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POLICY BRIEF

Why Government Shouldn't Regulate Reputation Risk at Banks

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What do payday lenders, firearms retailers, porn stars, churches, coal mines, and condom companies have in common? All have complained that regulators pressured financial institutions to close their accounts over reputation-risk concerns. Broad regulation of reputation risk does not reduce overall bank risk and unnecessarily politicizes bank regulators. Congress should prevent regulators from requiring banks to make changes when there is no other safety and soundness concern.[1]

WHAT IS REPUTATION RISK?

Financial regulators say reputation risk is the risk of negative public opinion or negative publicity.[2] Wells Fargo, for example, hurt its reputation by opening millions of unauthorized customer accounts. Reputation is important to all businesses, but it is especially important to banks. Negative publicity can cause depositors to withdraw their money. In extreme cases, reputation risk might cause a bank run or panic. At the same time, banks have a hard time signaling that they are trustworthy.[3] A bank's promise to return customer money might be worthless if the bank faces financial difficulty.

Instead, banks rely partly on government regulation to bolster their reputations and attract stable deposits. The Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA) provide insurance, reassuring depositors that even if a bank fails, each will have deposits up to $250,000 (and possibly more) protected. Regulation also works by outlawing harmful practices and then supervising banks to make sure they comply with the law. The supervision of banks falls to both federal regulators (the Office of the Comptroller of the Currency [OCC], the Board of Governors of the Federal Reserve System, the FDIC, and the NCUA) and state

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regulators. In a sense then, much of banking regulation is aimed at reputation risk.[4] Capital rules, liquidity rules, antifraud rules, asset concentration rules, insider lending rules, and many more are partly designed to give people confidence in financial institutions.

Bank regulators began to focus more directly on reputation risk in the mid-1990s, however. For the first time, they defined *reputation risk*.[5] Their definitions are now expansive. Negative publicity can be harmful "whether true or not."[6] Reputation risk "arises from virtually all bank products and services."[7] Regulators believe that activities posing reputation risk might warrant corrective action even when there is no threat of significant financial harm to the bank.[8]

REGULATORY GUIDANCE ABOUT REPUTATION RISK

Once regulators defined reputation risk, it began turning up in all types of agency guidance. Regulators warn that mortgage lending, credit cards, derivatives, securitization, overdraft fees, bank-owned life insurance, and many other bank activities pose reputation risk.[9] Rather than being in an isolated chapter, it is woven throughout the Federal Reserve's bank examination manual, which uses the words "reputation" and "reputational" 190 times.

It is not just bank activities that concern regulators. As the FDIC explains, "any negative publicity involving [a] third party, whether or not the publicity is related to the institution's use of the third party," could damage the reputation of a bank.[10] For example, the OCC warns that "[l]ending to [oil and gas] companies found or perceived by the public to be negligent in preventing environmental damage, hazardous accidents, or weak fiduciary management can damage a bank's reputation."[11] New York's financial regulator warns banks that "reputational risks . . . may arise from . . . dealing with the [National Rifle Association] or similar gun promotion organizations."[12]

Regulators have, at times, assured banks that this regulatory guidance is not binding.[13] For example, when the OCC added the term *reputation risk* to its supervisory lexicon, it assured banks that its examiners would just monitor—not "actively supervise"—reputation risk.[14] When payday lenders sued the FDIC complaining that reputation risk regulation caused them to lose banking relationships, the FDIC responded that its reputation risk guidance did "not impose rights or obligations" and had "no binding legal consequences."[15] More recently, the OCC has promised that it "does not prohibit national banks and federal savings associations from engaging in transactions and relationships that it identifies as involving greater reputation risk."[16]

But these assurances that regulators do not police reputation risk ring hollow. As regulators are aware, banks are repeat regulatory players. Upsetting a regulator may lead to increased regulatory scrutiny and enforcement. As a result, even if regulators assure banks that the guidance is not binding, many banks will treat the guidance as if it is the law.[17] Moreover, regulators sometimes take enforcement action for reputation risk, thus reinforcing banks' belief that guidance is binding.

