



FINANCIAL SERVICE CENTERS OF AMERICA, INC.
A NATIONAL TRADE ASSOCIATION

August 15, 2011

VIA E-MAIL

Nondepository Supervision
Consumer Financial Protection Bureau
1801 L Street, NW
Room 513-H
Washington, DC 20036
<http://www.regulations.gov>

Re: CFPB Docket No. CFPB-HQ-2011-2

Dear Sir/Madam:

These comments to the above-referenced Notice and Request for Comment (“Notice”) issued by the Consumer Financial Protection Bureau (“CFPB”) are submitted on behalf of Financial Service Centers of America (“FiSCA”), a national trade association representing over 6,500 neighborhood financial service center (“FSCs”) locations throughout the United States. FiSCA’s members provide non-depository financial services including check cashing, money transmission services, payday loans, prepaid card products, and many others. Since its inception, FiSCA has been the leading voice on legislative, regulatory and business issues that affect its members and the rights of U.S. consumers to access basic financial services.

In accordance with the requirement contained in the Consumer Financial Protection Act of 2010 (the “Act”) that Federal consumer financial law be enforced consistently “without regard to the status of a person as a depository institution”, the CFPB is required to implement a risk-based supervision program for certain non-depository covered persons. While several industries (mortgage, payday lending and private education lending markets) are automatically subject to supervision without regard to size, for other products and services the CFPB’s supervisory authority generally applies only to covered persons that are “larger participants” in markets for other financial products or services, as defined by rule. The CFPB now seeks comments regarding, *inter alia*, the criteria and thresholds to define a “larger participant” and which consumer financial products and services should be addressed in an initial rule.

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With respect to these issues, FiSCA submits that: 1) the definition of market should be broad, both in terms of geography and participants, however, the definition of “larger participant” should only include participants that are larger relative to other participants and that pose a high risk to consumers or financial markets. Accordingly, FSCs should not be considered “larger participants”; 2) check cashing should not be a supervised product or service because it poses little, if any, risk to consumers, is already highly regulated at the state and federal levels, and additional regulation will provide no corresponding benefit to consumers; 3) within the market defined as “Money Transmitting, Check Cashing and Related Activities”, FSCs acting as agents should not be subject to supervision; and 4) covered persons subject to supervision subject to §1024 (a)(1)(A), (D) and (E) of the Act should not be subject to supervision for other products not included within the rule.

As the representative of the FSC industry, FiSCA wholeheartedly supports the concept of promoting transparency in financial transactions and protecting against unfair practices in order to ensure that consumers have the information they need to make informed choices. However, FiSCA submits that, in fulfilling its statutory purpose of ensuring that all consumers have access to markets for consumer financial products and services, the CFPB must ensure that its supervision of non-depository entities does not add unnecessary levels of regulation and, thereby, constrict consumer access to the important products and services provided by the FSC industry.¹

I. The FSC Industry

The FSC industry has developed in response to the demand for cost-effective financial products and services that more closely match consumers’ needs, and that provide alternatives to bank products. Many FSCs are small businesses. FSCs serve both banked and un-banked consumers, who use us for the advantages we provide: convenient locations, excellent service and access to instant liquidity.

FSCs specialize in delivering basic financial services at convenient store-front locations. Many FSC locations are open extended days and hours, some 24 hours a day, seven days a week. While FSCs may be located in close proximity to bank branches, many FSC locations serve neighborhoods that have been abandoned by banks.² Moreover, because the workforce of FiSCA members is diverse and employees typically live in the neighborhoods in which they work, the FSC workforce speaks customers’

¹ §1021(a).

² See “Bank Closings Tilt Toward Poor Areas”, *The New York Times*, February 22, 2011; “Fewer Branches for Those Who Have Less”, *SNL Financial*, June 30, 2011.

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language and understands their unique cultural and financial needs, leading to an extraordinary level of customer service.³

Transaction fees at FSC locations are transparent and affordable, dictated either by state law or by the competitive markets, which often includes non-FSC providers. The price of each transaction is clearly posted – often in more than one language.⁴ Customers know exactly what financial product or service they are purchasing and how much it will cost, as compared to traditional financial institutions, which often charge hidden fees.

