AMERICA'S FUTURE

AMERICA'S FUTURE COMMENTS TO
OFFICE OF THE COMPTROLLER OF THE CURRENCY AND
FEDERAL DEPOSIT INSURANCE CORPORATION
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING
PROHIBITION ON USE OF REPUTATION RISK BY REGULATORS
(Docket No. OCC-2025-0142; FDIC RIN 3064-AG12)
(December 29, 2025)

AMERICA'S FUTURE, INC.

These comments relating to the above-referenced notice of proposed rulemaking are submitted on behalf of America's Future, where I serve as Executive Director. America's Future ("AF") is one of the nation's oldest policy-oriented nonprofit organizations, having been founded in 1946. America's Future fulfills its mission by educating citizens to be informed and active in their communities, by defending individual rights and the Constitution, and by protecting families and our children — the cornerstone of the Republic and the promise of the future.

SUMMARY

The Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) have undertaken a joint rulemaking designed to codify each entity's prohibition on the exclusive use of reputation risk in exercising their supervisory roles over regulated entities. This Notice of Proposed Rulemaking (NPRM) would prohibit these two primary bank regulators from abusing their power to dissuade regulated banks from providing services to politically disfavored customers on the basis of so-called "reputation risk" — so long as they are not engaging in illegal or financially risky activity. This is the right policy, and the proposed rulemaking should proceed to the issuance of a final rule on this topic.

BACKGROUND

For some years, America's Future has been concerned that there has been a growing trend by regulators, particularly in certain "blue states," to use their authority to engage in political warfare against conservative organizations. Regulators with responsibility for overseeing the banking industry have been no exception. Without access to banking and other services, individuals, for-profit corporations, and nonprofit organizations such as America's Future can be crippled, and even destroyed. Although the methods by which federal bank regulation has been weaponized is not well understood, there are clear examples of this abusive activity being carried out at state levels. There is every reason to take prophylactic action to make it more difficult to commit such abuses at the federal level.

It is particularly appropriate for this joint effort, as together, the OCC and FDIC regulate over 90 percent of banks in the United States, representing 80-85 percent of total U.S. banking

assets. Starting in the 1990s, these agencies began using risk-based factors in their supervision of regulated entities, and those factors included what is termed "reputation risk." *See* 90 *Fed. Reg.* 48826 n.2. At the state level, reputation risk has been used by bank regulators in certain states insisting that banks terminate business relationships with certain customers. To mitigate the misuse of reputation risk, earlier this year, the OCC and the FDIC removed reputation risk from their manuals and guidance, and this rulemaking institutionalizes this restriction by codifying that change. The NPRM begins by defining "reputation risk."

> ***Reputation risk*** means any risk, regardless of how the risk is labeled by the institution or regulators, that an action or activity, or combination of actions or activities, or lack of actions or activities, of an institution could negatively impact public perception of the institution for reasons **not clearly and directly related to the financial condition** of the institution. [90 *Fed. Reg.* 48834-35 (emphasis added).]

The proposed rules prohibit the agencies from taking a supervisory or other "adverse action" against a regulated bank for reputation risk which is wholly unrelated to its financial condition, such as the political views of its customers.

To show the need for these changes, these comments provide a real-life illustration of how "reputation risk" was weaponized by New York state regulators with some authority over banks and insurance companies, in an attempt to suppress or even destroy the activities of an advocacy group which the regulators in that state opposed for political reasons.

COMMENTS

This NPRM is not designed to address a theoretical threat, but rather one which is a clear and present danger to political advocacy in America. New York State regulators have shown a desire to misuse their powers to pressure banks to "de-bank" — that is, to discontinue doing business with — those businesses, individuals, and advocacy organizations that the regulators politically oppose. Although these agencies may have a degree of authority to ensure banks protect the assets of their depositors, they have no authority to infringe on the exercise of activities protected by the First Amendment.

