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Office of the Comptroller of the Currency
Chief Counsel's Office
Attention: Karen McSweeney, Special Counsel
400 7th Street SW
Washington, DC 20219

Re: Fair Access to Financial Services, Docket ID OCC-2020-0042, RIN 1557-AF05

Dear Ms. McSweeney:

On Thursday, November 12, 2020, the Office of the Comptroller of the Currency ("OCC") issued a notice seeking comment on a proposed rule designed to ensure that national banks and Federal savings associations offer and provide fair access to financial services. We appreciate the opportunity to review the proposed rulemaking and to provide comments on behalf of INFiN—A Financial Services Alliance ("INFiN"). INFiN strongly supports the proposed rulemaking. Our comments are grounded in a unique perspective on the proposed rulemaking, gleaned through involvement in litigation concerning some of the issues that are the subject of the proposal. We also respectfully submit amendments to the proposed regulatory language informed by that perspective.

INFiN, A Financial Services Alliance

INFiN, a Financial Services Alliance, is the leading national trade association representing the diverse and innovative consumer financial services industry. Formerly the Financial Service Centers of America ("FiSCA") and comprising members of FiSCA and the Community Financial Services Association of America ("CFSA"), INFiN includes more than 350 companies, operating approximately 8,000 locations throughout the United States and online. Headquartered in Washington, DC, INFiN serves as the voice of the vital and rapidly evolving consumer financial services industry to advocate on behalf of its customers.

As discussed in more detail below, INFiN members offer critical access to financial services to millions of Americans, particularly middle-income working families, who are often underserved by banks and credit unions and value the wide range of services provided by community-based financial service providers. Consumers choose these providers because they are affordable, offer integrated services through multiple convenient channels, and deliver services in a transparent and regulated environment.

Those consumer financial services include check cashing, pre-paid cards, money transfers, electronic bill payments, and small-dollar loan products, including payday and installment loans, among others. These simple, popular financial solutions play an integral role in the financial lives of millions of American households, helping them to manage their financial obligations and challenges and providing essential financial inclusion and stability. Millions of hardworking consumers, particularly middle-class families, choose to use consumer financial services because these products and services match their needs, and they are highly satisfied with the way in which their transactions are conducted. Indeed, as discussed below, during the ongoing COVID-19 pandemic, the federal government and many state governments designated providers of consumer financial services, like INFiN's members, as essential businesses, due to the critical nature of the services they provide many families.

INFiN members are uniquely aware of the harms that occur when large national banks and savings associations discriminate against lawful businesses in the provision of financial services based on policy opinions and other considerations wholly unrelated to safe and sound banking practices. As we describe below, many INFiN members were targets of what the notice of proposed rulemaking describes as "the now-discredited Operation Choke Point," which arose when government banking regulators "pressured banks to cut off access to financial services to disfavored (but not unlawful) sectors of the economy."[1] One of those disfavored sectors was the small-dollar lending industry. Indeed, INFiN members Purpose Financial (formerly Advance America, Cash Advance Centers) and Check Into Cash were both plaintiffs in the lawsuit challenging Operation Choke Point, and their experience was identical to the experience of countless other members.[2]

In addition, INFiN members are regulated as Money-Services Businesses ("MSBs"), and as MSBs, INFiN members have also suffered from terminations of banking services resulting from category-based decisions made about MSB services, as opposed to individual, case-by-case customer risk evaluations.

INFiN members' firsthand experience with discrimination in access to financial services gives them a unique perspective on the policy problems that the OCC's proposed rulemaking addresses and seeks to remedy. In this comment letter, we begin by providing further detail on Operation Choke Point, which we believe provides a critically important case study that illustrates both the

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[1] Fair Access to Financial Services, 85 Fed. Reg. 75,261, 75,263 (Nov. 25, 2020).

[2] *Community Fin. Servs. Ass'n of Am., Ltd. v. FDIC*, No. 14-953 (D.D.C.).

acute harm that is caused when banks fail to provide fair and equal access to financial services and some of the causes that prompt banks to engage in this type of discrimination.

We then describe why the ability of large national banks to cut off banking access and thereby cripple lawful industries—and in particular, the consumer financial services industry—poses a severe threat not only to the law-abiding industries that find themselves in the crosshairs but also to consumers and to the banks themselves. On behalf of INFiN, we therefore enthusiastically support OCC's proposal to curb this type of harmful discrimination.

Informed by our experience with Operation Choke Point, however, we believe the proposed regulation should be amended to additionally prevent what history indicates is one of the principal causes of banks' decision to discriminate in the provision of financial services: pressure from their safety-and-soundness regulators. The comment letter closes by briefly explaining the amendments we would propose and our reasons for suggesting them.

