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VIA ELECTRONIC SUBMISSION

Department of the Treasury

Office of the Comptroller of the Currency

Docket ID OCC–2020–0042

Re: Comments on OCC Proposed Rule for Fair Access to Financial Services

The Electronic Transactions Association ("ETA") respectfully submits these comments in response to the Office of the Comptroller of the Currency ("OCC") notice of proposed rulemaking to require national banks and federal savings associations (together, "national banks") to offer and provide fair access to financial services (the "Proposed Rule").

ETA is the leading trade association for the payments industry, representing over 500 payments and fintech companies that offer payments and related products and services to consumers and small businesses. ETA's members include national banks, payment processors, mobile wallet providers, fintechs, small business lenders, and all other parts of the payments ecosystem. ETA members make commerce possible by processing more than $21 trillion in purchases worldwide and deploying payments innovation to merchants and consumers.

Summary of Comments

ETA's membership includes national banks that offer payment services, and the various types of nonbank entities that partner with sponsor banks to offer payment services, including those that help merchants open payment processing accounts so that consumers can purchase goods and services in person, online, or through a mobile phone. National banks play a unique role in the payments processing industry as members of the card processing networks (including Visa, Mastercard, and others) and sponsors of merchant customers that accept card payments.

The Proposed Rule, if adopted, would require national banks to perform an independent risk evaluation of each customer that applies for financial services before declining to provide the customer the requested service. Although ETA and its members support financial inclusion and increased access to banking services, and oppose government efforts (such as Operation Choke Point) to pressure financial institutions to avoid disfavored industries, the Proposed Rule would have a significant negative impact on the risk management policies of national banks that

provide payment processing and related services. This negative impact would have repercussions across the entire payments ecosystem supporting those services.

As explained in these comments, the payments industry is dedicated to using innovation to fight fraud and ensure that consumers and businesses have access to safe, convenient, and affordable payment services. National banks and their service providers, including payment processors, payment facilitators, marketplaces, digital wallet operators, and independent sales organizations ("ISOs"), use prohibited and restricted merchant lists, and other risk-based compliance tools, to manage the significant financial risk associated with providing payment services and to protect the payments ecosystem and consumers from fraud and illegal activities.

The use of these tools—including prohibited and restricted merchant lists that vary among banks—has been expressly encouraged by the OCC and other federal regulators, including the Department of Justice ("DOJ"), Consumer Financial Protection Bureau ("CFPB"), and Federal Trade Commission ("FTC"). These tools not only protect the payments ecosystem from fraud, but also protect national banks and their payment services providers from financial loss and legal and regulatory risk. If the Proposed Rule is adopted, national banks and their payment service providers would face material increases in financial and regulatory risks as they would be forced to evaluate merchant types that they may not be well equipped to evaluate.

The cascading negative effects include:

- Creating an uncertain regulatory environment for national banks (and their service providers) by forcing them to balance the requirements of the Proposed Rule with conflicting federal guidance and agency expectations for providing payment processing services to merchants.

- Forcing national banks to take on riskier customers that present a greater risk of engaging in fraud and harming consumers, which would likely impose higher costs on national banks and their service partners.

- Requiring national banks to take on significant increases in underwriting, monitoring, and risk management costs in order to evaluate entire lines of business that they are not equipped to manage, which costs would, in part, be passed down to merchants and consumers.

- Disrupting the payments ecosystem, including the contractual relationships among sponsor banks, payment processors, payment facilitators, and ISOs.

- Limiting innovation and competition by inhibiting the ability of national banks and their agents to specialize in providing services to certain industries.

- Placing national banks in a difficult position when attempting to underwrite customers that engage in business activities that are not legal in all jurisdictions, such as marijuana, hemp, and CBD merchants.

Accordingly, ETA and its members encourage the OCC to rescind the Proposed Rule and allow national banks to continue to provide financial and payment services consistent with existing practices for safe and sound operations, including the use of lists of prohibited and restricted merchants when offering payment processing and related services.

Comments on the Proposed Rule

I. The Proposed Rule Will Have a Material Negative Impact on Merchant Services and Payment Processing

In the payments industry, national banks and their service providers use prohibited- and restricted-merchant lists and other risk-based compliance tools to manage financial risk and protect the payments ecosystem and consumers from fraud and illegal activities.

