



January 4, 2021

The Honorable Brian P. Brooks
Acting Comptroller
Office of the Comptroller of the Currency
Attention: Comment Processing
400 7th Street, SW, Suite 3E-218
Washington, DC 20219

VIA ELECTRONIC SUBMISSION

Re: Office of the Comptroller of the Currency Notice of Proposed Rulemaking to ensure that national banks and Federal savings associations offer and provide fair access to financial services. Docket ID OCC-2020-0042

Dear Acting Comptroller Brooks:

The Online Lenders Alliance (OLA) is pleased to submit comments in response to the Office of the Comptroller of the Currency's (OCC) Notice of Proposed Rulemaking (NPRM) regarding fair access to financial services. OLA appreciates the opportunity to provide its members' perspective on this topic.

About OLA and its Members

OLA represents the growing industry of innovative companies that develop and deploy financial technology, including proprietary and innovative underwriting methods, big data analytics, and non-traditional delivery channels, to offer online consumer loans and related products and services. OLA's members include online lenders, vendors and service providers to lenders, consumer reporting agencies, payment processors, and online marketing firms.

Fintech companies have pioneered innovative online techniques for advertising and marketing, preventing and managing fraud risk, underwriting and managing credit risk, servicing loans, and conducting collection activities in a manner that is fair and transparent to consumers seeking to obtain a loan over the Internet. The online consumer installment loan market is estimated to be \$4.2 billion¹, providing unsecured personal loans ranging from \$300 to \$10,000 with terms that vary from two weeks to three years. Lines of credit are also offered by our lenders and are the most popular amongst consumers. Online lenders provide benefits to consumers, particularly

¹ Sources: Jefferies, 2020 Presentation, LEND360

those in underserved communities, with fast, safe, and convenient choices that simply are not available through traditional lending markets. Our members also have increasingly offered products that can rehabilitate or establish credit for millions of Americans who have typically been ignored by traditional financial institutions.

Background

Much of the innovation undertaken by OLA members has given consumers greater access to financial services and products across multiple applications and platforms in a safe and accessible manner. We are encouraged that the proposed rule would promote policies that support the online lending industry's ability to innovate in a manner that serves American consumers' needs in a safe and secure manner.

In addition to protecting the safety and soundness of our financial markets, it is incumbent on Federal regulators to ensure customers have fair access to financial services and receive fair treatment by financial institutions. There has been a broad and longstanding anti-discrimination principle that individuals are entitled to be treated fairly by national banks and Federal savings associations (banks). That principle is reinforced by specific laws, such as the Equal Credit Opportunity Act, Fair Housing Act, and Community Reinvestment Act, among others.

OCC's proposed regulation is in keeping with the intent of these standards, and OLA strongly supports its enactment. Establishing clear regulatory guidelines will go a long way in ensuring that all legitimately licensed businesses have fair access to our nation's banking system.

History has shown that not all sectors of our economy have enjoyed fair access. For proof, one only needs to look to Operation Choke Point, a program instituted during the Obama Administration, as an example of why a regulation like the one proposed by the OCC is needed. Operation Choke Point purportedly was rooted in the principles that the U.S. banking system should not be used for unlawful purposes and that U.S. banks have an obligation to monitor their customers' accounts to ensure that they are not being used for such unlawful purposes.

However, this was not the true goal of Operation Choke Point. Its intended purpose was to target a group of legitimately licensed businesses that some senior agency officials viewed as undesirable to certain constituencies. The targeted industries included the online lending industry due to its work in the small-dollar lending market.

Once Operation Choke Point was initiated, the Department of Justice (DOJ) issued subpoenas under Section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. However, this was an overreach beyond the intended purpose of Section 951, which was established to provide regulators with the tools necessary to pursue civil penalties against entities that commit fraud, not private companies performing legal business. In a coordinated campaign, DOJ, working with federal bank regulators, pressed financial institutions to end relationships with targeted industries. Many banks stopped providing financial services to members of these industries altogether due to political pressure and fear of retribution.

Since Operation Choke Point came to light, there have been several attempts to rectify the damage done to the online lending industry, both through judicial proceedings and congressional action.

Operation Choke Point Related Litigation

In 2014, a complaint was brought in federal court against the Federal Deposit Insurance Corporation (FDIC), Federal Reserve Board of Governors and OCC, alleging that federal banking regulators participated in—and were continuing to take part in—Operation Choke Point. According to the plaintiffs, the defendants engaged in a two-part campaign: first, promulgating regulatory guidance regarding reputation risk; and second, relying on that guidance “as the fulcrum for a campaign of backroom regulatory pressure seeking to coerce banks to terminate longstanding, mutually beneficial relationships.” The plaintiffs sought declaratory and injunctive relief to set aside certain informal guidance documents and other actions by the FDIC, Board and OCC on the grounds they violated the Administrative Procedures Act and deprived the plaintiffs of due process of law². In July 2017, the D.C. federal district court permitted the plaintiffs’ due process claims to proceed.

