Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm Alan Kaplinsky. And I'm your host today and I'll be moderating the program. Those of you who want even more information about the topic that we're going to be talking about today you should consult our blog, consumerfinancemonitor.com.

Alan Kaplinsky:

We've hosted a blog since 2011, when the CFPB got stood up used to be called CFPBmonitor.com. And then when the change in administrations occurred, we broadened the scope of our blog to encompass all consumer financial services and the topic today we have covered in our blog and I'm sure we'll be covering some more. We host webinars or I should say we release webinars, podcasts every Thursday, except when Thursday falls on a public holiday.

Alan Kaplinsky:

So for example on Christmas week and new year's week we will not be releasing a podcast. You can find our podcasts basically on any platform that you use to get your podcasts. They're on our website, ballardspahr.com, or you can find them on Apple podcasts, Google Play, Spotify et cetera, et cetera. Well, I'm very pleased to have as my guests today, John Court. John is Executive Vice President and General Counsel at the Bank Policy Institute, where he manages the Regulatory Affairs Department and is responsible for overseeing all of BPI's legal and regulatory advocacy initiatives.

Alan Kaplinsky:

Previously, John served as Managing Director and Deputy General Counsel for The Clearing House Association, a predecessor organization to BPI. Prior to joining The Clearing House in 2012, he spent 10 years in private practice, advising clients on various financial regulatory and enforcement matters. And since 2015, he served as co-chair of the Legislation and Regulation Subcommittee of the American Bar Association's Banking Law Committee. So John, a very warm welcome to you, delighted to have you on our program today.

John Court:

Great, Alan, thank you. It's a pleasure to be here. And I think this is a great opportunity and I'm glad you guys are hosting these dialogues to bring issues into the public sphere.

Alan Kaplinsky:

Yeah. So let me briefly introduce the topic we're going to talk about today and then I'd like to get a lot of the details from you. So literally out of the blue, I say out of the blue I was surprised by it John, the Acting Comptroller of the Currency, Brian Brooks issued a notice of proposed rulemaking with respect to "fair access." When I first saw the release, but before I actually, I saw the title of it, but before I actually read it, I thought, "Oh, okay. It's something else dealing with fair lending."

Alan Kaplinsky:

That it's going to relate to the Equal Credit Opportunity Act or the Fair Housing Act, and it's going to talk about the fact that you can't discriminate against individuals who were applying for credit on a prohibited basis. But before, very shortly after I read what they issued, I said, "Whoa, this isn't what I

expected at all." It was something completely different, but I'll tell you before we get to that, I'd like you to tell me, what does the Bank Policy Institute do? What's your function?

John Court:

Sure, absolutely. We have 42 members and they are some of the largest banking organizations that operate in the United States, which includes seven out of the eight US headquarter GCC as well as a number of foreign banks that are designated GCC that have significant US operations, as well as the number of the regional and mid-size banks. And we are largely a research and a policy shop but our core, we are an advocacy organization as well, and we represent the interest of our members both in Washington, before policy makers, but also international.

Alan Kaplinsky:

Okay. So now let's turn to what the acting comptroller did. Could you describe for us what this NPRM and notice of proposed rulemaking is all about?

John Court:

Yes, absolutely. First, let me address your opening remark, which you're surprised to see the rule drop and it caught you by surprise. And I think that's true for a number of people, but there was a little bit going on behind the scenes, which if contextualized it might be helpful if I just [crosstalk 00:06:12]-

Alan Kaplinsky:

Yeah sure.

John Court:

So over the summer and this is all in the public record. So over the summer, there were a number of letters from certain Republican senators to acting comptroller Brooks at the OCC. And those senators were raising concerns that they had about a number of banking organizations that had made public declarations, that they were going to no longer bank or finance certain types of entities or certain types of projects.

John Court:

And so those senators in particular seem to have a concern that oil and gas exploration companies would be caught up in some of those announcements by certain banks. And they wrote the acting comptroller and express their concern that this segment of the US economy might not be getting access to the banking and financial services that is necessary for them to do their jobs and that could have an impact on residence and all that.

