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Legal Sidebar

Office of the Comptroller of the Currency's Fair Access to Financial Services Rule

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On January 28, 2021, the Office of the Comptroller of the Currency (OCC) announced that it had "paused publication" of its *Fair Access to Financial Services* final rule (*Fair Access Rule* or the Rule), which some have considered "controversial." The agency had finalized the Rule on January 14, 2021, the last day in office of Acting Comptroller of the Currency Brian Brooks, and withdrew it before publication in the *Federal Register* but after the Biden Administration had imposed a regulatory freeze on administrative rules. The Rule would generally prohibit national banks and federal savings associations with at least $100 billion in total assets from denying financial services to corporate entities, businesses, nonprofits, or individuals solely on a "subjective basis" and would set standards to impartially evaluate customer risk. At the same time that it paused publication of the Rule, OCC emphasized that "OCC's long-standing supervisory guidance … that banks should avoid termination of broad categories of customers without assessing individual customer risk remains in effect." The Rule emerged after what some have seen as a series of decisions by "systemically important financial institutions (SIFIs), including Citibank, Bank of America, JP Morgan Chase … to use their market dominance to financially discriminate against legal and compliant businesses for political reasons." Oil exploration firms and firearms dealers were denied credit by this "debanking," and OCC's rulemaking referenced banks denying service to non-bank ATMs, family planning organizations, and privately operated prisons.

This Legal Sidebar will first describe the *Fair Access Rule* and its genesis. It will then outline the Rule's progress from proposal to finalization. Finally, it will discuss how a provision of the National Bank Act may insulate OCC from the regulatory freeze.

OCC's *Fair Access Rule*

The Rule aims at preventing larger banks from cutting off services to customers—individual or corporate—based on what some characterize as political motivations rather than purely business calculations. The Rule limits application to "covered banks," a term carrying a rebuttable presumption that it encompasses all national banks, federal savings associations, or federal branches or agencies of foreign banks, with assets over $100 billion. Under the Rule as proposed and in final form, a "covered bank" may not deny services to an individual or corporation unless it is "justified by such person's

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quantified and documented failure to meet impartial, risk-management standards established in advance by the covered bank." The Rule requires a "covered bank" to:

> 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.

The Development of the Rule from Proposal to Finalization

Proposing the Rule

On November 25, 2020, OCC issued a Notice of Proposed Rulemaking (NPR) proposing the Rule. As authority, OCC cited a provision of the National Bank Act, as amended by Dodd-Frank Act, that modifies the OCC's statutory purpose to include assuring "fair access to financial services, and fair treatment of customers by … the institutions and other persons subject to its jurisdiction." According to OCC, the Rule responded to instances when "some banks" were denying service not by assessing individual customer risk but by using "personal beliefs … on matters … more appropriately within the purview of Federal legislatures … and … assessments premised on assumptions about future legal or political changes." Highlighting these denials of service was an incident in 2020 when the Alaska congressional delegation had written to OCC, concerned about oil exploration projects in the Arctic losing financial services on political grounds rather than reputational risk. OCC also cited banks "debanking" businesses such as "privately owned correctional facilities" and "nonbank automated teller machine operator[s]," as well as "calls for boycotts of banks that support certain health care and social service providers." According to OCC, such actions would violate the statutory requirement of fair access:

> Organizations involved in politically controversial but lawful businesses—whether family planning organizations, energy companies, or otherwise—are entitled to fair access to financial services under the law…. [and] a bank's decision not to serve a particular customer must be based on an individual risk management decision about that individual customer, not on the fact that the customer operates in an industry subject to a broad categorical exclusion created by the bank.

Among the reasons OCC advanced for deciding to limit the Rule to the larger institutions were their "market power," "systematic importance," government support in financial crises, and capability of serving some industries. The proposed definition did not expressly include an asset threshold. It defines *covered bank* as any institution that OCC supervises that can "[r]aise the price a person has to pay to obtain an offered financial service" (i.e., the price standard) or "[s]ignificantly impede a person, or a person's business, in favor of or to the advantage of another person or another person's business" (i.e., the impediment standard). The definition includes a rebuttable presumption that any bank with total assets of $100 billion qualifies as a "covered bank" and presumes that a bank with assets of less than $100 billion does not qualify. To rebut the presumption that such an institution is a "covered bank," the institution must provide OCC with "written materials that … demonstrate the bank does not meet the definition of covered bank." OCC chose the $100 billion asset threshold upon concluding that such banks "account for approximately 55 percent of the total assets and deposits of all U.S. banks," and denial of service by one of them could produce "a significant effect on … the nation's financial and economic systems, and the global economy."

Announcing the Final Rule

On January 14, 2021, OCC announced the Rule in final form and released it substantially as proposed. According to OCC, the Rule follows previous agency guidance and protects bank safety and soundness because it requires case-by-case risk assessment. The final Rule retains the $100 billion presumptive asset threshold for a "covered bank" and requires "quantitative, impartial risk-based standards" for access to financial services. OCC determined that the $100 billion asset threshold "effectively captures" all the banks that would satisfy the standards for "covered bank" but did not add the percentage-of-market-share threshold on which the NPR had invited comments. OCC noted that it could apply the Rule to a bank with less than $100 billion in assets upon determining that the bank met the qualitative "covered bank" standards.

