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January 4, 2021

Emily Boyes, Counsel
Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7 Street, SW
Suite 3E-218
Washington, DC 20219

Re: Fair Access to Financial Services: Docket ID OCC 2020-0042

Dear Ms. Boyes:

On behalf of the Competitive Enterprise Institute (CEI), I submit this comment letter in opposition to the Office of the Comptroller of the Currency's (OCC) proposed rule on "Fair Access to Financial Services" and urge the OCC to withdraw that rule immediately. As I will explain below, this rule, if implemented, would likely undermine recent efforts by the OCC as well as the Federal Deposit Insurance Corporation (FDIC) to ease the regulatory path for new entrants into the banking sector and likely result in more, not less, politicized banking. Furthermore, the proposed rule levies a sweeping mandate on financial services without any new grant of authority from Congress, thus exceeding the powers given to the OCC by statute.

Background

Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective. A strong focus of CEI is on removing regulatory barriers that inhibit choice, competition, and innovation, including financial

innovation. Over the past decade, my colleagues and I have noted with alarm the avalanche of red tape hitting Main Street financial institutions as well as the dearth of new banks chartered and approved by federal financial regulatory agencies.¹ Thus, we have supported recent OCC initiatives to charter “fintech” firms and other innovative financial institutions, as well as the FDIC’s paring back of regulatory barriers for new, or de novo, banks.²

CEI shares the sentiments expressed by OCC Acting Director Brian Brooks and Chief Economist Charles Calomiris in denouncing Operation Choke Point, in which regulators during the Obama administration pressured banks to cease dealing with certain industry sectors, such as gun dealers and manufacturers and payday lenders.³ CEI condemned Choke Point repeatedly since it first became public around 2014 and applauded Trump administration officials for ending it.⁴

But even as the OCC cites Choke Point as justification for the proposed “fair access” rule—citing private campaigns against many of the industries that were unfairly targeted by bureaucrats—CEI does not agree that banks should be *forced* to deal with certain industries anymore than they should be pressured by the government not to. As my colleague Iain Murray wrote in 2014 study on Choke Point, the judgement of whether to provide financial services to certain industries that may pose a “reputational risk” due to the controversy they may generate “is best left up to individual banks, which have a much better idea of the risks involved in their client relationships.”⁵

We still believe, consistent with the First Amendment’s guarantee of freedom of association and the freedom of conscience for corporations recognized in legal precedents such as *Burwell v. Hobby Lobby*,⁶ that banks and their shareholders should be the ones to decide the industries with whom they will or will not do business.

¹ John Berlau, “A Bird in the Hand and No Banks in the Bush,” *Issue Analysis* 2015 No. 3, Competitive Enterprise Institute, July 2015, https://www.cei.org/sites/default/files/John%20Berlau%20-%20Why%20Competition%20Offers%20a%20Solution%20to%20Too%20Big%20to%20Fail_0.pdf.

² Daniel Press, “Finance Regulators Create New National Charter for Innovative ‘Fintech’ Companies,” Competitive Enterprise Institute Blog, August 2, 2018
<https://cei.org/blog/finance-regulators-create-new-national-charter-for-innovative-fintech-companies/>; John Berlau, “Don’t Wall Off Innovative Tech Firms from Banking,” *Forbes*, July 25, 2019, <https://www.forbes.com/sites/johnberlau/2019/07/25/dont-wall-off-innovative-tech-firms-from-banking/?sh=311c285769bf>.

³ Brian P. Brooks and Charles W. Calomiris, “Payday Lenders, Gun Salesmen—and Taking Politics Out of Banking,” *Wall Street Journal*, November 20, 2020, <https://www.wsj.com/articles/payday-lenders-gun-salesmen-and-taking-politics-out-of-banking-11605904346>.

⁴ Iain Murray, “Operation Chokepoint: Creeping into Unconstitutionality,” *National Review*, May 8, 2014, <https://www.nationalreview.com/corner/operation-chokepoint-creeping-unconstitutionality-iain-murray/>; John Berlau, “‘Choke Point’ Is Frightening Precedent for Bank Regulatory Abuse,” *Forbes*, October 31, 2018, <https://www.forbes.com/sites/johnberlau/2018/10/31/choke-point-is-frightening-precedent-for-bank-regulatory-abuse/?sh=55ea5c2c42b7>

⁵ Iain Murray, “Operation Choke Point: What It Is and Why It Matters,” *Issue Analysis* 2014 No. 1, Competitive Enterprise Institute, July 2014, p. 1, <https://www.cei.org/wp-content/uploads/2014/08/Iain-Murray-Operation-Choke-Point.pdf>

⁶ 573 U.S. 682 (2014)

Further, we believe the OCC should not create sweeping mandates on the banking industry without specific authorization from Congress.

The “Fair Access” Rule Exceeds OCC’s Statutory Authority

Under the “fair access” rule, banks would be forced to provide financial services, from loans to deposit accounts, to all legal industries. “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,” the proposed regulation states.⁷

While the rule admits that loans carry more risk—and thus should be subject to greater scrutiny from the bank—than other types of financial services, it nonetheless still forbids loans from being subject to “categorical exclusions” based on the type of business. The regulation states, “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.”⁸

The OCC claims to have the authority to issue this rule from Title III of the Dodd–Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. § 1), which states that the OCC “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.”⁹ Yet, this provision confers no new authority on the OCC; it is essentially a mission statement that restates the OCC’s power and responsibilities under other laws.

