GEORGETOWN LAW

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Office of Comptroller of the Currency
Chief Counsel's Office
Attention: Comment Processing
400 7th Street, SW., Suite 3E-218
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RE: Docket No. OCC-2020-0042 (RIN 1557-AF05)

Dear Sir/Madam:

I write to strongly object to the Notice of Proposed Rulemaking (the "**Proposed Rule**") issued by the Office of Comptroller of the Currency ("**OCC**") regarding "Fair Access to Financial Services," Docket No. OCC-2020-0042.[1] There are four fundamental legal problems with the Proposed Rule:

- First, the OCC lacks legal authority to promulgate the Proposed Rule;
- Second, the Proposed Rule is unreasonable because it conflicts with a basic principle of safe and sound banking, namely responsible management of reputation risk;
- Third, the Proposed Rule unconstitutionally compels speech by banks and their owners in violation of the free exercise and free speech clauses of the First Amendment; and
- Fourth, the Proposed Rule's distinction between banks with $100 billion or more in assets and other banks is arbitrary and capricious because it lacks any evidentiary or analytical basis.

The OCC should retract the Proposed Rule, rather than rush it through in the waning twilight of a disgraced rejected Presidential administration before a new, popularly elected administration can take the reins of government.

Qualifications

By way of background, I am the Anne Fleming Research Professor and Professor of Law at Georgetown University Law Center, where I teach courses in Financial Regulation, Consumer Finance, Contracts, Commercial Law, Structured Finance, and Bankruptcy. I have also previously

[1] 85 Fed. Reg. 75261 (Nov. 25, 2020).

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served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School and as faculty for the Federal Trade Commission's Division of Financial Practices training program, and am an elected member of the American Law Institute, which awarded me its Young Scholars Medal in 2013. I have also previously served on the Consumer Financial Protection Bureau's Consumer Advisory Board. I have written extensively on antitrust issues in financial services, and have repeatedly testified before Congress on the subject.

Legal Problems with the Proposed Rule

1. The OCC Lacks Legal Authority to Promulgate the Proposed Rule Because There Is No Congressional Delegation of Authority Regarding "Fair Access"

The OCC has no legal authority for the Proposed Rule, as there has been no Congressional delegation of authority to the OCC regarding "Fair Access." The supposed authority for the Proposed Rule is section 1 of the National Bank Act, 12 U.S.C. § 1, which provides that:

> 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.

12 U.S.C. § 1(a). The problem with this supposed authority is that it is not actually a delegation, but even if it were, it would be unconstitutional because it lacks an "intelligible principle" for implementing the delegation. Either there is no delegation or the delegation is impermissible vague.

A. There Has Been No Congressional Delegation of Authority to the OCC Regarding "Fair Access"

The Proposed Rule asserts that section 1 of the National Bank Act is ambiguous and therefore, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that the OCC has the "responsibility" to interpret it. The OCC puts the cart ahead of the horse, however, and presumes that *Chevron* is the applicable analytical framework. Yet, a *Chevron* analysis is only applicable if there is a delegation of authority to an agency in the first place, and agencies are not presumed to have delegated authority. *United States v. Mead Corp.*, 553 U.S. 218, 226 (2001). Instead, such delegation must be either express or implied. Section 1 provides neither an express or implied delegation. The language "is charged with assuring," is a general statement of mission, not an actionable delegation of authority.

Nowhere does the National Bank Act ever provide that a *national bank* shall provide "fair access to financial services." Instead, section 1(a) places a burden on the *Office of Comptroller of the Currency* to regulate national banks with that goal in mind. While such a general charge should certainly inform the OCC's implementation of policy through supervision and enforcement, it is not a delegation that authorizes a rulemaking. If Congress has wanted the OCC to implement a fair access rulemaking it would have provided in the National Bank Act that national banks must provide fair access to financial services and left it up to the OCC to determine what constitutes "fair access." It did not, and the OCC is overstepping its statutory bounds with this rulemaking.

An analysis of the text of section 1(a) shows how risible the OCC's interpretation is. Section 1(a) charges the OCC with assuring four items:

> **[1]** the safety and soundness of, and **[2]** compliance with laws and regulations, **[3]** fair access to financial services, and **[4]** fair treatment of customers by, the institutions and other persons subject to its jurisdiction.

