

Acting Comptroller of the Currency Michael J. Hsu  
Remarks at the NCRC's 2023 Just Economy Conference  
“Elevating Fairness”  
March 30, 2023

Good morning. Thank you for inviting me to this year's Just Economy Conference. I'm honored to join NCRC's members today to discuss what we are doing at the Office of the Comptroller of the Currency (OCC) to elevate fairness in banking.

First, I want to say a few words about recent events. The OCC's focus is, and continues to be, the safety, soundness, and fairness of the federal banking system. We are closely monitoring the market and the conditions of the institutions we supervise. The banking system is sound and resilient. Your money is safe. Banks have strong capital and liquidity, and the U.S. government has the tools and the will to act to protect the system.

Given the events of the past several weeks, some might think it odd that, as a bank regulator, I want to focus my remarks today on fairness. I do this with intention because it is precisely during times like these—when the world is fixated on financial and systemic risks—that issues of fairness can get pushed to the bottom of the pile and ignored.

We saw this in response to the 2008 financial crisis. The de-prioritization of non-financial risks, such as consumer protection, compliance, and operational risk, delayed and may have worsened eventual reckonings, which took place years later with great force and attention.<sup>1</sup>

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<sup>1</sup> For example, in April 2011 the OCC (along with the former Office of Thrift Supervision, which was merged with the OCC in July 2011) issued consent orders against 12 banks for deficiencies and unsafe or unsound practices in residential mortgage servicing and/or the initiation and handling of foreclosure proceedings. In addition, with the other banking regulators, the OCC issued consent orders against two providers of services to the mortgage lending industry. In November 2014 the OCC issued consent orders and civil money penalties (against Bank of America, N.A., Citibank, N.A., and JPMorgan Chase Bank, N.A., for unsafe and unsound practices related to the banks' wholesale foreign exchange businesses. The OCC took multiple enforcement actions arising from compliance and operational deficiencies in the years following the financial crisis. See also *Agreement by and between Woodforest*

Those reckonings eroded trust in the banking system, much as the financial risks did years earlier.

We can learn from history and do better. We need to be able to walk and chew gum at the same time—i.e., maintain a laser focus on effective financial risk management *and* work to ensure fairness. Today I will share what we at the OCC are doing to meet our mission of not just ensuring a financially safe and sound federal banking system, but also ensuring that federally chartered banks provide fair access to financial services, treat customers fairly, and comply with laws and regulations.<sup>2</sup>

## **Elevating Fairness**

Since becoming Acting Comptroller in May 2021, I have emphasized that persistent inequality can erode trust in banking because people who feel stuck or lack access to responsible, affordable financial products and services may conclude that the banking system is working against them rather than for them. This can compel consumers to turn to nonbanks, such as

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*National Bank and Assessment of a Civil Money Penalty*, AA-EC-10-93 (October 8, 2010) (unfair and/or deceptive practices related to overdraft protection program); *Agreement by and between JPMorgan Chase Bank, N.A. and Assessment of a Civil Money Penalty*, AA-EC-11-63 (July 6, 2011) (internal control deficiencies that resulted in violations of law and/or unsafe or unsound banking practices); *In the Matter of Capital One Bank (USA), N.A., Consent Order*, AA-EC-2012-62, and *Assessment of a Civil Money Penalty*, EC-AA-2012-63 (August 17, 2012) (unfair and/or deceptive practices related to debt cancellation and credit identity monitoring products and failure to appropriately manage risks associated with these products); *In the Matter of Capital One, N.A., Consent Order*, and *Assessment of a Civil Money Penalty*, AA-EC-2014-71 (November 6, 2014) (violations of the Servicemember Civil Relief Act and deficiencies in the compliance program); *In the Matter of RBS Citizens, N.A., Consent Order*, and *Assessment of a Civil Money Penalty*, AA-EC-2014-109 (August 10, 2015) (unfair and/or deceptive practices related to deposit reconciliation practices and unsafe and failure to implement appropriate internal controls); and *In the Matter of U.S. Bank National Association, Consent Order*, AA-EC-2015-77 (October 23, 2015) (deficiencies in Bank Secrecy Act/anti-money laundering compliance).

