

OPERATION CHOKE POINT: MYTHS AND REALITY

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Folklore about Operation Choke Point, a regulatory enforcement initiative in the second term of the Obama Administration, continues to come up as a talking point among political conservatives when criticized regulatory agencies or attacking nominees for agency directorships. When several national banks announced in 2018 that they were backing away from the gun industry in various ways (in response to horrific mass shootings), the gun lobby reinvented Operation Choke Point as a conspiracy among bankers to defund gun dealers. This new, more fanciful narrative about Operation Choke Point has become the stated premise for new antiboycott laws that punish banks if they do not lend to the gun industry, such as Texas Senate Bill 19, enacted in 2021.

This Article is an attempt to set the record straight. Operation Choke Point was a benign initiative involving a small task force at the Department of Justice and officials from a variety of regulatory agencies that oversee the banking and consumer finance systems. Enforcement actions for consumer fraud targeted unscrupulous payday loan companies engaged in illegal activities, and exhortations from bank regulators reminded executives and compliance officers at financial institutions about their legal duties to screen business customers that presented elevated risks for fraud and money laundering. Backlash erupted when banking lobbyists and industry spokespersons claimed, with only anecdotal evidence, that banks were pressured to close accounts for bank customers who operated lawful businesses that were unpopular with Democrats. The gun industry also entered the fray, with vociferous but unsubstantiated claims that Operation Choke Point was a sinister conspiracy to defund (de-bank) firearm manufacturers and dealers, and was aimed at depriving the citizenry of the Second Amendment rights. Congressional hearings followed, along with investigations and reports by the FDIC's Office of Inspector General and class action lawsuits against several regulatory agencies, which were dismissed or settled. The Office of Inspector General reports, however, were

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underwhelming compared to the alarmist rhetoric characterizing the public discourse on the subject. The federal agencies at the center of the firestorm—DOJ and the FDIC—backpedaled on their regulatory guidance to financial institutions and wound down their enforcement activities, and whatever vestiges of Operation Choke Point ceased to exist when President Trump took office. Yet the myths surrounding Operation Choke Point continue to have political salience and real-world adverse impact.

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INTRODUCTION

Operation Choke Point was an Obama-era initiative involving a small task force in the Department of Justice (DOJ) and some of the bank regulatory agencies.¹ Since Operation Choke Point officially ended in 2017, it has taken on symbolic and mythic proportions in partisan discourse about regulation generally and regulation of the financial sector specifically. Operation Choke Point is now a frequent talking point in petitions and letters to these agencies

1. OFF. OF INSPECTOR GEN., FED. DEPOSIT INS. CORP., AUD-15-008, THE FDIC’S ROLE IN OPERATION CHOKE POINT AND SUPERVISORY APPROACH TO INSTITUTIONS THAT CONDUCTED BUSINESS WITH MERCHANTS ASSOCIATED WITH HIGH-RISK ACTIVITIES (2015) [hereinafter THE FDIC’S ROLE IN OPERATION CHOKE POINT]; Edward J. Balleisen & Melissa B. Jacoby, *Consumer Protection After the Global Financial Crisis*, 107 GEO. L.J. 813, 835–40 (2019) (detailing the case study of Operation Choke Point in its historical context); Adam J. Levitin, *Rent-A-Bank: Bank Partnerships and the Evasion of Usury Laws*, 71 DUKE L.J. 329, 376–77 (2021) (discussing specific examples of enforcement actions). There is no relationship between the federal government’s Operation Choke Point and the Cold War-era spy novel by the same name.

from industry associations² and members of Congress.³ For example, a guidance document from the Financial Crimes Enforcement Network (FinCEN), published in June 2022, addressed risk assessment for banks dealing with independent ATM operators.⁴ This guidance document was widely interpreted as addressing ongoing concerns about Operation Choke Point.⁵ Similarly, a regulation finalized by the Office of the Comptroller of the Currency (OCC) in January 2021⁶ was immediately “paused” by the incoming Biden appointee⁷ due to fears about Operation Choke Point.⁸ The same overblown concerns have

2. See, e.g., Letter from Bruce W. Renard, Exec. Dir. Nat'l ATM Council, Inc., to Off. of the Comptroller of the Currency, Bd. Of Governors of the Fed. Rsrv. Bd., & the Fed. Deposit Ins. Corp. (Aug. 5, 2022), <https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-community-reinvestment-act-3064-af81-c-291.pdf> (discussing Operation Choke Point and the harm independent Automated Teller Machine (ATM) owners have faced due to several U.S. depository institutions refusing to offer deposit services).

3. See, e.g., Letter from Rep. Patrick McHenry, Ranking Member, H. Comm. on Fin. Servs. & Rep. Blaine Luetkemeyer, Subcomm. on Consumer Prot. & Fin. Insts. of the H. Comm. on Fin. Servs., to Janet Yellen, Sec'y, Dep't of Treasury & Him Das, Acting Dir., Fin. Crimes Enf't Network (Mar. 12, 2022), https://luetkemeyer.house.gov/uploadedfiles/2022-03-01_pmc_bl_to_treasury_re_asset_freezes.pdf (stating that Operation Choke Point is the avenue through which the Federal Deposit Insurance Corporation (FDIC) and the Department of Justice (DOJ) shut down legal businesses).

4. See FIN. CRIMES ENF'T NETWORK, DEP'T OF TREASURY, STATEMENT ON BANK SECRECY ACT DUE DILIGENCE FOR INDEPENDENT ATM OWNERS OR OPERATORS (2022), https://www.fincen.gov/sites/default/files/2022-06/Statement%20for%20Independent%20ATM%20Owners%20or%20Operators_508.pdf.

5. David Baumann, *NCUA: Credit Unions Should Judge Individual Members in Risk Assessment*, CUCOLLABORATE (July 12, 2022), <https://www.cucollaborate.com/blogs/ncua-credit-unions-should-judge-individual-members-in-risk-assessment>; This Week in AML, *The Impacts of De-Risking on the Caribbean*, AML RIGHTSOURCE at 12:18 (Sep. 16, 2022), <https://www.amlrightsourc.com/this-week-in-aml/the-impacts-of-de-risking-on-the-caribbean> (“And it’s clear to me from the discussion today that some of those members [who continue to talk about Operation Choke Point] were instrumental in getting [Financial Crimes Enforcement Network (FinCEN)] to put that statement out earlier this year on independent ATM operators . . .”).

6. News Release, Off. of the Comptroller of the Currency, *OCC Finalizes Rule Requiring Large Banks to Provide Fair Access to Bank Services, Capital, and Credit* (Jan. 14, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html>.

7. News Release, Off. of the Comptroller of the Currency, *OCC Puts Hold on Fair Access Rule* (Jan. 28, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html>.

8. See Fair Access to Financial Services, 85 Fed. Reg. 75,261, 75,263–64 (proposed Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55) (“Particularly in light of the now-discredited Operation Choke Point, in which certain government agencies (but not the [Office of the Comptroller of the Currency (OCC)]) were revealed to have pressured banks to cut off access

also become the stated purpose or premise for new antiboycott laws that punish banks that do not lend to gun dealers or manufacturers.⁹

Heated rhetoric about Operation Choke Point also continues to pop up in Senate confirmation hearings for presidential nominees for agency directors. During the November 2021 confirmation hearings for Saule Omarova, President Biden's first nominee to serve as Comptroller of the Currency, Senator Mike Crapo grilled Omarova on her views on Operation Choke Point and accused her of planning to resurrect the program to defund

to financial services to disfavored (but not unlawful) sectors of the economy, the OCC believes these criteria are not, and cannot serve as, a legitimate basis for refusing to grant a person or entity access to financial services.”); *see also* M. MAUREEN MURPHY, CONG. RSCH. SERV., LSB10571, OFFICE OF THE COMPTROLLER OF THE CURRENCY'S FAIR ACCESS TO FINANCIAL SERVICES RULE 4 (2021) (“The Fair Access Rule hearkens back to legislation in previous Congresses introduced in response to a Justice Department program. From 2013 to 2017, the Department of Justice’s ‘Operation Choke Point’ sought to discourage banks from serving certain businesses.”). It is worth noting that the proposed rule relates a story about inquiring into recent complaints that the nation’s largest financial institutions were refusing to lend to the fossil fuel industry due to the industry’s impact on climate change:

The responses received indicate that, over the course of 2019 and 2020, these banks had decided to cease providing financial services to one or more major energy industry categories, including coal mining, coal-fired electricity generation, and/or oil exploration in the Arctic region. The terminated services were not limited to lending, where risk factors might justify not serving a particular client (e.g., when a bank lacked the expertise to evaluate the collateral value of mineral rights in a particular region or because of a bank’s concern about commodity price volatility). Instead, certain banks indicated that they were also terminating advisory and other services that are unconnected to credit or operational risk. In several instances, the banks indicated that they intend only to make exceptions when benchmarks unrelated to financial risk are met, such as whether the country in which a project is located has committed to international climate agreements and whether the project controls carbon emissions sufficiently.

Fair Access to Financial Services, 85 Fed. Reg. at 75,264. This type of socially conscious divestment from climate-unfriendly industries seems to be a typical target of current Operation Choke Point rhetoric.

9. *See, e.g.*, Comm. on State Affs. Comm. Rep., B. Analysis, Tex. S.B. 19.; CHARLES SCHWERTNER, 87R 23717, BILL ANALYSIS C.S.S.B. 19, <https://capitol.texas.gov/tlodocs/87R/analysis/pdf/SB00019H.pdf> (explaining the purpose of Texas S.B. 19, enacted in 2021, which punishes banks that do not lend to the gun industry); Texas House Journal, 87th Legislature, 2925 (May 13, 2021); Firearms Manufacturers and Dealers Protection Act of 2015, S. 477, 114th Cong. (makes repeated references to Operation Choke Point becoming “a threat to the Second Amendment”).

the fossil fuel industry.¹⁰ Omarova ultimately withdrew herself from consideration.¹¹ As recently as November 2022, President Biden’s nominee for Chair of the Federal Deposit Insurance Corporation (FDIC), Marty Gruenberg, also faced scrutiny and accusations over Operation Choke Point.¹² Senator Pat Toomey framed part of his attack against Gruenberg (who previously served a term as FDIC Chair) along these lines.¹³ Representative Blaine Luetkemeyer, a ranking member of a House subcommittee that oversees banks, also chimed in on the attacks in November 2022.¹⁴ He accused Gruenberg of being “one of the creators of the Obama-era . . . Operation Choke Point” and “a proven believer in and perpetrator of weaponizing the heavy hand of the federal government against United States citizens.”¹⁵ In a statement that captures the current mythology surrounding Operation Choke Point, Representative Luetkemeyer added, “With no regard for the law, then-Director Gruenberg used his position to force financial institutions to close the accounts of legally operating American businesses simply because they did not align with his political ideology.”¹⁶

This Article is an attempt to set the record straight. The lore circulating

10. See *Comptroller of Currency Confirmation Hearing*, C-SPAN (Nov. 18, 2021), <https://www.c-span.org/video/?516190-1/comptroller-currency-confirmation-hearing> (citing Sen. Mike Crapo, R-Idaho, who brought up Operation Choke Point at 51:30 in the video).

11. See Jesse Hamilton & Jennifer Epstein, *Biden Nominee Withdraws Name to Lead OCC Banking Watchdog*, BLOOMBERG (Dec. 7, 2021, 3:58 PM), <https://www.bloomberg.com/news/articles/2021-12-07/omarova-withdraws-name-to-lead-occ-banking-watchdog>; David Gura, *Biden’s Pick to Become a Key Banking Regulator Withdraws After Ugly Nomination Fight*, NPR (Dec. 7, 2021, 6:46 PM), <https://www.npr.org/2021/12/07/1062210606/bidens-pick-to-become-a-key-banking-regulator-withdraws-after-ugly-nomination-fi>.

12. See Jon Hill, *Biden’s Top FDIC Pick Draws GOP Ire Over Board Power Play*, LAW360 (Nov. 30, 2022, 10:21 PM), <https://www.law360.com/articles/1553300/biden-s-top-fdic-pick-draws-gop-ire-over-board-power-play> (“Republican senators also raised objections to other aspects of Gruenberg’s record at the FDIC, including the agency’s history with Operation Choke Point, a controversial Obama-era initiative that overlapped with Gruenberg’s previous term as FDIC chair from 2012 to 2017.”).

13. Press Release, Senate Committee on Banking, Housing, & Urban Affairs, Toomey Statement on Chopra’s Illegitimate FDIC Coup (Dec. 9, 2021), <https://www.banking.senate.gov/newsroom/minority/toomey-statement-on-chopras-illegitimate-fdic-coup> (attacking FDIC Board Member Marty Gruenberg for “his blemished record of implementing illegal Operation Choke Point and his mismanagement of the FDIC during his chairmanship.”).

14. Press Release, Blaine Luetkemeyer, Rep. for Mo., House of Representatives, Luetkemeyer on Martin Gruenberg’s Impending FDIC Chair Nomination, (Nov. 14, 2022), <https://luetkemeyer.house.gov/news/documentsingle.aspx?DocumentID=400773>.

15. *Id.*

16. *Id.*

now about Operation Choke Point is mostly just that: folklore and misrepresentations. The argument advanced here will, admittedly, run counter to the prevailing view among legal academic commentators.¹⁷ For example, Professor Todd Zywicki described the FDIC and DOJ activity in Operation Choke Point as “lawless and secretive,”¹⁸ to the point of being legalistic and highly publicized. Similarly, Professor Derek Bambauer argued that Operation Choke Point was an example of government “jawboning” that exceeded the statutory authority of the officials involved.¹⁹ I argue that all the enforcement actions brought under this DOJ initiative involved actual fraud and that the regulatory exhortations to banks were merely to be more scrupulous and dutiful in screening for fraud and money laundering when they serviced business customers.

Part I offers a brief history of Operation Choke Point, starting with its origin in the second term of the Obama Administration as a task force to respond to consumer financial fraud, which played a part in triggering the global financial crisis in the preceding years. A spate of high-profile enforcement actions against some payday loan companies operating illegally, combined with some cautionary guidance regarding high-risk industries by bank regulators, led to politically charged backlash, including acrimonious congressional hearings and investigations by the Office of Inspector General. Part II traces the development of the folklore-based narrative about Operation Choke Point that the firearms lobby and other anti-regulatory groups had advanced up to the present time. Part III details how this mostly fact-free rhetoric about Operation Choke Point became the basis for new legislative initiatives, such as the new antiboycott laws enacted in Texas in 2021 which, among other things, punish banks that do not lend to the gun industry. A brief Conclusion recaps the core argument and draws out the implications of the political symbol that Operation Choke Point has become.

