



January 4, 2021

VIA ELECTRONIC SUBMISSION

To: Office of the Comptroller of the Currency, Department of the Treasury
Re: Fair Access to Financial Services, 85 Fed. Reg. 75,261 (proposed November 25, 2020)
Docket ID: OCC–2020–0042 (RIN 1557-AF05)

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ and Environmental Defense Fund (“EDF”) respectfully submit the following comments to the Office of the Comptroller of the Currency (“OCC”) on the agency’s proposed regulations regarding the provision of “fair access to financial services” (“Proposed Rule”).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. EDF is a non-partisan, non-governmental environmental organization representing over two million members and supporters nationwide. Since 1967, EDF has linked law, policy, science, and economics to create innovative and cost-effective solutions to today’s most pressing environmental problems.

We write to rebut the Proposed Rule’s central premise: that the risks of climate change are “unrelated to financial exposures and the operations required to deliver financial services” and thus are not “fair” grounds for denying financial services to fossil-fuel companies.³ This is untrue.

Climate risks pose a significant threat to the economic and operational health of firms in the energy sector and to the stability of the financial system as a whole. Accordingly, banks can and should consider climate risks—including risks related to compliance with future greenhouse gas policies and risks that cannot be quantified—when making decisions regarding the provision of financial services.

To the extent that the Proposed Rule precludes or discourages banks from taking climate risks into account when making business decisions, it will impose costs, on both the affected banks and the broader economy, that OCC fails entirely to consider or justify.

¹ This document does not purport to present New York University School of Law’s views, if any.

² Fair Access to Financial Services, 85 Fed. Reg. 75,261 (proposed Nov. 25, 2020) [hereinafter Proposed Rule], <https://www.federalregister.gov/documents/2020/11/25/2020-26067/fair-access-to-financial-services>.

³ *Id.* at 75,264.

I. Climate risks are financial risks

Under the Administrative Procedure Act (“APA”), agencies must “articulate a satisfactory explanation for their actions, including a rational connection between the facts found and the choice made.”⁴ Here, OCC’s explanation for the Proposed Rule is unsatisfactory because it is based on a fundamental factual error—namely, a conclusion that climate risks are entirely distinct from financial risks.

OCC issues the Proposed Rule to address concern that “several large banks” have “decided to cease providing financial services to one or more major energy industry categories, including coal mining, coal-fired electricity generation, and/or oil exploration in the Arctic region.”⁵ The agency believes that such denials of service are improper—and that regulation is thus necessary to prevent them—because the risks of climate change are “unrelated to financial exposures and the operations required to deliver financial services.”⁶ In reality, climate risks are highly relevant to banks’ financial exposures and to the operations of the financial system as a whole.

The economic costs of climate change have already begun to materialize on a massive scale. Between 2015 and 2019 alone, direct economic losses from extreme weather events in the U.S. totaled more than \$500 billion.⁷ And that already-staggering estimate understates climate change’s financial toll during this period, because it does not, among other things, account for costs arising from changes in baseline climate conditions rather than acute weather events.⁸

If banks turn a blind eye to the effects of climate change, as OCC seeks to force them to do, climate risks will imperil not just individual firms but also the financial system as a whole. As a recent report from the U.S. Commodity Futures Trading Commission (“CFTC”) explains, “systemic shocks are more likely in an environment in which financial assets do not fully reflect climate-related physical and transition risks,” because “[a] sudden revision of market perceptions about

⁴ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1035 (10th Cir. 2002) (agency must examine “the relevant data” and articulate “a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”).

⁵ Proposed Rule, 85 Fed. Reg. at 75,264.

⁶ *Id.*

⁷ Nat’l Oceanic & Atmospheric Admin., *Billion-Dollar Weather and Climate Disasters: Summary Stats*, <https://perma.cc/7MXV-DU59> (last visited Dec. 11, 2020). For more information on the economic impacts of climate change in the United States, see Solomon Hsiang et al., *Estimating Economic Damage from Climate Change in the United States*, 356 *Sci.* 1362 (2017), <https://perma.cc/UN9D-PRYS>.

⁸ See TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 6 (2017), <https://perma.cc/QR9J-3636> [hereinafter TCFD REPORT] (noting that “[p]hysical risks resulting from climate change can be event driven (acute) or longer-term shifts (chronic) in climate patterns”); COMMODITY FUTURES TRADING COMM’N CLIMATE-RELATED MARKET RISK SUBCOMM. OF THE MARKET RISK ADVISORY COMMITTEE, MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM ii (2020), <https://perma.cc/UT9M-FG2Y> [hereinafter CFTC REPORT] (describing a climate-modeling exercise conducted by nine major international banks, which found that “most of the financial losses [associated with water stress] came from slow-onset, chronic impacts such as drought, not from sudden extreme events”).

