

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 55**

**[Docket ID OCC-2020-0042]**

**RIN 1557-AF05**

**Fair Access to Financial Services**

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency is proposing a regulation to ensure that national banks and Federal savings associations offer and provide fair access to financial services.

**DATES:** Comments must be received on or before January 4, 2021.

**ADDRESSES:** Commenters are encouraged to submit comments through the Federal eRulemaking Portal, if possible. Please use the title “Fair Access to Financial Services” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

• *Federal eRulemaking Portal* – Regulations.gov Classic or Regulations.gov Beta.

Regulations.gov Classic: Go to <https://www.regulations.gov/>. Enter “Docket ID OCC-2020-0042” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments. For help with submitting effective comments, please click on “View Commenter’s Checklist.” Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.

Regulations.gov Beta: Go to <https://beta.regulations.gov/> or click “Visit New Regulations.gov Site” from the Regulations.gov classic homepage. Enter “Docket ID OCC-2020-0042” in the Search Box and click “Search.” Public comments can be submitted (1) via the “Comment” box located below the displayed document information or (2) by clicking on the document title and then clicking on the “Comment” box on the top-left side of the screen. For help with submitting effective comments, please click on “Commenter’s Checklist.” For assistance with the Regulations.gov Beta site, please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET. or e-mail [regulations@erulemakinghelpdesk.com](mailto:regulations@erulemakinghelpdesk.com).

- *Mail*: Chief Counsel’s Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street, SW., suite 3E-218, Washington, DC 20219.

- *Hand Delivery/Courier*: 400 7th Street, SW., suite 3E-218, Washington, DC 20219.

Instructions: You must include “OCC” as the agency name and “Docket ID OCC-2020-0042” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the Regulations.gov website without change, including any business or personal information provided such as name and address information, e-mail addresses, and phone numbers. Comments, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action through Regulations.gov Classic or Regulations.gov Beta.

*Regulations.gov Classic*: Go to <https://www.regulations.gov/>. Enter “Docket ID OCC-2020-0042” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of

the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” and then using the filtering tools on the left side of the screen. Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

*Regulations.gov Beta:* Go to <https://beta.regulations.gov/> or click “Visit New Regulations.gov Site” from the Regulations.gov classic homepage. Enter “Docket ID OCC 2020-0042” in the Search Box and click “Search.” Click on the “Comments” tab. Comments can be viewed and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen. Supporting materials can be viewed by clicking on the “Documents” tab and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen. For assistance with the Regulations.gov Beta site, please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail [regulations@erulemakinghelpdesk.com](mailto:regulations@erulemakinghelpdesk.com). The docket may be viewed after the close of the comment period in the same manner as during the comment period.

**FOR FURTHER INFORMATION CONTACT:**

Karen McSweeney, Special Counsel, or Emily Boyes, Counsel, Chief Counsel’s Office, (202) 649-5490, Office of the Comptroller of the Currency, 400 7th Street, SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

Title III of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act) included a revised statement of the mission of the Office of the Comptroller of the

Currency (OCC or agency).<sup>1</sup> Codified at 12 U.S.C. 1, it charged the OCC 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. Title III also enhanced the supervision of national banks and Federal savings associations and transferred primary supervisory and regulatory authority for Federal savings associations to the OCC. In addition, Title III reaffirmed the agency's authority to establish regulations governing the operations of national banks and granted additional authority to do the same for Federal savings associations.

In one respect, the Dodd–Frank Act's amendments to 12 U.S.C. 1 recognized a broad and longstanding anti-discrimination principle that individuals are entitled to be treated fairly by national banks and Federal savings associations (banks). That principle is reinforced by specific laws such as the Equal Credit Opportunity Act, Fair Housing Act, and Community Reinvestment Act, among others. In another respect, the Dodd–Frank Act's articulation of “fair access” as a distinct concept implies a right of individual bank customers, whether natural persons or organizations, to have access to financial services based on their individual characteristics and not on their membership in a particular category of customers.<sup>2</sup>

Consistent with the Dodd–Frank Act's mandate of fair access to financial services and since at least 2014, the OCC has 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. As the OCC's then-Comptroller stated in a 2014 speech:

No matter what type of business you are dealing with, you have to exercise some sound judgment, conduct your due diligence, and

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<sup>1</sup> Pub. L. 111–203, 124 Stat. 1376, 1520–1528 (July 21, 2010).

