

**[BILLING CODE:]**

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 55**

**[Docket ID OCC-2020-0042]**

**RIN 1557-AF05**

**Fair Access to Financial Services**

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency is issuing this final rule to ensure that national banks and Federal savings associations provide fair access to financial services.

**DATES:** This final rule is effective on April 1, 2021.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The Office of the Comptroller of the Currency (OCC or agency) has recognized and emphasized the importance of individualized, quantitative risk-based analysis and management of customer risk and its role in the safety and soundness of national banks, Federal savings associations, and foreign branches and agencies of foreign banks (together, banks) for years.<sup>1</sup>

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<sup>1</sup> See, e.g., Remarks by Thomas J. Curry, Comptroller of the Currency, before the Association of Certified Anti-Money Laundering Specialists (Mar. 17, 2014), available at <https://occ.gov/news-issuances/speeches/2014/pub-speech-2014-39.pdf>; OCC Bulletin 2014-58, "Banking Money Services Businesses:

Making judgments and decisions about whether to provide a person<sup>2</sup> with financial services<sup>3</sup> on the basis of empirical data evaluated under quantifiable standards is fundamental to operating in a safe and sound manner.<sup>4</sup> Furthermore, as a general matter, the OCC does not direct banks to open, close, or maintain individual accounts, nor does the agency encourage banks to engage in the termination of entire categories of customer accounts without regard to the risks presented by an individual customer or a bank’s ability to manage the risk. Instead, the agency has repeatedly

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Statement on Risk Management” (Nov. 19, 2014), available at <https://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-58.html>, OCC 2015 Annual Report, available at <https://www.occ.gov/publications-and-resources/publications/annual-report/files/2015-annual-report.pdf>; 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>; OCC Spring 2015 Semiannual Risk Perspective From the National Risk Committee, available at <https://www.occ.gov/publications-and-resources/publications/semiannual-risk-perspective/files/pub-semiannual-risk-perspective-spring-2015.pdf>; Remarks by Thomas J. Curry, Comptroller of the Currency, before the Association of Certified Anti-Money Laundering Specialists 15th Annual Anti-Money Laundering and Financial Crime Conference (Sept. 28, 2016), available at <https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-117.pdf>; OCC Bulletin 2016-32, “Risk Management Guidance on Foreign Correspondent Banking: Risk Management Guidance on Periodic Risk Reevaluation of Foreign Correspondent Banking” (Oct. 5, 2016), available at <https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-32.html>, News Release 2016-123, “OCC Releases Risk Reevaluation Guidance for Foreign Correspondent Banking” (Oct. 5, 2016), available at <https://www.occ.treas.gov/news-issuances/news-releases/2016/nr-occ-2016-123.html>, GAO Report 20-46, “Bank Secrecy Act, Examiners Need More Information on How to Assess Banks’ Compliance Controls for Money Transmitter Accounts” (Dec. 2019), available at <https://www.gao.gov/assets/710/702959.pdf>.

While this material discusses the importance of individualized, quantitative risk-based analysis and management of customer risk, and its role in banks’ safety and soundness, primarily in the context of the Bank Secrecy Act and anti-money laundering regulations (BSA/AML), this principle is not limited to that context but is broadly applicable.

<sup>2</sup> For purposes of this rule, the OCC defines the term “person” to mean any natural person or any partnership, corporation, or other business or legal entity.

<sup>3</sup> For purposes of this rule, the OCC defines the term “financial services” to include financial products and services.

<sup>4</sup> See Comptroller’s Handbook for Large Bank Supervision (2018) at 11-12 (describing the OCC’s risk assessment system and specifying that “a risk is effectively managed when it is identified, measured, monitored, controlled, and reported” and “[a]ccurate and timely measurement of risks is essential to effective risk management system.”); Comptroller’s Handbook for Corporate and Risk Governance (2019) at 117-118 (defining “risk limits” as “[s]pecific quantitative measures based on, for example, forward-looking assumptions that allocate the bank’s risk appetite to business lines; legal entities as relevant, specific risk categories; concentrations; and, as appropriate, other measures” and “risk appetite statement” as “[t]he written statement of the aggregate level and types of risk that a bank is willing to assume to achieve its strategic objectives and business plan. It includes quantitative measures expressed relative to earnings, capital, risk measures, liquidity, and other relevant measures as appropriate. It should include qualitative statements to address reputation risk as well as money laundering and unethical practices.”).

stated that it expects banks to assess the risks posed by individual customers on a case-by-case basis and implement controls to manage relationships commensurate with these risks.<sup>5</sup>

Nevertheless, some banks continue to employ subjective or category-based evaluations to deny certain persons access to financial services.<sup>6</sup> These banks are often responding to pressure from advocates from across the political spectrum whose policy objectives are served when banks deny certain customers access to financial services. When a bank predicates a person's access to financial services on factors other than quantitative, impartial risk-based standards, it has failed to act consistent with basic principles of sound risk management and, as explained in greater detail below, failed to provide fair access to financial services.

To ensure that banks operate in a safe and sound manner, as well as provide fair access to financial services, the OCC issued a Notice of Proposed Rulemaking (proposal or proposed rule) on November 20, 2020.<sup>7</sup> The proposal sought to codify prior OCC guidance and other statements on the importance of individualized risk management to a bank's safety and soundness<sup>8</sup> and to clarify the meaning and parameters of fair access to financial services.

## II. Background

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<sup>5</sup> See *supra* note 1.

<sup>6</sup> See, e.g., *American Banker*, "BankThink JPMorgan, Condoms and the Problem of Reputational Risk" (Mar. 26, 2014); *Bloomberg Businessweek*, "The Most Difficult Business You Could Run: Why It's So Hard to Run an Abortion Clinic And Why So Many Are Closing" (Feb. 24, 2016); *Association of Mature American Citizens*, "You May Not Support Planned Parenthood...But Your Favorite Companies Do" (Oct. 12, 2017); *New York Times*, "How Banks Could Control Gun Sales if Washington Won't" (Feb. 19, 2018); *New York Times*, "Citigroup Sets Restrictions on Gun Sales by Business Partners" (Mar. 22, 2018); *American Banker*, "Florida gun maker told to find new bank, CEO claims" (Oct. 9, 2018); *Reuters*, "JPMorgan backs away from private prison finance" (Mar. 5, 2019); *Forbes Magazine*, "GEO Group Running Out of Banks as 100% of Known Banking Partners Say 'No' to the Private Prison Sector" (Sept. 30, 2019); Letter dated June 16, 2020, from Sen. Sullivan (R-AK), Sen. Murkowski (R-AK), and Rep. Young (R-AK) to Acting Comptroller B. Brooks, OCC; Chair J. Powell *et al.*, Board of Governors of the Federal Reserve System (Federal Reserve); and Chair J. McWilliams, Federal Deposit Insurance Corporation (FDIC); *Plant Based News*, "Banks Facing Calls To 'Stop Funding Factory Farming' To Protect Animals, The Planet, And Public Health" (Nov. 10, 2020); Letter dated November 11, 2020, from Rep. Rose (R-TN) *et al.* to Acting Comptroller B. Brooks, OCC; Vice Chair of Supervision R. Quarles *et al.*, Federal Reserve; and Chair J. McWilliams, FDIC; *Change.org*, "Development banks: Stop investing in industrial animal agriculture."

<sup>7</sup> 85 FR 75261 (Nov. 25, 2020).

<sup>8</sup> See *supra* note 1.

Twelve U.S.C. 1 (Section 1), as amended by Title III of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act),<sup>9</sup> charges the OCC 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.” Section 1 does not define or provide specific guidance about the meaning of “fair access to financial services,” nor does the Dodd–Frank Act or its legislative history. The National Bank Act, of which Section 1 is a part, also does not include relevant definitions or guidance. In the absence of specific statutory guidance on the question, the OCC interprets its charge to ensure “fair access to financial services . . . by[] the institutions and other persons subject to its jurisdiction” to provide that the agency’s mission includes ensuring that banks provide customers and prospective customers engaged in lawful activities with fair access to financial services.

Section 1—the focus of which is bank behavior—sets out an expectation that the OCC will ensure that banks conduct themselves in a safe and sound manner, comply with laws and regulations, treat their customers fairly, and provide fair access to financial services. While Section 1 does not clearly specify to whom banks must provide fair access to financial services, the only other language in Section 1 that explicitly discusses fairness (“fair treatment of customers”) describes banks’ interactions with customers. Consistent with this language, the OCC interprets “fair access to financial services” also to apply to banks’ interactions with customers.<sup>10</sup>

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<sup>9</sup> Pub. L. 111–203, 124 Stat. 1376, 1520–1528 (July 21, 2010).

<sup>10</sup> A covered bank’s decision not to provide financial services to another financial institution is covered by this rule, as provided by the definition of “person” to include partnerships, corporations, or other business or legal entities. However, the OCC is presently not aware of any instances of a bank declining to provide fair access to financial services to another financial institution.

Likewise, Section 1 does not specify what is meant by the term “fair access.” Three factors support the interpretation of that term embodied in the final rule. First, the plain meaning of the term “fair” is “marked by impartiality and honesty: free from self-interest, prejudice, or favoritism.”<sup>11</sup> The plain meaning of the term “access” is “freedom or ability to obtain or make use of something.”<sup>12</sup> Thus, a plain-language interpretation of “fair access” supports the conclusion that it requires persons—customers and prospective customers—to be able to obtain services at banks without impediments caused by a bank’s prejudice against a person or the person’s business or a bank’s favoritism for market alternatives to the person’s business.