I. "Operation Choke Point" Provides a Case Study in the Ability of Banks and their Regulators To Cripple Lawful, Critically Important Industries Out of Political Animus

To fully understand why and how banks discriminate in providing access to their financial services based on factors unrelated to an "objective, quantifiable risk-based analysis" of the potential customer, it is important to closely examine the most significant recent example of systemic discrimination of this kind: "the now-discredited Operation Choke Point."[3] This example starkly demonstrates both the serious harm that is inflicted when banks fail to provide fair access to financial services—either voluntarily or under pressure for their regulators—and how to most effectively put a stop to such discrimination.

A. The Origins of Operation Choke Point.

While it targeted many other lawful industries as well, the core of Operation Choke Point was an effort by the FDIC, assisted by a handful of other federal agencies, to encourage or, in some cases, coerce the banks they supervise to terminate their relationships with small-dollar lenders, seeking to effectively cut the industry off from access to the modern financial system. These lenders were uniquely vulnerable to this type of pressure campaign because their business model crucially relies upon access to banking services, especially the access that banks provide to the Automated Clearing House ("ACH") network. The agencies involved in Operation Choke Point, perceiving that access to banking services was the oxygen necessary to the small-dollar lending industry's survival, resolved to suffocate the industry by choking off this air supply.

FDIC officials had long harbored animus against small-dollar lending. In early 2005, for instance, the FDIC undertook a successful campaign to force banking institutions to stop directly offering

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[3] 85 Fed. Reg. at 75,263.

payday loans.[4] Having successfully stopped banks from entering the payday lending industry, the FDIC and its allies next shifted the regulatory crosshairs to the industry itself. According to records produced to Congress, for example, a 2012 meeting of the Financial Fraud Enforcement Task Force's Consumer Protection Working Group proposed that the agencies participating in the Working Group, including the FDIC and DOJ, "[p]lan and execute national operations targeting specific types of consumer fraud" including "payday lending" alongside such other clearly illegal activities as "identity theft," "business opportunity schemes," and "counterfeiting."[5] While the banking regulators do not have regulatory jurisdiction over these lenders directly, they recognized that their vast, discretionary authority over the Nation's financial institutions provided them with a convenient "means to get at payday lending" *indirectly* "(either by the bank's direct customer or through a third party payment processor)."[6] The DOJ officials involved in the project themselves dubbed it "Operation Choke Point"—as it was designed to "choke out" these lenders and other "high risk" businesses by constricting their access to necessary banking and payments networks at the most vulnerable point: their need for access to banking services.[7]

While DOJ formally named the operation only late in 2012, by that point the FDIC's efforts to cut the targeted lenders off from the banking system were already well underway. In late 2010 or early 2011, the FDIC's senior Washington officials convened a meeting of all Regional Directors (or their designees)—the heads of the FDIC's field offices, in charge of supervising financial institutions throughout the Nation.[8] The Senior Deputy Director informed the Regional Directors that he had discussed payday lending with the "Sixth Floor"—shorthand for the FDIC's Chairman and senior leadership—and that the regional offices were to implement the following approach: "if an institution in their region was facilitating payday lending, the Regional Director should require the institution to submit a plan for exiting the business."[9] The message, according to one

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[4] Financial Institution Letter: *Payday Lending Programs*, FDIC FIL-14-2005, 2005 WL 489733 at *1 (Mar. 1, 2005); *see also* STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., *THE DEP'T OF JUSTICE'S "OPERATION CHOKE POINT": ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES?* at app. HOGR-3PPP1 (May 29, 2014), *available at* https://bit.ly/2L5rzcu ("House DOJ Report") (due to agency pressure, "the relatively few FDIC-supervised institutions that were making payday loans stopped doing so in 2006.").

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[6] House FDIC Report at app. FDICHOGR6042.

[7] *Id.* at app. HOGR-3PPP17.

[8] OIG Report at 27.

[9] *Id.*; Plaintiffs' Statement of Undisputed Material Facts at ¶¶ 16–17, *Advance America, Cash Advance Centers, Inc. v. FDIC*, No. 14-953 (D.D.C. Oct. 12, 2018), *available at* https://bit.ly/3o0Lxn9 ("Statement of Facts").

of the Regional Directors at the meeting, was unambiguous: "if a bank was found to be involved in payday lending, someone was going to be **fired**."[10]

The legal fulcrum of the campaign against these small-dollar lenders was an amorphous and expanding definition of "reputation[ ]. . . risk." Traditionally, reputation risk has been understood to reflect the potential that a bank's own practices could cause it to have a negative reputation in the community and that this impaired reputation could threaten the bank's safety and soundness.[11] But starting in 2008, FDIC expanded the meaning of reputation risk to encompass not only the risks posed by a bank's own operations but also those posed by a bank's *customers*. And in 2011, as the first stages of Operation Choke Point were unfolding, it moved to deploy the expanded concept of reputation risk against the small-dollar lending industry.

