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Chief Counsel's Office
Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

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Re: Proposed "Fair Access to Financial Services," Docket ID OCC_2020-0042

I. Introduction and overview

The Center for Responsible Lending and the undersigned consumer, faith, community, and civil rights groups write to strongly oppose the Office of the Comptroller of the Currency (OCC)'s proposal to unreasonably limit banks' ability to decide not to serve particular entities.

As an initial matter, the OCC fails to find authority for this proposal. Further, the proposal is inconsistent with the OCC's fundamental charges to ensure safety and soundness, consumer protection, fair lending, and the aims of the Community Reinvestment Act.

Our comment focuses on the unmistakable and absolute conflict between, on one hand, requiring banks to engage in safe and sound lending practices, adhere to consumer protections, avoid discriminatory practices, and invest in their communities, while, on the other hand, pressuring them to finance lenders whose models are driven by unaffordable lending. Our comment further discusses the reality of reputational risk and how banks' facilitation of payday lending has heightened that risk in the past and promises to continue to do so going forward.

II. The OCC cannot find authority for this proposal in the Dodd-Frank Act.

The OCC's position that it finds authority for this action in Title III of the Dodd-Frank Act (DFA) does not withstand reason. The DFA grew from the financial crisis that the federal regulators enabled by yielding to the wishes of the banks they regulated, at the expense of safe and sound lending practices and consumer protection.

The impact the regulators' failure had on consumers, and particularly on communities of color, is made plain in the Senate Report accompanying the DFA. It notes that "the Committee heard a lot of testimony outlining how mortgage originators targeted minorities for subprime mortgages even when these borrowers might have qualified for lower cost prime mortgages."¹ It flags that the Federal Reserve found that only one sixth of the dramatic disparity in rates of African-Americans and Hispanics versus non-Hispanic whites who received high cost mortgages could be explained by the significant factors used to

¹ Sen. Rep., No. 111-176, at 14 (2010).

determine loan pricing.² The report also elaborates at length not only on the impacts on consumers of mortgage lending abuses, but also on problematic consumer lending practices related to credit cards, overdrafts, debt collection, payday lending, and auto lending.³

Title III in particular was adopted to address the “[f]ailure of the safety and soundness regulators.” It aims to “enhance the accountability of individual regulators,” “reduce the opportunities for depository institutions to shop for the most lenient regulator,” [and] “reduce regulatory gaps in supervision.” In so doing, it abolished the Office of Thrift Supervision, which had abjectly failed to prevent the predatory practices and subsequent failures of large thrifts that caused severe harm to homeowners and communities across the country.

So, fair access for consumers was at the heart of Dodd-Frank, just as it has been at the heart of civil rights lending law for decades. The issue on which this rule centers—whether banks can choose not to lend to certain companies—was not even on the periphery of the debate. There is nothing in the “fair access” language of DFA that supports the OCC’s authority to mandate that banks serve certain industries or limit their risk assessments of businesses to quantitative ones, especially when those industries harm consumers.

III. Pressuring banks to finance payday and other high-cost lenders is inconsistent with safety and soundness, consumer protection, fair lending, and the Community Reinvestment Act.

It is wholly illogical for the OCC to essentially mandate that banks finance financial service providers that engage in activities that regulators strongly discourage or prohibit banks from engaging in themselves. For example, payday loans costing 300% APR and higher are inconsistent with safety and soundness principles, consumer protection, fair lending, and investment in communities. The OCC and other banking regulators have long recognized many of the problems with these products, discussed below. And yet the OCC’s proposal could essentially force banks, some of whom have made business decisions not to finance payday lenders, to do so.

A. The OCC and other banking regulators have long flagged safety and soundness concerns, apart from reputational risk, posed by payday lending and other predatory financial practices.

The OCC and the other banking agencies have consistently discussed problems with a variety of consumer lending products by citing safety and soundness concerns. Notably this has been true even when those products are very profitable for the bank.

In 2001, the federal banking agencies issued joint guidance on subprime consumer lending products.⁴ In this guidance, the agencies emphasized that banks must base lending on a determination of the borrower’s ability to repay the loan, as opposed to relying on collateral, and that the failure to underwrite a loan is a safety and soundness concern:

² *Id.* at 15.

³ *Id.* at 17-23.

⁴ FIL 9-2001, Interagency Expanded Guidance for Subprime Lending Programs, January 31, 2001, *available at* <http://www.federalreserve.gov/boarddocs/srletters/2001/sr0104a1.pdf>.

