



February 14, 2022

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th St. SW, Suite 3E-218
Washington, DC 20219

Submitted via <https://www.regulations.gov>

Re: Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks, Docket ID OCC-2021-0023, OCC Bulletin 2021-62 (December 16, 2021)

Dear Sir/Madam:

On behalf of the undersigned, we respectfully submit the following comments in response to the Office of the Comptroller of the Currency ("OCC")'s request for feedback regarding Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks ("Proposed Principles").¹ We request that the OCC not adopt the Proposed Principles.

First, the OCC's Proposed Principles single out climate-related risk alone for special treatment, despite more serious threats that include economic downturns, foreign wars, and public health crises. We disagree that climate-related financial risk is the single gravest threat to the U.S. banking system and that it needs special treatment. Under the OCC proposal, banks will be required to monitor and respond to climate-related risk even when immaterial, to undertake costly scenario analyses that are not required even for other material risks, and to labor under a series of requirements that have no role where other risks are concerned. This special concern for and attention to climate-related risks is irrational. There is no evidence that such risks stand above other dangers to the banking system or that banks need prompting to consider such risks. Climate risk does not need special treatment. With the Proposed Principles, the OCC ignores a more realistic and holistic approach to risk management in favor of political and social concerns.

¹ OCC Bulletin 2021-62 (December 16, 2021), *Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback* (Docket Number OCC-2021-0023), <https://www.occ.treas.gov/news-issuances/bulletins/2021/bulletin-2021-62.html>.

Second, the proposed special treatment of climate-related risk will come with great costs that the OCC cannot ignore. Under the Proposed Principles, banks will incur needless additional operating costs which they will pass on to consumers. Businesses that produce essential goods like electricity and other energy will find it more difficult to obtain credit. Americans who work for these businesses will suffer lost jobs. States that produce energy will also be adversely affected as OCC “principles” are used by lenders against energy producers. Critical consumer goods will become more expensive. Home loans in regions allegedly exposed to climate risk may become harder to obtain. Banks will be encouraged to exclude areas of the economy. The potential adverse effects of these Proposed Principles on states, businesses, and consumers cannot be overstated. The OCC does not and cannot show that the Proposed Principles justify these likely immense costs or that they benefit more than a few activists and politicians.

Third, the Proposed Principles will force banks to monitor and account for speculative and immaterial risks. Banks will be required to spend more on professionals and compliance, trying to comply with these amorphous principles. Activists daily assert new, speculative harms from climate change. Under the Proposed Principles, banks may be forced to take each of these asserted harms seriously, constricting credit and other services to avoid entirely speculative risk.

Fourth, the Proposed Principles are not guidance at all. These will become (and are likely intended to be) de facto legislative rules and administrative regulations. The Proposed Principles expand far beyond the scope of current law, bind the OCC staff, and given the extraordinary power the staff hold over regulated banks, it binds banks as well. The OCC should instead engage in rulemaking and provide the full set of analyses and procedures that must accompany such proceedings.

Finally, the Proposed Principles also violate the OCC’s own regulations, in which the agency committed just a year ago that it would not attempt to issue binding regulations through guidance. The OCC’s casual disregard of its own regulations is one more reason the Proposed Principles, if finalized, would be arbitrary and capricious.

The OCC should not adopt the Proposed Principles because they will not assist banks to assess and prepare for all material risks. Instead, the Proposed Principles will adversely affect states, businesses, and consumers and cause banks to incur more costs. The Proposed Principles may even weaken federally chartered banks and the national and state banking systems.