In the summer of 2011, the FDIC published a Supervisory Insights article entitled "Managing Risks in Third Party Payment Processor Relationships."[12] The article warned against the reputational risk posed to banks by providing services to certain "high risk" merchants—even going so far as to *list* "merchant categories that have been associated with high-risk activity," a list that included "PayDay Loans" along with activities such as "Drug Paraphernalia," "Escort Services," "On-line Gambling," "Ponzi Schemes," and "Racist Materials."[13] And in 2012, FDIC moved to include these warnings in more formal guidance documents, including a January 2012 Financial Institution Letter that reproduced the list from the 2011 article and reiterated FDIC's view that payday lenders "pose elevated risk" to banks.[14]

The effects of enumerating payday lenders in a list of disfavored, "high risk" industries were swift and far reaching. Banks across the Nation concluded "that providing banking services to merchants on the high-risk list was discouraged by the FDIC."[15] And that conclusion was directly fostered by the Government. For example, the list of "high risk" industries was "often directly incorporated into FDIC-mandated Memorandums of Understanding (MOUs) and Consent Orders as 'prohibited

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[10] *Id.* at ¶ 18 (emphasis added).

[11] *See, e.g.*, Financial Institution Letter: *Foreign-Based Third-Party Service Providers*, FDIC FIL-52-2006, 2006 WL 1704535 at *1 (June 21, 2006).

[12] FDIC, *Managing Risks in Third-Party Payment Processor Relationships*, SUPERVISORY INSIGHTS, Summer 2011.

[13] *Id.* at 6, 7.

[14] Financial Institution Letter: *Payment Processor Relationships Revised Guidance*, FDIC FIL-3-2012, 2012 WL 299966 at *1 & n.1 (Jan. 31, 2012).

[15] OIG Report at 19.

businesses.' "[16] The list was also attached, by DOJ, to the back of numerous subpoenas served upon banks and payment processors during this period.[17]

B. The FDIC's Backroom Pressure Campaign.

With the Supervisory Insights article and 2012 FILs in place establishing the legal hook for the campaign against payday lenders, the rest of the campaign began to unfold. As one FDIC official explained, "[t]hose due diligence requirements definitely give us (the FDIC) grounds for asking banks to keep track of what [banks'] payday lender/TPPP account holders are doing and a failure of banks to perform that due diligence may be grounds for an enforcement action . . . in the right situations."[18] Indeed, the official noted, "a bank's relationship to payday lending . . . or to the payday lender or TPPP might by itself give rise to a possible enforcement action, depending on the nature of the relationship."[19]

In the FDIC's Washington Office—the nerve center of its policy-making apparatus—the Division of Consumer Protection ("DCP") took the lead in developing, coordinating, and directing the agency's efforts. It was DCP (according to emails from Marguerite Sagatelian, an FDIC Senior Counsel) that played the primary role in brainstorming the "avenues . . . available to the FDIC to take action against banks that facilitate payday lending," and the various regulatory hooks that "would provide the FDIC with the means to get at payday lending (either by the bank's direct customer or through a third party payment processor)."[20] And the internal emails from and between the DCP's senior leadership—Director of the DCP Mark Pearce, Deputy Director Jonathan Miller, and Associate Director Luke Brown—clearly illustrate their hostility to the payday lending industry as a whole.

For example, when the FDIC's Regional Director in Atlanta gloated to Director Pearce that he was "pleased we are getting the banks out of ach (payday, bad practices, etc.)," Pearce responded that he was glad they were "on the same page" and that "failure to be proactive on this will lead to enforcement agencies [sic] or reputational issues, which is not in [the] best interest of our institutions."[21] Deputy Director Miller similarly sent emails evincing antipathy to the targeted small-dollar lenders. According to a 2013 email, Deputy Director Miller insisted that whenever

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[16] STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., *FEDERAL DEPOSIT INSURANCE CORPORATION'S INVOLVEMENT IN "OPERATION CHOKE POINT"* at 7 (Dec. 8, 2014), *available at* https://bit.ly/3o5Pfw3 ("House FDIC Report").

[17] *Id.* at 16.