climate risk could lead to a disorderly repricing of assets, which could in turn have cascading effects on portfolios and balance sheets and therefore systemic implications for financial stability.”⁹ For this reason, the CFTC concludes that “[c]limate change poses a major risk to the stability of the U.S. financial system and to its ability to sustain the American economy.”¹⁰

The CFTC’s findings are by no means unique. A recent Financial Stability Report from the Board of Governors of the U.S. Federal Reserve (“Federal Reserve”) similarly explains “how climate change, which increases the likelihood of dislocations and disruptions in the economy, is likely to increase financial shocks and financial system vulnerabilities that could further amplify these shocks.”¹¹

Furthermore, while “[t]he impacts of climate change affect every aspect of the American economy—from production agriculture to commercial manufacturing and the financing of every step in each process,”¹² fossil-fuel companies are particularly vulnerable. Indeed, the energy sector is already experiencing significant physical effects across regions from a variety of climate impacts. In the Gulf Coast, for example, the sector has experienced significant damage from climate-amplified flooding and hurricanes. Houston-based Occidental Petroleum alone experienced \$70 million in pre-tax income reduction due to Hurricane Harvey.¹³ Twelve years prior, Hurricanes Katrina and Rita cost the energy industry \$15 billion.¹⁴ With hurricanes growing in severity and reach,¹⁵ storm-related impacts in this region are expected only to increase.¹⁶

As discussed in Section II, fossil-fuel companies are uniquely exposed not just to climate change’s future physical effects (i.e., physical risks) but also to future effects from climate *policy* (i.e., transition risks). Given the severity of these twin threats, it is particularly reasonable for banks to take climate risks into account when deciding whether to offer financial services to companies that extract or distribute fossil fuels. To deliberately ignore such risks, as OCC prefers, would run

⁹ CFTC REPORT, *supra* note 8, at ii.

¹⁰ *Id.* at i.

¹¹ BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FINANCIAL STABILITY REPORT 58 (2020), <https://www.federalreserve.gov/publications/files/financial-stability-report-20201109.pdf> [hereinafter FINANCIAL STABILITY REPORT].

¹² Rostin Behnam, Comm’r, Commodity Futures Trading Comm’n, Opening Statement of Commissioner Rostin Behnam Before the Market Risk Advisory Committee (June 12, 2019), <https://perma.cc/C37G-497S>.

¹³ COUNCIL ON FOREIGN RELS., IMPACT OF CLIMATE RISK ON THE ENERGY SYSTEM: EXAMINING THE FINANCIAL, SECURITY, AND TECHNOLOGY DIMENSIONS 27 (2019), <https://perma.cc/DAZ7-GFRC> [hereinafter CFR REPORT]. Houston, home to significant energy-sector infrastructure, has seen *three* 1-in-500-year flooding events since 2015. *Id.* at 35.

¹⁴ *Id.* at 35.

¹⁵ See ROGER R. GRENIER ET AL., AIR, QUANTIFYING THE IMPACT FROM CLIMATE CHANGE ON U.S. HURRICANE RISK (2020), <https://perma.cc/LF4Q-5SG6>; see also James P. Kossin et al., *Global Increase in Major Tropical Cyclone Exceedance Probability Over the Past Four Decades*, 117 PNAS 11975 (2020), <https://perma.cc/3GP2-TS2Z>.

¹⁶ Lin Li & Panaki Chakraborty, *Slower Decay of Landfalling Hurricanes in a Warming World*, 587 NATURE 230 (2020).

counter to the Federal Reserve’s expectation that banks “have systems in place that appropriately identify, measure, control, and monitor all of their material risks,” including “climate risks.”¹⁷

In sum, because the “central factual claim” underpinning the Proposed Rule—that climate risks are unrelated to financial risks—“is flatly untrue,”¹⁸ finalizing the proposal would be arbitrary and capricious.

II. Relevant climate risks include the costs of future climate policies

OCC suggests that banks cannot appropriately deny services based on risk assessments “premised on assumptions about future legal or political changes.”¹⁹ But investors, scholars, and regulators widely recognize that meaningful climate-risk assessments must include the costs of actions that society is likely to take *in response to* climate change’s physical effects, such as the adoption of new limits on greenhouse gas emissions.²⁰ In guidance on corporate disclosure of climate risks under its Regulation S-K, for example, the U.S. Securities and Exchange Commission (“SEC”) explains that pending legislation or regulation must be disclosed if it is reasonably likely to be enacted and reasonably likely to have a material effect on a publicly traded company’s finances or operations.²¹ The Federal Reserve, too, recognizes that climate-related risks include the effects of future “[c]limate policies,” as well as “[t]echnological advances” and changes in “[i]nvestor/consumer perceptions.”²² And the CFTC explains that, along with physical risks, these “transition risks, if not well-managed, likely will materially impact the value of a wide range of assets,” with consequences that “manifest throughout the financial system.”²³ In fact, “transition and physical risks could interact and compound the disruption either would exert on its own.”²⁴

As with physical risks, while every industry faces some degree of transition risk, fossil-fuel companies, the United States’ largest source of anthropogenic greenhouse gas emissions,²⁵ are particularly exposed. For example, 29 states and the District of Columbia have established target dates by which electric utilities must provide a set proportion of electricity from renewable or clean

¹⁷ FINANCIAL STABILITY REPORT, *supra* note 11, at 59.