17. For a typical example of the prevailing alarmist anti-government view, explained in much detail, see Charles J. Cooper, *Operation Choke Point and The Bureaucratic Abuses of Unaccountable Power*, in *LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE* 82–90 (Reuter & Yoo, eds. 2016). The argument set forth in this Article, in contrast, aligns with the views articulated by another law professor, Adam Levitin, in his testimony before a House subcommittee; these views were never published, to my knowledge. See “*Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department’s Operation Choke Point*,” *Hearing Before the Subcomm. On Regul. Reform, Com., & Antitrust L. of the H. Comm. on the Judiciary*, 113th Cong. 122–37 (2014) (written testimony of Adam J. Levitin) [hereinafter H. Subcomm. Testimony].

18. Todd Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 *SUP. CT. ECON. REV.* 77, 92 (2015) (concluding a lengthy subsection devoted to attacking Operation Choke Point).

19. Derek E. Bambauer, *Against Jawboning*, 100 *MINN. L. REV.* 51, 121–25 (2015) (extended criticism of Operation Choke Point).

I. SHORT HISTORY OF OPERATION CHOKE POINT

A. Origin Story

At the 1997 meeting of the international Financial Action Task Force (FATF), chaired by the director of FinCEN, experts in bank regulation and money laundering enforcement discussed the challenges posed by then-emerging technologies for electronic payment systems.²⁰ The FATF report explained “choke points” as an industry term of art:

Historically, law enforcement and regulatory officials have relied upon the intermediation of banks and other regulated financial institutions to provide “choke points” through which funds must generally pass and where records would be maintained. In fact, many anti-money laundering regulations as well as the FATF 40 Recommendations are designed specifically to require financial institutions to implement measures to ensure that a paper trail exists for law enforcement.²¹

The new challenge facing regulators was that “e-money systems” could “do away with the crucial ‘choke point’ that aids law enforcement investigations.”²² The members of FATF resolved to develop and implement new regulatory measures to address these emerging challenges.²³

Also in the 1990s, economists worried that bank assets (i.e., outstanding loans or investments) were notoriously difficult to evaluate for risk, and that undertaking thorough risk assessment could be prohibitively expensive, amounting to frequent errors in individualized risk assessments.²⁴ These routine errors in risk measurement result in the FDIC underpricing its deposit insurance for financial institutions.²⁵ The FDIC’s mispricing of deposit insurance is perhaps most pronounced for the banks processing the greatest leverage, which implies that the FDIC’s mispricing can contribute to large-scale systemic risk.²⁶ The FDIC suggested that financial institutions should assess risk based on industry groupings (categorical risk assessment for any customer from that

20. See FIN. ACTION TASK FORCE, FATF-VIII MONEY LAUNDERING TYPOLOGIES EXERCISE PUBLIC REPORT (1997), <https://www.fincen.gov/sites/default/files/shared/fatf.pdf>.

21. *Id.* at 23.

22. *Id.*

23. See *id.* (discussing the emerging nature of e-money systems).

24. See, e.g., Mark J. Flannery, *Pricing Deposit Insurance When the Insurer Measures Bank Risk With Error*, 15 J. BANKING & FIN., 975 (1991) (discussing how the difficulty and expense in evaluating bank assets for risk leads to errors in valuation and risk calculations, which in turn leads to errors by the FDIC in insuring the banks).

25. See *id.* (discussing how underpricing deposit insurance can distort customer decisions).

26. See *id.* (explaining the relationship between asset risk and the FDIC mismeasurement).

industry) rather than individualized risk assessments.²⁷

In the wake of the global financial crisis of 2007–2009, several key figures in the Obama Administration, which took office in January 2009, believed that the crisis had been partly due to lax federal enforcement of antifraud laws.²⁸ To address these concerns, President Obama, during his first year in office, created an interagency Financial Fraud Enforcement Task Force (FFETF),²⁹ led by DOJ but drawing on representatives from almost two-dozen federal agencies, departments, and state officials.³⁰ The original goals were to hold accountable those responsible for triggering the financial crisis and to prevent such a catastrophe from recurring.³¹ The FFETF undertook threat assessments for various types of financial fraud,³² and its findings led DOJ attorneys in its Consumer Protection Branch to focus on consumer fraud through online commerce, which often occurred with third-party payment processors.³³ At the time, only a few banks and credit card processors were processing a large proportion of e-commerce transactions, and an unusual number that involved consumer fraud.³⁴ As a result, DOJ Consumer Protection Branch sought to take preventative measures by targeting the online payment processors, rather than trying to react to complaints of fraud after it occurred.³⁵ The payment processors were the choke point.³⁶

As one reporter at the time noted, “The idea behind Operation Choke Point is simple: stop banks and third-party payment processors from abetting fraud. Financial institutions have long been required to watch out for (and report) evidence of criminal activity.”³⁷ Nevertheless, sometimes banks have perverse incentives to be lax in their screening of commercial customers.³⁸ By 2013, online consumer fraud had become a significant problem for regulators and law enforcement, costing victims tens of billions of dollars per year.³⁹

27. *Id.*

28. Balleisen & Jacoby, *supra* note 1, at 835.

29. *Id.*

30. *Id.*

31. *Id.* at 835–36.

32. *Id.* at 836.

33. *Id.*

34. *Id.*

35. *See id.* (discussing the emergence of the Consumer Protection Branch’s antifraud campaign).

36. *Id.*

37. Jim Lardner, *The Odd Crusade Against ‘Operation Choke Point’*, U.S. NEWS & WORLD REP. (July 2, 2014, 3:30 PM), <https://www.usnews.com/opinion/economic-intelligence/2014/07/02/some-in-congress-object-to-justice-departments-operation-choke-point>.

38. *Id.*

39. *Id.*

The antifraud campaign, dubbed Operation Choke Point, was a two-pronged attack: severe enforcement actions against a few egregious offenders who had windfall profits from their fraud⁴⁰ and moral suasion with the rest of the consumer finance industry.⁴¹ One enforcement action against the First Bank of Delaware ended with a \$15 million fine and the bank's closure.⁴² Investigations under the Operation "led the DOJ and other federal agencies to issue more than fifty subpoenas to financial institutions and pursue a handful of fraud cases against individual banks alleging they had systematically facilitated consumer scams,"⁴³ often with multimillion-dollar settlements.⁴⁴ "By all accounts, Operation Choke Point investigations were spearheaded by the DOJ."⁴⁵

The moral suasion prong required some collaboration with officials at the FDIC and the OCC. DOJ communicated to these agencies a list of warning signs that indicated fraudulent marketing by the firms using them for payment processing.⁴⁶ Whenever DOJ identified firms suspected of using deceptive trade practices—and maybe industries with high rates of fraud—the bank regulators would advise the banks under their supervision to shun those customers due to reputational risks.⁴⁷ In other words, banks should be aware of their customers' customers.⁴⁸ The theory was that more careful vetting by banks would prevent another rash of consumer fraud.⁴⁹ Operation Choke Point continued, at least officially, through the remaining years Obama was in office.⁵⁰

Over time, some "officials pressured financial service providers to investigate their business customers more closely."⁵¹ A number of businesses that had been customers of those banks ended up losing their access to online payment systems, including some businesses that were not actually engaged

40. Balleisen & Jacoby, *supra* note 1, at 836.

41. *Id.*

42. *Id.*

43. *Id.* at 837; *see also* Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523, 572 (2020) ("[DOJ] issued more than sixty subpoenas to financial institutions.").

44. Balleisen & Jacoby, *supra* note 1, at 837–38.

45. Andersen Hill, *supra* note 43, at 572.

46. Balleisen & Jacoby, *supra* note 1, at 837.

47. *Id.*

48. *Id.*

49. *Id.*; *see also* Andersen Hill, *supra* note 43, at 572 ("[DOJ] hoped the investigations would cause all banks 'to scrutinize their account relationships and, if warranted, to terminate fraud-tainted processors and merchants.'").

50. Balleisen & Jacoby, *supra* note 1, at 837.

51. *Id.* at 838.

in illegal conduct.⁵² In other words, there was an overdeterrent effect; banks would steer clear of commercial customers who posed some unknown amount of risk of legal violations, at least at the margins.⁵³

Despite the claims of commentators such as Todd Zywicki and Glenn Harlan Reynolds, there was nothing “secretive”⁵⁴ or “clandestine”⁵⁵ about Operation Choke Point. For example, in March 2013, as the initiative was still getting underway and had scored one of its first major enforcement victories, FFETF Executive Director Michael J. Bresnickat gave a public address to a group of business leaders,⁵⁶ explaining the task force’s activities and plans.⁵⁷ Bresnickat described how the Consumer Protection Working Group was focusing on “the role of financial institutions in mass marketing fraud schemes—including deceptive payday loans, false offers of debt relief, fraudulent health care discount cards, and phony government grants, among other things—that cause billions of dollars in consumer losses and financially destroy some of our most vulnerable citizens.”⁵⁸ Bresnickat devoted the largest section of his speech to the problem of third-party payment processors: “The reason that we are focused on financial institutions and payment processors is because they are the so-called bottlenecks, or choke-points, in the fraud committed by so many merchants that victimize consumers and launder their illegal proceeds.”⁵⁹ Claiming that “some financial institutions actually have been complicit in these schemes,”⁶⁰

52. *Id.*

53. For discussion of the “steer clear” phenomenon and overdeterrence at the margins, see Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1578 (2005) (“Where people have a fuzzy knowledge that a certain type of activity could subject them to criminal liability, but they are uncertain about the exact parameters of the rules, the tendency, according to most studies, will be for people to steer clear of the activities as much as possible.”).

54. See Zywicki, *supra* note 18, at 92 (describing Operation Choke Point inaccurately as “secretive”).

55. See Glenn Harlan Reynolds, *Second Amendment Censorship*, NAT’L RIFLE ASS’N: AM’S 1ST FREEDOM (Nov. 29, 2021), <https://www.americas1stfreedom.org/content/second-amendment-censorship/> (“And instead of proceeding via legitimate legal procedures, these agencies kept their pressure campaign clandestine.”).

56. Michael J. Bresnickat, Exec. Dir., Fin. Fraud Enft Task Force, Speech at the Exchequer Club of Washington, D.C. (Mar. 20, 2013), <https://www.justice.gov/opa/speech/financial-fraud-enforcement-task-force-executive-director-michael-j-bresnick-exchequer>.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

Bresnickat recounted their enforcement actions against the First Bank of Delaware:⁶¹ the agencies involved would, “as part of our focus on the role of financial institutions and third-party payment processors in mass-marketing fraud schemes, [examine] banks’ relationship with the payday lending industry, known widely as a subprime and high-risk business.”⁶² Bresnickat’s speech chided and warned banks about their legal duties to screen for fraud and other illegal activity by their business customers.⁶³

Similarly, in April 2013, FinCEN Director Jennifer Shasky Calvery gave a public address to the Network Mortgage Bankers Association explaining how a collaboration of regulatory agencies and law enforcement targeted third-party payment processors and detailed how such entities pose risks for consumer fraud and money laundering.⁶⁴ As Calvery explained, “These customer relationships can pose [an] increased risk to institutions and may require careful due diligence and monitoring. FinCEN issued an Advisory last October to alert financial institutions of possible indicators of suspicious activity involving Payment Processors.”⁶⁵ Calvery added that, in the view of officials at FinCEN, fraudulent payment processor firms targeted distressed financial institutions to provide them with banking services for two reasons: troubled institutions are more willing to handle high-risk transactions, and the wrongdoers would even buy stock in smaller financial institutions to induce the institution to partner with the high-risk payment processors.⁶⁶ The top officials involved in Operation Choke Point were open and honest in their public addresses about what their agencies were doing and why they were doing it; there was nothing secretive or hidden about it, though such claims have become part of the folklore.

In addition to DOJ, the Federal Trade Commission also brought enforcement actions. For example, in 2014 it forced one payment processor, Independent Resources Network Corp., to surrender \$1.1 million in illegal earnings⁶⁷ due to the firm’s connection to a fraudulent credit-card interest

61. *Id.*

62. *Id.*

63. *Id.*

64. Jennifer Shasky Calvery, Dir., Fin. Crimes Enf’t Network, Remarks at the Mortgage Bankers Association Fraud Issues Conference 3–4 (Apr. 15, 2013), <https://www.fincen.gov/sites/default/files/2016-08/20130415.pdf>.

65. *Id.* at 3.

66. *Id.* at 4.

67. *See* Stipulated Order for Permanent Injunction and Monetary Judgment as to Independent Resources Network Corp., at 10, 13, *FTC v. Innovative Wealth Builders, Inc.*, Civ. No. 8:13-CV-00123-VMC-EAJ (M.D. Fla. June 10, 2014),

rate reduction service.⁶⁸ The scam had defrauded tens of thousands of people out of millions of dollars.⁶⁹ Another high-profile enforcement action led to a settlement with Four Oaks Bank & Trust of North Carolina, which had processed nearly \$2.4 billion in transactions for a variety of illegal customers—illegal payday lenders, Internet gambling operations, and a “thinly disguised online Ponzi scheme.”⁷⁰ The bank had ignored both warning signs (unusually high charge reversal rates) and admonitions from state regulatory officials.⁷¹

The payday loan companies raised special concerns, unsurprisingly. Numerous academic commentators have criticized the payday loan industry for its predatory lending practices and contribution to personal bankruptcies.⁷² At the time President Obama took office, payday loans were illegal in many states.⁷³ It is not at all surprising, and therefore, much less inappropriate, that regulators began to discourage banks from having financial entanglements with payday lenders. Critics of Operation Choke Point have made much of an email by FDIC Atlanta Regional Director

<https://www.ftc.gov/system/files/documents/cases/140611iwbstiporder.pdf>; see also Press Release, Federal Trade Commission, Payment Processor Agrees to Give Up More Than \$1 Million to Settle FTC Charges it Assisted, Facilitated Telemarketing Scammers (June 11, 2014), <https://www.ftc.gov/news-events/news/press-releases/2014/06/payment-processor-agrees-give-more-1-million-settle-ftc-charges-it-assisted-facilitated>.

68. Lardner, *supra* note 37.

69. *Id.*

70. *Id.*

71. *Id.*

72. See Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?*, 62 J.L. & ECON. 485 (2019) (arguing that payday loan access increases personal bankruptcy rates); Steven L. Willborn, *Indirect Threats to the Wages of Low-Income Workers: Garnishment and Payday Loans*, 45 STETSON L. REV. 35 (2015) (arguing that payday loans result in de facto wage garnishment for low-income workers); Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563 (2010) (arguing for stricter statutory and regulatory controls over payday loans due to their usurious rates and practices); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110 (2008) (arguing for reforms of state usury laws to crack down on exploitative payday lenders); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1 (2002) (arguing that payday lenders engage in predatory practices, taking advantage of impoverished borrowers for profit by unfair, though technically legal, means). For a contrary perspective, see Neil Bhutta, Jacob Goldin & Tatiana Homonoff, *Consumer Borrowing After Payday Loan Bans*, 59 J.L. & ECON. 225 (2016), who argues that payday loan bans merely shift impoverished borrowers to other forms of high-interest credit.