The use of these lists reflects the fact that different industries present significantly different levels of risk when it comes to payment processing. A list of prohibited industries might identify certain industries that an institution has determined present too great a financial or other risk for the institution to manage consistent with its obligation to provide services in a safe and sound manner.[1] Similarly, an institution might maintain a list of restricted customers that identifies the types of customers that require enhanced diligence and specific approvals prior to providing service. Each institution that provides payment services will develop lists that are consistent with card brand requirements and reflect the institution's risk tolerance, compliance resources, and industry experience. These lists are then also used to provide guidance to payment processors and other service providers that help board merchants for services.

The use of prohibited- and restricted-merchant lists has been encouraged by the OCC and other federal regulators. If the Proposed Rule is adopted, national banks and their payment service providers would face material increases in financial and regulatory risks, which would result in cascading negative effects throughout the payments ecosystem for consumers and merchants.

[1] These determinations are based on cumulative experience with customers operating in particular industries. For example, merchants who sell products primarily through telemarketing have significantly higher rates of chargebacks and returns than other merchants, which results in increased financial risk for the sponsor bank and its service providers. Therefore, a sponsor bank may choose not to provide payment processing services to that industry.

A. The Proposed Rule Fails to Take into Account the Unique Economic Aspects of Different Financial Services

The Proposed Rule's commentary focuses almost exclusively on commercial lending, which is just one of many financial services offered by national banks. The OCC does not appear to have contemplated how the Proposed Rule would impact the economics of each of the various products and services offered by national banks. In particular, ETA notes that the Proposed Rule has no discussion, analysis, or mention of the payments industry.

In this regard, the economics of commercial lending is different from that of merchant services and payment processing. In general, the volume of commercial loans is less than other services, and each commercial loan is often for a considerably larger amount, which means that national banks are able to devote significant resources to case-by-case underwriting.

By contrast, merchant services is a low-margin, high-volume market that requires banks to use efficient and tailored underwriting methods. As bank customers, merchants (*i.e.*, any business that accepts card payments) vary more widely by size, industry, transaction volume, and potential risk than commercial borrowers, but the Proposed Rule requires national banks to treat them all as the same. Moreover, unlike commercial lending, identifying and onboarding merchant customers is dependent on multiparty relationships, with the bank and its agents performing different roles in the process. Each of these roles will be impacted by the Proposed Rule.

Finally, the Proposed Rule fails to take into account the full variety of markets served by national banks. These markets—which involve different financial services and geographic areas—have their own unique characteristics, but the Proposed Rule has not considered these issues in setting forth an overly broad fair-access requirement.[2]

B. The Proposed Rule Conflicts with Credit Card Network Requirements

Many of the national banks that would be subject to the Proposed Rule are participants in the card payment processing networks (*e.g.*, Visa and Mastercard). These networks' rules include prohibited and higher-risk classifications of merchants, and the use of lists of prohibited and high-risk merchants is a common practice by

[2] The Proposed Rule also does not take into account that there are various financial services provided in connection with government programs that prohibit banks from providing services to certain categories of customers. The Small Business Administration ("SBA"), for example, prohibits banks from making 7(a) loans to certain types of customers; the Proposed Rule does not address whether a national bank participating in an SBA program is permitted to comply with the SBA prohibitions.

merchant-acquiring banks and their partners to manage payment processing risks and compliance. For example, Visa has issued standards requiring "[a]n acquir[ing bank to] implement a policy defining designations representing merchant types that pose an unacceptable level of risk and will not be signed."[3]

Payment processing—particularly credit card processing—is subject to a complex ecosystem that connects the card brands, sponsor banks, and various service providers. This ecosystem is contractual in nature, and it relies on each participant passing along the card brand and sponsor bank requirements in its agreements. If adopted, the Proposed Rule would disrupt this ecosystem and require significant changes to thousands of contracts. This cost and disruption are not addressed by the Proposed Rule.