BACKGROUND

On December 16, 2021, the OCC issued OCC Bulletin 2021-62 entitled Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback.² The bulletin regards the OCC’s “draft principles designed to support the

² OCC Bulletin 2021-62 (December 16, 2021), *Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback* (Docket Number OCC-2021-0023), <https://www.occ.treas.gov/news-issuances/bulletins/2021/bulletin-2021-62.html>.

identification and management of climate-related financial risks by banks with more than \$100 billion in total consolidated assets.”³ The bulletin links to a document entitled “ Principles for Climate-Related Financial Risk Management for Large Bank (“Proposed Principles”).”⁴ OCC requests feedback on the Proposed Principles through February 14, 2022.⁵

The OCC starts the Introduction section of the Proposed Principles by stating that it “has identified the effects of climate change and the transition to a low carbon economy as presenting emerging risks to banks and the financial system.”⁶ The OCC then differentiates between climate-related physical risks (e.g., hurricanes, floods, wildfires) and transition risks (e.g., “stresses to certain banks or sectors”), both of which are referred to in the Proposed Principles “as climate-related financial risks.”⁷

The Proposed Principles lists five general climate-related financial risk principles, as follows: (1) Governance; (2) Policies, Procedures, and Limits; (3) Strategic Planning; (4) Risk Management; and (5) Data, Risk Measurement, and Reporting.⁸ The OCC states that “[m]anagement should develop and implement climate-related scenario analysis frameworks in a manner commensurate to the bank’s size, complexity, business activity, and risk profile.”⁹ The Proposed Principles also list climate-related risk assessment principles, which are as follows: Credit Risk; Liquidity Risk; Other Financial Risk; Operational Risk; Legal/Compliance Risk; and Other Nonfinancial Risk.¹⁰ The OCC requested feedback on the Proposed Principles, including thirteen specific questions.¹¹

DISCUSSION

Proposed Principles Irrationally Single Out Climate-Related Risk for Special Treatment

The Proposed Principles, if finalized, would irrationally single out climate-related risk for special treatment. Under existing law and regulations, banks are already obligated to achieve safety and soundness through monitoring and responding to risk from lending, operations, changes in law and policy, etc.¹² The OCC’s staff, some of whom are on-site every day at the large banks to which the proposal applies, are obliged to ensure that banks monitor and respond to this risk appropriately.¹³ The OCC has previously stated that “[p]rudently managing climate

³ See *id.*

⁴ See *id.*

⁵ OCC Bulletin 2021-62 (December 16, 2021), Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback (Docket Number OCC-2021-0023), <https://www.occ.treas.gov/news-issuances/bulletins/2021/bulletin-2021-62.html>.

⁶ Office of the Comptroller of the Currency, *Principles for Climate-Related Financial Risk Management for Large Banks*, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>.

⁷ See *id.* at p. 1.

⁸ See *id.* at pp. 1-3.

⁹ See *id.* at p. 4.

¹⁰ See *id.* at pp. 4-5.

¹¹ See *id.* at pp. 5-7.

¹² See, e.g., 12 C.F.R. pt. 30.

¹³ See 12 U.S.C. § 1

change risk is a safety and a soundness issue.”¹⁴ And many banks already take climate-related risk into account.¹⁵

The Proposed Principles go a big step further: they single out climate-related risk for unnecessary special treatment. Regulated banks no longer may simply treat climate-related risk as any other risk. Instead, banks must specifically focus on climate-related risk in a variety of ways. For instance:

- The proposal directs that banks must communicate about climate-related risks in particular and must specially assign responsibilities for them “throughout the organization.”¹⁶
- Climate-related risk is singled out as the subject of mandatory reporting by bank management to the board.¹⁷
- Climate-related risk is singled out for assessment with regard to “stakeholders’ expectations, the bank’s reputation, and ... disadvantaged households and communities.”¹⁸
- Banks must “incorporate climate-related risks into their internal control frameworks, including internal audit,”¹⁹ regardless of whether those risks would qualify for control or audit coverage under the procedures that the banks have reasonably adopted for other sorts of risk.
- Bank management must “develop and implement ... scenario analysis frameworks” for climate-related risks but not for other risks.²⁰
- Banks are to “consider climate-related financial risks as part of the underwriting and ongoing monitoring of portfolios.”²¹

Singling-out climate-related risk is unjustifiable. Climate-related eventualities do not pose greater risk than, for example, technological disruption, economic downturns, domestic

14 OCC, “OCC Announces Climate Change Risk Officer, Membership in the NGFS” (July 27, 2021), <https://occ.gov/news-issuances/news-releases/2021/nr-occ-2021-78.html>.