REPUTATION RISK ENFORCEMENT

Of the regulatory enforcement actions addressing reputation risk, most focus on conduct that is already illegal or otherwise financially risky. For example, an enforcement action directed at a credit union's violation of insider lending rules noted that violating the rules led to reputation risk.[18] Similarly, a bank with inadequate underwriting and liquidity practices was told that these problems triggered reputation-risk concerns.[19] Regulators also sometimes require that a penalized bank develop new risk management policies, including policies for managing reputation risk.[20] In these enforcement actions, reputation risk does little work. The regulators could require the same remediation without any mention of reputation risk. Regulators do not need reputation risk to punish Wells Fargo for opening unauthorized customer accounts. That conduct was already illegal.

In some cases, however, regulators use reputation risk to target otherwise legal conduct that poses little financial risk to the bank. Investigations into Operation Choke Point show that FDIC officials, citing reputation risk, pressured banks to end relationships with payday lenders.[21] Regulators did not think the banking relationships were illegal or financially harmful to the banks. Instead, FDIC officials were motivated by their personal beliefs that legal payday lending is "abusive," "fundamentally wrong," "unsavory," and "ugly."[22]

Operation Choke Point is not the only example of regulatory enforcement efforts purportedly justified by reputation risk. Consider the following examples:

- In 2009 (well before Operation Choke Point), the FDIC issued a cease-and-desist order requiring the Bank of Agriculture and Commerce in Stockton, California, to end its partnership with a third-party payment processor on the basis of reputation risk concerns.[23] The bank and the payment processor allowed consumers to receive electronic deposits of Social Security and other government payments. The payment processor held an account at the bank that received the government payments. When deposits arrived, the bank provided the consumers with checks that could be picked up at a payday lender or check casher. The FDIC's problem with this was that sometimes the payday lender or check casher (not the bank or the payment processor) also provided short-term loans. Sometimes a consumer would use nearly the entire benefits check to repay a loans. The FDIC faulted the bank for failing to monitor the payday lenders, saying that such a failure exposed the bank to "reputational and legal risk."[24] Although the FDIC mentioned legal risk, the only specific "law" the FDIC cited was its own document, "Third-Party Risk: Guidance for Managing Third-Party Risk." The cease-and-desist order does not suggest that the bank lost any money in connection with the program. The FDIC's actions seem primarily driven by the idea that the bank's reputation could be tarnished by doing business with a payment processor that does business with payday lenders and check cashers. The FDIC ordered the bank to "unwind its benefit payment deposit account business with [the payment processor]."[25]