[18] House FDIC Report at app. FDICHOGR5178.

[19] *Id.*

[20] *Id.* at FDICHOGR6042.

[21] Statement of Facts at ¶¶ 71, 72.

the letters or talking points prepared for Acting Chairman Gruenberg discussed payday lending, they should also mention pornography, because associating the two gives "a good picture regarding the unsavory nature of the businesses at issue" and thus "help[ed] with the messaging on this issue."[22]

Hostility to small-dollar lending reached to the very top of the FDIC. Indeed, there was "a widely-held understanding that the highest levels of the FDIC disfavored these types of banking services."[23] On February 24, 2013, for example, Acting Chairman Gruenberg emailed Pearce, Miller, and others a link to a New York Times article discussing the role of banks in facilitating payday loans, noting "We should discuss."[24] Pearce responded that "We've been focused on the back end of the relationship (e.g., risks of payment processors relationships with banks)" and that they could discuss the matter at a meeting the following day.[25] A short time later, Acting Chairman Gruenberg then arranged a meeting with a senior official at a prominent bank at which they discussed the "potential roles that national banks play which may[ ]be facilitating either traditional storefront or online payday lenders," including "facilitating payday loans by extending corporate lines of credit to national payday lending chains" and "act[ing] as the payment processor" for payday lenders.[26] They also discussed "[t]he potential ways in which regulators might intervene" to prevent these forms of facilitation, including "safety and soundness or reputational risk approaches."[27] Following the meeting, Pearce and other senior officials in the Washington Office followed up with the bank in a conference call "to discuss their approach to minimizing the number of fraudulent payday lenders debiting consumer accounts."[28] Two days later, the bank announced policy changes related to the repayment of payday loans—changes the FDIC hailed as potentially having a significant "impact in the global financial economy."[29]

While the FDIC's Washington Office was heavily involved in coordinating the operation and in establishing the "general expectation" that FDIC officials should "discourage institutions from facilitating payday lending,"[30] most of the heavy lifting was done by the agency's seven regional

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[22] House FDIC Report at app. FDICHOGR7424.

[23] OIG Report at 29.

[24] Statement of Facts at ¶ 88.

[25] *Id.* at ¶ 89.

[26] *Id.* at ¶¶ 90–92.

[27] *Id.* at ¶ 91–92.

[28] *Id.* at ¶ 94.

[29] *Id.* at ¶¶ 95–96.

[30] OIG Report at 28.

offices—the arms of the FDIC that have direct contact with supervised banks throughout the country. After the quarterly meeting in which the Regional Directors were instructed to "require [any] institution" found to be "facilitating payday lending" to "submit a plan for exiting the business,"[31] the Regional Directors and their senior staff began to apply backroom pressure on banks throughout the Nation, adopting the policy of using, in the words of one Regional Director, all "available means, including verbal recommendations, to strongly encourage [supervised banks] to refrain from any activities that provide assistance to the business activities of pd lenders."[32]

For example, Atlanta Regional Director Thomas Dujenski was an enthusiastic and active participant in Operation Choke Point who frequently expressed blatant hostility to payday lenders. In one email to Director Pearce, Dujenski emphasized that he was "sincerely passionate" about the fact that "I literally cannot stand pay day lending. They are abusive, fundamentally wrong, hurt people, and do not deserve to be in any way associated with banking."[33] In an email sent on Thanksgiving Day 2012, Dujenski told Director Pearce that "I think you will be pleased" because a "bank with ach is getting out of payday ach," remarking: "now that is something to celebrate on Thanksgiving! :)"[34]

Dujenski's participation in Operation Choke Point is illustrated by the actions he and his subordinates took to pressure a bank in the Atlanta region to sever all of its relationships with payday lenders. After regional examiners determined in late 2012 that the bank in question "process[es] transactions for up to 20 payday lenders," they raised the bank's relationship with payday lending with the senior Regional leadership, including Director Dujenski and Deputy Regional Director Phyllis Patton.[35] Patton responded that the relationships were "of serious concern" and would "likely adversely impact the rating" of the bank, and Director Dujenski responded that he was "look[ing] forward to hearing more."[36] The following month, seven regional officials—including Director Dujenski and his senior leadership—met with the bank's Chairman to discuss its relationship with payday lenders and its plans to offer a prepaid debit card with "payday lending elements."[37] Although the bank chairman "stressed that" the bank was not "involved in payday lending," the regional officials "detailed their numerous concerns with the

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[31] *Id.* at 27.

[32] Statement of Facts at ¶ 157.

[33] *Id.* at ¶ 100.