15 *See, e.g.*, Bank of America, “Task force on climate-related financial disclosures report,” <https://about.bankofamerica.com/en/making-an-impact/task-force-on-climate-related-financial-disclosures-report> (“As one of the world’s largest financial institutions, we are committed to ensuring that climate-related risks and opportunities are properly managed within our business.”).

16 Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>, at p. 2.

17 *See id.* at p. 2.

18 *See id.* at p. 3.

19 *See id.* at p. 3.

20 *See id.* at p. 4.

21 *See id.* at p. 4.

political changes, foreign conflicts, civic unrest, changing consumer tastes, non-climatic natural disasters, and public health crises such as the one ravaging the globe today. Even if climate-related risk were among the most important for some banks, there is no reason to believe that is true for all or most banks. Yet the proposal singles out only climate-related risk, and for all large banks.

The Proposed Principles’ defenders may argue that the proposal only requires banks to monitor and respond to material climate-related risk, which they ought to do anyway under current law. This contention must be rejected for three reasons.

First, the proposal does not limit its commands to material climate-related risk. For instance, management is directed to “regularly report[]” to the board on climate-related financial risks—without regard to whether such risks are regularly material.²² Similarly, banks are directed to “consider climate-related financial risks as part of the underwriting and ongoing monitoring of portfolios”—without regard to whether those risks are material for particular portfolios.²³ The result of the Proposed Principles would require banks to give climate-related risks a special place in their consideration without first determining that those risks are material.

Second, the proposal irrationally singles out climate-related risk for special procedures that are not required even for other material risks. For instance, the proposal demands scenario analysis for climate-related risks.²⁴ But banks are not required to conduct scenario analysis for other eventualities that pose material, and even greater, risk.

Third, if the proposal’s only point is that banks should take material climate-related risk into account on the same terms and in the same ways as other risk, it should just say so, in the form of a simple reminder that the same requirements of assessing material risk with a view to safety and soundness apply to all kinds of risk.

The largest banks, to which the Proposed Principles are directed, do not need more prompting to pay attention to climate-related risk as compared to other sorts of risk. Just the opposite is true. Such a reminder would in fact be unnecessary because the largest banks have shown a pronounced propensity to engage on issues surrounding climate-related risk.²⁵ Because no guidance is needed to remind banks and examiners of existing legal requirements, there is no need for the Proposed Principles, and their issuance would therefore be arbitrary and capricious.

²² See *id.* at p. 2.

²³ See *id.* at p. 4.

²⁴ See *id.* at p. 4.

²⁵ See, e.g., JPMorgan Chase & Co., Sustainability, <https://www.jpmorganchase.com/impact/sustainability/es-commitments>; Citigroup, Taskforce on Climate-Related Financial Disclosures Report 2021, <https://www.citigroup.com/citi/sustainability/data/taskforce-on-climate-related-financial-disclosures-report-2021.pdf?linkId=148731631>; Wells Fargo, Taskforce for Climate-Related Financial Disclosures, <https://www08.wellsfargomedia.com/assets/pdf/about/corporate-responsibility/climate-disclosure.pdf>.

If the OCC is determined to act in this space, it should prepare guidance for every type of eventuality that poses a level of risk similar to that assertedly presented by climate change and should present a reasoned basis for singling out these types of eventualities as presenting higher degrees of risk than other types. The OCC's failure even to ask whether singling out climate-related risk is needed, let alone to answer that question in the affirmative, is the essence of arbitrary decision-making. The proposal's irrationality is exacerbated by the fact that, as we establish below, its directives are mandatory, although the proposal would be irrational even if optional. At the very least, the OCC should add to the proposal text making clear that banks are not required to treat climate-related risk differently than any other sort of risk.

OCC Must Consider the Negative Effects

The Proposed Principles will have considerable negative effects. OCC must consider these before adopting the Proposed Principles. A regulation that fails to weigh its benefits against its costs is irrational.²⁶ Yet the proposal fails even to identify its costs, let alone assess whether the benefits it purports to achieve justify them. The Proposed Principles would impose serious real-world costs on banks, on the businesses to whom they lend, and on American citizens who depend on those businesses for their livelihoods and for goods and services and on the banks.