<sup>2</sup> The OCC's [mission](#) is "[t]o ensure that national banks and federal savings associations operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations." See 12 USC 1(a).

payday lenders, crypto platforms, and fintechs, which often have less stringent safety and soundness requirements and consumer protection oversight than banks.

Fairness is a core part of the OCC's mission and something that is on my mind every day. To some outsiders, it may seem like fairness sits in the shadow of financial safety and soundness, stepping out into the spotlight only during enforcement actions, after high profile scandals, and when certain regulations are being adopted. But insiders know better. In 2016, then-Comptroller Tom Curry established the Compliance and Community Affairs (CCA) department, which built institutional muscle at the OCC to engage on fairness and compliance issues on equal terms to financial safety and soundness. The legacy of that decision continues to be felt today within OCC leadership. For example, Comptroller Curry selected Grovetta Gardineer to head the department, which included compliance policy and compliance supervision functions. Grovetta now serves as the Senior Deputy Comptroller for Bank Supervision Policy, which integrates fairness, compliance, and safety and soundness policy. In addition, Beverly Cole, who then served as Deputy Comptroller for Compliance Supervision in CCA, is now the Senior Deputy Comptroller for Midsize and Community Bank Supervision, which oversees nearly 1,000 banks. Today, both Beverly and Grovetta serve as members of the OCC's Executive Committee, which leads the agency.

Fairness at the OCC is about more than just people and leaders. Every five years, the OCC adopts and publishes an agency-wide strategic plan. The most recent strategic plan leans in on how financial services is evolving and prioritizes "elevating fairness," noting as a goal that "[t]he OCC's renewed focus on fairness reinvigorates the agency's mission and demonstrates

leadership as the evolution of the banking system further integrates fairness with safety and soundness.”<sup>3</sup>

Of course, actions matter most. Our people and our words must drive meaningful actions for us to have credibility and to be trusted on issues of fairness. With this in mind, I would like to share some examples that demonstrate the OCC’s commitment to action in elevating and advancing fairness, especially for the underserved and financially vulnerable.

### **Reforming Bank Overdraft Protection Programs**

For the increasing number of people who feel they are living paycheck to paycheck, the maxim “It’s expensive to be poor” resonates. Overdraft fees can be one of those expenses.<sup>4</sup>

At last year’s American Bankers Association annual meeting, I noted that I was seeing a wide range of banks beginning to reexamine overdraft practices and that a significant number were contemplating or implementing meaningful pro-consumer reforms. My message to bankers was clear: “You don’t want to be the last bank to update your overdraft protection program.”<sup>5</sup> This message was one that I repeated in other public settings, as well as in private conversations with bankers.<sup>6</sup>

OCC examiners echoed that message and encouraged bank management to review their existing overdraft protection programs to consider pro-consumer reforms that might warrant

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<sup>3</sup> OCC, [Office of the Comptroller of the Currency Strategic Plan, Fiscal Years 2023-2027](#), September 22, 2022.

<sup>4</sup> Aaron Klein, [“Getting Over Overdraft.”](#) Brookings Institution, November 7, 2022.

<sup>5</sup> Acting Comptroller Michael J. Hsu, [“Don’t Be the Last Banker to Update Your Overdraft Program.”](#) American Banker, March 28, 2022.

<sup>6</sup> Acting Comptroller Michael J. Hsu, Remarks before the Consumer Federation of America’s 34th Annual Financial Services Conference, [“Reforming Overdraft Programs to Empower and Promote Financial Health,”](#) December 8, 2021.

consideration. Every bank is different and OCC examiners are uniquely positioned to combine in-depth, bank-specific knowledge with a broader, national perspective on leading and lagging practices.