12 U.S.C. § 1(a). If the charge of assuring "fair access to financial services" were a delegation for a rulemaking, then so too would be the other three charges. Yet the OCC's "safety and soundness" authority does not derive from section 1 of the National Bank Act, but from section 39 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831p-1. Indeed, the OCC's own safety-and-soundness regulations cite to that Federal Deposit Insurance Act provision, not to any section of the National Bank Act, as their source of authority. 12 C.F.R. § 30.2.

Likewise, assuring "compliance with laws and regulations" were a delegation, it would be so broad as to be meaningless—compliance with what laws and regulations?—as well as circular (regulations for compliance with regulations). And if "fair access" is a delegation, so too is "fair treatment," but that sort of *Bill and Ted's Excellent Adventure* exhortation ("Be excellent to each other.") is meaninglessly vague. Simply put, there is no reasonable way to read section 1(a) of the National Bank Act as a delegation of rulemaking authority to the OCC that authorizes the Proposed Rule.[2]

That section 1 is nothing more than a generic mission statement. It is not an actionable delegation is confirmed by a holistic reading of federal banking law. The National Bank Act regulates only a subset of banking institutions; other banks are regulated by the FDIC or Board of Governors of the Federal Reserve. It is necessary to read the National Bank Act in harmony with the Federal Deposit Insurance Act and the Federal Reserve Act. Such a harmonized reading suggests that there is no delegation contained in section 1 of the National Bank Act. If there were a delegation, it would imply a lack of parallel authority for the OCC's sister bank regulatory agencies, the FDIC and Federal Reserve Board, as they lack any equivalent mission statement language to section 1. Such a reading would be absurd for it would make no sense for Congress to charge solely national banks with safety and soundness, compliance with laws and regulations, fair access to financial services, and fair treatment of customers. A holistic reading of federal banking regulations shows how strained the Proposed Rule's claim of legal authority is.

While the Comptroller is expressly granted authority "to prescribe rules and regulations to carry out the responsibilities of the office," 12 U.S.C. § 93a, section 93a cannot be fairly read to extend to the generic exhortations of section 1 without running squarely into the problem that section 1 lacks an "intelligible principle" for delegation, as explained in section II.B of this comment. The OCC cannot have it both ways. Either there is no delegation or the delegation is impermissibly vague.

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[2] If I am wrong, however, there should be no question that not only does the OCC also has plenary authority to undertake all manner of pro-consumer rulemakings that ensure the "fair treatment of customers," but that *all* OCC rulemakings, past and future, must be consistent with and give consideration to the statutory charge of "fair treatment of customers," which many OCC rulemakings have failed to even consider. The OCC cannot have it both ways.

B. *Even if Section 1(a) Were Meant as a Delegation, the Delegation Would Be Unconstitutional Because It Lacks an Intelligible Principle*

The OCC might believe that there is a delegation merely because the Comptroller is expressly granted authority "to prescribe rules and regulations to carry out the responsibilities of the office". 12 U.S.C. § 93a. Section 93a, however, cannot fairly be read to extend to the generic exhortations of section 1 without running squarely into the problem that section 1 lacks an "intelligible principle" for delegation. The delegation of rulemaking authority to an agency must have some "intelligible principle" in order to pass constitutional muster. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). No such "intelligible principle" can be articulated here. If there is a delegation it is impermissibly vague.

The Supreme Court has on only two occasions found that a statute lacks the requisites "intelligible principle" for a delegation. Yet the Proposed Rulemaking, falls squarely into one of those two cases. In *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), a statute that required assurance of "fair competition" was held not to provide an intelligible principle for delegation. The language at issue in *Schechter* is virtually identical to that in section 1 of the National Bank Act, which requires "fair access". This suggests that there is no constitutional delegation of rulemaking authority under section 1 of the National Bank Act, at least with regard to "fair access."