By singling out climate-related risk for special treatment the Proposed Principles would force banks to implement procedures that are not justified by the prevention of financial harm—as indicated by the fact that the OCC does not require those procedures for comparable risk of other types. This may also empower litigation by activists and others seeking to influence or claim against the banks. This would pointlessly increase operating costs for banks, which will pass on these costs to customers. All these costs would be most heavily borne by small businesses, who will more often lack the resources to absorb an increase in the cost of credit or to modify their operations to cater to the demands of banks to avoid activities that generate climate-related risk.

By requiring banks to treat climate-related risk more sensitively than risks of other types, the proposal would drive banks to assemble portfolios that are inefficient. Indeed, by driving banks to assemble portfolios weighted toward businesses that putatively represent low climate risk, the proposal would make portfolios less diverse and hence will increase risk in the banking system. Moreover, while the Proposed Principles purport to only target large banks they will inevitably affect community banks and credit unions.

Banks would be encouraged to exclude areas of the economy. By singling out climate-related risk for special caution in the provision of credit, the Proposed Principles would prompt banks to deny credit, or offer credit on worse terms, to businesses that might be alleged to pose climate-related risk. This includes businesses such as mining and electric power companies, as well as others that may be alleged to be at risk from possible changes in law or public opinion regarding climate change. Because the proposal directs banks to consider climate-related risks to

²⁶ *Michigan v. EPA*, 576 U.S. 743 (2015).

“the bank’s reputation,”²⁷ banks would be forced to consider whether loan applicants are in favor with green activists or are green enough. Banks may (in good faith or otherwise) interpret the proposal to require that they lend only to businesses that make certain green commitments (net zero emissions by 2050, etc.). Businesses that are accused of or perceived as harming the climate may find it hard to obtain credit and/or reasonable loan terms. Banks may even believe they must refuse standard transactional services, such as banking accounts, to businesses that are in disfavor with green activists.

Businesses that operate in regions that may be alleged to be exposed to climate risk, such as coastal or forested areas, would also find it harder and more expensive to obtain credit. Indeed, the proposal suggests that banks should “determine ... lending limits” by reference to geographic location.²⁸ This harm would extend to states whose economies rely on energy generation.

The Proposed Principles will also hurt American citizens. As credit for businesses posing “climate risk” dries up, the Americans who work for those businesses or for other businesses who depend on them for goods or services would find their livelihoods in peril. Americans would find it harder to start small businesses alleged to pose such risks. Further, under the Proposed Principles, Americans who happen to live in areas that the banks may believe are at higher climate risk would find it harder to get home and business loans. And Americans would face higher charges for essential goods like electricity as the cost of credit for such goods increases. Americans would also suffer as towns—especially in rural America—lose businesses on which they depend for jobs that sustain a viable community life. Americans would further suffer from the broader societal risks inherent in the green policies that the proposal is meant to further. These policies risk creating economic downturns, undermining grid reliability, and impeding American trade competitiveness, to name just a few. But the Proposed Principles do not even acknowledge, let alone attempt to fathom, these risks, or to offset them against the asserted risks it addresses.

The Proposed Principles fail to assess not just costs, but also benefits. It claims that its approach will enhance bank safety and soundness, but it does not establish a baseline of current bank practices with respect to climate-related risk or show how the approach taken in the proposal differs from that approach. Without such information, it is impossible to know whether the proposal marks any advance over current levels of safety and soundness and hence whether it is necessary. A regulation aiming at a problem is “highly capricious if that problem does not exist.”²⁹

²⁷ Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>, at pp. 3, 5.

²⁸ *See id.* at p. 4.

²⁹ *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988).

Any rational approach to risk management, including climate-related risk, requires a robust cost-benefit analysis relying on rigorous economic, industrial, and consumer studies. But among its many questions, the Proposed Principles fail to ask about the costs and benefits of its mandates. If the OCC mistakenly elects to continue with this rulemaking, it should before finalization issue a request for information seeking the data it needs to assess and compare costs and benefits, then give careful heed to that data in any eventual finalization.