OCC divided its analysis of the comments received in the rulemaking process into legal and substantive categories. Some commenters had praised the proposal for preventing "activists and special interest groups from targeting individuals and lawful businesses attempting to access financial services…. [and for] ensur[ing] a 'level playing field,' rather than … 'picking winners and losers.'" Others had criticized the Rule for denying banks their "appropriate role in addressing … matters of public policy." A majority of the comments—31,290 of 35,700—did not favor the Rule, including those of banking trade associations. In general, critics questioned the "legal, substantive, and procedural basis" of the Rule. Many comments criticized the emphasis on quantitative risk factors and absence of reputational risk, OCC's response was general: "OCC expects that banks … will continue to take a broad range of risks into account." OCC also rejected comments claiming that "fair access" should refer to classes of individuals protected under such laws as the Equal Credit Opportunity Act, citing a lack of legislative history to support that interpretation.

One legal scholar asserted, among other things, that OCC has no authority to promulgate the Rule and that the Rule "unconstitutionally compels speech by banks and their owners in violation of the free exercise and free speech clauses of the First Amendment." OCC dismissed the First Amendment concerns summarily, noting that other commenters had "argued that the proposal would protect the free speech rights of bank customers…. [and] this rule … does not affect the First Amendment rights of covered banks, their customers, or any other person."

OCC issued the Rule based on its conclusion that "a plain-language interpretation of" the term *fair access* in its prefatory mission statement (12 U.S.C. § 1) "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." OCC explained that this interpretation "is informed by" another component of its mission statement—"assuring the safety and soundness" of the banks it supervises—because of "the crucial role of impartial, individualized risk-based analysis in promoting safety and soundness." But these "two brief clauses to the prefatory mission statement for the OCC" may not be sufficient authority for such a significant Rule.

Nevertheless, OCC has considerable authority to regulate national banks. As one appellate court has stated in the context of upholding another OCC regulation:

> National banks are perhaps as meticulously regulated as any industry. Every aspect of their affairs is scrutinized to assure financial soundness and ethical practice. The Comptroller's statutory duties require the closest monitoring and continuous supervision of these institutions. Thus, the Comptroller's discretionary authority to define and eliminate 'unsafe and unsound' conduct is to be liberally construed. Indeed, as the language of Section 1818(b) itself suggests, a regulation giving advance notice of conduct which the Comptroller disapproves as threatening to the safety and soundness of the banks he regulates is wholly consistent with the statutory scheme.

Effect of the Regulatory Freeze

It appears likely that OCC is pausing the Rule voluntarily in response to the regulatory freeze that the Biden Administration issued on January 20, 2021. The freeze calls on "Heads of Executive Departments and Agencies" to take certain actions "to ensure that the President's appointees or designees have the opportunity to review any new or pending rules." Among other things, it directs them to withdraw rules "that have been sent to the OFR [Office of the Federal Register] but not published in the *Federal Register*." In similar language to that in the freeze memorandum, OCC announced that it had paused *Federal Register* publication of the Rule to "allow the next confirmed Comptroller of the Currency to review the final rule and the public comments the OCC received, as part of an orderly transition."

Although there is precedent for an incoming Administration's authority to "respond to a prior administration's midnight rulemaking activities," as analyzed in this CRS Sidebar, and for a federal agency to withdraw a rule sent to the OFR but not yet published, that may not be the case with an OCC regulation. At least one scholar considers the authority of the President to direct the actions of federal financial regulators, including the OCC, to be circumscribed. Language in the same statute that OCC invoked to promulgate the Rule appears to potentially insulate OCC from the freeze. It declares that the "Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency…." Also, another statute (44 U.S.C. §3502(5)) classifies OCC, along with several of the federal financial services regulators, as "an independent regulatory agency."

Considerations for Congress

The fate of OCC's Fair Access Rule awaits the appointment of a new yet-to-be-nominated Comptroller of the Currency, who is expected "to review the final rule and the public comments … as part of an orderly transition." Among the considerations might be the following:

- Banking trade groups have characterized the Rule as being of an "unprecedented nature," "magnitude and potential consequence[]."
- Bipartisan critics accuse banks of failing in their fair access obligations, either by denying service to various industries or by "forc[ing] banks to serve major fossil energy companies despite the risks they may pose to the bank and the financial system," "rather than protecting individuals from discrimination by banks to ensure they have fair access to financial services."
- At the end of the 116th Congress, the chairwoman of the House Financial Services Committee along with majority members of that committee urged OCC to withdraw the proposal because it would "increase systemic risks to the financial system and discourage corporate social responsibility."

It is also possible that Congress may consider replacing the Rule with legislation. At least one of the public comments in the rulemaking suggested that OCC "not create sweeping mandates on the banking industry without specific authorization from Congress." Legislation could focus on OCC-regulated banks and savings associations, or it could define fair access to financial services standards for all federally chartered, regulated, or insured depository institutions.

The Fair Access Rule hearkens back to legislation in previous Congresses introduced in response to a Justice Department program. From 2013 to 2017, the Department of Justice's "Operation Choke Point" sought to discourage banks from serving certain businesses. In 2019, the Federal Deposit Insurance Corporation settled a lawsuit with a group of payday lenders, who were among the businesses singled out for this type of "de-risking." The plaintiffs dismissed OCC from the suit, and OCC stated that it "did not participate in 'Operation Choke Point' or any purported conspiracy to force banks to terminate the bank

accounts of plaintiffs or of other payday lenders." Some bills to address this in the 114th Congress included H.R. 766 (establishing requirements for the termination of a customer's bank accounts), H.R. 1413 and S. 477 (prohibiting banking agencies from using funds to carry out Operation Choke Point), H.R. 2578 (restricting funding of Operation Choke Point), and S. 1910 (prohibiting banking agencies from participating in Operation Choke Point).

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