73. See Paige Marta Skiba, *Regulation Of Payday Loans: Misguided?*, 69 WASH. & LEE L. REV. 1023, 1043 (2012) (criticizing laws and regulations that restrict payday lenders).

Thomas Dujenski saying, “I literally cannot stand pay day lending,”⁷⁴ but a wide range of legal experts and reformers share Dukenski’s view.

The FDIC focused on payday lenders for its enforcement actions and moral suasion efforts.⁷⁵ In the latter case, there was not necessarily evidence of illegal activity (otherwise, it could have recommended DOJ pursue an enforcement action), but instead relied on reputational risk due to the exploitative nature of payday loans,⁷⁶ the high rate of illegality and regulatory violations among them, and the fact that some states, such as New York, prohibit most payday loans.⁷⁷ Although some scholars have recently criticized the FDIC and other regulators for treating regulatory risk as something under their purview,⁷⁸ reputational risk does present financial risks for firms with bad reputations because of the stigmas against them can cause these firms to lose customers, employees, investors, lend vendors, landlords or tenants, etc.

Thus, Operation Choke Point originated with a modest initiative within DOJ during the Obama Administration, partnering with a multiagency task force targeting financial fraud.⁷⁹ These officials coordinated their efforts to an attempt to “choke off” the financing of certain industries connected with various consumer fraud, especially from payday lenders.⁸⁰ The FDIC took steps to discourage banks from financing Ponzi schemes, consumer fraud, and (mostly, it turned out) payday loan providers. The high-profile enforcement actions early on in Operation Choke Point had their intended deterrent effect—the industry noticed.⁸¹

74. See, e.g., Dennis Shaul, Opinion, *There’s No Downplaying the Impact of Operation Choke Point*, AM. BANKER (Nov. 28, 2018, 10:39 AM), <https://www.americanbanker.com/opinion/theres-no-downplaying-the-impact-of-operation-choke-point>.

75. Andersen Hill, *supra* note 43, at 575, 577.

76. *Id.*

77. *Id.*

78. See, e.g., *id.* (decrying any regulatory activity based on reputational risk).

79. LANA SWARTZ, *NEW MONEY: HOW PAYMENT BECAME SOCIAL MEDIA* 79–80 (2020).

80. See *id.* (“As one Justice Department official described it, ‘We are changing the structures within the financial system that allow all kinds of fraudulent merchants to operate,’ with the intent of ‘choking them off from the very air they need to survive.’”); see also Balleisen & Jacoby, *supra* note 1, at 835–37 (explaining that after DOJ lawyers identified firms that either operated in industries with a high likelihood of fraud or possibly deceptive business practices, regulators would recommend that banks cut off relations with those firms).

81. See Marjorie J. Peerce & Jeremy T. Rosenblum, *DOJ Hits Bank Target in “Operation Choke Point,”* 67 CONSUMER FIN. L.Q. REP. 243, 311 (2013) (describing enforcement actions against Four Oaks Bank & Trust Company in North Carolina and the Consumer Financial Protection Bureau actions against CashCall).

B. Backlash: The Gun Industry Enters the Controversy

Large national banks had provided banking services for the payday lenders, which meant that payday lenders were a profit source for the big banks. Operation Choke Point's successes in shutting down payday lenders represented a revenue loss for the established banks, and the "moral suasion" used by federal regulators to persuade large banks to cut off the payday lenders generated resentment among bank executives.⁸² In April 2014, the President of the American Bankers Association, Frank Keating, wrote a scathing op-ed in the *Wall Street Journal* about Operation Choke Point, characterizing it as government overreach by bureaucratic zealots and ideologues.⁸³

A firestorm of controversy erupted,⁸⁴ and Republicans in Congress launched investigatory hearings.⁸⁵ This became a partisan issue—a Republican-led crusade against an operation within the Obama-era DOJ and other regulatory agencies.⁸⁶ A House Oversight and Government

82. THE FDIC'S ROLE IN OPERATION CHOKE POINT, *supra* note 1.

83. Frank Keating, *Justice Puts Banks in a Choke Hold*, WALL ST. J. (Apr. 24, 2014, 7:21 PM), <https://www.wsj.com/articles/frank-keating-justice-puts-banks-in-a-choke-hold-1398381603> [<https://web.archive.org/web/20201225005448/https://www.wsj.com/articles/SB10001424052702304810904579511911684102106>].

84. SWARTZ, *supra* note 79, at 80.

85. Balleisen & Jacoby, *supra* note 1, at 839; Evan Weinberger, *House GOP Seeks Investigation into OCC 'De-Risking' Push*, LAW360 (July 6, 2016, 4:29 PM), <https://www.law360.com/articles/814504/house-gop-seeks-investigation-into-occ-de-risking-push>; *The Department of Justice's Operation Choke Point: Hearing Before the Subcomm. on Oversight & Investigations of the Comm. on Fin. Servs.*, 113th Cong. (2014); Rob Tricchinelli, *House Republicans Want Investigation of DOJ's Operation Choke Point Program*, BLOOMBERG L. (Oct. 17, 2014, 12:00 AM), <https://news.bloomberglaw.com/securities-law/house-republicans-want-investigation-of-doj-operation-choke-point-program>. See also SWARTZ, *supra* note 79, at 80 (describing how Rep. Darrell Issa, then-head of the House Oversight Committee, declared that "the 'true goal' of Operation Choke Point was not to combat fraud, but to 'choke out' companies the [Obama] administration considers a 'high risk' or otherwise objectionable.' He held up as evidence task force documents that described gun and ammunition sales as high risk.").

86. See, e.g., Rob Tricchinelli, *Republicans Slam Operation Choke Point; DOJ Official Emphasizes Its Targeted Nature*, BLOOMBERG L. (July 16, 2014, 12:00 AM), <https://news.bloomberglaw.com/bankruptcy-law/republicans-slam-operation-choke-point-doj-official-emphasizes-its-targeted-nature>. See also Evan Weinberger, *GOP Lawmakers Push Regulators to 'Repudiate' Choke Point*, LAW360 (Aug. 10, 2017, 4:20 PM), <https://www.law360.com/articles/953219/gop-lawmakers-push-regulators-to-repudiate-choke-point> ("Republican lawmakers on Thursday asked two bank regulators to 'repudiate' Operation Choke Point, an Obama-era [DOJ] program that aimed to cut off illegal

Reform Committee's staff report "concluded that it [was] necessary to dismantle Operation Choke Point in light of its impact on lawful businesses."⁸⁷ The report was scathing, but not very objective.⁸⁸ DOJ publicly denied the accusations from Republican Congressmen.⁸⁹

One of the few dissenting voices at the congressional hearings was Georgetown Law Professor Adam Levitin. "The fuss over [DOJ's] Operation Choke Point reflects a fundamental lack of understanding of the operation of payment systems," he explained.⁹⁰ His written comments carefully describe the mechanics of online banking and payday lenders, the complex relationship between these high-interest consumer lenders and the national banks that serviced these businesses, and the technical federal regulations that apply at each step in the process.⁹¹ Levitin put Operation Choke Point in context, explaining that it "aims to reduce consumer fraud by ensuring that banks that provide payment intermediary services comply with their existing legal obligations under

operations from the banking system that critics say swept up legitimate payday lenders, gun dealers and other businesses."); Jessica Corso, *GOPs Tell Regulators to Back Off Operation Choke Point*, LAW360 (April 9, 2015, 6:21 PM), <https://www.law360.com/articles/641474/gops-tell-regulators-to-back-off-operation-choke-point> ("Republican members of the House Financial Services Committee asked the nation's top financial regulators Thursday to publicly disavow a controversial [DOJ] initiative known as 'Operation Choke Point' and to provide clear guidance on the process for cutting off finances to suspect operations."); *Disavow Operation Choke Point, Say House Republicans*, 49-5 PRATT'S BANK L. & REGUL. REP. 15 (2015) (listing Republican Congressmen involved in demanding answers); *De-Risking and Operation Choke Point; Operation Choke Point Controversy Continues*, 14-12 PRATT'S MORTG. COMPLIANCE LETTER 18 (2014) ("House Republicans called for an 'immediate investigation' into Operation Choke Point . . . Six Republican senators (Crapo, Vitter, Johanns, Moran, Coburn, and Heller) also recently expressed their concern to Attorney General Eric Holder.").

87. Alan S. Kaplinsky & Jeremy T. Rosenblum, *Payday Lenders' "Operation Choke Point" Remains Under Fire*, 69 CONSUMER FIN. L.Q. REP. 62, 63 (2015); Jeff Bater, *House Panel Issues Report on 'Choke Point'; Says FDIC Partnered with Justice Department*, BLOOMBERG L. (Dec. 9, 2014, 12:00 AM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberglaw-news/X1MMTT74000000>.

88. Jeff Bater, *FDIC 'Aggressive' Stance on Tax Refund Loans Draws Panel's Ire*, BLOOMBERG L. (March 17, 2016, 12:00 AM), <https://www.bloomberglaw.com/bloomberglawnews/banking-law/XB65E6EK000000>.

89. Jeff Bater, *DOJ Official Denies Choke Point Is Political; Reiterates Aim Is Fighting Consumer Fraud*, BLOOMBERG (July 18, 2014, 12:00 AM), <https://news.bloomberglaw.com/bankruptcy-law/doj-official-denies-choke-point-is-political-reiterates-aim-is-fighting-consumer-fraud>.

90. H. Subcomm. Testimony, *supra* note 17, at 3.

91. *Id.* at 4-10.

the Bank Secrecy Act and Anti-Money Laundering regulations.”⁹² He explained that any action by Congress to prevent the bank regulators or DOJ from enforcing anti-money laundering laws would be tantamount to “a subsidy to high-risk businesses.”⁹³ Unfortunately, his comments did not fit with the prevailing narrative that was taking hold.

There also ensued a small flurry of lawsuits against the agencies by payday lenders and a trade association of ATM companies.⁹⁴ Federal regulators claimed that the legal challenges were baseless,⁹⁵ and at least one court agreed.⁹⁶ The lawsuits⁹⁷ and congressional hearings painted the FDIC as the primary culprit in an alleged example of organized government overreach.⁹⁸ The congressional hearings led to internal audits⁹⁹ and an investigation (and subsequent report) by the FDIC Office of Inspector General (OIG).¹⁰⁰

The gun industry and its lobbyists became associated with Operation

92. *Id.* at 3.

93. *Id.* at 4.

94. *See* *Advance Am., Cash Advance Ctrs., Inc. v. FDIC*, 257 F. Supp. 3d 56 (D.D.C. 2017); *Cmty. Fin. Servs. Ass’n of America, Ltd. v. FDIC*, 132 F. Supp. 3d 98 (D.D.C. 2015); *Advance Am., Cash Advance Ctrs., Inc. v. FDIC*, 251 F. Supp. 3d 78 (D.D.C. 2017); *see also* *Hengle v. Asner*, 433 F. Supp. 3d 825 (E.D. Va. 2020), *aff’d sub nom.* *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021); *Akyar v. TD Bank US Holding Co.*, No. 18-CV-379, 2018 WL 4356734, at *2 (S.D.N.Y. Sept. 12, 2018); Chris Bruce, *Judge Allows Payday Lenders to Press Lawsuit Against Regulators*, BLOOMBERG L. (July 7, 2017, 12:00 AM), <https://news.bloomberglaw.com/bankruptcy-law/judge-allows-payday-lenders-to-press-lawsuit-against-regulators>.

95. Evan Weinberger, *Feds Call Payday Lenders’ ‘Choke Point’ Claims ‘Erroneous’*, LAW360 (Dec. 9, 2016, 2:03 PM), <https://www.law360.com/articles/870871>.

96. *See* *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106-RS, 2016 WL 2961868 at *4 (N.D. Cal. May 23, 2016) (asserting that Nationwide’s pleading contained “conclusory factual allegations without adequate basis to support plausibility.”).

97. Jon Hill, *Payday Lenders Ask DC Circ. to Halt ‘Choke Point’ For Now*, LAW360 (May 22, 2017, 3:45 PM), <https://www.law360.com/articles/926480/payday-lenders-ask-dc-circ-to-halt-choke-point-for-now>; *Payday Lenders Sue to Stop Operation Choke Point*, 12-12 PRATT’S LETTER 06 (Dec. 12, 2016); *Feisty Lawsuit by Payday Lenders Aims to Disrupt ‘Operation Choke Point’ By Attacking Regulatory Guidance*, 30-8 CLARKS SECURED TRANSACTIONS MONTHLY 03 (Aug. 1, 2014).

98. *See, e.g.*, Jessica Corso, *FDIC Chair Pressed on Role in Operation Choke Point*, LAW360 (Mar. 24, 2015, 6:05 PM), <https://www.law360.com/articles/635135/fdic-chair-pressed-on-role-in-operation-choke-point> (reporting that “Gruenberg . . . first became aware of the FDIC’s involvement in Operation Choke Point in August of 2013 due to congressional inquiries.”).

99. Evan Weinberger, *Fed. Watchdogs Launch Probes into Operation Choke Point*, LAW360 (Nov. 14, 2014), <https://www.law360.com/articles/596527/fed-watchdogs-launch-probes-into-operation-choke-point>; *FDIC and DOJ Commit to Investigate Operation Choke Point*, 2014-2 PRATT’S LETTER 02 (Nov. 24, 2014).

100. *See* THE FDIC’S ROLE IN OPERATION CHOKE POINT, *supra* note 1.

Choke Point due to an FDIC newsletter article. The FDIC's Division of Risk Management Supervision publishes a semiannual newsletter, *Supervisory Insights*, to promote sound principles and practices for bank supervision. One article from the Summer 2011 issue of *Supervisory Insights* included a table that listed thirty types of "merchants associated with high-risk activities."¹⁰¹ Two of these thirty were "firearms and ammunition manufacturers and retailers."¹⁰² Other industries grouped with guns and ammunition sales on the table were "escort services," "Ponzi Schemes," and "Racist Materials."¹⁰³ Note that this was neither a regulation nor an official guidance document under the Administrative Procedure Act—but bank officers read the article, and the gun lobby reacted strongly¹⁰⁴ and began featuring anecdotes from gun dealers who claimed their bank closed their accounts or denied their credit applications because of a bureaucratic conspiracy.¹⁰⁵ In response, the FDIC later officially revised this article to remove the list of high-risk merchants, explaining:

FDIC guidance and an informational article contained lists of examples of merchant categories that had been associated by the payments industry with higher-risk activity when the guidance and article were released. The lists of examples of merchant categories have led to misunderstandings regarding the FDIC's supervisory approach to [third-party payment providers], creating the misperception that the listed examples of merchant

101. *Id.*; see also Michael B. Benardo, Kathryn M. Weatherby & Robert J. Wirts, *Managing Risks in Third-Party Payment Processor Relationships*, 8 SUPERVISORY INSIGHTS, no. 1, 2011, at 3, https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum11/SL_sum11.pdf (noting that the version of the article now available has had the list of high-risk merchants removed—there is no publicly-available version of the original and the FDIC announced its revision in 2014); FED. DEPOSIT INS. CORP. FIL-41-2014, FDIC CLARIFYING SUPERVISORY APPROACH TO INSTITUTIONS ESTABLISHING ACCOUNT RELATIONSHIPS WITH THIRD-PARTY PAYMENT PROCESSORS (2014) (noting the original list was included in later reports by the Office of Inspector General, discussed above).

