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

Via: Federal eRulemaking Portal at: <https://beta.regulations.gov/docket/OCC-2020-0042>

Fair Access to Financial Services / Docket ID OCC-2020-0042 / RIN 1557-AF05

Dear Acting Comptroller Brooks,

On behalf of our millions of members and supporters, we offer the following comments on the Office of the Comptroller of the Currency's (OCC) proposed rule regarding fair access to financial services.¹ The OCC proposes to require banks to serve every category of high-risk business, with the express goal of increasing bank lending to risky fossil fuel companies.

The proposal is irredeemably flawed and should be rescinded. The OCC has no legal authority to enact this rule, and the rule would flatly contradict the OCC's mission by threatening the safety and soundness of banks seeking to mitigate climate-related risks, including strategic and reputational risk. We urge you to withdraw the proposal and instead fully integrate climate into prudential regulation and supervision. The OCC should focus on preparing the banking system for physical climate risks and the transition away from a high-emission economy, as well as stemming banks' contributions to the climate crisis.

The OCC lacks the authority to adopt this rule.

Agencies may not act outside of the statutory authority that Congress grants them.² The OCC rests its authority to adopt this rule on 12 U.S.C. § 1(a), which mentions, among other things, assuring "fair access to financial services."³ But this provision is a summary of the OCC's purposes, not a free-standing grant of rulemaking authority.⁴ The Dodd-Frank Act amended 12 U.S.C. § 1(a) to add assuring "fair access to financial services, and fair treatment of customers by" the institutions under the OCC's jurisdiction to the summary.⁵ Under the OCC's

¹ 85 Fed. Reg. 75,261, 75,266 (Nov. 25, 2020).

² 5 U.S.C. § 706(2)(C).

³ 85 Fed. Reg. at 75,266.

⁴ Adam Levitin, *OCC Suggests "Fair Access" Rulemaking to Require Banks to Finance the Oil and Gas Industry*, Credit Slips (August 4, 2020), <https://www.creditslips.org/creditslips/2020/08/occ-suggests-fair-access-rulemaking-to-require-banks-to-finance-the-oil-and-gas-industry.html>.

⁵ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Sec. 314 (2010) (hereinafter, "Dodd-Frank").

interpretation, this added phrase was enough to give it novel, expansive powers. But Congress does not fundamentally alter regulatory schemes in vague terms or ancillary provisions.⁶ This change was part of the administrative provisions in the Dodd-Frank Act abolishing the Office of Thrift Supervision and transferring without modification its authority over savings associations to other regulators.⁷ Dodd-Frank never defined “fair access to financial services” and made no related updates to banking laws. Elsewhere, Dodd-Frank made much more detailed changes to grant the Consumer Financial Protection Bureau (CFPB) the authority to regulate fair lending, transferring existing powers over consumer financial protection to the CFPB and directing it to use those powers.⁸ This contrast reinforces that Congress added “fair access” as part of a summary of the purposes of existing laws that the OCC should enforce, not to grant the agency new rulemaking authority.

The proposal also identifies three laws that the OCC uses to protect fair access to financial services — and it rightly does not claim that any applies here.⁹ These laws and their contrast to 12 U.S.C. § 1(a) also demonstrate that Congress knows how to write a law protecting fair access to financial services, and it did not do so in an amendment merely adding those words to a summary of the OCC’s purposes.

The proposal also states that the OCC has repeatedly warned banks to avoid freezing out entire categories of business.¹⁰ This assertion is erroneous. The statements that the proposal cites for support were made in the context of concerns that the OCC wanted banks to *exit* risky categories of business.¹¹ In the statements it now cites, the agency merely affirms that it has not encouraged or recommended such moves.¹² To be sure, the OCC should reconsider this view. It is both sensible and permissible for the agency to advise or even require banks to exit a risky market segment. But that is beside the point. What is relevant here is that the agency has never required banks to do business with categories of companies they reasonably believe are too risky.