FSC customers are from all walks of life and do not fit into a single demographic. The majority of FSC customers are banked (58%) and are employed full time (75%). However, many FSC customers live paycheck to paycheck and cannot afford to maintain a bank account, especially one that requires a minimum balance. Many do not qualify for various bank products and services due to concerns about credit history and liquidity.

In recent years, there has been a growing body of research on unbanked and underbanked consumers. The most significant and prevalent finding is that these individuals have trouble gaining easy and immediate access to their money. Cash is needed to pay their rent and bills, and to cover other daily necessities. Tying up access to their cash through minimum balance requirements, waiting periods, mandatory deposit amounts, and other restrictions at mainstream financial institutions is an impediment. Moreover, high fees typically charged by banks for services, particularly maintenance fees and punitive overdraft⁵ and other charges (even with recent banking regulations), further alienate these consumers from mainstream banking relationships.

The FSC industry is a highly regulated industry. FSCs are regulated in most U.S. state jurisdictions, typically by state banking departments or other state financial regulators. State regulation of FSCs typically includes licensing or registration requirements, mandatory recordkeeping requirements, periodic financial examinations, annual financial reporting requirements, regulation of fees chargeable and various consumer protections including signage specifying rates. Virtually every state in the U.S. with any sizable FSC industry has enacted legislation to regulate these businesses.⁶

³ A recent FiSCA national customer satisfaction survey showed that 95% of customers rated our services as “good to excellent,” and 92% rated the overall value of our services as “good to excellent.”

⁴ In addition, FSCs that are members of FiSCA adhere to a Code of Conduct that requires transparency, disclosure and strict adherence to the law in the provision of financial services. FiSCA’s Code of Conduct is available at fisca.org.

⁵ Consumer Federal of America, “2011 CFA Survey of Big Bank Overdraft Loan Fees and Terms,” August 3, 2011.

⁶ The FiSCA Summary of State Check Cashing Laws is attached hereto.

FSCs are also regulated at the federal level. Most FSCs are classified as Money Services Businesses (“MSBs”) by the U.S. Treasury Department.⁷ As such, they are subject to many of the same federal Bank Secrecy Act (“BSA”) anti-money laundering (“AML”) requirements as banks.⁸ These requirements include mandatory reporting and recordkeeping requirements and Internal Revenue Service (“IRS”) examinations. In a typical IRS Title 31 review, examiners go on-site to each location of a company to review books, records and systems to ensure that the business is maintaining an appropriate AML program, including compliance with federal reporting and recordkeeping requirements.

II. Comments to the Notice

A. Criteria and Thresholds to Define “Larger Participant”

The Notice seeks industry input regarding various issues in determining the definition of “larger participant.” It further recognizes that some of the issues presented in making this determination cut across markets and others are specific, relating to particular markets that may be covered by an initial rule.

1. “Larger Participant” Should be Defined on the Basis of Relative Size of Participants Within a Market.

In reaching its determination with respect to the definition of “larger participant”, the CFPB must be guided by Congressional intent underlying the Act. With respect to the definition of “larger participant”, FiSCA submits that in using the term “larger” – as opposed to the term “large” – Congress meant to include only those companies that are large “relative” to other market participants. This term implies that a larger participant should have larger total assets and revenue than others in the market.

Moreover, Congress was clear that the CFPB should not place burdens on businesses that are smaller in terms of total assets and revenue. In fact, the Act has very important protections for small businesses. For instance, Congress took the unusual step of requiring the CFPB to comply with the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) when promulgating rules. SBREFA protects small businesses by requiring the agency to consider alternative regulations that would reduce the burden on small businesses. The CFPB is one of only three agencies that are subject to the

⁷ Any entity that conducts more than \$1,000 in business with one person in one or more transactions (e.g., check cashing or money transmission) a day is required to register with FinCEN as an MSB. 31 C.F.R. 103.11 (uu)(2).

⁸ FSC industry compliance with BSA regulations is overseen by the federal Financial Crimes Enforcement Network (“FinCEN”).

SBREFA requirements. It would be inconsistent with Congress' legislative intent if the CFPB were to subject businesses with fewer total assets and revenue to its supervisory authority.

FiSCA further submits that markets should be broadly defined, both in terms of geography and participants. Technology has eliminated geographic boundaries and allowed a large and growing range of market participants to provide financial services, either directly or as agents. Accordingly, the definition of a market should be quite broad.