2. The Proposed Rule Is Inconsistent with Basic Principles of Safe and Sound Banking

Even if the OCC has properly delegated rulemaking authority for the Proposed Rule, the Proposed Rule is not reasonable because it is inconsistent with basic principles of safe and sound banking, including those expressly enunciated by the OCC.[3]

The gist of the Proposed Rule is that banks cannot deny service to business based on the bank's opinion of "the person's legal business endeavors, or any lawful activity in which the person is engaging or has engaged."[4] Instead, the bank may deny service only based on "quantified and documented failure to meet quantitative, impartial, risk-based standards established in advance by the covered bank".[5]

This means that it does not matter if a bank has business concerns about the effect of financing controversial industries, such as fossil fuels, opioid manufacturers, firearm manufacturers, payday lenders, reproductive health services, pornographers, gay conversion therapy, fur farming, drug paraphernalia manufacturers, the private prison industry, or businesses involved in the deportation of immigrants. Under the Proposed Rule, unless the bank can show that the borrower does not meet "*quantitative, impartial, risk-based* underwriting standards," it must lend because these are all legal industries. (Emphasis added.) <u>The Proposed Rule thus appears to require a verifiable, *mathematical* underwriting model that precludes consideration of any non-quantifiable or "soft" underwriting factors, including reputational risk.</u>

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[3] Accordingly, if the Proposed Rule were challenged it would not receive *Chevron* deference, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and because it does not involve interpreting a "highly detailed" "regulatory scheme," where the OCC has particular expertise, it would not receive even *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[4] 85 Fed. Reg. 75261, 75265 (Nov. 25, 2020).

[5] 85 Fed. Reg. 75261, 75265 (Nov. 25, 2020).

It is unlikely that a bank will ever have "quantitative, impartial, risk-based underwriting standards" regarding a particular disfavored industry. To have this sort of valid mathematical underwriting model, the bank would have to have data on the history of the performance of loans or other services to an industry. That will not be possible if the bank has previously avoided dealing with the industry because of some distaste for it. The standard for denial of service has been drafted to be functionally impossible to meet. In effect the Proposed Rule is a mandate for large banks to serve all legal industries, irrespective of reputation or other business risks, full stop.

The Proposed Rule's failure to allow banks to account for reputation or other business risks makes the Proposed Rule inconsistent with basic principles of safe and sound banking and therefore unreasonable. It also makes the Proposed Rule inconsistent with its supposed authority, 12 U.S.C. § 1(a), which charges the OCC with assuring the "safety and soundness" of banks.

It is axiomatic that a bank cannot be safe and sound if it does not prudently manage risk. There are numerous risks involved in the business of banking, and all must be prudently managed for a bank to be safe and sound. Ignoring a risk is inherently a failure to engage in prudent risk management. Yet that is precisely what the Proposed Rule mandates: it prohibits covered banks from considering either reputation risk or other direct business risks if they cannot be put into "quantitative, impartial, risk-based underwriting standards".

A. The Proposed Rule Would Prevent Banks from Considering Reputation Risk When Providing Financial Services

The business of banking involves multiple types of risk, including reputation risk. The OCC has explained that:

> Reputation risk is the risk to earnings or capital arising from negative public opinion. This affects the institution's ability to establish new relationships or services, or continue servicing existing relationships. This risk can expose the institution to litigation, financial loss, or damage to its reputation. Reputation risk exposure is present throughout the organization and is why banks have the responsibility to exercise an abundance of caution in dealing with their customers and community. This risk is present in activities such as asset management and agency transactions.[6]

Similarly, the Comptroller's Handbook explains that:

> Reputation risk is the risk to current or projected financial condition and resilience arising from negative public opinion. The strength and level of transparency of a bank's corporate and risk governance structure influence the bank's reputation with shareholders, regulators, customers, other stakeholders, and the community at large. A responsible corporate culture and a sound risk culture are the foundation of an effective corporate and risk governance framework and help form a positive public perception of the bank.[7]

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[6] OCC, News Release, 1996-2a, Jan. 4, 1996, *at* https://www.occ.treas.gov/news-issuances/news-releases/1996/nr-occ-1996-2a.pdf.

[7] OCC, *Comptroller's Handbook*, Safety and Soundness, Corporate and Risk Governance, Version 2.0, July 2019, at 4.