“Loans to borrowers who do not demonstrate the capacity to repay the loan, as structured, from sources other than the collateral pledged are generally considered unsafe and unsound. Such lending practices should be criticized in the Report of Examination as imprudent.”⁵

This guidance was applicable to subprime consumer lending generally, beyond the mortgage context, and has been cited as specifically relevant to payday lending.⁶

Other guidances directly addressing payday lending—both payday lending done directly by banks and programs operated by third parties⁷—also cite safety and soundness concerns. The OCC’s 2000 advisory letter addressing payday lending, for example, notes that “payday lending can pose a variety of safety and soundness, compliance, consumer protection, and other risks to banks;”⁸ and that “multiple renewals without principal reduction . . . are not consistent with safe and sound banking principles.”⁹ The FDIC’s 2005 guidance addressing payday lending also cites the “heightened safety and soundness and compliance risks posed by payday lending.”¹⁰

The agencies’ 2007 joint statement on subprime mortgage lending also emphasized that, as a risk management practice, banks must assess the borrower’s ability to repay the loan rather than relying predominantly on collateral.¹¹

⁵ *Id.* at 11.

⁶ The 2001 Expanded Subprime Guidance refers to lending generally throughout and addresses consumer loans specifically (“The evaluation of consumer loans is governed by the Uniform Retail Credit Classification and Account Management Policy (Retail Classification Policy) issued by the FFIEC on June 12, 2000. This policy establishes general classification thresholds based on delinquency, but also grants examiners the discretion to classify individual retail loans that exhibit signs of credit weakness regardless of delinquency status.”). *Id.* at 9. The guidance also contemplates equity stripping outside the context of mortgage lending, noting that lenders may make a loan to a borrower who has little or no ability to repay other than from the collateral pledged, then take possession of the borrower’s home or automobile upon default.” *Id.* at 10. And the FDIC’s 2005 payday loan guidelines note that they clarify previously issued guidance, including this 2001 Expanded Subprime Guidance. FDIC Financial Institution Letters, Guidelines for Payday Lending, FIL 14-2005 (Feb. 2005), updated via 52-2015 (Nov. 2015), available at <https://www.fdic.gov/news/financial-institution-letters/2005/fil1405a.html/>.

⁷ OCC Advisory Letter, AL 2000-10, “Payday Lending,” at 5 (2000), <https://www2.occ.gov/news-issuances/advisory-letters/2000/advisory-letter-2000-10.pdf> (stating “[t]he OCC will closely review any payday lending activities conducted directly by national banks, as well as any payday lending or financing activities conducted through arrangements with third parties.”)

⁸ *Id.* at 1.

⁹ *Id.* at 3.

¹⁰ FDIC Financial Institution Letters, Guidelines for Payday Lending, FIL 14-2005 (Feb. 2005), updated via 52-2015 (Nov. 2015), available at <https://www.fdic.gov/news/financial-institution-letters/2005/fil1405a.html/>.

¹¹ Department of the Treasury-Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Interagency Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37569, 37573 (July 10, 2007). “[I]nstitutions should ensure they do not engage in . . .

In 2000, the OCC took its largest enforcement action to date at that time, requiring subprime fee harvester credit card company Providian to pay customers at least \$300 million, citing both safety and soundness concerns as well as unfair and deceptive acts and practices.¹² Comptroller John Hawke stated:

“When a bank engages in unfair or deceptive marketing practices, it damages its most precious asset — the trust and confidence of its customers That relationship of trust and confidence is central to the bank’s safe and sound operation. We will not tolerate abuses that breach that trust through unfair and deceptive practices This settlement ensures that, going forward, Providian will conduct its business in a way that both respects the interests of its customers and protects the safety and soundness of the bank.”¹³

Fee harvester practices share significant similarities with payday loans. They are profitable to the lender, and they minimize credit losses because fees are so large relative to the credit extended—but largely because the loans trap borrowers in debt.¹⁴

It is irrational that the OCC would require national banks to engage in safe and sound practices while potentially mandating that they fund businesses driven by fundamentally unsafe and unsound lending practices.

Moreover, the OCC’s proposal would provide that “assessments premised on assumptions about future legal or political changes” “are not, and cannot serve, as a legitimate basis” for refusing to lend to payday or other high-cost lenders.¹⁵ Yet the likelihood that policymakers will take action to rein in harmful lending practices, which would make a loan to an industry that employs those practices risky, is a relevant consideration. And there is indeed significant risk that payday and other high-cost loans will be affected by state or federal regulatory changes that could pose credit risk to banks funding that

[m]aking loans based predominantly on the foreclosure or liquidation value of a borrower’s collateral rather than on a borrower’s ability to repay the mortgage according to its terms.”

¹² OCC News Release 2000-49, *Providian to Cease Unfair Practices, Pay Consumers Minimum of \$300 Million Under Settlement with OCC and San Francisco District Attorney*, June 28, 2000, available at <https://www2.occ.gov/news-issuances/news-releases/2000/nr-occ-2000-49.html>.