C. The Proposed Rule Conflicts with Other OCC and Federal Agency Guidance

If taken at face value, the Proposed Rule would bar the use of lists of prohibited and high-risk merchants and force affected national banks to underwrite each prospective merchant-processing customer individually. If that is the case, it is difficult to square the Proposed Rule with existing guidance that the OCC has issued for national banks engaged in merchant processing. The OCC has encouraged sponsor banks to treat business categories and industry segments differently. It is worth quoting the OCC's merchant-processing guidance at length:

> When evaluating merchants' credit quality, banks must consider the business lines and any products the merchants offer. The bank card associations segment businesses by activity, and acquiring banks should analyze merchants along similar lines on an ongoing basis. Most acquiring banks compile lists of prohibited or restricted merchants, describing the types of merchants they are unwilling to sign or are willing to sign only under certain circumstances. Certain types of businesses are inherently more risky.[4]

It is unclear how this guidance can be reconciled with the Proposed Rule. Presumably, it would not be enough under the Proposed Rule for a national bank to find that a merchant's line of business has a high propensity for fraud. Instead, if the national bank did not want to sponsor the merchant, it would have to find that the individual

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[3] Visa Global Acquirer Risk Standards, Appendix A – Acquirer Risk Management Policies, https://usa.visa.com/dam/VCOM/download/merchants/visa-global-acquirer-risk-standards.pdf.

[4] Comptroller's Handbook: Merchant Processing (Aug. 2014), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/merchant-processing/pub-ch-merchant-processing.pdf.

applicant shows a "quantified and documented failure to meet quantitative standards."[5]

Similarly, federal law enforcement agencies, including the DOJ, CFPB, and FTC expect banks and their payments partners to use lists of prohibited and restricted merchants as part of their compliance efforts. In a recent FTC consent order, the FTC required a payment processor and its merchant-processing sales partners to "[e]stablish and enforce . . . policies and procedures [that] identify and describe in detail: (1) prohibited and restricted merchant categories . . . ."[6] In numerous other complaints, the FTC has focused on payment processors that provided services to high-risk industries, and in many cases the FTC's settlement orders have prohibited processors from providing services to specific industries.[7] These payment processors operate under contractual arrangements with banks to provide payment processing services. Under the Proposed Rule, if a sponsor bank must evaluate all prospective merchants on an individual, rather than categorical, basis, must their non-bank processing partners also follow suit? What about those partners that are subject to other contractual requirements or government directives that prohibit certain categories of merchants? It remains unclear how the Proposed Rule could be reconciled with actions by other government agencies that prescribe risk management by avoidance.

For its part, ETA has published various guidelines that provide best practices for merchant and risk underwriting and diligence, including the "Guidelines on Merchant and ISO Underwriting and Risk Monitoring" and "Payment Facilitator Guidelines."[8] These documents provide the payments industry with underwriting and diligence guidance, including information on anti-fraud tools, security, and related issues. Consistent with industry best practices, these guidelines advise processors and others in the payments industry to use lists of prohibited and restricted merchants as part of their underwriting processes. In preparing these guidelines, ETA and its members worked closely with the FTC and other government stakeholders. The Proposed Rule puts these efforts, and the progress made in fighting fraud, at risk.

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[5] Proposed Rule, p.75265.

[6] *FTC v. First Data Merchant Services*, Stipulated Order, 1:20-cv-3867, p.16 (S.D.N.Y. 2020), https://www.ftc.gov/system/files/documents/cases/first_data_entered_first_data_order.pdf.

[7] *See, e.g.*, *FTC v. Qualpay*, Complaint, 6:20-cv-00945 (M.D. Fla 2020), https://www.ftc.gov/system/files/documents/cases/qualpay_complaint.pdf; *FTC v. Allied Wallet*, Stipulated Order, 2:19-cv-04355 (C.D. Cal. 2019), https://www.ftc.gov/system/files/documents/cases/alliedwallet_stipulated_final_order_re_allied_7-3-19.pdf

[8] These documents are available to ETA members and can be provided to the OCC on request.