Second, Section 1 also emphasizes the OCC’s responsibility to ensure the safety and soundness of the banks it supervises. Under the interpretive canon *noscitur a sociis*, the meaning of “fair access” is informed by the surrounding text in the same statutory provision, suggesting a link between fair access and the agency’s traditional mission of safety and soundness. The OCC’s post-Dodd–Frank Act pronouncements have assumed such a link, and since enactment of the Dodd–Frank Act, the OCC has emphasized the crucial role of impartial, individualized risk-based analysis in promoting safety and soundness.<sup>13</sup>

Third, in other regulated industries, Federal courts (including the U.S. Supreme Court) have held that Federal antitrust laws prevent firms from entering into agreements with competitors, or otherwise using anticompetitive practices, to deny access to their services or facilities.<sup>14</sup> In one such case, the Supreme Court held that a Federal agency had the authority to

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<sup>11</sup> See e.g., fair, Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/fair> (last visited Jan. 12, 2021).

<sup>12</sup> See, e.g., access, Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/access> (last visited Jan. 12, 2021).

<sup>13</sup> See *supra* note 1.

<sup>14</sup> See *United States v. Terminal Railroad Ass’n of St. Louis*, 224 U.S. 383 (1912); *Associated Press v. United States*, 326 U.S. 1 (1945); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

use its regulatory powers to set the terms of access to a firm's services.<sup>15</sup> Banks, no less than other businesses, are subject to the Federal antitrust laws.<sup>16</sup> Thus, this body of law provides further support for the final rule.

Accordingly, the OCC interprets "fair access to financial services" in Section 1 to recognize its broad responsibility to ensure that banks make decisions about whether to provide a person with financial services on the basis of impartial criteria that are free from prejudice or favoritism. Banks can ensure this impartiality by relying on empirical data that are evaluated consistent with their established, impartial risk-management standards. To allow other factors or information (such as the products a customer manufactures or the services it provides) or evaluation under anything other than a bank's established, impartial risk-management standards to influence the bank's decisions about the customer's access to financial services would be to ratify decisions that are based, in whole or in part, on prejudices or favoritism and would threaten banks' safety and soundness. The OCC interprets the Section 1 "fair access" language also to reflect antitrust principles, such as the prohibition on group boycotts and the "proportionally equal terms" concept.<sup>17</sup>

The fair access principle in Section 1 does not obligate a bank to offer any particular financial service, operate in any particular geographic area, or provide a service it offers to any particular person. The principle of fair access also is not a guarantee of banking services to all-comers. Instead, the OCC interprets Section 1 to require a bank to make (1) the financial

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<sup>15</sup> See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). As one commentator described the case, "[n]ot only was the defendant a natural monopolist, it was regulated and its activities may have evaded that regulation, to the prejudice of consumers." Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 848 (1989).

<sup>16</sup> See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

<sup>17</sup> As the Supreme Court has noted, Congress is presumed to know existing law, including judicial interpretations of federal statutes, when it enacts a new law. See, e.g., *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1762 (2018) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

services it chooses to offer available to all customers and (2) decisions about whether to provide a particular customer with financial services based on an analysis of the risk factors unique to that individual customer, such as the customer's ability to pay or the bank's ability to manage the risks associated with the customer relationship. Put simply, as the OCC has stated repeatedly, banks are free to provide or deny financial services to any individual customer—but first, they must do their homework and be able to show their work. Anything less is not prudent risk management and may result in unsafe or unsound practices and denial of fair access to financial services.

### **III. Description of Proposal**

While all banks have the responsibility to provide fair access, the OCC's proposal focused specifically on the nation's largest banks because they are most likely to have both the ability to influence the price of financial services and the depth of expertise to serve a broad range of industries. As proposed, the rule would have applied to a "covered bank," which was defined as any OCC-regulated entity with 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. A bank with \$100 billion or more in total assets would be presumed to be a covered bank but could rebut this presumption by demonstrating to the OCC that it does not have the abilities set forth above – for example, by showing the availability from a meaningful number of competitors of a given service that the bank itself has chosen not to offer. A bank with less than \$100 billion in total assets would be presumed not to be a covered bank.

As proposed, to provide fair access to financial services, a covered bank would be required to (1) make each financial service it chooses to offer available to all persons in the

geographic market served by the bank on proportionally equal terms; (2) not deny any person a financial service the bank offers except as justified and documented by measurable, empirical, quantifiable data evaluated under the bank's established, impartial risk-management standards established in advance by the bank; (3) not deny any person a financial service the bank offers when the effect of the denial is to prevent, limit, or otherwise disadvantage the person from entering or competing in a market or business segment or in such a way that benefits another person or business activity in which the bank has a financial interest; and (4) not deny, in coordination with others, any person a financial service the bank offers.

The OCC invited public comment on all aspects of the proposal. In addition, the agency solicited feedback on whether the final rule should include a percent of national market share as another threshold for a bank to be presumed to meet the definition of covered bank and, if so, what percent of the national market share would be the appropriate threshold. The OCC also invited public comment on whether a presumption different from the \$100 billion asset threshold would more effectively capture banks that meet the definition of covered bank and exclude banks that do not meet the definition.

#### **IV. Overview of Comments Received**

The OCC received approximately 35,700 comments on the proposal.<sup>18</sup> The commenters represented a wide range of stakeholders, including the banking industry and industry trade associations; environmental and other advocacy groups and related trade associations; government officials; academia; and members of the public.

Approximately 4,200 comments supported the proposal. These commenters generally agreed that banks should not be allowed to discriminate against lawful industries, politicize

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<sup>18</sup> This figure includes approximately 28,000 form letters collected by a single organization.

access to financial services, or provide access to financial services based on subjective or category-based decision-making. Approximately 31,290 comments opposed the proposal. These commenters generally challenged the legal, substantive, and procedural basis of the rulemaking and, among other issues, argued that banks have an appropriate role in addressing customer, shareholder, or other stakeholder concerns about matters of public policy. These issues and others raised by commenters are discussed in more detail below.

## **V. Discussion of Comments**

### **A. Legal Issues**

*Authority.* The OCC received several comments challenging its legal authority to issue the proposal. These commenters argued that Section 1, considered in light of its plain language, relevant legislative history, and canons of statutory construction, is a statement of the agency’s mission and cannot serve as the basis to impose legal requirements on banks. Others argued that Section 1 does not include a delegation of authority to the OCC and, if it does, it is an unconstitutional delegation under the “intelligible principle” line of case law. One commenter argued that Section 1 does not permit the OCC to apply its rule only to covered banks. Another commenter argued that 12 U.S.C. 93a does not provide the agency with authority to issue this rule. Other commenters argued that the OCC’s reading of Section 1 should be, but is not, informed by the purposes of Title III of the Dodd–Frank Act (the Title that amended Section 1).

The OCC has clear authority to interpret the statutes it is charged with administering<sup>19</sup> and specific authority “to prescribe rules and regulations to carry out the responsibilities of the

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<sup>19</sup> The Supreme Court has repeatedly recognized the authority of the OCC to interpret the meaning of the banking laws and has deferred to the OCC’s reasonable interpretations of these laws pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–845 (1984). *See, e.g., NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (deferring to the OCC’s reasonable interpretation of ambiguous language in 12 U.S.C. 92); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) (deferring to the OCC’s reasonable interpretation of ambiguous language in 12 U.S.C. 85).

office.”<sup>20</sup> Section 1 sets out several responsibilities of the office, including “assuring the safety and soundness of, and . . . fair access to financial services . . . by[] the institutions and other persons subject to its jurisdiction.” In fulfillment of its express statutory obligations in Section 1, the OCC is issuing this rule to codify and provide further clarity about its existing guidance, to ensure banks operate in a safe and sound manner, and to clarify the meaning and parameters of a bank’s obligation when deciding whether to provide financial services.<sup>21</sup>

Although the meaning of the term “fair access to financial services” is ambiguous, as explained earlier in this *Supplementary Information* section, the OCC interprets this phrase in the context of Section 1, as well as the broader context of banking and antitrust laws, including general principles of safety and soundness such as prudent risk management. These contexts provide the OCC with sufficient boundaries and policy guidance to exercise the legislative power delegated to it by Congress.<sup>22</sup> Further, the OCC’s reading of Section 1 is entirely consistent with Title III of the Dodd–Frank Act’s stated purpose to, among other things, “provide for the safe and sound operation of the banking system of the United States.”<sup>23</sup>

*Scope.* The OCC also received comments about the scope of the proposed rule. Several commenters argued that the “fair access” reference in Section 1 applies to natural persons only, and not to partnerships, corporations, or other businesses or legal entities as provided for in

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<sup>20</sup> 12 U.S.C. 93a.

<sup>21</sup> One commenter asserted that the OCC’s previous guidance does not justify the proposed rule because the guidance does not require a bank either to enter a line of business or to refrain from exiting a line of business. As explained earlier in the *Supplementary Information* section of this final rule, nothing in the proposed or final rule requires a bank to enter a line of business or prevents it from exiting a line of business.