<sup>2</sup> For purposes of this rulemaking, the term financial services includes financial products and services.

evaluate customers individually. Even in areas that traditionally have been viewed as inherently risky, you should be able to appropriately manage the risk. This is basic risk management, and that's a business that the institutions we at the OCC supervise excel at. You shouldn't feel that you can't bank a customer just because they fall into a category that on its face appears to carry an elevated level of risk. Higher-risk categories of customers call for stronger risk management and controls, not a strategy of total avoidance. Obviously, if the risk posed by a business or an individual is too great to be managed successfully, then you have to turn that customer away. But you should only make those decisions after appropriate due diligence.<sup>3</sup>

This principle of individual, rather than category-based, customer risk evaluation has since been reinforced in numerous OCC reports, the testimony of OCC officials, and other agency releases.<sup>4</sup>

On at least two occasions, the OCC has issued guidance to specifically address reports of banks refusing to provide access to financial services to entire industry categories engaged in lawful business activities without regard to the risk factors of the individual customers in these industry categories. In 2014, amid reports of banks refusing to provide financial services to the entire category of money services businesses (MSBs), the OCC issued a clarification of its

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<sup>3</sup> Remarks by Thomas J. Curry, Comptroller of the Currency, before the Association of Certified Anti-Money Laundering Specialists (Mar. 17, 2014), available at <https://occ.gov/news-issuances/speeches/2014/pub-speech-2014-39.pdf>.

<sup>4</sup> See, e.g., OCC Bulletin 2014-58, "Banking Money Services Businesses: Statement on Risk Management" (Nov. 19, 2014); OCC 2015 Annual Report, available at <https://www.occ.gov/publications-and-resources/publications/annual-report/files/2015-annual-report.pdf>; Testimony of Daniel P. Stipano, Deputy Chief Counsel, OCC (July 15, 2014) (Stipano Testimony), before the U.S. House of Representatives, Subcommittee on Oversight and Investigations, available at <https://occ.gov/news-issuances/congressional-testimony/2014/pub-test-2014-101-written.pdf>; OCC Spring 2015 Semiannual Risk Perspective From the National Risk Committee, available at <https://www.occ.gov/publications-and-resources/publications/semiannual-risk-perspective/files/pub-semiannual-risk-perspective-spring-2015.pdf>; Remarks by Thomas J. Curry, Comptroller of the Currency, before the Association of Certified Anti-Money Laundering Specialists 15th Annual Anti-Money Laundering and Financial Crime Conference (Sept. 28, 2016), available at <https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-117.pdf>; and GAO Report 20-46, "Bank Secrecy Act, Examiners Need More Information on How to Assess Banks' Compliance Controls for Money Transmitter Accounts" (Dec. 2019).

supervisory expectations with regard to banks offering financial services to MSBs.<sup>5</sup> The guidance emphasized that banks should not “engage in the termination of entire categories of customers” and stated that “banks are expected to assess the risks posed by an *individual* MSB customer on a *case-by-case* basis and to implement controls to manage the relationship commensurate with the risk associated with *each customer*.”<sup>6</sup>

In 2016, the OCC addressed a similar issue in the context of foreign correspondent banking. In guidance issued that year, the OCC made clear that refusing to service the entire category of foreign correspondent banking was inconsistent with supervisory expectations and that banks must decide whether to serve individual firms “based on analysis of the risks presented by *individual* foreign financial institutions and the bank’s ability to manage those risks.”<sup>7</sup>

Despite the OCC’s statements and guidance over the years about the importance of assessing and managing risk on an individual customer basis, some banks continue to employ category-based risk evaluations to deny customers access to financial services. This happens even when an individual customer would qualify for the financial service if evaluated under an objective, quantifiable risk-based analysis. These banks are often reacting to pressure from advocates from across the political spectrum whose policy objectives are served when banks deny certain categories of customers access to financial services.