- According to a report from the FDIC's Office of Inspector General, between 2008 and 2012, the FDIC used reputation risk to pressure three banks to end tax refund anticipation loans.[26] First the FDIC sent the banks letters warning of reputation risk.[27] Then the FDIC followed the letters with "what it termed 'strong moral suasion' to persuade [the] banks to stop offering [refund anticipation loans]. What began as persuasion degenerated into meetings and telephone calls where banks were abusively threatened by an FDIC attorney."[28] After two of the three banks had already stopped offering the loans, the FDIC further pressured the last bank by "deploying an unprecedented 400 examiners to examine [the bank and] 250 tax preparers throughout the country."[29] The FDIC pursued this aggressive enforcement strategy even though refund anticipation loans "were, and remain, legal activities," and, as the FDIC's Office of Inspector General found, there was no "significant examination-based evidence of harm" to the bank caused by the loan program.[30]
- In money laundering actions, the OCC and the FDIC have ordered banks to close all accounts that pose reputation risk (not just those that are used to launder money). For example, the OCC found deficiencies in anti-money-laundering policies and practices at Pacific National Bank, a subsidiary of Ecuador's state-owned Banco del Pacifico S.A. An enforcement order required the bank to close any customer accounts that are "detrimental to the reputation . . . of the Bank."[31] Although there are anti-money-laundering statutes and regulations, none requires the closure of customer accounts that pose reputation risk. This type of enforcement requires banks to take action based entirely on reputation risk and not required by any other laws.
- The National Rifle Association (NRA) has sued the New York Department of Financial Services, alleging that it used regulatory guidance coupled with "backroom exhortations" to convince banks to cut off all services to gun rights groups.[32] As previously mentioned, the New York regulator issued a guidance letter warning banks of dealing with the NRA or similar gun-promotion organizations.[33] The NRA's complaint highlights the strident rhetoric surrounding the regulator's release of the letter. New York Governor Andrew Cuomo stressed that he had directed the guidance, calling "gun safety . . . a top priority for every individual, company, and organization that does business across the state."[34] Governor Cuomo later emphasized, "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public."[35] The regulator's press release accompanying the guidance praised "businesses [that] have ended relationships with the [NRA]."[36] Beyond these statements, the NRA believes that discovery will further illuminate regulatory enforcement efforts.[37] The New York Department of Financial Services denies that it engaged in any "backroom exhortations" aimed at chilling the NRA's gun rights advocacy.[38] It claims that the guidance letter is not binding and was "plainly intended to convince companies to work towards 'positive social change' without threat of regulatory action."[39] The case has not yet reached a resolution.

These enforcement efforts may be only the tip of the iceberg. Regulators conduct most of their enforcement work behind closed doors. They visit banks and prepare examination reports, sometimes requiring banks to take corrective action. Banks, however, are legally prohibited from revealing the reports or other confidential examination information.[40] Indeed, it took congressional investigations to uncover much of the evidence showing that the FDIC used reputation risk to choke off banking services to payday lenders and curtail tax refund anticipation loans. Regulators might be quietly using reputation risk to stop other banking activities.

THE RISK OF REPUTATION RISK REGULATION

This expansive use of reputation risk is troubling. Recall that regulation acts as a partial substitute for bank reputation. Depositors trust banks in part because they trust government regulators to effectively oversee banks. That public trust in regulators depends on regulators having strong reputations for technical competence and political neutrality. Yet the foregoing examples of expansive regulation of reputation risk—particularly in the absence of other violations of law or the threat of significant financial harm—could damage the reputation of regulators as competent and impartial experts.

It is not clear that regulators are technically competent to manage reputation risk. Regulators are not likely to be good at predicting when negative publicity will lead to a loss. Each bank has a unique collection of stakeholders. What matters to the depositors, employees, or shareholders of one bank might not matter to the depositors, employees, or shareholders of another bank. Regulators spend little time gathering input from individual bank stakeholders, so they are not well positioned to evaluate or balance their preferences. Suppose, for example, that a bank wants to introduce a new account fee. It would be difficult for the bank's regulator to determine whether the negative reputational impact from customers who don't like the fee would be offset by reputational gains from shareholders who appreciate an increase in earnings. If regulators claim to regulate reputation risk but do a poor job of it, their reputations may suffer.

Regulators can, of course, identify industries that have frequently received public criticism. Payday lenders, gun rights groups, oil companies, and tax refund anticipation loans all have critics. But it is not clear that criticism of these industries regularly leads to material bank losses. In some cases, stakeholders may not attribute the action of the third party to the bank. In other cases, the negative impact to the bank may be offset by interest, fees, or even positive publicity from those who disagree with the critics.

Moreover, "subject to public criticism" is not a workable metric for reputation risk regulation. Any industry or third-party bank partner could at some point be perceived negatively. A restaurant might serve tainted food. An airline might have a fatal crash. A once-thought-safe product might be found to cause cancer. Banks need customers. Consequently, regulators must decide that

many businesses and people with their own reputation risks do not pose significant risk to banks as customers or partners.