<sup>22</sup> As the Supreme Court explained, “a delegation is permissible if Congress has made clear to the delegee ‘the general policy’ he must pursue and the ‘boundaries of [his] authority.’ Those standards, the Court has made clear, are not demanding, . . . Only twice in this country’s history (and that in a single year) have we found a delegation excessive—in each case because ‘Congress had failed to articulate *any* policy or standard’ to confine discretion, . . . By contrast, we have over and over upheld even very broad delegations.” *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (some alterations in original) (internal citations omitted).

<sup>23</sup> See Dodd–Frank Act, Section 301 of Title III, *codified at* 12 U.S.C. 5401.

proposed section 55.1(a)(3)(ii). One commenter asserted that the term “fair access” is intended to refer only to access by individuals who are members of protected classes under other statutory schemes, such as the Fair Housing Act or the Equal Credit Opportunity Act. Other commenters argued that the final rule should specifically address unreasonable barriers to financial services that stem from customers’ histories of criminal convictions or incarceration.<sup>24</sup>

The OCC is finalizing the definition of “person” without change. There is nothing in the plain language or context of Section 1, the legislative history of the Dodd–Frank Act, or the broader contexts of banking and antitrust laws that requires, or even suggests, the interpretation advanced by the commenters. Section 1 includes three references to types of persons other than the OCC: “customers,” “institutions,” and “other persons,” and none of these is limited to individuals, suggesting that Section 1’s protections are intended to be extended broadly. The term “customer” is not limited to natural persons. Likewise, “institutions” are not natural persons, and the term “person” encompasses both natural persons and entities such as corporations, companies, and associations.<sup>25</sup>

As provided by the definition of “person” in the proposal, the proposed rule’s fair access mandate would apply equally to natural and non-natural persons.<sup>26</sup> For example, just as the rule would prevent a bank from refusing to open a checking account for a small business solely on

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<sup>24</sup> This comment is framed, in part, as a petition pursuant to 5 U.S.C. 553(e) for the OCC to compile a further record as part of this rulemaking and to issue an amended rule that addresses broader types of financial discrimination against natural persons. The OCC does not believe an additional rulemaking is necessary, as this rule applies equally to access to financial services by natural and non-natural persons. The OCC notes, however, that this final rule prohibits banks from discriminating against any person based solely on that person’s membership in the category of persons with a criminal or incarceration history. The OCC denies the petition for rulemaking with respect to adding new regulatory text to specifically address this form of discrimination since the general terms of the regulation already cover it.

<sup>25</sup> As provided at 1 U.S.C. 1, in determining the meaning of any Act of Congress, the term “person” includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”

<sup>26</sup> See *supra* note 2.

the basis that the business was located near the U.S. border, without any consideration of the risk posed by that specific small business, the rule would prevent a bank from refusing to open a checking account for an individual solely on the basis that the individual has previously been incarcerated, without any consideration of the risk posed by that specific individual.

The OCC also received numerous comments about the refusal of payment processors to process payments for customers availing themselves of lawful businesses. To the extent that such payment processors are either (1) covered banks or (2) payment processors whose refusal to process payments is the result of a covered bank's refusal to provide fair access to financial services to the payment processor, this rule applies to the bank decision refusing access.<sup>27</sup>

One commenter argued that the proposal's scope is broad and not proportional to the limited problem that the rule is seeking to solve (*i.e.*, banks declining to do business with certain industries). The OCC disagrees and has narrowly tailored this rule to achieve the goals of ensuring bank safety and soundness and fair access to financial services.

Finally, the OCC received comments questioning whether the rule would apply to the foreign operations of OCC-chartered institutions or Federal branches and agencies of foreign banks and expressing concern that the rule could be unworkable if these entities are included in its scope. Because this rule will help to ensure bank safety and soundness and fair access to financial services, it applies to all activities of covered banks. In this way, this rule is similar to the OCC's operational and managerial standards, which the OCC expects all covered institutions it regulates to follow, regardless of the location of the bank or its activities.<sup>28</sup>

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<sup>27</sup> The OCC also received a comment requesting that the agency specify whether the rule applies to nonprofit organizations in addition to other entities. The OCC does not believe any changes are needed to the rule to address this comment but confirms that the phrase "any partnership, corporation, or other business or legal entity" in the definition of the term "person" includes nonprofit organizations.

<sup>28</sup> See 12 CFR Part 30, Appendix A.

*Administrative Procedure Act (APA)*. Some commenters opposed the proposal generally on the grounds that the criteria in the rule are vague and ambiguous and, as a result, would lead to unintended consequences. Comments about specific terms are addressed in more detail elsewhere in this *Supplementary Information* section; however, as a general matter, this rule represents the OCC's best efforts to balance the need for certainty and precision with the need for supervisory flexibility. The OCC encourages banks to contact the OCC's supervisory staff with specific questions about the final rule, and the agency will issue guidance and clarifications in the future if needed.

Other commenters asserted that the public's opportunity to comment on the rule was legally insufficient for several reasons, including because the comment period (1) was only 40 days long, (2) bridged a holiday season, and (3) was during a pandemic. The OCC disagrees. The APA requires that an agency provide "interested persons an opportunity to participate in the rule making."<sup>29</sup> Neither the APA nor relevant case law mandates a comment period of a specific number of days or prohibits a comment period during particular times of year. In fact, over the years, the OCC has proposed rules with a variety of comment period lengths, including comment periods shorter than the 40 days provided for this proposal.<sup>30</sup> The OCC also has sought public comment on proposed rules during prior holiday seasons<sup>31</sup> and during the current pandemic.<sup>32</sup>

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<sup>29</sup> See 5 U.S.C. 553(c).

<sup>30</sup> See, e.g., Changes to Applicability Thresholds for Regulatory Capital Requirements for Certain U.S. Subsidiaries of Foreign Banking Organizations and Application of Liquidity Requirements to Foreign Banking Organizations, Certain U.S. Depository Institution Holding Companies, and Certain Depository Institution Subsidiaries: Notice of Proposed Rulemaking, 84 FR 24296 (May 24, 2019) (comments due June 21, 2019); Margin and Capital Requirements for Covered Swap Entities, 84 FR 59970 (Nov. 7, 2019) (comments due Dec. 9, 2019).

<sup>31</sup> See, e.g. Reduced Reporting for Covered Depository Institutions, 83 FR 58432 (Nov. 19, 2018) (comments due by Jan. 18, 2019); Loans in Areas Having Special Flood Hazards—Private Flood Insurance, 81 FR 78063 (Nov. 7, 2016) (comments due by Jan. 6, 2017).

<sup>32</sup> See, e.g., Community Reinvestment Act Regulations (Dec. 4, 2020); Role of Supervisory Guidance, 85 FR 78258 (Nov. 5, 2020); National Banks and Federal Savings Associations as Lenders, 85 FR 44223 (July 22, 2020).

Furthermore, the pandemic has only heightened, not diminished, the need for access to financial services, and the OCC and other Federal financial regulators have worked to address this need through numerous rulemakings finalized during the pandemic.<sup>33</sup> Finally, this rulemaking seeks to codify existing OCC policy that a bank should provide financial services based on an objective, risk-based analysis of each individual customer, and the OCC is confident that a 40-day period to comment on the codification of an existing policy is reasonable.<sup>34</sup> The fact that the OCC received more than 35,000 comments from a diverse array of commenters reinforces the point that the length of the comment period did not deter or impede the submission of comments.

The OCC also received comments that the proposal is a change in OCC policy that the agency has not explained. These commenters cited OCC policy that they believe directs banks, among other things, to evaluate reputation risk, take qualitative factors into consideration, and consider a borrower's industry in a way that is inconsistent with this rulemaking. This rule is not a change in OCC policy. It is a codification of existing guidance dating to at least 2014 and provides additional information on how to operationalize the codified guidance. The rule clarifies that the OCC expects banks to apply quantitative, impartial risk-based standards in evaluating individual customers, including when considering reputation risk, qualitative factors, and a borrower's industry. It is not sufficient to evaluate these characteristics solely on a subjective basis.

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<sup>33</sup> See, e.g., Regulatory Capital Rule: Paycheck Protection Program Lending Facility and Paycheck Protection Program Loans, 85 FR 20387 (Apr. 13, 2020); Regulatory Capital Rule: Eligible Retained Income, 85 FR 15909 (Mar. 20, 2020); Standardized Approach for Calculating the Exposure Amount of Derivative Contracts, 85 FR 17721 (Mar. 31, 2020); Regulatory Capital Rule: Revised Transition of the Current Expected Credit Losses Methodology for Allowances, 85 FR 17723 (Mar. 31, 2020).

<sup>34</sup> The OCC also received comments objecting that the proposal was issued two months before the beginning of a new presidential administration. As an independent regulatory agency, the OCC fulfills its mission as required by law regardless of who is President of the United States and whether the person in that position is changing.

*Other Laws.* The agency received several comments addressing the relevance of a variety of statutes to the proposal. One commenter asserted that the Acting Comptroller would be issuing the final rule after the time provided for him to serve in an acting capacity under the Federal Vacancies Reform Act (FVRA).<sup>35</sup> While the FVRA is generally the exclusive means for temporarily authorizing an acting official to perform the functions and duties of an Executive agency office for which Presidential appointment and Senate confirmation is required, the FVRA and its time restrictions do not apply if another statute—in this case, 12 U.S.C. 4 (Section 4)—expressly designates an officer to perform the functions and duties of a specified office in an acting capacity.<sup>36</sup> On April 1, 2020, pursuant to Section 4, the Secretary of the U.S. Department of the Treasury appointed Mr. Brooks as First Deputy Comptroller of the Currency. Mr. Brooks’s authority to exercise the powers of the Comptroller of the Currency thus derives from Section 4 and not from the FVRA. In accordance with Section 4, upon the May 29, 2020 departure of then-Comptroller Joseph Otting, Mr. Brooks began serving as the Acting Comptroller.