Overdrafts can present a variety of risks, including compliance, operational, and reputational risks. An important risk is the risk of engaging in unfair or deceptive acts and practices (UDAP) prohibited by section 5 of the Federal Trade Commission Act.<sup>7</sup> Under this law, a practice may be **deceptive** if (i) there is a representation, omission, act, or practice that is likely to mislead; (ii) it is deceptive from the perspective of a reasonable consumer; and (iii) it is material. A practice may be **unfair** if it (i) causes substantial consumer injury; (ii) that is not outweighed by benefits to the consumer or competition; and (iii) the injury cannot be reasonably avoided.

More than a decade ago, the Dodd-Frank Act added new authority that reinforces these legal requirements while also adding a prohibition on abusive acts or practices. Last year, the Consumer Financial Protection Bureau (CFPB), which has rulemaking authority over UDAAP, cited unfair, deceptive, and abusive practices associated with so-called “surprise overdraft” fees.<sup>8</sup> In addition, the Federal Reserve and Federal Deposit Insurance Corporation (FDIC) have noted the risk of violating UDAP in connection with certain overdraft practices.<sup>9</sup>

Importantly, not all overdraft practices are equally risky, so some precision here is warranted. From a bank regulatory perspective, we have identified two practices in particular

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<sup>7</sup> See [OCC Advisory Letter 2002-3](#), “Guidance on Unfair or Deceptive Acts or Practices” (citing to the FTC Policy Statement on Unfairness (December 17, 1980) and the FTC Policy Statement on Deception (October 14, 1983)).

<sup>8</sup> [CFPB, “CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts,”](#) October 26, 2022.

<sup>9</sup> See Board of Governors of the Federal Reserve System, [Consumer Compliance Supervision Bulletin](#) (July 2018); Federal Deposit Insurance Corporation, [Consumer Compliance Supervisory Highlights](#) (March 2022).

that present heightened risk: “authorize positive, settle negative” (APSN) and “representation” fees.

#### Authorize Positive, Settle Negative

The phrase “authorize positive, settle negative”—or APSN—refers to the practice of assessing overdraft fees on debit card transactions that are authorized when a consumer’s available balance is positive but later post to the account when the available balance is negative. This happens when, for example, a customer swipes their debit card after checking their balance in their banking app, which indicates they have enough money for the transaction. However, when the bank deducts the amount of that transaction from the customer’s balance, the bank does not actually reserve the funds to use for settlement. Subsequently, different transactions in the customer’s account may be authorized or may settle; so when that initial debit card transaction finally settles, there are no longer sufficient funds, and the bank assesses an overdraft fee.

Thus, with APSN transactions consumers believe they have enough money in their account to pay for something, only to find out later that they don’t and then are charged an overdraft fee. Hence the surprise.

The compliance risk with APSN transactions is elevated, especially as it relates to UDAP. For example, even when disclosures accurately describe the circumstances under which consumers may incur such APSN fees, the fees may be unfair if consumers are unable to reasonably avoid injury and the facts support the other factors to establish unfairness.

Many banks have already eliminated APSN-related overdraft fees or are in the process of doing so. However, some community bankers have noted that a third-party service provider that does their core processing has not offered a technical solution to avoid the APSN practice.

When possible, I encourage the core processors to address client bank requests for technical adjustments to eliminate APSN-related overdraft fees.

### Representment Fees

Representment fees are distinct from APSN but also pose significant UDAP risks.

When a bank receives a check or automated clearing house (ACH) transaction that is presented for payment from a customer's deposit account and the account has insufficient funds to cover the transaction, the bank may decline to pay and then will charge the customer a non-sufficient funds—or NSF—fee. Banks may also assess an additional fee each time a third party, usually a merchant, resubmits the same transaction for payment, resulting in multiple fees for the same transaction.

Through ongoing supervision, the OCC has found representment fee practices that pose UDAP risk.

For example, disclosures may be deceptive if they do not clearly explain that multiple or additional fees may result from multiple presentments of the same transaction. Even when customer disclosures explain that a single check or ACH transaction may result in more than one fee, a bank's practice of assessing fees on each representment may also be unfair if consumers cannot reasonably avoid the harm and the other factors for establishing unfairness are met. Consumers typically have no control over when a returned ACH transaction or check will be presented again and lack knowledge as to whether an intervening deposit will be sufficient to cover the transaction and related fees, which may result in substantial injury that is not outweighed by benefits to consumers or competition.