2. *In Defining "Larger Participant" More Than One Criterion Should be Applied Based Upon the Complexity of the Financial Product or Service.*

The determination of whether more than one criterion should be used to identify "larger participants" should depend on the complexity of the financial product or service and the extent of risk to consumers. With respect to a financial product or service that is large in dollar terms relative to the average consumer's net worth, and that has complex pricing structure and product structure, more than one criterion would make sense. In a market with transactions that are small relative to the average customer's net worth and where the product is characterized by simple pricing and structure, more than one criterion is not necessary.

3. *"Larger Participant" Should Include Only Participants That Pose a High Risk to Consumers Based on the Complexity of the Product or Service and the Volume of Transactions.*

The definition of "larger participant" should reflect the complexity of the product or service offered and the risk posed to consumers. If a financial product or service is neither complex nor risky, the definition of "larger participant" should be construed very narrowly. Moreover, entities that handle a large percentage of the total funds in a market pose a larger risk than participants that handle a small percentage of the total funds.

As compared to FSCs, large superstores and grocery conglomerates offer customers a wide variety of financial products, yet many are exempt from, or operate without respect to, many state and federal financial laws.⁹ We submit that more risk is presented to the consumer who purchases a financial product or service from a retail merchant, than an FSC. Retail stores do not specialize in providing financial services and the consumer protections that should be provided with them. These huge stores are clearly much larger in terms of total assets and revenue than the other participants in the

⁹ See "Notable Exemptions to Regulation", contained in the FiSCA Summary of State Check Cashing Laws, attached hereto.

various financial markets.¹⁰ Moreover, they handle significantly more consumer funds than other participants. We believe that the CFPB should include only these non-depositories in the definition of “larger participant.”

4. *If Check Cashing is Part of a Covered Market, FSCs Should Not Be Considered “Larger Participants” Within that Market.*

If the CFPB covers check cashing in the initial “larger participant” rule, FiSCA urges that FSCs not be considered “larger participants” within that market. In the first instance, the vast majority of FSCs are independent entrepreneurs operating multiple branch locations. Moreover, check-cashing activity at FSCs is already well-supervised at the state and federal levels. Thirty-three states and the District of Columbia already require FSCs to register with or obtain a license from the state before offering check cashing services. And, as MSBs, FSCs are covered by a variety of federal financial laws. Accordingly, FSCs should not be subject to additional federal supervision.

The definition of “larger participant” should, however, include participants that are not regulated by state and federal authorities. FiSCA submits that the CFPB may want to fill in the gaps and supervise participants providing check cashing services that are not currently covered by the state check cashing laws or federal financial laws described above. For instance, grocery stores – which are often large conglomerates – are exempt from many state check cashing laws. Moreover, while Wal-Mart has submitted to regulation in two (2) states (Massachusetts and Connecticut), it operates its check cashing business under exemptions in every other jurisdiction in which it carries on such activities.¹¹

According to the 2010 Federal Reserve Payments Study, the total value of checks cashed in the U.S. in 2009 was \$32.4 trillion. An industry survey commissioned by the U.S. Treasury Department and performed by KPMG concluded that total MSB check cashing activity for a recent year was estimated at only \$80 billion. In other words, the percentage of total funds cashed by all FSCs put together is less than 1% of all check cashing activity, a tiny fraction compared to the funds cashed at other locations.

It is important to keep in mind that financial transaction fees are likely to rise if an FSC is considered a “larger participant” subject to CFPB supervision. Virtually all

¹⁰ For example, as of 2009, Wal-Mart controlled 11% of the check cashing market. Aite Group, LLC “*Wal-Mart: A Rising Force in Alternative Financial Services*”, April 2009. See also “Wal-Mart Expands Check Cashing Services”, *Daily Finance*, August 9, 2011.

¹¹ Recent media reports indicate that other mega-retailers such as Target and Sears Holdings/K-Mart, are currently, or are planning to, provide check cashing services. It is likely that these entities would also seek to operate under retailer exemptions as Wal-Mart does.

