January 4, 2021

Brian Brooks
Acting Comptroller of the Currency
400 7th St SW
Washington, DC 20219

Re: Comments on Proposal addressing "Fair Access to Financial Services," Docket ID: OCC-2020-0042 RIN 1557-AF05.

Dear Comptroller Brooks,

We write in opposition to the proposed rule addressing "Fair Access to Financial Services," Docket ID: OCC-2020-0042 RIN 1557-AF05. If adopted, the rule will harm the banking industry by forcing lenders to make credit decisions without considering important factors like reputational harm from organizations engaged in risky or unsafe business practices. This rule will further curtail the steps that organizations like The Brady Center ("Brady") have taken towards encouraging firearm dealers to adopt safe business practices.[1] Finally, the Office of the Comptroller of Currency ("OCC") improperly relies upon the anti-discrimination protections created by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") to propose this regulation.

## I. Introduction

Brady was founded in 1974 and is one of the nation's most longstanding nonpartisan, nonprofit organizations dedicated to reducing gun violence. Brady works across Congress, the courts, and communities, uniting gun owners and non-gun owners alike to take action, not sides, and end America's gun violence epidemic. Since 2000, our organization has carried the name of former White House press secretary Jim Brady, who was shot and severely injured in the assassination attempt on President Ronald Reagan, and his wife, Sarah, who led the fight to pass

[1] THE BRADY CENTER, THE PRIVATE SECTOR'S ROLE IN REDUCING THE GUN VIOLENCE EPIDEMIC IN AMERICA, (2018) https://brady-static.s3.amazonaws.com/Report/ThePrivateSectorsRoleInReducingTheGunViolenceEpidemicInAmerica.pdf.

federal legislation requiring background checks for gun sales. Through a combination of education, research, policy advocacy, and litigation, Brady has created a comprehensive approach to preventing firearm violence, including strengthening the background check system, empowering high risk communities, promoting safe storage of firearms, and advocating for transparency and accountability in the firearm industry.

## II. The proposed regulation will force banks to do business with entities without engaging in a complete analysis of their creditworthiness

The proposed regulation is inconsistent with numerous obligations that federal law currently imposes on banks to assess the risk factors of their potential customers. It is critically important that banks retain the ability to scrutinize and engage in thorough due diligence of borrowers before lending to them, and retain the freedom to decide not to lend if they are unable to conduct thorough due diligence or are unsatisfied with the results. This is particularly true when considering whether to finance firearm industry businesses, where an unsafe business practice by a potential borrower can cause serious harm to American citizens.

Among other things, when making a lending decision, lenders review a number of factors beyond simply a borrower's financial creditworthiness, including reputational harm and liability. The OCC itself categorized "reputation" as a category of risk in its 1996 risk assessment guidance:

> "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 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 present in activities such as asset management and agency transactions.
>
> The assessment of reputation risk recognizes the potential impact of the public's opinion on a bank's franchise value. This risk is inherent in all bank activities. Banks which actively associate their name with products and services, such as with fiduciary services, are more likely to have higher reputation risk exposure. As the bank's vulnerability to public reaction increases, its ability to offer competitive products and services may be affected."[2]

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[2] *Hearing before the Committee on Banking and Financial Services*, House of Representatives, 104th Cong. 141 (1996).

The OCC has since broadened the definition of risk from earnings and capital to include "risk to current or projected financial condition and resilience arising from negative public opinion,"[3] acknowledging that reputational risk is a key driver in lending decisions.

Reputational risk derived from dealing with an ethically contentious industry is well documented. For example, several cities in California and Washington voted to terminate their relationship with Wells Fargo after it participated in a syndicated loan to finance the Dakota Access pipeline.[4] This kind of reputational risk could be catastrophic for a bank, which relies on the opinions of a broad array of stakeholders, as the OCC itself has acknowledged,[5] to uphold its financial stability in the market. Stakeholder expectations go well beyond what a bank is legally obligated to do and encompass a variety of responsibilities, from customer service to corporate citizenship, all the way to outright macroeconomic responsibility.[6] Lenders who are forced to do business with companies that engage in risky or unsafe business practices could lose investors, employees, and valued customers who feel strongly about the lender's reputation and approach to ethical concerns.