One commenter opposed the rule because the OCC did not comply with the National Environmental Policy Act (NEPA), asserting that the OCC is obligated to produce an environmental impact statement assessing the environmental impacts of the proposed rule.<sup>37</sup> This commenter also argued that the OCC failed to comply with procedural requirements of the Endangered Species Act (ESA), which directs Federal agencies to determine the effects of their

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<sup>35</sup> 5 U.S.C. 3345 *et seq.*

<sup>36</sup> 5 U.S.C. 3347(a)(1)(B). *See also* Office of Legal Counsel, Slip Opinion, from Curtis E. Gannon, Principal Deputy Assistant Attorney General (Mar. 18, 2019) (“The Vacancies Reform Act is the ‘*exclusive*’ means’ for authorizing acting service in most such positions ‘unless’ another statute expressly designates an officer to serve in an acting capacity or expressly authorizes the President, a court, or an agency head to designate an acting officer.”) (emphasis in original).

<sup>37</sup> 42 U.S.C. 4321 *et seq.*

actions, including on endangered and threatened species and their critical habitats, and in some cases, to consult with the Fish and Wildlife Service or National Marine Fisheries Service.<sup>38</sup> The OCC does not believe that either NEPA or ESA applies to this rule. This is a procedural rule that sets forth standards for covered banks' decision-making and codifies the existing agency position. As explained earlier in this *Supplementary Information* section, this rule does not require any bank to provide any particular type of financial service to any particular customer. Even if it were true, as some commenters argue, that the rule could make it easier for bank customers in the oil and gas industry to obtain financial services (which, they assert without evidence, could have a negative impact on the environment), any bank customer that obtains access to a financial service under this rule—regardless of industry—will continue to be subject to the same Federal and state environmental restrictions it would have been if this rule had not been issued. This rule does nothing to alter existing environmental laws and protections.

Some commenters opposed to the proposal argued that it would violate banks' rights under the First Amendment of the U.S. Constitution, including their rights to political boycotts and the free speech clauses. One commenter argued that the proposal unconstitutionally compels speech by covered banks. In contrast, others argued that the proposal would protect the free speech rights of bank customers. As explained earlier in this *Supplementary Information* section, this rule does not require any bank to provide any particular type of financial service to any particular customer and thus does not affect the First Amendment rights of covered banks, their customers, or any other person.

*Cost-Benefit Analysis.* Some commenters stated that the OCC was required to prepare and share a cost-benefit analysis of the proposed rule and to consider costs and benefits under the

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<sup>38</sup> 16 U.S.C. 1531 *et seq.*

APA.<sup>39</sup> One commenter also asserts that the OCC’s analysis under the Unfunded Mandates Reform Act of 1995 (UMRA)<sup>40</sup> is unsupported and likely incorrect.

While agencies are not required by the APA to conduct a cost-benefit analysis,<sup>41</sup> the OCC notes that a cost-benefit analysis is required by UMRA if a rule may result in the expenditure of funds by state, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more adjusted for inflation (currently \$157 million) in any one year.<sup>42</sup> The OCC conducted an economic analysis of the proposed rule under UMRA and concluded that if any covered banks have risk-based standards that include criteria that would not be allowed under the proposed rule, the cost of eliminating the prohibited criteria would impose little, if any, burden on covered banks. Therefore, the OCC concluded the proposed rule would not result in an expenditure of \$157 million or more annually by state, local, and tribal governments, or by the private sector. The UMRA analysis of the final rule is discussed below.

A commenter also challenged the OCC’s Paperwork Reduction Act (PRA)<sup>43</sup> analysis of the proposed rule’s requirement that a denial of financial services be based on a person’s quantified and documented failure to meet standards, arguing that the requirement amounts to a collection of information as defined in the PRA. This requirement is not a collection of information and thus is not subject to the procedural requirements of the PRA. The PRA defines a “collection of information” as, among other things, “answers to identical questions posed to, or

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<sup>39</sup> Another commenter asserted that the OCC is required to consider costs and benefits under the Riegle Community Development and Regulatory Improvement Act (RCDRIA). The OCC specifically invited comment on RCDRIA in its proposal. The OCC has considered costs and benefits in formulating this final rule and notes that this consideration is reflected in the rule’s presumption that banks with less than \$100 billion in total assets are not covered banks. The agency’s RCDRIA analysis of the final rule is set forth in the *Regulatory Analyses* section.

<sup>40</sup> See 2 U.S.C. 1531 *et seq.*

<sup>41</sup> See *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 670 (D.C. Cir. 2011); *Nat’l Ass’n of Homebuilders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012).

<sup>42</sup> See 2 U.S.C. 1532.

<sup>43</sup> See 44 U.S.C. 3501 *et seq.*

*identical* reporting or recordkeeping requirements imposed on, ten or more persons . . .”<sup>44</sup> This rule does not require covered banks to maintain identical documentation of customers’ failures to meet bank standards. To the contrary: the OCC expects that such documentation could vary significantly depending on the covered bank, the customer, and the financial service at issue.

## B. Substantive Issues

*Definition of Financial Service.* One commenter argued that the final rule should establish different standards for access to different types of financial services, instead of including a single standard for financial services generally. The commenter argued that the standards for checking and savings accounts should be different from the standards for mortgages, start-up financing, and commercial lending to different types of industries. Another commenter said that the definition of financial services was vague and should differentiate between types of industries.

Because the OCC does not believe it is necessary to distinguish between types of financial services or the industries to which financial services are provided, the OCC is finalizing the definition of “financial service” without change. The rule text is principles-based, not prescriptive, thereby allowing a covered bank to tailor the application of the rule to different financial services and the industries it serves while ensuring that the rule’s primary objective—to ensure bank safety and soundness and fair access to financial services—guides its application.<sup>45</sup>

*Definition of Covered Bank.* The OCC received numerous comments on the proposed definition of “covered bank,” including (1) the \$100 billion asset threshold, (2) the presumption that a bank does not meet this definition if it has less than \$100 billion in total assets, and (3) the

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<sup>44</sup> See 44 U.S.C. 3502(3)(A)(i) (emphasis added).

<sup>45</sup> Another commenter requested that the rule cover all types of financial services, not just lending. The OCC confirms that this rule applies to all financial services a bank offers, not only lending.

question of whether a different definition of “covered bank” would more effectively capture banks with the ability 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.

Some commenters argued that an asset threshold in general, and the \$100 billion threshold specifically, is not useful, because there is no meaningful difference between a bank with \$99 billion in assets and a bank with \$100 billion in assets. A few commenters suggested lowering the asset threshold. Another commenter stated that the rule should apply to a bank with assets under \$100 billion, if it can be proven that the bank is equipped to analyze and manage a particular risk class. Some commenters preferred that all banks, regardless of asset size, be covered by the rule. Other commenters stated that, because the proposed rule would apply to only some banks, the rule appeared political or retaliatory in nature. Other commenters said that the rule should apply to additional types of entities, including payment processors and crowdfunding platforms. Another commenter requested an exception for completely private banks or banks that are part of a religious organization.

The OCC also received comments arguing that the \$100 billion threshold was arbitrary and capricious because it lacks an evidentiary or analytical basis. One commenter specifically argued that the OCC has not provided a rational basis for its assertion that banks included in the definition of “covered bank” have the ability to raise the price a person has to pay to obtain an offered financial service from the bank or from a competitor or to significantly impede a person, or a person’s business activities, in favor of or to the advantage of another person. The commenter argued that (1) the OCC has provided no economic or market-based analysis to support its conclusion; (2) there is no cited case demonstrating an individual bank possesses

national market power; and (3) the agency has offered no economic justification for basing market power analysis on the aggregate market share of individual competitors. In addition, the commenter argued that the OCC and other Federal regulators have rejected the existence of a single national market and have traditionally used deposits, not assets, to measure market concentration and market power. The commenter further argued that (1) an aggregation of assets or competitors is not a legitimate basis for calculating an individual bank's market position or power; (2) market power is a function of competitive dynamic (including the actual competitors in the relevant markets, their competitive presence, and their potential to engage in anti-competitive, collusive behavior) rather than of asset size alone; and (3) even if there were a national market for financial services, the OCC has not accounted for all the competitors in it. Finally, the commenter argued that there is no evidence that large banks benefit from assistance and favorable treatment from the government that would justify their inclusion in the definition of "covered bank."

One commenter agreed that major national banks have influence on services and pricing such that the loss of a banking relationship with one bank serves as a nearly insurmountable obstacle to secure new services from similar banks. The commenter requested, however, that the definition not be limited to cases where the grant or denial of services is used in favor of or to the advantage of another person or where the bank has the ability to raise the price a person has to pay to obtain a financial service.