D. The Proposed Rule Will Increase Bank and Service Provider Risk Management Costs and Liabilities

The payments industry is dedicated to using innovation to fight fraud and ensure that consumers have access to safe, convenient, and affordable payment services. ETA's members, for example, are service providers that work on behalf of sponsor banks to set up merchants with payment processing accounts so that consumers can purchase goods and services in person, online, or through a mobile phone. Indeed, consumers choose electronic payments over cash and checks because they have zero liability for fraudulent charges, making electronic payments the safest and most reliable way to pay.

In most cases, payment processors bear financial responsibility under federal law and payment network rules for fraud involving payment systems. When it comes to credit cards, for example, a consumer can submit a chargeback request to his or her card-issuing bank disputing a particular card transaction. This process serves to protect consumers and ensures that the acquiring bank or merchant bears ultimate responsibility for fraudulent transactions. Thus, the industry has a strong interest in making sure fraudulent actors do not gain access to payment systems.

With the benefit of decades of experience, ETA members have developed effective due diligence programs to prevent fraudulent actors from accessing payment systems, to monitor the use of those systems, and to terminate access for network participants that engage in fraud. These efforts include the use of lists of prohibited and restricted merchants, which are used by banks and their partners to allocate compliance resources, mitigate risk, prevent fraud, and ensure that a bank's risk tolerance is aligned with its use of financial resources for compliance purposes.

The Proposed Rule would limit the ability of national banks and their payments partners to manage risk effectively, and it would force national banks to take on significant additional compliance costs. Performing individual, case-by-case underwriting of every merchant customer would be extremely costly, burdensome, and time consuming, and would force national banks and payments companies to allocate resources to customer segments that do not align with their risk tolerances or business plans.

In addition to increasing compliance costs, the Proposed Rule would expose national banks and payments companies to significantly higher fraud risk. Sponsor banks take on fraud risk in merchant processing so that consumers are protected from liability. By limiting the ability of sponsor banks to manage their risk, the Proposed Rule would push significant additional liability onto sponsor banks. For example, not all national banks and their service providers are willing to serve the airline industry or other advance-payment businesses where the financial risk of loss is borne by the

bank and their service provider. Some national banks and their service providers include on their prohibited and restricted lists industries that may pose a higher risk of consumer harm if not underwritten and monitored with specialized and costly skills and tools to avoid such risk; if the bank or its service provider have not developed such tools, they cannot adequately protect the payments ecosystem and consumers from fraud and illegal activities.

This liability would manifest in a number of ways, not only in higher chargebacks and fraud costs, but also in potential litigation by customers denied access to payments services. The reality is that some merchants denied merchant-processing accounts under the Proposed Rule—even for legitimate reasons—will use the denial to claim a violation of the fair-access rule and threaten litigation. These threats will put pressure on national banks to provide services to any customer, no matter how risky, that applies for services.

Finally, the Proposed Rule puts sponsor banks in a difficult position when attempting to underwrite customers that engage in business activities that are not clearly legal or are not legal in all jurisdictions, such as marijuana, hemp, and CBD merchants. The legal framework governing these types of businesses is extremely complex. Marijuana is illegal under federal law, but it has been legalized for various uses in dozens of states. Is a national bank required to provide fair access to a recreational marijuana dispensary operating in compliance with state law? What about a medical dispensary? How should a sponsor bank underwrite a CBD merchant that sells CBD nationwide? Depending on the circumstances, CBD products may be legal at the federal level and in certain states, but illegal in others. Under the Proposed Rule, a sponsor bank would need to perform a detailed underwriting of these risks for each customer that applies for a financial service, which would cost significant time and money but would not necessarily result in a clear answer on whether denial of the service would violate the fair-access rule.

E. The Proposed Rule Will Increase Fraud and Potential Consumer Harm

National banks are responsible for applying their Bank Secrecy Act / Anti-money Laundering ("BSA/AML") program to each merchant customer, including performance of customer due diligence. These reviews are risk-based and will vary by industry, given that the regulatory and fraud risk for some categories of merchants is significantly higher than for others. To address these market realities, national banks and the payments industry have developed and recommend the use of lists of restricted and prohibited merchants. These efforts have been supported by the OCC, DOJ, and FTC, but now would be prohibited by the Proposed Rule.

