December 30, 2020

Office of the Comptroller of the Currency
Brian P. Brooks, Acting Comptroller
400 Seventh St., SW
Washington, DC 20219
**VIA REGULATIONS.GOV**

Re: Docket ID OCC-2020-0042, Fair Access to Financial Services
Comments on Proposed Rule and Petition for Rulemaking

Dear Mr. Brooks:

The undersigned organizations (collectively, the "Criminal Justice Commenters") submit the following comments and petition for rulemaking in response to the notice of proposed rulemaking published on November 25, 2020 (the "NPRM").[1] The rule proposed by the Office of the Comptroller of the Currency ("OCC") purports to address issues regarding "fair access" to services offered by banks.[2] Although the proposed rule nominally applies to both individuals and business entities, the rule's text and the OCC's stated justifications make clear that the NPRM is motivated entirely by a desire to shield certain business entities from scrutiny of their operations.

The Criminal Justice Commenters submit these comments because the OCC's stated rationale for the proposed rule includes a reference to certain banks' decisions to cease lending to operators of for-profit contract correctional facilities.[3] Some of our organizations actively advocate for banks to cease lending to companies that immorally profit from mass incarceration. Others of us prioritize different types of advocacy with similar goals in mind. What brings us together in opposition to the proposed rule is a shared belief that ethical lending practices are beneficial to society at large. As relevant to criminal justice policy, ethical lending has the potential to benefit communities impacted by mass incarceration by encouraging public debate and incentivizing innovative approaches to financial services. The proposed rule would prohibit ethical lending practices and for that reason we oppose it in its current form.

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[1] 85 Fed. Reg. 75261 (Nov. 25, 2020).

[2] For purposes of this letter, "bank" refers to any institution subject to the OCC's regulatory jurisdiction, and is synonymous with the term "covered bank" as defined in the proposed rule. We would note that the proposed definition of "covered bank" purports to limit the applicability of the rule to large banks. In actuality, however, the rule only states that smaller banks are "presumed not to meet the definition of a covered bank." Proposed § 55.1(a)(1)(ii) But if the OCC determines that the presumption does not apply, the proposed rule provides no objectively defined method by which a bank can challenge the OCC's determination. Accordingly, it appears that the OCC retains the unchecked right to apply the rule to any bank subject to the agency's jurisdiction, regardless of size.

[3] NPRM, 85 Fed. Reg. at 75263, n.9 and accompanying text.

As set forth in greater detail below, we believe that the proposed rule is ill-conceived and impossible to implement fairly. In addition, we believe that the proposed rule overlooks a type of discrimination in the banking sector that is far more deleterious, namely barriers to access faced by formerly incarcerated people. Thus, to the extent that the OCC does wish to issue a rule regarding discrimination in banking, we believe that the rule should also address unreasonable barriers based on customers' history of criminal conviction or incarceration.

## I. Society Benefits from a Marketplace of Ideas

The proposed rule seeks to prohibit banks from making qualitative judgments regarding the ethics of financing certain types of businesses. There is, of course, a robust and successful movement that encourages financial investors to emphasize environmental, social, and governance ("ESG") values when making investing decisions.[4] Some advocates have successfully applied the framework of ESG investing to other areas of finance, including bank lending. The growth of this type of ethics-based financial management is a success story with broad social benefits. Unfortunately, the OCC's proposed rule seeks to terminate the ESG movement in the banking sector (at least among OCC-chartered banks).

By prohibiting banks from considering the qualitative effects of a potential borrower's "legal business endeavors" or "lawful activity,"[5] the OCC is effectively transforming the mere legality of a business into a means of compelling the extension of credit without regard to social harm inflicted by the business's operations. This is not only poor regulatory policy, but is also woefully myopic. For a large portion of U.S. history, slavery was legal and financial institutions were intimately involved in the mechanics of the slave trade.[6] More recently, the twentieth century movement against apartheid relied on public campaigns seeking to curtail bank lending in South Africa.[7] Large-scale campaigns for the use of ESG principles in banking and financial services are a critical part of our public discourse and should be welcomed by regulatory agencies that are tasked with promoting the public welfare.

The OCC's proposed rule would force banks to ignore morally problematic business practices when making lending decisions—a policy that neither promotes the soundness of the banking system nor produces socially desirable results.

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[4] *See e.g.*, Paul Sullivan "Investing in social good is finally becoming profitable," New York Times (Aug. 28, 2020).
[5] NPRM, 85 Fed. Reg. at 75265.
[6] *See e.g.*, Rafael I. Pardo, *Bankrupted Slaves*, 71 Vanderbilt L. Rev. 1071 (2018) (discussing the use of enslaved people as collateral in secured lending).
[7] Nerys John, *The Campaign against British Bank Involvement in Apartheid South Africa*, 99 African Affairs 415 (2000).