Over the years, lenders have ceased or limited their business with certain industries as a result of reputational concerns of the particular industry. For example, banks have become increasingly aware of the reputational and liability risks of conducting business with firearm manufacturers and dealers that oppose common sense, safe firearm distribution practices. Banks are aware that growing majorities of Americans favor action that would decrease gun violence: 64% support stricter laws on firearm sales, 96% support universal background checks, and 75% favor a 30-day waiting period for all firearm sales.[7] Moreover, 89% of Americans report being more or equally willing to do business with a company whose CEO has acted on gun violence,

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[3] OFFICE OF THE COMPTROLLER OF CURRENCY, COMPTROLLER'S HANDBOOK: LARGE BANK SUPERVISION 64 (2019).

[4] Lynda V. Mapes, *Seattle City Council Votes to Cut Ties with Wells Fargo over Dakota Access Pipeline Lending*, Seattle Times (Feb. 22, 2017), https://www.seattletimes.com/seattle-news/environment/seattle-city-council-to-vote-on-pulling-billions-from-wells-fargo/.; *see* Felicia Alvarez, *City of Davis Votes to Divest from Wells Fargo Bank*, Davis Enter. (Feb. 8, 2017), https://www.davisenterprise.com/local-news/city-of-davis-votes-to-divest-from-wells-fargo-bank/; Kate Cagle, *In Solidarity with Standing Rock, City Moves Forward to Cut Ties with Wells Fargo*, Santa Monica Daily Press (Feb. 16, 2017), https://www.smdp.com/in-solidarity-with-standing-rock-city-moves-forward-to-cut-ties-with-wells-fargo/159811.; Tom Lochner, *City Will Withdraw Wells Fargo Business - Institution "Will Have to Compete with Other Banks" for Future City Business*, Berkeley Voice (June 9, 2017) at 1A; Riley McDermid, *Alameda Moves to Divest More than $36 Million from Wells Fargo*, S.F. Bus. Times (Feb. 23, 2017)), https://www.bizjournals.com/sanfrancisco/news/2017/02/23/alameda-moves-to-divest-more-than-36-million-from.html.

[5] OFFICE OF THE COMPTROLLER OF CURRENCY, COMPTROLLER'S HANDBOOK: LARGE BANK SUPERVISION 64 (2018) (listing counterparties, correspondents, investors, regulators, and employees).

[6] Sergio Scandizzo, An Asset-Liability View of Banks' Reputation in REPUTATIONAL RISK MANAGEMENT IN FINANCIAL INSTITUTIONS 21, 25 (Thomas Kaiser & Petra Merl eds., 2014).

[7] Gallup Poll (2017 and2019)

including 45% who are expressly more interested.[8] Banks also know that gun violence hurts employees, customers, communities, and the American economy as a whole. Gun violence is estimated to cost the U.S. economy at least $229 billion annually,[9] and data from U.S. cities shows that each local gun homicide was associated with as many as 80 fewer jobs, 2 fewer businesses, and a 20-point drop in average credit scores.[10]

Further, the OCC has an affirmative duty to protect the safety and soundness of the institutions it oversees.[11] Given the systemic reputational risk to lenders posed by firearm businesses with unsafe sales and distribution practices, the OCC should support the current firearm control safety efforts by banks and provide guidance on how to better manage such risks, rather than punishing banks already taking these important steps. The proposed rule contradicts OCC's own core mandate.

Finally, the OCC is not well suited to weigh the benefits against the reputational damage that a bank may experience as a result of dealing with a given third party. The OCC itself instructs that "[t]he integrity and effectiveness of the examination process depends upon its being kept completely free from any appearance of being influenced by political considerations."[12] Regulators rarely speak with customers, employees, shareholders or community members, especially when compared with the rate with which banks conduct these activities. The OCC should withdraw the proposed regulation and allow banks, who are much closer to reputational risk issues, to make appropriate credit lending decisions.

## III. The OCC improperly interprets Dodd-Frank's anti-discrimination provisions as a legal basis to protect entire industries

The OCC claims this regulation would enforce the protections envisioned by Dodd-Frank, which "recognized a broad and longstanding anti-discrimination principle that individuals are entitled to be treated fairly by national banks and Federal savings associations." However, the anti-discrimination principle was intended to shield protected classes of individuals rather than particular industry sectors, building upon the original definitions set forth by the Equal Credit Opportunity Act, Fair Housing Act, Community Reinvestment Act, and the Home Mortgage Disclosure Act. For example, Dodd-Frank modified the Home Mortgage Disclosure Act to address discrimination patterns in lending to individuals in protected categories, such as race, sex,

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[8] "Business Leadership + Anti-Gun Violence in America" (Edelman, 2019).