¹³ *Id.* at 1. In addition, in 2003, the Federal Reserve took enforcement action against First Premier on safety and soundness grounds, while noting that the bank must comply with the Board’s applicable guidance related to subprime lending. *Written Agreement by and among United National Corporation, Sioux Falls, South Dakota; First PREMIER Bank, Sioux Falls, South Dakota; PREMIER Bankcard, Inc., Sioux Falls, South Dakota; and the Federal Reserve Bank of Minneapolis*, Federal Reserve Board, September 25, 2003, at 3, available at <http://www.federalreserve.gov/Boarddocs/Press/enforcement/2003/20030925/attachment.pdf>

¹⁴ The founder of Providian, for example, said in 2004: “It didn’t require a lot of investigation to see that the people who paid in full every month were not profitable”; the most lucrative customers were the “revolvers,” who routinely carried high balances, but were unlikely to default. Robin Stein, *The Ascendancy of the Credit Card Industry*, PBS Frontline, Nov. 23, 2004, <https://www.pbs.org/wgbh/pages/frontline/shows/credit/more/rise.html> (quoting Andrew Kahr, founder of Providian).

¹⁵ 85 Fed. Reg. at 75263.

lending. See, e.g., discussion in Section IV below of six state ballot initiatives in the last 12 years that have prohibited high-cost lending in those states.

B. Payday and other high-cost lending also poses consumer protection risks, also long acknowledged by the OCC and other agencies.

The guidances described above addressing subprime lending and payday lending raise consumer protection concerns in addition to safety and soundness concerns. The OCC recently reiterated its view that “a departure from fundamental principles of loan underwriting generally forms the basis of abusive lending: Lending without a determination that a borrower can reasonably be expected to repay the loan from resources other than the collateral securing the loan.”¹⁶ The OCC cautioned about activities that “may be considered predatory, unfair, or deceptive, [including] loans with high fees and frequent renewals or . . . re-financings that result in little or no economic benefit to the borrower that are undertaken with the primary or sole objective of generating additional fees.”¹⁷

The recent 2020 Interagency Lending Principles for Offering Small-Dollar Loans, issued jointly by the OCC and other banking regulators, emphasize that responsible loan programs generally have “a high percentage of customers successfully repaying . . . in accordance with original terms[,] a key indicator of affordability, eligibility, and appropriate underwriting,” and that loans should “support borrower affordability and successful repayment of principal and interest/fees in a reasonable time frame rather than reborrowing, rollovers, or immediate collectability in the event of default.”¹⁸

Payday loans, and other high-cost/high-default loan models, are designed to, and do, function in precisely the opposite manner. So it defies reason that the OCC would discourage banks from engaging in abusive practices toward their own customers, while hampering banks’ ability to decline to facilitate other lenders’ abusive treatment of consumers. These consumers, too, are typically bank customers—their accounts put in jeopardy by the very predatory lenders the OCC rule would pressure banks to finance.

C. Payday and other high-cost lending poses fair lending concerns, as it has long targeted and causes particular harm to communities of color.

A legacy of racial discrimination in housing, lending, banking, policing, employment, and other areas has produced dramatically inequitable outcomes that persist today. Communities of color, often largely segregated due to the history of redlining and other racially exclusionary housing policies, experience higher rates of poverty, lower wages, and higher cost burdens to pay for basic living expenses. These disparities have been laid bare of late, as communities of color, and especially Black communities, are experiencing far greater human and economic loss during the COVID-19 pandemic.

¹⁶ OCC, “National Banks and Federal Savings Associations as Lenders,” Final Rule, 85 Fed. Reg. 68742, 68746 (Oct. 30, 2020) (quoting OCC Advisory Letter 2003-2, at 3).

¹⁷ *Id.*

¹⁸ Federal Reserve System, Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC), *Interagency Lending Principles for Offering Responsible Small-Dollar Loans* (May 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-65a.pdf>.

High-cost lenders peddling unaffordable loans cause particular harm to these communities,¹⁹ often in the same geographic areas that experienced redlining. Storefront high-cost lenders have long targeted borrowers of color and are more likely to locate stores even in more affluent communities of color than in less affluent white communities.²⁰ Online high-cost lenders may focus more on subprime credit score than geography, although we understand that some lenders use zip codes to target online marketing. But historical discrimination against communities of color is also reflected in credit scores.²¹ Lenders that focus on subprime borrowers will inevitably disproportionately target borrowers of color. The algorithms and big data that “fintech” lenders use may also result in disparate impacts on these communities.²²

Moreover, payday and high-cost online lenders often promote their models as expanding economic inclusion, which will often put borrowers of color among their target borrowers since they have been disproportionately left out of the traditional banking system. Some defend high-cost loans as bringing communities of color into the economic mainstream. But high-cost loans, particularly with their high association with lost bank accounts,²³ drive borrowers out of the banking system and only exacerbate this disparity.