If adopted, the Proposed Rule would potentially impact the ability of national banks to manage AML and terrorist financing risks. In particular, the Proposed Rule does not appear to contemplate the AML or terrorist financing risks that may be presented by requiring national banks to provide fair access to "all persons," which would potentially include domestic branches of foreign banks (particularly as it relates to correspondent services); U.S. subsidiaries of foreign money services businesses (*e.g.* digital wallets/money transmitters); foreign embassies, and U.S. subsidiaries of foreign-owned or government-controlled businesses. In this regard, the Federal Financial Institutions Examination Council's AML manual recognizes that foreign embassies, consulates, and other entities present higher risks that require specialized compliance efforts to manage.[9]

As discussed, requiring national banks to provide fair access to all customers will pressure them to provide services to all applicants, or else risk alleged violations of the Proposed Rule and potential litigation by declined customers. This will force national banks in the merchant-processing space to take on riskier customers, which in turn, will harm consumers that are taken advantage of by unscrupulous merchants. The payments industry has done a remarkable job of fighting fraud; the Proposed Rule will jeopardize the progress that the industry has made in protecting the payments ecosystem from fraudsters.

F. The Proposed Rule Will Negatively Impact Innovation and Specialization in the Payments Industry

While the Proposed Rule acknowledges that a national bank may choose to avoid certain lending services (*e.g.*, capital development projects) because it lacks expertise, it does not provide guidance as to what constitutes a different service.[10] If national banks are required to treat all categories of payment processing as a single type of financial service, national banks and their agents would be prohibited from specializing in providing services to certain industries. This would have a significant impact on the payments industry, where national banks often work with agents that specialize in particular industries.

For example, many payment processors and ISOs that work as agents of a bank focus on a single vertical, such as restaurants or doctors' offices, and develop suites of products and services tailored to their customers' needs. Under the Proposed Rule, it's unclear whether these entities—at the direction of their sponsor banks—will be required to provide their services to all industries. This type of a requirement would interfere with a dynamic and vibrant payments market and force numerous businesses to make drastic changes. Entities that may have no expertise in particular

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[9] https://bsaaml.ffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/24.

[10] Proposed Rule, p.75265.

industries or knowledge of the associated risks will be forced by the Proposed Rule to bank them.

The fact is that underwriting and performing diligence are complex and subjective, and can vary drastically from industry to industry. In many cases, it can be difficult to accurately underwrite a customer without a detailed knowledge of the underlying industry. How, for example, is a national bank or payments company supposed to individually underwrite a dietary supplement company that sells products and services online through a recurring billing model? This type of business touches on dozens of consumer protection laws, all of which have a direct impact on the risk associated with processing for the business.

Meanwhile, the use of lists of restricted and prohibited merchants by larger banks provides an opportunity for innovative smaller banks that want to specialize in higher-risk merchant customers, and the Proposed Rule would put these smaller banks in direct competition with larger banks that otherwise would not enter these markets.

II. The Proposed Rule Creates an Unworkable Compliance Framework and Is Short on Details

The Proposed Rule requires national banks to provide "fair access" by performing an individualized risk evaluation of each person who applies for a financial service, but the Proposed Rule provides no guidance on how national banks are supposed to achieve this goal. If all businesses engaged in lawful activities have a right to "fair access to financial services," may a national bank consider the unique risks associated with a customer's industry when underwriting? May a national bank consider the reputational risks of an industry when evaluating a customer's risk? In its commentary supporting the Proposed Rule, the OCC seems to criticize instances where financial institutions have denied financial services because of perceived reputational risk.

Yet in the OCC's Comptroller's Handbook, the OCC encourages national banks to implement a risk governance framework that takes reputational risk into consideration.[11] The OCC has issued similar guidance advising national banks to take into account reputational and other forms of risk (*e.g.*, strategic and compliance) when offering new, modified, or expanded bank products and services.[12] The Proposed

[11] Comptroller's Handbook: Corporate and Risk Governance (Jul. 2019), https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/corporate-risk-governance/pub-ch-corporate-risk.pdf.

[12] New, Modified, or Expanded Bank Products and Services: Risk Management Principles, OCC Bulletin 2017-43 (Oct. 20, 2017), https://www.occ.treas.gov/news-issuances/bulletins/2017/bulletin-2017-43.html.