The OCC has previously recognized that reputational harms can have real financial impact on a bank:

> The assessment of reputation risk recognizes the potential impact of the public's opinion on a bank's franchise value. This risk is inherent in all bank activities. Banks which actively associate their name with products and services, such as with fiduciary services, are more likely to have higher reputation risk exposure. As the bank's vulnerability to public reaction increases, its ability to offer competitive products and services may be affected.[8]

The OCC requires large banks to have a risk governance framework that addresses reputation risk. 12 C.F.R. Pt. 30, App. D.II.B. As the Comptroller has noted, "A bank that fails to implement effective corporate and risk governance principles and practices may hinder the bank's competitiveness and adversely affect the bank's ability to establish new relationships and services or to continue servicing existing relationships."[9] For example, a bank that is known as the bank that financed the manufacturing of firearms used in school shootings or as the bank that financed oil exploration in pristine and fragile Arctic lands will suffer reputationally and ultimately in its business.

There are numerous bank clients—myself included—who will switch financial service providers without hesitation if their bank obtains a reputation for providing services to distasteful industries. To use an example recently in the news of the harm reputational damage can cause a firm, look at the law firms that have been representing President Trump's election appeals. These firms are facing losing clients and even losing valued employees who do not wish to be associated with the representation of the President's attempts to undermine democracy, and at the very least they have increased public relations expenses and distractions because of the representation.[10] It is hardly a stretch of the imagination to think that any bank that provides financing to Mr. Trump or his businesses in the future will be tarred with a badge of opprobrium and will lose substantial business from those who find Mr. Trump loathsome.

A bank that engages in reputationally risky activities can find itself with a diminished deposit base and the loss of long-time valuable clients. Many depositors and other banking clients do not wish to be associated with banks that are known to provide services to activities they find distasteful. For example, a B-Corporation, like Patagonia that makes it its mission to "save our home planet," is unlikely to want to give business to a bank that finances oil exploration in the Arctic. And given that the Proposed Rule covers only national banks, national banks' socially conscientious clients have numerous other options for financial services, be it from state-chartered banks or nonbanks.

A bank that engages in reputationally risky activities will also see its share price suffer as investors divest. For example, Boston Common Asset Management completely divested from JP

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[8] OCC, News Release, 1996-2a, Jan. 4, 1996, *at* https://www.occ.treas.gov/news-issuances/news-releases/1996/nr-occ-1996-2a.pdf.

[9] OCC, *Comptroller's Handbook*, Safety and Soundness, Corporate and Risk Governance, Version 2.0, July 2019, at 4.

[10] *See, e.g.*, Jessica Silver-Greenberg, Rachel Abrams, and David Enrich, *Growing Discomfort at Law Firms Representing Trump in Election Lawsuits*, N.Y. TIMES, Nov. 9, 2020; David Enrich, Jessica Silver-Greenberg, and Rachel Abrams, *A law firm has stopped representing the Trump campaign in a Pennsylvania lawsuit*, N.Y. TIMES, Nov. 13, 2020 (noting resignation of an attorney from the law firm in protest over the representation of the Trump campaign).

Morgan Chase because it was the world's top financier of the fossil fuel industry.[11] As SEC Commissioner Allison Herren Lee has noted, "ESG investing is no longer just a matter of personal choice. Asset managers responsible for trillions in investments, issuers, lenders, credit rating agencies, analysts, index providers, stock exchanges—nearly all types of market participants—use ESG as a significant driver in decision-making, capital allocation, pricing, and value assessments."[12]

While share price is itself largely irrelevant to safety-and-soundness, a falling share price is likely to be a key source of distraction for bank management, both because it likely affects their compensation and because if share price falls too low, the bank is vulnerable to a take-over, which may cost current senior managers their jobs.

And banks that work with odious clients are more likely to attract regulatory attention. For example, Deutsche Bank has received particular regulatory attention—and been fined—because of its relationship with Jeffrey Epstein.[13] While the fine was not levied because of the relationship with Epstein per se, but because of regulatory violations, dealings with an odious client are more likely to attract regulatory scrutiny.

