UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. and ADVANCE AMERICA, CASH ADVANCE CENTERS, INC., Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORPORATION, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, OFFICE OF THE COMPTROLLER OF THE CURRENCY, and THOMAS J. CURRY, in his official capacity as Comptroller of the Currency, Defendants.	)	Civil Action No. 14-953 GK

DEFENDANTS OFFICE OF THE COMPTROLLER OF THE CURRENCY AND THOMAS J. CURRY'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants Office of the Comptroller of the Currency and Thomas J. Curry in his official capacity as Comptroller of the Currency (together, "OCC"), by their attorneys, respectfully move this Court to dismiss Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

First, the Court should dismiss all counts against the OCC for lack of subject matter jurisdiction pursuant to Rule 12(b)(l) because Plaintiffs lack constitutional standing. Plaintiffs cannot satisfy the *redressability* or *causation* requirements of Article III of the United States Constitution.

Second, to the extent that the Amended Complaint seeks to preemptively enjoin the OCC from exercising its authority to examine national banks and federal savings associations and

bring administrative enforcement proceedings to address unsafe and unsound conditions at such institutions, Congress has withdrawn jurisdiction for any court to affect by injunction or otherwise such enforcement proceedings. 12 U.S.C. § 1818(i)(1).

Third, the Court should dismiss Counts VI and VII of the Amended Complaint, alleging a violation of the notice-and-comment rulemaking requirement of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, pursuant to Rule 12(b)(6) on grounds that those requirements do not apply to the Agency guidance at issue.

Fourth, the Court should dismiss Counts VIII, IX, and X of the Complaint pursuant to Rule 12(b)(6) for failure to state a claim because Plaintiffs are incorrect that the OCC exceeded its authority, engaged in arbitrary and capricious conduct, or violated Plaintiffs' due process rights under the United States Constitution by issuing guidance that discusses potential risks encountered by the institutions OCC regulates.

Last, the Amended Complaint's conclusory allegations fail to assert any "plausible claim for relief" against the OCC under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Respectfully submitted,

AMY S. FRIEND
Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

HORACE G. SNEED
Director of Litigation

GREGORY F. TAYLOR
Assistant Director of Litigation

/s/ Peter C. Koch
PETER C. KOCH
Counsel – Litigation Division
Office of the Comptroller of the Currency
400 7th Street SW
Washington DC 20219
Telephone: (202) 649-6313
Facsimile: (202) 649-5709

August 18, 2014

CERTIFICATE OF SERVICE

I, Peter C. Koch, an attorney of record, do hereby certify that a copy of this Motion and the accompanying Memorandum in support thereof were served this 18th day of August 2014 by electronic filing pursuant to Local Civil Rule 5.4.

/s/ Peter C. Koch
PETER C. KOCH
Counsel – Litigation Division
Office of the Comptroller of the Currency
400 7th Street SW
Washington DC 20219
Telephone: (202) 649-6313
Facsimile: (202) 649-5709

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DISTRICT OF COLUMBIA

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 14-953 GK
FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,	)	
Defendants.	)	

DEFENDANTS OFFICE OF THE COMPTROLLER OF THE CURRENCY AND THOMAS J. CURRY'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORYAND INJUNCTIVE RELIEF

AMY S. FRIEND
Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

HORACE G. SNEED
Director of Litigation

GREGORY F. TAYLOR
Assistant Director of Litigation

/s/ Peter C. Koch
PETER C. KOCH
Counsel

Office of the Comptroller of the Currency
400 7th Street SW
Washington DC 20219
Telephone: (202) 649-6313

August 18, 2014

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Defendants Office of the Comptroller of the Currency and Thomas J. Curry in his official capacity as Comptroller of the Currency (together, "OCC"), by their attorneys, respectfully respectively submit this memorandum in support of their Motion to Dismiss Plaintiffs' Amended Complaint for Injunctive and Declaratory Relief ("Amended Complaint") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

On June 11, 2014, plaintiffs Community Financial Services Association of America, Ltd. ("CFSA") and Advance America, Cash Advance Centers, Inc. ("Advance America") initiated this action against the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the OCC. Plaintiff CFSA is an organization that represents payday lenders and Advance America is a payday lender. As part of its business, a payday lender typically must submit checks provided by its borrowers through the payment system by causing the checks to be deposited at a bank.[1] In their allegations against the OCC, Plaintiffs contend that the OCC has taken part in a campaign initiated by the Department of Justice ("DOJ") and known as "Operation Choke Point" that they allege is intended to force financial institutions to terminate their business relationships with payday lenders.

Stripped to their essentials, the allegations in Plaintiffs' Amended Complaint are: (1) that the OCC was an active participant in DOJ's Operation Choke Point, (2) that in conjunction with this initiative the OCC issued a guidance document, *Third-Party Relationships: Risk Management Guidance*, OCC Bulletin 2013-29 (Oct. 30, 2013) ("OCC Bulletin 2013-29"), and (3) that the OCC coerced the banks that it regulates by means of "a variety of back-room

[1] Payday lenders may establish their own accounts at a bank through which they deposit checks or may use a payment processor to submit the checks for processing through the payment system and deposit the funds in a bank account for the payday lender.

pressure tactics" to drop payday lenders as bank customers. Am. Complt. ¶ 7. Plaintiffs seek declaratory and injunctive relief principally in the form of an order that would set aside OCC Bulletin 2013-29 and enjoin the OCC's "officers, employees, and agents" from "implementing, applying, or taking any action whatsoever" pursuant to OCC Bulletin 2013-29, from "relying on the novel and revised definition of reputation risk that [it has] adopted without notice and comment rulemaking," or from applying "informal pressure to banks to encourage them to terminate business relationships with payday lenders." Am. Complt. ¶ 185(f).[2]

While the OCC routinely complies with requests for supervisory records from DOJ and other federal regulatory agencies when those agencies deem the records necessary to the performance of their official duties,[3] contrary to Plaintiffs' allegations the OCC is not and never has been part of Operation Choke Point. The OCC's longstanding approach to ensuring that banks comply with their obligation to identify and mitigate potential risks to the bank caused by the activities of bank customers is to require that these institutions put in place adequate risk management controls that alert the institution to risky or illegal behaviors. What OCC policy and informal guidance does *not* require or encourage is that an institution ban entire lines of business—including payday lenders—from being customers, as long as the bank has controls in place to manage the risks presented. OCC policy requires that banks assess risk on a customer-by-customer basis. As long as an institution has adequate risk identification and mitigation processes in place, it is the OCC's policy and practice to allow banks to make their own

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[2] A fuller description of Plaintiffs' requested relief is set forth below in the section on Plaintiffs' Amended Complaint.

[3] *See* Testimony of Daniel P. Stipano, Deputy Chief Counsel, Office of the Comptroller of the Currency, before the Subcommittee on Oversight and Investigations, House Committee on Financial Services, United States House of Representatives, July 15, 2014, found at http://www.occ.gov/news-issuances/congressional-testimony/2014/index-2014-congressional-testimony.html and also at http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=387064. *See also* 12 U.S.C. § 3412(f) (Right to Financial Privacy); 12 C.F.R. Part 4.

decisions regarding which banking services they provide to customers.

Each of the five counts in the Amended Complaint directed to the OCC should be dismissed. First, the Court should conclude that *all* counts against the OCC should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(l) because Plaintiffs lack constitutional standing. The relief requested in the Amended Complaint will not redress the harm that Plaintiffs allege, thereby failing to satisfy the "redressability" requirement of Article III of the United States Constitution. Moreover, CFSA and Advance America have not adequately alleged the necessary causal link between the alleged actions of the OCC and the harm that they claim; the banks that allegedly dropped CFSA members as customers reached those decisions without the participation of the OCC.

Second, to the extent that the Amended Complaint seeks to preemptively enjoin the OCC from exercising its authority to examine national banks and federal savings associations and using its statutory enforcement authority to administratively address unsafe or unsound conditions at OCC-regulated institutions, Congress has withdrawn jurisdiction for any court to affect by injunction or otherwise such enforcement proceedings. 12 U.S.C. § 1818(i)(1). Consequently, this Court lacks the jurisdiction to grant relief that would require the OCC to cease activities necessary to pursue enforcement action, the very relief that Plaintiffs demand.

Third, the Court should dismiss Counts VI and VII of the Amended Complaint, which allege that the OCC failed to promulgate OCC Bulletin 2013-29 through notice-and-comment rulemaking pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, as failing to state a claim upon which relief may be granted, Fed. R. Civ. P. 12(b)(6). On its face,

OCC Bulletin 2013-29 is a general statement of policy that is not subject to the notice-and-comment requirements of the APA.[4]

Fourth, the Court should dismiss Counts VIII, IX, and X of the Amended Complaint for failure to state a claim because Plaintiffs are incorrect that the OCC exceeds its authority or violates the United States Constitution by issuing guidance that discusses potential risks encountered by the institutions OCC regulates—including "reputation risk" posed when a bank customer is engaged in economic activity that is illegal under federal or state law—or by criticizing a bank in supervisory correspondence or taking an enforcement action when the OCC finds that an institution is engaging in unsafe or unsound practices or violations of law. These activities are well within the OCC's statutory mandate and are based on well-established principles that pre-date Operation Choke Point. Similarly, the OCC's authority to require banks to assess the risks posed by individual customer relationships based on evidence suggesting a customer could be engaged in conduct that is fraudulent or otherwise violates state or federal law does not bar OCC-regulated institutions from providing services to entities legally engaged in payday lending or any other legal business.