[34] *Id.* at ¶ 103 (cleaned up).

[35] *Id.* at ¶ 111.

[36] *Id.* at ¶¶ 112–13.

[37] *Id.* at ¶ 116.

program," which they viewed as "facilitating payday lending activities."[38] According to the chairman, Director Dujenski stated during the course of this meeting that the bank was getting involved in a "dirty business," and that he could refer any money-laundering issues to the Department of Justice, which could lead to personal criminal prosecution.[39]

Later that same day, in the shadow of a threat of criminal prosecution, the bank "informed Deputy Director Patton that it had decided not to pursue the debit-card program."[40] Not satisfied with preventing the bank from engaging in payday-lending-related activities directly, Ms. Patton then followed up with the Chairman by phone to see if he was also going "to sever the entire relationship" with the lenders in question.[41] He assured her that the bank was meeting with the lenders "to let them know that the relationship is ending."[42]

Regulatory pressure tactics such as this were not limited to the Atlanta region. In 2013, for example, the Chicago Regional Office engaged in a months-long effort to get a bank to cease providing ACH payment processing for a payday lender customer. On January 15, 2013, the Director of the Chicago Region, Anthony Lowe, sent a memo to Director Pearce informing him that the Chicago Office had investigated the bank because of a high number of ACH returns, and they had determined that they stemmed from a relationship with a payday lender.[43] Although a bank visitation had determined that the "volume of ACH returns are reasonable," Mr. Lowe nonetheless stated that "we will determine a supervisory strategy for the bank, including considerations for encouraging termination of the relationship with the payday lender."[44]

Director Lowe informed the bank's board of directors that it was "unacceptable" for the bank to continue serving payday lenders: "It is our view that payday loans are costly, and offer limited utility for consumers, as compared to traditional loan products. Furthermore, the . . . relationship carries a high degree of risk to the institution . . . Consequently, we have generally found that activities related to payday lending are unacceptable for an insured depository institution."[45] The FDIC kept up the pressure on the bank for months until it finally capitulated and terminated the

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[38] *Id.* at ¶ 117.

[39] *Id.* at ¶¶ 118–19.

[40] *Id.* at ¶ 120.

[41] *Id.* at ¶ 121.

[42] *Id.* at ¶ 122.

[43] *Id.* at ¶ 136.

[44] *Id.* at ¶ 137.

[45] *Id.* at ¶ 140.

relationship.[46]

The letter from the bank notifying the FDIC of its decision to terminate the relationship makes clear that the decision was not voluntary. The bank noted that it "*is not engaged in payday lending*" but rather in merely providing "traditional banking services" to small-dollar lenders, which were "engaged only in lawful lending activities."[47] It then reiterated that it was not "engaged in unfair or deceptive practices through our services to [the lender] and its customers," and it related that it had "retained the services of a well-known consultant" to conduct a "risk assessment" of the relationship, which had concluded that the relationship "pose[s] no significant risk to the financial institution, including financial, reputational and legal risk."[48] While the bank believed a variety of options were available to even further mitigate any risk stemming from the relationship, it recognized that what FDIC really wanted was for it "to request that [the payday lender] terminate their banking relationship with [the] bank," and it accordingly asked "to schedule a time to discuss . . . the termination of our relationship" with the lender.[49] Clearly frustrated at being pressured to terminate the relationship, however, the bank posed a number of questions, including: which "FIL . . . addresses the ability of the FDIC to force an institution to dismiss a relationship when there have been no safety and soundness considerations identified other than potential reputational risks," and what the consequences would be "[a]ssuming all federal regulators are successful in their attempt to drive the payday lenders from the banking system."[50]

Nor was the intimidation campaign limited to the Washington, Atlanta, and Chicago Offices. The House Oversight Committee, for example, reported that a senior FDIC official in the Kansas City region threatened a bank considering serving a payday lender with severe regulatory consequences: "The official told the banker, 'I don't like this product, and I don't believe it has any place in our financial system. Your decision to move forward will result in an immediate unplanned audit of your entire bank.' "[51]

As this brief account illustrates, Operation Choke Point provides a paradigmatic example of banks—under the thumb of their safety-and-soundness regulators—refusing to provide fair access to financial services to an entire category of customers, based on concerns that are wholly unrelated to any objective and quantifiable risk posed by serving the customers but, rather, arise solely from a political distaste for the (entirely lawful) business in which they are engaged. In the remainder of this letter, we describe the lessons we believe OCC can learn from Operation Choke Point as it

[46] *Id.* at ¶ 142.

[47] *Id.*

[48] *Id.* at ¶ 143.