It is reasonable for banks to exit the fossil fuel business because of climate risk and other risks.

This rulemaking responds to concerns from a single state’s congressional delegation that banks are refusing to finance Arctic drilling projects.¹³ An OCC review concluded that “certain banks” were making these decisions for reasons “unconnected to credit or operational risk” or “unrelated to financial risk.”¹⁴ This narrow view of risk contradicts the OCC’s own supervision guidance, which requires assessing a bank’s strategic and reputation risks as well.¹⁵ Involvement

⁶ See, e.g., *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001) (“[Congress] does not, one might say, hide elephants in mouseholes.”).

⁷ See Dodd-Frank Act § 314(a); *id.* tit. III. (“TRANSFER OF POWERS TO THE COMPTROLLER OF THE CURRENCY, THE CORPORATION, AND THE BOARD OF GOVERNORS”).

⁸ See, e.g., Dodd-Frank at tit. X §§ 1002, 1013, 1052, 1085, 1094.

⁹ 85 Fed. Reg. at 75,262.

¹⁰ *Id.*

¹¹ See Testimony of Daniel P. Stipano, Deputy Chief Counsel, OCC (July 15, 2014), 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> (“Currently there is great concern that banks are terminating the accounts of entire categories of customers, without regard to the bank’s ability to manage the risks posed by those customers, and some have suggested that regulators are dictating those actions.”).

¹² *Id.* (“As a general matter, the OCC does not recommend or encourage banks to engage in the wholesale termination of categories of customer accounts.”).

¹³ 85 Fed. Reg. at 75,264.

¹⁴ *Id.*

¹⁵ OCC Comptroller’s Large Bank Handbook <https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/large-bank-supervision/pub-ch-large-bank-supervision.pdf>.

in Arctic drilling, or with the companies driving climate change more generally, exposes banks to these risks. And the risks will only deepen as customers and employees increasingly seek to work with banks that share their values. A bank giving full and appropriate consideration to risk could reasonably conclude it should cease doing business with fossil fuel companies altogether.

Technological advances and public and private efforts to combat climate change worldwide are precipitating a rapid shift toward a low-carbon economy, and the fossil fuel industry has been in financial trouble for years.¹⁶ The coronavirus pandemic has magnified these problems, with fossil fuel companies disproportionately using the CARES Act lending facilities.¹⁷ In April 2020, benchmark West Texas Intermediate prices went negative for the first time.¹⁸ As the shift to a low-carbon economy accelerates, the risks inherent in fossil fuel finance will only grow.

These risks are endemic to whole segments of the fossil fuel industry, not just to particular companies. Exposure to any of them creates a risk of losses that banks and markets must prepare for.¹⁹ These risks are unpredictable and grow with every year, further compounding the dangers of being in business with fossil fuels.²⁰ Like subprime lenders in 2008, companies that appear safe today will become risky faster than a bank can reevaluate them. It is eminently reasonable to conclude that the most prudent move in the face of such large, unpredictable risks is to avoid them entirely.

Banks are broadly exposed to climate change through their full range of investments, and many climate-related risks are correlated and procyclical. Mortgage lending, for one, may see upheaval as floods, fires and extreme weather change the homebuying market.²¹ These same events can increase political pressure for, and investment in, a low-carbon economy. Exiting industries that will decline because of this shift is a way for banks to avoid compounding the climate-related losses that they must manage.

The OCC should scrutinize and curb banks' involvement with high-emission activities.

Despite the OCC's concerns, investment in fossil fuels remains, regrettably, alive and well. From 2016–2019, banks provided \$2.7 trillion in direct fossil fuel financing, with most of that money coming from the large banks targeted by this rule.²²

¹⁶ Institute for Energy Economics and Financial Analysis, *The Oil Industry Has Been in Financial Trouble for Years* (Lakewood, OH: 2020), available at <https://ieefa.org/wp-content/uploads/2020/04/IEEFA-Oil-Industry-Finance-April-2020.pdf>.