[9] "A State-by-State Examination of the Economic Cost of Gun Violence" (U.S. Congress Joint Economic Committee Democratic Staff, 2019).

[10] "A Neighborhood-Level Analysis of the Economic Impact of Gun Violence" (Irvin-Erickson et al., 2017).

[11] OFFICE OF THE COMPTROLLER OF CURRENCY, MISSION STATEMENT, https://www.occ.treas.gov/about/index-about.html; 12 C.F.R. § 1.5.

[12] *See* OFFICE OF THE COMPTROLLER OF CURRENCY, OCC ETHICS RULES—A PLAIN ENGLISH GUIDE, https://careers.occ.gov/careers/apply/occ-ethics-rules-a-plain-english-guide.html#ethics-rules (last visited Nov. 6, 2019).

ethnicity, or age.[13] Nowhere in the legislative history does Congress provide any indicia of an intent to protect entire industries from discrimination based on reputational and ethical factors considered by lending institutions. The very idea of protecting an entire industry from discrimination is absurd.

The OCC also claims that Dodd-Frank mandates "fair access to financial services, and fair treatment of customers by the institutions and other persons subject to its jurisdiction."[14] At most, the fair access provisions apply to both individuals and organizations of protected classes seeking to do business with a particular lender. Yet even under a broad application, it is a step too far to read Dodd-Frank's fair-access provisions to protect entire industries. As noted in the OCC's Semiannual Risk Perspective from 2015, the agency refers to its work on "fair access" as "assess[ing] banks' efforts to meet the needs of creditworthy borrowers and monitor banks' compliance with the Community Reinvestment Act (CRA), fair lending laws, and other consumer protection laws."[15] The current proposal is inconsistent with the OCC's previous interpretations of "fair access" and would significantly alter the OCC's oversight responsibilities in comparison to its traditional concern for "fair access" and "discrimination." The firearm industry is not a protected class and banks' decisions regarding dealings with the industry do not contravene any of the aforementioned laws. The proposed regulation strays from the OCC's statutory mandate to protect the segments of the banking population that are actually being discriminated against based on race, sex, ethnicity, or age. The OCC oversteps its authority under Dodd-Frank in promulgating this regulation and ignores its own traditional view of discrimination.

Moreover, the firearm industry already enjoys several federal-level legal protections that other American industries do not have, including:

- The Protection of Lawful Commerce in Arms Act, which provides the firearm industry with unique immunity from civil negligence claims and often allows firearm companies to escape accountability to victims even if their business practices are unreasonably dangerous;
- The Tiahrt Amendment's prohibition on ATF's disclosure of certain firearm trace data, which shields from public scrutiny the businesses that transfer firearms that are recovered by law enforcement and used in violent crime;
- Certain provisions of the Firearm Owners Protection Act, which weakens the ATF's oversight and enforcement authority over non-compliant firearm businesses; and

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[13] 12 C.F.R. § 1003.

[14] Proposed Regulation addressing "Fair Access to Financial Services," Docket ID: OCC-2020-0042 RIN 1557-AF05, at 4, https://www.occ.gov/news-issuances/federal-register/2020/nr-occ-2020-156a.pdf.

[15] OFFICE OF THE COMPTROLLER OF CURRENCY, SEMIANNUAL RISK PERSPECTIVE FROM NATIONAL RISK COMMITTEE, https://www.occ.treas.gov/publications-and-resources/publications/semiannual-risk-perspective/files/semiannual-risk-perspective-fall-2015.html.

- The firearms exemption to the Consumer Products Safety Act, which exempted firearms from CPSC authority to ensure that firearms are designed or built safely.

Given these unique regulatory protections relating to tort liability, transparency, and product liability issues, among others, the OCC's strained efforts to protect the firearm industry are unnecessary. Indeed, to promote the public safety, policymakers should repeal these special protections for the gun industry rather than create new ones. The proposed rule, however, would further shield the firearm industry from answering to American consumers, as well as prevent other affected entities from adopting business practices that promote public safety while unfairly exposing them to reputational and liability risks.

## IV. Conclusion

Thank you for your attention to this rule making and again we urge you to reject or withdraw "Fair Access to Financial Services," Docket ID: OCC-2020-0042 RIN 1557-AF05.

Sincerely,

Christian Heyne

Christian Heyne
Vice President of Policy