At the same time, if a bank gets a reputation for being willing to take on sketchy clients—*viz.* Deutsche Bank with both Jeffrey Epstein and Donald Trump, among others—it may become a magnet for sketchy clients, including some who engage in activities that are not just distasteful, but illegal. In essence, a bank in this situation because the "go to" bank for illicit businesses, raising compliance burdens for the bank.

The Proposed Rule does is set national banks up to lose business, to see their share prices suffer, face additional regulatory scrutiny, attract even more problematic clients, and to become a politically toxic set of banking entities. This is not consistent with safe-and-sound banking.

What's more, reputation risk may not affect only the bank in question, but other banks. As the Comptroller has observed, "Departures from effective corporate and risk governance principles and practices cast doubt on the integrity of the bank's board and management. History shows that such departures can affect the entire financial services sector and the broader economy."[14]

Additionally, reputational risks can not only harm the bank's relationships with existing or potential customers, but also with its workforce. A bank that is known for financing a disreputable industry might not be able to retain or recruit employees competitively.

The OCC is well aware of reputational risk as an important consideration in safe and sound banking. Yet the very nature of reputation risk, however, is that it cannot be quantified or put into an impartial, risk-based underwriting model. It is an inherently subjective evaluation, but an important

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[11] Laura Alix, *What's pushing U.S. banks deeper into ESG*, AM. BANKER, Jan. 13, 2020, *at* https://www.americanbanker.com/news/whats-pushing-us-banks-deeper-into-esg.

[12] Securities and Exchange Commission Commissioner Allison Herren Lee, Public Statement, *Regulation S-K and ESG Disclosures: An Unsustainable Silence*, Aug. 26, 2020, *at* https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26.

[13] Dan Mangan, *Deutsche Bank hit with $150 million penalty for relationship to sex offender Jeffrey Epstein*, CNBC, July 7, 2020, at https://www.cnbc.com/2020/07/07/jeffrey-epstein-case-deutsche-bank-fined-150-million-penalty-for-relationship.html.

[14] OCC, *Comptroller's Handbook*, Safety and Soundness, Corporate and Risk Governance, Version 2.0, July 2019, at 4.

one nevertheless. The Proposed Rule would prevent covered banks from considering reputational risk in their lending decisions. This is unreasonable because it is inconsistent with long-standing principles of safe-and-sound banking.[15]

B. The Proposed Rule Would Prevent Banks from Considering Risks to the Bank's Existing Loan Portfolio from the Collateral Consequences of New Lending

The Proposed Rule does not merely interfere with safe-and-sound banking by preventing consideration of reputational risk. It also prevents banks from considering the spillover effects of financing on their existing loan portfolios.

Consider a bank in a vulnerable coastal community that is threatened by rising sea levels. The bank has made numerous loans to consumers and businesses in its community, and many of those loans are secured by real property in the community. Business disruptions from flooding are likely to contribute to increased defaults on loans, and if the community is inundated, the value of the collateral securing the loans will be impaired. The overwhelming scientific consensus is that the rise in sea levels is a function of global warming, which is caused in part by the release of carbon dioxide into the atmosphere by the burning of fossil fuels. The bank might quite reasonably conclude that it does not want to finance any projects that contribute to global warming not because of any distaste for the fossil fuel industry, etc., but simply out of self-interest—financing fossil fuels harms the bank's existing book of business. Indeed, there is already major investment and insurance activity based on projections of climate change and sea-level rise.[16] The Proposed Rule would prevent a covered bank from taking such a reasonable business decision.

3. The Proposed Rule Impinges on the First Amendment Rights of Banks and Their Owners

The Proposed Rule impinges on the First Amendment rights of national banks and their owners. By requiring national banks to provide services without regard for the nature of the client's business (so long as it is legal), the Proposed Rule compels a form of speech by national banks. A national bank's provision of services to a business may reasonably be viewed as an endorsement of the business, particularly when other banks are not so required to serve without regard the nature of the business.