John Court:

The acting comptroller then, and again, this is in the public record, indicated that he was going to undertake an examination and investigation of some of those banks to see sort of what was going on. And how that actually unfolded I do not know that's not in the public record and I don't have any transparency of that. But the acting comptroller did start to talk in public remarks during that time and shortly thereafter so going into the fall that he had concerns that those actions might violate provisions of the National Bank Act.

John Court:

And he specifically referenced the fair access language in section 1A of National Bank.

Alan Kaplinsky:

Which we'll get to in a minute.

John Court:

Yeah. So to your question, what is the proposed rule do? Who does it cover and what does it require? So as we said the statutory basis, which we'll get to in a minute is section 1A of the National Bank Act among other things indicates that the comptroller should assure fair access to financial services. This rule articulates a vision for what fair access means.

John Court:

The scope of the rule is that it's going to apply to any national bank that meets a qualitative threshold. And here's the qualitative threshold. If the bank has the ability to one, raise the price, a person has to pay to obtain a financial service from the bank or from a competitor or if the bank has the ability to significantly impede a person or a person's business activity in favor or to the advantage of another person.

John Court:

So what does that mean? We have to unpack that, but fortunately, the rule comes with a rebuttable presumption a quantitative threshold that makes it easy for compliance. So there is a rebuttable presumption that any national bank with a hundred billion dollars or more in total assets will be subject to this.

Alan Kaplinsky:

I see. And what does the rule actually require?

John Court:

Yup. So it's actually a relatively short rule. And so in this sense, it's relatively simple, although simple in brevity, not simple, once you start to unpack what the words mean, but here are the operative requirements, and there are basically four operative requirements. First banks shall make each financial service that the bank offers available to all persons in the geographic market served by the bank on "proportionately equal terms".

John Court:

That's number one. Number two, banks should not deny any person or financial service the bank offers except to the extent justified by, and this is key language, a documented failure of the customer to meet quantitative impartial risk-based standards established by the bank in advance. The third operative requirement banks shouldn't deny any person or financial service the bank offers, when the effect of the denial is to prevent limit or otherwise disadvantaged the person from entering into or competing in a certain market or business segment, or in such a way that benefits another person in which the bank has a financial interest.

John Court:

And then finally, the fourth operative provision is that bank shall not deny in coordination with others, any person or financial service that the bank offers. So that's like an anti collusion standard. Those are the operative for me.

Alan Kaplinsky:

So, let's try to unpack that language a little bit, as you said, it's not a very lengthy rule and unlike most rules that get issued by the federal banking regulators and CFPB, not a lot of words and I think the federal register publication, isn't very lengthy even after you look at the supplementary information, but how do you interpret that language? What is the... Let me put it bluntly too, is the acting comptroller saying large banks, the biggest banks in the country are public utilities and they've got to make services available to everybody, everybody needs electricity.

John Court:

I suspect the acting comptroller would not say that, that is what he is trying to do. I would argue that in effect, that is probably what this rule would do. I think with the acting comptroller would say is that, he believes that any business in the United States that's engaged in lawful activities should be able to access banking and financial service.

John Court:

I do not disagree with that premise and I don't think many people would. I think the acting comptroller would probably go further and confess that what he's really trying to do is solve for the problem of the Alaska Senate. And he would say, oiling, this rule is intended to make it easier for oil and gas exploration companies to get financing for projects in Alaska.

John Court:

Then I think he would probably stop there. And there's more we could say about gun manufacturers and planned parenthood and all those things are in the preamble. I think that's what he's trying to do, but I do not think that's what these operative provisions do. I think what they do is actually much more akin to what you suggest.

Alan Kaplinsky:

Yeah. And as I think about it and maybe let's get to one of the things that you mentioned and see if we can solve what I consider to be a little bit of a puzzle and that is the proposed rule is purportedly based on section 1A of the National Bank Act, which was added to the National Bank Act by the Dodd-Frank Act in 2010. And it charges the OCC with the shoring among other things "Their access to financial services."

Alan Kaplinsky:

Before that language got added it focused on let me read it to you. It charges the OCC with assuring the safety and soundness of the compliance with laws and regulations, and then the new language fair access to financial services. And then it says, and fair treatment of customers by the institution and other persons subject to its jurisdiction.