Finally, the Amended Complaint fails to state a claim even under the liberal pleading standards of the Federal Rules of Civil Procedure. Plaintiffs' allegations of OCC involvement in Operation Choke Point and purported actions in forcing banks to terminate relationships with payday lenders are, at best, conclusory. Indeed, the allegations are rebutted by the U.S. House of Representative's staff report upon which Plaintiffs' rely heavily for the factual basis of their suit. As such, Plaintiffs fail to assert any "plausible claim for relief" against the OCC and the Amended Complaint should be dismissed. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[4] Because the OCC's issuance of OCC Bulletin 2013-29 did not constitute a final agency action, there is no administrative record to be filed in accordance with Local Civil Rule 7(n).

STATEMENT OF THE CASE

A. THE STATUTORY AND REGULATORY SCHEME

1. The OCC and the Examination and Regulation of Bank Activities

The OCC is a bureau of the Treasury Department that functions as the primary supervisor of federally chartered (national) banks and federally chartered savings and loan associations. 12 U.S.C. §§ 21 *et seq.*, 12 U.S.C. § 1461 *et seq.* The OCC administers statutory provisions governing virtually every aspect of the federal banking system, from chartering a new institution to appointing a receiver for an insolvent bank. 12 U.S.C. §§ 21, 191, 1464. The OCC has broad authority to "make a thorough examination of all the affairs of the bank[s]" it supervises. 12 U.S.C. § 481, *see also* 12 U.S.C. § 1463 (authorizing Comptroller to provide for the examination and safe and sound operation of Federal savings associations). "Bank safety and soundness supervision is an iterative process" between the regulators and the banks, and communication between regulators and banks is essential to achieving this end. *In re Subpoena Served upon Comptroller of Currency,* 967 F.2d 630, 633-34 (D.C. Cir. 1992); *see also In re Providian Fin. Corp. Sec. Litig.* 222 F.R.D. 22, 25-26 (D.D.C. 2004) "Through periodic examinations and intense regulation of unsound practices, the OCC actively engages with bank management to protect the interest of depositors and the general public in the solvency and soundness of national banks." *Sinclair v. Hawke,* 314 F.3d 934, 941 (8th Cir. 2003). This highly interactive scheme between regulators and banks has sometimes been described as a "relationship [that] is both extensive and informal." *In re Subpoena,* 967 F.2d at 633.

2. Bank Secrecy Act

The Bank Secrecy Act ("the BSA"), 31 U.S.C. §§ 5311-5330, is the primary U.S. anti-money laundering law and has been amended to include certain provisions of Title III of the

USA PATRIOT Act, which is intended to detect, deter, and disrupt terrorist financing networks. The OCC has promulgated regulations that (1) require institutions supervised by the OCC to have a written, board-approved program that is reasonably designed to assure and monitor compliance with the BSA. 12 C.F.R. § 21.21. OCC regulations also implement the portion of the BSA, 31 U.S.C. § 5318(g), that requires every national bank and federal savings association to file a Suspicious Activity Report ("SAR") when its employees detect "known or suspected" violations of federal law or suspicious transactions related to a money laundering activity or a violation of the BSA. *See also* 12 C.F.R. § 21.11 (SAR regulation). This reporting obligation not only requires an institution to report actual or suspected violations of law committed or attempted against the bank, a bank's BSA compliance program is expected to monitor customer activity for indications that a customer is using the institution to facilitate a criminal violation. 12 C.F.R. § 21.11(c). The filing of SARs by financial institutions alerting law enforcement to the suspicious activities of bank customers frequently leads to successful criminal prosecutions with respect to a broad variety of illegal activities.[5]

3. The OCC's Authority to Issue Regulations and Guidance Concerning Safety and Soundness

Legislative Rules

Congress has charged the OCC with assuring the "safety and soundness" of national banks and federally chartered savings associations under various statutes, including the National Bank Act, the Home Owners Loan Act ("HOLA"), and the Federal Deposit Insurance Act (the "FDI Act"). The OCC's supervisory power is broad, and the OCC is authorized "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. §§ 93a; 1464, *see*

[5] *See* "Investigations Assisted by FinCEN Data (Involving SARs)," http://www.fincen.gov/news_room/rp/sar_case_example_list.html?catid=00002

also Conference of State Bank Sup'rs v. Conover, 710 F.2d 878, 885 (D.C. Cir. 1983); *In re Franklin Nat'l Bank Sec. Litig.,* 478 F. Supp. 210, 217 (E.D.N.Y. 1979). These legislative rules are binding on the OCC and regulated institutions and fix the rights and obligations of entities coming within the jurisdiction of the OCC. *See*, *e.g.*, 12 C.F.R. Part 21, Minimum Security Devices and Procedures, Reports of Suspicious Activity, and Bank Secrecy Act Compliance.

Safety and Soundness Guidelines

The FDI Act requires that the OCC prescribe—by regulation or guideline—certain "standards for safety and soundness" regarding a bank's operation and management, its asset quality, earnings, and stock valuation, and its compensation of its employees," and "such other operational and managerial standards as the agency determines to be appropriate." *See* 12 U.S.C. § 1831p-1(a)-(c). In accordance with the FDI Act, the OCC has prescribed guidelines establishing "safety and soundness" standards which, following notice and comment, were published in the Code of Federal Regulations. *See* 12 C.F.R. § 30, App. A. Among these guidelines is a standard governing a bank's "internal controls and information systems," which provides that an institution should have such controls and systems that are "appropriate to the size of the institution and the nature, scope and risk of its activities" and that provide for, among other attributes, "[e]ffective risk assessment." *See* 12 C.F.R. § 30, app. A, ¶ II.A.2.

Policy Statements and Less Formal Guidance Documents

The OCC also provides guidance regarding the manner in which it supervises national banks and federal savings associations in the *Comptroller's Handbook*, a series of booklets that describe various aspects of the supervisory process. As set out in the "Large Bank Supervision" booklet, the OCC has identified eight different categories of risk that may have an impact on the safety or soundness of a financial institution: credit risk, interest rate risk, liquidity risk, price

risk, operational risk, compliance risk, strategic risk, and reputation risk. Of the eight, Plaintiffs' Amended Complaint focuses on reputation risk. As defined in the *Handbook*:

> Reputation risk is the risk to current or anticipated earnings, capital, or franchise or enterprise value arising from negative public opinion. This risk may impair a bank's competitiveness by affecting its ability to establish new relationships or services or continue servicing existing relationships. Reputation risk is inherent in all bank activities and requires management to exercise an abundance of caution in dealing with customers, counterparties, correspondents, investors, and the community.

Comptroller's Handbook, Large Bank Supervision (January 2010) (Updated May 2013), p. 63. The *Handbook* also provides the following illustration of reputation risk:

> A bank that actively associates its name with products and services offered through outsourced arrangements or asset management affiliates is more likely to have higher reputation risk exposure. Significant threats to a bank's reputation also may result from negative publicity regarding matters such as unethical or deceptive business practices, violations of laws or regulations, high-profile litigation, or poor financial performance. The assessment of reputation risk should take into account the bank's culture, the effectiveness of its problem-escalation processes and rapid-response plans, and its deployment of media.

Ibid.[6] The OCC may identify certain lending arrangements as presenting higher credit risk, but identification of the higher risks associated with those types of lending arrangements does not prevent national banks and federal savings associations from engaging in those transactions. Similarly, the OCC does not prohibit national banks and federal savings associations from engaging in transactions and relationships that it identifies as involving greater reputation risk.

In addition to the *Comptroller's Handbook*, the OCC issues bulletins and other publications that provide guidance on various topics. Plaintiffs' Amended Complaint identifies what they perceive as procedural and substantive failings of OCC Bulletin 2013-29. As

[6] The *Comptroller's Handbook* for Large Bank Supervision, along with other OCC guidance on the supervisory and examination process can be found at www.occ.gov/publications/index-publications.html.

discussed more fully below, *see* § IV, *infra*, by its own terms OCC Bulletin No. 2013-29 does not apply to the situation that is presently before the Court; *i.e.* the manner in which banks manage their relationships with their *customers.* Rather, this OCC Bulletin provides risk management guidance on operational concerns related to use of third parties to provide services to bank customers.