This is particularly problematic when the bank is a closely held corporation, as the bank's activities will reflect on its owners and are effectively compelling speech by the bank's owners. For example, a bank owned by an evangelical Christian family could not refuse financing to a provider of abortion services or a professional pornographer under the Proposed Rule. Likewise, a bank owned by an environmentalist might resent being forced to finance activities that harm the environment, lest others believe that the environmental supports such despoilation of the earth. And a bank whose owners are Republicans might not want to provide financing for a Democratic political candidate or vice-versa. For example, under the Proposed Rule a bank would be forced to provide financing in the

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15 I note that it is immaterial that Acting Comptroller Brooks is personally "skeptical of claims that the [oil and gas] sector poses a 'reputational risk' to the banks that serve it." Letter from Brian Brooks, Acting Comptroller of the Currency to Senator Dan Sullivan, July 24, 2020, *at* https://bankingjournal.aba.com/wp-content/uploads/2020/07/brian-brooks-occ-letter-sen-dan-sullivan.pdf. The Comptroller's personal skepticism about particular risks is irrelevant, as it is ultimately the bank's own capital at risk. Thus, there is no precedent for the OCC forcing a bank to engage in a lending activity that the bank's management deems unduly risky.

16 *See, e.g.*, Christopher Flavelle, *Rising Seas Threaten an American Institution: The 30-Year Mortgage*, N.Y. TIMES, June 19, 2020; Chunka Mui, *Will Investors and Insurers Sink or Save Florida*, FORBES.COM, Nov. 18, 2019.

future to Donald Trump (although given his businesses' track record, perhaps he is the one case where there is a quantifiable empirical risk of default) even if the bank and its owners find him and his politics odious.

Supreme Court precedent has made clear that this sort of compelled corporate speech is inconsistent with the free speech and free exercise rights of both the national bank[17] and its owners.[18] Proposed Rule appears to be inconsistent with the First Amendment and fails to provide any analysis of how it is consistent with constitutional rights.

4. The Proposed Rule Is Arbitrary and Capricious Because It Provides No Basis for Distinguishing Between Banks with Assets of $100 Billion or More and Smaller Banks

The OCC's rationale for the rule sounds in antitrust. As the OCC notes, the Proposed Rule, draws on "principles of long-established antitrust law". Yet the OCC has failed to perform even the most elementary antitrust analysis to support the Proposed Rule.

In particular, the Proposed Rule applies to any OCC regulated entity that has the ability to "[r]aise the price a person has to pay to obtain an offered financial service from the bank or from a competitor".[19] The Proposed Rule presumes that a national bank is a "covered person" if it has assets of $100 billion or more. The sole support the OCC provides for this distinction is that banks with over $100 billion "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."[20] Based on this the OCC concludes that the large bank population has a "dominant market position." This is the entirety of the OCC's analysis supporting the distinction.[21]

A. *The OCC Fails to Define a Relevant Market*

The OCC's antitrust-infused analysis is materially deficient. The most fundamental problem is that the OCC has not defined a relevant market. An antitrust analysis that does not define a relevant market fails antitrust 101 because a market definition is necessary to identify where competitive concerns arise and to identify market participants and their market power.[22] While the OCC claims that large banks have a "dominant market position," it is impossible to evaluate this claim without a definition of the relevant market.

Merely referring to "financial services" does not suffice as a market definition for two reasons. First, there is no generic product market for financial services. One might start by looking at broad categories of financial services—credit, deposits, payments, trust services, etc. But even if one were to do so, one would need to consider both formal credit and deposits, for example, and functional substitutes. For example, credit would need to consider not just loans and certain leases, but also debt securities. In 2019, US chartered depositories held some $9.8 trillion in loans.[23] But there were another

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[17] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[18] *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

[19] 85 Fed. Reg. 75261, 75266 (Nov. 25, 2020) (proposed 12 C.F.R. § 55.1(a)(1)(i)(A)).

[20] 85 Fed. Reg. 75261, 75264 (Nov. 25, 2020).

[21] The OCC fails to note how many banks would be covered under this cutoff, but it appears to be less than 30 institutions.

[22] *See, e.g.*, Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Aug. 19, 2010, at 9, at https://www.justice.gov/atr/file/810276/download.

[23] Federal Reserve, Financial Accounts of the United States, Statistical Release Z.1.