But when regulators' actions reduce banking services to some controversial industries and not others—especially when there is no violation of the law or evidence of serious financial risk to the bank—regulators' choices seem political. Regulators, for example, seem to be choosing to punish controversial gun rights groups, but not controversial abortion providers.[41]

To be clear, though, reputation risk regulation can hurt groups of all political stripes. In the wake of Operation Choke Point, porn stars, churches, coal mines, and condom companies all thought they were being targeted by bank regulators for reasons unrelated to their financial risk. Moreover, elections might change which controversial practices or groups attract regulatory scorn. Those that escape the negative impact of reputation risk regulation today may not tomorrow.

In the end, bank reputation risk regulation may be counterproductive. If the public comes to believe that bank regulators are taking sides in political controversies and punishing political foes, even when those controversies have little financial impact on banks, the public will not trust bank regulators. This loss of trust could be far more financially devastating to banks than the reputational harm regulators warn about.

LIMITING REPUTATION RISK REGULATION

So how does society prevent regulators from expansively policing bank reputation risk?

The public examples of reputation risk enforcement demonstrate that regulators cannot be left to their own devices. Courts are also not well-positioned to constrain bank regulators. Banks have strong incentives to keep their regulators happy. Banks are likely unwilling to fight regulators over customer reputation risk when the customers impacted are small industries with whom the bank does little business. Because the bank examination process is confidential,[42] customers (and other bank partners) who are hurt by reputation risk enforcement may never learn the reason for their banking troubles. If they do, they may not have the inclination or resources to sue.

This leaves legislation as the best avenue to restrain reputation risk regulation. In 2017, the US House of Representatives passed a bill providing that bank regulators "may not formally or informally request or order a depository institution to terminate a specific customer account or group of customer accounts . . . unless the agency has a valid reason for such request or order and such reason is not based solely on reputation risk."[43] The bill also included measures designed to strengthen oversight of regulatory action involving third parties. It required regulators to provide banks with the legal justification for account closures and required that banks relay that information to the affected customers.[44] Thus, customers would have notice of the regulatory action

affecting them. Finally, the bill required regulators to annually report to Congress the number of customer accounts the regulator requested be closed and the legal authority for the requests.[45] Although the bill had broad bipartisan support in the House, it never received a vote in the Senate.[46] Some lawmakers may have lost interest in the measure after regulators repeatedly assured them that Operation Choke Point had ended and would not be resumed.

Reform for reputation risk regulation should not depend on the status of Operation Choke Point. Operation Choke Point is not the only time regulators have required action on the basis of reputation risk alone. Indeed, regulators have taken enforcement action based on reputation risk even while stating that they do not do so.[47] Operation Choke Point was not the anomalous result of overzealous regulators with a particular disdain for payday lending. It was a natural outgrowth of a regulatory structure that sees reputation risk everywhere. It is the outgrowth of a definition of reputation risk that regulates any negative publicity, whether it has any basis or not. And it is an outgrowth of a system where regulators insist that they have power to regulate even when there is little evidence of a risk of serious financial harm. At best, the current reputation risk framework encourages regulators to regulate banks on the basis of regulators' uncertain forecasts of negative publicity. At worst, it provides regulators cover for implementing their own political agenda unrelated to the safety or soundness of banks. Congress should restrict regulators' ability to enforce regulations based on reputation risk.