102. THE FDIC'S ROLE IN OPERATION CHOKE POINT, *supra* note 1.

103. *Id.*

104. See, e.g., Press Release, National Shooting Sports Foundation, Inc., NSSF Issues Statement on 'Operation Choke Point' (May 29, 2014), <https://www.nssf.org/articles/nssf-issues-statement-on-operation-choke-point>; Press Release, National Rifle Association Institute for Legislative Action, "Operation Choke Point" Raises Alarms (May 2, 2014), <https://www.nraila.org/articles/20140502/operation-choke-point-raises-alarms>; Press Release, National Rifle Association Institute for Legislative Action, House Report: "Choke Point" Targets Legal Businesses for Asphyxiation (May 30, 2014), <https://www.nraila.org/articles/20140530/house-report-choke-point-targets-legal-businesses-for-asphyxiation>.

105. See, e.g., Press Release, National Rifle Association Institute for Legislative Action, Operation Choke Point Forces Bank to Dump Gun Store (May 30, 2014), <https://www.nraila.org/articles/20140530/operation-choke-point-forces-bank-to-dump-gun-store>.

categories were prohibited or discouraged. In fact, it is FDIC's 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 law. Accordingly, the FDIC is clarifying its guidance to reinforce this approach, and as part of this clarification, the FDIC is removing the lists of examples of merchant categories from its official guidance and informational article.¹⁰⁶

The OIG audit mentioned above found little or no involvement by the FDIC in Operation Choke Point (though it acknowledged a few FDIC officials had seemingly stepped out of line), and no evidence that any FDIC actions had harmed these industries:

We determined that the FDIC's supervisory approach to financial institutions that conducted business with merchants on the high-risk list was within the Corporation's broad authorities granted under the [Federal Deposit Insurance] Act and other relevant statutes and regulations. However, the manner in which the supervisory approach was carried-out was not always consistent with the FDIC's written policy and guidance.

We found no evidence that the FDIC used the high-risk list to target financial institutions. However, references to specific merchant types in the summer 2011 edition of the FDIC's *Supervisory Insights* Journal and in supervisory guidance created a perception among some bank executives that we spoke with that the FDIC discouraged institutions from conducting business with those merchants. This perception was most prevalent with respect to payday lenders.¹⁰⁷

The OIG Report went further:

With the exception of payday lenders, we found no instances among the financial institutions we reviewed where the FDIC pressured an institution to decline banking services to a merchant on the high-risk list. Further, bank executives that we spoke with indicated that, except for payday lenders, they had not experienced regulatory pressure to terminate an existing customer relationship with a merchant on the high-risk list, including a firearms, ammunition, or tobacco retailer. As described below, the FDIC has had concerns regarding payday lending by financial institutions that precede Operation Choke Point by many years. These concerns led to supervisory guidance and actions that caused FDIC-supervised institutions to stop offering payday loans. More recently, FDIC officials became concerned about other types of banking activities that facilitate payday lending.¹⁰⁸

In other words, the OIG's investigation found that the FDIC's activities related to Operation Choke Point were "inconsequential."¹⁰⁹ To emphasize,

106. See FED. DEPOSIT INS. CORP. FIL-41-2014, FDIC CLARIFYING SUPERVISORY APPROACH TO INSTITUTIONS ESTABLISHING ACCOUNT RELATIONSHIPS WITH THIRD-PARTY PAYMENT PROCESSORS (2014).

107. See THE FDIC'S ROLE IN OPERATION CHOKE POINT, *supra* note 1.

108. *Id.*

109. John Kennedy, *FDIC 'Inconsequential' to Operation Choke Point, Report Says*, Law360

the OIG said that even the banks alleging to have been pressured said the regulatory pressure pertained *only* to payday lenders.¹¹⁰ Operation Choke Point did not affect banks' relationships with gun manufacturers or dealers.

The following year, the OIG completed a second audit related to Operation Choke Point—this time specifically focused on the controversy surrounding the FDIC and a credit product known as a refund anticipation loan (RAL).¹¹¹ Here, the OIG was more critical, but note that its concerns related solely to a crackdown on RALs:

While the FDIC's Legal Division believed the pursuit of an enforcement remedy against the banks presented "high litigation risk," the FDIC chose to pursue such remedies. Members of the Board, including the then-Chairman of the Case Review Committee, were involved in drafting the language of a proposed enforcement order and in advising management on the development of supervisory support for the enforcement case. The FDIC also attempted to strengthen its case by pursuing a compliance-based rationale. To that end, in early 2011 the FDIC employed extraordinary examination resources in an attempt to identify compliance violations that would require the bank to exit RALs. This examination effort, in the form of a "horizontal review," involved deploying an unprecedented 400 examiners to examine 250 tax preparers throughout the country and the remaining bank offering RALs. The horizontal review was used as leverage in negotiations to get the final bank to exit RALs. Ultimately, the results of the horizontal review were used for little else.

The FDIC also employed what it termed "strong moral suasion" to persuade each of the banks to stop offering RALs. What began as persuasion degenerated into meetings and telephone calls where banks were abusively threatened by an FDIC attorney. In one instance, non-public supervisory information was disclosed about one bank to another as a ploy to undercut the latter's negotiating position to continue its RAL program.¹¹²

As Professor Levitin wrote in a blog essay during the 2014 congressional hearings, the furor over Operation Choke Point may have caused more de-banking of businesses than the Operation itself caused.¹¹³ Bank managers

(Sept. 17, 2015), <https://www.law360.com/articles/704346/fdic-inconsequential-to-operation-choke-point-report-says>; *FDIC's Involvement in Operation Choke Point "Inconsequential" Concludes OIG*, Pratt's Letter 04 (Sept. 28, 2015).

110. FDIC's Involvement in Operation Choke Point "Inconsequential" Concludes OIG, Pratt's Letter 04 (Sept. 28, 2015).

111. OFF. OF INSPECTOR GEN., FED. DEPOSIT INS. CORP., REPORT NO. OIG-16-001, REPORT OF INQUIRY INTO THE FDIC'S SUPERVISORY APPROACH TO REFUND ANTICIPATION LOANS AND THE INVOLVEMENT OF FDIC LEADERSHIP AND PERSONNEL (2016).

112. *Id.* at iii.

113. Adam Levitin, *Operation Choke Point Hysteria: Are Choke Point's Critics Responsible for the Account Closings?*, CREDIT SLIPS: BLOG (July 17, 2014, 5:11 PM), <https://www.credit-slips.org/creditslips/2014/07/operation-choke-point-hysteria-are-choke-points-critics->

and compliance officers listened to DOJ's critics—such as Frank Keating, the head of their trade association—and believed the doomsayers rather than what they actually heard from regulators.¹¹⁴ If bank executives or compliance officers thought that serving *any* high-risk industry (as identified by FinCEN, the FDIC, or the OCC) would trigger an enforcement action and sanctions against the bank, they would steer clear of those industries regardless of whether the bank's customers were engaged in illegal activity.¹¹⁵ “The safe thing to do in the compliance world is to follow the herd and avoid risks. The attack on Operation Choke Point may well have spooked banks' compliance officers, [who were not] going to parse through the technical distinctions involved.”¹¹⁶ The hysteria may have become a self-fulfilling prophecy in some cases.¹¹⁷

C. *The Office of the Comptroller of the Currency*

The OCC always insisted, publicly at least, that it had no involvement in Operation Choke Point,¹¹⁸ and thereby mostly deflected congressional inquiries onto the other regulatory agencies involved.¹¹⁹ As soon as congressional inquiries into Operation Choke Point began in 2014,¹²⁰ the

responsible-for-the-account-closings.html.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. See Jack Newsham, *OCC Says It Had Nothing to Do with Operation Choke Point*, LAW360 (Aug. 21, 2017), <https://plus.lexis.com/api/permalink/cf64e6a6-e9ce-4c49-aa45-0ff208135313/?context=1530671> (“The Office of the Comptroller of the Currency on Friday disclaimed any role in a Department of Justice operation that Republicans accused of freezing payday lenders and gun stores out of the banking system, telling a top congressman that it didn't single out any particular industry for scrutiny.”).

119. See Evan Weinberger, *OCC Won't Issue Anti-Money Laundering Recommendations*, LAW360 (Jan. 26, 2015, 3:03 PM), <https://www.law360.com/articles/615111/occ-won-t-issue-anti-money-laundering-recommendations> (“The OCC denies that is a part of Operation Choke Point, and much of the Congressional scrutiny has fallen on the FDIC.”); see also Nobert Michel, *Newly Unsealed Documents Show Top FDIC Officials Running Operation Choke Point*, FORBES (Nov. 5, 2018, 6:30 PM), <https://www.forbes.com/sites/norbertmichel/2018/11/05/newly-unsealed-documents-show-top-fdic-officials-running-operation-choke-point/#640a8f721191> (reporting that banks were often coerced into complying with the FDIC to avoid extra audits, additional operating restrictions, or civil or criminal charges).

120. *Choke Point Backpedaling—OCC Clarifies MBS Supervisory Expectations*, 2014-1 PRATT'S LETTER 04 (Dec. 1, 2014).

OCC published Bulletin 2014-58,¹²¹ assuring the banking industry that “the OCC does not direct banks to open, close, or maintain individual accounts, nor does the agency encourage banks to engage in the termination of entire categories of customers without regard to the risks presented by an individual customer or the bank’s ability to manage the risk.”¹²² This was consistent with what the FATF said at the time, which was arguably one of the entities behind Operation Choke Point.¹²³ In 2015, Comptroller of the Currency, Thomas Curry, distanced his agency from Operation Choke Point in public remarks, reiterating the points from the agency’s 2014 Bulletin.¹²⁴

That same year, the OCC may have overcorrected its course, announcing through its senior counsel responsible for oversight of anti-money laundering compliance that it would “no longer make recommendations on how banks can better comply with anti-money laundering regulations, raising all such problems to a level that could see enforcement actions if they are not fixed”¹²⁵ Before this, the OCC gave banks specific recommendations on how to fix their compliance issues for anti-money laundering regulations.¹²⁶ While this announcement disavowed applying pressure on banks to screen categories of clients, it simultaneously left the looming threat of an enforcement action if the bank made a mistake—by being

121. OFF. OF THE COMPTROLLER OF THE CURRENCY, OCC BULL. 2014-58, BANKING MONEY SERVICES BUSINESSES: STATEMENT ON RISK MANAGEMENT (2014), <https://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-58.html>.

122. *Id.* The Bulletin rejected a categorical exclusion of client industries from banking services, while still requiring that risk assessment occur for Regarding Money Services Business (MSBs) individually:

Not all MSBs should be considered high risk. In keeping with the OCC’s mission and commitment to ensuring all customers have fair access to financial services, the agency expects OCC-regulated banks to assess the risks posed by each MSB customer on a case-by-case basis and to implement appropriate controls to manage the relationship commensurate with the risks associated with each customer.

Id.

123. See *De-Risking and Operation Choke Point; FATF Cautions Banks About “Inappropriate De-Risking Behavior”*, 14-12 PRATT’S MORTG. COMPLIANCE LETTER 17 (Dec. 1, 2014) (stating that “its formal recommendations only require financial institutions to terminate customer relationships on a case-by-case basis.”) (emphasis added).

124. See *Curry on Operation Choke Point – No Easy Answers*, 49-4 PRATT’S BANK L. & REGUL. REP. 16 (Apr. 1, 2015) (emphasizing that the OCC’s primary goal is to ensure that banks manage their risks appropriately instead of dictating how exactly banks should run their businesses).

125. Weinberger, *supra* note 118.

126. *Id.*

less cautious—and one of its clients was indeed laundering money.¹²⁷ In 2017, then-Acting Comptroller Noreika again repudiated Operation Choke Point in public speeches: “The OCC’s policy is not to direct banks to open or close individual accounts, nor to encourage banks to terminate entire categories of accounts without assessing the risks presented by individual customers or the bank’s ability to manage the risk.”¹²⁸

In contrast, some bank officials still claimed that OCC officials had pressured them, as part of Operation Choke Point, to cut ties with numerous client businesses that posed elevated risks for money-laundering violations, or at least were exceptionally difficult to monitor for money-laundering problems.¹²⁹ Whatever involvement the OCC may have had in Operation Choke Point would have been as part of its anti-money laundering oversight. The OCC was initially a co-defendant with the FDIC in some lawsuits over Operation Choke Point,¹³⁰ but it was able to have the claims against it dismissed¹³¹ and continues to deny its involvement.¹³²

The OCC and the other federal agencies that regulate banks have continued to reassure the financial industry that they do not want overly cautious “de-risking” by banks that would categorically exclude entire industries, such as ATM companies and pawn shops, from connections to the large national banks.¹³³ In July 2022, all the relevant agencies issued a

127. *Id.*

128. See Obrea Poindexter, Sean M. Ruff & Calvin Funk, *Client Alert: OCC Acting Comptroller Woos Fintech Companies with Remarks on Online Lending*, MONDAQ BUS. BRIEFING (Oct. 4, 2017) (detailing remarks given in Washington D.C. at the Online Lending Policy Summit discussing online lending and innovation).

129. See Weinberger, *supra* note 119 (“[Banks] alleged that the OCC and other regulators have been applying pressure to stop them from doing business with targeted firms [and] . . . there is at least a perception that banks are limiting their relationships with firms that have drawn the ire of regulators and law enforcement.”)

130. Jon Hill, *OCC, FDIC Try to Shut Down Lenders’ ‘Choke Point’ Suit*, LAW360 (Nov. 13, 2018, 9:43 PM), <https://www.law360.com/articles/1101311/occ-fdic-try-to-shut-down-lenders-choke-point-suit>.

131. *Id.*

132. See, e.g., News Release, Office of the Comptroller of the Currency, “Operation Choke Point” Lawsuit Dismissed (May 23, 2019), <https://www.occ.treas.gov/news-issuances/news-releases/2019/nr-occ-2019-53.html> (“This resolution of the case confirms what the OCC has long told the U.S. District Court and the Congress: namely, that the agency did not participate in ‘Operation Choke Point’ or in any purported conspiracy to force banks to terminate the bank accounts of plaintiffs or of other payday lenders. Furthermore, the OCC has not entered into any settlement agreement or made any other concessions to plaintiffs in exchange for their agreement to dismiss all claims against the agency.”).