¹⁹ See CFPB Payday Rule, 82 Fed. Reg. at 54556-57 (African Americans are payday borrowers at three times the rate, and Hispanics at twice the rate, of non-Hispanic whites (citing 2015 FDIC National Survey of Unbanked and Underbanked Households (calculations using custom data tool))). Vehicle title borrowers are also disproportionately African American and Hispanic. *Id.*

²⁰ Li, et al., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California*, Center for Responsible Lending (2009), <http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf>; Brandon Coleman and Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, Center for Responsible Lending at 7, Chart 2 (March 2016); Delvin Davis and Lisa Stifler, *Power Steering: Payday Lenders Targeting Vulnerable Michigan Communities*, Center for Responsible Lending (Aug. 2018), <https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities>; Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color*, Center for Responsible Lending (Aug. 2017; amended Feb. 2018), <https://www.responsiblelending.org/research-publication/mile-high-money-payday-stores-target-colorado-communities-color>.

²¹ See Chi Chi Wu, *Past Imperfect: How Credit Scores and Other Analytics “Bake In” and Perpetuate Past Discrimination*, National Consumer Law Center (May 2016), https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

²² See Testimony of Chi Chi Wu, National Consumer Law Center, Before the U.S. House Committee on Financial Services Task Force on Financial Technology Regarding “Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit” (July 25, 2019); Carol A. Evans, *Keeping Fintech Fair: Thinking about Fair Lending and UDAP Risks*, Consumer Compliance Outlook (2017), <https://consumercomplianceoutlook.org/2017/second-issue/keeping-fintech-fair-thinking-about-fair-lending-and-udap-risks/>; see also Christopher K. Odinet, *Predatory Fintech and the Politics of Banking* 19-20 (Iowa Law Review (2021 Forthcoming) (Aug. 2020), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3677283).

²³ CFPB found that about half of borrowers with online payday or other high-cost online loans paid a nonsufficient funds (NSF) or overdraft fee. These borrowers paid an average of \$185 in such fees, while 10% paid at least \$432. It further found that 36% of borrowers with a bounced payday payment later had their checking accounts closed involuntarily by the bank. CFPB Online Payday Loan Payments at 3-4, 22 (April 2016).

By sustaining, exploiting, and exacerbating an existing precarious financial situation, high-cost lending reinforces and magnifies existing income and wealth gaps—legacies of continuing discrimination—and perpetuates discrimination today.²⁴

The OCC and the other banking agencies have long raised the concern that high-cost lending²⁵ and loans made without regard to ability to repay²⁶ carry heightened fair lending risk. Particularly as banks reexamine their relationship to structural racism, some banks may wish to stop investing their dollars in loan products that systematically strip wealth from communities of color. The OCC does not serve banks or communities by making it unreasonably difficult for banks to do so.

D. Payday and other high-cost lending is inconsistent with the Community Reinvestment Act.

The objective of the Community Reinvestment Act (CRA), which the OCC implements as to national banks, is to ensure that financial institutions meet the banking needs of the communities they are chartered to serve, including low- and moderate-income neighborhoods and individuals.²⁷ This legal obligation is considered a *quid pro quo* for the valuable public benefits financial institutions receive, including federal deposit insurance and access to favorably priced borrowing through the Federal Reserve's discount window.²⁸

In contradiction to this obligation, the OCC now puts forth a proposal that will facilitate the flow of capital to actors that systematically drain wealth from low- and moderate-income communities. CRA requires that banks serve communities' credit needs.²⁹ But the data show that high-cost, unaffordable

²⁴ For more on civil rights groups' concerns about the harm predatory consumer loans cause communities of color, and the efforts we have long made to stop that harm, see the sampling of references cited here:

<http://stophedebtttrap.org/wp-content/uploads/2014/11/PayDay-loans.7-2016.pdf>;

http://stophedebtttrap.org/wp-content/uploads/2015/08/lcchr_resolution_payday_deposit_advance_lending_12dec2015.pdf;

http://stophedebtttrap.org/wp-content/uploads/2015/08/naacp_letter_obama_payday_15december2014.pdf;

<http://ourfinancialsecurity.org/2011/04/hilary-shelton-cfpb-testimony/>;

http://www.responsiblelending.org/payday-lending/policy-legislation/states/Letter-JBond_Rendell-012306.pdf;

<https://nalcab.org/nalcab-new-pay-day-rule-step-forward-latino-consumers-businesses/>;

<http://stophedebtttrap.org/blog/cfpb-payday-lending-rule-will-disrupt-abusive-lending-protect-families-financial-predators/>.

²⁵ See, e.g., OCC-AL-2000-10 at 4: "Banks that originate or purchase payday loans must take special care to avoid violating fair lending and consumer protection laws and regulations."

²⁶ See, e.g., Interagency Expanded Guidance for Subprime Lending Programs, January 31, 2001, at 10-11: "Further, examiners should refer any loans with the aforementioned characteristics [loans made without regard to ability to repay] to their Agency's respective consumer compliance/fair lending specialists for additional review."

