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

Re: Comment Letter on the Notice of Proposed Rulemaking on Fair Access to Financial Services (Docket ID OCC-2020-0042)

Ladies and Gentlemen,

Everytown for Gun Safety Support Fund submits this comment on the Notice of Proposed Rulemaking issued by the Office of the Comptroller of the Currency (the **OCC**), entitled *Fair Access to Financial Services*, published in the Federal Register on November 25, 2020 (the "**Proposed Rule**").¹

We believe that the Proposed Rule is inconsistent with prior and existing OCC guidance, with long-standing anti-discrimination policies, and with mainstream corporate governance practices. Further, we believe that there is no basis for the regulatory change set forth in the Proposed Rule given the negative effect it would have on common sense public safety standards and policies that have been put in place by financial institutions to prevent gun violence. These practices follow applicable regulations and are necessary to counteract the inherent risks that certain firearms industry participants have neglected to manage. Indeed, the gun industry already enjoys myriad unjustified special protections and the rule would only further reward sector irresponsibility by offering the gun industry protected class status. The Proposed Rule should therefore be withdrawn.

I. Introduction

The Proposed Rule would impose a new "fair access" standard on U.S. financial institutions with more than \$100 billion in total assets. The fair access standard would prohibit banks from making sound banking decisions based on well-established risk management practices by prohibiting banks from evaluating industry- or category-based considerations when determining what products or services it offers and to whom. Under its terms, the Proposed Rule would:

- force banks to do business with reckless actors by requiring that banks provide any product or service they offer to any person or company unless that person or company fails to meet "quantitative, impartial risk-based standards established in advance," regardless of any qualitative factors or reputational risks;
- prohibit banks from denying products or services to a customer, even based on creditworthiness, if the denial would impact the customer's ability to compete in a market;

¹ 85 Fed. Reg. 75261 (Nov. 25, 2020)



- prohibit banks from coordinating with others to make business decisions that may deny a customer a product or service, and
- likely bar banks from adopting or implementing common sense public safety standards and gun safety codes of conduct, by requiring banks to make each offered financial service available to all persons and companies on “proportionally equal terms.”

Financial institutions have identified serious reputation, compliance, and public safety risks associated with making and selling certain high-powered firearms. While banks and asset managers have taken steps to work with the firearms industry to mitigate these risks, the industry has failed to reciprocate and take action. The Proposed Rule would discount these material non-credit risks and would have the absurd result of forcing banks to assume the inherent risks that firearms manufacturers have neglected to manage. The Proposed Rule would also likely prohibit banks from implementing risk-reducing policies like gun safety codes of conduct and public safety principles, which several major banks have adopted.

These carefully considered gun safety policies are well within the mainstream for America’s largest corporations who work regularly to recognize the reputational risk to their businesses, their shareholders and the communities they serve. Walmart, the nation’s largest retailer, announced that it would not sell firearms to anyone under 21 years of age and would no longer sell assault-style rifles. A growing list of brands including ALDI, CVS, Kroger, Meijer, Walgreens, Wegmans, and Publix have all announced prohibitions on the open carry of firearms in their stores. Asset managers including BlackRock, State Street Global Advisors, and the California State Teachers’ Retirement System have taken steps to ensure that public firearms manufacturers are conducting their business in accordance with common sense public safety practices. The Proposed Rule would be out of step with the mainstream and would prohibit banks from exercising their rights and responsibilities to mitigate the American gun violence epidemic — along with other public health crises such as climate change.

The remainder of this comment letter is structured as follows: **Part II** discusses the Proposed Rule’s Proportionally Equal Terms Requirement and the common sense public safety polices it would ban if implemented. **Part III** discusses the Proposed Rule’s requirement that denials of service be based only on credit-risk and how that requirement would shield reckless firearms dealers and manufacturers. **Part IV** discusses the Proposed Rule’s deviation from prior and existing OCC guidance on industry-based risk evaluations. **Part V** discusses the Proposed Rule’s flawed comparison to long-standing anti-discrimination policies.