Rule does not address this apparent conflict, and it does not explain how national banks are supposed to balance their risk assessments with the requirement to provide fair access to financial services while engaging in uniform underwriting and diligence.

Similarly, the Proposed Rule does not clearly explain how national banks can provide "fair access," but still manage risk through tools such as risk-based pricing. Under the Proposed Rule, may a national bank offer customers different pricing for services based on a risk assessment? The Proposed Rule would require national banks to "make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms."[13] In a footnote, the OCC explains that 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."[14] What are the factors that a national bank would need to demonstrate to justify any differential pricing for customers in light of the "fair access" requirement?

Even more concerning is the Proposed Rule's requirement that a national 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 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 covered bank has a financial interest."[15] The Proposed Rule does not explain the factors a national bank should use to assess each customer's market or potential market position or current or potential ability to compete.

This particular requirement appears to be grounded in antitrust principles, yet the Proposed Rule overlooks the fact that under the antitrust laws, "a seller has the right to choose its business partners. A firm's refusal to deal with any other person or company is lawful so long as the refusal is not the product of an anticompetitive agreement with other firms or part of a predatory or exclusionary strategy to acquire or maintain a monopoly."[16] The Proposed Rule does not include any economic rationale, data, or other support for imposing limitations on a national bank's right to choose the businesses to which it will sell its products or services.

The fact is that the fair access requirement creates an unworkable standard that would expose national banks to regulatory and private litigation risks in connection

[13] Proposed Rule, p.75265.

[14] *Id*. at n. 21.

[15] *Id*.

[16] *Verizon Commc'n v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). *See also* FTC Guide to Antitrust Laws, Dealings in the Supply Chain: Refusal to Supply, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/refusal-supply.

with declining any customer. National banks should not be put in the impossible position of having to perform an economic assessment of each customer's market position and prospects without any clear, specific, and detailed guidance. These types of assessments are normally performed by economists and sophisticated industry consultants, and often cost millions of dollars when performed in connection with government investigations and private litigation. The Proposed Rule would, in effect, require national banks to perform the same type of complex analysis or else simply approve every customer that applies for a service. The cost of performing this type of assessment is prohibitive; moreover, any customer that is denied service could argue that the denial impedes its ability to compete in the market. As a practical result, national banks will be forced to provide services to any applicant that applies for a financial service.

III. No Evidence Has Been Provided to Support the Justification for the Proposed Rule

Aside from providing a handful of anecdotes, the OCC provides no data or economic analysis supporting a need for the Proposed Rule in order to ensure "fair access" or competition in any financial market. The United States has a competitive banking industry that provides low-cost, high-value services to customers across the country. Other than a few thin examples, the Proposed Rule has not attempted to provide evidence demonstrating that any entities that need financial services have not been able to access them. And while some national banks have limited the services they provide and the industries they serve because of risk considerations, there is no shortage of banks and other financial institutions that specialize in providing services to niche industries, including higher-risk industries that require specialization and greater compliance resources and experience. The OCC has provided no justification for the Proposed Rule in light of a diverse banking industry that provides services across the economy.

On the other hand, the Proposed Rule would immediately impact at least the 20 largest national banks and federal savings associations, and it would potentially apply to many more under the various trigger provisions set forth in the Proposed Rule.[17] The Proposed Rule contains no analysis on how the fair-access requirement will impact competition in the market, including whether the Proposed Rule would give a significant market advantage to payments processors that partner with state banks or smaller institutions.

[17] Proposed Rule, p.75264. As of September 30, 2020, there are 20 national banks or federal savings associations with $100 billion or more in total assets. *See* FDIC Bank Data & Statistics, https://www7.fdic.gov/idasp/advSearchLanding.asp.

ETA and its members favor limited government intervention in merchant services and payments processing. ETA strongly opposed Operation Chokepoint and would support commitments by regulators not to pressure financial institutions to de-bank or avoid disfavored industries or categories of customers. The Proposed Rule, however, is merely a mirror image of Operation Chokepoint in that it interferes with the free market by forcing banks to change the market segments they serve at the direction of the government.