²⁷ 12 U.S.C. 2901 *et seq.*

²⁸ Federal Reserve Board Chairman Ben S. Bernanke, *The Community Reinvestment Act: Its Evolution and New Challenges*, Speech at the Community Affairs Research Conference, Washington, D.C. (March 30, 2007), <http://www.federalreserve.gov/newsevents/speech/Bernanke20070330a.htm#f2>.

²⁹ 12 U.S.C. 2901.

loans to financial distressed consumers do the opposite, leading to high-cost cycles of indebtedness that not only leave borrowers' needs unmet but leave them affirmatively worse off than before the lending began.

The harms caused by unaffordable covered loans spill over to borrowers' communities.³⁰ When borrowers cannot escape debt designed to trap them, others often step in to settle the debt. Payday and car title lending are associated with increased reliance on charity or government support. Texas Catholic Charities estimated that it spent \$1 million in 2010 to help individuals who had payday or car title debt.³¹ It estimated that nearly half of payday borrowers that received their charitable assistance identified the loans as contributing to their need to ask for help.³² In addition, a study has found that households who lived within easy access to payday loan stores were more likely to use food stamps and less likely to make required child support payments than similar households that did not live near these stores.³³ Other data show that when borrowers cannot afford to repay, they often—one study found nearly 20% of the time—turn to friends or family for the funds,³⁴ which puts a drain on them as well.

Research from the Insight Center for Community Economic Development has estimated the broader cost that payday lending imposes on local economies. During 2011, payday lending resulted in a net loss in U.S. economic activity of \$774 million nationwide and a net loss of 14,094 jobs.³⁵ To fulfill its charge to administer the CRA as to national banks, the OCC should not be making it harder for banks to divest from such activities.

IV. Reputational risk is real and involvement with payday lending damages it.

A. Reputational risk is real.

Reputational risk is real, as the OCC's definition dating back decades reflects:

“Reputation risk is the risk to earnings or capital arising from negative public opinion. This affects the institution's ability to establish new relationships or services, or continue servicing existing relationships. This risk can expose the institution to litigation, financial

³⁰ See, generally, Sarah D. Wolff, *State of Lending in America & Its Impact on U.S. Households: The Cumulative Costs of Predatory Practices*, Center for Responsible Lending (June 2015), <http://www.responsiblelending.org/state-of-lending/reports/13-Cumulative-Impact.pdf>.

³¹ *Id.* at 16 (citing Texas Catholic Conference, *Texas faith for fair lending: Religious leaders call for reform in payday lending regulation*).

³² *Id.*

³³ B. Melzer, *Spillovers from Costly Credit*, *The Review of Financial Studies* (2018), <https://academic.oup.com/rfs/article-abstract/31/9/3568/4760436?redirectedFrom=fulltext>.

³⁴ Pew Charitable Trusts, *Payday Lending in America: How Borrowers Choose and Repay Payday Loans*, at 36 (2013), [https://www.pewtrusts.org/-/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-\(1\).pdf](https://www.pewtrusts.org/-/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf).

³⁵ Tim Lohrentz, *The Net Economic Impact of Payday Lending in the U.S.*, Insight Center for Community Economic Development (March 2013), <http://www1.insightcced.org/uploads/assets/Net%20Economic%20Impact%20of%20Payday%20Lending.pdf>.

loss, or damage to its reputation. Reputation risk exposure is present throughout the organization and is why banks have the responsibility to exercise an abundance of caution in dealing with their customers and community. . . . This risk is inherent in all bank activities.”³⁶

The OCC’s supervision manual retains a very similar definition today.³⁷ Other banking regulators define reputational risk similarly.³⁸

Federal Reserve Board (FRB) Staff has noted: “While it is a defined risk, reputational risk is often difficult to identify and quantify Assessing reputational risk is not an objective process, but rather it is a subjective assessment that could reflect a number of different factors.”³⁹

Reputational risk has long been considered among the most significant risks banks face. The FRB Staff cites the view that “reputational risk is the starting point of all risks: if you have no reputation, you have no business.”⁴⁰ In 2007, even as credit risk would soon bring the economy to its knees, reputational risk overtook credit risk as the most pressing issue facing bank audit committees at that time, according to an annual Ernst & Young survey released in early 2007.⁴¹ A 2004 Economist Intelligence Unit survey of senior managers found that reputational risk was the most significant threat to business out of a choice of 13 categories.⁴²

This year, KPMG’s 2020 advisory for banking industry audit committees cautioned that “[t]he reputational costs of an ethics or compliance failure are higher than ever . . . [t]he culture must support the company’s strategy, including its commitment to its stated values, ethics, and legal/regulatory

³⁶ OCC, News Release, 1996-2a, Jan. 4, 1996, at <https://www.occ.treas.gov/news-issuances/news-releases/1996/nr-occ-1996-2a.pdf>.