II. The Proposed Rule’s Proportionally Equal Terms Requirement Could Restrict Common Sense Policies and Codes of Conduct

The Proposed Rule would require banks to make each offered financial service available to all persons and companies on “proportionally equal terms” (the “**Proportionally Equal Terms Requirement**”). The Proposed Rule does not explicitly define “proportionally equal terms,” but notes that it would include, for example, “ensuring that pricing and denial decisions are commensurate with measurable risks based on quantitative and qualitative characteristics.”²

The preamble to the Proposed Rule suggests that the Proportionally Equal Terms Requirement would not only restrict a bank’s ability to *deny* financial services based on what industry the potential

² 85 Fed. Reg. 75261, 75265



client is in, but would also restrict the ability of banks to require enhanced due diligence for certain industry categories, or make pricing and service determinations conditional on the client meeting certain risk-reducing standards. The preamble points specifically to the example of financial institutions requiring that clients in the fossil fuel industry meet certain risk-reducing environmental standards (e.g. aligning with international climate agreement standards, or controlling a project's carbon emissions sufficiently). The preamble also points to the example of financial institutions setting common sense public safety standards for clients that sell firearms.³

It is therefore likely that the Proportionally Equal Terms Requirement would have the troubling effect of prohibiting banks from adopting risk-reducing standards for clients in the firearms industry, including gun safety codes of conduct, which Everytown for Gun Safety has recommended as essential for responsible businesses. Gun safety codes of conduct and other public safety principles include common sense best practices to manage or contain the risks that come with making and selling firearms — like the foreseeable risks that products are misused or used unlawfully. Financial institutions that engage in business with gun manufacturers and gun dealers have the responsibility — and therefore require the ability — to ensure those customers are engaged in practices that maintain public safety. Any restriction placed on these policies would be contrary to well-established risk management practices.

Every year, gun dealers and manufacturers legally sell millions of guns, and yet hundreds of thousands of these guns are recovered by law enforcement in connection with crimes or are otherwise put to illegal or unauthorized use. Dealers and manufacturers can play an important role in preventing the illegal diversion of firearms and in improving public safety. Lenders, banks, credit card companies, and payment processors have the ability to require their gun dealer clients to engage in business practices that put public safety first and that they take reasonable steps to prevent firearms from falling into the wrong hands. Financial institutions that engage in business with gun manufacturers have an opportunity to ensure their clients are not unnecessarily fueling gun violence, that they are taking affirmative steps to improve gun safety, and that they use their business leverage to promote responsible dealer conduct.⁴

The Proposed Rule vastly overstates the intent and the effect of these carefully considered policies. Specifically, the preamble states that firearms manufacturers have been unfairly debanked in recent years, citing the announcement of Citigroup's U.S. Commercial Firearms Policy.⁵ Under this policy, Citigroup requires certain categories of clients to adhere to common-sense best practices for selling firearms, including requirements that retailers do not sell firearms to someone who hasn't passed a background check or to someone who is under the age of 21. Prospective firearms dealer clients that do not abide by these best practices are more exposed to the risk of a firearm ending up in the wrong hands, which can in turn expose a bank to risk or adverse effects. Prospective clients can on the other hand, simply abide by these best practices and avoid being constrained. And the OCC has a long history of

³ See 85 Fed. Reg. 75261, 75263

⁴ Everytown has written extensively about the opportunity that gun safety codes of conduct present for financial institutions. See <https://bit.ly/2L6YBcd>.

⁵ See 85 Fed. Reg. 75261, 75263



recognizing the need for banks to manage all risks, including compliance and reputational risks.⁶ The Proposed Rule would mark a significant departure from this history and would jeopardize the ability of banks to make sound business decisions based on well-established risk management practices, including the adoption of gun safety codes of conduct or public safety principles.

III. The Proposed Rule Would Force Banks to Assume Risks That Gun Manufacturers Have Neglected to Manage

The Proposed Rule would require banks to provide any product or service it offers to any person or company unless that person or company fails to meet “quantitative, impartial risk-based standards established in advance.”⁷ This requirement would have the effect of forcing a bank to consider only a customer’s creditworthiness, regardless of any qualitative factors or reputational or compliance risk.