4. Administrative Proceedings: Formal and Informal Enforcement Actions

During the course of its examination of banking institutions, the OCC may determine that "any insured depository institution ... or any institution-affiliated party is engaged or has engaged ... in an unsafe or unsound practice in conducting the business of such depository institution," and institute administrative proceedings. *See* 12 U.S.C. § 1818(b)(l). The OCC may require that a bank submit an acceptable plan to achieve compliance with the "safety and soundness" guidelines set forth in 12 C.F.R. § 30 if the OCC determines that a bank has failed to satisfy safety and soundness standards. *See* 12 U.S.C. § 1831p-1(e)(1)(A); 12 C.F.R. §§ 30.2, 30.3. The OCC may "issue and serve upon ... such party a notice of charges constituting the alleged violation" and, after the notice and a hearing, determine whether the issuance of a permanent cease and desist order is warranted. 12 U.S.C. § 1818(b)(l), (6).[7] The OCC may also use informal enforcement actions, such as memoranda of understanding, to correct problems within a bank.

[7] In addition to its permanent cease and desist authority, the OCC is statutorily authorized to issue temporary cease and desist orders, which require a bank to take immediate actions to correct a safety and soundness deficiency, or to cease and desist from any further violation. See 12 U.S.C. § 1818(c)(l). Such temporary cease and desist orders are the only orders that may be reviewed by Federal district courts in actions brought by a bank: any notices issued by the OCC during the course of the administrative proceedings process are not reviewable in such federal actions. *See* 12 U.S.C. 1818(i)(l); *Peoples Nat'l Bank v. O.C.C.*, 227 F. Supp. 2d 645, 650 (E.D. Tex. 2002), *aff'd*, 362 F.3d 333 (5th Cir. 2004). Judicial review of such permanent orders is only available in the United States Courts of Appeals. *See* 12 U.S.C. § 1818(h)(2).

B. PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs allege: (1) that the OCC was an active participant in DOJ's Operation Choke Point, (2) that in conjunction with this initiative the OCC issued OCC Bulletin 2013-29, and (3) that the OCC coerced banks to drop payday lenders as bank customers, causing the injuries of which Plaintiffs complain. Am. Complt. ¶ 7. Plaintiffs seek declarations that the issuance of OCC Bulletin 2013-29 violated the APA's notice and comment rulemaking requirement, exceeded the OCC's statutory authority, and was arbitrary and capricious; that the OCC significantly changed the definition of *reputation risk* as used in OCC Bulletin 2013-29 in violation of the APA's notice and comment rulemaking requirements, and that the OCC has deprived them of their constitutional right to due process of law. Plaintiffs also seek entry of an injunction barring the OCC's "officers, employees, and agents" from "implementing, applying, or taking any action whatsoever" to have banks address the concerns identified in OCC Bulletin 2013-29, from "relying on the novel and revised definition of reputation risk that [it has] adopted without notice and comment rulemaking," from applying "informal pressure to banks to encourage them to terminate business relationships with payday lenders," or from acting in concert with the other agency defendants to harm Plaintiffs' reputations, to deprive them of their access to financial services; or to deprive them of their ability to pursue their chosen line of business without due process of law. Am. Complt. ¶ 185.

ARGUMENT

The Court should dismiss all of the claims asserted against the OCC. First, two threshold jurisdictional infirmities mandate dismissal. Plaintiffs lack the requisite standing under Article III of the U.S. Constitution, and 12 U.S.C. § 1818(i)(1) withdraws the Court's jurisdiction to grant the relief requested by the Plaintiffs – to preemptively enjoin the OCC from

investigating and, should circumstances warrant, taking formal action to redress safety and soundness issues that may arise at an OCC-regulated institution. Second, the Court should conclude that the issuance of OCC Bulletin 2013-29 neither violates the APA nor exceeds the OCC's broad authority to issue general statements of policy and other informal guidance regarding safe and sound operation of OCC supervised banks. Third, the Court should find that Plaintiffs' conclusory allegations regarding "informal pressure" allegedly brought by the OCC to encourage banks to drop payday lenders as customers fail to meet even the liberal pleading requirements of the Federal Rules of Civil Procedure. Plaintiffs can point to nothing in OCC regulations or guidance provided to institutions regulated by the OCC to support this claim, nor do their allegations in this regard move beyond "labels and conclusions." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Their Amended Complaint does not contain the "well-pleaded, nonconclusory factual allegation[s]" of improper conduct that are necessary to "nudge" their claims "across the line from conceivable to plausible." *Id.*

I. PLAINTIFFS LACK CONSTITUTIONAL STANDING TO PURSUE THIS ACTION AGAINST THE OCC

Plaintiffs lack the necessary standing required by Article III of the United States Constitution to bring this action because they have failed to show that the injuries purportedly suffered by CFSA members and Advance America would be redressed by an order against the OCC or that those injuries were caused by actions of the OCC.[8]

[8] An organization such as CFSA would have standing to sue on behalf of its members when: "[a] its members would otherwise have standing to sue in their own right, [b] the interests at stake are germane to the organization's purpose, and [c] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 181 (2000). In this case, *none* of the CFSA's members, including Advance America, would have standing to sue in their own right.

In order to meet the "case or controversy" requirement of Article III of the U.S. Constitution, a plaintiff must establish that it has standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.,* 454 U.S. 464, 471 (1982); *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102-103 (1998). The "irreducible constitutional minimum of standing" contains three requirements. *Steel Co.,* 523 U.S. at 102-103 (quoting *Lujan,* 504 U.S. at 560). First, a plaintiff must allege an "injury in fact – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted). Second, "there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* And third, "there must be redressability – a likelihood that the requested relief will redress the alleged injury." *Id.* "This triad of injury in fact, causation and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Id.* at 103-104.

Advance American and CSFA's other members lack standing to sue in their own right because they cannot meet either the "redressability" requirement or the "causation" requirement. Taking up the redressability element first, where a plaintiff challenges governmental action, the nature and extent of the facts that must be averred to satisfy the redressability requirement "depend[] considerably upon whether the plaintiff is himself an object of the [governmental] action" or whether the "asserted injury arises from the government's allegedly unlawful regulation ... of someone else." *Lujan,* 504 U.S. at 561-562. In cases where redressability "hinges on the response of the regulated ... third party to the government action," then "much more is needed." *Id.* The court may not "presume" or "predict" that such a third party will act in

a manner that will redress plaintiff's injury: it is incumbent on the plaintiff to allege facts "showing that those choices have been or will be made in such a manner as to ... permit redressability of injury." *Id.; see also, e.g., Illinois Public Telecommunications Ass'n v. F.C.C.*, 752 F.3d 1018, 1027 (D.C. Cir. 2014) ("it is well established that a merely speculative theory of redressability does not suffice to create Article III standing"); *St. John's United Church of Christ v. F.A.A.*, 520 F.3d 460, 463 (D.C. Cir. 2008) (holding that a plaintiff injured by a regulated third party must demonstrate a likelihood that the third party would change action in the event that the defendant agency changes action, notwithstanding the fact that plaintiff has alleged a procedural injury); *Town of Babylon v. Federal Housing Finance Agency*, 699 F.3d 221, 229 (2d Cir. 2012) ("Where, as here, a plaintiff complaining of procedural or substantive injury is not the regulated party, the plaintiff must demonstrate that favorable action by the regulating agency is likely to result in favorable action by the regulated party in addition to demonstrating a link between the procedural or substantive injury to the plaintiff and the adverse agency action"); *Levine v. Vilsack,* 587 F.3d 986, 992 (9th Cir. 2009) (discussing *Lujan* and stating that the redressability standard "is altered somewhat when third parties not before the court must change their behavior in order for any injury suffered to be redressed;" court will not engage in "speculation" or even "confident speculation"); *Burton v. Cent. Interstate Low-Level Radioactive Waste Compact Comm'n,* 23 F.3d 208, 210 (8th Cir. 1994) (when redressability of injury depends on actions of third parties not before the court, the complaint must contain allegations that the injury is likely to be redressed by a favorable decision: court does not accept "on faith" that the third party will act in a manner that will redress the plaintiffs injuries).

In this case, CFSA's members would be unable to satisfy the redressability requirement because, even if this Court were to grant the relief requested and vacate OCC Bulletin 2013-29

and enjoin the OCC and its officers, employees, and agents from implementing, applying, or taking any of the identified actions, it does not necessarily follow that the banks supervised by the OCC would open or re-open accounts of CFSA's members. Ultimately, the decision to open a bank account for a payday lender resides with the institution, not the OCC. Too many factors other than OCC guidance and supervision affect each bank's individual decision for Plaintiffs to demonstrate that those decisions would be changed if OCC Bulletin 2013-29 were withdrawn.

Plaintiffs complain of the effect of Operation Choke Point on banks' willingness to accept them as customers. Operation Choke Point is a program that was initiated and controlled by DOJ. It was directed at preventing third parties from using financial institutions as willing or unwilling participants in facilitating illegal activities. The OCC is not part of Operation Choke Point and had no role in planning it. Plaintiffs bear the burden of demonstrating that the relief they seek would redress their injuries. Thus, they must do more than allege that things will improve. They must provide evidence that, as a result of their requested relief being entered against the OCC, DOJ will dismantle Operation Choke Point, will cease to seek information from banks regarding customers alleged to be involved in illegal activity, and will no longer bring civil and criminal actions against banks that are believed to have facilitated illegal activities by bank customers.

