Government Examiners Are Prohibiting Banks from Lending to Some of America's Most Important Companies

Greg Baer & Jeremy Newell | June 11, 2025

In past notes, we have documented how the banking agencies' leveraged lending guidance was based on a misdiagnosis of "macroprudential risk," which has significantly reduced bank lending to growing mid-sized companies, and was never properly submitted to Congress — and thus invalid, under the Congressional Review Act.[1] Recent evidence suggests that much the same can be said of a separate OCC bulletin on venture loans issued by Acting Comptroller Hsu in 2023, which is choking off credit to companies that fuel much of U.S. economic growth and innovation. [2]

The Bulletin, titled "Commercial Lending: Venture Loans to Companies in an Early, Expansion, or Late Stage of Corporate Development," focuses on (as the name suggests) businesses in the early-, expansion-, or late-stage of corporate development. These are start-ups that are not yet generating significant cash flows – in other words the start-ups and similar companies across all industries that in the past have grown, often with the help of bank credit, to become America's largest technology and other companies. By targeting these loans, the OCC guidance effectively starves credit to small businesses and early-stage companies that are the engine of growth and jobs, including in small towns and mid-sized cities across America.

[1] *See* [https://bpi.com/the-gaos-determination-that-leveraged-lending-guidance-is-a-rule-under-the-congressional-review-act-key-issues-ramifications/; [https://bpi.com/why-leveraged-lending-guidance-is-far-more-important-and-far-more-misguided-than-advertised/]; [https://bpi.com/turns-out-leveraged-loans-arent-a-systemic-risk-after-all/]; [https://bpi.com/the-banking-agencies-and-leveraged-lending-a-case-study-in-the-hazards-of-macroprudential-regulation/]. While the initial 2013 guidance was published for notice and comment, subsequent FAQs issued by the agencies in 2014 that imposed significant further restrictions were not, and thus the latter also violated the Administrative Procedure Act.

[2] *See* OCC Bulletin 2023-34, *Commercial Lending: Venture Loans to Companies in an Early, Expansion, or Late Stage of Corporate Development* (Nov. 1, 2023), *available at* https://www.occ.treas.gov/news-issuances/bulletins/2023/bulletin-2023-34.html.

As a general matter, one can wonder what qualifies government examiners to dictate whether, and how, banks lend to such companies. The Bulletin cites no data or experience in support of its edicts.[3] It was not published for public comment, so it certainly was not informed by the experience or expertise of venture companies or their lenders, or any data they or other commenters might have been able to provide on relevant issues. Leaving aside this general lack of empirical or analytical foundation, one provision of that guidance establishes a particularly significant bar to growing companies that wish to obtain bank funding: the "guidance" states that, as a categorical matter, "[v]enture loans originated with a non-pass risk rating are inconsistent with safe and sound lending standards." With those sixteen words, the OCC has enacted a governmental ban on a sweeping range of loans to new businesses.

To understand that result, the statement includes two definitions that need to be unpacked.

- First, under the loan rating system used by the OCC and other banking agencies, a non-pass loan is defined to include loans classified as (in increasing order of problem) special mention, substandard, doubtful and loss.[4] A "special mention" loan is in turn defined as one with "potential weaknesses that deserve management's close attention. If left uncorrected, these potential weaknesses may result in deterioration of the repayment prospects for the asset or in the institution's credit position at some future date. Special mention assets are not adversely classified and do not expose an institution to sufficient risk to warrant adverse classification."[5]

- Second, the reference to "safe and sound lending standards" is an implicit reference to the OCC's enforcement power, which authorizes the OCC to bring enforcement actions against banks that engaged in unsafe or unsound practices.[6] As interpreted over time by the federal courts, an unsafe or unsound practice in this context means one that "threatens the financial integrity of the institution"[7] or that "would be contrary to generally accepted standards of prudent operation (that is, it constituted an imprudent act), the possible consequences of which, if continued, created an abnormal risk or loss or damage to the financial stability of [a bank]."[8]

The statement in the guidance thus seems to make little sense: loans that by definition "do not expose an institution to sufficient risk to warrant adverse classification" are conclusively presumed to represent a threat to the financial integrity or stability of the bank, and thus categorically prohibited.

That oddity becomes nonsensical when one recognizes that this prohibition applies regardless of the risk management practices of the bank. So even if a bank (i) has a robust underwriting process that considers the risk of the loan and potential mitigating factors (such as strong sponsors with track records of support), (ii) holds reserves that are reasonable in relation to those risks, (iii) subjects the credits to strong stress testing and analysis that capitalizes severe tail risks and (iv) sets concentration limits to limit its aggregate exposure to these type of credits, the bulletin deems all those factors irrelevant. Similarly, the bulletin also entirely ignores any consideration or assessment of whether the pricing of the loan and thus the potential financial rewards to the lender are nonetheless consistent with the risks it presents.

[3] The Bulletin explains, "Venture lending supports new business formation and can improve access to capital for growth companies. However, new business ventures have a high probability of failure." One must wonder how the OCC feels about small business lending, given that over 20 percent of small businesses fail within the first year.
[4] *See* [https://www.occ.treas.gov/publications-and-resources/publications/shared-national-credit-report/files/shared-national-credit-report-2024.html].
[5] *Id.*
[6] *See* 12 U.S.C. § 1818.
[7] *Johnson v. OTS*, 81 F.3d 195, 204 (D.C. Cir. 1996).
[8] *Gulf Federal Savings & Loan Association v. Federal Home Loan Bank Board*, 651 F.2d 259, 264 (5th Cir. 1981).

Of course, by their very nature, start-up companies seeking venture financing lack cash flows and present risk; thus, by ignoring all potential risk mitigants and how any remaining risk is priced, the Bulletin is an effective bar to lending to many of them.

While one might think that a mere bulletin could not have such a significant impact, banks continue to operate in a world where any bulletin, handbook or guidance is treated by banking agency examiners as a binding rule, and any deviation is grounds for sanction through the non-public examination process. In this case, examiners have made very clear to national banks that deviation from the bulletin is impermissible and would come with sanction – it is impossible to read the plain text of the guidance as anything other than a binding prohibition on specific lending activities.

That is not only (yet another example of) unlawful conduct by a federal banking agency but also bad news for the U.S. economy. New management at the OCC should rescind Acting Comptroller Hsu's bulletin, to the benefit of America's newest and most innovative companies and those banks that wish to finance them. More broadly, that management should consider how we reached a place where examiners tell banks which loans to make, as opposed to ensuring that they understand the risks of those loans and reserve and capitalize for them appropriately.

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