Alan Kaplinsky:

So the words, safety and soundness are still in there. And as I recall there are many instances where the comptroller and not just comptroller Brooks, but literally every comptroller I'm aware of says that even when the bank is engaging in something that doesn't literally violate any law it impacts the reputation of the bank, that is if it creates reputational risk, then that implicates safety and soundness.

Alan Kaplinsky:

So it sounds to me like the way he's interpreted fair access, he's created a sort of a conundrum of sorts. I mean, how can you reconcile fair access with safety and soundness concerns?

John Court:

So that's a great question. I think what I hear are two questions. So let me answer the first one first, which is how does fair access... It's fair access provides sort of a sound basis for this rule, or at least the history of the language. I'm sorry. So that's where you started with sort of the history of the language. So it is important to remember this language which in section 1A, which really is a mission statement for the agency.

John Court:

It is prefatory language that leads into the National Bank Act. It was amended in Dodd-Frank to add the language that you pointed out, which is fair access to financial services and fair treatment of customers. Those are things the comptroller continues to need to assure about the national banking system. So remember back in Dodd-Frank, Dodd-Frank was transferring from the Prudential regulatory agencies, including the OCC, the authority to write the regulations implementing the federal consumer protection statute.

John Court:

For the most part, there's a few consumer protection statute that the authority for the rule writing of which was not transferred to the CFPB, but the vast majority of it was. So the OCC was losing that. In addition to that rule writing authority being transferred to the CFPB so was the examination authority, at least for bags with more than $10 million of assets.

John Court:

So that's a huge chunk of what the OCC did. And I think during that period, I think they felt like they were probably losing a lot and they think they wanted to put a marker down that they remain relevant on consumer protection issues. And they do remain relevant today, even for banks with more than 10 billion assets, although that's a different conversation, but this language was drafted by senior members of the OCC during Dodd-Frank, when it was becoming obvious the rule writing authority for the US consumer protection statutes was going to be transferred from the US prudential agencies to the newly formed CFPB.

John Court:

And it was in response to that, that they provided this language to the congressional staff who were drafting Dodd-Frank to insert it in there, to kind of put a marker down for them. So in our view, this language was not intended to support the OCC writing a rule to force large banks to lend oil and gas exploration, planned parenthood, gun manufacturers, or whoever. I will confess the actual legislative

history in the record is sparse to nonexistent as far as we can tell but that's, I think how this language developed.

John Court:

Now how can you extrapolate that into reputational risk and safety and soundness? I think that is a broader question, which I'd be happy to get into but let me turn it back to you to see where you want it.

Alan Kaplinsky:

Yeah, sure. So under the Obama administration there was very controversial policy that existed at the FDIC not the comptroller. And the comptroller in fact, disclaims that they were ever involved in it, but it arose in connection with the payday lending industry. And there was a period of time when a number of banks that dealt with payday lenders were terminating their services, not so much, yeah. I mean any lending that they were doing, they terminated, but they wouldn't even bank payday lenders.

Alan Kaplinsky:

And when the payday lenders question the banks about it, they were told that's what the FDIC examiners told us to do. They told us we should get out of that line, so I'm sorry about it but you're going to have to look elsewhere. That created a major problem for that industry and indeed they ultimately brought a lawsuit against FDIC that ended up getting settled in the FDIC desk essentially did a mea culpa.

Alan Kaplinsky:

They admitted that they did it and they admitted that it was wrong and said, it's never going to happen again. Is there some and I guess he looked at, I think fairly objectively I think most people in the industry, the banking industry although not consumer advocates would say Operation Choke Point was not right, and the FDIC should not dictate to banks who they can lend to, as long as they're engaged in a lawful business. Is there some connection here between Operation Choke Point and this proposed rule making by acting comptroller Brooks?

John Court:

Yep. So I think that's a great question. As you said, I think in simple terms, Operation Choke Point was government examiners telling banks to stop dealing with a certain industry or segment of an industry. And it was payday lenders there, presumably on the theory that the payday lenders engaged in a kind of business or activity that presented reputational risk for the banks. And the examiners to planted the judgment of the bank board and CEO for their own judgment and said, "This reputational risk is too great."