FiSCA members offer check cashing and it is a large part of the business. Our competitors – such as large grocery chains and superstores – are able to spread the cost of supervision across a wide array of products and services. FSCs, on the other hand, specialize in, and in many states are restricted to, providing financial products and services.¹² Thus, the costs of supervision will likely lead to higher financial transaction fees for FSC customers, many of whom are low- and moderate-income consumers. The CFPB's actions should lead to lower – not higher – costs for these consumers. Finally, in jurisdictions in which fees are capped, profits of FSCs will be further squeezed, threatening the availability of financial services and inhibiting capital available for the development of innovative products and services.

B. Financial Products or Services to be Covered by the Initial Rule.

The Notice states that the CFPB is considering which markets to include in an initial rule and identifies several product markets under consideration. One of the most important services that FSCs offer is a convenient place for hard-working people to cash their checks, a necessary service that consumers cannot always obtain at a bank, or choose not to for various reasons, including the high fees assessed by banks to non-customers for check cashing services. Placing their own capital at risk, FSCs provide their customers with immediate cash from payroll, tax refunds, government benefits and other types of checks.

FiSCA submits that the initial rule should not cover check cashing because such coverage would not move the financial services industry closer to any of the stated goals of supervision. Inclusion of check cashing in the initial rule would not ensure compliance with consumer laws or provide a better understanding of compliance procedures. Nor would it limit risk to consumers, provide a better understanding of risk, supervise the unregulated, or help level the playing field between depository and non-depository check cashers.

1. Supervision of Check Cashing Would Not Help Assess Compliance with Federal Consumer Protection Laws Because None of the Enumerated Consumer Laws in the Act Apply to Check Cashing.

Two key purposes of CFPB supervision of non-depository larger participants are improved compliance with consumer protection laws and better information about compliance systems and procedures. Yet, there are no federal consumer protection laws that apply to check cashing. Despite the inclusion of check cashing¹³ in the Act's

¹² See, e.g., New York Banking Law, Article 9-A, §369; New Jersey Check Cashing Law, N.J.S.A. 17:15A-47(f).

¹³ §1002(15)(A)(vi).

definition of “financial product or service”, check cashing is not subject to any of the “[e]numerated consumer laws” identified therein.¹⁴ Furthermore, the Act does not confer on the CFPB the authority to enforce state check cashing laws.

While check cashing is subject to Bank Secrecy Act requirements, these requirements are focused on money laundering – not consumer protection. Therefore, most of the compliance procedures associated with check cashing focus on limiting the risk of the check casher and preventing money laundering.

Because there are no applicable consumer protections for which it has jurisdiction, there are no consumer compliance systems or procedures for the CFPB to monitor. Even if consumer protections did apply, check cashing transactions are very simple and basic transactions. FSCs would not need to utilize any complex compliance systems and procedures to ensure compliance with applicable consumer protection laws.

2. *Supervision of Check Cashing Would Not Help Reduce Consumer Risk Because Check Cashing Poses Little if Any Risk to Consumers.*

As the Notice correctly states, the “larger participant” rule is risk-based. The CFPB’s authority was created in large part to address the fact that consumers were purchasing complicated financial products and services without fully understanding the costs. Consumers were taking out loans they could not afford to pay back. In contrast, a non-depository check cashing transaction is simple and poses little – if any – risk to consumers, or to consumer markets. Thus, check cashing is not one of the risky financial products or services Congress had in mind when it drafted the Act. FiSCA respectfully submits that the CFPB should devote its supervisory resources to overseeing activities that pose the biggest risks to consumers.

Most importantly, the structure of a check cashing transaction eliminates the possibility of risk to a consumer. Check cashing is a “fee for service” transaction and does not create an ongoing, or account relationship between the provider and the customer and, therefore, no customer deposits are at risk. A consumer cashing a check leaves the check cashing establishment with proceeds in hand. There is no risk that a customer will not receive the full proceeds of the check, less only the transparent check cashing fee. The customer is present to oversee the entire transaction and can confirm that the correct amount of money is received. In fact, any risk – such as the risk that the check is fraudulent or that there are insufficient funds – is assumed by the check casher, which privately funds its operations.

¹⁴ §1002(12).

Further, check cashing businesses present no safety and soundness risk to the public, or risk to the economy as a whole. The failure of a large check cashing operation poses no risk to consumers or other market participants.

Check cashing transactions are typically small. Industry studies have found that the average value of checks cashed at FSCs is approximately \$400. Moreover, typical check cashing fees are less than 2% of the face amount of a check.¹⁵ Therefore, a typical fee for a check cashing transaction at an FSC would be less than \$10.

