Following input from over 35,000 stakeholders, the OCC has issued a final rule that ensures fair access to banking services provided by large banks.

The Office of the Comptroller of the Currency has issued a final rule that ensures fair access to banking services provided by large national banks, federal savings associations, and federal branches and agencies of foreign bank organizations. Specifically, the fair access rule applies to banks with more than $100 billion in assets that may exert significant pricing power or influence over sectors of the national economy.

Codifying OCC guidance. The fair access rule, which is effective April 1, 2021, codifies more than a decade of OCC guidance stating that banks should conduct risk assessment of individual customers, rather than make broad-based decisions affecting whole categories or classes of customers, when provisioning access to services, capital, and credit. The fair access rule also implements language included in Title III of the Dodd-Frank Act which charged the OCC with "assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction." The statute expanded the OCC’s mission to include fair access separately from fair treatment following the last financial crisis during which the government had provided substantial public resources to support the banking system.

Impartial, risk-based standards. Covered banks will still be able to determine their product lines and geographic markets and are free to make legitimate business decisions about what and whom to serve. However, the fair access rule requires these covered banks to make those products and services they choose to offer available to all customers in the communities they serve, based on consideration of quantitative, impartial, risk-based standards established by the bank. A covered bank’s decision to deny services based on such an objective assessment would not violate the bank’s obligation to provide fair access. Finally, a covered bank’s decision not to offer a specific kind of financial product or service or not to compete in a geographic market is unaffected.

The OCC first proposed the fair access rule in November 2020 (see Banking and Finance Law Daily, Nov. 30, 2020). During the comment period, the agency received comments and suggestions from over 35,000 stakeholders, which included approximately 28,000 form letters collected by a single organization. A number of stakeholders, representing trade associations and various advocacy groups, had called upon the OCC to withdraw its proposal since the agency did not have authority to issue it (see Banking and Finance Law Daily, Jan. 5, 2021; Jan. 7, 2021; and Jan. 8, 2021).

"Show their work." Acting Comptroller of the Currency Brian P. Brooks, who is departing from the OCC on the same date the fair access rule was released, said, "When a large bank decides to cut off access to charities or even embassies serving dangerous parts of the world or companies conducting legal businesses in the United States that support local jobs and the national economy, they need to show their work and the legitimate business reasons for doing so. He added, "As Comptrollers and staff in previous administrations have made clear in speeches, guidance, and testimony, banks should not terminate services to entire categories of customers without conducting individual risk assessments. It is inconsistent with basic principles of prudent risk management to make decisions based solely on conclusory or categorical assertions of risk without actual analysis. Moreover, elected officials should determine what is legal and illegal in our country."
Both the American Bankers Association and the Bank Policy Institute, which were critical of the OCC’s proposal, released statements panning the final rule.

Hugh Carney, the ABA’s senior vice president of prudential regulation, stated, “We are disappointed that the OCC has chosen to rush through this ill-advised rulemaking on the Acting Comptroller’s last day in office. In addition to short-circuiting the traditional rulemaking process and failing to take into account thoughtful comments from thousands of stakeholders, we believe it is a mistake for the OCC to mandate which businesses banks must service.” He added, “Given those procedural and substantive concerns, we urge that this rule not take effect.”

A statement by BPI President and CEO Greg Baer noted, “We are disappointed the Acting Comptroller chose to fast-track the final approval of this hastily conceived and poorly constructed rule on his last day in office. The rule lacks both logic and legal basis, it ignores basic facts about how banking works, and it will undermine the safety and soundness of the banks to which it applies. Its substantive problems are outweighed only by the egregious procedural failings of the rulemaking process, and for these reasons it is unlikely to withstand scrutiny.”

Companies: American Bankers Association; Bank Policy Institute

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