John Court:

There's another example of this that happened after Operation Choke Point, which was where government examiners pressure banks to close correspondent accounts maintained in the US for non US banks and particularly in Latin America, and this was under the guise of de-risking. And so that was a similar case. Now, there's a bit of a distinction to be made because the examiners might've been focused more on AML or BSA legal risks rather than reputational risks.

John Court:

But again, it was an example of an instance in which examiners pressure banks to close off services to certain segments of an industry. Now we agree that Operation Choke Point, or I think at BPI, like you said, representing the bank industry, certainly agree that Operation Choke Point and even the de-risking situations were inappropriate, meaning that we do not think that bank examiners should be pressuring banks to either bank or not bank, a lawful business or industry based on the examiner's own perception of reputational risk.

John Court:

As I said, I think the de-risking thing can be distinguished a bit because there was a BSA AML component, but still our view is that if anyone should be focused on reputational risk, it's the CEO, the senior management and the board of directors, OCC examiners should not be making their own or FDIC examiners, any government examiner should not be making their own assessments about reputational risks, because it's an inherently qualitative judgment to some degree.

John Court:

And it's about values, frankly, and probably a bit about social norms and other considerations. So government examiners should have no outsize role there, but we think a CEO or a board can and probably should be allowed to make those types of judgment. And so the fair access rule is different than Operation Choke Point and de-risking because it appears to say that CEOs and bank boards can not take reputational risks or any other qualitative factors into consideration when deciding to extend services to certain segments of an industry or even an entire industry.

John Court:

And rather it requires any bank to give any product or service that it offers to any lawful business, anywhere in the United States, admittedly on proportionate terms but I don't even know what that means and we can get into that later. And so we think that's wrong for the government to be supplanting and eliminating the discretion of the CEO and the board. And so, I mean, quite honestly, to be Frank, I can't tell if this rule is more Marxist or fascist or both, but what I do believe and what I think most people would believe once they understand this proposal is that it is actually profoundly un-American.

Alan Kaplinsky:

Yeah, let me raise another issue with you and that is what if a bank we are talking admittedly about the largest banking institutions in the US we're not talking about the regional banks or community banks, we're talking about the mega banks, but they make a decision that they don't want to go into a certain lend to a certain industry because they don't have the expertise in that industry.

Alan Kaplinsky:

Let's say oil and gas take an example, not a simple industry to understand and quite apart from the individual credit risks of individual companies within the industry, the industry itself is a complicated industry. I mean, there are folks on Wall Street who specialize in following just that industry. Is the OCC saying that we understand you don't have expertise right now, but you better get the expertise.

Alan Kaplinsky:

You better go out and hire people. I don't know how many people you're going to need. You'll have to figure that out, but you better get that expertise because if someone in that industry applies to you, you can't say to them, "Oh, we don't lend to that industry it's very specialized, sorry you'll have to go to some other financial institution that understands your industry." So am I reading too much into this, but I mean, that's how I looked at it John.

John Court:

So we'd look at it in a similar way, and I'll confess this thing has only been out for a few weeks and so we continue to analyze and assess it. But yes, I mean our initial view is one of concern, much like yours. We think this is basically completely unworkable as a practical matter. And again, injecting some hyper bowl into this discussion just to make the podcast interesting, but we do think it reflects a pretty shocking ignorance of how banking is prudently conducted in the United States.

John Court:

And the reason we say that is for what you talk about, which is, it's literally up ending how banking is conducted. And when you were talking about banks specializing in certain industries or specializing in certain geographic regions, that's absolutely true. I mean, that's where they develop an expertise. That's where they understand the industry, they understand the borrowers, they understand the cash flows and this is going to upend that and frankly, eviscerate that to some degree.

John Court:

And when I say it reflects a shocking ignorance, the reason I think it's shocking is because this proposal is out of the agency that supervises national bank and therefore one would ordinarily expect should have a good and grounded understanding of how banks operate profitably, efficiently and frankly safely. And so there are many examples of the unworkability of this proposal-

Alan Kaplinsky:

Yeah. Tell me some of the other things.