In the absence of OCC Bulletin 2013-29, the BSA would still require OCC-supervised institutions to take steps to assure that they were not being used for money laundering, terrorist financing, or other illegal activities and to report suspicious activities to federal authorities. 12 C.F.R. Part 21. Similarly, even if OCC Bulletin 2013-29 were set aside and the OCC enjoined from enforcing it, each bank that terminated a payday lender's account would still be required to consider the safety and soundness standards imposed by 12 C.F.R. § 1831p-1(a)-(c), and to make

an independent determination of whether, for example, the bank could properly manage the risks that would be associated with re-opening an account for a payday lender while meeting the bank's obligation to have adequate internal controls and information systems "appropriate to the size and of the institution and the nature, scope and risk of the activities" and that would provide for "[e]ffective risk assessment." *See* 12 C.F.R. § 30, app. A at II.A.2. Moreover, the banks supervised by the OCC still would be subject to civil and criminal investigations by DOJ for their role in potentially facilitating illegal and fraudulent conduct by their customers and to criminal investigations by state law enforcement authorities for violations of state law. *See Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009). "Absent [factual allegations demonstrating that third party would act in a manner that would redress plaintiffs injury], any pleading directed at the likely actions of third parties or of parties under separate and independent statutory obligations would almost necessarily be conclusory and speculative." *Vilsack,* 587 F.3d at 992.

The Second Circuit addressed allegations similar to those made by Plaintiffs in an opinion involving separate claims by a municipality and an environmental advocacy group that each was injured by an OCC bulletin that described credit risk present in making mortgage loans where a municipal lending program would give the municipality a superior lien. The Second Circuit held that each of the plaintiffs had failed to meet the redressability requirement, explaining that even if it were to vacate the OCC guidance, national banks still would be free to make their own credit-risk assessment in determining whether to provide mortgage financing. *Town of Babylon*, 699 F.3d at 230 ("none of the declarations stated, or could state, that vacatur of the OCC Bulletin alone would result in national banks resuming their *status quo ante* lending practices").

> Nothing in the OCC Bulletin compelled national banks to take any action. The Bulletin is labeled "Supervisory Guidance," and is couched in entirely permissive language. *See* Office of the Comptroller of the Currency, OCC Bull. No. 2010–25, Property Assessed Clean Energy (PACE) Programs 1–2 (2010) ("National banks need to be aware of the FHFA's directives.... National bank lenders *should* take steps to mitigate exposures and protect collateral positions.... [B]anks that invest in mortgage backed securities ... *should consider* the impact of tax-assessed energy advances." (emphasis added)). The Bulletin alerts recipient banks only to the need for calculating a risk that varies from locality to locality. Were the Bulletin withdrawn, the need for a calculation would remain.

Id. at 230 (emphasis in original).

As with the plaintiffs in *Town of Babylon*, the Plaintiffs' in this case have failed to demonstrate redressability. Plaintiffs have the same problems demonstrating that OCC's actions in supervising banks *caused* the injuries to CFSA's members alleged in the Amended Complaint. Thus, while Plaintiffs allege specific instances of banks regulated by the OCC closing accounts of payday lenders, they have failed to allege sufficient facts to show that those decisions were the result of OCC actions rather than the result of independent decisions of bank management. *See, e.g.*, Am. Complt. ¶ 69 (alleging that a CFSA member lost "direct or indirect" business relations with, among other banks, Associated Bank, Bank of America, FirstMerit Bank, and JPMorgan Chase Bank and that these banks "cited regulatory pressure *or risk concerns*") (emphasis added); ¶ 70 (alleging that another CFSA member lost their relationship with Bank of America and that the bank "cited pressure from regulators"). Even these two allegations – the only ones where Plaintiffs even attempt to connect the closing of a CFSA member bank account with any OCC conduct – lack any meaningful specificity. *See National Wrestling Coaches Ass'n v. Department of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) ("[M]ere 'unadorned speculation' as to the existence of a relationship between the challenged government action and the third-party conduct

'will not suffice to invoke the federal judicial power'") (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)); *see also Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 457-58 (D.C. Cir. 2012) (where agency statements "neither require nor forbid any action on the part of" plaintiff, and plaintiff is not "the object of the government action or inaction," standing "is ordinarily substantially more difficult to establish").

Because Plaintiffs cannot show redressability, or causation, they lack standing to bring this action on behalf of themselves or CFSA members. *See Illinois Pub. Telecomm. Ass'n*, 752 F.3d at 1027; *Burton,* 23 F.3d at 210; *Simmons v. I.C.C.,* 900 F.2d 1023, 1026 (7th Cir. 1990); *see also, e.g., New York Coastal P'ship v. U.S. Dep't of Interior,* 341 F.3d 112, 116 (2d Cir. 2003) (affirming grant of motion to dismiss, stating that "[p]laintiffs-appellants have no standing in this case, because we can only speculate whether the remedy they seek would redress their purported injuries").[9]

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[9] To the extent that the Plaintiff CFSA purports to bring this action on its own behalf, it has no standing to do so for the further reasons that it has not suffered any injury in fact. Plaintiffs allege that CFSA "has expended substantial financial and human resources attempting to protect its members," that its "membership participation and revenue has diminished as a result of Operation Choke Point," and that "several sponsors withdrew or lessened their support of CFSA over the last year." *See* Am. Compl. ¶ 13. These allegations do not meet the test for standing. *See*, *e.g.*, *National Assoc. of Home Builders, et al. v. Environmental Protection Agency, et al.*, 667 F.3d 6, 11-12 (D.C. Cir. 2011) (finding no standing of trade association based merely on expenditure of "staff time and monetary resources" in pursuit of associational goals). CFSA alleges that it was not provided all of the procedural requirements of rulemaking under the APA and that the OCC "failed to provide any sort of public notice and opportunity to comment in advance of promulgating the rules relating to reputation risk contained in [OCC Bulletin No. 2013-29]." Am. Compl. ¶ 119. However, the Supreme Court has made clear that a procedural injury is, by itself, insufficient to confer standing. *See Lujan*, 504 U.S. at 572. Only a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Summers v. Earth Island Inst*., 555 U.S. 488, 496 (2009) (quoting *Lujan*, 504 U.S. at 572, n. 7) (emphasis in original). As a result, even if issuance of OCC Bulletin 2013-29 required adherence to APA rulemaking requirements, which it did not, CFSA has failed to allege facts showing that it has standing to bring this action on its own behalf, and the Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(l).

II. SECTION 8(i)(1) OF THE FEDERAL DEPOSIT INSURANCE ACT WITHDRAWS THE COURT'S JURISDICTION TO ENTER THE REQUESTED RELIEF

Plaintiffs' claims for injunctive relief that would prohibit the OCC from examining regulated entities to determine whether to bring an enforcement action must be dismissed. Section 8(i)(1) of the FDI Act withdraws the Court's jurisdiction to enjoin the OCC from exercising its authority to address unsafe or unsound conditions at an OCC-regulated institution. 12 U.S.C. § 1818(i)(1).

In furtherance of its statutory responsibilities, the OCC is authorized under section 8(b) of the FDI Act to order banking organizations for which the OCC is the "appropriate Federal banking agency" to cease and desist from engaging in unsafe or unsound practices or violations of law, and also to take "affirmative action" to correct the conditions resulting from any such practices or violations. 12 U.S.C. § 1818(b). The affirmative action that section 8(b) authorizes is broad and includes restricting the growth of the institution, disposing of any loan or asset, and rescinding agreements and contracts. 12 U.S.C. § 1818(b)(6)(B)-(D). The Congressional withdrawal of jurisdiction in 12 U.S.C. § 1818(i) is expressed in clear and categorical terms.[10] Except as specifically provided,[11] "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under [sections 1818, 1831o, or 1831p-1 of Title 12], or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 1818(i)(1). The Supreme Court has confirmed the breadth of this "plain,

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[10] The withdrawal of jurisdiction effected by section 1818(i) falls within Congress's authority under Article III, section 1 over the jurisdiction of federal courts other than the Supreme Court. *See First Nat'l Bank of Scotia v. United States*, 530 F. Supp. 162, 167 (D.D.C. 1982).

[11] Judicial review of agency enforcement actions under the Federal Deposit Insurance Act is available in only three situations: (1) district court jurisdiction to enjoin temporary agency orders pending completion of administrative proceedings; (2) court of appeals review of a final agency enforcement action; and (3) district court jurisdiction to enforce an effective and outstanding agency notice or order. *Board of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 38 (1991).

preclusive language" *Board of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 39 (1991) (holding that court lacked jurisdiction to enforce automatic stay in bankruptcy against agency enforcement proceeding).