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NOTES

1. For a full discussion, see Julie Andersen Hill, "Regulating Bank Reputation Risk," *Georgia Law Review* 54, no. 2 (2020): 523–604.
2. The FDIC defines reputation risk as "arising from negative public opinion." Federal Deposit Insurance Corporation, "Third-Party Risk: Guidance for Managing Third-Party Risk" (Financial Institution Letter No. FIL-44-2008, Federal Deposit Insurance Corporation, Arlington, VA, June 6, 2008), 3. The Federal Reserve defines *reputation risk* as "the potential [for] negative publicity." Board of Governors of the Federal Reserve System, "Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies" (Supervisory

Letter No. SR 95-51, Board of Governors of the Federal Reserve System, Washington, DC, November 14, 1995). The National Credit Union Administration defines reputation risk as "arising from negative public opinion or perception." "Examiner's Guide," National Credit Union Administration, last updated October 11, 2016, https://publishedguides.ncua.gov/examiner/Pages/default.htm#ExaminersGuide/Risk-Focused_Program/Risk%20Categories.htm#Reputati. The Office of the Comptroller of the Currency defines reputation risk as "the risk . . . arising from negative public opinion." Office of the Comptroller of the Currency, *Comptroller's Handbook: Large Bank Supervision*, September 2019, 64.

3. Jonathan R. Macey, *The Death of Corporate Reputation: How Integrity Has Been Destroyed on Wall Street* (Upper Saddle River, NJ: FT Press, 2013), 26. Macey explains why it is hard for financial firms to credibly signal their reputation.

4. Macey, *Death of Corporate Reputation*, 10; John C. Coffee Jr., "Systemic Risk after Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies beyond Oversight," *Columbia Law Review* 111, no. 4 (2011): 815–16.

5. Eugene A. Ludwig, "Remarks of Eugene A. Ludwig, Comptroller of the Currency, before the Georgetown University Center for Business-Government Relations" (lecture, Georgetown University, Washington, DC, September 26, 1995), https://www.occ.treas.gov/news-issuances/speeches/1995/nr-occ-1995-101a.pdf. Ludwig announced a "new program [called] 'supervision by risk'" that "define[d] a common set of risks," including reputation risk. Board of Governors of the Federal Reserve System, "Rating the Adequacy of Risk Management Processes"; National Credit Union Administration, "Risk-Focused Examination Program" (Letter No. 02-FCU-09, National Credit Union Administration, Alexandria, VA, May 2002).

6. "Reputational risk is the potential that negative publicity regarding an institution's business practices, whether true or not, will cause a decline in customer base, costly litigation, or revenue reduction." Board of Governors of the Federal Reserve System, "Rating the Adequacy of Risk Management Processes."

7. According to a joint statement by the OCC, the Board of Governors of the Federal Reserve System, and the FDIC, reputation risk "arises from virtually all bank products and services." Office of the Comptroller of the Currency et al., "Bank-Owned Life Insurance: Interagency Statement on the Purchase and Risk Management of Life Insurance" (OCC Bulletin No. 2004-56, Office of the Comptroller of the Currency, Washington, DC, December 7, 2004), 14. The NCUA has similarly noted that "[r]eputation risk exposure appears throughout the credit union organization." "Examiner's Guide," National Credit Union Administration.

8. The OCC, for example, defines reputation risk to include not just risks to "current or projected financial condition" but also threats to a bank's "resilience." Office of the Comptroller of the Currency, *Comptroller's Handbook: Large Bank Supervision*. Regulators have long argued that their statutory authority to correct any "unsafe or unsound banking practice" gives them authority to take enforcement actions whenever there is an "abnormal risk." 12 U.S.C. § 1818(b)(1) (2012) (providing power to correct unsafe or unsound conditions); Heidi Mandanis Schooner, "Fiduciary Duties' Demanding Cousin: Bank Director Liability for Unsafe or Unsound Banking Practices," *George Washington Law Review* 63, no. 2 (1995): 175–76 (explaining that regulators sometimes use an "abnormal risk" or even more lenient standards). Some courts (including the DC Circuit) have a more exacting standard, requiring that regulators show a threat to the financial condition of the bank. Gulf Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 651 F.2d 259 (5th Cir. 1981); Johnson v. Office of Thrift Supervision, 81 F.3d 195 (D.C. Cir. 1996).