John Court:

Well, you certainly highlighted one, and I think it is worth dwelling on a little bit, which is national banks frequently develop specialties in certain sectors, such as industry verticals in the corporate and investment banking field. But these specialties are based on deep expertise in the relevant industry, whether it's retail, healthcare, oil, and gas, and the banks offer services targeted to those areas of expertise.

John Court:

So this proposed rule, unfortunately, would facially require a national bank that has expertise in one industry to also provide credit or services to other industries. Even if the bank doesn't have the expertise or the resources necessary to extend credit or provide services in a safe and sound way. And so that doesn't make any sense. And in our view is reflective of how this proposal ignores how banking is conducted within the United States.

Alan Kaplinsky:

Right. So BPI is said that the proposal undermines rather than promote safety and soundness. Can you explain the basis of that statement, John?

John Court:

Yes, absolutely. And I'll give you some good concrete examples, but I just want to say, I think this is an important question and an important point, because when you go back to section 1A and you read it and it says that the comptroller is responsible for assuring the safety and soundness of the banking system. I think that's the first thing, he's responsible for assuring. And that language has been there going back many decades.

John Court:

It's only the fair access language that was added in Dodd-Frank. But in some senses, we think that in pursuing fair access, the comptroller is actually undermining safety and soundness, and therefore this proposal really needs to be rethought. And here is, let me give you an example or two of how we think that's being done. So in this rule, the OCC indicates that the proportionately equal standard would prohibit a bank from engaging in geographically based redlining, for example, by refusing to provide financial services to customers solely based on where the customer or the customer's business activity is located when the customer or the business activity is in the geographic market or by the covered bank.

John Court:

So that's a lot, but that's in the rule and the preamble. So this standard, we believe could force national banks to make loans that are fundamentally unsafe or unsound. For example, if a bank generally makes commercial real estate loans and say, Louisiana, then the rule would appear to require that the bank make commercial real estate loans in other geographies that are highly susceptible to flood or hurricane damage.

John Court:

Which just seems very odd, but if you read facially what's in the rule on the preamble that's what would be required. And let me say a little bit more about this proportionality standard, because it reinforces why this rule is unworkable. In the extreme, the term proportionately could be viewed as implying an affirmative duty on banks to manage their portfolios in a manner that ensures they are not in practice lending more to one sector than another.

John Court:

And this would ignore factors such as market demand, and it could perversely be read to require banks to reduce the provision of services to some sectors in order to achieve proportionality with other sectors. So for example, public welfare investments, which are for example, it could be low income housing finance, public welfare investments are typically structured very differently from other commercial finance like through equity investments in real estate.

John Court:

And so this proposal would require that these products be offered to all customers, which would likely limit this type of funding going forward. As it is not appropriate for non public welfare investments. So it's just an example of a perverse outcome. That's clearly not the desired intent of the OCC, but that is

what the requirements in this proposal would mandate. And they're so broad and would result in those types of unintended consequences.

John Court:

Another example is that the proposal says that a bank may not deny any person or financial services that the bank offers, except to the extent justified by the persons documented failure to meet quantitative risk-based standards established in advanced by the bank. So this is really overly broad and would result in innumerable regulatory conflicts for banks across lending, deposit taking and other services, given that the term financial services is such broad and isn't limited in any way.

John Court:

So for example, the requirement that a bank's denial to make a loan or provide a service only pursuant to quantitative impartial risk based standards established in advance would appear to require a bank to make a loan to a customer that is engaged in a novel business, or would use loan proceeds in a novel way, or at least in a way that's novel to the bank because in those circumstances, it's unlikely that any concerns the bank might have regarding the customer's business prospects or risks would have been documented in advance.

John Court:

And so the rule would encourage higher risk borrowers to apply for loans from banks that have little experience in that relevant field, as that bank would be forced to make the loan or risk violating the rule. So this doesn't make any sense and could undermine the safety and soundness of banking institutions. And so the author of this rule in my view shows an ignorance of how banking is conducted and how it's conducted in a way that is safe and sound. And so I'd just be interested if you see it a different way.

Alan Kaplinsky:

Well. Let me ask a question of you and I'm wondering if, what I'm about to say makes a difference to you. Banks offer variety of services. Lending is very important part of what they do, but not the only thing that they do. They also bank companies that is, they provide deposit accounts and other kinds of deposit products to individuals and companies. Would it matter to you if this had been limited to non lending services or services where the bank would not be undertaking any credit risk at all?