A. New York's Use of Reputation Risk to Punish Political Enemies.

Some years ago, New York State Department of Financial Services Superintendent Maria Vullo "called upon banks and insurance companies doing business in New York to consider the risks, including 'reputational risks,' that might arise from doing business with the [National Rifle Association] or 'similar gun promotion organizations,' and she urged the banks and insurance companies to 'join' other companies that had discontinued their associations with the NRA.... Thereafter, multiple entities indeed severed their ties or determined not to do business with the NRA." *NRA v. Vullo*, 49 F.4th 700, 706 (2d Cir. 2022) (emphasis added), reversed, *NRA v. Vullo*, 602 U.S. 175, 180 (2024).

Further, former New York Governor Andrew Cuomo boasted that "DFS is encouraging regulated entities to consider reputational risk and promote corporate responsibility in an effort to encourage strong markets and protect consumers."[1] The U.S. Court of Appeals for the Second Circuit was willing to tolerate New York's threats to banks based on the theoretical risk that investors would lose money when the public learned they were servicing the NRA and other gun groups. However, that use twists the term reputational risk beyond any reasonable understanding.

By way of illustration, a legitimate reputational risk might be avoiding engaging in business ventures with persons conducting Ponzi schemes (*e.g.,* Bernie Madoff) or sex trafficking (*e.g.,* Jeffrey Epstein). However, in those cases the banks continued to do business despite reputational risk without interference from regulators.[2] In New York, regulators asserted that reputation risk should cover the danger of the public objecting to a bank doing business with an organization dedicated to protecting the exercise of a constitutionally enumerated right disfavored by state officials.

B. The Supreme Court Rejects New York's Use of Reputational Risk.

The Second Circuit accepted New York State's arguments, noting that its "guidance letters" instructed "DFS-regulated entities to consider what they could do to reduce ... the **reputational risks** of doing business with gun promotion groups." *NRA*, 49 F.4th at 715 (emphasis added). But New York's concern for business solvency is the thinnest of veneers for its "desire to leverage [its] powers to combat the availability of firearms." *Id.* at 708.

The Supreme Court rejected New York's and the Second Circuit's claims to use reputation risk as a facade to harm the NRA. The Court granted certiorari only on the question of whether the NRA had plausibly asserted a First Amendment claim. *See NRA*, 602 U.S. at 180. Citing to *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), the Court reversed the Second Circuit, "reaffirm[ing] [that] Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." *Id.* at 180.

The Court explained, "a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress

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[1] New York Department of Financial Services press release, "Governor Cuomo directs Department of Financial Services to urge companies to weigh reputational risk of business ties to the NRA and similar organizations" (Apr. 19, 2018).

[2] "JPMorgan's compliance team started a 'wide-ranging review of its customers' at the end of 2008, after the Bernie Madoff Ponzi scheme was revealed. JPMorgan had been Madoff's primary bank. During that review, compliance officers at JPMorgan, which had a relationship with Epstein from the late 1990s to 2013, flagged Epstein's accounts as 'potentially problematic' and recommended the bank drop him as a client. But the bank stuck with him." E. Stewart, "Why banks kept doing business with Jeffrey Epstein," *VOX* (Aug. 13, 2019).

disfavored speech on her behalf." *Id.* at 190. It ruled that "the complaint, assessed as a whole, plausibly alleges that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy. If true, that violates the First Amendment." *Id.* at 194. The Court remanded the case to the Second Circuit, adding a footnote that "the Second Circuit is free to revisit the qualified immunity question in light of this Court's opinion." *Id.* at 186 n.3.

CONCLUSION

First, America's Future understands that the NPRM would apply only to federal regulators, and supports this rulemaking to make it more difficult for a subsequent Administration to weaponize federal regulations to target political opponents. But additionally, even though these rules would not directly apply to state banks regulators, those state regulators work in conjunction with federal regulators and can look to them for guidance. State regulators who otherwise might follow the lead of highly partisan Governors or Attorneys General to weaponize reputation risk against political opponents will likely be discouraged from doing so as a result of the rules proposed in this docket. At a minimum, the regulated banks will have a clear statement of federal policy to use to defeat state efforts to force them to terminate customers.

America's Future urges the OCC and the FDIC to adopt the proposed rules.

Respectfully submitted,

Mary Flynn O'Neill
Executive Director