COMMENT ON **"PROHIBITION ON USE OF REPUTATION RISK BY REGULATORS"**

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Overview

The proposed rule by the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) generally aims to eliminate "reputation risk" from supervisory programs to reduce subjectivity and prevent regulatory overreach, focusing instead on measurable risks tied to safety and soundness. This rule addresses unlawful actions taken by previous administrations to use such "risk" to restrict financial services based on political or religious beliefs. The proposed rule also prohibits adverse actions against institutions based on reputation risk, refocusing the supervision of financial institutions to those actions measured under a rubric of true financial safety and soundness. Finally, the rule restricts agencies from influencing financial institutions' business relationships based on reputation risk or political views.

The use of reputation risk by bank regulators is illegal, unconstitutional, and makes the financial sector less sound and less safe

As the OCC recently found, the practice of debanking has "often extended beyond core financial risks and instead focused on the impacts to the banks' reputation associated with engaging with certain industry sectors."[1] Debanking has unfortunately become a serious problem with the OCC now "reviewing nearly 100,000 consumer complaints from the OCC's internal complaint database and from other government and third-party sources to identify potential instances of debanking."[2] Other investigations have clearly shown that the government's actions have threatened the financial well-being of numerous customers on the basis of their political or religious views.[3]

It is past time for federal banking agencies to address this bad policy. The OCC and FDIC should finalize this rule, with minor amendments, and eliminate reputation risk from regulatory frameworks. Further, the agencies are justified in doing so not only on policy grounds, but because such a policy lacks statutory authorization, violates constitutional due process requirements, and enables arbitrary enforcement that undermines the rule of law. Eliminating reputation risk in regulation, as proposed, will go a long way in ending debanking and it will also re-focus resources toward achieving regulator statutory goals—safety and soundness.

The use of reputation risk by agencies is unconstitutional and should end

The limits of reputation risk as a regulatory tool were highlighted in *Community Financial Services Association v. FDIC*.[4] In that case, plaintiffs challenged the agencies' use of expanded reputation risk definitions to pressure banks to terminate relationships with payday lenders. While the district court in that case ultimately found that the agency guidance documents were not final reviewable actions under the Administrative Procedure Act (APA), it allowed due process claims to proceed based on allegations that regulators used reputation risk as "the fulcrum for a campaign of backroom regulatory pressure."[5] Such a regulatory regime chills free speech and exercise rights guaranteed by the First Amendment. The Supreme Court has held that "[i]f a legislature may direct business corporations to 'stick to business,' it also may limit other corporations – religious, charitable, or civic

– to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment."[6] The Court has further held that "speakers" do not "shed their First Amendment protections by employing the corporate form to disseminate their speech."[7] By utilizing vague regulatory standards begotten by reputation risk, federal agencies chill the speech rights of financial institutions through pre-textual threat of enforcement. In the financial services context, this not only negatively impacts the livelihoods of the regulated businesses, but it also necessarily negatively impacts their customers who have chosen, for various reasons, to place their savings and investments with those institutions.

In addition to First Amendment concerns, reputation-based assessments present due process concerns in violation of the Fifth Amendment, since such regulations are inherently vague. The Supreme Court has instructed that "vague laws" are unconstitutional under the Due Process Clause as they fail to give "fair notice of conduct that is forbidden or required" and because "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[8] While the use of reputation risk on paper isn't a "law," functionally, it has bound the rights of financial institutions in the policy's application and thus falls under scope of the Court's opinion. The open-ended risk of actions that may result in "negative public opinion" smack of the very vagaries the Supreme Court warned against and thus must be repealed.

The use of reputation risk by agencies is unlawful and should end

In addition to the constitutional issues arising under reputation risk, the policy is also flawed in that its implementation as a guiding doctrine of financial regulators violates several provisions of federal law. The APA requires, among other things, that agency actions not be arbitrary or capricious, that substantive rules be promulgated through notice-and-comment procedures, and that agencies act within their statutory authority.[9] Prior uses of reputation risk failed all three requirements.

Among the chief concerns raised over financial service regulators use of reputation risk in regulating is the fact that there is no statutory authorization for such action. Under our constitutional order "an agency literally has no power to act…unless and until Congress confers power upon it."[10] The use of reputation risk by regulators with no reference, explicit or otherwise, in statute not only violates the broad understanding of the separation of powers, but specifically hearkens to the APA's command that administrative actions be set aside by a court if they are "in excess of statutory jurisdiction, authority, or limitations…"[11]

Reputation risk assessments also violate the APA requirements for reasoned decision-making and non-arbitrary agency action. Under the APA, courts "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".[12] The use of reputation risk in regulating is a speculative tactic basing regulatory acts on an agency's feelings about the public's perception in place of more measurable metrics like impacts to capital investment, liquidity, and other financial operations. Such subjective regulatory tactics serve to empower bureaucratic preferences that may change by the day, rather than data-driven metrics and established financial practices objectively regulated for generations.