$6.5 trillion in corporate debt securities,[24] which are functional equivalents in terms of financing to bank loans. Viewed this way, the largest national banks' share of the debt financing market is only 29%. Likewise, any consideration of a deposit market would need to at least consider whether to include the $3.6 trillion of money market mutual funds,[25] many of which have a stable net asset value and are even checkable.

Even broad categories like credit and deposits break down into smaller actual markets. For example, the market for consumer lending is a distinct market from that for corporate loans. Within the consumer market, the credit card market is distinct from the mortgage lending market, the auto lending market, the student loan market, and deposit services market to name but a few examples. Likewise, in the corporate lending market, the market for large syndicated loans is a distinct market from small business lending or from agricultural lending, and there are further industry-specific lending markets, such as for the oil-and-gas industry. The same could be said about time deposits vs. demand deposits or insured vs. uninsured deposits. Again, the OCC fails to give any consideration to these basic market distinctions.

My point here is not to urge any particular product market definition, but that the OCC has failed to undertake even the most basic analysis, and any further consideration of product market definition is likely to necessitate consideration of nonbank providers of financial services and will only *reduce* the importance of large banks.

Second, even once a product market is defined, a geographic market may still be relevant. Geography matters, particularly outside of major urban centers. The number of banks that actually compete for lending business in any locale varies considerably. In some locations, the market power of smaller banks in particular product markets is likely to be substantially greater than that of megabanks. In a rural community, a small community bank might actually have significant market power for certain product markets. The importance of geographic markets is also particularly true in United States overseas territories, where there large national banks have scant presence. The OCC's presumption fails to account for this sort of geographic diversity and instead erroneously treats the entire United States, including territorial possessions, as a single geographic market.

B. *The OCC Presents No Basis for Using a $100 Billion Cut-Off for a Presumption of Market Power*

Even if the OCC had undertaken the necessary market definition analysis, it presents no basis whatsoever for where it draws the line. Selecting a $100 billion cut-off is the very exemplar of an "arbitrary and capricious" decision. The $100 billion cutoff is not supported by *any* evidence of relevance. The mere fact that this number captures "approximately 55 percent of the total assets and deposits of all U.S. banks" and "approximately 50 percent of the dollar value of outstanding loans and leases in the United States"[26] tells absolutely nothing about whether these banks individually or collectively have market power in any geographically defined product market.

The standard market power test is whether an institution or cartel would lose market share based on a "small but significant and non-transitory increase in price".[27] This is a similar standard to

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[24] *Id.*

[25] *Id.*

[26] 85 Fed. Reg. 75261, 75264 (Nov. 25, 2020).

[27] *See, e.g.*, Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Aug. 19, 2010, at 9, at https://www.justice.gov/atr/file/810276/download.

the one in the Proposed Rule, namely the ability to "[r]aise the price a person has to pay to obtain an offered financial service from the bank or from a competitor".[28] The problem is that the Proposed Rule creates a presumption that a bank has this power without any evidence or analysis at all. Is a bank with over $100 billion in assets likely to have this sort of market power in any financial product market? Nothing in the Proposed Rulemaking suggests that the OCC has any basis for reaching a conclusion on this question one way or another.[29] Moreover, without doing the necessary work of defining a product and geographic market, there is no basis for reaching any conclusion whatsoever.

It is astonishing to see a federal government agency undertaking an antitrust analysis without even a nod to this well-established standard. Instead, the OCC picked a number without consideration of the effect of a higher or lower cutoff. This is the very definition of "arbitrary and capricious."

Conclusion

The Proposed Rule is a remarkable and disappointing departure from the OCC's tradition of taking bank safety-and-soundness seriously and setting it above partisan politics. The OCC should retract the Proposed Rule.

Sincerely,

Adam J. Levitin

[28] 85 Fed. Reg. 75261, 75266 (Nov. 25, 2020) (proposed 12 C.F.R. § 55.1(a)(1)(i)(A)).

[29] As it happens the $100 billion threshold is likely to be both over- and under-inclusive. When looking at many non-urban local markets, it is likely to rope in the wrong set of banks, while in major urban markets, it is unlikely that the refusal of any individual large bank to provide financial services would materially affect the availability or pricing of those services to any given client.