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<sup>5</sup> OCC Bulletin 2014-58, “Banking Money Services Businesses: Statement on Risk Management” (Nov. 19, 2014).

<sup>6</sup> *Id.* (emphasis added); see also Stipano Testimony.

<sup>7</sup> OCC Bulletin 2016-32, “Risk Management Guidance on Foreign Correspondent Banking: Risk Management Guidance on Periodic Risk Reevaluation of Foreign Correspondent Banking” (Oct. 5, 2016) (emphasis added), available at <https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-32.html>; see also News Release 2016-123, “OCC Releases Risk Reevaluation Guidance for Foreign Correspondent Banking” (Oct. 5, 2016).

The pressure on banks has come from both the for-profit and nonprofit sectors of the economy and targeted a wide and varied range of individuals, companies, organizations, and industries. For example, there have been calls for boycotts of banks that support certain health care and social service providers, including family planning organizations, and some banks have reportedly denied financial services to customers in these industries.<sup>8</sup> Some banks have reportedly ceased to provide financial services to owners of privately owned correctional facilities that operate under contracts with the Federal government and various state governments.<sup>9</sup> Makers of shotguns and hunting rifles have reportedly been debanked in recent years.<sup>10</sup> Independent, nonbank automated teller machine operators that provide access to cash settlement and other operational accounts, particularly in low-income communities and thinly-populated rural areas, have been affected.<sup>11</sup> Globally, there have been calls to de-bank large farming operations and other agricultural business.<sup>12</sup> And companies that operate in industries important to local economies and the national economy have been cut off from access to financial services, including those that operate in sectors of the nation’s infrastructure “so vital to the United States

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<sup>8</sup> *American Banker*, “BankThink JPMorgan, Condoms and the Problem of Reputational Risk” (Mar. 26, 2014); *Bloomberg Businessweek*, “The Most Difficult Business You Could Run: Why It’s So Hard to Run an Abortion Clinic” (Feb. 24, 2016); *Association of Mature Citizens*, “You May Not Support Planned Parenthood...But Your Favorite Companies Do” (Oct. 12, 2017).

<sup>9</sup> *Reuters*, “JPMorgan backs away from private prison finance” (Mar. 5, 2019); *Forbes Magazine*, “GEO Group Running Out of Banks as 100% of Known Banking Partners Say ‘No’ to the Private Prison Sector” (Sept. 30, 2019).

<sup>10</sup> *American Banker*, “Florida gun maker told to find new bank, CEO claims” (Oct. 09, 2018); *New York Times*, “Citigroup Sets Restrictions on Gun Sales by Business Partners” (Mar. 22, 2018); *New York Times*, “How Banks Could Control Gun Sales if Washington Won’t” (Feb. 19, 2018).

<sup>11</sup> Letter dated November 11, 2020, from Rep. Rose (R-TN) *et al.* to Acting Comptroller B. Brooks, OCC; Vice Chair of Supervision R. Quarles *et al.*, Board of Governors of the Federal Reserve System (Federal Reserve); and Chair J. McWilliams, Federal Deposit Insurance Corporation (FDIC).

<sup>12</sup> See, e.g., *Plant Based News*, “Banks Facing Calls To ‘Stop Funding Factory Farming’ To Protect Animals, The Planet, And Public Health” (Nov. 10, 2020), available at <https://plantbasednews.org/news/environment/banks-told-stop-funding-factory-farming>; *Change.org*, “Development banks: Stop investing in industrial animal agriculture,” available at <https://www.change.org/p/world-bank-development-banks-stop-investing-in-industrial-animal-agriculture>.

that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.”<sup>13</sup>

It is our understanding that some banks have taken these actions based on criteria unrelated to safe and sound banking practices, including (1) personal beliefs and opinions on matters of substantive policy that are more appropriately the purview of state and Federal legislatures; (2) assessments ungrounded in quantitative, risk-based analysis; and (3) assessments premised on assumptions about future legal or political changes. In some cases, banks appear to have denied persons access to financial services without even attempting to price the financial services to reflect the perceived risk. Particularly in light of the now-discredited Operation Choke Point, in which certain government agencies (but not the OCC) were revealed to have pressured banks to cut off access to financial services to disfavored (but not unlawful) sectors of the economy, the OCC believes these criteria are not, and cannot serve as, a legitimate basis for refusing to grant a person or entity access to financial services. Bank actions based on these criteria are inconsistent with a bank’s legal responsibility to provide fair access to financial services.

