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OCC Finalizes Rule Requiring Large Banks to Provide Fair Access to Services, Capital, and Credit

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In a final act of his tenure, Brian Brooks, the acting Comptroller of the Currency (OCC) on January 14 finalized a rule to ensure "fair access to banking services provided by large national banks, federal savings associations, and federal branches and agencies of foreign bank organizations." Brooks announced that he would be stepping down from his role on the same day the rule was finalized. OCC Chief Operating Officer Blake Paulson will assume the role as acting comptroller of the currency.

Under the rule, the nation's largest banks may still determine their product lines and geographic markets and make legitimate business decisions about what and whom they serve, so long as those decisions are "based on consideration of quantitative, impartial, risk-based standards established by the bank." By way of background, some large banks have been pressured to forgo making loans to certain sectors of the economy, such as energy firms in the fossil-fuels market, based upon public actions by certain groups. In addition, Operation Chokepoint was a targeted effort by certain parts of the Obama Administration to cut off access to the high-cost lending industry.

According to Brooks, the rule is aimed at preventing banks with more than $100 billion in assets from denying loan applications and refusing to provide services to certain industries and entire categories of customers without conducting "individual risk assessments." Brooks stated, "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."

After considering more than 35,000 stakeholder comments during the public comment period that ended on January 4, the OCC determined to exclude a section from the initial proposal which would have required that a covered bank not deny any person a financial service the bank offers "when the effect of the denial is to prevent, limit, or otherwise disadvantage the person: (1) from entering or competing in a market or business segment; or (2) in such a way that benefits another person or business activity in which the covered bank has a financial interest." The agency concluded that this requirement "would have resulted in regulatory burden without contributing to the primary objective of the rule." In its press release, the OCC stated the remainder of the rule is "substantially unchanged from the proposal."

The rule, which was set to go into effect in April 2021, was finalized in just 10 days after its public comment period ended—a surprisingly quick turnaround for a federal rule, particularly given the large volume of comments and the opposition to the rule by the banking industry.

Despite the softening of the rule from its initial proposal, the future of the rule is unclear. On January 28, 2021, the OCC announced, after the White House had ordered a halt to all final rules that had not been published in the Federal Register, that it was pausing the publication of the rule in the Federal Register to “allow the next confirmed Comptroller of the Currency to review the final rule and the public comments the OCC received, as part of an orderly transition.” Given that the rule was strongly opposed by Democratic lawmakers and the industry, it is unlikely the rule will survive in its current form, if at all.

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