9. Office of the Comptroller of the Currency, *Comptroller's Handbook: Mortgage Banking*, February 2014, 19; Office of the Comptroller of the Currency, *Comptroller's Handbook: Credit Card Lending*, November 2015, 11–12; Office of the Comptroller of the Currency, "Credit Derivatives: Guidelines for National Banks" (OCC Bulletin No. 1996-43, Office of the Comptroller of the Currency, August 12, 1996); Office of the Comptroller of the Currency, *Comptroller's Handbook: Asset Securitization*, November 1997, 34–35; Office of the Comptroller of the Currency, *Comptroller's Handbook: Deposit-Related Credit*, September 2018, 8; Office of the Comptroller of the Currency et al., "Bank-Owned Life Insurance."

10. Federal Deposit Insurance Corporation, "Third-Party Risk."

11. Office of the Comptroller of the Currency, *Comptroller's Handbook: Oil and Gas Exploration and Production Lending*, October 2018, 17.

12. Maria T. Vullo, *Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations* (Albany, NY: Department of Financial Services, April 19, 2018).

13. Office of the Comptroller of the Currency et al., *Interagency Statement Clarifying the Role of Supervisory Guidance*, September 11, 2018.

14. Susan F. Krause, "Remarks by Susan F. Krause, Senior Deputy Comptroller for Bank Supervision Policy, before the Robert Morris Associates Risk Management Conference, on Risk Management in Bank Supervision, Washington, D.C., December 11, 1995," *Quarterly Journal* 15, no. 1 (March 1996): 125–29.

15. Memorandum in Support of FDIC's Motion to Dismiss Amended Complaint for Lack of Subject Matter Jurisdiction, Community Fin. Servcs. Ass'n of Am. v. FDIC, 132 F. Supp. 3d 98 (D.D.C. 2015) (No. 14-CV-953).

16. Defendants Office of the Comptroller of the Currency & Thomas J. Curry's Memorandum in Support of Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief at 8, Community Fin. Servcs. Ass'n of Am. v. FDIC, 132 F. Supp. 3d 98 (D.D.C. 2015) (No. 14-CV-953). On the specific question of reputation risk presented by customer accounts, the OCC has stated that it only requires banks to cease activity "where the bank cannot properly manage the risk presented by a customer, or a customer has engaged in suspected criminal or other illegal activity." The Department of Justice's "Operation Choke Point," Hearing before the Subcomm. on Oversight and Investigation of the H. Comm. on Fin. Services, 113th Cong. 13 (2014) (testimony of Daniel P. Stipano, Deputy Chief Counsel, Office of the Comptroller of the Currency). The FDIC instructs that "[a]s long as banks have appropriate risk mitigation measures in place, we are not going to prohibit or discourage them from doing business with anyone with whom they want to do business." The Department of Justice's "Operation Choke Point," Hearing before the Subcomm. on Oversight and Investigation of the H. Comm. on Fin. Services, 113th Cong. 33 (2014) (testimony of Richard J. Osterman, Acting General Counsel, Federal Deposit Insurance Corporation). A Federal Reserve official has similarly explained, "The decision to establish, limit or terminate a particular customer relationship is a decision for the banking organization. It is not the Board's policy to discourage banking organizations from offering services to any class of law-abiding financial services customers." The Department of Justice's "Operation Choke Point," Hearing before the Subcomm. on Oversight and Investigation of the H. Comm. on Fin. Services, 113th Cong. 9 (2014) (testimony of Scott Alvarez, General Counsel, Board of Governors of the Federal Reserve System).

17. Nicholas R. Parrillo, "Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries," *Yale Journal on Regulation* 36, no. 1 (2019): 192–95. Parrillo explains the regulatory dynamic that leads banks to treat agency guidance as binding.

18. National Credit Union Administration, *Letter of Understanding and Agreement by and between the National Credit Union Administration and Charleston County Teachers Federal Credit Union Charter Number 10875*, June 6, 2003. The letter cites 12 C.F.R. § 701.21(d).