Courts have repeatedly acknowledged and given full effect to the Congressional intent behind the provision. *See Ridder v. O.T.S.*, 146 F.3d 1035, 1039 (D.C. Cir. 1998) (affirming district court's finding of no jurisdiction under 1818(i)(1) to enjoin provision in consent order prohibiting payment of attorney fees for bank officers who were non-parties to the consent order proceedings); *Hindes v. F.D.I.C.*, 137 F.3d 148, 162-64 (3d Cir. 1998) (holding that section 1818(i) barred injunctive and declaratory relief to shareholders of bank put into receivership where shareholders sought review under APA of agency notice of undercapitalization issued just prior to appointment of receiver); *American Fair Credit Ass'n v. United Credit Nat'l Bank*, 132 F. Supp. 2d 1304, 1312 (D. Colo. 2001) (finding no jurisdiction over consumer group's claim for damages asserted against a bank for breach of contract where a consent order entered against bank prohibited "payment of funds for any reason" to the consumer group); *Spiegel Holdings, Inc. v. Office of Comptroller of Currency*, Case No. 03-335-KI, 2003 WL 21087707 *3 (D. Or. Apr. 28, 2003) (finding no jurisdiction under § 1818(i)(1) over holding company's claims to enjoin OCC from requiring indirect subsidiary bank to make further draws on letter of credit required by consent order; noting "[t]he fact that [the bank] may not be able to satisfy a judgment against it does not give this court the authority to enjoin the OCC or its supervision of the Consent Order and required [letter of credit]").[12]

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[12] *Ridder* is especially instructive. In that case, OTS issued a consent order that restricted a holding company's use of the assets of its subsidiary depository institution on grounds that the holding company was likely to cause significant dissipation of assets or earnings of the depository institution. 146 F.3d at 1037. The holding company's suit to enjoin this prohibition in a prior action was dismissed and the dismissal was affirmed by the D.C. Circuit. *See CityFed Fin. Corp. v. OTS*, 58 F.3d 738 (D.C. Cir. 1995). At the same time that the holding company was

(footnote continues on next page)

Plaintiffs' claim for injunctive relief runs afoul of Section 1818(i)(1). Plaintiffs ask for an order "[e]njoining … OCC … and [its] officers, employees, and agents" from "implementing, applying, or taking any action whatsoever" pursuant to OCC Bulletin 2013-29, from "relying on the novel and revised definition of reputation risk that [it has] adopted without notice and comment rulemaking," or from applying "informal pressure to banks to encourage them to terminate business relationships with payday lenders." Am. Complt. ¶ 185(f). In its broad and sweeping terms, this relief would preemptively "affect by injunction or otherwise" the issuance or enforcement of any notice or order under 12 U.S.C. §§ 1818(b) and 1831p-1. This is because an injunction prohibiting the OCC from implementing, applying, or taking *any action* pursuant to OCC Bulletin 2013-29 arguably would prevent the OCC, as a practical matter, from requiring banks through notice or order to cease and desist from engaging in unsafe or unsound practices with regard to third-party relationships to the extent those unsafe or unsound practices are addressed in OCC Bulletin 2013-29. It would arguably prevent the OCC from requiring banks to correct unsafe or unsound conditions to the extent those practices or violations are addressed in the OCC guidance. Section 1818(i)(1) does not allow a Court to order such relief. Accordingly, this Court should dismiss Plaintiffs' claims for injunctive relief.

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subject to this prohibition, however, the Third Circuit found the holding company to be obligated to advance legal fees to certain of its former officers who were defendants in an unrelated action. *See Ridder v. CityFed Fin. Corp.*, 47 F.3d 85 (3rd Cir. 1995). Recognizing the conflict between the Consent Order and its ruling, the Third Circuit vacated its order and remanded the case to the District Court. Eventually, the former officers filed suit against the OTS in the D.C. District Court, seeking an injunction prohibiting OTS from enforcing the consent order and requiring OTS to authorize the holding company to disburse funds to cover the former officers' legal fees and costs. The D.C. District Court found that it had no jurisdiction under § 1818(i)(1) to entertain the former officers' action where they were non-parties to the consent order. The D.C. Circuit affirmed, concluding that "section 1818(i) unambiguously precludes judicial review." 146 F.3d at 1041 (citing *MCorp* and *Hindes*). Significantly, the court dismissed the officer's injunction action for lack of jurisdiction despite the Third Circuit's prior determination that the holding company otherwise had an obligation to advance the officers' attorney fees.

III. OCC BULLETIN 2013-29 NEITHER CONSTITUTES FINAL AGENCY ACTION SUBJECT TO REVIEW UNDER THE APA NOR EXCEEDS THE OCC'S BROAD STATUTORY AUTHORITY

Even if the Plaintiffs had standing to bring this action – which they do not – the case should still be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) because the OCC's issuance of OCC Bulletin 2013-29 is neither final agency action that Congress granted federal courts jurisdiction to review under 5 U.S.C. § 704 nor exceeds the OCC's broad authority to supervise national banks and federal savings associations. OCC Bulletin 2013-29 constitutes guidance – not a regulation. As such, it is not final agency action that is subject to review under the APA and the OCC was not required to use the notice-and-comment rulemaking procedures of the APA for the issuance of the bulletin.

Plaintiffs claim that the OCC violated the APA by failing to comply with the APA's notice-and-comment procedures in issuing OCC Bulletin 2013-29. Am. Complt. ¶ 119. However, it is well settled that the APA's notice and comment provision does not apply to "general statements of policy." *Investment Co. Institute v. C.F.T.C.*, 720 F.3d 370, 377 (D.C. Cir. 2013) (holding that Commission guidance did not require opportunity for notice and comment). Indeed, under the APA's taxonomy, prior notice and comment is required for "substantive" (or "legislative") rules, but not for "general statements of policy." 5 U.S.C. § 553(b)(3)(A); *see also*, *e.g.*, *Air Transport Ass'n of America, Inc. v. F.A.A.*, 291 F.3d 49, 55 (D.C. Cir. 2002) (Section 553 "exempts 'interpretive rules' and 'general statements of policy' from notice and comment procedures").

In attempting to determine whether an issuance is a legislative rule or a more general statement of policy "[s]ometimes a simple reading of the document and study of its role in the regulatory scheme will yield the answer." *Public Citizen, Inc. v. U.S. Nuclear Regulatory*

Comm'n, 940 F.2d 679, 682 (D.C. Cir. 1991). Such is the case here. A reading of OCC Bulletin 2013-29 within the context of the statutory scheme in which the OCC and the banks operate shows that OCC Bulletin 2013-29 is a general statement of policy.

The Supreme Court has described general statements of policy as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (announcement that agency will discontinue program is general statement of policy). The purpose of a general statement of policy has been described as follows:

> As an informational device, the general statement of policy serves several beneficial functions. By providing a formal method by which an agency can express its views, the general statement of policy encourages public dissemination of the agency's policies prior to their actual application in particular situations. Thus the agency's initial views do not remain secret but are disclosed well in advance of their actual application. Additionally, the publication of a general statement of policy facilitates long range planning within the regulated industry and promotes uniformity in areas of national concern.

Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). An agency policy statement "merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm. By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach." *Syncor Int'l Corp. v. Shalala*, 127 F. 3d 90, 94 (D.C. Cir. 1997).

In determining whether an agency document constitutes a statement of policy rather than a binding rule, courts are guided by two lines of inquiry. *See National Ass'n of Broadcasters v. F.C.C.*, 569 F.3d 416, 426 (D.C. Cir. 2009); *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006). The first line of inquiry focuses on the effects that the statement has on the agency and whether the statement cabins the agency's discretion.

See Center for Auto Safety, 452 F.3d at 806 ("One line of analysis considers the effects of an agency's action, inquiring whether the agency has '(1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion'") (quoting *Crop Life America v. E.P.A.*, 329 F.3d 876, 883 (D.C. Cir. 2003)). The second line of inquiry focuses on whether the agency expressed an intention to be bound by the statement. *See Center for Auto Safety*, 452 F.3d at 806; *Vietnam Veterans of Am. v. Sec'y of Navy*, 843 F.2d 528, 538 (D.C. Cir. 1988); *United States Tel. Ass'n v. F.C.C.*, 28 F.3d 1232, 1234 (D.C. Cir. 1994). The determination of the agency's intention "entails a consideration of three factors: '(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.'" *Center for Auto Safety*, 452 F.3d at 806 (quoting *Molycorp, Inc. v. E.P.A.*, 197 F.3d 543, 545 (D.C. Cir. 1999)). The language used by an agency is an important consideration in such determinations. *See Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (*per curiam*).

It is apparent from the four corners of OCC Bulletin 2013-29 that it constitutes a "general statement of policy" under the APA that does not require prior notice and comment. The OCC has labeled this issuance as "guidance" and the language used by the agency when it drafted OCC Bulletin 2013-29 is consistent with this label. The OCC's intent is made clear in the very first sentence of the document: "[t]his bulletin provides guidance to national banks and federal savings associations (collectively banks) for assessing and managing risks associated with third-party relationships." Further, the language selected by the agency reflects the fact that this is an informational document that reflects the OCC's thinking regarding "its current enforcement or adjudicatory approach." *Syncor*, 127 F. 3d at 94. The repeated use of the precatory verb

"should" instead of "shall" or "must," for example, makes it clear that the document is intended to be advisory in nature rather than establishing compulsory requirements:

- "A bank should adopt risk management processes commensurate with the level of risk and complexity of its third-party relationships."
- "A bank should ensure comprehensive risk management and oversight of third-party relationships involving critical activities."
- "Before entering into a third-party relationship, senior management should develop a plan to manage the relationship."
- "A bank should conduct due diligence on all potential third parties before selecting and entering into contracts or relationships."
- "The bank should consider [listed matters] during due diligence."
- "Once the bank selects a third party, management should negotiate a contract that clearly specifies the rights and responsibilities of each party to the contract."
- "Senior management should periodically assess existing third-party relationships to determine whether the nature of the activity performed now constitutes a critical activity."
- "Management should ensure that relationships terminate in an efficient manner, whether the activities are transitioned to another third party or in-house, or discontinued."
- "Senior management should ensure that periodic independent reviews are conducted on the third-party risk management process, particularly when a bank involves third parties in critical activities."