133. See Jon Hill, *Feds’ De-Risking Guidance May Not Move Needle at Banks*, LAW360 (July 8, 2022,

joint statement on “risk-based approaches” to due diligence.¹³⁴ De-risking occurs when financial institutions refuse service—or at least restrict their services—to entire industries, like payday lenders, or customers in specific geographic regions because as a group such bank clients typically pose higher risks for financial crimes.¹³⁵ The regulators encourage banks to avoid stereotyping and instead employ an individualized “risk-based approach” when conducting required due diligence to spot money laundering.¹³⁶ The problem is that de-risking is a tempting approach for banks that want to steer clear of regulatory problems. As Jon Hill asserts, “In an era of tough anti-money laundering regulation and enforcement, it has often been the case that dropping a potentially high-risk customer can make more business sense for a bank than investing heavily to manage the necessary compliance.”¹³⁷ Attorneys who represent some of the large banks reacted with skepticism to the attempted reassurances from regulators because existing regulations still do not provide safe harbors for banks that try to be more inclusive and stop using a de-risking approach.¹³⁸ The July 2022 Joint Statement from the regulators provides no specific guidance about how to strike the proper balance, or where to draw a line in risk assessment.¹³⁹ Hill later asserted that “[i]f anything, some attorneys said they see [the July 2022] statement as effectively putting banks in the perceived position of shouldering more responsibility for de-risking.”¹⁴⁰ Banks still have the unenviable role of being the gatekeepers to prevent money laundering and consumer fraud.¹⁴¹

In a free market, banks will sometimes decide it is more prudent to terminate accounts for high-risk business customers even though those businesses are legal.¹⁴² Banks face compliance costs as a routine part of their

9:32 PM), <https://www.law360.com/articles/1509143/feds-de-risking-guidance-may-not-move-needle-at-banks> (describing 2022 joint statement by agencies and skeptical response by bank lawyers).

134. See JOINT STATEMENT ON THE RISK-BASED APPROACH TO ASSESSING CUSTOMER RELATIONSHIPS AND CONDUCTING CUSTOMER DUE DILIGENCE (2022) [hereinafter JOINT STATEMENT], <https://www.fdic.gov/news/financial-institution-letters/2022/fil22028a.pdf> (submitting a Joint Statement from the Board of Governors of the Federal Reserve System, the FDIC, the FinCEN, the National Credit Union Administration (NCUA), and the OCC).

135. Hill, *supra* note 133.

136. JOINT STATEMENT, *supra* note 134, at 1.

137. Hill, *supra* note 133.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See H. Subcomm. Testimony, *supra* note 17, at 10 (explaining that “[i]f the cost

overhead.¹⁴³ Banks can face legal liability and serious reputational harm by providing payment services for a careless gun store owner or online gun dealer that sells to minors, convicted felons, or straw purchasers, especially if those guns are used in a high-profile mass shooting.¹⁴⁴ It is rational for banks to curtail business relationships that pose higher legal compliance costs—in terms of risk or thorough due diligence—than revenue.¹⁴⁵ Forcing or pressuring banks to provide such loans, or to provide them at reduced rates, or pressuring regulators to take a hands-off approach to the banks under their purview constitutes a de facto subsidy for the businesses that the bank would otherwise avoid or charge higher fees.¹⁴⁶ Neither payday lenders nor Internet-based gun dealers merit special protections from lawmakers.¹⁴⁷

D. Postmortem

The FDIC settled its last lawsuit over Operation Choke Point by payday loan companies in 2019.¹⁴⁸ The program officially terminated with the end of the Obama Administration though lenders continued to utilize the program for some time.¹⁴⁹

Professor Levitin observed that even though Operation Choke Point involved only a few criminal prosecutions, it appears to have prompted bank managers to reassess their own compliance with federal banking regulations, particularly

of legal compliance is greater than the benefit to a bank from a customer relationship, the bank will rationally terminate the customer relationship.”).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 12.

147. *Id.* at 4.

148. See John Nancarrow, *Tentative Deal Reached with Bank Regulators in Choke Point Suit*, BLOOMBERG L. (May 23, 2019, 6:00 PM), <https://news.bloomberglaw.com/securities-law/tentative-deal-reached-with-bank-regulators-in-choke-point-suit>; Evan Weinberger, *Payday Lenders, Regulators Reach Deal in Choke Point Suit (3)*, BLOOMBERG L. (May 22, 2019, 10:50 AM), <https://news.bloomberglaw.com/banking-law/bank-regulators-reach-tentative-deal-in-choke-point-suit>; Alan S. Kaplinsky, *FDIC Settles Operation Choke Point Lawsuit; Entire Lawsuit Dismissed*, CONSUMER FIN. MONITOR (May 23, 2019), <https://www.consumerfinancemonitor.com/2019/05/23/fdic-settles-operation-choke-point-lawsuit/>.

149. See Balleisen & Jacoby, *supra* note 1, at 840 (explaining that several congressional hearings and research reports provided the necessary foundation for the Trump Administration to end Operation Choke Point); Evan Weinberger, *Justice Dept. to End Obama-Era Operation Choke Point*, LAW360 (Aug. 17, 2017, 9:58 PM), <https://www.law360.com/articles/955460/justice-dept-to-end-obama-era-operation-choke-point>; *DOJ Drops Operation Choke Point*, PRATT'S LETTER. (Sept. 1, 2017).

those related to money laundering and the Bank Secrecy Act.¹⁵⁰ Some banks may have concluded that there would be cost savings if they simply terminated their relationships with businesses that required extra due diligence to ensure the bank complied with federal regulations.¹⁵¹ This categorical or broad-brush approach, of course, could be overinclusive, and some experts estimate that most online lenders (perhaps more than 70%) had their bank accounts closed and lost their relationships with the large national banks.¹⁵²

By some measures, Operation Choke Point was a great success. Brian Baugh, a professor of finance at the University of Nebraska-Lincoln, conducted a large empirical study of several thousand households that were borrowers from payday loan companies before and after Operation Choke Point.¹⁵³ In states where payday lenders were illegal, borrowers of lenders that were closed down during Operation Choke Point thereafter borrowed significantly less (\$136) per month on average, saw a 17% reduction in bounced checks, and experienced a 3% reduction in overall consumption costs.¹⁵⁴ These effects were persistent for over a year after the lenders' shutdown.¹⁵⁵ The positive change was most pronounced for those who had been most dependent on the shuttered payday lenders—the heaviest borrowers experienced a 20% reduction in the frequency of bounced checks, a 5% reduction in the frequency of overdrafts, a 4% increase in the level of household consumption (that is, they were more responsible with spending), and no change in their household consumption volatility.¹⁵⁶

For comparison, Baugh's study involved a similarly-sized control group of borrower households whose payday lenders were unaffected by Operation Choke Point.¹⁵⁷ The enforcement actions under the Operation reduced the amount of payday borrowing by affected households, relative to control

150. ADAM LEVITIN, *CONSUMER FINANCE: MARKETS AND REGULATION* 333 (2018 2d ed.).

151. *Id.*

152. *Id.*

153. See Brian Baugh, *Payday Borrowing and Household Outcomes; Evidence from a Natural Experiment* 1–3 (Fisher Coll. Of Bus., Ohio State Univ., Working Paper, Dec. 2015), <https://www.smu.edu/-/media/Site/Cox/Departments/Finance/FINASeminarSeries/Payday-borrowing-and-household-outcomes.ashx?la=en> (detailing the study of the effects of Operation Choke Point on payday lenders and their customers).

154. *Id.* at 3.

155. *Id.*

156. *Id.*

157. *Id.* at 10–11 (explaining that the study included almost 7,000 households in each category—customers of lenders shut down and customers of lenders unaffected—for a total data set of more than 13,000 households).

households, by \$109 per month, and this effect was persistent over time.¹⁵⁸ It is worth noting that the largest, most established lenders were unaffected by Operation Choke Point.¹⁵⁹ “Clearly, the largest lenders were not the targets of Operation Choke Point.”¹⁶⁰ Overall, Operation Choke Point was very successful in deterring payday-loan borrowing by those who were being exploited by the lenders that closed down.¹⁶¹ Some of these borrowers had been using their payday loan funds for gambling activity, not merely household overhead expenses or emergency costs.¹⁶² In a companion study, Baugh found that bans on payday loans improved household welfare—households that otherwise would have been borrowers from the banned lending services saw a 5% reduction in the frequency of financial distress.¹⁶³ The heaviest borrowers—most chronically desperate—were those who benefitted the most from Operation Choke Point.¹⁶⁴ Occasional or incidental borrowers, on the other hand, were not harmed by the enforcement actions—they were unaffected.¹⁶⁵

For all the complaining by the banks in the era of Operation Choke Point, when some of the same regulatory agencies tried to take the opposite approach at the end of the Trump Administration—prohibiting banks from divesting from the gun industry or the fossil fuel industry, just as Texas has done via debarment on the state level—the banks stridently objected.¹⁶⁶ The Bank Policy Institute wrote in response that the proposal could “effectively replace the traditional business of American banking” by replacing a financial institution’s risk-assessment decisions with a regime where regulators force them to lend to any customer in the privileged industries,

158. *Id.* at 2.

159. *Id.* at 9.

160. *Id.* at 10.

161. *Id.* at 11.

162. *Id.* at 1, 31 (stating that evidence shows “abnormal gambling activity immediately preceding and following payday borrowing.”).

163. Brian Baugh, *What Happens When Payday Borrowers Are Cut Off from Payday Lending? A Natural Experiment 2* (Fisher Coll. Of Bus., Ohio State Univ. Working Paper, Aug. 2015), https://files.fisher.osu.edu/departments-finance/public/what_happens_when_payday_borrowers_are_cut_off_from_payday_lending_a_natural_experiment.pdf.

164. *Id.*

165. *Id.*

166. Jesse Hamilton, *Banks Blast Rule that Would Force Lending to Oil, Gun Firms (1)*, BLOOMBERG L. (Jan. 5, 2021, 2:28 PM), <https://news.bloomberglaw.com/banking-law/banks-blast-rule-that-would-force-lending-to-oil-gun-firms-1>.

mandating “to whom financial services must be provided.”¹⁶⁷

I. THE GUN LOBBY’S ALTERNATE HISTORY OF OPERATION CHOKE POINT

A. *The Story Evolves*

In the wake of some horrific mass shootings in 2017 and 2018, several large national banks publicly announced plans to back away from the gun industry in various ways.¹⁶⁸ In response, the gun lobby reprised its narrative about Operation Choke Point being a conspiracy of gun-hating bureaucrats, but with a new twist: bankers replaced bureaucrats in the story. This is the revised storyline pushed by the National Shooting Sports Foundation (NSSF), the official trade association for gun manufacturers,¹⁶⁹ which uses this narrative as a talking point in its publications.¹⁷⁰ The NSSF has featured this new version of the Operation Choke Point story in the news updates on its website many times, such as this excerpt from a February 2021 article by writer Larry Keane:

It also shouldn’t be surprising that big banks with antigun agendas are emboldened to violate their customers’ privacy, turn them out and label them as “extremist” and “domestic terrorist.” The Biden administration yanked the publication of the “Fair Access” banking rule by the Office of the Comptroller of the Currency. That gave banks the greenlight to continue to openly discriminate against firearm business, which is just a privatization with a wink-and-nod to continue the illegal Operation Choke

167. *Id.*; see also Jesse Hamilton, *OCC Plan Would Force Banks to Lend to Oil and Gun Companies* (2), BLOOMBERG L. (Nov. 20, 2020, 5:32 PM), <https://news.bloomberglaw.com/banking-law/occ-chief-wants-to-force-banks-to-lend-to-oil-and-gun-companies> (discussing the proposed rule that “would require banks to extend services and credit to any customers that pass their risk assessments.”).

168. Ed Skyler, *Announcing Our U.S. Commercial Firearms Policy*, CITIGROUP: BLOG (Mar. 22, 2018), <https://blog.citigroup.com/2018/03/announcing-our-us-commercial-firearms-policy/>; Tiffany Hsu, *Citigroup Sets Restrictions on Gun Sales by Business Partners*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/business/citigroup-gun-control-policy.html>; Kevin McCoy, *Bank of America Halting Business with Makers of Military-Style Guns for Civilian Use*, USA TODAY (Apr. 11, 2018, 10:02 AM), <https://www.usatoday.com/story/money/2018/04/11/bank-america-halting-business-makers-military-style-guns-civilian-use/506223002>; Tiffany Hsu, *Bank of America to Stop Financing Makers of Military-Style Guns*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/business/bank-of-america-guns.html>.

169. NAT’L SHOOTING SPORTS FOUND., <https://www.NSSF.org> (last visited May 9, 2023).

170. NAT’L SHOOTING SPORTS FOUND., NSSF FAST FACTS: FINANCIAL DISCRIMINATION AGAINST THE FIREARMS INDUSTRY (2021), <https://www.nssf.org/wp-content/uploads/2021/05/NSSF-factsheet-Financial-Discrimination.pdf>.

Point that was begun under the Obama [A]dministration.

It is no longer the Bank of America. It is a gun control cabal working to undermine American freedoms, label gun owners as criminals and use their customers' money and information as the tools to get it done. Welcome to the Bank of Gun Control America.¹⁷¹

Keane published another article in March 2021 discussing the legislation in Texas and similar bills that were pending in other states:

Banking discrimination is a real concern. National financial institutions are pushing “woke” social activism from their boardrooms and discriminating against firearm businesses that rely on banking services, loans, lines of credit and payment processing services. It’s a privatization of the illegal Operation Choke Point and banks are doing this despite the fact they received taxpayer-funded bailouts and benefits. While there’s movement in Congress to prohibit this discrimination, several state legislatures are going on offense.

Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Missouri, Ohio, South Carolina, Texas, West Virginia and Wyoming have all seen state-level firearm industry nondiscrimination (FIND Act) legislation introduced. In Texas, Lt. Gov. Dan Patrick even announced gun industry protections are among his top 2021 legislative priorities, a significant move in the Lone Star State.¹⁷²

Writing for the NSSF, Keane further claimed that President Biden conspired with large national banks to surreptitiously revive Operation Choke Point:

The [rescinded] Fair Access [R]ule would have made it a fair and even match-up. It would have stopped big banks from picking winners and losers based on executives' personal politics and protected banks from outside pressure from special interest groups to take a dive when it came to seeking to do business with members of the firearm industry. It put an end to the privatization of the illegal Operation Choke Point that was started by the Obama [A]dministration, run through the Department of Justice (DOJ) and the Federal Deposit Insurance Corporation (FDIC) that denied banking services to the firearm industry.

That’s like the referee loading up a fighter’s gloves right before the bout starts. But the ref got caught. When the Biden [A]dministration “paused” the Fair Access rule, they basically winked at the cornerman, letting him know that as long as the gloves are loaded up in the locker room, he’s not going to stop it.¹⁷³

A few weeks later, a no-bylines NSSF news update claimed:

171. Larry Keane, *Bank of America Sells Out Gun & Ammo Purchasers as Potential Criminals*, NAT'L SHOOTING SPORTS FOUND. (Feb. 9, 2021), <https://www.nssf.org/articles/bank-of-america-sells-out-gun-ammo-purchasers-as-potential-criminals/>.