### No Limits

In addition, bank overdraft programs that have no limits on the cumulative fees that may be assessed can lure some customers into high-cost debt traps and thus heighten compliance and reputational risks. A high limit, or a lack of a limit, on the number of overdraft and NSF fees that can be charged in a single day has contributed to determinations that banks' overdraft protection programs as a whole were unfair. Lower fee amounts or limits on the number of fees that can accumulate over a period of time can reduce, or even effectively mitigate, this risk.

The good news is that in 2022 we saw OCC-supervised banks of all sizes adopt pro-consumer reforms that decreased their reliance on overdraft fees. The CFPB found that overdraft fees overall were 33 percent lower in the first three quarters of 2022 than in the same period in 2019. It also reported that overdraft fees have trended downward in each quarter since the fourth quarter of 2021.<sup>10</sup>

I want to be clear: Most of the bankers I have spoken with have embraced this conversation on overdrafts and reform possibilities. They understand the importance of treating their customers fairly and have been open to learning about best practices. These bankers are committed to being there for their customers and providing them with short-term, small dollar liquidity when it is needed most. Many customers tell their banks, as well as groups that have studied overdraft practices, that this banking service helps them meet payments when they come due. What we are all trying to do is improve the *fairness* of these programs by making them more pro-consumer, not to eliminate them. More fairness means more financially healthy communities, which means more trust in banking.

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<sup>10</sup> CFPB, "[Banks' Overdraft/NSF Fee Revenue Declines Significantly Compared to Pre-pandemic Levels.](#)" Consumer Financial Protection Bureau, February 7, 2023.



## **Fighting Discrimination and Bias**

To treat customers fairly, bank products, services, and practices must be free of discrimination and bias. Here, I would like to highlight three areas of particular focus at the OCC: (1) lending, (2) appraisals, and (3) artificial intelligence.

### Supervision and Enforcement of Fair Lending Laws

Discriminatory lending practices are illegal, exacerbate inequality, and erode trust in banking. To help combat these illegal practices, the OCC is taking steps to strengthen our supervisory processes and resources devoted to compliance with fair lending laws.

In January we published a comprehensive update to the OCC's Fair Lending Booklet of the Comptroller's Handbook.<sup>11</sup> This booklet, which had last been revised in 2010, now guides our fair lending examinations. The updated version provides transparency into the current OCC approach to fair lending examinations, including new details on examination scenarios. It also includes clarified and expanded risk factors, new explanations of risk management and third-party controls, and additional details about applicable legal standards. The updated and enhanced guidance for examiners strengthens our supervisory process and the fight against discrimination.

We have also updated our annual process for screening mortgage lending activities to leverage the new Home Mortgage Disclosure Act (HMDA) data fields for non-redlining screens, and to enhance the redlining screens by incorporating updated peer analysis and evaluation of assessment areas. These updates strengthen how we risk focus our fair lending examinations, support more effective fair lending examination strategies, and allow us to better deploy resources and identify weaknesses or potential discriminatory practices.

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<sup>11</sup> OCC Bulletin 2023-2, "[Fair Lending: Revised Comptroller's Handbook Booklet and Rescissions](#)," January 12, 2023.