In June 2020, the Alaska Congressional delegation sent a letter to the OCC discussing decisions by several of the nation’s largest banks to stop lending to new oil and gas projects in the Arctic.<sup>14</sup> The letter noted the critical importance of the energy sector to the U.S. economy, as well as the jobs, state revenue, and diplomatic and national security benefits attributable to the oil

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<sup>13</sup> See Letter dated June 16, 2020, from Sen. Sullivan (R-AK), Sen. Murkowski (R-AK), and Rep. Young (R-AK) to Acting Comptroller B. Brooks, OCC; Chair J. Powell *et al.*, Federal Reserve; and Chair J. McWilliams, FDI; see also U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency, “Critical Infrastructure Sectors,” available at <https://www.cisa.gov/critical-infrastructure-sectors>; *Presidential Policy Directive 21* (PPD-21), “Critical Infrastructure Security and Resilience” (Feb. 12, 2013).

<sup>14</sup> See Letter dated June 16, 2020, from Sen. Sullivan (R-AK), Sen. Murkowski (R-AK), and Rep. Young (R-AK) to Acting Comptroller B. Brooks, OCC; Chair J. Powell *et al.*, Federal Reserve; and Chair J. McWilliams, FDIC.



and gas industries targeted by the banks' actions.<sup>15</sup> In the letter, the authors described as unfair the effects of this decreased lending on Alaska Native communities on the state's North Slope, as well as on the population of the state as a whole. The letter also stated that, although the authors believed that the banks' rationale was political in nature, the banks had ostensibly relied on claims of reputation risk to justify their decisions.

In response to this letter, the OCC requested information from several large banks to better understand their decisionmaking. The responses received indicate that, over the course of 2019 and 2020, these banks had decided to cease providing financial services to one or more major energy industry categories, including coal mining, coal-fired electricity generation, and/or oil exploration in the Arctic region. The terminated services were not limited to lending, where risk factors might justify not serving a particular client (*e.g.*, when a bank lacked the expertise to evaluate the collateral value of mineral rights in a particular region or because of a bank's concern about commodity price volatility). Instead, certain banks indicated that they were also terminating advisory and other services that are unconnected to credit or operational risk. In several instances, the banks indicated that they intend only to make exceptions when benchmarks unrelated to financial risk are met, such as whether the country in which a project is located has committed to international climate agreements and whether the project controls carbon emissions sufficiently.

Neither the OCC nor banks are well-equipped to balance risks unrelated to financial exposures and the operations required to deliver financial services. For example, climate change is a real risk,

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<sup>15</sup> The energy sector (which includes the interrelated segments of electricity, oil, and natural gas) is one of the nation's 16 critical infrastructure sectors. See U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency, "Critical Infrastructure Sectors," Energy Sector, *available at* <https://www.cisa.gov/energy-sector> ("The U.S. energy infrastructure fuels the economy of the 21st century. Without a stable energy supply, health and welfare are threatened, and the U.S. economy cannot function. [PPD-21] identifies the Energy Sector as uniquely critical because it provides an 'enabling function' across all critical infrastructure sectors. More than 80 percent of the country's energy infrastructure is owned by the private sector, supplying fuels to the transportation industry, electricity to households and businesses, and other sources of energy that are integral to growth and production across the nation.").

but so is the risk of foreign wars caused in part by U.S. energy dependence and the risk of blackouts caused by energy shortages. Furthermore, balancing these risks is the purview of Congress and Federal energy and environmental regulators. It is one thing for a bank not to lend to oil companies because it lacks the expertise to value or manage the associated collateral rights; it is another for a bank to make that decision because it believes the United States should abide by the standards set in an international climate treaty. Organizations involved in politically controversial but lawful businesses – whether family planning organizations, energy companies, or otherwise – are entitled to fair access to financial services under the law. In order to ensure that banks provide customers with fair access to financial services, and consistent with longstanding OCC policy, a bank’s decision not to serve a particular customer must be based on an individual risk management decision about that individual customer, not on the fact that the customer operates in an industry subject to a broad categorical exclusion created by the bank.<sup>16</sup>