Alan Kaplinsky:

So, I mean, it could be issuing letters of credit, there's a risk to banks, but if we're talking about let's say maintaining checking accounts for a company that's in the oil and gas area there is risks not just to and I don't mean to diminish that banks are certainly a fraud risk all the time with deposit accounts, but would that largely mitigate the concern that you have?

John Court:

I think it could mitigate it on the credit risk concerns that we have been talking about certainly and what is the risk to a bank of maintaining a deposit account or a transaction account, probably minimal. So I think that's right, but I bet by limiting that way, I think you would bend the policy objectives that the comptroller is seeking to achieve the acting comptroller.

Alan Kaplinsky:

Yeah. Well, that's for sure. I mean, it's very clear that, I think lending is the main thing that the acting comptroller is concerned about. Although it really is very probably worded and I think covers lending and any other type of service. So tell me about a FOIA request that you submitted to the comptroller. What are you seeking and have they honored that request or if not what do you intend to do about it?

John Court:

Sure. So as of the date of this recording they have not responded to our FOIA requests but we submitted a FOIA request because the preamble to the NPR makes a number of conclusory statements and assertions that we disagree with. And ordinarily, you would see, as we talked about earlier, this is a very short proposal that both of the effects of the rule is very short and the preamble is very short for rule of this magnitude.

John Court:

Ordinarily in those preambles the agency would show its work. That's why some of these rulemakings are so long, but the staff hearing to the requirements of the administrative procedures act and other procedural safeguards embedded into administrative law, the staff in the preamble typically shows all their work. They identify a problem, they document and evidence the problem we're up, it's usually a market problem or something or there's this an express statutory grant of authority, which there isn't.

John Court:

But and then they document different ways they've considered to address the problem. And none of that is embedded in this proposal. And this is the type of proposal that actually all that stuff really should be in. So we've submitted FOIA request asking for the OCC's homework across a number of these assertions and I'll quickly tick through it. So first of all, the NPR asserts that it draws on principles of long established antitrust law, but it cites to no such principles.

John Court:

And so we've asked the OCC to provide the principles to which they refer. The MVR also refers to the "Dominant market position of the large bank population," but again provides no support. So we just ask them to provide the data, statistical and other evidence or analysis to back that up. The NPR asserts that a decision and this one actually kind of really risks, not passing the lab test, but the NPR asserts that a decision by even one bank not to provide a person with fair access to financial services could have a significant effect on that person, maybe past the lab test.

John Court:

The nation's financial and economic systems really, and the global economy, okay. So we just request the OCC to provide the data, evidence and analysis that was considered were relied upon in reaching that decision. There's just a couple more here. So they also asserted that large banks exercise, deficient market power to influence the price of a financial services, and that those banks have the ability to raise the price for financial services or impede a person in favor of another person, but they provide absolutely zero support for that contention.

John Court:

So again, we've asked them to show their work. They also, on the administrative side, they provide an analysis of their obligations under the unfunded mandates for format. And they basically say that this

rule won't result in an expenditure of $157 million or more annually by the government or by the private sector. This is just preposterously inaccurate. So we've asked them to show their work so that we can challenge.

John Court:

And then finally there's the Paperwork Reduction Act, which requires information collections to go through certain processes. The OCC basically asserts that the rulemaking isn't subject to that act, but we all know that the rule requires banks to document a significant paper trail to show compliance with the rule. So we think the OCC has once again aired likely in their haste to jam this rule out. And so we've asked them to provide their analysis, underpinning their assertion.

Alan Kaplinsky:

Yeah. And they have a deadline coming up under FOIA that they've got to respond to you right?

John Court:

Yeah. So listen, I mean, we cited the fact that the comment deadline is January 4th. We indicated that this information was critical to our analysis and responding to the proposal. Yeah, I will just tell you that as of the date of this recording, we have not heard back yet.

Alan Kaplinsky:

Right, don't hold your breath. So what are you hearing, obviously you represent the larger banking institutions, the ones that are most severely impacted by this, but what are you hearing from others in the industry? And what is the rest of the banking industry think? The banks that aren't probably covered by it, the other less in 100 billion, do they not like it?