The OCC is finalizing the definition of "covered bank" without substantive change.<sup>46</sup>

The OCC continues to believe that \$100 billion in total assets is the appropriate threshold and is

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<sup>46</sup> The OCC has also added a definition of "bank" in the final rule in section 55.1(a)(1) to clarify the meaning of that term as used in Section 55. Bank is defined as an entity for which the Office of the Comptroller of the Currency is the appropriate Federal banking agency as defined in 12 U.S.C. 1813(q)(1). As a result of this

finalizing the definition of “covered banks” without change. To arrive at the \$100 billion threshold, the agency examined the costs for different sizes of banks to comply with the rule and determined that compliance costs would be lower for banks large enough to have historically served all or most sectors of the economy. Such banks would not face a significant potential burden from defending their decisions to specialize in some sectors. Because there are sector-specific overhead costs associated with serving borrowers (*e.g.*, hiring loan officers with skills and experience in those sectors), small banks tend to be limited in the sectors they can serve. Only banks of sufficiently large size can absorb overhead costs associated with serving all sectors.

Furthermore, banks over the \$100 billion asset threshold have been shown to exercise significant influence over the cost of borrowing for small and middle-market customers. With respect to the ability to influence market outcomes, there is a large volume of empirical literature in economics examining competition in bank lending, deposit taking, and the provision of other financial services. The literature finds that location matters for competition in both deposit-taking and lending. In particular, the cost of credit for small business and middle-market borrowers depends crucially on the competitiveness of the local lending markets in which they operate. There is significant direct and indirect evidence from a large number of empirical studies that large banks have disproportionate influence on market outcomes for these borrowers.<sup>47</sup>

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addition, non-substantive and conforming changes were also made to the definition of “covered bank” in final rule section 55.1(a)(2)(i).

<sup>47</sup> The supporting literature is vast. For example, the ability of a large bank to influence market outcomes in local markets applies to the markets for both deposits and loans and can be magnified by a reduction in competition due to bank consolidation, which allows large banks to exert greater market power. An early study (A. Berger and T. Hannan, 1989, “The Price-Concentration Relationship in Banking,” *Review of Economics and Statistics* 71, pp. 291-299) focused on the price-concentration relationship in the deposit market. It found an

By setting a \$100 billion asset threshold for covered banks, the OCC is able to ensure that covered banks are those banks with the greatest ability to influence market outcomes while also being able to avoid significantly increased compliance burdens. In fact, the OCC regards the \$100 billion asset size threshold as a conservative choice, given that banks of this size face

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association between higher concentration in local markets for deposits and lower interest rates on deposits. More recent articles confirm competitive differences related to concentration (I. Drechsler, A. Savov, and P. Schnabl, 2017, “The Deposits Channel of Monetary Policy,” *Quarterly Journal of Economics* 132, pp. 1819-1876; B. Craig and V. Dinger, 2013, “Bank Mergers and the Dynamics of Deposit Interest Rates,” Deutsche Bundesbank and Federal Reserve Bank of Cleveland, Working Paper). In addition, the OCC Economics Department’s analysis of deposit interest rates found that large banks (those with assets over \$100 billion) on average tend to pay much less (roughly 100 basis points less) than the average rates paid by smaller banks.

Large banks also can exert market power in local markets for loans. One study found that a large bank acquiring two out of the three banks specializing in lending to a local industry can acquire significant market power as lenders (W. Marsh and R. Sengupta, 2017, “Competition and Bank Fragility,” The Federal Reserve Bank of Kansas City, Research Working Papers, RWP 17-06, Nguyen (2014, 2019) showing that merger-induced branch closings during the 2000s had large adverse effects on the credit supply to local small businesses.) This study also found that closings led to a persistent decline in local small business lending, with annual originations falling by \$453,000 after a branch closing, off a baseline of \$4.7 million, and remained depressed for up to six years. These effects were extremely localized, dissipating within six miles, and were especially severe during the financial crisis (H.L. Nguyen, 2014, “Do Bank Branches Still matter? The Effect of Closings on Local Economic Outcomes,” Working paper, MIT; H.L. Nguyen, 2019, “Are Credit Markets Still Local? Evidence from Bank Branch Closings,” *American Economic Journal: Applied Economics*, 11, pp. 1-32).

The literature has shown more generally that geography matters in access to credit, which means that large banks with significant local market shares do not face competition from banks located elsewhere. A shorter distance to a lender reduces a borrower’s loan interest rate, particularly for smaller firms. These findings likely reflect information opacity, where local soft information is important for measuring and managing loan risk. Smaller distances increase the precision of soft information (S. Agarwal and R. Hauswald, 2010, “Distance and Private Information in Lending,” *Review of Financial Studies* 23, pp. 2757–2788).

Smaller distances also reduce transportation costs incurred by firms when using bank services as well as banks’ cost of monitoring a borrower (H. Degryse and S. Ongena, 2005, “Distance, Lending Relationships, and Competition,” *Journal of Finance* 60, pp. 231–266. Glancy (2015), proposing a new measure of concentration, or bank market power, which accounts for banks’ locations within markets and emphasizes local concentration. Another study conducted an empirical analysis using the Local Herfindahl index and found that bank lending rates depend most strongly on the availability of competitors within five miles of their branches, indicating a limited ability to substitute towards distant banks (D. Glancy, 2015, “Measuring Spatial Banking Competition,” Working Paper, Department of Economics, Brown University).

A recent study found that rural areas in the United States can be locations where the consequences of limited bank competition can be particularly severe (D. Benson, S. Grundl, and R. Windle, 2020, “How do Rural and Urban Retail Banking Customers Differ?,” FEDS Notes. Washington: Board of Governors of the Federal Reserve System, June 12, 2020, available at <https://doi.org/10.17016/2380-7172.2513>). Another study found that the presence of large banks can be particularly helpful in promoting competition in those areas (A. Cohen and M. Mazzeo, 2010, “Investment Strategies and Market Structure: An Empirical Analysis of Bank Branching Decisions,” *Journal of Financial Services Research* 38, pp. 1-21).

minimal additional compliance burdens per dollar of assets and have significant ability to influence market outcomes.<sup>48</sup> In addition, to the extent that a bank that meets the definition of a covered bank believes that a financial service it offers is provided by non-banks, such that the covered bank cannot raise the price a person has to pay to obtain the financial service from the bank or from a competitor or significantly impede a person, or a person's business activities, in favor of or to the advantage of another person, the bank can rebut the presumption that it meets the definition of a covered bank with respect to that financial service pursuant to section 55.1(a)(2)(iii) of the final rule. Conversely, if the OCC determines that a bank with less than \$100 billion in total assets 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, the agency may rebut the presumption that the bank is not a covered bank. In this circumstance, the OCC will inform the bank in writing that the agency has determined it to be a covered bank for purposes of this rule.<sup>49</sup>

The OCC also received comments incorrectly arguing that the proposal posits the existence of a national market for "financial services." This commenter misunderstands the proposal: the \$100 billion threshold relies on the factors discussed above, not the existence of a national market. To the extent that a covered bank does not offer a financial service on a national scale, the relevant market is the market in which the bank offers the financial service in question.

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<sup>48</sup> One could argue in favor of a lower size threshold if research demonstrates that smaller banks are also able to comply with the rule at little cost or that smaller banks also exert substantial influence over market outcomes.

<sup>49</sup> For example, the OCC may receive information from consumer complaints about the market power of a bank with less than \$100 billion and based on its investigation of this information, the agency may determine that the bank is a covered bank as defined in this rule.

This same commenter stated that Federal banking regulators typically use deposits, not assets, as a proxy to measure market concentration and market power. While deposits are a metric evaluated in some situations (*e.g.*, mergers), the OCC has determined that assets are more appropriate to this context, consistent with traditional antitrust analysis that focuses on market power and assets. Furthermore, the academic literature on market competition does not restrict itself to deposit market share.<sup>50</sup>

*Market Share.* The OCC invited public comment in the proposal on whether the agency should include a percent of national market share threshold as another reason for a bank to be presumed to meet the definition of covered bank and, if so, whether 10 percent, 20 percent, or another percentage of the national market share would be the appropriate threshold. One commenter opposed the use of a percentage of national market share as a metric for identifying covered banks, while a few commenters said that a presumption based on market share was appropriate and suggested various thresholds. The OCC has determined not to include a percentage of national market share as a metric for identifying covered banks because it has concluded that the proposed \$100 billion threshold effectively captures banks that meet the standards described in section 55.1(a)(2)(i) of the final rule and presumptively excludes banks that do not meet these standards.

*Environmental and Other Impacts.* Several commenters opposed to the proposed rule argued that it would have adverse effects on the environment. Others opposed the rule because they believe it will enrich the gun industry or increase danger or violence in communities. The OCC understands that environmental issues can have financial implications, which can sometimes be very significant. Nothing in this rule prevents a covered bank from considering

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<sup>50</sup> See *supra* note 47.

financial risks caused by environmental issues. For example, a lender with collateral property in areas experiencing increased frequencies of wildfires, or a lender with real estate exposure in hurricane-prone areas, will be expected to account for those environmental risks in making its risk management decisions. But this rule does require a covered bank to base its decision about whether to provide a person with financial services—including a person whose activities affect the environment or the firearms industry—on an analysis of whether providing a particular financial service to that person presents quantifiable risks to the bank, as opposed to indirect or generalized risks that should be balanced by the political branches of government or by price signals and other market forces. Conclusory, inconsistent, or categorical assertions in any substantive area not tied to the bank’s specific risk profile reflect poor risk management and unsafe and unsound behavior.