19. First Asian Bank, FDIC Order No. FDIC-08-239b (Sept. 25, 2008) (order to cease and desist).

20. For example, the FDIC required the First Bank of Northern Kentucky to develop a strategic plan that identifies "existing credit, interest rate, liquidity, transaction, compliance, strategic, reputation, price, and foreign currency translation risks, if any, and a written analysis of those risks to the extent they exist." First Bank of N. Ky., Inc., FDIC Order No. FDIC-03-215b (Jan. 6, 2004) (order to cease and desist). The OCC required the Bank of America to develop policies that consider reputation risk after an investigation into the bank's market timing and late-trading practices. Written Agreement by and between Bank of Am. and the OCC OCC Docket No. AA-EC-04-35, OCC EA No. 2005-10 (Feb. 9, 2005). In a joint enforcement action, federal regulators required a mortgage servicer to develop a risk assessment program that considers reputation risk after it was discovered that the servicer robo-signed mortgage foreclosure documents. Lender Processing Services, Inc., FRB Docket Nos. 11-052-B-SC-1, 11-052-B-SC-2, 11-052-B-SC-3, FDIC Order No. FDIC-11-204b, OCC Docket No. AA-EC-11-46, OCC EA No. 2011-054, OTS DC-11-039 (Apr. 13, 2011) (consent order).

21. Federal Deposit Insurance Corporation, Office of Inspector General, "The FDIC's Role in Operation Choke Point and Supervisory Approach to Institutions That Conducted Business with Merchants Associated with High-Risk Activities" (Report No. AUD-15-008, Federal Deposit Insurance Corporation, Arlington, VA, September 2015); US House Committee on Oversight and Government Reform, *The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses?*, 2014; US House Committee on Oversight and Government Reform, *Federal Deposit Insurance Corporation's Role in "Operation Choke Point,"* 2014.

22. Federal Deposit Insurance Corporation, Office of Inspector General, "FDIC's Role in Operation Choke Point"; US House Committee on Oversight and Government Reform, *Federal Deposit Insurance Corporation's Role in "Operation Choke Point."*