Proposed Principles Force Banks to Account for Immaterial and Speculative Risk

The Proposed Principles force banks to monitor and account even for speculative and immaterial risks. Despite having a stated purpose of helping banks manage risk arising from climate change, the Proposed Principles do not explain the nature and scope of that risk, leaving banks to feel their way blindly on this decisive question, or to guess what will best keep them out of regulatory audits and litigation.

Predictions about the physical risks of climate change vary wildly, ranging from increasing numbers of hurricanes and wildfires to destruction from climate-driven great-power conflict or even more speculative claims.³⁰ And predictive climate science is in its infancy.³¹ For these reasons the obstacles to understanding the risk of various climate eventualities, especially decades into the future, are immense. Yet the proposal fails to offer principles by which banks can determine which asserted physical risks are realistic in the OCC's view and therefore should be considered.

Further, the proposal demands that banks monitor and account for risk arising from climate-driven changes to the legal framework. But regulatory and (especially) legislative action is notoriously difficult to predict, and the Proposed Principles do not offer any means by which banks may weed out probable from speculative future regulatory and legislative developments or any safe harbors on which banks may rely in making judgments about such future government action. Faced with the proposal's demand that banks monitor and respond to climate-related risk and the OCC's refusal to explain which sorts of alleged risk are of concern, banks will have no choice but to err on the side of caution. Rather than run afoul of the OCC, they will take an unwarrantably and unpredictably expansive view of the risks of climate change, exacerbating the harms to the banking system, small businesses, and Americans discussed in the preceding section. Indeed, the proposal sanctions this approach: it urges banks to adopt "measures of conservatism" in the face of uncertainty.³²

For this reason, too, the OCC should not finalize this proposal. If it does choose to finalize, then it should make clear that banks may form their own judgments about the likelihood

³⁰ See Elizabeth Kolbert, "Three Scenarios for the Future of Climate Change," *New Yorker* (Oct. 5, 2020).

³¹ The proposal itself admits that climate "[d]ata, risk measurement, modeling methodologies, and reporting continue to evolve at a rapid pace." P. 3.

³² Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>, at p. 5.

and magnitude of various asserted climate-driven eventualities and that the OCC will not second-guess those judgments.

This is Rulemaking, Not Guidance

The Proposed Principles are legislative rules masquerading as guidance. The OCC must treat it as a legislative rule. The “hallmark of legislative rules” is “[e]xpanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created.”³³

The Proposed Principles expand the regulatory footprint in two ways. First, it decides once and for all that climate-related financial risk poses a graver risk to bank safety and soundness than other sorts of risk and therefore warrants special treatment. Regulated banks are no longer free to make their own prudential assessment in this area, as they do in others; they *must* act as though climate-related risk is of especially great concern. Second, the proposal establishes several concrete new requirements for regulated banks. *See supra*.

Neither of the above represents a mere interpretation of existing legal duties.³⁴ Indeed, the proposal does not cite a statute or regulation. It appears to deduce the new requirements from the general duty of safety and soundness,³⁵ but that general standard neither singles out climate-related risk for special treatment nor creates the particular duties the proposal demands.

The Proposed Principles, if finalized, would have binding force. The proposal binds banks to single out climate-related risk as of special concern. Banks under the OCC’s jurisdiction must remain safe and sound.³⁶ The Proposed Principles declare the OCC’s position that climate-related financial risk implicates safety and soundness in an especially serious way.³⁷ Banks are no longer free to reach their own conclusions on this issue. This determination from the OCC’s headquarters controls the actions of its supervisory staff. The OCC has a statutory duty to preserve safety and soundness.³⁸ Its staff therefore cannot allow supervised banks to engage in behavior that the agency has determined would imperil safety and soundness.³⁹ The proposal leaves OCC supervisory staff no opportunity for reaching different conclusions about climate-related risk; indeed, the proposal makes clear that the staff’s “supervisory expectations” will be

³³ *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013); *see also Gen. Motors Corp. v. Ruckelshaus*, 742 F.3d 1561, 1565 (D.C. Cir. 1984) (rule is legislative when it “create[s] ... new rights or duties”).

