

January 4, 2021

Acting Comptroller Brian P. Brooks
Office of the Comptroller of Currency
400 7th St. SW
Washington, DC 20219

Submitted electronically at <http://www.regulations.gov>

Re: Docket No. OCC-2020-0042
Notice of Proposed Rulemaking “Fair Access to Financial Services”

Dear Acting Comptroller Brooks,

The National Fair Housing Alliance (NFHA) and the 42 undersigned local and national civil rights, consumer, housing and community development organizations submit these comments to express our strong opposition to the Office of the Comptroller of Currency’s (OCC) Notice of Proposed Rulemaking “Fair Access to Financial Services.” We urge the OCC to immediately withdraw this proposed rule.

This proposal is a perversion of the long-held anti-discrimination principles upon which our nation’s fair housing and fair lending laws stand and it grossly applies the language of civil rights to potentially shield market activities that maintain the legacy of lending discrimination in the United States. The proposed rule lacks clarity in drafting and proposes standards so vague as to be unintelligible. This proposed rule would also improperly undermine the ability of financial institutions to consider important facets of reputational risk in making investment and underwriting determinations. Finally, given its broad implications, it is inappropriate and negligent to propose this rule within a 45-day comment period at a time when the nation continues to battle the dual COVID-19 pandemic and economic crises.

Our organizations have long advocated for fair and equitable access to financial services for communities who have historically been shut out of mainstream financial services, particularly communities of color. Such access is essential to address the legacy of government-sponsored segregation, redlining, and community disinvestment and facilitate fair housing. The language from the Dodd-Frank Wall Street Reform and Consumer Protection Act cited by the OCC as the statutory basis for the proposed rulemaking describes in general terms the OCC’s mission, including its role in assuring “fair access to financial services.”¹ This statutory provision refers to the important anti-discrimination principles, reflected in laws such as the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA), that are focused on ensuring that protected characteristics like race, sex, religion, national origin and disability are not barriers to

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 314, 124 Stat. 1376, 1523 (*codified at* 12 U.S.C. § 1) (“Dodd-Frank Act”).

equal access to financial services. Indeed, the same act that generally referenced OCC's role in assuring "fair access to financial services" also reaffirmed the OCC's role in enforcing ECOA with respect to financial institutions within its jurisdiction.²

Our legal and regulatory systems have long been premised on the understanding that characteristics like those protected by ECOA are due special protections because they are recognized as fundamental and immutable or deeply-held personal attributes, and because of the history of discrimination and oppression that has accompanied them. This proposed rulemaking threatens to undermine the significance and heightened care due these anti-discrimination principles, by extending these important civil rights principles to activities—such as participation in a particular industry or market sector—that do not share these fundamental attributes or inequities. Safeguarding against racial, gender-based, and other forms of unlawful invidious discrimination requires treating these characteristics as qualitatively different and requiring of special protections not provided to other types of characteristics or activities. For example, anti-discrimination laws recognize that characteristics such as race and gender cannot play any part in credit determinations.³ This is because Congress has determined that such factors are never appropriate considerations in credit decisions. Congress has made no such determination regarding the routine business activities the proposed rulemaking purports to protect, nor has it delegated this determination to the OCC. Accordingly, the OCC does not have the statutory authority to promulgate this proposed rule.

Furthermore, this proposed rule would improperly undermine the ability of financial institutions to consider important facets of reputational risk in making investment and underwriting determinations. It would also prevent civil and/or human rights and consumer protection organizations such as ourselves from advocating with and to covered banks with the goal of holding corporate bad actors, such as those engaging in racial, gender, or other forms of prohibited discrimination, accountable.

Compounding these deficiencies, the proposed rule lacks clarity in drafting and proposes standards so vague as to be unintelligible. For example, the proposed rule requires that covered banks make credit available to all persons in the geographic market area on "proportionately equal terms," but fails to define what it means to offer proportionately equal credit terms or what factors would be considered in a proportionality analysis. The proposed rulemaking also fails to define what it means to "deny, in coordination with others, any person a financial service the bank offers." The proposed rule does not provide any indication of who would be considered an "other" under this definition, nor what types of activity would qualify as coordination. The broad, undefined language in the proposed rule thus raises a multitude of questions about the rule's true scope.