23. Bank of Agric. & Commerce, FDIC Order No. FDIC-08-408b (Feb. 19, 2009) (order to cease and desist).

24. Bank of Agric. & Commerce, FDIC Order No. FDIC-08-408b (Feb. 19, 2009) (order to cease and desist).
25. Bank of Agric. & Commerce, FDIC Order No. FDIC-08-408b (Feb. 19, 2009) (order to cease and desist).
26. Federal Deposit Insurance Corporation, Office of Inspector General, "Report of Inquiry into the FDIC's Supervisory Approach to Refund Anticipation Loans and the Involvement of FDIC Leadership and Personnel" (Report No. OIG-16-001, Federal Deposit Insurance Corporation, Arlington, VA, February 19, 2016). Because the report included "sensitive information," the FDIC Office of Inspector General released only an executive summary of its findings, rather than a full report.
27. The FDIC's Targeting of Refund Anticipation Loans, Hearing before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Services, 114th Cong. (2016) (statement of Rep. Randy Hultgren, R-IL, quoting from the letters).
28. Federal Deposit Insurance Corporation, Office of Inspector General, "Report of Inquiry into the FDIC's Supervisory Approach," iii.
29. Federal Deposit Insurance Corporation, Office of Inspector General, "Report of Inquiry into the FDIC's Supervisory Approach," iii.
30. Federal Deposit Insurance Corporation, Office of Inspector General, "Report of Inquiry into the FDIC's Supervisory Approach," ii.
31. Pacif. Nat'l Bank, OCC Docket No. AA-EC-10-106, OCC EA No. OCC-2010-253 (Dec. 15, 2010) (consent order). The OCC ordered, "The Bank shall not open any account for a customer and shall close any existing account of a customer if the information available to the Bank indicates that the customer's relationship with the Bank would be detrimental to the reputation or the safety or soundness of the Bank." The FDIC has issued similar orders. For example, the FDIC ordered a bank to develop a "comprehensive list of entities that present elevated [legal, compliance, reputation, or fraud] risk or potential for consumer harm and for which the bank will not process transactions." Meridian Bank, FDIC Order No. FDIC-12-367 (Oct. 22, 2012) (consent order).
32. Original Complaint & Jury Demand, Nat'l Rifle Ass'n of Am. v. Cuomo, 350 F. Supp. 3d 94 (N.D.N.Y. 2018) (No. 1:18-CV-0566).
33. Vullo, *Guidance on Risk Management*.
34. New York Department of Financial Services, "Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations: Insurance Companies, Banks, and Other Financial Institutions Encouraged to Review Relationships with the NRA and Similar Organizations," press release, April 19, 2018, https://www.dfs.ny.gov/about/press/pr1804191.htm.
35. Andrew Cuomo (@NYGovCuomo), "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public," Twitter, April 20, 2018, 8:58 a.m., https://twitter.com/NYGovCuomo/status/987359763825614848.
36. New York Department of Financial Services, "Governor Cuomo Directs."
37. Nat'l Rifle Ass'n of Am. v. Cuomo, 350 F. Supp. 3d 94, 119 (N.D.N.Y. 2018). The decision denies New York's motion to dismiss and states that "[w]hile the NRA may not be able to establish the factual predicates for these claims, it has presented sufficient allegations to allow them to go forward."
38. Answer at 30, 33–34, 36–37, 47, Nat'l Rifle Ass'n of Am. v. Cuomo, 350 F. Supp. 3d 94 (N.D.N.Y. 2018).
39. Memorandum of Law in Support of Defendants' Motion to Dismiss the First Amended Complaint Pursuant to FRCP12(B)(6) at 36, Nat'l Rifle Ass'n of Am. v. Cuomo, 350 F. Supp. 3d 94 (N.D.N.Y. 2018).
40. Federal regulators warn banks about the criminal penalties associated with revealing examination reports in violation of 18 U.S.C. § 641. Office of the Comptroller of the Currency et al., "Interagency Advisory on the Confidentiality of the Supervisory Rating and Other Nonpublic Supervisory Information" (OCC Bulletin No. 2005-4, Office of the Comptroller of the Currency, Washington, DC, February 28, 2005). The bulletin cites the criminal penalties associated with revealing examination reports in violation of 18 U.S.C. § 641.

41. Todd Zywicki, "Operation Choke Point," *Volokh Conspiracy*, *Washington Post*, May 24, 2014. Former FDIC chairman William M. Isaac has noted that the same regulatory justifications for regulating third-party relationships with payday lenders could be used to choke off banking services to "convenience stores selling large sugary sodas, restaurants offering foods with high trans-fat content or family planning clinics performing abortions." William M. Isaac, "DOJ's 'Operation Choke Point': An Attack on Market Economy," *BankThink*, *American Banker*, March 21, 2014.

42. Office of the Comptroller of the Currency et al., "Interagency Advisory."

43. H.R. 2706, 115th Cong. § 2(a) (as passed by the House, Dec. 11, 2017).

44. H.R. 2706, 115th Cong. §§ 1(b)–(c).

45. H.R. 2706, 115th Cong. § 1(d).

46. US House of Representatives, "Report on the Activity of the Committee on Financial Services of the United States House of Representatives for the One Hundred Fifteenth Congress" (Report No. 115-1122, US Government Publishing Office, Washington, DC, 2019), 106. This report notes that the bill passed the House with a vote of 395 to 2 and was received by the Senate.

47. For examples of federal regulators' repeated assurances that reputation risk guidance is not binding see notes 13–16. Notwithstanding these assurances, the regulators have taken action to end banking relationships with payday lenders and tax refund anticipation loan providers, as described in notes 21–30 and the accompanying text.