Additionally, we continue to maintain a strong, collaborative approach to fair lending enforcement. If our fair lending examinations find a potential pattern or practice of discrimination, we make referrals to the Department of Justice (DOJ) and Department of Housing and Urban Development (HUD), as required by law. And when we discover lending discrimination, we do not hesitate to use our authority to take action under the Fair Housing Act and Equal Credit Opportunity Act, as our enforcement actions over the past several years have demonstrated.<sup>12</sup>

### Appraisal Bias

Bias in the appraisal of home values exacerbates and perpetuates inequality. As noted in the Action Plan to Advance Property Appraisal and Valuation Equity (PAVE): “[P]erhaps the biggest drivers of the racial and ethnic wealth gap today are the racial and ethnic disparities in rates of homeownership and in the financial returns associated with owning a home.”<sup>13</sup>

The OCC has taken an active role on the Interagency PAVE Task Force initiative to evaluate the causes, extent, and consequences of appraisal bias. We are also developing and enhancing our supervisory methods for identifying discrimination in appraisals, taking steps to ensure that consumers know of their rights regarding appraisals, and supporting research that may lead to new ways to address the undervaluation of housing in communities of color caused by decades of discrimination.

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<sup>12</sup> See *In the Matter of Trustmark National Bank, Consent Order*, AA-EC-2021-39 (October 20, 2021); *In the Matter of Cadence Bank, N.A., Consent Order*, AA-EC-2021-32 (August 27, 2021); *In the Matter of Citibank, N.A., Consent Order*, AA-EC-2019-8 (March 19, 2019).

<sup>13</sup> PAVE, [Action Plan to Advance Property Appraisal and Valuation Equity](#), March 2022.

## Artificial Intelligence

Finally, let me say a few words about artificial intelligence (AI) in the context of discrimination and bias.

In 2021 the OCC joined with other federal banking agencies in issuing a request for information and comments on the use of AI and machine learning.<sup>14</sup> The core concerns remain salient today: the un-explainability of model outputs, the limits of training data, and risks from updates involving little to no human interaction (i.e., machine learning).

Unless we proceed carefully, AI adoption may inadvertently *reinforce* or *exacerbate* old biases and discriminatory practices from the past and *prevent* growth and progress toward a fairer system.

Fortunately, there is keen awareness of the so-called “alignment problem” among AI researchers: How can we ensure that AI models do what *we* want them to do?<sup>15</sup> Bankers have generally taken a prudent approach to AI adoption, and some community organizations have begun to survey best practices related to AI controls and risk management.<sup>16</sup>

However, my sense today is that we are all soon going to be struggling to keep up with the accelerating speed of AI development. Institutions may soon face strong pressure to rapidly adopt and deploy AI technologies to avoid being left behind. The recent release of ChatGPT and Microsoft’s integration of it into its products has accelerated the race to make AI accessible and deployable across a wide range of domains and tasks. Although several large banks quickly

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<sup>14</sup> OCC News Release 2021-39, “[Agencies Seek Wide Range of Views on Financial Institutions’ Use of Artificial Intelligence.](#)” March 29, 2021.

<sup>15</sup> Brian Christian, *The Alignment Problem: Machine Learning and Human Values* (New York: W.W. Norton, 2020).

<sup>16</sup> See Michael Akinwumi, Lisa Rice, and Singdha Sharma, “[Purpose, Process, and Monitoring: A New Framework for Auditing Algorithmic Bias in Housing & Lending.](#)” National Fair Housing Alliance, February 2022.

announced limits on employee use of such technologies, the promise of greater efficiency—through chatbots and co-pilots, for compliance and underwriting, etc.—will be difficult for bank management teams and boards of directors to ignore.

When that happens, will the controls be in place for banks and regulators to be able to detect when an algorithm may be reinforcing or introducing discrimination and bias? In 2015 Google released automated captioning in its Google Photos app. Unbeknownst to its engineers, it ended up labeling pictures of individuals in highly inappropriate and racist ways. Once notified, Google quickly shut it down. The post-mortem revealed that the problem was not the algorithm per se, but the training data—data that reflected an internet’s worth of discrimination and unconscious bias.<sup>17</sup> Imagine making a mistake of this type when deciding whether to underwrite a small business loan or pricing a mortgage or offering a credit card.

Getting governance and controls right ex ante is, I believe, critical to building the public’s trust in how the banking system uses AI. Done right, the benefits are potentially enormous. As I’ve noted in other contexts: the better a car’s brakes, the faster one can safely drive it. Developing good controls for AI, especially regarding discrimination and bias, should be in the shared long-term interests of banks and consumers.