There also is little risk that the check cashing fee is not a fair price. Fees are either capped by state law or set by the competitive marketplace. In addition to FSCs, check cashing services are offered by a wide variety of entities including banks, credit unions, grocery stores, superstores, liquor stores and more. This robust and competitive market has led to a fair market price. Moreover, there are no “back end” fees, all fees are paid in full at the time of the transaction. Even if aggregated over the course of a year, check cashing fees do not have a material impact on consumers.

The absence of risk to the consumer in check cashing (along with the transparent nature of the transaction) is reflected in the fact that consumer complaints about check cashing transactions are virtually non-existent. Furthermore, due to the existence of state regulation of check cashing, consumer complaints can be dealt with adequately by state regulators.

The CFPB should not waste its resources supervising consumer financial products and services – like check cashing -- that do not truly present risks to consumers or markets.

3. *Supervision of Check Cashing Would Not Reduce Risk by Providing Oversight Over the Unregulated.*

Supervision of check cashing at FSCs would not reduce consumer risk by providing oversight over an unregulated industry. FSCs are regulated in most U.S. state jurisdictions, typically by state banking departments or other state financial regulators.¹⁶ State regulation of FSCs typically includes licensing or registration requirements,

¹⁵ Cypress Research Group, Survey of Key FiSCA Member Organizations on Transaction Volumes, October, 2007. The median check cashing fee nationally is three (3%) percent of the face amount of the check, however, checks that pose a lower risk – such as government and payroll checks – are often cashed for a much smaller fee. Cypress Research Group, Survey of FiSCA Member Companies Size and Scope of Markets Served, October 2010.

¹⁶ See the FiSCA Summary of State Check Cashing Laws attached hereto. In addition to check cashing laws, almost all 50 states have laws that require licensing and regulation of money transmission activity.

mandatory recordkeeping requirements, periodic financial examinations, annual financial reporting requirements, regulation of fees chargeable and various consumer protections. Every state in the U.S. with any sizable FSC industry has enacted legislation to regulate these businesses. In fact, most states have laws that specifically regulate check cashing and cap or provide posting requirements for check cashing fees.

As set forth above, as MSBs, FSCs are also supervised and regulated at the federal level by FinCEN. Bank Secrecy Act requirements include mandatory reporting and recordkeeping requirements, periodic BSA compliance examinations by IRS examiners and the filing of Currency Transaction Reports (“CTRs”) and Suspicious Activity Reports (“SARs”). Title 31 examinations are rigorous and include separate examinations at each location of a company to review an MSBs books, records and systems to ensure that the business is maintaining an appropriate AML program, including compliance with federal reporting and recordkeeping requirements.

FSCs are subject to robust state¹⁷ and federal supervision. Accordingly, adding another layer of federal supervision would provide little, if any, consumer benefit.

4. *Supervision of Check Cashing Would Not Level the Playing Field Between Depository and Non-Depository Institutions.*

FiSCA welcomes CFPB’s efforts to level the playing field between depository and non-depository institutions, so consumers can better compare the cost of financial products and services. However, FiSCA is concerned that the check cashing services offered by depository and non-depository institutions are very different and, therefore, any effort to compare the costs of each could mislead the consumer.

In the first place, check cashing fees at non-depository institutions are clear and transparent. However, because the business model of banks is not a transaction-based model, it would be difficult to parse out the true cost to the consumer of a single bank transaction. Banks often advertise “free” and “low-cost” financial services and products to priority customers. However, these advertised fees are subsidized by fees for failing to maintain a minimum balance, overdraft fees, and ATM fees. These hidden, and frequently unpredictable, fees are most often levied on low- and moderate-income customers who do not qualify for priority status. A bank’s advertised fee is also subsidized by interest payments on customers’ deposits that the bank does not pass on to customers. In other words, many bank services that are advertised as “free” or “low cost” have a very real hidden cost to the consumer.

¹⁷ The Act specifically directs that the CFPB consider the extent to which a covered person is subject to oversight by State authorities in assessing risks posed to consumers and in exercising its supervisory authority. §1024(b)(2)(D).

