submit that the comment period was truncated, and the decision not to respond to any extent whatsoever to BPI's FOIA request prejudicial to the opportunity to comment, and therefore the close of the comment period on Jan. 4, 2021 violates the notice and comment requirement of Section 553(c) of the APA.⁸⁴ Accordingly, if the Proposal is not withdrawn due to other defects as outlined in this letter, we request that the comment period be reopened for a three-week period commencing on the date when the OCC has made available the information sought in the FOIA Request.

The OCC's stated reason for rejecting an extension of the comment period is contradicted by both the OCC's own statement in the Proposal and the actual facts. The stated reason was:

[T]he proposed rule would codify longstanding OCC guidance, including formal guidance issued in 2014 and 2016, with which banks and other stakeholders are familiar. Accordingly, the OCC continues to believe that a 45-day deadline for public comments is sufficient.⁸⁵

The OCC, however, contradicts that position in the Proposal itself. There, the OCC acknowledges the major departure represented by the Proposal:

*Unlike prior articulations of the fair access principle discussed above, this OCC action would have the force and effect of law and enable the agency to take supervisory and enforcement action*⁸⁶

By the OCC's admission, there is a major departure from prior OCC actions, and one that has potentially serious consequences. An enforcement action based on a violation of the regulation would cause, at a minimum, significant reputational damage and entail potential monetary penalties.

Moreover, the "formalization" of the prior statements cited by the OCC is not the only difference between the Proposal and prior statements. A major difference, as we describe in detail in Part III, is the OCC's single-out approach. The dichotomy between the 19 national banks with over \$100 billion in assets and all other national banks is found nowhere in the prior articulations. Likewise, totally novel are the concepts that (i) fair access requires a subset of national banks to make "each financial service it offers available to *all* persons in the geographic market served by the bank" and (ii) such services must be offered "on proportionally equal terms."⁸⁷ Because these procedural

⁸⁴ See *Century Foundation v. Devos*, 2017 U.S. Dist. LEXIS 217802; *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) ("[We have held for many years that an agency's failure to disclose *critical* material, on which it relies, deprives comments of a right under §553 to participate in rulemaking" (emphasis in original)); *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449 (3rd Cir. 2011), *cert. den.* 567 U.S. 951 ("[A]mong the purpose of the APA's notice and comment requirements are ... to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review").

⁸⁵ Letter from Brian P. Brooks, Acting Comptroller of the Currency, OCC, to Dafina Stewart, Senior Vice President, Associate General Counsel, Bank Policy Institute, et. al., (Nov. 30, 2020).

⁸⁶ Proposal at 75264 (emphasis added).

⁸⁷ Proposal at 75266 (emphasis added).

shortcomings have been, and remain unaddressed, the Proposal continues to fall well short of the meaningful opportunity to participate in rulemaking as required under the APA.

B. The Proposal's analysis under the Unfunded Mandates Reform Act is unsupported and likely incorrect.

In the preamble, the OCC asserts that the Proposal will not result in an expenditure of \$157 million or more annually by the private sector for purposes of the Unfunded Mandates Reform Act. That assertion is not supported by any evidence; rather, it is based on a conclusory assertion that (i) compliance with the Proposal would entail the elimination of risk-based criteria prohibited by the Proposal, and (ii) such elimination would impose little if any burden. That assertion reflects a rather shocking lack of understanding of how the Proposal would actually impact the underwriting and other practices at banks, as the rule would on its face impose an entirely new burden on banks to document each and every individual failure to meet quantitative, risk-based standards in advance for each and every product that it offers, and presumably also require banks to make loans and provide other financial services that are not provided today (thereby incurring additional capital, liquidity, funding and other expenses). We believe that such a burden would *clearly* result in compliance costs and other expenditures that substantially exceed \$157 million annually, yet the OCC has not even accurately identified that burden, let alone attempted to quantify it.

C. The proposed rule violates the Paperwork Reduction Act ("PRA").

The Proposal incorrectly concludes that the "proposed rule contains no information collections." Yet the Proposal prohibits a national bank from denying financial services except to the extent justified by such person's "quantified *and documented* failure to meet quantitative, impartial risk-based standards established in advance by the covered bank." Because the Proposal would require more than 10 entities to create and maintain documentation in connection with every decision made regarding whether to extend financial services, it includes substantial "information collections" for purposes of the PRA.

The definition of "collection of information" under the PRA includes "identical ... recordkeeping requirements" imposed on ten or more persons, and defines recordkeeping requirement to mean "a requirement imposed by or for an agency on persons to maintain specified records, including a requirement to—(A) retain such records; (B) notify third parties, the Federal Government, or the public of the existence of such records; (C) disclose such records to third parties, the Federal Government, or the public; or (D) report to third parties, the Federal Government, or the public regarding such records." The referenced language from the proposal clearly meets that definition because it requires banks to create and presumably retain two specific records in the form of (i) documentation that a borrower does not meet certain standards, and (ii) the underlying risk-based standards on which the denial must be based.

VI. Conclusion

As outlined in this letter, the OCC's proposed rulemaking on fair access to financial services would create a unique, far-reaching precedent in instructing national banks, under threat of enforcement action, to make or not make certain loans and provide other financial services. Under the Proposal, national banks could no longer consider the range of factors they have traditionally taken into account, both in the context of applying their own sound risk management practices and meeting the OCC's supervisory expectations, when deciding whether and how to provide a customer with financial services. This would represent significant departure from how banks currently operate their businesses and the OCC currently supervises national banks. Given the critical legal, practical and procedural deficiencies as discussed above and their serious consequences, it is only appropriate that the Proposal be withdrawn.

* * * * *

BPI appreciates this opportunity to comment on the notice of proposed rulemaking regarding fair access to financial services. If you have any questions or would like to discuss any of the comments, please contact Lauren Anderson, Senior Vice President and Associate General Counsel, at (202) 737-3536 (lauren.anderson@bpi.com) or Dafina Stewart, Senior Vice President and Associate General Counsel, at (202) 589-2424 (Dafina.stewart@bpi.com).

Respectfully submitted,



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