¹⁷ *Oil and Gas Dominates in 'Main Street' Lending Program* (December 16, 2020) <https://bailoutwatch.org/analysis/mslp-november-analysis>.

¹⁸ Catherine Ngai, Olivia Raimonde, and Alex Longley. *Oil Plunges Below Zero for First Time in Unprecedented Wipeout*, Bloomberg (April 19, 2020) <https://www.bloomberg.com/news/articles/2020-04-19/oil-drops-to-18-year-low-on-global-demand-crunch-storage-woes>.

¹⁹ Tyson Slocum and David Arkush, Testimony of Public Citizen to the CFTC's Climate-Related Market Risk Subcommittee <https://www.citizen.org/article/cftc-should-adjust-capital-and-margin-requirements-to-reflect-climate-risks/>.

²⁰ Andy Green, Gregg Gelzinis and Andrea Thornton, *Financial Markets and Regulators are Still in the Dark on Climate Change*, <https://www.americanprogress.org/issues/economy/reports/2020/06/29/486893/financial-markets-regulators-still-dark-climate-change/>.

²¹ Zack Colman and Katy O'Donnell, *Borrowed time: Climate change threatens U.S. mortgage market*, POLITICO (June 8, 2020) <https://www.politico.com/news/2020/06/08/borrowed-time-climate-changemortgage-market-304130>.

²² Regarding the \$2.7 trillion figure, see Rainforest Action Network, *Banking on Climate Change*, available at <https://www.ran.org/bankingonclimatechange2020/>. On the proposal's targeting of large banks, see 86 Fed. Reg. at

Given the systemic interconnectedness of large banks with the climate crisis, most, if not all, are likely unprepared for the physical and transition risks of climate change. The increasing prevalence of physical climate risks and the ongoing decline in high-emitting industries will stress the economy and financial system. The failure of an overexposed bank would amplify that stress in unpredictable ways. If, as the proposal claims, the OCC and banks are not well-equipped to evaluate these risks, then the OCC should view that as a crisis to be solved, not a trifle to be ignored. With climate risk stressing the financial system as a whole, regardless of any specific bank's apparent prospects, the OCC should also work to reduce the banks' contributions to climate risk.

Conclusion

This proposal is an unlawful and counterproductive attempt to protect political favorites by pressuring banks into financing the increasingly risky fossil fuel industry. Its adoption would conflict with the OCC's own mission of assuring the safety and soundness of the banking system. Instead of unlawfully denying banks the ability to mitigate climate risk, the OCC should use its actual legal authority to ensure that they appropriately account for and reduce it, including their own contributions. To that end, the OCC should withdraw this proposal and begin to work on updating its prudential and supervisory frameworks to take climate risk fully into account.

For questions, please contact David Arkush at darkush@citizen.org and Yevgeny Shrago at yshrago@citizen.org.

Sincerely,

Public Citizen
Alaska Wilderness League
Americans for Financial Reform Education Fund
Baltimore, MD Phil Berrigan Memorial Chapter Veterans For Peace
BankTrack
Beneficial State Foundation
Better Markets
Call to Action Colorado
CatholicNetwork.US
Center for International Environmental Law
Climate Hawks Vote
ClimateYogi.org
Colorado Businesses for a Livable Climate
Colorado Democratic Party Energy & Environment Initiative
Consumer Action
Friends of Alaska National Wildlife Refuges
Institute for Agriculture and Trade Policy
Interfaith Center on Corporate Responsibility
Jim Schulman, Architect
National Community Reinvestment Coalition
Rainforest Action Network

75,264 (“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.”).

RapidShift.Network
Revolving Door Project
Sierra Club
Texas Campaign for the Environment
The Wilderness Society
U.S. PIRG
Union of Concerned Scientists
Venner Consulting

Dave Jones, Center for Law, Energy & the Environment, University of California-Berkeley*
Mark Paul, New College of Florida*

*Organization listed for identification purposes only