¹⁸ *New York v. United States Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475, 541 (2019).

¹⁹ Proposed Rule, 85 Fed. Reg. at 75,263.

²⁰ *See, e.g.*, TCFD REPORT, *supra* note 8, at 6 (listing “Policy and Legal Risks” among the “main climate-related risks and opportunities that organizations should consider”); CFR REPORT, *supra* note 13, at 46 (describing policy-driven “energy transition risk” as one of the two ways through which “[c]limate change can impair corporate valuations”).

²¹ Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6296 (Feb. 8, 2010) (outlining the SEC’s views on the applicability of Regulation S-K to climate risks).

²² FINANCIAL STABILITY REPORT, *supra* note 11, at 58.

²³ CFTC REPORT, *supra* note 8, at 25.

²⁴ *Id.* at 27.

²⁵ U.S. Env’tl. Prot. Agency, *Sources of Greenhouse Gas Emissions*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Jan. 4, 2021).

energy sources.²⁶ The prevalence and aggressiveness of these targets has increased in recent years, and 15 states now aim to achieve 100% clean or renewable energy by 2050 or earlier.²⁷ At the federal level, President-elect Biden has pledged to implement policies to transition the nation to carbon-free electricity generation by 2035, establish new greenhouse gas and fuel economy standards for motor vehicles, and support tax incentives and new finance mechanisms for clean energy.²⁸ By requiring or promoting the use of carbon-free energy, such policies can, of course, be expected to significantly affect the value of carbon-intensive assets.²⁹

Contrary to OCC’s claim, banks that consider such policy effects when deciding whether to provide financial services to fossil-fuel companies are not usurping the role of “environmental regulators.”³⁰ Recognizing that a policy *is likely to* be imposed is not even equivalent to arguing that the policy *should* be imposed, much less to imposing it oneself. Moreover, implicit policy assumptions—about, for example, future interest-rate policies from the Federal Reserve—are a necessary component of virtually any financial decision. OCC provides no reasonable explanation for treating the potential effects of climate policy differently from other types of policy risk. As a result, finalizing the Proposed Rule’s prohibition on considering potential climate-policy costs in risk assessments would be arbitrary and capricious.

III. Relevant climate risks include risks not readily susceptible to quantification

The Proposed Rule would allow banks to deny financial services based only on “quantitative, impartial risk-based standards.”³¹ OCC suggests that decisions based in qualitative risk

²⁶ Ctr. for Climate & Energy Solutions, *U.S. State Electricity Portfolio Standards* (last updated Nov. 2019), <https://perma.cc/7ZP9-RYP6>.

²⁷ *100 Percent Renewable Targets*, ENERGY SAGE (last updated May 2, 2020), <https://perma.cc/9X9W-TUBJ>; Sophia Ptacek, *Race to 100% Clean*, NAT. RES. DEF. COUNCIL (Dec. 2, 2020), <https://perma.cc/255V-A7BV>.

²⁸ Biden Harris, *The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future*, <https://perma.cc/2T8G-SKDH> (last visited Nov. 24, 2020). While the Biden Administration may face hurdles to enact portions of his climate plan without new legislation, President-elect Biden can use the existing authority of federal agencies to take action on climate. *See, e.g.*, Umair Irfan, *How Joe Biden Plans to Use Executive Powers to Fight Climate Change*, VOX (Nov. 9, 2020), <https://www.vox.com/21549521/joe-biden-transition-climate-change-senate-runoff>; Anna M. Phillips, *Five Things Joe Biden Can Do to Fight Climate Change – Without Congress’ Help*, L.A. TIMES (Nov. 8, 2020), <https://www.latimes.com/politics/story/2020-11-08/five-things-joe-biden-can-do-to-fight-climate-change-without-congress-help>.

²⁹ *See, e.g.*, CFTC REPORT, *supra* note 8, at 19 (“In a speedy transition to a net-zero economy, fossil fuel industry assets might become stranded.”). To be sure, a clean-energy transition will create not only risks but also opportunities for the energy sector and the financial institutions that serve it. One analysis has found, for example, that “the expected transition to a lower-carbon economy is estimated to require around \$1 trillion of investment a year for the foreseeable future, generating new investment opportunities.” TCFD REPORT, *supra* note 8, at ii (citing INT’L ENERGY AGENCY, WORLD OUTLOOK SPECIAL BRIEFING FOR COP21 (2015), <https://perma.cc/X7H9-TKRV>).