Further, the OCC does not have the authority or expertise to set environmental or firearm policy, nor does it seek to do so with this or any other rule. This rule is narrowly focused on fulfilling the agency’s statutory mission to ensure banks’ safety and soundness and fair access to financial services, as directed by Congress in Section 1. Commenters who have concerns about the environmental or social impact of bank customers’ lawful activities may communicate with their elected state and Federal officials, who are better positioned to, and are tasked with, balancing the array of environmental, social, and other risks and benefits of the activities that occur in our market economy.<sup>51</sup>

*Government Involvement in Bank Decision-Making.* Many commenters opposed to the proposed rule asserted that it would constitute an unwarranted intrusion into bank decision-

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<sup>51</sup> One commenter argued that the OCC should integrate climate risk into all its regulatory and supervisory priorities. The agency notes that its supervisory guidance is principles based and applicable to numerous risks, including those stemming from weather, flooding, and other natural hazards.

making. Some commenters argued that banks should be permitted to take social or political considerations into account when deciding with which industries or customers they will do business. Some commenters stated that banks should be allowed to compete based on their policy choices. One commenter argued that banks should be able to take into consideration the morality of a customer's business practices, not just whether the customer is engaged in lawful activity.

Commenters also argued that the OCC should not "force" banks to do business with any particular industry, especially an industry that some believe is or may be risky or unprofitable.<sup>52</sup> One commenter asserted that forcing banks to lend money to risky endeavors would shift risk from the banks to taxpayers and bank shareholders and depositors. Other commenters argued that requiring banks to lend to all industries would create systemic risk in the financial system because it would (1) prevent banks from making sound underwriting decisions and (2) interfere with banks' evaluation of long term risks.<sup>53</sup>

One commenter argued that banks are not "common carriers" and should not be required to serve all customers, particularly because loans to different types of borrowers require different types of expertise. Another commenter argued that requiring banks to lend to all industries, including industries that may be subject to future changes in regulation, puts at risk the safety of Federally-insured deposits at those banks.

Some commenters opposed to the proposed rule argued that it would interfere in the operation of the free market by (1) requiring banks to prop up industries that are not otherwise viable and (2) preventing banks from responding to the demands of their customers and

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<sup>52</sup> Commenters noted that the rule would make it harder for banks to deny services to the firearms industry or other risky projects, even if the decision would be financially detrimental to banks' shareholders.

<sup>53</sup> Commenters also suggested that lending to the fossil fuel industry could pose a systemic risk to the financial system.

employees. These commenters believe that higher costs for funding certain industries do not indicate that the market is inefficient; rather, they indicate that the market is appropriately reflecting risk. Commenters also asserted that an individual bank choosing not to do business with a certain industry does not lead to risk in the banking system. Other commenters asserted that if banks do not provide certain persons with financial services, the market will fill in any gaps—if it makes business sense to do so (*e.g.*, through niche, nonbank lenders that may charge higher prices to reflect additional risks).

One commenter, while generally supportive of the rule, argued that banks should continue to be able to take reputation risk and shareholder values into account in order to be responsive to their shareholders. Another commenter argued that the rule would interfere with investors' basic corporate governance rights and contravene duties imposed under a recent Department of Labor rule concerning fiduciary duties relating to proxy voting and shareholder rights. Another commenter, however, asserted that current and expected market prices for customer outputs already take into account reputation risk. Another commenter who generally supported the proposed rule requested that the final rule specify that banks are prohibited from taking into consideration the opinions of their shareholders (as well as those of the bank and its employees).

Other commenters supported the rule because they believe it would prevent the politicization of banking and prevent activists and special interest groups from targeting individuals and lawful businesses attempting to access financial services. They viewed the rule as an appropriate exercise of government power to ensure a “level playing field,” rather than an act of “picking winners and losers.” One commenter argued that the proposed rule would protect against the economic costs of the politicized lending system that is created when activists urge

banks and investors to implement environmental, social, and governance frameworks. Other commenters argued that consideration of environmental, social, and governance issues leads banks to ignore their fiduciary duties. A few commenters noted that bank restrictions on access to financial services have negative effects on the economy and the adoption of the proposed rule would promote growth. One commenter asserted that the rule would maximize the aggregate value of all production by leading banks to make lending decisions on the basis of expected returns on investments, which would, in turn, reduce poverty and increase the size of the economy. One commenter agreed that personal, forecasted assumptions should not overshadow quantifiable risk-based analysis. Some commenters argued that categorical decisions by banks not to lend to certain industries are similar to other forms of discrimination, including redlining, while one commenter noted possible geopolitical implications if certain industries (specifically, the energy sector) are categorically denied financing.

One commenter argued that banks should provide services to a business based solely on the health of the business, its credit, and good standing, not the type of business. Some commenters argued that banks should only have the discretion to deny access to a financial service if there is evidence of criminal activity. One commenter argued that the rule would prevent distortions in lending decisions by banks, which would enhance the safety and soundness of individual banks, as well as the banking industry as a whole. The commenter also asserted that the rule would prevent reductions in wages over time that would result from discrimination in lending.

Some commenters stated that the proposed rule would protect constitutional and statutory rights, including rights under the First and Second Amendments and those infringed by prior government action in Operation Chokepoint. A few commenters asserted that customers should

be entitled to due process before being denied banking services. Some commenters argued that political goals should be pursued through statutory changes rather than by pressure on financial institutions. One commenter argued that political consideration should only be reflected in statute or litigation, not by regulation or pressure from activists, regulators, or a minority of the members of Congress.

Some commenters cited personal experiences, including being denied financial services. For example, some commenters shared their experience that bank refusals to lend to private prison contractors have serious negative consequences for employees of these contractors. Some commenters who operate firearms-related businesses explained the difficulties they faced in obtaining financial services. One commenter cited its personal experience with a financial institution that denied an application to participate in the Main Street Lending program because the commenter's business was in the oil and gas industry. Another commenter reported that one of its members was recently denied a savings account by a large bank because the member is part of the debt collection industry and banks continue, without notice or specific explanation, to terminate relationships with persons in this industry. Another commenter detailed pawnbrokers' experiences with the loss of banking relationships, such as deposit accounts, payroll accounts, lines of credit, credit card accounts, and commercial real estate loans.<sup>54</sup> Another trade association for the ATM industry commented on the loss of banking relations in the independent ATM industry.

One commenter argued that banks enjoy significant privileges in our financial system and should not be permitted to act as *de facto* regulators by withholding financial services to impede otherwise lawful commerce and thereby achieve certain policy goals. Similarly, some

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<sup>54</sup> Other commenters who operate or work closely with pawnbrokers also described challenges obtaining access to financial services.

commenters argued that banks are effectively utilities and should be regulated so that they cannot discriminate. Commenters supporting the rule asserted that because large banks receive support from the Federal government and taxpayers, they should be required to uphold fundamental standards of fairness and nondiscrimination. One commenter suggested that financial institutions that choose to discriminate against certain businesses should lose access to all Federal protections, guarantees, backing, and bailouts. Another commenter supported the proposed rule because it would allow its company to continue to fulfill Federal government contracts, arguing that banks should not be permitted to finance the operations of government agencies while denying services to contractors that do business with those same agencies.

Similarly, commenters believe that the banking industry's denial of services to certain businesses is anti-competitive, disproportionately hurts small businesses, and stifles innovation. Other commenters noted that past bank mergers have limited competition and made it possible for large banks to wield power in anticompetitive ways. Commenters also stated that the rule (1) may prevent banks from gaining too much power by determining who can access the financial system and (2) would allow for innovation and competition within existing industries.

Commenters supporting the proposed rule also suggested that allowing banks to deny certain businesses access to financial services could have national security implications. One commenter asserted that without the proposed rule, businesses would be required to seek funding overseas, including in nations that are strategic competitors with the United States. Another commenter noted that there are national security risks associated with oil dependence, and this rule would support U.S. transportation needs for the foreseeable future.<sup>55</sup> Other commenters argued that the rule would protect national security by, for example, supporting correctional and

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<sup>55</sup> Likewise, commenters noted that without access to financial services, customers would seek services from undesirable entities or in undesirable areas where there is potentially more criminal and tax risk.

housing facilities for incarcerated migrants and the supply of firearms to the military. One commenter argued that denying access to financial services could jeopardize the animal protein supply chain. Other commenters argued that the rule will help prevent financial activity from moving into un- or less-regulated spaces, such as cryptocurrency, cash, or black markets. Other commenters argue that the proposal would require a covered bank with expertise in one industry to provide credit or services to other industries—even if the bank does not have the expertise, resources, or risk appetite to extend credit or provide such services in a safe and sound way.

As stated above, the final rule does not require a covered bank to provide any specific type of financial service, to do business with a particular person or industry, or to operate in a particular market. It does not prevent a bank from declining to provide financial services to a risky or unprofitable person or to a person with a risk-profile that the covered bank does not have the expertise to evaluate or manage. This rule does not interfere with the free market. It simply sets out the guideposts for a covered bank's decision-making when the bank decides whether to provide a financial service to a person in the geographic market served by the bank. To the extent that a covered bank chooses not to do business with a particular customer, that decision must be based on the customer's quantified and documented failure to meet impartial, risk-management standards established in advance by the covered bank. The rule does not prevent a covered bank from pricing or setting other terms of a financial service in a way that reflects the covered bank's analysis of the risks posed by a particular customer. If the results of the bank's objective, quantitative and individualized risk analysis demonstrate that the person should not be provided with the financial service, the bank can decline to provide the service.