³⁴ *See, e.g., Iowa League of Cities*, 711 F.3d at 875 (legislative rule exists where no “preexisting ... legislative rule ... supplies the basis for the prohibition” in guidance).

³⁵ Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>, at p. 2.

³⁶ 12 U.S.C. § 1(a).

³⁷ Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>, at p. 1.

³⁸ 12 U.S.C. § 1.

³⁹ OCC, *Comptroller’s Handbook: Large Bank Supervision* 11 (2019) (“If examiners determine that a risk is ... not effectively managed ... they *must* communicate to bank management and the board the need to mitigate or eliminate the unwarranted risk.”) (emphasis added).

shaped by the framework offered in the proposal.⁴⁰ The OCC staff who closely supervise large banks must therefore *require* the banks they supervise to treat climate-related risk as the proposal demands.

Because regulated banks know this, they must accept the proposal’s determination about climate-related risk if they do not wish for adverse action by their examiners. This is why the proposal simply assumes that banks will “incorporate[e] these principles [of the proposal] into their risk management systems.”⁴¹ It does not even consider whether banks might decline to accept this purported “guidance.”

The Proposed Principles therefore resemble the EPA guidance found binding in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), and *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011), both of which committed agency staff—and therefore by extension the public regulated by those staff—to the positions taken by guidance. Indeed, the proposal presents the concerns in these cases in an aggravated form, for the OCC’s supervisory power is among the broadest and most powerful known to law. Regulated banks, as chartered entities, owe their very existence to the OCC. Moreover, examiners are on-site at large regulated banks at all times, with authority to “require action by bank management to address deficiencies before [they] compromise the bank’s safety and soundness.”⁴²

The Proposed Principles also bind banks to implement its particular demands. The proposal states that an “effective risk governance framework is *essential* to a bank’s safe and sound operation,”⁴³ and that such governance “includes” certain specific climate-related measures such as “assigning climate-related financial risk responsibilities throughout the organization.” Per the proposal, regulated banks that treat climate-related risk like other risks, rather than singling it out for, e.g., “assign[ment] ... throughout the organization,” will fail at an “*essential*” element of safety and soundness.

Similarly, the proposal often asserts that banks “should” comply with its demands. While this word can sometimes merely recommend, here the Proposed Principles make clear that banks “should” undertake the demanded measures if they want to remain safe and sound—and they are required by law to remain safe and sound. The guidance does not disclaim that it is binding or anywhere inform banks or the public that it does not bind.

⁴⁰ P. 2; *see also* *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (explaining that the fact that a document constrains an agency’s discretion tends to show it is a legislative rule).

⁴¹ Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>, at p. 6.

⁴² *Comptroller’s Handbook* at 14.

⁴³ Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>, at p. 2 (emphasis added).

The OCC should therefore admit that the proposal, if finalized, would constitute a legislative rule subject to the procedural requirements of the Administrative Procedures Act (APA). The OCC should withdraw the proposal and (if it mistakenly chooses to proceed with the rulemaking) should reissue it with the full set of findings and analyses that ordinarily accompany a rulemaking. Further, the OCC should explain why a binding rulemaking, rather than optional guidance, is appropriate in these circumstances. Nothing in the proposal addresses this question, but a rulemaking that fails to engage whether a rulemaking (rather than guidance) is necessary at all is arbitrary and capricious.

As Guidance, the Proposed Principles Violate OCC Regulations

The Proposed Principles, if finalized, would violate the OCC's own regulations because they would create a binding rule through purported guidance. Just a year ago, the OCC issued a regulation providing that "supervisory guidance does not have the force and effect of law."⁴⁴ In the preamble to that regulation, the OCC explained that "examples ... included in supervisory guidance (including guidance that goes through public comment) are not binding on institutions," but are "intended to be illustrative."⁴⁵

Yet, as explained above, the proposal if finalized would create a binding rule, and the examples it gives of practices banks must undertake to protect against climate-related risk are mandatory rather than illustrative.