³⁰ Proposed Rule, 85 Fed. Reg. 75,264 (speculating that banks are denying services to fossil-fuel companies because the banks “believe[] the United States should abide by the standards set in an international climate treaty”).

³¹ *Id.* at 75,265.

assessments are necessarily unsound.³² This is false. On the contrary, regulatory precedent, scholarship, and caselaw support the consideration of unquantified effects.

The SEC’s Regulation S-K, for example, requires publicly traded companies to provide qualitative descriptions of material risks—including climate risks—in annual disclosures.³³ And in the context of regulatory cost-benefit analysis, it is well established that agencies should give “due consideration to factors that defy quantification but are thought to be important.”³⁴ After all, the mere fact that a benefit cannot currently be quantified says little about its magnitude: some of the most substantial categories of monetized benefits of environmental regulation, such as avoided mortality risks and reduced carbon-dioxide emissions, were once considered unquantifiable.³⁵

For this reason, courts have repeatedly held that that agencies are not merely authorized but *obligated* to consider reasonably foreseeable but difficult to quantify regulatory effects.³⁶ Thus, the Proposed Rule would require banks to take an approach to decisionmaking—one in which qualitative risks are ignored—that OCC itself could not lawfully employ. This is patently arbitrary.

IV. OCC fails to consider the cost of precluding or discouraging consideration of climate risks

A regulation is arbitrary and capricious under the APA if the issuing agency fails to “examine the relevant data” or “consider an important aspect of the problem.”³⁷ Here, OCC fails to consider the relevant factor of cost.³⁸ Specifically, the agency fails to estimate and justify the extent to which

³² *Id.* at 76,264 (“It is our understanding that some banks have taken these actions based on criteria unrelated to safe and sound banking practices, including . . . assessments ungrounded in quantitative, risk-based analysis.”).

³³ ALEXANDER F. COHEN ET AL., FINANCIAL STATEMENT REQUIREMENTS IN US SECURITIES OFFERINGS: WHAT YOU NEED TO KNOW 1 (2020), <https://perma.cc/YG7H-36CX>; *see also* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. at 6290 (outlining the SEC’s views on the applicability of Regulation S-K to climate risks).

³⁴ KENNETH J. ARROW ET AL., BENEFIT-COST ANALYSIS IN ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION: A STATEMENT OF PRINCIPLES 8 (1996); *see also* Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. at 51,735 (“Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”); Office of Mgmt. & Budget, Circular A-4 on Regulatory Analysis, at 2 (2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4 (cautioning agencies against ignoring unquantified effects, because the most efficient rule may not have the “largest quantified and monetized net-benefit estimate”).

³⁵ *See* Richard L. Revesz, *Quantifying Environmental Benefits*, 102 CAL. L. REV. 1423, 1436 (2014).

³⁶ *See, e.g.,* Public Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1219 (D.C. Cir. 2004) (“The mere fact that the magnitude of [an effect] is uncertain is no justification for disregarding the effect entirely.”); *Am. Trucking Ass’n v. EPA*, 175 F.3d at 1052 (rejecting the idea that EPA could ignore health effects that are “difficult, if not impossible, to quantify reliably”).

³⁷ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

³⁸ *Michigan v. EPA*, 135 S. Ct. 2699, 2707–08 (2015) (explaining that “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate,” that costs “include[] more than the expense of complying with regulations,” and that “any disadvantage could be termed a cost”); *see also* *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732–33 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (“As a general rule, the costs of an agency’s action are a relevant factor that the agency must consider before deciding whether to act.”).

the Proposed Rule will, by precluding or discouraging banks from considering climate risks, promote inefficient allocation of capital and decrease the stability of the financial system.

As noted in Section I, “systemic shocks are more likely in an environment in which financial assets do not fully reflect climate-related physical and transition risks,” because “a sudden revision of market perceptions about climate risk could lead to a disorderly repricing of assets.”³⁹ The Federal Reserve’s Financial Stability Report likewise found that “opacity of exposures and heterogeneous beliefs of market participants about exposures to climate risks can lead to mispricing of assets and the risk of downward price shocks.”⁴⁰ By deliberately hindering banks from considering climate risks when deciding whether and under what conditions to offer financial services, the Proposed Rule can be expected to increase the likelihood and severity of a future financial crisis. Yet OCC neither acknowledges this cost nor offers any reason to believe that the benefits of the Proposed Rule outweigh it. This failure, too, renders the Proposed Rule arbitrary and capricious.

Respectfully,

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³⁹ CFTC REPORT, *supra* note 8, at ii.

⁴⁰ FINANCIAL STABILITY REPORT, *supra* note 11, at 59.