Alan Kaplinsky:

I would think nobody would like it, because there would be a fear. I mean, if I were a bank and I wasn't included it's the old story about, once the camel's foot is in the door under the tent it won't take long before that gets broadened to encompass many other banking institutions.

John Court:

Yeah. So it's a great question. We submitted a request for an extension of the comment period with a number of other banking trade groups, and that extension was denied. So I know they're focused on this and yes, as you point out the way the rule is constructed, it only applies presumptively applies to any bank that has a hundred billion or more of assets.

John Court:

So if you are less than a hundred billion of assets, there's a presumption that you're not going to be subject to the rule. Now that's this rule under this acting comptroll. I mean, one of our biggest concerns with this rule is that there are few, if any limiting principles in it, the only limiting principle really is the presumption of who it should apply to.

John Court:

But I think if you really start to unpack the justification for that while it makes sense politically, because the acting comptroller doesn't want to raise the ire of the 5,000 community banks in this country,

although not all of them are federally chartered admittedly, but I think that's why he applied it just to the large banks but theoretically the concerns that he has they're more principal concerns and they really should apply to any bank, is it really inappropriate for a large bank to base a decision on sort of reputational risk, but it's entirely appropriate for a small bank to do so, or even a mid-sized bank?

John Court:

It doesn't seem that, that's the right answer. And it raises sort of problems with the language that the rule is based on. I mean, how can fair if the comptroller is responsible for assuring fair access, how can he only be assuring fair access at large banks, but not be assuring fair access at smaller banks? And actually it raises a bigger picture concern with this rule, Alan, which is, in this rule this acting comptroller is proffering a vision for what fair access means.

John Court:

And from the context, it appears that the rule is motivated by political considerations if we can just be frank. But if unchecked, we presume that nothing would stop a future comptroller from changing or expanding that vision to suit different political considerations or from seeking to offer a vision and a rule for what other elements of the mission statement should be written in a rule like fair treatment of customers, and nothing will stop a future acting comptroller from applying it only to large banks if they're really more principled about it, they'd applied it to all national bank.

John Court:

So this mission statement and the way it's being used, today only applies to large banks, but in the future, we'll become a channel through which I think we will see the unencumbered politicization of the OCC undermining its ability to function as an independent, reliable, trustworthy prudential regulatory agency.

John Court:

And I think that would be a bad outcome for good policymaking, a bad outcome for trust in our banking system and a bad outcome for good government. And for the other banks that are currently presumptively subject to this rule, that's what I think they should be giving thought to and weighing the considerations.

Alan Kaplinsky:

I've also seen some criticism from consumer groups. They don't like it either at least I saw one of the blogs that I look at, I think it was Credit Slips professor, I think it was Adam Levitin at Georgetown Law. He railed against this thing and I think his the main reason he didn't like it is, he didn't like the fact that banks are going to be required to lend to payday lenders, but the companies that charge very, very high interest rates to consumers.

Alan Kaplinsky:

But I haven't seen any support for the rule, I guess there will be, we'll see, comment letters coming in, but what about the FDIC in the Fed have either of them weighed in on the proposal or do either of them do you think they have in mind doing something similar to this that would apply to state banks?

John Court:

That's interesting. They would have to develop a statutory basis to do so and they are not governed by the National Bank Act. So they'd have to look to their own statutes, hopefully not the mission statements in their own statutes, but operative provisions of their statutes that actually confer some kind of rulemaking or enforcement authority. So I don't think they have any plans. I saw a chair, Nick Williams made some public remarks that he didn't think that a rulemaking trying to achieve these objectives was appropriate.

John Court:

He thought if there were policy objectives to be achieved, it was more appropriately done through the supervisory and examination framework. I haven't seen anything from the Fed but I will say I suspect and hope those agencies, particularly the Fed are studying this rule because if finalized and allowed to go effective, I think this role could interfere with a range of other existing Prudential policy tools.

John Court:

And so I suspect the Fed and the FDIC would care very much. But I don't know where they are in that analysis. And I don't think they've said anything public.

Alan Kaplinsky:

Yeah. Do you think the treasury supports it?