While all banks have the responsibility to provide fair access to financial services, it is particularly important that the nation’s largest banks fulfill this obligation. Large banks exercise sufficient market power to influence the price of financial services, and only the largest banks have the diversified balance sheets and sophisticated risk management systems to serve certain industries. It is also fair to place particular responsibilities on the largest banks because their systemic importance often results in their receiving assistance and favorable treatment from the government during periods of financial distress. In addition, these banks have positioned themselves to provide

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<sup>16</sup> Other Federal agencies have taken similar actions to ensure that private institutions do not use their market position to make public policy. *See e.g.*, News Release, U.S. Department of Labor Announces Final Rule To Protect Americans’ Retirement Investments (Oct. 30, 2020) *available at* <https://www.dol.gov/newsroom/releases/ebsa/ebsa20201030>, discussing U.S. Department of Labor Final Rule, “Financial Factors in Selecting Plan Investments,” 85 FR 72846 (Nov. 13, 2020).

services to all sectors of the economy by virtue of the scale and breadth of their technical expertise. In contrast, smaller banks generally are not in a position to influence the price of services, are not systemically significant, may lack comprehensive technical expertise across the full range of banking services, and have limited capacity to bear overhead costs (*e.g.*, salaries of loan officers and industry-specific subject-matter experts and the cost of maintaining extensive physical offices and branch locations)—all of which limit the number of sectors of the economy they can serve.

The dominant market position of the large bank population is clear when all OCC-regulated institutions with assets of \$100 billion or more are considered. Together, these banks account for approximately 55 percent of the total assets and deposits of all U.S. banks and hold approximately 50 percent of the dollar value of outstanding loans and leases in the United States.<sup>17</sup> In light of this market position, a decision by one or more of these banks not to provide a person with fair access to financial services could have a significant effect on that person, the nation’s financial and economic systems, and the global economy. This effect is all the more likely if the financial service at issue is not available on reasonable terms elsewhere.

To address the concerns identified above, the OCC is proposing a regulation to clarify (1) the obligation of large banks to provide fair access to financial services, consistent with the Dodd–Frank Act’s mandate<sup>18</sup> and (2) the parameters of this requirement. Unlike prior articulations of the fair access principle discussed above, this OCC action would have the force

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<sup>17</sup> Reports of Condition and Income, June 30, 2020.

<sup>18</sup> As previously noted, the OCC’s responsibility to ensure that banks provide fair access to financial services originated with the Dodd–Frank Act. The OCC has the responsibility to interpret this ambiguous language and provide the necessary clarity for the banks it supervises. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”); *see also* 12 U.S.C. 93a (authorizing the OCC to prescribe rules and regulations to carry out the responsibilities of the office). This proposal is not intended to affect in any way the applicability of antitrust laws to any bank action, including any unlawful anticompetitive agreement. *See, e.g.*, 15 U.S.C. 1 *et seq.*

and effect of law and enable the agency to take supervisory or enforcement action, when appropriate.<sup>19</sup>

## **II. Description of the Proposal**

The proposed rule would create a new part 55 to address fair access to financial services, drawing both on principles of long-established antitrust law and on the OCC guidance and other statements referenced above. It would apply to any “covered bank,” which is defined in proposed paragraph 55.1(a)(1)(i) as an entity for which the OCC is the appropriate Federal banking agency under 12 U.S.C. 1813(q)(1) that has the ability to (1) raise the price a person has to pay to obtain an offered financial service from the bank or from a competitor or (2) significantly impede a person, or a person’s business activities, in favor of or to the advantage of another person. Under proposed paragraph 55.1(a)(1)(ii), a bank would be presumed not to meet the definition of covered bank if it has less than \$100 billion in total assets.<sup>20</sup> Under proposed paragraph 55.1(a)(1)(iii), however, a bank is presumed to meet the definition of covered bank if it has \$100 billion. A bank that meets the criteria in paragraph (a)(1)(iii) can seek to rebut the presumption that it is a covered bank under this rule by submitting to the OCC written materials that, in the agency’s judgment, demonstrate the bank does not meet the definition of a covered bank.