172. Larry Keane, *States Act to Protect Rights While White House Mulls Gun Control Moves*, NAT'L SHOOTING SPORTS FOUND. (Mar. 2, 2021), <https://www.nssf.org/articles/states-act-to-protect-rights-while-white-house-mulls-gun-control-moves/>.

173. Larry Keane, *President Biden's 1-2 Punch Plan to Buckle the Firearm Industry*, NAT'L SHOOTING SPORTS FOUND. (Feb. 19, 2021), <https://www.nssf.org/articles/president-bidens-1-2-punch-plan-to-buckle-the-firearm-industry>.

Corporate banks have privatized “Operation Choke Point,” the illegal discrimination scheme that began under the Obama-Biden [A]dministration. The Department of Justice and Federal Deposit Insurance Corporation-led (FDIC) effort, directed financial institutions to deny entire industries access to services, including the firearm industry. Despite being a constitutionally-protected industry, the Obama-Biden [A]dministration illegally coerced banks to end existing business relationships and denying new ones.

After the illegal practice was ended under the Trump [A]dministration, banks and special interest advocates simply privatized this scheme by adopting policies that specifically denied firearm businesses financial services for being in the business of selling certain types of lawful firearms. They forced these discriminatory practices while exploiting taxpayer-funded resources like FDIC insurance protections.¹⁷⁴

B. *That One Victim in Wisconsin . . .*

While Operation Choke Point was still underway, in 2014, one disgruntled gun dealer in Wisconsin named Mike Schuetz became the poster child for the gun lobby’s attack on DOJ and the FDIC. Republican politicians, gun industry lobbyists, news outlets,¹⁷⁵ and even law professors¹⁷⁶ repeated or alluded to the story so often that it morphed into a noticeable pattern in the eyes of the public. Eventually, even a Senate bill’s “Findings and Purpose” section found: “there is evidence that the FDIC and the Department of Justice continue to use Operation Choke Point to target

174. See *NSSF Applauds Sen. Cramer’s ‘Fair Access to Banking Act’*, NAT’L SHOOTING SPORTS FOUND. (Mar. 3, 2021), <https://www.nssf.org/articles/nssf-applauds-sen-cramers-fair-access-to-banking-act/>; *NSSF Hails Rep. Barr’s ‘Fair Access to Banking Act’*, NAT’L SHOOTING SPORTS FOUND. (Mar. 11, 2021), <https://www.nssf.org/articles/nssf-hails-rep-barrs-fair-access-to-banking-act/>. In December 2021, the NSSF reported that President Biden’s first nominee for the Comptroller of the Currency, Saule Omarova, failed to garner Senate confirmation because senators thought she planned to revive Operation Choke Point. See *Gun Control Advocates Had a Terrible, Horrible, No Good, Very Bad Year*, NAT’L SHOOTING SPORTS FOUND. (Dec. 30, 2021), <https://www.nssf.org/articles/gun-control-advocates-had-a-terrible-horrible-no-good-very-bad-year>.

175. See, e.g., Nicholas Ballasy, *Operation Choke Point Accuser Speaks Out*, CREDIT UNION TIMES (Apr. 3, 2015), <https://www.cutimes.com/2015/04/03/operation-choke-point-accuser-speaks-out>; Robert Gearty, *Gun Dealers Bid Adieu to Obama ‘Operation Choke Point’ Program*, FOX NEWS (Sept. 25, 2017, 9:41 PM), <https://www.foxnews.com/us/gun-dealers-bid-adieu-to-obama-operation-choke-point-program>; Michael Patrick Leahy, *Operation Choke Point: Feds Pressure Credit Union to Close Wisconsin Gun Dealer’s Bank Account*, BREITBART (Jan. 14, 2015), <https://www.breitbart.com/politics/2015/01/14/operation-choke-point-feds-pressure-credit-union-to-close-wisconsin-gun-dealers-bank-account/>.

176. Bambauer, *supra* note 19, at 122; Todd Zywicki, *Operation Choke Point Closes Another Gun Store’s Bank Account*, WASH. POST (Jan. 14, 2015, 4:05 PM), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/14/operation-choke-point-closes-another-gun-stores-bank-account/>.

firearms dealers such as Hawkins Guns LLC of Hawkins, Wisconsin.” The Senate bill also stated, “there is evidence that the targeting of Hawkins Guns LLC is far from an isolated incident.”¹⁷⁷

Mike Schuetz formerly worked as a state probation and parole officer in Hawkins, Wisconsin.¹⁷⁸ He owned a small-town private investigation and security business, and operated a small gun store as a side business, Hawkins Guns LLC.¹⁷⁹ Schuetz opened a separate bank account for Hawkins Guns LLC at Heritage Credit Union, located in the same small Wisconsin town.¹⁸⁰ In November 2014, the credit union abruptly informed him that it was closing his account.¹⁸¹ Schuetz inquired about this at the credit union, and he claimed afterward that he recorded a series of conversations and phone calls between himself and employees at Heritage Credit Union.¹⁸² As far as I can ascertain, these recordings were never subjected to any forensic verification, and there is no way to be certain if the recordings were conversations with credit union representatives or if they were staged with an accomplice; further, the credit union managers later adamantly denied having closed the account due to Operation Choke Point.¹⁸³ In any case, a conservative activist group named the U.S. Consumer Coalition posted audio of those recordings,¹⁸⁴ and the same day, Schuetz posted his story on his gun store’s Facebook page.¹⁸⁵ The posted audio recordings, along with

177. Firearms Manufacturers and Dealers Protection Act of 2015, S. 477, 114th Cong. § 2(a)(13) (2015).

178. Kelsey Bolar, *Smoking Gun? Tape Recordings Reveal the Real Reason Bank Closed Gun Seller’s Account*, DAILY SIGNAL (Jan. 14, 2015), <https://www.dailysignal.com/2015/01/14/smoking-gun-tape-recordings-reveal-real-reason-bank-closed-gun-sellers-account/>.

179. *Id.*

180. *Id.*

181. Gearty, *supra* note 175.

182. *Id.*; Bolar, *supra* note 178; *Operation Choke Point Alleged to Be Cause of Account Closing*, 11 BSA/AML UPDATE, no. 10, 2015175, LEXIS [hereinafter BSA/AML UPDATE].

183. See Michael Patrick Leahy, *Operation Choke Point US Consumer Coalition Scoffs as Credit Union Denies Feds Forced It to Shut Down Gun Dealer’s Bank Account*, Breitbart (Jan. 15, 2015), <https://www.breitbart.com/politics/2015/01/15/operation-choke-point-us-consumer-coalition-scoffs-as-credit-union-denies-feds-forced-it-to-shut-down-gun-dealers-bank-account/> (reporting that the NCUA’s reason for shutting down the bank account of Hawkins Guns turned on its inability to meet the new levels of monetary required by regulation); BSA/AML UPDATE, *supra* note 182.

184. Patrick Caldwell, *Who’s Behind the Secretive Group Bashing Elizabeth Warren’s Favorite Agency?*, MOTHER JONES (Feb. 26, 2015), <https://www.motherjones.com/politics/2015/02/cfbp-us-consumer-coalition-brian-wise-elizabeth-warren/> (listing connections between U.S. Consumer Coalition staff and the Republican Party); Bolar, *supra* note 178.

185. Bolar, *supra* note 178.

the sensationalist promotion of them by the Consumer Coalition, quickly led to a segment about Schuetz on Fox News' Special Reports.¹⁸⁶ Schuetz was the subject of additional Fox News coverage,¹⁸⁷ briefly becoming a minor celebrity among conservative media outlets,¹⁸⁸ and in 2015 attended the Congressional Financial Services Oversight and Investigations subcommittee hearing about Operation Choke Point.¹⁸⁹ Schuetz had "landed in the national spotlight."¹⁹⁰

Schuetz's recordings seem to reveal a Heritage Credit Union regional manager rambling to Schuetz about how they had been recently audited by examiners from the National Credit Union Administration (NCUA) and that the auditors had flagged a few of the Credit Union's accounts as questionable.¹⁹¹ The manager of Heritage Credit Union went on to state: "Here's some accounts that we feel that we're going to regulate you on . . . and kinda put the screws to us as far as what we could and couldn't do. The regulatory and compliance issues that we said earlier are true. We never used to have to do that stuff."¹⁹² The recordings also have the manager saying, "We're really not anti-gun as a company, but our hands are tied, and I feel horrible about this. I didn't sleep last night."¹⁹³ In his Fox News interview, Schuetz claimed his "business suffered until he could find another bank, located 40 miles away,"¹⁹⁴ even though this was a new venture and a side business at best.¹⁹⁵ He claimed that he "lost customers" from his tiny gun store attached to his small-town private investigation business, and was "still dealing with the fallout."¹⁹⁶ "It's a sad day in America when this can happen to you," Schuetz told reporters.¹⁹⁷ "I didn't realize how big of an issue it was until I started

186. U.S. Consumer Coalition, *Fox News "Special Report" (1/14/2015) - Operation Choke Point Hits Wisconsin Gun Store*, YOUTUBE (Jan. 14, 2015), <https://youtu.be/KF2WE-lemzs>; Bolar, *supra* note 178.

187. Gearty, *supra* note 175.

188. BSA/AML UPDATE, *supra* note 182.

189. *Id.*

190. Gearty, *supra* note 175.

191. Bolar, *supra* note 178.

192. *Id.*; David Morrison, *Matz: NCUA Doesn't Dictate Businesses CUs Can Serve*, CREDIT UNION TIMES (Apr. 16, 2015), <https://www.thefreelibrary.com/Matz%3A+NCUA+Doesn%27t+Dictate+Businesses+CUs+Can+Serve-a0409943528>.

193. Gearty, *supra* note 175.

194. *Id.*

195. Bolar, *supra* note 178.

196. Gearty, *supra* note 175.

197. BSA/AML UPDATE, *supra* note 182.

investigating what had happened to me.”¹⁹⁸ The gist of the conversation was that the credit union was being pressured by regulators.¹⁹⁹

The Credit Union had a completely different story that contradicted Schuetz’s surreptitious recordings. Anita Rauch, the President and CEO of the Heritage Credit Union, “refuted [the] claims that her credit union terminated the account of a local business owner because of Operation Choke Point.”²⁰⁰ Rauch explained that the credit union had made a mistake in opening an account for the gun store in the first place, because its internal systems were not ready to keep tabs on a cash-intensive business like a gun dealership, at least for purposes of compliance issues.²⁰¹ Rauch added, “We should not have opened the account for Hawkins Guns because we knew we couldn’t monitor any cash intense businesses. It was quickly closed because it showed up on our audit report. At that time we were manually monitoring.”²⁰² Heritage Credit Union clarified that this was a temporary problem because the institution purchased upgraded monitoring software later that Fall.²⁰³ Rauch later recounted, “Our position all along has been our inability to serve Mike at Hawkins Guns was simply a temporary situation. It’s not reasonable to think you can buy the software, plug it in and it just works. It takes a little bit of programming.”²⁰⁴ Most importantly, Rauch insisted that Heritage Credit Union was not “getting pressure from the regulator.”²⁰⁵ Instead, they were a newer, small-town credit union that had “grown \$100 million in three years and at our size, the amount of monitoring for cash intense businesses—the expectation is a little bit higher. In August, we began working on being able to accommodate cash intense businesses no matter what the type of business.”²⁰⁶

Nor had they focused on excluding guns or gun shop owners—the problem was upgrading their systems to accommodate a sudden influx of members with cash intense businesses.²⁰⁷ “When asked if her credit union had ever closed a customer’s account due to requirements from regulators or as a result of Operation Choke Point, the CEO replied, ‘No, we have not.’”²⁰⁸ The Credit

198. *Id.*

199. Morrison, *supra* note 192.

200. BSA/AML UPDATE, *supra* note 182.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Morrison, *supra* note 192.

206. BSA/AML UPDATE, *supra* note 182.

207. Morrison, *supra* note 192.

208. BSA/AML UPDATE, *supra* note 182.

Union had more than 27,000 members at the time, with ten branches in Wisconsin and two in Illinois.²⁰⁹ Rauch emphatically denied that Heritage was requested by federal regulators to close accounts as part of Operation Choke Point.²¹⁰ Heritage Credit Union offered to open new accounts for Schuetz in early 2015, but at that point he refused, because he had already gone to another bank.²¹¹ The ease with which he switched banks undermines his claim that there was a widespread, systemic attempt by bank regulators to choke out gun dealers.

The regulator involved in this alleged incident, the NCUA, also repudiated the story, explaining that its audit of the credit union had “nothing to do with Operation Choke Point.”²¹² NCUA Public Affairs Specialist John Fairbanks assured reporters that neither the NCUA nor the credit union were not involved in Operation Choke Point.²¹³ The “NCUA does not have a policy specific to any business, nor [does the NCUA] instruct a credit union about what individuals or businesses it can serve. The decision to open, close or decline an individual or business account generally lies with the credit union.”²¹⁴ The “NCUA requires all those credit unions to evaluate risks posed by accounts and maintain the necessary capacity to effectively manage those risks.”²¹⁵

When reporting on Schuetz, conservative news outlets would sometimes include claims (completely unsubstantiated) by two or three other individual gun dealers around the country that they had difficulty obtaining credit, loans, or other banking services, and had to try several banks before they found someone willing to take them on as a business client.²¹⁶ They all blame this inconvenience on Operation Choke Point.²¹⁷ The reports never discuss whether these individuals had bad credit, had undercapitalized or underinsured businesses, or why they were eventually able to find a bank if all the banks were under pressure from federal regulators to exclude the same categories of businesses.

The Schuetz story is still in the background of the discourse about Operation Choke Point, even though the gun lobby turned its aim on commercial banks rather than regulators. The allusion to the victimized “gun owner in Wisconsin”

209. *Id.*

210. *Id.*

211. *Id.*

212. Bolar, *supra* note 178.

213. BSA/AML UPDATE, *supra* note 182.

214. Bolar, *supra* note 178.

215. *Id.*

216. See Gearty, *supra* note 175 (“Russ Farnsworth, 29, a licensed online gun auctioneer . . . told Fox News his bank stopped doing business with him [in 2016].”).

217. *Id.*; Ballasy, *supra* note 175; Leahy, *supra* note 183.

helps frame the counterreaction to the banks' socially conscious investing decisions as a David-versus-Goliath struggle over the individual's right to bear arms for personal self-defense. The new storyline has important implications for a new development in our legal system—antiboycott laws designed to protect the gun industry from de-banking or divestment.