Furthermore, an FSC assumes much more risk than a depository institution assumes when a check is cashed. Unlike a depository institution, an FSC cannot withhold a customer's funds until a check has cleared. Because an FSC cannot rely on an ongoing account relationship with the customer, it is unable to rely on a "hold" mechanism to prevent a loss. The FSC must fully assume the substantial risk that the check may be dishonored as fraudulent or for insufficient funds.

A similar problem arises if check cashing fees charged by FSCs were to be compared to the fees charged by non-depository competitors. Grocery, liquor, and super stores will often offer customer services – such as check cashing – at below market price because the fee is subsidized by the customer's grocery, liquor, merchandise or other purchases.

Because the CFPB will not be "comparing apples to apples," we are not confident that the playing field can be leveled through supervision. Comparing the check cashing fees charged by depository and non-depository institutions would likely mislead customers.

C. *FSCs Providing Money Transmitting and Bill Payment Services as Agents Should Not be Subject to Supervision.*

FiSCA submits that covered persons acting only as agents should not be included in the money transmitting and bill payment product markets. This position was clearly the intent of Congress. In fact, in the prepaid card market, the statutory language specifically exempts agents who do not exercise "substantial control" over the terms or conditions of the product or service.¹⁸ FiSCA submits that this same exemption should apply in the money transmission and other markets.

In almost all markets (other than check cashing), FSCs facilitate the sale of products or services, but do not control the terms and conditions of the product or service. For instance, many FSCs sell and reload general-use reloadable prepaid cards. However, FSCs do not set the terms or conditions of prepaid cards with respect to fees for use, failure to use, or loss of the card. FSCs simply facilitate distribution of prepaid cards and reload cards at the customer's request.

Similarly, in the area of money transmission, FSCs are generally agents for licensed money transmitters such as Western Union, MoneyGram, and other remitters. In the area of bill payment, FSCs contract with the recipient of the bill payment, such as

¹⁸ §1002(15)(v).

Verizon, but transmit funds through a licensed money transmitter. As remittance agents, FSCs do not exercise substantial control over the terms and conditions of a money transmission, bill payment, or related transaction. In most instances, the consumer contracts with the primary transmitter. FSCs also do not set or benefit from currency exchange rates or other charges. If a problem arises, the primary transmitter – not the FSC – has the contractual responsibility to the consumer.

Moreover, most state jurisdictions already provide comprehensive regulatory frameworks, including consumer protections, covering remittance providers and, indirectly, their agents. Notwithstanding its status as an agent, an FSC is required by BSA regulations to maintain detailed records for monetary instrument sales and remittance activity at certain levels. FiSCA is concerned that a further layer of regulation – especially CFPB supervision of agents – will result in higher consumer prices without any consumer benefit. Therefore, FiSCA urges the CFPB to exempt money transmission and bill payment services provided by agents from supervision in the money transmission and related services market.

D. Covered Persons Subject to Supervision Pursuant to §1024 (a)(1)(A), (D) and (E) of the Act Should Not be Subject to Supervision for Other Products or Services not Included in the Initial Rule.

The Notice does not specify whether covered persons that are subject to supervision by virtue of offering products or services specified by §1024 (a)(1)(A), (D) and (E) of the Act will also be subject to supervision for the balance of products and services offered regardless of whether they are a “larger participant” in other covered product markets. FiSCA submits that expanding the CFPB’s supervision to the balance of the financial products and services offered by such companies would impose a disproportionate burden on those companies that was not contemplated by the Act.

III. Conclusion.

We appreciate the opportunity afforded us to comment with respect to these very important issues. We submit that adding additional federal regulation of the FSC industry, particularly supervision by CFPB, is unnecessary and, if imposed, would simply create duplicative and superfluous levels of regulation, with no corresponding benefit to consumers. We hope that the CFPB will consider favorably our comments and recommendations. We are grateful for the CFPB’s efforts thus far and we are committed to continuing to work with all interested parties in this regard. Of course if there are any questions regarding any of the matters raised in this letter we would be delighted to discuss them with you. Thank you for your consideration.

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Very truly yours,

FINANCIAL SERVICE CENTERS OF AMERICA

A handwritten signature in black ink, appearing to read "E. P. D'Alessio". The signature is written in a cursive, flowing style.

Edward P. D'Alessio, General Counsel

EPD/lt
Enc.