IV. The Proposed Rule Rests on Questionable Legal Authority

The only substantive statute the OCC cites in support of its authority to issue the Proposed Rule is 12 U.S.C. § 1.[18] This section, which was rewritten by the Dodd–Frank Act, charges the OCC to "assur[e] 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."[19] Section 1(a) is a mission statement, not grant of authority for the OCC to act; rather, it is the remainder of chapter 1 and, in particular, chapter 2 of title 12 that provide the OCC with the legal authority necessary to achieve that mission.

The Proposed Rule does not cite 12 U.S.C. § 24, Seventh, which is the primary section authorizing national banks to conduct the business of banking and under which the OCC is authorized to regulate such business. The Proposed Rule does not cite and does not address the implications for financial subsidiaries of national banks under 12 U.S.C. § 24a. The Proposed Rule cites neither the OCC's authority to set lending limits under 12 U.S.C. § 84 nor its authority to permit national banks to exercise trust powers under 12 U.S.C. §92a. The Proposed Rule does not even cite to 12 U.S.C. § 93, which provides the OCC's enforcement authority for violations of title 12, chapter 2.

Instead, the Proposed Rule merely asserts that the mission statement, by separating "fair treatment" and "fair access" with a comma, contains two "distinct concept[s]."[20] The Proposed Rule references the Equal Credit Opportunity Act ("ECOA"), Fair Housing Act ("FHA"), and Community Reinvestment Act ("CRA") as examples of the principle of fair treatment.[21] But the OCC does not address the history of those acts,

[18] Proposed Rule, 85 FR 75261, 75262 and 75266 (Nov. 25, 2020). The OCC also cites to 12 U.S.C. 93a, which is its general authority to promulgate rules.

[19] 12 U.S.C. 1(a); Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203 (July 21, 2010).

[20] Proposed Rule, p.75262.

[21] *Id.*

including federal court jurisprudence, showing that they embody both fair treatment and fair access principles.[22]

Furthermore, the OCC does not explain how it determined (if they are, in fact, two distinct principles) that fair treatment applies only to individuals while fair access applies to both individuals and businesses. Nothing in the OCC's past practice suggests that it has previously found fair access to be distinct and applicable to business customers.

Although fair access was not added to 12 U.S.C. § 1 until 2010, the OCC has long held that fair access to financial services is an essential component of its mission. In 1997, then-Comptroller Eugene A. Ludwig stated that "the historic principles upon which the agency was founded [are]: achieving a safe and sound banking system built on the full and fair access to financial services so important to the well being of our nation's communities."[23]

In 2015, the OCC completed a rulemaking that, among other things, expressly added "fair access" to three of its rules: 12 CFR 5.20(f)(1)(ii), 5.30(e)(2), and 5.31(e)(2).[24] In each case, national banks are encouraged "to provide fair access to financial services by helping to meet the credit needs of its entire community." Nothing in the OCC's 2015 rulemaking states or implies that fair access to financial services means anything other than the ECOA, FHA, and CRA principles of providing all individuals within a community with fair treatment and equal access to credit. The OCC does not address the apparent conflict between its justification for the Proposed Rule and its previous usage of fair access, including within its previous rulemakings.

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[22] *See, e.g.*, *Hawkins et al. v. Community Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) ("Our conclusion also comports with the purposes and policies underlying the ECOA. . . . These policies focus on ensuring *fair access* to credit by preventing lenders from excluding borrowers from the credit market based on the borrowers' marital status."), *aff'd* 577 U. S. ____ (2016); *City of Oakland v. Wells Fargo & Co.*, No. 19-15169 (9th Cir. 2020) ("Congress heeded the Kerner Commission's recommendation and passed the Fair Housing Act of 1968 to ensure fair access to housing for racial minorities and other historically disadvantaged groups.").

[23] Remarks of Eugene A. Ludwig, Comptroller of the Currency, before the National Urban League (Aug. 5, 1997), https://www.occ.gov/news-issuances/news-releases/1997/nr-occ-1997-78.html.

[24] Integration of National Bank and Federal Savings Association Regulations: Licensing Rules, 80 FR 28345 (May 18, 2015).

We appreciate your taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact me at Stalbott@electran.org.

Respectfully submitted,

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