II. ANTIBOYCOTT LAWS PREMISED ON OPERATION CHOKE POINT

A. *Protecting the Gun Industry's Finances*

In 2021, the Texas legislature enacted Senate Bill 19, which forbids state entities or Texas municipalities from contracting with companies, including financial institutions (e.g., for underwriting state or municipal bond issues) if the companies “discriminate” against firearm or ammunition manufacturers.²¹⁸ In the three years leading up to this enactment, several large national banks had announced plans to curtail their relationship with the gun industry, or at least certain parts of it, in response to the horrific mass shootings in schools.²¹⁹

The NSSF sent Darren LaSorte, Director of Government Relations of State Affairs for the NSSF, to testify in person in Texas legislative hearings about the bill.²²⁰ The Texas Attorney General announced a policy of strict enforcement for the statute against boycotts of the firearms industry.²²¹ The statute requires government contractors (companies) to certify as a provision in their contract that they do not “discriminate” against the firearms industry, and the Texas Attorney General has disapproved

218. Act of 2021, S.B. 19, 87th Leg. (Tex. 2021) (codified at TEX. GOV'T. CODE ANN. § 2274.001–003 (West 2023)). See also Dru Stevenson, *Guns & Banks: New Laws & Policies*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Apr. 7, 2022), <https://firearmslaw.duke.edu/2022/04/guns-and-banks-new-laws-policies/> (explaining the practical legal effect of Senate Bill 19). A forthcoming companion article to this article explores the new Texas antiboycott in depth, including their effects on the Texas economy and potential legal challenges that could arise.

219. See *supra* note 168 and accompanying text.

220. See *Senate Committee on State Affairs (Part 1)*, TEXAS SENATE (Apr. 1, 2012), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15665 (recording of Darren LaSorte's, Director of Government Relations – State Affairs for the National Shooting Sports Foundation, testimony starts at 38:30 in the video, which has not been transcribed).

221. Lydia Beyoud & Nushin Huq, *Texas Puts Banks in Tight Spot with New Law Backing Gunmakers*, BLOOMBERG L. (Sept. 1, 2021, 6:00 AM), <https://news.bloomberglaw.com/banking-law/texas-puts-banks-in-tight-spot-with-new-law-backing-gunmakers> (“The new law . . . requires banks and other businesses seeking municipal or state contracts worth \$100,000 or more to certify that they don't exclude firearm or ammunition industries and retailers.”).

compliance certifications with caveats or qualifications.²²²

Around the same time,²²³ the Wyoming legislature passed House Bill 0236, which also punished banks that “discriminate” against gun manufacturers or dealers.²²⁴ Unlike the Texas law, which cuts off banks that avoid the firearms industry from municipal bond work in the state, the Wyoming statute creates a cause of action for those claiming to be victims of such discrimination—that is, gun dealers denied a loan based on their line of work—for which they can seek treble damages.²²⁵

Now it is becoming a trend for legislators to propose new laws designed to punish financial institutions that refuse to bankroll the gun industry.²²⁶ Other states’ legislatures have introduced similar bills,²²⁷ and more are likely to come in the next few years. The firearms industry itself has promoted a standardized-text bill, called the Firearms Industry Nondiscrimination (FIND) Act,²²⁸ that states can conveniently adopt as off-the-shelf legislation. A bill similar to the Texas law passed the Arizona House²²⁹ but then stalled—for this year, at least—in the Arizona Senate.²³⁰

222. E-mail from Leslie Brock, Assistant Att’y Gen., Att’y Gen. of Tex., to Fredric A. Weber, Of Couns., Norton Rose Fulbright LLP (Aug. 23, 2021) (on file with author).

223. *Governor Gordon Signs Firearms Industry Non-Discrimination Act*, ROCKET MINER (Apr. 9, 2021), https://www.wyomingnews.com/rocketminer/news/state/governor-gordon-signs-firearm-s-industry-non-discrimination-act/article_60ad8b1f-4aa2-5da7-b920-117bddccc60f.html.

224. H.B. 0236, 66th Leg., Gen. Sess. (Wyo. 2021).

225. *Id.*

226. See Karen Pierog, *More State Lawmakers Target Muni Underwriters’ Firearm Policies*, THE BOND BUYER (Mar. 14, 2022, 1:23 PM), <https://www.bondbuyer.com/news/more-state-lawmakers-target-muni-underwriters-firearm-policies> (“Similar bills have been introduced in Arizona, Indiana, Kansas, Kentucky, Ohio, Oklahoma, and West Virginia.”); Amanda Albright & Danielle Moran, *Law That Shut Goldman, JPMorgan Out of Texas Munis Is Spreading*, BLOOMBERG L. (Feb. 10, 2022, 7:00 AM), <https://www.bloomberglaw.com/bloomberglawnews/banking-law/XD91JALG000000>.

227. According to the Giffords Law Center, “Arizona, Indiana, Kansas, Kentucky, Missouri, New Hampshire, and West Virginia have similar bills pending.” Allison Anderman, *Giffords Law Center Gun Law Trendwatch: March 1, 2022*, GIFFORDS L. CTR. (Mar. 1, 2022), <https://giffords.org/lawcenter/trendwatch/giffords-law-center-gun-law-trendwatch-march-1-2022/>.

228. Joe Mullin, *Firearms Industry Nondiscrimination Act (FIND Act)*, CONG. SPORTSMEN’S FOUND., <https://congressionsportsmen.org/policies/state/firearms-industry-nondiscrimination-act-find-act> (describing its generic bill and its progress in various states).

229. H.B. 2473, 55th Leg., 2d Reg. Sess. (Ariz. 2022). This bill is very similar to Texas Senate Bill 19.

230. See Howard Fischer, *Bill Supported by Arizona Gun Lobby Fails to Get Vote in Senate Panel*, ARIZ. DAILY STAR (May 31, 2022), <https://tucson.com/news/local/govt-and-politics/bill->

Similarly, the Oklahoma House passed a bill similar to the Texas law, but the bill did not muster enough support to pass the state Senate.²³¹

Those advocating for such legislation are persistent—the first round of these bills appeared in legislatures in the 2015–2016 session in Alabama,²³² Georgia,²³³ Kansas,²³⁴ and Tennessee.²³⁵ Another spate of similar bills appeared in 2021–2022, when Texas and Wyoming passed their laws, in Kentucky,²³⁶ Indiana,²³⁷ and West Virginia, but in these latter states, the

supported-by-arizona-gun-lobby-fails-to-get-vote-in-senate-panel/article_0a895996-ab01-11ec-99db-43f4b25ad5ea.html (explaining that the bill killed was in committee, at least for now); Bob Christie, *Arizona House Bill Hits Banks That Refuse Gun Firm Business*, U.S. NEWS & WORLD REP. (Feb. 18, 2022, 5:20 PM), <https://www.usnews.com/news/best-states/arizona/articles/2022-02-18/arizona-house-bill-hits-banks-that-refuse-gun-firm-business>; Howard Fischer, *Gun Lobby Suffers Setback in Anti-Discrimination Effort*, DAILY INDEP. (Mar. 23, 2022, 5:45 PM), <https://www.yourvalley.net/stories/gun-lobby-suffers-setback-in-anti-discrimination-effort,293497>; Dan Zimmerman, *Arizona House Passes Bill Banning State from Contracting With Firms that Discriminate Against Gun Industry Firms*, THE TRUTH ABOUT GUNS (Feb. 24, 2022), <https://www.thetruthaboutguns.com/arizona-house-passes-bill-banning-state-from-contracting-with-firms-that-discriminate-against-gun-industry-firms/>; Laurie Roberts, *Republican Lawmakers Think “Vulnerable” Gunmakers Need Protection*, AZCENTRAL, <https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2022/04/01/republican-lawmakers-would-rather-protect-vulnerable-gun-industry/7238452001/> (Apr. 1, 2022, 1:43 PM) (providing an op-ed which criticized the proposed legislation).

231. H.B. 3144, Reg. Sess. (Okla. 2022) (died in chamber); Brent Skarky, *Oklahoma Lawmakers Weigh in On Gun Control Amid Texas Tragedy*, KFOR, <https://kfor.com/news/oklahoma-legislature/oklahoma-lawmakers-weigh-in-on-gun-control-amid-texas-tragedy/> (May 25, 2022, 7:26 PM) (explaining that Oklahoma House Bill 3144 “has cleared the House. [It is] sitting on the Senate side right now, but Senate leadership tells KFOR that no more policy bills will be heard this session. So, [it is] very likely dead this year.”); Kim Jarrett, *Bills Would Ban Companies That Boycott Firearms, Fossil Fuel Industries from State Contracts*, THE CTR. SQUARE (May 2, 2022), https://www.thecentersquare.com/oklahoma/bills-would-ban-companies-that-boycott-firearms-fossil-fuel-industries-from-state-contracts/article_9775eedc-ca46-11ec-9a59-7fda5ba9f2fe.html (describing Oklahoma House Bill 3144).

232. H.B. 327, Reg. Sess. (Ala. 2015) (died in committee).

233. S.B. 282, Reg. Sess. (Ga. 2016) (appears to have passed the Senate but not the House).

234. H.B. 2311, Reg. Sess. (Kan. 2015) (died in committee); Associated Press, *Kansas Bill Aims to Ban Discrimination Against Gun Dealers*, TOPEKA CAPITAL-J. (Jan. 26, 2016, 1:37 PM), <https://www.cjonline.com/story/news/politics/state/2016/01/26/kansas-bill-aims-ban-discrimination-against-gun-dealers/16603143007/>.

235. H.B. 0561, 110th Gen. Assemb. (Tenn. 2017) (stalled in committee).

236. H.B. 123, Reg. Sess. (Ky. 2022) (died in committee).

237. H.B. 1409, 122nd Gen. Assemb., 2d Reg. Sess. (Ind. 2022) (died in committee).

bills died in committee.²³⁸ In 2022, bills to protect the gun industry from “discrimination,” such as boycotts or divestment by the financial sector, also passed one chamber on the first attempt, but died in the other in Louisiana,²³⁹ Missouri,²⁴⁰ and South Dakota.²⁴¹ Ohio’s version of the bill is still pending in its legislature at the time of this writing.²⁴² The Kansas bill has been re-introduced and is currently pending.²⁴³ All of these are designed to punish private-sector entities that avoid financial entanglements with gun manufacturers or dealers.

Banks face a complex set of pressures when it comes to industries that present elevated risks. Gun retailers have a high number of cash transactions and trade-in transactions, and cash businesses or those relying heavily on trade-ins present a higher-than-average risk for money laundering and other financial crimes, such as bribery or kickback schemes.²⁴⁴ More recently, gun stores have become early adopters of cryptocurrency payments.²⁴⁵ Banks that have gun dealers as customers must balance the threat of sanctions under state antiboycott statutes like Texas Senate Bill 19, which add teeth to the federal regulatory discouragement of categorical de-risking. Yet the banks still face potential liability if one of their customers, like a gun dealer, turns out later to be

238. S.B. 268, Reg. Sess. (W. Va. 2021) (died in committee).

239. H.B. 978, Reg. Sess. (La. 2022) (died in chamber); Victor Skinner, *Louisiana House Passes Bill that Could Ban Agencies from Contracting with Anti-Gun Companies*, THE CTR. SQUARE (May 11, 2022), https://www.thecentersquare.com/louisiana/louisiana-house-passes-bill-that-could-ban-agencies-from-contracting-with-anti-gun-companies/article_24513cc6-d16d-11ec-bc13-3f28729df680.html.

240. S.B. 1048, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

241. S.B. 182, 97th Leg. Sess. (S.D. 2022).

242. H.B. 297, 134th Gen. Assemb., Reg. Sess. (Ohio 2022).

243. Noah Taborda, *Kansas Senate Considers Shielding Firearm Industry from Discrimination by Businesses*, KAN. REFLECTOR (Feb. 22, 2022, 10:10 AM), <https://kansasreflector.com/2022/02/22/kansas-senate-considers-shielding-firearm-industry-from-discrimination-by-businesses/>; *Kansas: Firearm Industry Nondiscrimination Act Scheduled for Committee Hearing*, NAT’L RIFLE ASS’N: INST. FOR LEGIS. ACTION (Feb. 18, 2022), <https://www.nrila.org/articles/20220218/kansas-firearm-industry-nondiscrimination-act-scheduled-for-committee-hearing> (asking readers to support Kansas Senate Bill 482).

244. *See, e.g.*, Press Release, U.S. Attorney’s Office for District of Kansas, U.S. Dep’t of Just., Indictment: Kansas Firearms Distributor Paid Bribes and Kickbacks to Glock Executives (June 4, 2014), <https://www.justice.gov/usao-ks/pr/indictment-kansas-firearms-distributor-paid-bribes-and-kickbacks-glock-executives> (describing bribery & kickback scheme between gun dealer and executives of gun manufacturer).

245. Karen Epper Hoffman, *Crypto’s Best Bet for Retail Payments: Gun Shops*, AMER. BANKER (Feb. 1, 2019, 12:01 AM), <https://www.americanbanker.com/payments/news/ryptos-best-bet-for-retail-payments-gun-shops> (explaining why cryptocurrencies are popular with gun dealers).

laundering money or knowingly supplying guns to a criminal cartel,²⁴⁶ especially if auditors after the fact conclude that the bank should have been more scrupulous in screening its customers and monitoring for unlawful activities.

B. The Role of Operation Choke Point Rhetoric in Antiboycott Legislation

The legislative history for Texas Senate Bill 19 contains repeated references by legislators and lobbyists to Operation Choke Point. The bill's lead sponsor, Texas state Senator Charles Schwertner, began his official bill analysis for Senate Bill 19 with the following claim:

From 2013 to 2017, Operation Choke Point was a program operated by the U.S. Department of Justice (DOJ) and the Federal Deposit Insurance Corporation (FDIC). Under the program, [DOJ] issued unofficial directives to banks to restrict access to essential banking services for merchants in certain industries, including members of the firearms and ammunition industries. Although the program was officially ended in 2017, bank executives and financial institution leaders have reportedly continued the program's discriminatory banking practices. [Senate Bill] 19 seeks to ensure that companies contracting with a state agency or political subdivision do not have an internal practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association.²⁴⁷

Similarly, in the legislative debates in the Texas House, this exchange occurred:

Rep. ISRAEL: Representative, are we here at this point because after the El Paso and Odessa shootings a lot of corporate America stood up and said this is unacceptable and they took strong stances against the [National Rifle Association]?

Rep. CAPRIGLIONE: No, it's not. And if you will, I'll just share with you a little about the history of where this came from. And just for the record, I had the privilege and honor of being on the Mass Violence Prevention Committee, the select committee, during the interim, and I went to El Paso. But this bill has nothing to do with that. In fact, it was in 2013, well before that, that the Obama [A]dministration began a program code-named Operation Choke Point. It's used by the FDIC and the Department of Justice to choke off essential financial service members of the firearm and ammunition industries. So this has a lot more to do, has only to do, with the fact that everyone in the U.S. should be afforded, absolutely, the rights that are

246. See, e.g., Carrick Mollenkamp, *HSBC Became Bank to Drug Cartels, Pays Big for Lapses*, REUTERS (Dec. 11, 2012, 10:25 PM), <https://www.reuters.com/article/us-hsbc-probe-idUSBRE8BA05M20121212> (discussing HSBC's settlement with U.S. prosecutors for almost \$2 billion after an investigation revealed the bank "had degenerated into the 'preferred financial institution' for drug traffickers and money launderers" in Mexico and Colombia).