The documented acts in Operation Choke Point demonstrate how agencies have used these subjective criteria in ways that raise significant APA concerns.[13] There, federal regulators used reputation risk guidance to negatively impact disfavored industries without consistent standards or transparent procedures. This expansion occurred without notice-and-comment rulemaking procedures required for substantive regulations under the APA.[14] The documented use of reputation risk during Operation Choke Point and other instances demonstrates how subjective regulatory criteria enable the political weaponization of the banking supervision system.

The proposed rule remedies the unlawful use of reputation risk

While the government's use of reputation risk in regulating the banking industry violates several laws and the constitution, the proposed rule remedies its main defects by (a) ensconcing regulatory supervision and action in statutory and regulatory standards; (b) rejecting subjective bureaucratic reputational judgments as an independent basis for action while committing to transparent, reasoned, and evidence-based processes; and (c) providing transparency by explicitly defining the prohibited bases for adverse actions against the regulated community.

The rule restores regulator supervision by law rather than subjectivity

Importantly, by removing the use of reputation risk, the agencies are restoring lawful regulation. Federal law already allows regulators to take necessary steps to ensure financial institution safety and soundness.[15] Restoring the focus of regulators to the measurability of financial institutions by data and facts rather than subjective opinion ensures safety and soundness for both financial institutions and their customers. Further, financial institutions will be able to freely serve their customers without fear of retaliation, thereby enabling them to make clearer business decisions with the certainty of predictable regulation.

The rule supports the APA requirement for agency actions to be reasoned and non-arbitrary

The proposed rule prevents the agencies from interfering with bank operations not tied to the measurable data of a financial institution's financial condition. This restriction based on regulation and grounded in statute and the constitutional limits of government, ensures that regulators are focused on objective data related to credit, liquidity, and operational risks rather than bureaucratic subjective reputation risk. This return to predictable regulation also will have no cost to the regulated community but rather restores resources to both regulators and financial institutions that would otherwise have been used in the open-ended task of determining ever-shifting public opinions relative to reputation risk.

The proposed rule could go further

While the proposed rule makes great strides to both remedy the unlawful actions of previous administrations, the rule could be improved strengthen protections. The proposal states:

> The proposed rule would further prohibit the agencies from requiring, instructing, or encouraging an institution or an employee of an institution to terminate a contract

> with, discontinue doing business with, or modify the terms under which it will do business with a person or entity on the basis of the person's or entity's political, social, cultural, or religious views or beliefs, constitutionally protected speech, or *solely* on the basis of the third party's involvement in politically disfavored but lawful business activities perceived to present reputation risk.[16] (emphasis added)

At best, the use of the word "solely" in the passage leaves questions as to whether, or to what extent, regulators can continue to use reputation risk in regulating. At worst, the term opens an opportunity for ideologues in a department of government to revert to the use of retaliatory tactics against those in the regulated community that are disfavored.

We urge at this part of the regulation—and throughout the rule—that the agencies make clear that reputation risk by any name and at any level is unlawful and must not be used by any agency official in any capacity in the supervisory structure or otherwise.

Conclusion

The proposed rule restores lawful and constitutional regulation both in policy and in process. While the agencies have taken action to eliminate reputation risk from use in practice at the agencies, formal rulemaking is required to ensure such illegal regulation isn't used in the future. This action rights the illegal agency policies of the past and ensures appropriate and lawful regulation of financial institutions in the future, helping both financial institutions and their customers succeed.

References

[1] Office of the Comptroller of the Currency, "Preliminary Findings from the OCC's Review of Large Banks' Debanking Activities," (2025), https://www.occ.gov/news-issuances/news-releases/2025/nr-occ-2025-123a.pdf.
[2] Ibid.
[3] Paige Terryberry, "States Must End Political and Religious Debanking," Foundation for Government Accountability (2024), https://thefga.org/research/states-must-end-political-religious-debanking/.
[4] *Community Financial Services Association of America, Ltd. v. Federal Deposit Insurance Corporation*, 132 F.Supp.3d 98 (2015).
[5] Ibid.
[6] *First Nat'l Bank. V. Bellotti*, 435 U.S. 765, 785 (1978).
[7] *303 Creative LLC v. Elenix*, 600 U.S. 570, 594 (2023).
[8] *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).
[9] 5 U.S.C. 551 et seq.
[10] *La. Public Serv. Com v. FCC*, 476 U.S. 355, 374 (1986).
[11] 5 U.S.C. § 706(2)(C).
[12] 5 U.S.C. § 706
[13] U.S. House of Representatives Committee on Oversight and Government Reform, "Report: DOJ's Operation Choke Point Secretly Pressured Banks to Cut Ties with Legal Business, (2014), https://oversight.house.gov/report/report-dojs-operation-choke-point-secretly-pressured-banks-cut-ties-legal-business/.
[14] 5 U.S.C. § 553.
[15] 12 U.S.C. § 1818.
[16] 90 Fed. Reg. 48827 (2025).