

January 4, 2021

Office of the Comptroller of the Currency  
Chief Counsel's Office  
400 7<sup>th</sup> Street, SW Suite 3E-218  
Washington, DC 20219

***Re: Fair Access to Financial Services***

Dear Chief Counsel Gould:

The American Financial Services Association (AFSA)<sup>1</sup> is pleased at having the opportunity to comment on the notice by the Office of the Comptroller of the Currency (OCC) of proposed rulemaking (NPR) to establish rules for national banks and federal savings associations (collectively, Banks) regarding fair access to financial products and services. While a minority of AFSA member companies are regulated by the OCC, all financial institutions are interested in this proposal and its potential effects throughout the consumer finance industry.

AFSA members are supportive of the OCC's efforts to encourage Banks to offer financial products and services in a neutral manner, unaffected by subjective biases. In the recent past, the experience of initiatives such as Operation Choke Point, in which the OCC was not a participant, along with ad hoc decisions by financial institutions to deny products and services based on subjective biases have harmed the financial services sector as a whole. Consumer and business customers of financial institutions deserve service unimpeded by subjective biases, whether imposed by a particular financial institution or from the government.

**I. Inefficiencies of Conducting Risk Assessments for Quasi-Legal or Novel Business Customers**

The NPR articulates the considerations made by the OCC in drafting this proposed rule and observes that access to financial services should be based on an individual assessment of a customer's characteristics rather than membership in a particular category of customers. The NPR makes the point that Banks should make individual risk assessments of customers rather than snap judgments based on the customers' membership in a particular category.

This is a clear goal, but perhaps overlooks the fact that there are categories of customers whose business activities operate in a quasi-legal limbo for which individual risk assessments are inefficient. For the sake of an example, consider marijuana-related businesses. While several states have enacted laws to permit production, sale, and use of marijuana, under Federal law marijuana remains illegal. While the U.S. Treasury's Federal Financial Crimes Enforcement Network (FINCEN) has proposed a framework for financial institutions to perform risk management for

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<sup>1</sup> Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

providing financial services to marijuana-related businesses, that guidance is predicated on a memo from 2013 regarding federal law enforcement priorities that can be overlooked at any time.

The marijuana-related business example is given to remind the OCC that there are potential financial institution customers whose businesses operate in a legal environment that is neither entirely legal nor illegal. For this sort of customer, the OCC should consider how much of an individualized risk assessment is necessary. Rather than establishing through rulemaking that an individualized risk assessment is necessary for every potential customer seeking a financial product or service from a Bank, the OCC might make allowances for shorter reviews in limited circumstances.

Another example where a Bank might seek latitude for an abbreviated risk assessment is in the area of complex international business. If a given Bank does not have customers that are engaged in complex international business, does the OCC intend to require a complete individualized risk assessment that would require developing (or engaging external) expertise to do a novel risk assessment? In such a circumstance, it might be more efficient for a national bank or federal savings association to decline to offer financial products or services.

## **II. Considerations of Sector Risk**

The NPR provides the example that a Bank that offers asset-based lending collateralized by accounts receivable in some business sectors cannot categorically deny those services to a company operating in a different sector. This example overlooks that business sectors constantly vary in their performance and risk over time, and it overlooks that a financial institution may develop expertise in a single business sector. A Bank that offers services to a consumer goods company based on its assessment of the likely performance of similar companies might efficiently form a business decision to avoid exposure to customers in more risky or volatile businesses. The NPR suggests that certain risk-based decisions by Banks may be improper. The OCC should clarify how Banks should harmonize the imperatives to provide fair access while also managing risk in an efficient manner. Managing risk is essential to protecting depositors.

## **III. Availability of Financial Products or Services on Proportionally Equal Terms**

The NPR proposes that a Bank must “make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms.” The NPR states:

“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.”


Despite the NPR’s explanation, it remains unclear what is meant by “proportionally equal terms.” The phrase suggests that compliance with this rule might be determined by a portfolio review, rather than by review of the Banks policies, procedures, and execution. The OCC should confirm

that it does not intent to create an “effects test.” Absent the imposition of a statute to the contrary, Banks should be judged on the basis of their actions, rather than by observations of effects in portfolios.

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AFSA appreciates the opportunity to provide feedback on the OCC’s proposed rule. Please contact me by phone, 202-776-7300, or email, [cwinslow@afsamail.org](mailto:cwinslow@afsamail.org), with any questions.

Sincerely,



Celia Winslow  
Senior Vice President  
American Financial Services Association