



March 17, 2020

**VIA OVERNIGHT DELIVERY AND POSTED TO PUBLIC DOCKET**

Hon. Joseph M. Otting  
Comptroller of the Currency  
Office of the Comptroller of the Currency  
400 7th Street SW  
Washington, DC 20219

**Re: Community Reinvestment Act Regulations, Docket ID OCC-2018-0008**

Dear Mr. Otting,

On behalf of our clients, the California Reinvestment Coalition and the National Community Reinvestment Coalition, we are writing to express our concern that you and your staff are engaging in prohibited undisclosed ex parte communications with nongovernmental stakeholders regarding the pending rulemaking to revise the regulations implementing the Community Reinvestment Act. *See* 85 Fed. Reg. 1204 (Jan. 9, 2020) (notice of proposed rulemaking) (“Proposed Rule”). Engaging in such communications—and then failing to document them in the public record—is inappropriate and contrary to the Administrative Procedure Act, 5 U.S.C. § 706. We request that you undertake corrective action immediately.

Recent reporting indicates that you have been contacting banking industry executives to solicit their feedback and support regarding the Proposed Rule. *See* Andrew Ackerman, *Bank CEOs Courted by Regulator on Low-Income Lending Overhaul*, Wall Street Journal (Feb. 21, 2020); Victoria Guida, *Bank-Friendly Regulator Troubles Lenders with Redlining Law Rewrite*, Politico (Feb. 27, 2020). The *Journal* indicated that you have personally “spoken with the chief executives of more than 20 national and regional banks in recent weeks,” and that on these calls, the CEOs have shared “specific concerns about the plan’s details.” The *Politico* story suggested that the bank CEOs have made concrete suggestions and recommendations on these telephone calls, and expressed their misgivings about the proposal.

Thorough documentation of the content of all such discussions between OCC and stakeholders must be included in the rulemaking record. Without documentation of those conversations, the record will not be complete, and any agency decision based upon that defective record will be infirm. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971) (review must be “based on the full administrative record that was before the” agency at the time of decision). Accordingly, “information gathered ex parte from the public

which becomes relevant to a rulemaking will have to be disclosed.” *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977). Otherwise, the agency would be free to frustrate judicial review and establish the “intolerable” condition of creating “one administrative record for the public and this court and another for the [agency] and those ‘in the know.’” *Id.* at 54.

If you are to engage in ex parte communications regarding the Proposed Rule, including oral communications, records reflecting those communications must be placed promptly on the rulemaking docket. Otherwise, “information central to the justification of the rule could be obtained without ever appearing on the docket, simply by communicating it by voice rather than by pen.” *Sierra Club v. Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981).<sup>1</sup> It is therefore essential that the content of these discussions be placed on the record without delay. The public, including stakeholders such as our clients, will be prejudiced if these communications are not posted on the docket until after the comment period has closed. To avoid this prejudice, the records must be included “as soon as possible” in order to afford the public, including our clients, a meaningful opportunity to consider and respond to these communications. *Id.*

Accordingly, we respectfully request that you immediately take corrective action to include on the rulemaking docket comprehensive summaries of your oral communications with stakeholders regarding the Proposed Rule, and extend the comment period for the Proposed Rule in order to afford the public a meaningful opportunity to review the conversation records.

Sincerely,

/s/

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cc: Jonathan Gould, Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency

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<sup>1</sup> We note, moreover, that OCC has seemingly acknowledged its duty to place records of discussions with nongovernmental entities on the rulemaking docket, having done so (although with an inadequate level of detail) for staff-level meetings with stakeholders. *See, e.g., Summary of February 26, 2020 Meeting with American Bankers Association*, <https://www.regulations.gov/document?D=OCC-2018-0008-2039>. OCC’s apparent decision to include records of some, but not all, such discussions in the docket is arbitrary and capricious and raises substantial public transparency concerns.