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<sup>19</sup> See Notice of Proposed Rulemaking: “Role of Supervisory Guidance,” 85 FR 70512 (Nov. 5, 2020) for a discussion of the difference between agency guidance and regulations.

<sup>20</sup> The \$100 billion threshold is a commonly used threshold for large banks. See, e.g., Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements, 84 FR 59230 (Nov. 1, 2019) (establishing risk-based categories for determining applicability under the agencies’ regulatory capital rule and liquidity coverage ratio rule and stating that the “rule seeks to better align the regulatory requirements for large banking organizations with their risk profiles, taking into account the size and complexity of these banking organizations as well as their potential systemic risks. The final rule is consistent with considerations and factors set forth under section 165 of the [Dodd–Frank Act], as amended by the Economic Growth, Regulatory Relief, and Consumer Protection Act” (citations omitted)).

In addition to the proposed \$100 billion asset threshold, the OCC contemplated including a separate threshold, linked to national market share of any financial service, as an alternative for a bank to be presumed to meet the definition of a covered bank. A national market share threshold would recognize that some banks have less significant on-balance sheet assets but nonetheless have a market position that provides them with the ability to (1) raise the price a person has to pay to obtain a financial service offered by the bank from the bank or from a competitor or (2) significantly impede a person, or a person's business activities, in favor of or to the advantage of another person. The OCC invites public comment on whether the agency should include a percent of national market share threshold as another reason for a bank to be presumed to meet the definition of covered bank and, if so, whether a 10 percent, 20 percent, or other percent of the national market share would be the appropriate threshold. The OCC also invites public comment on whether a presumption different than the \$100 billion asset threshold presumption proposed in paragraphs 55.1(a)(1)(ii) and (iii) would be more effective to capture banks that meet the definition of covered bank in paragraph 55.1(a)(1)(i) and to exclude banks that do not meet these standards.

Paragraph 55.1(a)(2) would define "financial service" to mean a financial product or service. Paragraph 55.1(a)(3) would define "person" to mean any natural person or any partnership, corporation, or other business or legal entity.

For a covered bank's board and its management to carry out their core risk management responsibilities, the rule would require that a covered bank provide fair access to its financial services with relevant risks quantified and managed, including through pricing, as needed. The covered bank's board and management would ultimately be responsible for ensuring that the bank's operations are consistent with its obligation to provide fair access to financial services,

including through established written policies and procedures. Upon review of a covered bank's operations, including its written policies and procedures, it should be clear whether the bank is providing persons access to financial services based on quantitative, impartial risk-based standards or on a basis that is not tied to individual risk assessment and risk management.

Specifically, proposed paragraph 55.1(b) states that to provide fair access to financial services, a covered bank shall (1) make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms;<sup>21</sup> (2) 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, risk-based standards established in advance by the covered bank; (3) not deny 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; and (4) not deny, in coordination with others, any person a financial service the covered bank offers.

Under this proposed rule, if a covered bank offers cash management services or commercial lending and specifically provides such services to a large retailer, the bank would be required to offer such services to any other lawful business (*e.g.*, an electric utility or a family planning organization) on proportionally equal terms. The covered bank's decision to deny one of these services to a person could not include consideration of the bank's opinion (or the opinion of its employees or customers) of the person, the person's legal business endeavors, or

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<sup>21</sup> Providing financial services on proportionally equal terms includes, at a minimum, ensuring that pricing and denial decisions are commensurate with measurable risks based on quantitative and qualitative characteristics. Additionally, this provision would prohibit a bank from engaging in geography-based redlining, for example, by refusing to provide financial services to customers solely based on where the customer or the customer's business activity is located when the customer or business activity is within the geographic market served by the covered bank.

any lawful activity in which the person is engaging or has engaged. However, the covered bank must consider factors such as compliance with laws and regulations and safety and soundness, in deciding whether to provide services to the person.<sup>22</sup>

Furthermore, under the proposal, a covered bank could deny a person access to a financial service without violating its obligation to provide fair access to financial services if the bank's decision is justified by the quantified and documented failure of the person to meet quantitative, impartial risk-based standards established by the bank in advance (*e.g.*, the person's inability to pay for the service or creditworthiness or an objective assessment of the person's collateral). Nothing in the proposal would require a bank to offer a particular service; the proposal requires only that the financial services offered by a bank to some customers are offered on proportionally equal terms to all customers engaged in lawful activities.