³⁷ OCC, Bank Supervision Process, Comptroller’s Handbook at 28 (Version 1.1, Sept. 2019), available at <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/bank-supervision-process/pub-ch-bank-supervision-process.pdf> (“Reputation risk is the risk to current or projected financial condition and resilience arising from negative public opinion. This risk may impair a bank’s competitiveness by affecting its ability to establish new relationships or services or continue servicing existing relationships. Reputation risk is inherent in all bank activities, and management should deal prudently with stakeholders, such as customers, counterparties, correspondents, investors, regulators, employees, and the community.”).

³⁸ For example, the Federal Reserve Board’s supervision manual defines “reputational risk” as “the potential that negative publicity regarding an institution’s business practices, whether true or not, will cause a decline in the customer base, costly litigation, or revenue reductions.” Federal Reserve System, Commercial Bank Examination Manual, Section 1012.1 (effective May 2019), <https://www.federalreserve.gov/publications/files/cbem.pdf>.

³⁹ William J. Brown, Federal Reserve Board Enforcement Specialist, Understanding Reputational Risk: Identify, Measure, and Mitigate the Risk, 4th Quarter 2007, on file with CRL [hereinafter FRB Enforcement Specialist Article] (citing “Poll: Reputation Top Risk at Bank Audit Committees,” *American Banker*, February 27, 2007).

⁴⁰ FRB Enforcement Specialist Article (citing McDowall, Bob, “Reputational Risk,” *The Register*, May 22, 2006).

⁴¹ Economic Intelligence Unit, Reputation: Risk of risks (2005), <https://databreachinsurancequote.com/wp-content/uploads/2014/10/Reputation-Risks.pdf>.

⁴² *Id.*

compliance As a result of the radical transparency enabled by social media, the company’s culture and values, commitment to integrity and legal compliance, and brand reputation are all on full display.”⁴³

Not every risk is easily quantified. Wells Fargo’s struggle with its reputation has been clear in recent years, as the bank has noted challenges competing for new wealth management clients⁴⁴ and consumer bank customers⁴⁵ in the wake of the investigations and enforcement actions that exposed its egregious practices.

Thus, even if subjective and difficult to quantify, reputational risk is no doubt real. The OCC’s proposal, which asserts that unless an assessment is grounded in “quantitative, risk-based analysis,” it “cannot serve [] as a legitimate basis” for refusing to lend,⁴⁶ is unreasonable in its dismissal of this reality.

B. Bank involvement with high-cost lending, directly or via financing, poses reputational risks.

There is no question that association with high-cost lending poses reputational risks to banks. A 2007 article on reputational risk by a Federal Reserve Enforcement Specialist provided only a few examples of practices posing reputational risk. Payday lending was one of them: “There is . . . a stigma attached to institutions involved with payday lending, even though that type of lending is not illegal.”⁴⁷

This risk is likely greater now that it was then, as the harms of high-cost lending, both short-term loans and longer-term loans, has become more fully documented and widely known.⁴⁸ Since 2008, six states have considered statewide ballot initiatives to cap state interest rates at 36% APR or less. All the measures passed, none with less than three-fifths of the vote, most with two-thirds or higher, and most recently in November in Nebraska, where an overwhelming 83% percent supported the rate limit. In

⁴³ KPMG, On the 2020 Banking Industry Audit Committee Agenda at 3 (2020), <https://home.kpmg/content/dam/kpmg/us/pdf/2020-banking-audit-agenda.pdf>.

⁴⁴ Imani Moise, “Wells Fargo CFO says reputation issues a challenge for wealth unit,” Reuters, July 13, 2018, <https://www.reuters.com/article/us-wells-fargo-results-wealth/wells-fargo-cfo-says-reputation-issues-a-challenge-for-wealth-unit-idUKKBN1K32U6> (quoting CFO John Shrewsbury: “The employees in [the wealth unit] would make the case that it’s a little harder to compete for new business or to compete head-to-head with other advisers for new business . . . Just as it was a big tailwind because of Wells Fargo’s reputation before that The reputational issue is something that we have to work hard to help those team members work through.”).

⁴⁵ Robert Armstrong and Laura Noonan, “Wells Fargo: repairing a damaged brand,” Financial Times, Jan. 14, 2019, <https://www.ft.com/content/b858da70-1418-11e9-a581-4ff78404524e> (quoting Mary Mack, head of Wells Fargo’s consumer bank: “Existing customers stuck with us It was with prospective customers choosing between us and another bank that we got hurt.”).

⁴⁶ 85 Fed. Reg. 75263.

⁴⁷ William J. Brown, Federal Reserve Board Enforcement Specialist, Understanding Reputational Risk: Identify, Measure, and Mitigate the Risk, 4th Quarter 2007, on file with CRL.