This language plainly demonstrates that the Bulletin is an advisory statement that is not intended as a final agency action[13] that sets a binding norm upon banks.[14] Plaintiffs fail to identify any

[13] *See, e.g., Independent. Equip. Dealers Ass'n v. E.P.A.*, 372 420, 427 (D.C. Cir. 2004) (no final agency action where letter was "the type of workaday advice letter that agencies prepare countless times per year in dealing with the regulated community"); *Aerosource, Inc. v. Slater,* 142 F.3d 572, 575, 580 (3d Cir. 1998) (reports and alerts issued by the FAA were not final agency action given that the reports and alerts "recommended that anyone who had [certain aircraft parts] repaired by [plaintiff] take appropriate action to determine whether they met applicable standards;" the reports and alerts provided "advisory information" to the aviation community); *Air California v. U.S. Dep't of Transp.,* 654 F.2d 616, 620-621 (9th Cir. 1981) (letter which "did not specify the exact form that compliance [with statutes] would take, but rather commented, briefly and tentatively, upon alternatives" was not final agency action); *see also Golden and Zimmerman, LLC v. Domenech,* 599 F.3d 426,431 (4th Cir. 2010) (granting motion to dismiss because document "on its face purports to provide only 'information' to help new

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wording from the 2013 guidance to support their contention that it is "being enforced as a binding legal norm" and "creates new legal consequences." *See* Am. Complt. ¶ 47. [15]

OCC Bulletin 2013-29 does not commit the OCC to a particular course of action.[16] While OCC Bulletin 2013-29 does provide guidance to the industry regarding the OCC's views concerning proper management of vendor relationships, the OCC retains complete discretionary authority under the FDI Act to determine whether particular circumstances warrant further investigation or to initiate an enforcement action against a bank that, in the OCC's view, may be engaged in unsafe or unsound practices. *See* 12 U.S.C. § 1818(b)(1). Because the Bulletin takes nothing away from the OCC's discretion, it is not "final" for purposes of judicial review.[17]

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licensees 'comply' with the applicable laws and regulations"); *DRG Funding Corp. v. Sec'y of Hous. and Urban Dev.,* 76 F.3d 1212, 1214-1215 (D.C. Cir. 1996) (document that "did not complete the administrative proceedings" was not final agency action: any intermediate action "is necessarily tentative, provisional, or contingent and therefore nonfinal") (internal quotation marks and citations omitted).

[14] *See, e.g., Natural Res. Def. Council. v. E.P.A.,* 559 F.3d 561, 565 (D.C. Cir. 2009) (giving "decisive weight to the agency's choice of words" and finding that language such as "may be exceptional events" or "may qualify for exclusion" to be non-binding); *Brock v. Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533, 538 (D.C. Cir. 1986) (stating that court has "given decisive weight to the agency's choice between the words 'may' and 'will'" in determining whether a statement is binding or not); *see also, e.g., National Ass'n of Home Builders v. Norton,* 415 F.3d 8, 14 (D.C. Cir. 2005) (finding that protocols issued by the Fish and Wildlife Service were not final agency actions because they did not contain "any language *compelling* a landowner to conduct a survey at all") (emphasis added); *Aerosource,* 142 F.3d at 575 (finding no final agency action when FAA reports and alerts informed aviation community that plaintiffs aircraft parts "*should* be suspected as improperly maintained" and "*may* be subject to early failure," and advised the aviation community to "take appropriate action to determine whether [the parts] met applicable standards") (emphasis added).

[15] The informational nature of the 2013 guidance is made even more clear by its location on the OCC's website, where it was posted under the heading "News and Issuances," and grouped together with: "News Releases," "Alerts," "Consumer Advisories," "Congressional Testimony," "Speeches," "Events," and "Public Service Announcements." *See* http://www.occ.treas.gov/news-issuances/index-news-issuances.html.

[16] *See, e.g., Biotics Research Corp. v. Heckler,* 710 F.2d 1375, 1378 (9th Cir. 1983) (FDA regulatory letter was not a final agency action because "such letters do not commit the FDA to enforcement action"); *Estee Lauder, Inc. v. U.S. Food & Drug Admin.,* 727 F. Supp. 1, 5 (D.D.C. 1989) (holding that an FDA regulatory letter ordering a manufacturer to alter its labeling and warning that "the agency is prepared to take the regulatory measures discussed in our previous letters," was not final agency action because its "language is equivocal- there is no definite plan of attack on the part of the Administration"); *Domenech,* 599 F.3d at 433 (ATF's reference guide was not final agency action because it did not alter agency's discretion to prosecute entities for engaging in conduct described in the reference guide); *see also, e.g., Norton,* 415 F.3d at 16 (protocols issued by the Fish and Wildlife Service were not final agency actions because they did not "cabin the agency's discretion").

[17] To the extent OCC Bulletin 2013-29 could be read to suggest that the OCC would have "reason to believe" that a bank which, in the course of dealing with a third party relationship, was engaged in an unsafe or unsound practice or was violating the safety and soundness guidelines, the 2013 guidance would still not constitute "final agency action." *See Federal Trade Comm'n v. Standard Oil Co. of California*, 449 U.S. 232, 241 (1980) (complaint issued

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OCC Bulletin 2013-29 does not impose new or different obligations upon the banking industry; the rights and obligations of national banks and federal savings associations remained exactly the same after the 2013 guidance's issuance as they had been previously. *See, e.g., Acquest Wehrle LLC v. U.S.,* 567 F. Supp. 2d 402,410 (W.D.N.Y. 2008) (no final agency action when "the legal rights and obligations of the parties were precisely the same the day after the jurisdictional determination was issued as they were the day before"). As an initial matter, OCC Bulletin 2013-29 did nothing to alter the banks' preexisting obligations to conduct their activities in accordance with principles of safe-and-sound banking practice, or to abide by 12 C.F.R. § 30 and follow the requirements contained in the OCC's regulations. The guidance did not augment or diminish banks' obligations to take necessary steps to comply with the BSA. Additionally, OCC Bulletin 2013-29 left untouched any of a bank's rights, including the right to participate in an administrative proceeding in the event that the OCC were to decide to initiate an enforcement action pursuant to its authority under the FDI Act, and to seek judicial review of a final order at the proceeding's conclusion. *See* 12 U.S.C. §§ 1818(h)(2), 1818(c)(2). To the extent the Plaintiffs believe that the rights of the banks were affected by the 2013 guidance, these rights were only affected "on the contingency of future administrative action," which does not support the conclusion that OCC Bulletin 2013-29 was a "final" action by the OCC. *See Peoples Nat'l Bank v.* O.C.C., 363 F.3d 333, 337 (5th Cir. 2004) (dismissing action and finding that OCC bulletin was not final agency action because bulletin only affected bank's rights "on the contingency of future administrative action"); *DRG Funding Corp. v. Sec'y of Hous. and Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (holding unreviewable an agency order that "does not itself adversely affect the complainant but only affects his rights adversely on the contingency of

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by the Federal Trade Commission was not, by its terms, a final agency action because it was only indicative of the FTC's "reason to believe" that the party was violating the law).

future administrative action”); *Independent Equip. Dealers Ass’n v. E.P.A.,* 372 F.3d 420, 428 (D.C. Cir. 2004) (“[p]ractical consequences such as the threat of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement are insufficient to bring an agency’s conduct under our purview”) (internal quotation marks omitted).

OCC Bulletin 2013-29 is also not a final agency action because legal consequences do not flow from failure to comply with the guidance itself. *See Domenech,* 599 F.3d at 433 (no final agency action “because legal consequences do not emanate from [the document] but from the Gun Control Act and its implementing regulations”); *id.* (no final agency action when the document “did not itself *determine* the law or the consequences of not following it”) (italics in original); *id.* (no final agency action because the document “is not the source of an obligation that gives rise to penalties or other consequences); *American Land Title Ass’n v. Clarke,* 743 F. Supp. 491, 494 (W.D. Tex. 1989) (granting motion to dismiss because interpretative letters issued by the OCC were not final agency actions in light of the fact that letters themselves did “not have the status of law”); *see also Federal Trade Comm’n v. Standard Oil Co. of California,* 449 U.S. 232, 241 (1980) (“[t]he action must be a definitive statement of [the agency’s] position, with concrete legal consequences”). Here, OCC Bulletin 2013-29 only alerts regulated institutions to risks and steps that can be taken to address those risks. Were the OCC to take an enforcement action, it would still need to prove by a preponderance of the evidence that the failure to take appropriate steps in the face of particular risks constituted an unsafe or unsound practice. *See* 12 U.S.C. § 1818; 12 C.P.R. § 30.

