

November 30, 2020

THROWING DOWN THE GAUNTLET ON POLITICS AND BANKING: OFFICE OF THE COMPTROLLER OF THE CURRENCY PROPOSES “FAIR ACCESS” RULE

To Our Clients and Friends:

On November 20, 2020, the Office of the Comptroller of the Currency (“OCC”) proposed a rule to require large national banks and federal savings associations to offer and provide “fair access” to financial services (Fair Access Proposal).[1] The Fair Access Proposal can be seen as a potential preemptive strike against regulatory encouragement of moves to “debank” certain bank customers, such as the fossil fuel industry and agribusiness. This Client Alert contains a summary of the Fair Access Proposal, the OCC’s justifications for it, and the OCC’s asserted legal authority for promulgating it. The deadline for comments on the Fair Access Proposal is January 4, 2021 – suggesting that the OCC may be seeking to finalize it before a new Comptroller of the Currency is appointed and confirmed.

I. Scope of Fair Access Proposal

The Fair Access Proposal applies to a subset of national banks and federal savings associations – those that have the ability either 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 (Covered Bank). A bank or savings association *with \$100 billion or more in total assets* would be presumed to be a Covered Bank; such a bank could rebut this presumption by submitting to the OCC written materials that demonstrate that the bank does not meet the Covered Bank definition. The OCC justified focusing on large banks on the ground that such banks have the greatest potential to affect customers if they withdraw services. It noted that national banks and federal savings associations with \$100 billion or more in total assets controlled approximately 55 percent of the nation’s bank assets and deposits.

The OCC also invited public comment on whether a threshold linked to national market share of any financial service should be included, and if so, what percentage share would be appropriate.

II. Substantive Provisions

Under the Fair Access Proposal, a Covered Bank would be required:

- To make each financial service it offers available to all persons in the geographic market served by the Covered Bank on proportionally equal terms;

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- Not to deny any person a financial service the Covered 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;
- Not to deny any person a financial service the Covered 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
- Not to deny, in coordination with others, any person a financial service the Covered Bank offers.

Providing financial services "on proportionally equal terms" would include ensuring that pricing and denial decisions are commensurate with measurable risks based on quantitative and qualitative characteristics. This provision would also prohibit a Covered 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.

A Covered Bank's decision to deny services would not be permitted to include consideration of the Covered Bank's opinions of a customer or the customer's lawful activities. A Covered Bank should, by contrast, consider factors like safety and soundness and compliance with applicable laws, like the Bank Secrecy Act and consumer protection laws, when deciding to provide services to a customer. It should also consider whether it has the knowledge or expertise to offer a service in a particular market.

Because the Fair Access Proposal, if finalized, would be a regulation that had been subject to notice and comment, it would have the force of law. The OCC would examine Covered Banks for compliance, and failure to comply could lead to enforcement actions.

III. Justifications for the Fair Access Proposal

In justifying the Fair Access Proposal, the OCC asserted that some banks have been employing category-based, as opposed to individualized, risk evaluations to deny access to financial services. The OCC contended that those banks had reacted to pressure from policy advocates whose objectives are served when banks deny financial services to certain categories of customers. It cited calls for boycotts of banks that support family planning organizations, reports that some banks have ceased to provide financial services to owners of privately owned correctional facilities, and the alleged debanking of firearm manufacturers, as evidence of such practices.

In particular, the OCC mentioned Operation Choke Point, dating from the Obama Administration, in which it was alleged that certain regulators, not including the OCC, had pressured banks to terminate their business relationships with payday lenders. It also noted a letter that it had received from the Alaska Congressional delegation that discussed decisions by several banks to stop lending to new oil and gas projects in the Arctic. Upon receiving that letter, the OCC requested information from several large banks in order to evaluate their criteria for denying access to financial services. The OCC further stated that certain banks had ceased providing lending and advisory services to coal-mining, coal-fired

electricity generation, and oil exploration customers, and such banks intended to make exceptions only when certain non-financial criteria were met, such as whether the country in which a project is located had committed to international climate agreements and whether the project controls carbon emissions adequately. The OCC criticized such actions, declaring that neither it nor banks themselves are capable of evaluating risks unrelated to credit and operational risk.

IV. Legal Authority

The Fair Access Proposal would be a significant development in the scope of OCC regulation, and, as noted above, would have the force of law, thus subjecting Covered Banks to potential enforcement actions for noncompliance. The OCC grounded the proposal in the statutory changes to the National Bank Act made by the the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).

In particular, Title III of the Dodd-Frank Act revised the OCC’s mission statement set forth in the National Bank Act by charging the OCC with, among other purposes, “assuring . . . fair access to financial services.”^[2] The OCC stated that the concept of “fair access” as used in Title III includes a right of individual bank customers to have access to financial services based on their individual characteristics and not on their membership in a particular customer category. It further stated that as the agency charged by Congress with implementing the National Bank Act, its interpretation of “fair access” was entitled to judicial deference. The OCC also indicated that during the Obama Administration, it had previously focused on individualized customer risk assessments in precedents involving the banking and debanking of money services businesses and correspondent banks, and thus the Fair Lending Proposal was not a novel approach.

Conclusion

The Fair Lending Proposal has a relatively short, 45-day comment period that expires on January 4, 2021. This may reflect that fact that Comptrollers of the Currency may be dismissed by a President without cause, and therefore Acting Comptroller Brooks’ remaining tenure at the OCC may be short after President-elect Biden is inaugurated, notwithstanding that Mr. Brooks was recently nominated by President Trump for a full term as Comptroller. It is therefore reasonable to view the Fair Lending Proposal as seeking to head off, or at least restrict, certain actions by the incoming Biden Administration. Prior to the election, for example, Democratic policy papers advocated for an increased focus on climate change by the banking regulators, and there are other industries where a change in Administrations will mean heightened scrutiny. For this reason, it bears watching whether the OCC’s interpretation of “fair access” in the Dodd-Frank Act ultimately becomes law.

[1] OCC, Notice of Proposed Rule Making: Access to Financial Services (November 20, 2020), available at <https://www.occ.gov/news-issuances/federal-register/2020/nr-occ-2020-156a.pdf>.

[2] 12 U.S.C. § 1.

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The following Gibson Dunn lawyers assisted in preparing this client update: Arthur S. Long and Samantha J. Ostrom.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Financial Institutions practice group, or the following:

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