Further, the rule does not prevent a bank from declining or ceasing to offer a particular type of financial service. For example, the rule does not require all covered banks to provide

custody services. But, if a covered bank offers custody services, the rule requires the covered bank to provide fair access to those custody services to all persons absent demonstrated individual risk factors that cannot reasonably be managed. As another example, if a covered bank has historical expertise serving the retail sector, but not the energy sector, the rule allows the bank to provide financial services that require this expertise to the former and not the latter. The rule does not, however, allow a covered bank to provide, for example, payroll administration services to a company in the wind power business but not to a company in the natural gas business absent a showing that facts particular to the specific natural gas company reflect risks to the bank not presented by the wind power company.

*Criteria for Fair Access.* One commenter supported specific aspects of the criteria for fair access detailed in section 55.1(b) of the proposed rule, including its concise statement of principles and the proportional requirement in proposed section 55.1(b)(1).<sup>56</sup> The commenter also appreciated the emphasis in the proposal’s *Supplementary Information* section on offering services to customers with lawful businesses, especially those with specialty licenses from state or Federal agencies subject to examination by those agencies (such as pawnbrokers).

Several commenters argued that section 55.1(b)(1) of the proposed rule was vague and unreasonable, would create practical problems and produce unintended results, would undermine

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<sup>56</sup> The commenter also asked that the OCC provide additional guidance on the requirement that a covered bank make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms. The concept of “proportionally equal terms” comes from the Robinson—Patman Act (15 U.S.C. 13 *et seq.*), which generally requires that a seller treat all competing customers in a proportionately equal manner. *See also* Federal Trade Commission, “Price Discrimination: Robinson-Patman Violations,” available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman> (last visited Jan. 12, 2021). As stated in the proposal, 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. Additionally, this provision would prohibit a 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.

safety and soundness, and was inconsistent with existing OCC policy. Commenters asked for specific guidance on how to define the geographic market and how to determine the meaning of the terms “proportionally” and “equal.”

One commenter argued that proposed section 55.1(b)(2) was overbroad, burdensome, conflicts with other statutory and regulatory obligations, and would undermine safety and soundness. The commenter argued that the proposal would require a covered bank with expertise in one industry to provide credit or services to other industries—even if the bank does not have the expertise or resources to extend credit or provide such services in a safe and sound way. The commenter also expressed concern that this provision would prohibit a bank from declining to provide a service due to the bank’s own operational or resource constraints, or require banks to provide services even if they would result in undue concentrations of credit risk, undermine capital adequacy, undermine management of liquidity risk or brokered deposits, or give rise to undue aggregate interest rate risks, because the decision would be based on aggregate effects rather than the customer’s individual characteristics.

Some commenters argued that the documentation requirements of proposed section 55.1(b)(2) would significantly increase burden on banks, slow decision-making, and raise the cost of credit for customers by preventing banks from automating credit and pricing decisions in high-volume, low-margin lines of business such as merchant acquiring and credit cards.

One commenter suggested that under the proposed rule, termination of existing customer accounts would only occur when there was specific and quantifiable evidence of the customer’s failure to comply with applicable compliance requirements, the customer’s loss of a state or Federal license, or the customer mishandles the banking services obtained from the bank.

Several commenters objected to proposed section 55.1(b)(3), arguing that the provision was overbroad, vague, unworkable, and inconsistent with safety and soundness.

To clarify that notwithstanding this rule, a bank is permitted to decline to provide a person with access to a financial service if doing so is necessary for the bank to comply with another provision of law (e.g. laws on credit, capital, liquidity, and interest rate risk), the OCC has revised proposed section 55.1(b). The OCC is finalizing section 55.1(b)(1) and (2) without change for the reasons described in the *Supplementary Information* section of the proposed rule.

To focus the rule on the fairness of the covered banks' decision-making processes and utilization of prudent risk management principles, as well as to facilitate the OCC's administration of this rule, the agency has determined to eliminate section 55.1(b)(3) of the proposed rule.<sup>57</sup> The final rule's sections 55.1(b)(1) and (2) will ensure that covered banks operate consistent with the principles of safety and soundness and fair access to financial services by basing access to financial services on individualized risk-based decisions. Section 55.1(b)(3) of the final rule (section 55.1(b)(4) of the proposed rule) will ensure that banks do not act in concert to formulate risk-based standards that deny services to specific customers or groups of customers, as prohibited by Federal antitrust law.<sup>58</sup> Except as described above, the OCC is retaining in the final rule section 55.1(b) as proposed.

*Quantifying Risks.* Some commenters argued that banks should be permitted to take all risks, not just quantifiable risks, into account when making business decisions and that to do otherwise would be arbitrary and unsafe and unsound. One commenter argued that just because

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<sup>57</sup> Proposed section 55.1(b)(3) would have required that a covered bank not deny any person a financial service the bank offers when the effect of the denial is to prevent, limit, or otherwise disadvantage the person: (1) from entering or competing in a market or business segment; or (2) in such a way that benefits another person or business activity in which the covered bank has a financial interest.

<sup>58</sup> See generally Sherman Antitrust Act, 15 U.S.C. 1 *et seq.*

a credit risk is ill-suited to quantitative measurement does not mean the risk is not real. One commenter argued that long-term risks are important but difficult to quantify. Other commenters argued that the proposed rule conflicts with safety and soundness principles because, among other things, it inhibits responsible management of reputation risk. Another commenter argued that banks must assess reputation risks that result from lending to persons whose activities are inconsistent with the transition to a low carbon economy. Some commenters argued that the rule's emphasis on quantitative, impartial risk-based standards would lead to racial and gender discrimination, including discrimination against Alaska Native communities. One commenter argued that banks should be able to take "climate risk" into consideration because it is a type of financial risk. One commenter argued that, where relevant, political and legal risks can be pertinent but should be evaluated through an unbiased loan approval process and not subject to blanket discrimination. The commenter argued that the rule would protect banks against the reputation risk posed by pressure from activists.

The OCC expects that banks and bank examiners will continue to take a broad range of risks into account when making business decisions and supervising bank activities. As explained in the Comptroller's Handbook on the Bank Supervision Process, "the OCC employs an ongoing risk-based supervision approach focused on evaluating risk, identifying material and emerging concerns, and requiring banks to take timely corrective action before deficiencies compromise their safety and soundness . . . Risk cannot always be quantified in dollars. For example, numerous or significant internal control deficiencies may indicate excessive operational risk."<sup>59</sup> However, under this final rule, examiners and banks alike must ensure that their evaluation of risk is supported by objective fact rather than mere preference or opinion.

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<sup>59</sup> See Comptroller's Handbook on Bank Supervision Process (2018), at 30.

The OCC uses the term quantify (and other words with the same stem, such as quantitative, quantifiable, and quantification) to mean measurable, auditable, and falsifiable. The OCC believes it is not only possible, but advisable, for banks to undertake the quantification of risk. For purposes of making a decision about whether to provide a financial service to a customer, a bank may not rely on factors that cannot be quantified. All legitimate risks can be quantified, albeit with different degrees of precision.<sup>60</sup> Quantification of risk entails an analysis of, for example, the factors influencing a borrower's operational risks, as well as an analysis of the range of variation in a borrower's cash flows or asset values. Even reputation risk can be (and generally is) quantified in terms of the anticipated reach and frequency of negative news stories, the perception of those stories by various segments of the bank's customer population, the forecasted effect on the bank's ability to raise capital, and other factors affecting the severity of a given event. These factors will determine whether a borrower can repay its debts and more broadly whether a given customer relationship will be profitable or unprofitable to the bank on a risk-adjusted basis. They therefore are of central relevance in granting credit and providing other financial services.

*Denial of Service in Coordination with Others.* One commenter expressly supported section 55.1(b)(4) of the proposed rule (which would prevent a covered bank from denying, in coordination with others, any person a financial service the bank offers), because it would protect nonprofit organizations working in conflict-affected and high-risk areas from disinformation campaigns by politically motivated groups. Another commenter asserted that cooperation by

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<sup>60</sup> See, e.g., *id.* at 24 (discussing quantity of risk in the context of the risk assessment system); *id.* at 69 (discussing the Uniform Financial Institutions Rating System, commonly known as CAMELS, which assigns quantitative ratings to financial institutions).

A prohibited and restricted merchant list is another example of a quantified risk. A merchant not on the list could be assigned a "1," and a merchant on the list could be assigned a "0," provided that the list itself is based on metrics, such as frequency or severity of certain risk indicators applied to each merchant.

banks to discriminate against specific sectors are cartel arrangements that violate antitrust laws. Other commenters noted that widespread denial of banking services could effectively “cancel” or eliminate certain businesses in society. The OCC agrees that this provision of the rule provides an important protection against concerted action by covered banks that would deny fair access to financial services and adopts this provision without change.

*Effect of Violations of Rule.* The OCC received several comments concerning penalties for violations of the rule, including recommendations that the final rule specifically address penalties. Some commenters suggested specific penalties for banks or individuals that violate the rule, such as fines, criminal penalties, revocation of the charter, exclusion from government contracts, or, in the case of bank examiners, termination. Several commenters suggested adding a provision that would hold directors, officers, and employees of a covered bank to the same fiduciary standards as the covered bank.