Lastly, there are sound policy reasons as to why OCC Bulletin 2013-29 should be found to be non-binding guidance rather than final agency action. Courts have long recognized that

federal agencies should be encouraged to communicate information and advice to their regulated community in an informal manner without judicial interference. As some courts have stated:

> This technique of apprising persons informally as to their rights and liabilities has been termed an "excellent practice in administrative procedure." Administrative opinions should, to the greatest extent possible, be available to the public as a matter of routine; it would be unfortunate if the prospect of judicial review were to make an agency reluctant to give them.

Clarke, 743 F. Supp. at 494 (quoting *National Automatic Laundry and Cleaning Council v. Shultz,* 443 F.2d 689 (D.C. Cir. 1971)); *see also, e.g., Domenech,* 599 F.3d at 432 ("Holding that the publication of the Reference Guide constitutes agency action 'would quickly muzzle any informal communications between agencies and their regulated communities – communications that are vital to the smooth operation of both government and business.'") (quoting *Independent Equip. Dealers Ass'n,* 372 F.3d at 428)). OCC Bulletin 2013-29 represents communication of information and supervisory opinion of a sort that the OCC routinely employs to draw banks' attention to risks. This Court should not interfere with this type of informal communication. *See, e.g., Peoples Nat'l Bank v. O.C.C.,* 362 F.3d 333, 336-37 (5th Cir. 2004) (OCC bulletin that changed procedures for review of examination ratings not final agency action); *Clarke,* 743 F. Supp. at 495-497 (OCC interpretive letters addressing hypothetical questions not reviewable as final agency action).

A policy statement that is purely informational in nature, imposes no new obligations, and merely expresses the agency's views of what the law requires is not reviewable final agency action. *Independent Equipment Dealers Association v. Environmental Protection Agency*, 372 F.3d 420, 427-428 (D.C. Cir. 2004). OCC Bulletin 2013-29 falls into this category. As explained in the document, the OCC previously had addressed the risk management principles contained in OCC Bulletin 2013-29 in OCC Bulletin 2001-47, "Third-Party Relationships: Risk

Management Principles," and OCC Advisory Letter 2000-9, "Third-Party Risk." OCC Bulletin 2013-29 at p. 1. In issuing OCC Bulletin 2013-29, the OCC collected prior guidance and provided additional information about the risk management life cycle and techniques that banks could follow, but left the legal rights and obligations of banks and their customers the same as they existed prior to its issuance. The publication of this information did not constitute final agency action that is reviewable under the APA. *See Independent Equipment Dealers Association v. Environmental Protection Agency*, 372 F.3d at 428. Because OCC Bulletin 2013-29 is not final agency action reviewable under the APA, federal courts lack jurisdiction to consider Plaintiffs' claims. *Id.* For the same reasons, the OCC was not required to follow notice and comment rulemaking procedures prior to issuing OCC Bulletin 2013-29. 5 U.S.C. § 553(b)(3)(A); *see, e.g. Investment Co. Institute v. C.F.T.C.*, 720 F.3d 370, 377 (D.C. Cir. 2013).

The language of OCC Bulletin 2013-29 also does not support Plaintiffs' newly asserted claim that, in issuing the Bulletin, the OCC revised its prior definitive interpretation of reputation risk so that it was required to engage in notice and comment rulemaking. *See* Am. Complt. ¶¶ 125-128. In their amended pleading, Plaintiffs now allege that since 2008 the OCC and the other defendants have expanded the traditional understanding of reputation risk ultimately "to encompass the potential risk posed to a depository institution by its customers' public reputation or popularity," *see* Am. Complt. ¶ 44. But in support of this allegation, Plaintiffs point to nothing other than OCC Bulletin 2013-29. As discussed below, *see* § IV *infra*, Plaintiffs' characterization of OCC Bulletin 2013-29 as addressing risk posed by the reputation of a bank's customer is patently erroneous. OCC Bulletin 2013-29 provides guidance on how a bank should manage risk associated with its third-party (*i.e.* vendor) relationships, not its relationships with

its own customers. Furthermore, apart from Plaintiffs' mischaracterization of OCC Bulletin 2013-29, the description of reputation risk in the 2013 guidance is entirely consistent with the OCC's prior descriptions of reputation risk and cannot reasonably be characterized as constituting any sort of revised or expanded definition. As noted in the *Comptroller's Handbook*, "[r]eputation risk is inherent in *all* bank activities and requires management to exercise an abundance of caution in dealing with customers, counterparties, correspondents, investors, and the community." *Comptroller's Handbook, Large Bank Supervision* (January 2010) (Updated May 2013), p. 63. Prior OCC guidance from 2008 and 2006 explains that reputation risk can come from a bank's relationship with a customer. In April 2008, the OCC issued *Payment Processors: Risk Management Guidance*, OCC Bulletin 2008-12 (Apr. 24, 2008), which provides "guidance to national banks for due diligence, underwriting, and monitoring of entities that process payments for *telemarketers and other merchant clients*." *Id.*, p. 1 (emphasis added). The guidance notes that "[a]s detailed in several OCC issuances, certain merchants, such as telemarketers, pose a higher risk than other merchants and require additional due diligence and close monitoring." *Ibid.* The 2008 guidance further notes that a bank may be subject to reputation risk in its dealing with a customer that acts as a payment processor:

> When a bank has a relationship with a processor, it is exposed to risks that may not be present in relationships with other commercial customers. The bank encounters strategic, credit, compliance, transaction, and reputation risks in these relationships. * * * Banks should also consider carefully the legal, reputation, and other risks presented by relationships with processors including risks associated with customer complaints, returned items, and potential unfair or deceptive practices.

Ibid. Prior to that, in September 2006, the OCC issued *Automated Clearing House Activities: Risk Management Guidance*, OCC Bulletin 2006-39 (Sept. 1, 2006), which provides "guidance for national banks and examiners on managing the risks of automated clearing house (ACH)

activity." *Id.*, p. 1. The guidance states that banks should be aware of risks arising from relationships with third-party senders of ACH transactions. "Although third-party senders are *bank customers*, they require oversight by bank management." *Id.*, p. 2.

> Banks that engage in ACH transactions with high-risk originators or that involve third-party senders face increased reputation, credit, transaction, and compliance risks. High-risk originators include companies engaged in potentially illegal activities or that have an unusually high volume of unauthorized returns. High-risk originators often initiate transactions through third-party senders because they have difficulty establishing a relationship directly with a bank.

Id., p. 4. The 2006 guidance further recommends that banks that initiate ACH transactions for third-party senders should require certain information on the customers of the third-party senders (the originator) such as the customer's name, taxpayer identification number, principal business activity, and geographic location and should verify that the originator is operating a legitimate business. *Id.*, p. 7.

This previously issued guidance rebuts Plaintiffs' contention that the OCC has redefined reputation risk in the last few years or deployed the new definition in support of Operation Choke Point. Thus, the facts here are easily distinguishable from cases where an agency gives a regulation a definitive interpretation and later significantly revises its interpretation. *See*, *e.g.*, *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. 1997), and *Alaska Professional Hunters Ass'n v. F.A.A.*, 177 F.3d 1030 (D.C. Cir. 1999). In those two cases, the D.C. Circuit recognized that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." *Id.* at 1034. *See also Mortgage Bankers Association v. Harris*, 720 F.3d 966, 969 (D.C. Cir. 2013) (reaffirming those prior holdings). Plaintiffs fail to show any grounds for application of this line

of authority. In *Alaska Professional Hunters*, the Court of Appeals invalidated an FAA regulatory notice requiring hunting and fishing guides who piloted light aircraft as part of their tours to abide by regulations applicable to commercial air operations. The notice had overturned the FAA regional office's longtime practice of not having such a requirement. The court of appeals described how the notice was a break from prior practice.

> Agency officials in the Alaskan Region uniformly advised all guides, lodge managers and guiding services in Alaska that they could meet their regulatory responsibilities by complying with the requirements of part 91 only. FAA officials gave that advice for almost thirty years. As for the agency as a whole, the FAA noted in 1992 that its "past policy" permitted guide pilots and lodge operators to operate aircraft under Part 91. And it acknowledged in 1997 that "[u]ntil recently, lodge/guide operators have been advised that Part 135 did not address their operation of aircraft."

177 F.3d at 1035. In contrast to such a clear about-face, OCC Bulletin 2013-29 continues the OCC longtime guidance that "[r]eputation risk is inherent in *all* bank activities." *Comptroller's Handbook, Large Bank Supervision*, p. 63.

For all the foregoing reasons, this Court should find that OCC Bulletin 2013-29 is non-binding guidance that is neither reviewable under the APA nor subject to the APA's notice and comment procedures, and based upon that finding dismiss the Amended Complaint.