[49] *Id.* at ¶¶ 144–45.

[50] *Id.* at ¶ 146.

[51] House FDIC Report at 14.

seeks to prevent banks from discriminating in this manner.

II. Discrimination by Banks Against Small Dollar Lenders Harms Lawful Businesses, Consumers, and the Banks Themselves

As INFiN's members know from direct experience, when large banks discriminate in providing access to financial services based on irrelevant considerations such as political animus, or where banks are subject to regulatory pressure, or fail to make individual, case-by-case banking decisions based on customer risk, the resulting harm can be significant and lasting. Indeed, Operation Choke Point caused severe harm to the small-dollar lending industry, American consumers, and even the banks that engaged in the discrimination.

The small-dollar lending industry is uniquely vulnerable to the type of discrimination discussed in the notice of proposed rulemaking, and Operation Choke Point seized upon that vulnerability to cause critical and lasting harm to the industry. As mentioned above, small-dollar lending critically depends on access to ordinary banking services. Operation Choke Point seized on the industry's acute reliance on access to financial services, and the campaign to "choke out" the industry by closing off their access to the banking services they needed to operate caused serious damage. Following the commencement of the intimidation campaign, regulated banks began terminating their payday lender customers, often *en masse*, and often with little warning and with little to no explanation.[52]

During the course of the campaign, leading small-dollar lenders had their accounts terminated by scores of banks—including such giants as U.S. Bank, Capital One, and JP Morgan Chase—and were turned away by hundreds more, when they sought new banking partners to replace these critical relationships.[53] The deliberate deprivation of access to financial services caused lenders to close hundreds of storefronts and threatened their continued viability.[54]

The fact that Operation Choke Point threatened to bring a lawful, multi-billion-dollar industry to its knees is evidence enough of the harm that can be inflicted when financial services are not available on a fair and non-discriminatory basis. But the impact of Choke Point cannot be measured by its effect on the lending industry alone. No, the unlawful pressure campaign also inflicted severe harm on the millions of Americans who rely on small-dollar loans and similar consumer financial services as their only available source of credit.

For millions of individuals across the country, small-dollar lenders provide convenient access to credit to address short-term financial needs. In 2019, over 5% of U.S. households—approximately 7.1 million—were entirely "unbanked," meaning that "no one in the household had a checking or

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[52] Statement of Facts at ¶¶ 198–210.

[53] *Id.* at ¶¶ 225–39.

[54] *Id.* at ¶¶ 231–51.

savings account at a bank or credit union."[55] Low-income and minority families are disproportionately affected by lack of access to traditional banking services.[56] Payday loans provide short-term credit to these unbanked, and many more underbanked, households—helping over nineteen million American households each year to bridge unexpected financial needs between income installments.[57]

Small-dollar loans are more readily available than more traditional forms of credit and less costly than the informal credit systems on which many underbanked consumers must rely in the absence of payday advances, such as overdraft protection, bounced checks, and late bill payment fees. As former FDIC Chairman William Isaac has noted,

> The millions of people who use these loans are not irrational. To these borrowers, these loans are less expensive than a series of overdrafts. They are less painful than the consequences of defaulting on an auto loan or a mortgage. They are a better deal than having the electricity and heat turned off only later to pay for having them turned on again.[58]

Indeed, in the Dodd-Frank Act, Congress acknowledged the need for short-term credit products, prohibiting federal regulators from imposing rate limitations on short-term loans.[59]

The short-term lending industry is of course fully regulated by state and federal regulators. And when offered in full compliance with ethical business practices, there is simply no denying that consumer financial services, including small-dollar loans, often fill a niche in the marketplace that other financial institutions, such as banks and credit unions, have chosen not to fill. They are valued by customers, providing critical access to essential, regulated financial services designed to help them attain greater financial experience, security, and upward mobility.

While small-dollar loans and other consumer financial services have provided a crucial service to underbanked communities for many years, the ongoing COVID-19 pandemic has sharply underscored the critical need many Americans have for access to these less traditional forms of credit and related financial services. Accordingly, government officials have widely recognized

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[55] FDIC, HOW AMERICA BANKS: HOUSEHOLD USE OF BANKING AND FINANCIAL SERVICES, 2019 FDIC SURVEY 12 (Oct. 2020), *available at* https://bit.ly/37XDC4w.

[56] *Id.* at 13 tb.3.1.

[57] Bethany McLean, *Payday Lending: Will Anything Better Replace It?*, THE ATLANTIC (May 2016), *available at* https://bit.ly/2X7t3pz.