247. SCHWERTNER, *supra* note 9.

in our Constitution. And so that's what this bill is entirely aimed at.²⁴⁸

As mentioned above, the NSSF sent Darren LaSorte, Director of Government Relations of State Affairs for the NSSF, to testify in person in Texas legislative hearings about the bill.²⁴⁹ He reiterated the narrative that Operation Choke Point was a conspiracy to starve out the gun industry financially, and thereby deprive citizens of the ability to exercise their Second Amendment rights—and that now it had been “privatized” by the banks themselves.²⁵⁰

This narrative from the NSSF has become a standard talking point in justifying antiboycott laws related to financial institutions and the gun industry. For example, the proposed Fair Access to Banking Act (Senate Bill 563), introduced in Congress, includes as one of its findings:

(2) banks rightly objected to the Operation Choke Point initiative through which certain government agencies pressured banks to cut off access to financial services to lawful sectors of the economy;

(3) banks are now, however, increasingly employing subjective, category-based evaluations to deny certain persons access to financial services in response to pressure from advocates from across the political spectrum whose policy objectives are served when banks deny certain customers access to financial services;

(4) the privatization of the discriminatory practices underlying Operation Choke Point by banks represents as great a threat to the national economy, national security, and the soundness of banking and financial markets in the United States as Operation Choke Point itself.²⁵¹

The problem is that this does not reflect what actually transpired with Operation Choke Point, nor does it explain banks divesting from weapons manufacturers. Unfortunately, even writers from the legal academic field have amplified this narrative in their law review articles,²⁵² accepting

248. Tex. H. J., 87th Leg., Reg. Sess. 2963 (2021).

249. *Senate Committee on State Affairs (Part 1)*, *supra* note 220.

250. *Id.* (beginning at 38:48 of the video).

251. Fair Access to Banking Act, S. 563, 117th Cong. (2021).

252. See, e.g., Brannon P. Denning, *A Skeptical Look at Associational Marketplaces and Gun Ownership*, 39 QUINNIAC L. REV. 397, 404 (2021) (stating that “[d]uring the Obama Administration, [DOJ], the [FDIC], and the [OCC] ran ‘Operation Choke Point,’ which pressured banks not to do business with firearms dealers, payday lenders, and other disfavored industries.”); Andersen Hill, *supra* note 43, at 571 (quoting sources that asserted Operation Choke Point targeted gun-related businesses); Zywicki, *supra* note 18, at 90–92; Bambauer, *supra* note 19, at 121–25. A student comment also amplified this message. See Jeri Leigh McDowell, Comment, *Insidious Design or Instrument of Progress: The Multi-Agency Initiative to Choke Off Undesirable Businesses’ Access to the Financial World*, 47 TEX. TECH L. REV. 803, 811–12 (2015)

uncritically sources that merely parroted the NSSF talking points, or the well-worn story about an unlucky gun shop owner in Wisconsin whose local bank abruptly dropped him as a customer some years back.²⁵³

Just as Operation Choke Point spooked some bank managers and compliance officers into taking some drastic measures to terminate accounts they saw as potential liabilities, the Texas law is likely to induce banks to steer clear in the other direction—to err on the side of lending to some gun manufacturers or dealers out of fear of sanctions (disbarment or fines for breaching their contractual promises). If it is a risk *not* to lend to a gun dealer, bank officers will lend to some in this industry that they otherwise would have declined due to actuarial risk concerns. The requirement of neutrality, combined with the threat of serious sanctions, will inevitably operate as a nudge in the opposite direction. Such a nudge is tantamount to a state-mandated subsidy of the gun industry, which can externalize some of its risks and costs onto the banks without paying for it.

The narrative now disseminated by gun-rights groups like the NSSF, and Texas politicians beholden to them, is simply ahistorical. The legislative history for Texas Senate Bill 19 declares, disturbingly, that it is based on this misinformation; it is a legislative enactment to counteract something that never even happened. When the basis for a law is completely unsound, it should be repealed, or at the least, fall into desuetude from non-enforcement.

CONCLUSION

Historically, Operation Choke Point was a benign effort in the wake of the global financial crisis to tighten enforcement on consumer fraud and exploitative payday lenders—this is clear from the enforcement actions that

(“Operation Choke Point has expanded to encompass a wide variety of lawful industries including firearms and ammunition sales, adult entertainment, check cashing, payday lending, and third-party payment processors. Recognizing that it has the financial world running scared, the DOJ has abandoned all vestiges of restraint, casting a wide dragnet . . .”).

253. See for example Zywicki, *supra* note 18, at 92, where he makes the following unsupported assertions:

Despite the lawless and secretive manner in which Operation Choke Point operated, banks got the message. Payday lenders, firearms dealers, adult performers and others suddenly found bank services—sometimes decades-long relationships—terminated summarily and without explanation. Unstated was that the reason that the targeted industries provided “reputational risk” was the circular reasoning that FDIC subjectively considered them to have a bad reputation. Noticeably absent was any rhyme or reason for why some controversial industries, such as firearms dealers, raised reputational risk, but other controversial industries, such as abortion clinics, did not.

were in fact brought as part of the operation.²⁵⁴ At the same time, Ponzi schemes exposed at the same time as the financial crisis,²⁵⁵ like those of Bernie Madoff²⁵⁶ and the Stanford Financial Group,²⁵⁷ led to criticisms of financial regulators for not providing enough oversight and scrutiny.²⁵⁸ It was perfectly natural for regulators to urge financial institutions to be more cautious about high-risk types of commercial business. It is possible that some bank managers reacted to these admonitions by overcorrecting their course and categorically excluding certain types of commercial borrowers. It is equally plausible that bank managers that had grown accustomed to lax oversight under previous administrations bristled at the regulators' new admonitions, and they exaggerated their reaction to it in hearings called by Republicans in Congress.

Professor Julie Anderson Hill has recently criticized government agencies for attempting any type of regulation based on reputational risk;²⁵⁹ in doing so, she paints an uncharitable picture of Operation Choke Point in her article.²⁶⁰ But it does not seem that the agencies were, in fact, "regulating" reputational risk; the FDIC's informally-published cautions about high-risk types of business was not a threat of enforcement actions or penalties²⁶¹ but rather an encouragement for banks to remember to conduct their due diligence scrupulously with risk-prone commercial borrowers to avoid a

254. See discussion *supra* Part I.A.

255. See generally Marie Springer, *The Financial Crisis and White-Collar Crime: An Examination of Brokerage-Failure and Its Link to Ponzi Schemes*, CUNY ACAD. WORKS (Sept. 2017) (Ph.D. dissertation, CUNY), https://academicworks.cuny.edu/gc_etds/2283 (showing that many Ponzi schemes came to light in the financial crisis of 2007–2010, and that more intentional schemes than usual had taken place).

256. Charles Ferguson, *Heist of the Century: Wall Street's Role in the Financial Crisis*, GUARDIAN (May 20, 2012, 3:00 PM), <https://www.theguardian.com/business/2012/may/20/wall-street-role-financial-crisis>.

257. *The Stanford Ponzi Scheme: Lessons for Protecting Investors from the Next Securities Fraud: Hearing Before the H. Subcomm. on Oversight and Investigations of the Comm. on Fin. Servs.*, 112th Cong. (2011), <https://www.govinfo.gov/content/pkg/CHRG-112hhrg66868/html/CHRG-112hhrg66868.htm>.

258. See *id.* (highlighting negligence by the SEC and the more proactive role it should have taken to prevent the Ponzi scheme); see also Ferguson, *supra* note 256 (highlighting failures of the SEC and the large banks, which are regulated by the OCC and the FDIC).

259. See generally Andersen Hill, *supra* note 43.

260. *Id.* at 571–78.

261. Professor Andersen Hill says, "The investigations surrounding Operation Choke Point show that regulators sometimes rely on reputation risk as an enforcement tool when a bank is not violating the law." *Id.* at 578. I believe this is incorrect—I do not think the regulators brought enforcement actions based solely on reputational risk concerns.

repeat of the financial sector meltdown that had just occurred. Within a year of publishing these exhortations, the FDIC publicly clarified this issue and said the banks had misunderstood the FDIC's message if they thought this was a regulatory bar to lending for those industries.²⁶² The OCC directors made public remarks each year during the heyday of Operation Choke Point, explaining that they did *not* want financial institutions to undertake categorical de-risking, but merely to be careful in their individualized risk assessments for commercial bank customers.²⁶³

Furthermore, reputational risk is a type of aggregate financial risk, and it is appropriate for financial institutions to consider it. Reputational risk is admittedly hard to quantify but no harder than appraising the good-will value of a business name when it is sold. Professor Andersen Hill bases her criticism of the agencies on the fact that many businesses posing reputational risk are legal, but as the Bible says, not everything that is lawful is beneficial.²⁶⁴ It is appropriate for financial institutions to steer away from industries that are subject to frequent boycotts, social stigma, threats of increased regulation, and that impose stigma on their investors, customers, and employees. This is what makes the modern movement of activist shareholder proposals so effective—as one recent article explained:

Corporations will take pains to avoid negative publicity, which can damage the value of the brand and, in extreme cases, lead to boycotts. Corporations that ignore investor preferences [about socially responsible investing] as documented by shareholder proposals may see their stock price drop and their cost of capital go up.²⁶⁵

I conclude by returning to the written version of Professor Levitin testimony at a House subcommittee hearing in 2014, when he said, “The Department of Justice should be lauded, not lambasted, for its efforts to make sure that banks take their anti-money laundering responsibilities seriously.”²⁶⁶ The task force of DOJ lawyers and bank regulators behind Operation Choke Point were merely trying to urge banks to be scrupulous

262. Press Release, Federal Deposit Insurance Corporation, Statement of the Federal Deposit Insurance Corporation, (2019), <https://www.fdic.gov/news/press-releases/2019/pr19040a.pdf> (placing strong emphasis on the FDIC's core principals to underscore its effort to ensure banks operate safely).

263. Jack Newsham, *OCC Says It Had Nothing to Do with Operation Choke Point*, Law360 (Aug. 21, 2017, 8:49 PM), <https://www.law360.com/articles/956232/occ-says-it-had-nothing-to-do-with-operation-choke-point>.

264. *See 1 Corinthians* 10:23 (King James) (stating that “[a]ll things are lawful for me, but all things are not expedient: all things are lawful for me, but all things edify not.”).

265. Susan S. Kuo & Benjamin Means, *Climate Change Compliance*, 107 IOWA L. REV. 2135, 2179 (2022).

266. *See generally* H. Subcomm. Testimony, *supra* note 17, at 4.

in following their legal duties to screen for money laundering and fraud.²⁶⁷ Many outspoken critics of Operation Choke Point were not knowledgeable about Automated Clearing House systems or the regulatory regime governing these transactions.²⁶⁸ The ongoing political brinksmanship, misinformation, and alarmist rhetoric, as seen in the attacks on some of President Biden's nominees for agency directors,²⁶⁹ could have a chilling effect on federal regulators in their enforcement decisions. It is a boon for high-risk enterprises that take advantage of bank services if regulators are hesitant about enforcement.²⁷⁰ Merchants operating on the edge of the law, or even over the line, can externalize the higher compliance costs, which instead fall on banks.²⁷¹

There were never *any* verified instances of financial institutions terminating their business-customer accounts as a direct result of Operation Choke Point.²⁷² The closing of a small business owner's bank accounts during the period of Operation Choke Point does not show a causal connection,²⁷³ even if the entrepreneur operated a business that carries some social stigma. It was inevitable that even a modest increase in enforcement actions and exhortations from regulators would prompt large financial institutions to reassess their compliance with Bank Secrecy Act, Anti-Money Laundering laws, and Nacha Operating Rules.²⁷⁴ In such an environment, some banks would naturally conclude that it was more costly, in terms of labor and risk, to follow all the requisite steps to ensure that each customer relationship complied with all applicable laws than to forego the customer's business altogether.²⁷⁵ Historically, banks would sometimes close accounts of high-risk merchants long before Operation Choke Point began.²⁷⁶

It is also misleading to use a slippery-slope argument regarding Operation Choke Point, that is, that such government activities eventually target businesses based purely on political vendettas that do not fit with reality.²⁷⁷ Operation Choke Point was not used to shut down legitimate businesses.²⁷⁸

267. *Id.*

268. *Id.* at 9.

269. *See supra* text accompanying notes 10–16.

270. H. Subcomm. Testimony, *supra* note 17, at 7.

271. *Id.* at 3–4.

272. *Id.* at 10.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 11.

278. *Id.* at 13.

Industries that regulators or banks categorically designate as high-risk receive such designations because “they have high unauthorized transaction rates, using objective metrics.”²⁷⁹ Gun shops are one of many types of small businesses that have statistically high rates of unauthorized transactions.²⁸⁰

Market prices for bank fees reflect the risk posed for the bank by certain types of business customers.²⁸¹ As a colorful example, Professor Levitin pointed to pornography websites, which may have had to

pay 15% of a transaction amount to their bank to accept a credit card payment because of [sic] a high percentage of their transactions are disputed [when viewers are embarrassed that a spouse or partner has discovered their pastime] In contrast, a low-risk business such as Wal-Mart might pay around 1%–2% of a credit card transaction.²⁸²

It is not surprising that such businesses would lobby to have bank oversight squelched, as this could lead to lower fees; but in terms of externalized risk, this would constitute a public subsidy for such businesses.²⁸³ In hindsight, Operation Choke Point deserves credit, not criticism, for inducing financial institutions to dutifully follow anti-money laundering laws. Customers—individually or categorically—that require higher compliance costs should pay more for banking services.

Critics continue to claim that Operation Choke Point was an effort to target and shut down certain lawful industries, such as firearms and payday lending, based on political ideology.²⁸⁴ The intent of the government actors involved, however, was to target fraudulent and high-risk businesses that were vulnerable to usury, fraud, money laundering, and other illegal activities.²⁸⁵ The operation was focused on ensuring that these businesses were not able to access the financial system, thereby protecting consumers and the integrity of the banking system. Critics of the operation have failed to understand its true purpose and instead have focused on politicizing the issue. It was necessary to combat illegal activities and protect the financial system. Moreover, besides the question of whether Operation Choke Point should have ended or whether we should prevent its recurrence, there is the far worse problem that it has become a rhetorical weapon used to attack nominees for agency leadership positions and a justification for antiboycott laws that aim to prevent large

279. *Id.* at 11.

280. *Id.*

281. *Id.*

282. *Id.* at 11–12.

283. *Id.*

284. See discussion *supra* Part I.B.

285. See discussion *supra* Part I.A.

corporations from adopting socially responsible business practices. It is my hope that the foregoing pages will help correct the record.