Moreover, the proposal if finalized would be arbitrary and capricious because the creation of a binding rule through guidance would constitute an unexplained departure from the agency's own past practice, as codified in the agency's own regulation on guidance.⁴⁶ That the proposal passed through a comment period changes nothing because the OCC's rule on guidance commits the agency not to issue binding guidance even through notice and comment.

CONCLUSION

The OCC should not adopt the Proposed Principles. Climate-related financial risk is not the gravest threat to our banking system and should not be elevated to that status over economic downturns, foreign wars, or public health crises. The direct costs of compliance and indirect cost to businesses and consumers may be devastating, increasing already high inflation but curtailing credit to the energy sector and further burdening low-income Americans. The Proposed Principles favor and elevate social and political issues to the detriment of states, businesses, consumers, and our banking system.

Moreover, the Proposed Principles are labeled guidance, but will be treated and enforced as rules. The OCC should withdraw the Proposed Principles and proceed with rulemaking.

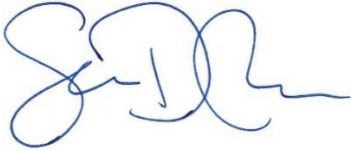
⁴⁴ 86 Fed. Reg. 9253, 9260 (2021).

⁴⁵ *Id.* at 9258.

⁴⁶ *See, e.g., Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

Thank you for the opportunity to provide comments. If you have any questions, please contact the Office of the Utah Attorney General, the Utah Office of State Treasurer, or the Utah Office of the State Auditor.

Respectfully submitted,



Sean D. Reyes
Utah Attorney General



Marlo M. Oaks, CFA, CAIA
Treasurer, State of Utah



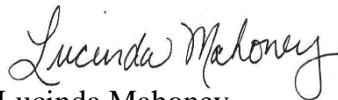
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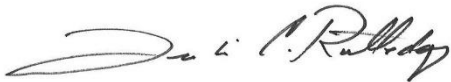
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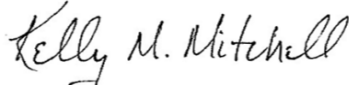
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Daniel Cameron
Kentucky Attorney General



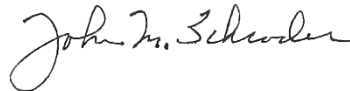
Allison Ball
Treasurer, State of Kentucky



Mike Harmon
Kentucky Auditor of
Public Accounts



Jeff Landry
Louisiana Attorney General



John M. Schroder
Treasurer, State of Louisiana



Lynn Fitch
Mississippi Attorney General



David McRae
Treasurer, State of
Mississippi



Scott Fitzpatrick
Treasurer, State of Missouri



Austin Knudsen
Montana Attorney General



Douglas J. Peterson
Nebraska Attorney General



John Murante
Treasurer, State of Nebraska



Thomas Beadle
Treasurer, State of
North Dakota



Dave Yost
Ohio Attorney General



John M. O'Connor
Oklahoma Attorney General



Randy McDaniel
Treasurer, State of Oklahoma



Alan Wilson
South Carolina
Attorney General



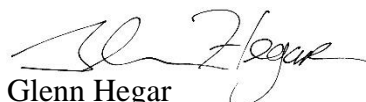
Curtis Loftis
Treasurer, State of
South Carolina



Josh Haeder
Treasurer, State of South
Dakota



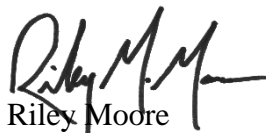
Ken Paxton
Texas Attorney General



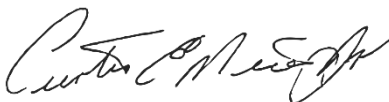
Glenn Hegar
Comptroller of Public
Accounts, State of Texas



Patrick Morrissey
West Virginia
Attorney General



Riley Moore
Treasurer, State of West
Virginia



Curtis Meier
Treasurer, State of Wyoming