None of the fair lending laws that the OCC references in this rule, such as the Equal Credit Opportunity Act, require banks to serve all types of businesses. Such a sweeping mandate requires a directive from Congress, rather than what is essentially lawmaking through regulation.

The “Fair Access” Rule Would Harm Bank Specialization, Increase Risks to the Financial System, and Created Added Costs for Consumers

Banks specializing in lending to certain types of industries has been the rule, rather than the exception, in American banking history. This is evident by the names of many banks in operation today, even if their customer base has changed over the years. For example, the regional bank chain M&T Bank originally served mainly “Manufacturers and Traders.” More than a dozen banks contain the word “farmers” in their name, according to the OCC’s most recent list of active national banks.¹⁰ M&F Bank, the second oldest minority-owned bank, was originally named “Mechanics and Farmers Bank” to reflect

⁷ Office of Comptroller of the Currency, “Notice of Proposed Rulemaking Fair Access to Financial Services,” p. 10, <https://www.occ.treas.gov/news-issuances/federal-register/2020/nr-occ-2020-156a.pdf>.

⁸ Ibid, p. 14.

⁹ Ibid., p. 4

¹⁰ OCC, “National Banks Active As of 11/30/2020,” <https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/national-by-name.pdf>.

its clientele.¹¹ These customer bases change over time. But the need for many banks—particularly new banks—to specialize in dealing with certain industries does not.

Thus, a rule that would force “access” to a bank’s resources to an industry outside a bank’s zone of expertise would force new risks and new costs on banks that specialize in lending to specific industries. This would particularly harm the new entrants to financial services that the OCC is now rightly championing. These firms may have specific “fintech” areas of expertise, or they may wish to specialize in serving businesses specific to their respective communities. This rule would harm their ability to grow and compete with more established financial players.¹²

The Near-Impossibility of Enforcing Against Industry Bias

The proposed rule would command banks to evaluate businesses using a “risk-based standard,” which is vaguely defined in the rule, rather than any “personal beliefs” of its employees and executives. Yet this standard, even if defined more precisely, is likely to prove very difficult to enforce. In many cases, bank officials could have a low personal opinion of an industry as well as valid business reasons for denying a loan to a specific firm. As *Bloomberg Businessweek* noted on lending to abortion clinics, “Lenders may have rejected [an abortion clinic’s] loan applications because of abortion stigma or legitimate financial concerns; it’s often hard to disentangle the two.”¹³

The difficulty of disentangling personal opinion from business concerns raises questions as to how exactly regulators would enforce this rule, and whether enforcement mechanisms would produce an even more politicized banking sector. How could OCC regulators attempt to prove that a loan was rejected based on the lender’s personal beliefs? In the case of an abortion clinic, does the OCC query whether any of the bank’s employees or directors were members of pro-life groups? In the case of a loan rejection for a socialist website, do OCC regulators look at whether bank personnel donated to conservative or libertarian think tanks? Enforcement of the rule could result in highly invasive probes that would have a chilling effect on involvement in civic activity by thousands of bank employees and directors. The result would potentially be greater politicization of the financial industry.

Conclusion: Withdraw the Rule and Continue Cutting Red Tape

With banks already facing billions of dollars of compliance costs from regulations stemming from laws like Dodd-Frank and Sarbanes-Oxley, the last thing they—and their customers, shareholders, and

¹¹ Zachary Eanes, “M&F Bank Has an Age Problem. It Needs Millennials to ‘Bank Black,’” *Herald Sun*, March 9, 2020, <https://www.mfbonline.com/mf-bank-has-an-age-problem-it-needs-millennials-to-bank-black/>.

¹² The rule, in its current proposal stage, leaves open the question of which banks would be subject to the mandate. The rule states (p. 12) that the mandate would “apply to” any bank 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.” Then, somewhat confusingly, it states (p. 12) that “a bank is presumed to meet the definition of covered bank if it has \$100 billion” and “presumed not to meet the definition of covered bank if it has less than \$100 billion in total assets.” Elsewhere, though, the rule states (p. 10) that “all banks have the responsibility to provide fair access to financial services.” Given these contradictory, yet all-inclusive in combination, statements of the rule’s reach, these comments make the presumption that banks of all sizes could be subject to the mandate.

¹³ Meaghan Winter, “The Most Difficult Business You Could Run,” *Bloomberg Businessweek*, February 24, 2011, <https://www.bloomberg.com/features/2016-abortion-business/?Src=longreads>.

employees—need is more red tape. Lifting burdensome rules to ease the path for new financial institutions is the best way to enable multiple sources of financing for many industries—while avoiding adding excess risk to the financial system.

The OCC should withdraw this rule and instead pursue the goal of increasing consumers' access to capital and credit by continuing its deregulatory policies, such as expanding the types of financial institutions eligible for bank charters.

Thank you for this opportunity to present the views of the Competitive Enterprise Institute. If you should have any questions or comments, please contact me by phone, (202) 331-2272, or email, john.berlau@cei.org.

Sincerely,

John Berlau, Senior Fellow

Competitive Enterprise Institute