John Court:

I think this treasury department is supportive of this acting comptroll.

Alan Kaplinsky:

Right. Yeah. So you think this is going to get finalized by January 20th, by the time of the inauguration?

John Court:

Yeah, yes. I absolutely think that the acting comptroller will finalize it-

Alan Kaplinsky:

That's why you didn't get the extension, I guess, right?

John Court:

I suppose, but he was kind enough to do deny our extension requests within one business day with his own signature on the paper though we know that he's actively involved in what's going on. Hey, can I go back and just talk a little bit about, you asked about what the consumer groups think of this proposal?

John Court:

So it's a good question. I'm not entirely sure you've done more diligence on this than I, but I do think most progressive groups oppose this and I think largely on the basis that they see it as a relatively naked political stunt to appease a particular audience, that's their view as I understand it and so I don't think they're inclined to see this stand in a new administration.

Alan Kaplinsky:

Okay. So John let's look forward a bit and try to figure out what the ultimate fate of this rule is going to be. Let's assume we do have a final rule that gets issued sometime before January 20th, and the inauguration and let's assume we've gotten newly constituted house, newly constituted Senate, house will be in control of the Democrats I'm not sure what's going to happen yet on the Senate side.

Alan Kaplinsky:

It will depend on the outcome of the runoff elections in Georgia. There is something called the Congressional Review Act. I assume that, that's a potential avenue of trying to get the rule repealed or overturned. There's the possibility of going to court to challenge it depending upon who the next comptroller is, assume that will be somebody appointed by president Biden.

Alan Kaplinsky:

There may be an acting comptroller for a period of time and that person may not like the rule and they might have to re-initiate rule-making proceedings with the idea of getting rid of the rule. Where do you see it going? I mean, these are three avenues that I can conjure up.

John Court:

Yep. I think those are the right three avenues to look at. We're obviously in conjecture land here but I'm happy to engage. Look I think repeals under the Congressional Review Act would be tough particularly if you continue to have a divided government in the Congress. So if the dems keep the house, but the Republicans keep the Senate, I think it's unlikely that this would see a CRA repeal.

John Court:

Yes, listen, any private citizen can assert and defend their rights by petitioning to an article three judge and so that is another possible avenue. But I think probably the more likely avenue is people will want to wait and see what the new administration's policy is going to be on this issue. And we'll want to probably watch closely what a new acting comptroller or new confirmed comptroller even will do and say.

John Court:

And given the politics here, I suspect the Biden administration will feel some pressure to re-examine this rule and we would certainly be supportive of those efforts.

Alan Kaplinsky:

Yeah. Let me ask you this is, maybe an unfair question, John, but how would you feel if the rule got changed to say that no bank will be required to lend to industries they don't want to lend to based either on reputational risk or lack of expertise, safety, and soundness, but if you do land, you'll get some CRA credit for lending to them. Would that make you happy?

John Court:

Sure. I feel like we're negotiating peace in our time, and I think history has taught us that that is unwise. Listen, I think, but look, are there ways to make this rule better? Gosh, I don't know. This rule is so fundamentally flawed Alan and really what it risks is the precedent that it sets that two words in a mission statement for an agency can be extrapolated into such a meaningful rulemaking.

John Court:

I think if this policy objective of this acting comptroller wants to be achieved, then this is something that is the proper province of the Congress. And if the Congress wants to decide that they want to take this kind of decision-making away from a bank CEO and a bank board, then that should probably be a law and there should be proper deliberation and debate about that. So that's what I think.

Alan Kaplinsky:

Okay. Well, I think, yeah, with that I think we're going to wind up our program for today. Want to thank you, John very much for taking the time to share your thoughts with us. We look forward very much to reading your comment letter to the OCC and other comment letters on this subject. So thank you, John.

John Court:

It's been my pleasure. I appreciate the opportunity to come and to share our views. So thanks for having us.

Alan Kaplinsky:

Yeah. And I want to thank all of our listeners today who have downloaded the podcast. And if you have any comments yourself and what you've heard today feel free to email me or ballardspahr.com it's questions at ballardspahr.com, and we'd be happy to hear from anybody. So that brings our podcast to its conclusion today. Thank you everyone.