⁴⁸ See Comments of CRL, NCLC, and a number of additional consumer and civil rights groups, on the CFPB’s proposed payday lending rule, at §2, pp. 17-40 (discussing harm to consumers) (Oct. 2016).

2016, Google stopped selling ads for loans exceeding 36% APR, and in 2019 it banned such loans from its App Store “to protect people from deceptive and exploitative personal-loan terms.”⁴⁹

Direct bank involvement in payday lending by a handful of banks, until 2013 guidance generally led to its end,⁵⁰ was met with sweeping public condemnation from virtually every sphere—the military community,⁵¹ community organizations,⁵² civil rights leaders,⁵³ faith leaders,⁵⁴ socially responsible

⁴⁹ Yuka Hayashi, “Google Shuts Out Payday Loans With App-Store Ban,” Wall Street Journal, Oct. 12, 2019 (quoting Google spokesman).

⁵⁰ The OCC rescinded that guidance in 2017.

⁵¹ See, e.g., Testimony of Steve Abbot, former President of the Navy-Marine Corps Relief Society, Before the U.S. Committee on Banking, Housing and Urban Affairs (Nov. 3, 2011) (noting bank payday loans among the “most egregious trends”); Comments of Michael Archer, Director of Military Legal Assistance, Marine Corps Installations East, to CFPB (April 4, 2012): “Most ominously, a few large banks have gotten into the business of payday loans through the artifice of calling the loans open ended credit,” <http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0009-0056>.

⁵² Hundreds of groups urged the prudential regulators to stop banks from trapping borrowers in payday loans. Letters from approximately 250 groups to FDIC, OCC, FRB and CFPB, March 13, 2013, (<http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2013/03/Bank-Payday-Sign-On-Letter-3-13-13-Final.pdf>) and February 22, 2012, (<http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Dear-Regulators.pdf>). Thousands of individuals and many community groups filed comments with the OCC urging that Wells Fargo’s Community Reinvestment Act rating be negatively impacted because it was making payday loans, including CRL and NCLC (http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/cra-comment_wells-nov-29-2012_final.pdf).

⁵³ See, e.g., Letter from Benjamin Todd Jealous, President and Chief Executive Officer, NAACP, to FDIC, OCC, FRB, and CFPB opposing bank payday lending (Feb. 21, 2013), <http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/NAACP-redatory-Pay-Day-Loans-to-regulators-BTJ.pdf>.

⁵⁴ See, e.g., Elaina Ramsey, Faith Groups Take On Payday Lenders, Sojourners, <https://sojo.net/magazine/stub/faith-groups-take-payday-lenders> (discussing a National Day of Action among faith leaders in early 2013 to address payday lending). In connection with this National Day of Action, Rev. DeForest B. Soaries, jointly with other nationally prominent African American ministers, called for “an end to enslavement to both payday lenders and the banks now offering equally dangerous products” in *An Emancipation Proclamation from Payday Lending*. Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns*, CRL Issue Brief, March 7, 2013, <http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf>

investors,⁵⁵ state legislators,⁵⁶ and members of Congress.⁵⁷ And the rise of online and social media make it faster and easier to garner outrage at a bank that is facilitating predatory lending today than it was then.

Bank financing of payday lending has likewise reflected negatively on banks. A 2010 report entitled *Predators' Creditors: How the Biggest Banks are Bankrolling the Payday Loan Industry* highlighted the loan facilities large banks were providing large payday lenders.⁵⁸ A 2015 report looked more broadly at how banks were financing a range of high-cost lenders.⁵⁹ In 2013, payday lender Cash America reported that its lending relationship with J.P. Morgan Chase had ended, which was believed to be at Chase's initiative.⁶⁰ This generally coincided with the bank's review of its commercial clients, including not only payday lenders but also buy-here, pay-here auto dealers, which notoriously make unaffordable loans to

⁵⁵ For proxy year 2013, investors filed shareholder resolutions with the four largest banks making payday loans expressing concern about the product and requesting data, which none of the banks agreed to provide. Wells Fargo (<https://trilliuminvest.com/shareholder-proposal/payday-lending-wells-fargo-2013/>); Fifth Third Bank (<http://www.trilliuminvest.com/resolutions/payday-lending-fifth-third-bancorp-2013/>); U.S. Bank; (<https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/dominisocial012513-14a8.pdf>); and Regions (<https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/congregationsisters011413-14a8.pdf>).

⁵⁶ See, e.g., "Legislative Black Caucus slams Regions Bank over payday-style loans," Raleigh News and Observer "Under the Dome," Oct. 11, 2012, <http://www.cashcowadvances.com/paydayblog/legislative-black-caucus-slams-regions-bank-over-payday-style-loans.html> (quoting letter from N.C. Senator Floyd McKissick, Jr., chairman of the N.C. Legislative Black Caucus, to Regions Bank, which stated: "We are deeply concerned about recent reports of Regions Bank offering its 'Ready Advance' payday loans in North Carolina . . . High-cost, short-term balloon loans like these sharply increase the financial distress of families under economic strain"); Letter from Arizona Democratic Caucus to the prudential banking regulators, February 2012 (noting that Arizona "has spent countless state resources to study and understand the effects of [payday lending], and ultimately outlaw payday lending entirely" and calling on federal regulators to "take immediate action so that meaningful reforms taking place in Arizona and throughout the country in the name of consumer protection will not be undermined.").