² See Dodd-Frank Act, Pub. L. No. 110-203, § 1085(4) (amending 15 U.S.C. § 1691c to allocate ECOA enforcement authority among various federal agencies, including OCC); 15 U.S.C. § 1691c(a)(1)(A) (giving OCC, through cross-reference to section 8 of the Federal Deposit Insurance Act, authority to enforce ECOA respect to national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks).

³ The exception here is the use of Special Purpose Credit Programs which help meet the goals of the Fair Housing Act. See https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA_Relman_SPCP_Article.pdf.

For example, would coordinating the denial of financial services with third-party vendors, investors, or independent rating companies or market analysts violate this prohibition? Would the prohibition on coordination with others prevent a covered bank from denying credit any time an outside organization or advocacy group has publicly indicated it opposes the provision of credit to a particular applicant or industry? The question of coordination is of particular importance to advocacy organizations such as ours, as any attempt to draw public attention to corporate bad actors would be undermined if such efforts would have the counterproductive result of *forcing* covered banks to lend to such entities. The proposed rule leaves these important questions, as well as many others, unanswered, and therefore presents an unworkably vague standard that will inevitably result in arbitrary and capricious agency actions if enforced.

Finally, the limited time frame provided for comments on the proposed rule—a 45-day period during a major national health pandemic and economic crisis and which includes multiple major federal holiday periods—is far too short to permit the necessary public comment and feedback on a proposed rulemaking of this import. In fact, the OCC itself has recognized that a comment period of at least 60 days is recommended.⁴ Without additional time for review, interested parties such as advocacy groups, industry stakeholders, and the public at large are deprived of their right to participate in the rulemaking through submission of comments. We and others cannot possibly provide the level of meaningful feedback that would be necessary to capture all concerns with and possible unintended consequences of the proposed rulemaking, particularly given the ambiguities and questions raised by the proposal.

For the foregoing reasons, we urge the OCC to withdraw the proposed rulemaking in its entirety. Please contact Jorge Andres Soto, Associate Vice President of Policy and Advocacy at the National Fair Housing Alliance, at JSoto@nationalfairhousing.org or 202-898-1661 should you have any questions.

Sincerely,

Multi-State and National Organizations

Americans for Financial Reform Education Fund
Center for Disability Rights
Center for Responsible Lending
Consumer Action
Equal Rights Center
Local Initiatives Support Corporation (LISC)
NAACP
National Community Reinvestment Coalition
National Disability Rights Network (NDRN)
National Fair Housing Alliance
Poverty & Race Research Action Council

⁴ See OCC, Bull. 2020-100 (Nov. 16, 2020) (“the generally recommended time for comment is 60 days”).

The Leadership Conference on Civil and Human Rights
Woodstock Institute

Local and State Organizations

Organization	City	State
Fair Housing Center of Northern Alabama	Birmingham	AL
Southwest Fair Housing Council	Tucson	AZ
California Reinvestment Coalition	San Francisco	CA
Fair Housing Advocates of Northern California	San Rafael	CA
Project Sentinel	Santa Clara	CA
Connecticut Fair Housing Center	Hartford	CT
Fair Housing Center of the Greater Palm Beaches	Lantana	FL
Housing Opportunities Project for Excellence (HOPE), Inc.	Miami	FL
Metro Fair Housing Services, Inc.	Atlanta	GA
Savannah-Chatham County Fair Housing Council	Savannah	GA
Intermountain Fair Housing Council, Inc.	Boise	ID
Northside Community Resources Chicago - Fair Housing Program	Chicago	IL
South Suburban Housing Center	Homewood	IL
Louisiana Fair Housing Action Center	New Orleans	LA
Massachusetts Fair Housing Center, Inc.	Holyoke	MA
Fair Housing Center of West Michigan	Grand Rapids	MI
High Plains Fair Housing Center	Grand Forks	ND
Long Island Housing Services	Bohemia	NY
Fair Housing Justice Center, Inc.	Long Island City	NY
ERASE Racism	Syosset	NY
CNY Fair Housing, Inc.	Syracuse	NY
Westchester Residential Opportunities	White Plains	NY
Fair Housing Advocates Association	Akron	OH
Miami Valley Fair Housing Center, Inc.	Dayton	OH
The Fair Housing Center	Toledo	OH
North Texas Fair Housing Center	Dallas	TX
Greater Houston Fair Housing Center	Houston	TX
Fair Housing Council of Greater San Antonio	San Antonio	TX
Piedmont Housing Alliance	Charlottesville	VA
Fair Housing Center of Washington	Tacoma	WA