The OCC considers the full range of its supervisory and enforcement authority in addressing bank deficiencies, as appropriate, including matters requiring attention, informal or formal enforcement actions, and referral to other government agencies (*e.g.*, the U.S. Department of Justice’s Antitrust Division) in instances where bank actions have been deemed discriminatory or harmful. In the past, the agency has responded to bank trends regarding the termination of broad categories of customers through the issuance of guidance, some of which is cited above.

One commenter argued that the rule should include a private right of action. Another commenter argued that individuals harmed by a bank’s violation of the rule should be able to receive fines collected by the OCC for violations. The OCC has not interpreted Section 1 to provide a private right of action or to enable those alleging harm to benefit from fines that the agency may impose on banks. The agency is confident that its supervisory and regulatory tools

are sufficient to ensure covered banks' compliance with the final rule. The OCC has made no changes to the proposal in response to these comments.

*Disclosure of Basis for Denial.* Several commenters requested that the final rule require covered banks to provide additional information to customers that are denied financial services. One commenter requested that the OCC require a covered bank to provide the quantitative risk-based standards it uses to any person who is denied access to a financial service by the bank. Another requested that a bank be required to provide the documented basis for denial of financial services or termination of an account. Another commenter requested that the rule create a dedicated OCC enforcement team that would report annually on its investigations and actions under the rule. Although the OCC supports transparency, a requirement that banks disclose their risk-based standards may require banks to disclose sensitive commercial information, confidential supervisory information, or information relating to an ongoing civil or criminal investigation, any of which, if disclosed, could be detrimental to the bank, the quality of the OCC's supervision of the bank, or law enforcement efforts.

One commenter suggested that the regulation include information about how individuals and companies can file a complaint about a bank with the OCC. Another requested that the OCC establish a reporting system for customers to report instances of discrimination that would allow for sharing of information with bank examiners. The OCC encourages customers who believe they have been denied fair access to financial services under this rule to contact the OCC's Customer Assistance Group (CAG).<sup>61</sup>

*Bank Examiners and Examiner Guidance.* One commenter expressed concern that the criteria examiners would use to make assessments under this rule are unclear. Another

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<sup>61</sup> Information and assistance for bank customers, including information about contacting CAG, can be found at <https://www.helpwithmybank.gov/>.

commenter supported the proposed rule as a means of deterring rogue examiners. The OCC intends to provide examiners with the tools necessary to implement this rule and will make this information public consistent with its usual practice.

Another commenter requested that the OCC advise banks to avoid using negative media searches when conducting customer due diligence (CDD) due to the likelihood of retrieving disinformation. Currently, there is no regulatory requirement for banks to conduct negative news searches on customers as part of banks' compliance with BSA/AML requirements. Banks have flexibility in developing risk-based procedures and monitoring processes for the purpose of complying with BSA/AML requirements (including CDD), and where appropriate, banks may review negative news to assist in the evaluation of customer risk and of any activity that the banks deem potentially suspicious. To the extent that banks find negative news searches provide useful information, the OCC declines to restrict the use of such searches.

## **VI. Regulatory Analyses**

*PRA.* In accordance with the requirements of the PRA, 44 U.S.C. 3501 *et seq.*, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The final rule contains no information collection requirements under the PRA. Therefore, no filings will be made with OMB.

*Regulatory Flexibility Act.* The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires an agency, in connection with a final rule, to prepare a Final Regulatory Flexibility Analysis describing the impact of the rule on small entities or to certify that the final rule would not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) defines small entities for purposes of the RFA to include

commercial banks and savings institutions with total assets of \$600 million or less and trust companies with total assets of \$41.5 million or less. Because the final rule will not apply to OCC-supervised banks with less than \$100 billion in total assets, it will not affect small OCC-supervised entities.<sup>62</sup> Therefore, the OCC certifies that the final rule will not have a significant economic impact on a substantial number of small entities, and a Final Regulatory Flexibility Analysis is not required.

*UMRA.* UMRA, 2 U.S.C. 1532, requires that the OCC prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation, currently \$157 million) in any one year. The purpose of the final rule is to codify the existing OCC principle that a bank should make an individualized decision about providing a person with a financial service based on quantitative, impartial risk-based standards established in advance by the covered bank. If any covered banks have risk-based standards that include criteria not allowed under the final rule, the OCC believes that eliminating the prohibited criteria will impose little, if any, burden on covered banks. Therefore, the OCC has determined that the final rule does not result in the expenditure by the private sector of \$154 million or more and has not prepared an UMRA budgetary impact statement.

*RCDRIA.* Pursuant to section 302(a) of the RCDRIA, 12 U.S.C. 4802(a), in determining the effective date and administrative compliance requirements for new regulations that impose

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<sup>62</sup> The OCC currently supervises approximately 745 small entities. Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an institution as a small entity. The OCC used December 31, 2019, to determine size because a “financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See footnote 8 of the U.S. Small Business Administration’s *Table of Size Standards*.

additional reporting, disclosure, or other requirements on insured depository institutions, the OCC must consider, consistent with principles of safety and soundness and the public interest, (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions and (2) the benefits of such regulations. The OCC has considered the changes made by this final rule and believes that the overall effective date of April 1, 2021 will provide OCC-regulated institutions with adequate time to comply with the rule. With respect to administrative compliance requirements, the OCC has considered the administrative burdens and the benefits of this final rule and believes that any burdens are necessary for fair access to financial services, safety and soundness, and proper OCC supervision. Further discussion of the consideration by the OCC of the burdens and benefits of this rule is found in other sections of the final rule's *SUPPLEMENTARY INFORMATION* section.

In addition, section 302(b) of RCDRIA, 12 U.S.C. 4802(b), requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form, unless, among other things, the agency determines for good cause that the regulations should become effective before such time.<sup>63</sup> The April 1, 2021 effective date of this final rule meets this RCDRIA effective date requirement as it will take effect on the first day of a calendar quarter following publication. However, the OCC notes that RCDRIA provides that insured

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<sup>63</sup> 12 U.S.C. 4802(b).

depository institutions may comply with regulations that impose additional reporting, disclosure, or other requirements before the regulation's effective date.<sup>64</sup>

*APA.* The APA, 5 U.S.C. 551 *et seq.*, generally requires that a substantive rule be published in the Federal Register not less than 30 days before its effective date except for: (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.<sup>65</sup> The April 1, 2021 effective date of this final rule meets the APA effective date requirement as it will take effect at least 30 days after its publication date of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

*Congressional Review Act.* Before a rule can take effect, the Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.*, provides that the OCC must submit to Congress and to the Comptroller General of the United States the rule along with a report indicating whether the rule is a "major rule." The CRA defines a "major rule" as any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the OMB finds has resulted in or is likely to result in (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.<sup>66</sup> In general, if a rule is a "major rule," the CRA generally provides that, unless Congress enacts a

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<sup>64</sup> 12 U.S.C. 4802(b)(2).

<sup>65</sup> 5 U.S.C. 553(d).

<sup>66</sup> 5 U.S.C. 804(2).

joint resolution of disapproval, the rule takes effect the later of: (1) 60 calendar days after the filing of the required reports to Congress or publication of the rule in the Federal Register, whichever is later; or (2) the date the rule would otherwise take effect.<sup>67</sup> The OCC will submit this rule to OIRA for its major rule determination. As required by the CRA, the OCC will also submit the final rule and appropriate reports to Congress and the Government Accountability Office for review.

### **List of Subjects in 12 CFR Part 55**

Banks and banking, Definitions, Federal savings associations, National banks, Risk, Safety and soundness

For the reasons set out in the *Supplementary Information* section, the OCC adds 12 CFR part 55 to read as follows:

## **PART 55 – FAIR ACCESS TO FINANCIAL SERVICES**

Sec.

55.1 Fair Access to Financial Services.

55.2 [Reserved]

Authority: 12 U.S.C. 1 *et seq.* and 12 U.S.C. 93a.

### **§ 55.1 Fair access to financial services.**

(a) For purposes of this section:

(1) *Bank* means an entity for which the Office of the Comptroller of the Currency is the appropriate Federal banking agency as defined in 12 U.S.C. 1813(q)(1).

(2) (i) *Covered bank* means a bank that has the ability to:

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<sup>67</sup> 5 U.S.C. 801(a)(3).

(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.

(ii) A bank is presumed not to meet the definition of covered bank in paragraph (a)(2)(i) of this section if it has less than \$100 billion in total assets.

(iii) A bank is presumed to meet the definition of covered bank in paragraph (a)(2)(i) of this section if it has \$100 billion or more in total assets. A bank that meets the criteria in this paragraph (a)(2)(iii) can seek to rebut this presumption by submitting to the Office of the Comptroller of the Currency written materials that, in the agency's judgment, demonstrate the bank does not meet the definition of covered bank in paragraph (a)(2)(i) of this section.

(3) *Financial service* means a financial product or service.

(4) *Person* means:

(i) Any natural person; or

(ii) Any partnership, corporation, or other business or legal entity.

(b) To provide fair access to financial services, a covered bank shall, except as necessary to comply with another provision of law:

(1) Make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms;

(2) Not deny any person a financial service the covered bank offers unless the denial is justified by such person's quantified and documented failure to meet quantitative, impartial risk-based standards established in advance by the covered bank; and

(3) Not deny, in coordination with others, any person a financial service the covered bank offers.

**§ 55.2 [Reserved]**

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Brian P. Brooks

*Acting Comptroller of the Currency*