[58] William Isaac, *Payday Crackdown Creates More Problems than It Solves*, AMERICAN BANKER (Feb. 18, 2014) *available at* https://bit.ly/3ncAmH7.

[59] The Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"), § 1027, Pub. L. 111-203, 124 Stat. 1376 (2010), *codified at* 12 U.S.C. § 5517(o).

the importance of preserving access to consumer financial products like payday loans. The U.S. Department of Homeland Security's influential list of "critical infrastructure" included "consumer and commercial lending" activities and "consumer access to bank and non-bank financial services and lending services."[60] Numerous State COVID-19 orders likewise explicitly included payday lenders as essential businesses.[61]

Any effort by large banks—either unilaterally or under pressure from interest groups or regulators—to choke off the small-dollar lending industry thus not only harms the companies engaged in this lawful and ethical form of lending; it also harms the millions of American consumers who rely upon access to this critical financial resource to make ends meet.

Finally, depriving small-dollar lenders of fair access to the financial services offered by banks also harms *the banks themselves*. During Operation Choke Point, the banks that were forced to cut ties with payday lenders repeatedly stated that their longstanding banking relationships with their payday-lender customers were valuable and mutually beneficial.[62] By definition, when a bank ends such a mutually profitable relationship, the bank will suffer financially. Indeed, the notice of proposed rulemaking recognizes this, noting that when a bank fails to provide fair access to its financial services, it is ending or refusing to provide its services "even when an individual customer would qualify for the financial service if evaluated under an objective, quantifiable risk-based analysis"—i.e., even when the relationship with the customer would be profitable.[63] It is thus no surprise that the banks pressured to terminate their small-dollar lender accounts during Choke Point frequently expressed regret at having to end their longstanding, profitable relationships with these customers.[64]

Accordingly, as the notice of proposed rulemaking recognizes, when banks fail to provide fair access to financial services, the result is significant and lasting harm to the American economy. The systematic deprivation of access to financial services that small-dollar lenders suffered during Operation Choke Point provides a paradigmatic illustration of this phenomenon, showing that this

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[60] U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency, *Guidance on the Essential Critical Infrastructure Workforce: Insuring Community and National Resilience in COVID-19 Response* at 21 (Aug. 18, 2020), *available at* https://bit.ly/2MbGkuK.

[61] *See, e.g.*, Executive Order 2020-12 at § 3(e)(vii), *available at* https://bit.ly/2Ju8ccA (Arizona); Executive Order 2020-10 at § 1(12)(f), https://bit.ly/2WXpbHm (Illinois); Executive Order 20-22 at § 14(h), https://bit.ly/3pyIG5p (Indiana); Executive Order 2020-257 at § 1(g), https://bit.ly/3aQlag9 (Kentucky); Executive Order 22, attach. A at § 12, https://bit.ly/3mZxPzU (Tennessee).

[62] Statement of Facts, *supra*, at ¶ 223.

[63] 85 Fed. Reg. at 75,263.

[64] Statement of Facts, *supra*, at ¶ 223.

type of discrimination by banks harms not only the members of the industry that is in the crosshairs, but also the customers that rely upon the services they provide and, indeed, even the banks themselves. INFiN thus strongly supports OCC's effort to curb this pernicious practice, in furtherance of its statutory mandate to assure "fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction."[65]

III. Regulations Ensuring Fair Access to Financial Services Should Also Prevent the Federal Banking Regulators from Instigating and Encouraging Banks to Discriminate Against Politically Disfavored Industries

INFiN members' experience with Operation Choke Point does more than provide a powerful example of why the proposed rulemaking is necessary. Our unique experience also points the way towards proposed amendments that would make OCC's work to prevent discrimination in the provision of financial services more effective.

As the discussion of Operation Choke Point above illustrates, banks who *want* to provide fair access to their services can nonetheless be *effectively forced* to discriminate against disfavored industries by pressure from their regulators. This accords with common sense. Generally, a bank acting rationally will not *voluntarily wish* to end or forgo a customer relationship that, by every "objective, quantifiable" measure,[66] would be mutually profitable. Rather, as the notice of proposed rulemaking recognizes, banks that discriminate in providing financial services are often instead "reacting to pressure" from outside parties "whose policy objectives are served when banks deny certain categories of customers access to financial services."[67] And unfortunately, the lesson of Operation Choke Point is that one of the principal sources of that pressure, historically, has been the bank's safety-and-soundness regulators.