### **Expanding Inclusion and Opportunity**

Ensuring that federally chartered banks provide fair access to financial services is the second fairness prong of the OCC’s mission statement. Our country’s history of slavery and segregation, of bouts of jingoism, and of state-sponsored redlining serve as an important backdrop to this. Expanding financial inclusion and opportunity are not just feel-good

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<sup>17</sup> Emily Flitter, *The White Wall: How Big Finance Bankrupts Black America* (New York: Simon & Schuster, 2022).

buzzwords. They are imperatives. A banking system that is financially safe and sound, but not fair and inclusive, is a system at odds with trust, growth, and democracy.

The OCC's focus on expanding inclusion and opportunity are currently centered on strengthening and modernizing the Community Reinvestment Act (CRA) and maturing Project REACH.

This audience is well aware of our efforts to work with the Federal Reserve and FDIC on strengthening the CRA. The CRA is *the* key tool in the bank regulatory tool kit to expand financial inclusion and opportunity for all Americans, especially the underserved. I don't need to belabor the point here. I will simply note that we are working hard to incorporate and respond to feedback provided via comment letters to the Notice of Proposed Rulemaking.

Regarding Project REACH, it is rapidly approaching its third-year anniversary. Project REACH was initiated in 2020 following the murder of George Floyd. By serving as a convener of leaders across banking, civil rights, technology, and community organizations like NCRC, the OCC is helping to catalyze solutions to eliminating barriers to financial inclusion. REACH has notched a number of important successes: facilitating pilot programs to make those without credit scores visible to lenders, securing pledges from two dozen banks to revitalize and support minority depository institutions, promoting homeownership for the underserved and those on tribal lands, and supporting minority small businesses' awareness of special purpose credit programs. And this is just a partial list, of course.

The challenge for us going forward is building on REACH's momentum and institutionalizing it—building it into our DNA and processes—while maintaining the magic of bringing highly motivated individuals together to collaboratively and creatively break down key barriers to inclusion and equal opportunity.

As one of REACH's founding members, NCRC has played an important role in guiding and supporting us to do more and to stay focused on outcomes. I look forward to continuing this work as REACH enters its fourth year.

Finally, I want to highlight the importance of making banking accessible to all who want it. Approximately six million U.S. households are “un-banked” and lack a bank account. A much higher number, nearly 19 million households, have a bank account but rely on non-bank products and services, such as money orders and check cashers, pawn shops, and auto title lenders, to meet some of their banking needs, and are thus deemed “under-banked.”<sup>18</sup> Behind these statistics are people—immigrants, students, laborers, parents between jobs, citizens who live in banking deserts. Fully including them in the banking system can help unlock their potential and help their communities grow. Campaigns such as BankOn and similar bank-specific efforts to provide low to no cost bank accounts can make a big difference in this regard.

## **Conclusion**

Fairness in banking matters as much as financial safety and soundness. This concept is inscribed in the OCC's mission statement, which calls on the OCC “[t]o ensure that national banks and federal savings associations operate in a safe and sound manner, treat customers fairly, provide fair access to financial services, and comply with applicable laws and regulations.”

We are elevating fairness in our strategic plan, with our people and processes, and through our actions, some of which I have highlighted today.

As a financial regulatory agency, the OCC has an extraordinarily strong culture—the strongest of any of the agencies at which I have worked. This is due to our people and our

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<sup>18</sup> FDIC, [“2021 FDIC National Survey of Unbanked and Underbanked Households,”](#) November 14, 2022.

history. The OCC's founding dates to the Civil War when the Union needed a national banking system to fund the war effort and bring the country together. Lincoln saw the abolition of slavery as not just a moral imperative, but also an economic one. In a July 4th address to Congress in 1861 he argued:

*This is essentially a People's contest. On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading project is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life.*

Two years later, Lincoln would sign what's known today as the National Banking Act, creating the federal banking system and the Office of the Comptroller of the Currency to oversee it.

We carry this history proudly today.

Thank you.