## II. The Proposed Rule's Exclusive Reliance on Quantifiable Standards is Arbitrary and Functionally Impossible to Implement

The proposed rule would prohibit banks from making lending decisions based on qualitative factors that impact borrowers' credit risk. Although the rule does acknowledge the importance of risk scoring, it specifies that any such scoring must be quantitative.[8] This approach bespeaks a poor understanding of risk analytics, and is belied by disclosures made by the private prison industry itself.

Just because a credit risk is ill-suited to quantitative measurement does not mean the risk is not real. The dominant operators of for-profit contract correctional facilities in the United States routinely advise investors of certain risks related to normative policy debates over the companies' operations and business models. These risks include the potential for legislative action that reduces the use of incarceration,[9] local community opposition to the companies' operations,[10] and reevaluation of the proper scope of outsourcing governmental functions.[11] All of these debates are value-laden and ultimately require voters, legislative bodies, and government agencies to make subjective determinations. Those subjective determinations pose real financial risk to private prison operators. But for purposes of the proposed rule, a bank would be unable to consider these risks when making lending decisions. This is both unsound as a matter of banking supervision, and unwise as a matter of broader public policy.

## III. The Proposed Rule Fails to Address Harm Caused by Unjustified Discrimination against Consumers with Criminal Records

The OCC claims that the proposed rule is necessary because banks' use of qualitative factors in lending decisions is allegedly "inconsistent with" with their "legal responsibility to provide fair access to financial services."[12] Curiously, the OCC does not specify what law imposes this obligation on banks. Although the NPRM does reference a "broad and longstanding anti-discrimination principle" in banking,[13] the statutes cited in support of this principle prohibit very specific types of discrimination against individuals.[14]

The only direct statutory authority that the OCC provides for the proposed rule is 12 U.S.C. § 1, as amended and reenacted by section 314 of title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[15] Nothing in this statute expressly authorizes this type or rulemaking

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[8] Proposed § 55.1(b)(2).
[9] GEO Group, Inc., Annual Report (Form 10-K) at 33 (Feb. 26, 2020); Corecivic, Inc., Annual Report (Form 10-K) at 39 (Feb. 20, 2020).
[10] GEO Ann. Rpt. at 36; CCA Ann. Rpt. at 39.
[11] GEO Ann. Rpt. at 34; CCA Ann. Rpt. at 38.
[12] NRPM, 85 Fed. Reg. at 75263-64.
[13] *Id.* at 75262.
[14] *Id.* (citing the Equal Credit Opportunity Act, the Fair Housing Act, and the Community Reinvestment Act).
[15] Pub L. 111-203 (Jul. 21, 2010).

by the OCC. The OCC relies on one oblique reference in section 314 to "fair access to financial services;" yet, the construction of this phrase must be informed by section 301 of the Dodd-Frank Act, which lists the purposes of title III, none of which include promoting the right of corporate entities to access borrowed capital.[16]

Nonetheless, to the extent that the OCC decides to establish new anti-discrimination standards untethered to statutory language, the Criminal Justice Commenters would ask that the OCC use the opportunity to address a much more common and harmful type of discrimination, namely barriers facing formerly incarcerated people who wish to access financial services.[17] In light of this societal problem, we hereby petition, pursuant to 5 U.S.C. § 553(e), for the OCC to promulgate a rule protecting consumers from unwarranted discrimination in access to financial services based on a history of criminal conviction or former incarceration. Specifically, we request that a further record be compiled as part of the current rulemaking, after which the OCC should issue an amended rule that addresses broader types of financial discrimination against natural persons.

## IV. Conclusion

For the reasons stated above, the organizations listed below oppose the proposed rule. If the OCC insists on forging ahead with the rule, then it should be amended to address unfair barriers to financial service facing marginalized communities including formerly incarcerated people.

Sincerely,

American Friends Service Committee
Beneficial State Foundation
Families Belong Together
Human Rights Defense Center
In the Public Interest
Make the Road New York
MomsRising
Presente.org
Prison Policy Initiative
Worth Rises

[16] *Id.* § 301 (codified as 12 U.S.C. § 5401).
[17] *See e.g.*, David Benoit, "Ex-inmates struggle in a banking system not made for them," Wall Street Journal (Oct. 31, 2020); Taja-Nia Y. Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination against Ex-Offenders*, 80 N.Y.U. L.Rev. 1237 (2005).