The OCC has recognized in both prior and existing guidance that credit risk is one of eight categories of risk, and that certain types of business activities may expose a bank to varying types of risk.⁸ Specifically, in guidance on oil and gas exploration and production lending, the OCC noted that loans to companies in the oil and gas industry can expose a bank to significant reputational risks given that when accidents occur “the loss of life, property, and damage to the environment attracts wide media coverage.”⁹ Some dealers and manufacturers of firearms expose banks to similar risks. For example, assault weapons are exceptionally deadly, often irresponsibly marketed, and commonly used in high-profile mass shootings where the loss of life often attracts similar media coverage.¹⁰

In recent years, banks have attempted to engage with firearms manufacturers and push for better risk management and public safety practices. Following the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida that killed seventeen students and educators and wounded more than a dozen, banks and asset managers asked gun manufacturers to address what steps they had taken to manage the reputation and compliance risks inherently associated with manufacturing assault weapons for civilians, selling weapons to people under the age of 21, or allowing gun sales to proceed without a completed background check.¹¹ But despite these efforts, firearms manufacturers have still not taken steps to manage or control these risks. The Proposed Rule’s prohibition on denying services to a customer for any reason other than a customer’s credit-risk would have the absurd result of forcing banks to assume those same inherent risks that firearms manufacturers have neglected to manage — and that banks have repeatedly brought to the attention of gunmakers. We strongly believe that reckless actors should be held

⁶ See Office of the Comptroller of the Currency. (2019). *Comptroller’s Handbook: Corporate and Risk Governance*, 3 (noting that “[t]he OCC has defined eight categories of risk for bank supervision purposes: credit, interest rate, liquidity, price, operational, compliance, strategic, and reputation. These categories are not mutually exclusive. Any product or service may expose a bank to multiple risks.”). See also Press Release, Office of the Comptroller of the Currency, *Categories of Risk* (1996), available at <https://bit.ly/355sdxA> (noting that “[t]he OCC has defined nine categories of risk for bank supervision purposes. These risks are: Credit, Interest Rate, Liquidity, Price, Foreign Exchange, Transaction, Compliance, Strategic and Reputation. These categories are not mutually exclusive; any product or service may expose the bank to multiple risks.”)

⁷ 85 Fed. Reg. 75261, 75265

⁸ *Supra* note 6.

⁹ See Office of the Comptroller of the Currency. (2016). *Comptroller’s Handbook: Oil and Gas Exploration and Production Lending*, 17, available at <https://bit.ly/38XqATV>.

¹⁰ For more information on assault weapons and high capacity magazines see Everytown for Gun Safety, Assault Weapons and High-Capacity Magazines, March 2019, available at <https://bit.ly/387xk2s>.

¹¹ See Ross Kerber, *BlackRock Poses Tough Questions for Gunmakers and Sellers*, Reuters (March 2, 2018) <https://bit.ly/3888YFG>.



accountable and that banks should have the ability to terminate these relationships or refuse to start them in the first place, consistent with well-established risk management practices.

IV. The Proposed Rule Goes Further Than Prior OCC Guidance and Is Inconsistent With Existing OCC Guidance

The OCC states that the Proposed Rule is simply a codification of prior OCC guidance.¹² However, the Proposed Rule goes far beyond any prior guidance. Further, the Proposed Rule does not address or take into account existing OCC guidance that is inconsistent with the Proposed Rule.

A. The Proposed Rule Goes Further Than Prior Guidance

In supporting its statement that the Proposed Rule is merely a codification of prior guidance, the OCC points to examples where it has admonished or discouraged banks from refusing to provide products or services to entire industry categories.¹³ However, the Proposed Rule goes far beyond discouraging banks from terminating entire categories of customers. Indeed, the Proposed Rule would also require that banks make each offered financial service available to all persons and companies on “proportionally equal terms,” would prohibit banks from denying products or services based on anything other than the customer’s creditworthiness, would prohibit a bank from denying products or services to a customer even based on creditworthiness if the denial would impact the customer’s ability to compete in a market, and would prohibit banks from coordinating with others to make business decisions that may deny a customer a product or service.

If implemented, the Proposed Rule would be an unprecedented action from the OCC, or any other prudential bank regulator, and would extend the gun industry’s already unparalleled federal protections. The gun industry already benefits from a variety of unjustified special protections, including the exclusion of firearms from basic consumer product safety regulations, protections from legal liability for many dangerous and irresponsible practices, and limitations on federal oversight by its primary regulator, the Bureau of Alcohol, Tobacco, Firearms and Explosives. The Proposed Rule goes far beyond prior guidance — and in so doing, gives the firearms industry another unjustified privilege by offering some form of protected class status and by forcing banks to provide the industry with capital, credit, and financial services despite the associated risks.