⁵⁷ In January 2013, several Senators wrote the FRB, OCC, and FDIC urging action to address bank payday lending (<http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-calls-on-regulators-to-act-to-stop-abusive-bank-payday-lending>). In April 2013, House members did the same. For further documentation of opposition to bank payday lending, see Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns* at 10, CRL Issue Brief, March 7, 2013, <http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf>.

⁵⁸ Kevin Connor and Matthew Skomarovsky, *Predators' Creditors: How the Biggest Banks are Bankrolling the Payday Loan Industry*, National People's Action and Public Accountability Initiative (2010), <https://public-accountability.org/wp-content/uploads/2011/09/payday-final-091410.pdf>.

⁵⁹ Adam Rust, Connecting the Dots: How Wall Street Brings Fringe Lending to Main Street, Reinvestment Partners (2015), https://reinvestmentpartners.org/file_download/inline/81ecdbcd-458c-464d-a63b-6d17e9e41feb.

⁶⁰ See Julie Steinberg, Dan Fitzpatrick, and Andrew R. Johnson, J.P. Morgan to Cull Business Clients, Wall Street Journal, Oct. 8, 2013, <https://www.wsj.com/articles/SB10001424052702304441404579123790905453728>; see also Adam Rust, Connecting the Dots: How Wall Street Brings Fringe Lending to Main Street, Reinvestment Partners, at 11 (2015), https://reinvestmentpartners.org/file_download/inline/81ecdbcd-458c-464d-a63b-6d17e9e41feb.

borrowers and engage in a range of other practices inconsistent with the OCC's own principles of fairness and responsible lending.⁶¹

Notably, a 2013 article quotes an OCC spokesman as saying that the funding relationship between banks and payday lenders "is an issue on the radar"—in contrast to the OCC's approach with this proposal seven years later, which would effectively encourage banks' financing of practices that it wouldn't let banks engage in themselves.⁶²

C. Conclusion

Banks should not be discouraged from refusing to finance activities that are inconsistent with safe and sound lending practices, consumer protection, anti-discrimination, and the Community Reinvestment Act. We urge the agency to withdraw this proposal and recommit to protecting consumers from predatory lending by, or facilitated by, banks.

National

Center for Responsible Lending
Americans for Financial Reform Education Fund
Beneficial State Foundation
Better Markets
Consumer Action
Consumer Federation of America
Consumers for Auto Reliability and Safety
The Leadership Conference on Civil and Human Rights
MyPath
NAACP
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
Public Good Law Center
U.S. PIRG

State

Alaska PIRG
Arizona PIRG Education Fund
Arkansans Against Abusive Payday Lending

(signatories continued on following page)

⁶¹ See, e.g., *CFPB Takes First Action Against "Buy-Here, Pay-Here" Auto Dealer*, Nov. 19, 2014, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-first-action-against-buy-here-pay-here-auto-dealer/>; Larissa Padden, *DOJ Settles "Buy Here, Pay Here" Lawsuit*, Auto Finance News, Feb. 11, 2015, <https://www.autofinancenews.net/allposts/comp-reg/doj-settles-first-federal-buy-here-pay-here-auto-lending-lawsuit/>.

⁶² Jennifer Bjorhus, *Big banks provide cash for payday loans: Commercial banks say that they're just doing their job*, Star Tribune, May 17, 2013, <https://www.startribune.com/big-banks-provide-cash-for-payday-loans/207968101>.

California League of United Latin American Citizens (LULAC)
California Reinvestment Coalition
Center for Economic Integrity (AZ)
Coalition on Homelessness & Housing in Ohio
Consumer Federation of California
Delaware Community Reinvestment Action Council, Inc.
Faith Voices of SW Missouri
Housing and Economic Rights Advocates (HERA) (CA)
Jacksonville Area Legal Aid, Inc.
Missouri Faith Voices
New Economics for Women (CA)
New Economy Project (NY)
New Jersey Citizen Action
North Carolina Justice Center
THE ONE LESS FOUNDATION (PA and CO)
SC Appleseed Legal Justice Center
SC NAACP
Shoreline Study Center (CA)
Statewide Poverty Action Network (WA)
Texas Appleseed
Tzedek DC (DC)
Virginia Citizens Consumer Council
Virginia Organizing
Virginia Poverty Law Center
VOICE-OKC (OK)
Wildfire: Igniting Community Action to End Poverty in Arizona
WISPIRG