A covered bank should also consider whether it has the expertise or knowledge to offer a service in a given market. For example, while 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. A covered bank that operates consistent with this proposal would satisfy its obligation to provide fair access to financial services.

The OCC invites comments on all aspects of this proposal.

### **III. Regulatory Analyses**

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<sup>22</sup> This includes, for example, the Bank Secrecy Act, anti-money laundering regulations, and applicable consumer protection laws, such as fair lending and anti-discrimination laws.

*Paperwork Reduction Act.* In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The proposed rule contains no information collection requirements under the PRA. Therefore, no filings will be made with OMB.

*Regulatory Flexibility Act.* The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of \$600 million or less and trust companies with total assets of \$41.5 million or less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. The OCC currently supervises approximately 745 small entities. Because the proposed rule would apply generally to OCC-supervised banks that have \$100 billion or more in total assets, the proposed rule would not affect any small OCC-supervised entities. Therefore, the OCC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

*Unfunded Mandates Reform Act.* Consistent with the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, the OCC considers whether the proposed rule includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million adjusted for inflation (currently \$157 million) in any one year. If any covered banks have risk-based standards that include criteria that would not be allowed under the proposed rule, the elimination of the prohibited criteria would impose



little, if any, burden on covered banks. Therefore, the proposed rule would not result in an expenditure of \$157 million or more annually by state, local, and tribal governments, or by the private sector.

*Riegle Community Development and Regulatory Improvement Act.* Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4802(a), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA, 12 U.S.C. 4802(b), requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form. The OCC invites comments that will inform its consideration of the administrative burdens and the benefits of its proposal, as well as the effective date of the final rule.

#### **List of Subjects in 12 CFR Part 55**

Banks and banking, Definitions, Federal savings associations, National banks, Risk, Safety and soundness

For the reasons set out in the preamble, the OCC proposes to add a new 12 CFR part 55 to read as follows:

## **PART 55 – FAIR ACCESS TO FINANCIAL SERVICES**

Sec. 55.1 Fair Access to Financial Services.

Authority: 12 U.S.C. 1 *et seq.* and 12 U.S.C. 93a.

### **§ 55.1 Fair Access to Financial Services.**

(a) For purposes of this section:

(1) (i) *Covered bank* means an entity for which the Office of the Comptroller of the Currency is the appropriate Federal banking agency as defined in 12 U.S.C. 1813(q)(1) that 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.

(ii) A bank is presumed not to meet the definition of covered bank in paragraph (a)(1)(i) if it has less than \$100 billion in total assets.

(iii) A bank is presumed to meet the definition of covered bank in paragraph (a)(1)(i) if it has \$100 billion or more in total assets. A bank that meets the criteria in this paragraph (a)(1)(iii) can seek to rebut this presumption by submitting to the Office of the Comptroller of the Currency written materials that, in the agency's judgment, demonstrate the bank does not meet the definition of covered bank in (a)(1)(i).

(2) *Financial service* means a financial product or service.

(3) *Person* means:

(i) Any natural person; or

(ii) Any partnership, corporation, or other business or legal entity.

- (b) To provide fair access to financial services, a covered bank shall:
- (1) Make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms;
  - (2) 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;
  - (3) Not deny any person a financial service the bank offers when the effect of the denial is to prevent, limit, or otherwise disadvantage the person:
    - (i) From entering or competing in a market or business segment; or
    - (ii) In such a way that benefits another person or business activity in which the covered bank has a financial interest; and
  - (4) Not deny, in coordination with others, any person a financial service the bank offers.

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*Acting Comptroller of the Currency*