B. The Proposed Rule Does Not Address or Take Into Account Existing OCC Guidance That Is Inconsistent With the Proposed Rule

In addition to the Proposed Rule’s scope and impact being far broader than the prior guidance cited in the Proposed Rule, the Proposed Rule also fails to address or take into account existing OCC guidance that is inconsistent with the Proposed Rule. The Proposed Rule suggests that restrictions set by financial institutions on certain firearms-related transactions are unfair and “based on criteria unrelated to safe and sound banking practices.”¹⁴ However, in existing public guidance, the OCC has allowed and even actively encouraged banks to treat categories of business activity and industry segments differently. The OCC’s Merchant Processing Handbook states:

¹² See Press Release, Office of the Comptroller of the Currency, Proposed Rule Would Ensure Fair Access to Bank Services, Capital, and Credit (November 2020), available at <https://bit.ly/2JJM66a>.

¹³ 85 Fed. Reg. 75261, 75263

¹⁴ *Id.*



“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.”¹⁵

The OCC's Oil and Gas Exploration and Production Lending booklet highlights this by advising banks that lending to the oil and gas industry carries elevated risks, including operational, compliance, and reputational risks.¹⁶ This guidance is inconsistent with the Proposed Rule's prohibition on considering category- or industry-based risks. It's unclear how the OCC plans to square the requirements of the Proposed Rule with its existing guidance.

V. The OCC's Interpretation of Fair Access Is Highly Unusual and Its Comparison to Long-Standing Anti-Discrimination Policies Is Flawed

In the preamble to the Proposed Rule, the OCC suggests that the “fair access” requirement set forth by the Proposed Rule is simply a continuation of a longstanding history of anti-discrimination policies, such as the Equal Credit Opportunity Act, Fair Housing Act, and Community Reinvestment Act. However, the Proposed Rule is highly unusual and is a significant departure from the anti-discrimination policies the OCC cites. Anti-discrimination laws, like those cited in the Proposed Rule, generally protect people, not specific industries. The Equal Credit Opportunity Act prohibits credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or the receipt of public assistance.¹⁷ The Fair Housing Act prohibits housing discrimination on the basis of race or color, religion, sex, national origin, familial status, or disability.¹⁸ The Community Reinvestment Act encourages depository institutions to meet the credit needs of low- and moderate-income neighborhoods.¹⁹

The OCC says that it is in accordance with this history that the Proposed Rule prohibits banks from denying products or services to customers “based on their individual characteristics and not on their membership in a particular category of customers.”²⁰ By making an analogy to core civil rights protections, the Proposed Rule apparently purports to suggest that it is offering a form of protected class status. However, the only categories of customers that the Proposed Rule identifies as being unfairly treated, are industry segments, including private prisons, the fossil fuels industry, and firearms manufacturers. Treating the firearms industry and other industry-segments as akin to a protected class under civil rights law is an unprecedented action taken by a prudential banking regulator, is anti-free market, and would effectively force banks to do business with industry participants regardless of any qualitative factors the bank may want to consider. Industry segments are not people, and common sense policies requiring that high-risk industries comply with public safety best practices are not based on individual identities, but rather based on the business activities a company is engaged in and the steps

¹⁵ Office of the Comptroller of the Currency. (2016). Comptroller's Handbook: Merchant Processing, 14, available at <https://bit.ly/3b2RTir>

¹⁶ See Office of the Comptroller of the Currency. (2016). Comptroller's Handbook: Oil and Gas Exploration and Production Lending, 14-17, available at <https://bit.ly/38XqATV>

¹⁷ 15 U.S.C. 1691 et seq.

¹⁸ 42 U.S.C. §§ 3601-19

¹⁹ 12 U.S.C. 2901 et seq.

²⁰ 85 Fed. Reg. 75261, 75262



they are taking to mitigate the risks that come with those practices. It is critical that banks maintain the ability to make business decisions based on these factors in accordance with longstanding risk management practices.

Everytown for Gun Safety Support Fund thanks the OCC for their consideration of our comments. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Madison Roberts
Counsel
Everytown for Gun Safety Support Fund