Indeed, compared to the private-sector "advocates from across the political spectrum" with which the proposed rulemaking is primarily concerned,[68] banking regulators are *especially* well positioned to exert pressure on supervised banks to discriminate in providing access to their services. The Federal Deposit Insurance Act (FDIA),[69] vests the federal banking regulators with expansive power to set standards for the "safety and soundness" of insured depository institutions, including "standards relating to (A) internal controls, information systems, and internal audit systems . . . ; (B) loan documentation; (C) credit underwriting; (D) interest rate exposure; (E) asset growth; and (F) compensation, fees, and benefits" and "such other operational and managerial

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[65] 12 U.S.C. § 1(a).

[66] 85 Fed. Reg. at 75,263.

[67] *Id.*

[68] *Id.*

[69] 12 U.S.C. § 1811 *et seq.*

standards as the agency determines to be appropriate."[70] Violations of these standards can trigger a variety of negative consequences—including costly visitations and examinations and, ultimately, seizure of control by the regulators or placement in conservatorship or receivership.[71] Moreover, regulators often operate under a veil of secrecy pursuant to their claims of the "bank examination privilege." As many INFiN members know from personal experience with Operation Choke Point, federal banking regulators are not immune from the temptation to use these vast and largely unaccountable powers to pressure banks to "deny certain categories of customers access to financial services" in a way that has nothing to do with the banks' safety and soundness, but that suits the regulators' "policy objectives."[72]

To effectively curb discrimination in the provision of baking services, the proposed rule should strike at the problem's root causes. And unfortunately, one of those causes is back-room intimidation and pressure by banking regulators. Accordingly, INFiN recommends that the proposed rule be amended to bar any OCC employee from informally pressuring covered banks to deny fair access to their financial services in any of the ways described by subsection (b) of the proposed rule.

Such an amendment is consistent with the steps that the FDIC took, in response to litigation over its role in Operation Choke Point, to prevent its employees from engaging in informal pressure tactics. After acknowledging that "certain [of its] employees acted in a manner inconsistent with FDIC policies with respect to payday lenders in what has been generically described as 'Operation Choke Point,' " the FDIC took "steps to clarify and reinforce its policy that insured institutions that properly manage customer relationships are neither prohibited nor discouraged from providing services to any customer operating in compliance with applicable state and federal law."[73] The FDIC explained that the exercise of its regulatory authority "rests on laws and regulations, not on personal beliefs or political motivations," and that "[r]egulatory threats, undue pressure, coercion, and intimidation designed to restrict access to financial services for lawful businesses have no place at the FDIC."[74] They should have no place at the OCC, either.

To ensure that our proposed amendment's bar prohibiting OCC employees from pressuring banks to discriminate in the provision of financial services is not a mere parchment barrier, INFiN further

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[70] *Id.* § 1831p-1(a).

[71] *Id.* §§ 1831o(f)(2), 1831p-1(e)(1).

[72] 85 Fed. Reg. at 75,263.

[73] Letter from Floyd Robinson, Deputy General Counsel, FDIC, at 1 (May 22, 2019), *available at* https://bit.ly/3801F2V.

[74] FDIC, Statement of the Federal Deposit Insurance Corporation at 1, *available at* https://bit.ly/3801F2V.

proposes that the bar be enforced by tangible consequences for employees who violate the prohibition, including termination, consistent with any applicable civil-service protections.[75]

Furthermore, the rule should make clear that the bank-examiner privilege will not apply to any materials relating to an alleged violation of the rule. During the Choke Point litigation, bank regulators invoked this common law privilege in an effort to keep their conduct hidden from courts. Sunlight is the best disinfectant. And bank regulators should not be able to invoke the bank examiner privilege to hide their misdeeds. The privilege should be totally inapplicable in the face of such allegations. But at a minimum, the rule should make clear that only the banks themselves can invoke this privilege in litigation surrounding the enforcement of this rule.

To ensure that "the now-discredited Operation Choke Point,"[76] or something like it, does not happen again, OCC's proposed rule should strike at the root causes of discrimination by banks in providing access to their financial services, including informal pressure brought to bear by banking regulators themselves. And it should do so in a way that ensures that informal, regulatory pressure on banks to discriminate against disfavored customers or industries is barred not only on paper but also in practice—by providing serious, tangible consequences for any agency employee who ignores the bar. Only then can OCC fully realize its statutory charge to assure "fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction."[77]

INFiN appreciates the opportunity to provide comments and OCC's attention to these important issues.

Respectfully submitted.

s/ David H. Thompson
David H. Thompson

cc: Edward P. D'Alessio, Executive Director, INFiN—A Financial Services Alliance

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[75] *See generally* 5 U.S.C. §§ 4303, 7513.

[76] 85 Fed. Reg. at 75,263.

[77] 12 U.S.C. § 1(a).