By 2019 an agreement was reached. In exchange for the plaintiffs’ dismissal of the suit against the FDIC, the agency agreed to issue a statement summarizing its long-standing policies and guidance regarding the circumstances in which the FDIC recommends that a financial institution terminate a customer’s deposit account, reiterating pre-existing public guidance to financial institutions about providing banking services and carrying out Bank Secrecy Act (BSA) obligations. In addition, the agency pledged to conduct additional training of its examination workforce on its policies by the end of 2019 “to ensure that its examiners adhere to the highest standards of conduct and respect the rule of law.”³

Congressional Action

While the legal challenges were working their way through the courts, Operation Choke Point also was subject to extensive congressional review. No fewer than three House committees held hearings between 2014 and 2018 on the negative consequences of Operation Choke Point.⁴ These actions helped shed considerable light on the Operation and led the FDIC to issue a Financial Institution Letter in January 2015 that clarified the agency’s position regarding Operation Choke Point. The letter stated that banks should take “a risk-based approach in assessing individual customer relationships rather than declining to provide banking services to

² *Advance America v. Federal Deposit Insurance Corp.*

³ Statement of the Federal Deposit Insurance Corporation May 22, 2019

⁴ *The Department of Justice’s ‘Operation Choke Point’*” House Financial Services Committee July 15, 2014; *Guilty until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department’s Operation Choke Point.*” House Judiciary Committee July 17, 2014; “*The Federal Deposit Insurance Corporation’s Role in Operation Choke Point*” House Financial Services Committee March 24, 2015; *Federal Trade Commission Enforcement of operations Choke Point-Related Businesses.* House Committee on Oversight and Government Reform July 26, 2018

entire categories of customers without regard to the risks presented by an individual customer or the bank's ability to manage the risk.”⁵

This action was followed in March by testimony before a Congressional committee by the FDIC Chairman, reiterating that banks should act like banks by accurately assessing individual customer risk, not by shunning customers just because they are members of certain industries.⁶ The FDIC later followed up these statements with a letter outlining further actions that the regulator would take to end Operation Choke Point, committing to investigate the agency's prior actions and hiring an outside counsel to investigate the matter.⁷

Conclusion

These actions were meant to put an end to Operation Choke Point. However, OLA continues to receive anecdotal evidence from its members that the industry still is having access to financial services curtailed, with no satisfactory explanation from their banks. Although the actions taken by regulators to date have been positive, they have been unsuccessful in undoing the systemic problems created by Operation Choke Point. It remains the sense of many in the industry that bank executives still believe that DOJ and federal bank examiners negatively view providing financial services to members of certain industries.

That is why the proposed regulation, by clarifying the obligation that financial institutions must provide fair access to financial services and setting clear parameters, is crucial. There is no place for politics in our banking system, and Operation Choke Point must end once and for all. This is an abuse of government power and is antithetical to the best interests of the banking industry, the U.S. economy, and the consumers who rely on legal banking products and services.

By placing these standards into a regulation consistent with the Administrative Procedures Act (APA), OCC's rulemaking will evidence a much stronger weight of law than previous actions by regulators. This also will send a clear message that Operation Choke Point is no longer in effect and no agency or bank examiner has the authority to continue pursuing this policy. This would assure banks that they may provide financial services without discriminating against certain industries. Without such action, banks' perception of "regulatory risk" will continue to deny financial services to legitimate and profitable businesses.

⁵ FDIC Encourages Institutions to Consider Customer Relationships on a Case-by-Case Basis
<https://www.fdic.gov/news/press-releases/2015/pr15009.html>

⁶ *The Federal Deposit Insurance Corporation's Role in Operation Choke Point* House Financial Services Committee March 24, 2015

⁷ https://luetkemeyer.house.gov/uploadedfiles/fdic_response_to_rep._luetkemeyer.pdf

This proposed regulation is a positive step that should encourage stability in the lending space and increase access to credit and uniformity across different markets. It should be noted that the proposed rule would apply only to nationally chartered banks supervised by the OCC. OLA encourages other regulators, including the FDIC, to follow suit as it has previously done on regulations like the Valid-When-Made proposal and provide regulatory guidance on this issue.

As you work to chart the OCC's future direction, OLA's members will continue to support the OCC on policies that support the fintech industry. Thank you again for your leadership.

If you have questions or would like additional information, I can be reached at MJackson@oladc.org.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Mary Jackson", with a long horizontal flourish extending to the right.

Mary Jackson
President and CEO