IV. PLAINTIFFS FAIL TO STATE A CLAIM THAT IS PLAUSIBLE ON ITS FACE

Plaintiffs' claims against the OCC also should be dismissed pursuant to Rule 12(b)(6) because they fail to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

> Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556-557). Plaintiffs' specific allegations relating to the OCC are very limited. Plaintiffs allege that the OCC has used OCC Bulletin 2013-29 and the concept of reputation risk to pressure financial institutions to terminate their relationships with payday lenders. *Id.*, ¶¶ 47-51. A review of the actual wording of the 2013 guidance reveals that Plaintiffs' allegations regarding the guidance are entirely erroneous.[18] The plain wording of the guidance shows that it applies to a bank's dealings with its own vendors, not to its relationships with its customers. *See also* OCC Bulletin No. 2013-29, n. 1 ("Third-party relationships include activities that involve outsourced products and services, use of independent consultants, networking arrangements, merchant payment processing services, services provided by affiliates and subsidiaries, joint ventures, and other business arrangements where the bank has an ongoing relationship or may have responsibility for the associated records. * * * Third-party relationships generally do not include customer relationships").[19] As for Plaintiffs' allegations that the OCC uses the concept of reputation risk to pressure banks to terminate accounts of payday lenders, *see*, *e.g.*, Am. Complt. ¶ 53, these allegations are just as conclusory and inaccurate as Plaintiffs' allegations regarding the 2013 guidance. *See*, *e.g.*, *Comptroller's Handbook, Large Bank Supervision* (January 2010) (Updated May 2013), p. 63 (identifying reputation risk as being "inherent in all bank activities"). This Court should disregard all of

[18] When the complaint explicitly references and relies upon a document, that document can be treated as incorporated into the complaint for purposes of a motion to dismiss. *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

[19] OCC Bulletin 2008-12: *Payment Processors*, and OCC Bulletin 2006-39: *Automated Clearing House Activities*, provide guidance to banks on managing relationships with bank customers whose business entails processing a large volume of transactions through the payments system. Although Plaintiffs do not cite these guidance documents in their Amended Complaint, the arguments in this memorandum would apply equally to these documents were they the subject of Plaintiffs' Amended Complaint.

Plaintiffs' allegations regarding the 2013 guidance and the Agency's use of reputation risk on grounds that Plaintiffs' allegations are contradicted by the relevant documents. *See*, *e.g.*, *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004) ("[n]or must we accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice"); *Thompson v. HSBC Bank USA, N.A.*, 850 F. Supp. 2d 269, 275 (D.D.C. 2012) (dismissing action on grounds that court did not need to accept as true allegations expressly contradicted by exhibits); *Bopp v. Wells Fargo Bank, N.A.*, 740 F. Supp. 2d 12, 15 (D.D.C. 2010) ("this Court does not have to accept as true any factual allegations in the Complaint insofar as they contradict exhibits to the complaint or matters subject to judicial notice"); *Spahr v. U.S.*, 501 F. Supp. 2d 92, 97 (D.D.C. 2007) (dismissing taxpayers suit against IRS for failure to state claim where claims were based on allegations flatly contradicted by exhibits plaintiff attached to amended complaint). The Court should credit the actual wording of OCC Bulletin 2013-29 and the guidance provided in the *Comptroller's Handbook* over Plaintiffs' erroneous interpretation of that guidance and find that Plaintiffs' allegations with respect to OCC Bulletin 2013-29 and to OCC's use of reputation risk do not meet the plausibility test.

Plaintiffs' other allegations with respect to the OCC's purported involvement in Operation Choke Point also fail to set forth any plausible claim for relief. Their allegations of conduct of "the Defendant agencies" are couched in conclusory language and are made "on information and belief." *See*, *e.g.*, Am. Complt. ¶ 7 ("On information and belief, the Defendant agencies have employed a variety of back-room pressure tactics against regulated financial institutions"); *ibid.* ("On information and belief, numerous banks have yielded to Defendant's [sic] coercive regulatory pressure").

Where Plaintiffs' allegations do provide any specificity, they refer to documentation that simply does not support the proposition that the OCC was a participant in Operation Choke Point. For example, Plaintiffs allege that "[t]he Defendant agencies, under the guise of protecting the safety and soundness of banks, are waging a covert war against certain legitimate businesses that rely on banking services to function." Am. Compl. ¶ 52. In support of this allegation regarding the "Defendant agencies," Plaintiffs cite to a recent staff report on Operation Choke Point by the U.S. House of Representatives Committee on Oversight and Government Reform as well as to documents provided in an appendix to the report. *Ibid.* (citing STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., REP. ON THE DEPARTMENT OF JUSTICE'S 'OPERATION CHOKE POINT': ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES? (Comm. Print. 2014) (hereinafter "Staff Report"), at 1. Significantly, neither the Staff Report nor the materials in the Report's Appendix supports Plaintiffs' allegations with respect to the OCC. Indeed, the Staff Report itself does not even mention the OCC. The Report's Appendix, which is 898 pages long, in no place states that the OCC was a part of Operation Choke Point. This is not surprising since the OCC was, in fact, not part of Operation Choke Point.

Plaintiffs allege that "[t]he Defendant agencies have also acted in concert with DOJ, which has used its investigatory authority to reinforce the Defendant agencies' back-room pressure tactics." Am. Compl. ¶ 56. While Plaintiffs cite to several documents contained in the Appendix to the Staff Report as support for this allegation, none support the conclusion that the OCC was ever involved in Operation Choke Point. Plaintiffs cite two documents, but neither names OCC. *Id.* (citing Staff Report app. at HOGR-3PPP000029 and HOGR-3PPP000048.) Plaintiffs cite to a September 2013 DOJ memorandum, which Plaintiffs acknowledge only "mentioned future coordination with the OCC." *Id.* (citing Staff Report app. at HOGR-

3PPP000329.) But that DOJ memorandum, which was from Michael S. Blume, Director of DOJ's Consumer Protection Branch, to Stuart F. Delery, Principal Deputy Assistant Attorney General in DOJ's Civil Division and dated September 9, 2012, states that "we hope to begin working with the OCC soon." *Id.* (citing Staff Report app. at HOGR-3PPP000329.)

Plaintiffs also allege that later in September 2013, "representatives of DOJ, FDIC, and OCC, made a joint presentation on Operation Choke Point to the Federal Financial Institutions Examination Council." *Id.* (citing Staff Report app. at HOGR-3PPP000344.) The documents cited do not support this allegation. The documents are a set of PowerPoint slides for a panel discussion at the Federal Financial Institutions Examination Council on the topic *Third-Party Payment Processors: Relationships, Guidance, and Case Examples*. *Id.* (citing Staff Report app. at HOGR-3PPP000344.) The PowerPoint slides for the OCC and FDIC presenters do not mention Choke Point. The OCC presentation addressed past OCC formal enforcement actions against Wachovia Bank in 2008 and against T Bank in 2010 for those institutions' respective unsafe or unsound practices involving relationships with telemarketers and third-party payment processors. *See* Staff Report app. at HOGR-3PPP000362. Plaintiffs also mischaracterize the Report. Plaintiffs state:

> As the House of Representatives Committee on Government Oversight recently reported, this "close coordination" among Defendant agencies and DOJ "likely contribute[s] to the banks' understanding that the FDIC policy statements carr[y] with them the threat of a federal investigation."

Id. (citing Staff Report at 9). The Staff Report actually states:

> The FDIC's close coordination with the Department was well-reported, and likely contributed to the banks' understanding that the FDIC policy statements carried with them the threat of a federal investigation.

See Staff Report at 9. Thus, Plaintiffs' reference to the Staff Report and its Appendix do not support Plaintiffs' allegations with respect to the OCC.

Plaintiffs make conclusory statements about the OCC's participation in Operation Choke Point and conclusory allegations that OCC's actions caused Plaintiffs' injuries. Plaintiffs' references to the OCC Bulletin 2013-29 and to the Staff Report and its Appendix not only fail to support Plaintiffs' allegations with respect to the OCC, the references contradict Plaintiffs' allegations. Moreover, an OCC official has testified to Congress that the OCC was not part of Operation Choke Point.[20] Accordingly, Plaintiffs fail to state a claim against the OCC that is plausible on its face and, thus, Plaintiffs' claims against the OCC should be dismissed.

V. PLAINTIFFS FAIL TO STATE A CLAM FOR DENIAL OF DUE PROCESS

Finally, in Count X Plaintiffs claim that the OCC violated their constitutional right to due process and that the Court "has authority under 28 U.S.C. § 1331 and its traditional powers of equity to declare invalid and enjoin agency action that violates the Constitution." Am. Complt. ¶¶ 146-47. In support of their claim, Plaintiffs allege that the "OCC has inflicted reputational harm upon CFSA's members" and other payday lenders "by stigmatizing them as, among other things, 'illegitimate,' 'fraudulent,' and 'high risk,'" and that such stigma "threatens to preclude them from pursuing their lawful, chosen line of business." Am. Complt. ¶¶ 147-48. Plaintiffs assert that the OCC never provided them with "notice of its intention to blacklist them … or with any opportunity to be heard and to defend their good names." Am. Complt. ¶ 150. Thus, Plaintiffs allege a violation of their procedural due process rights. Apart from their failure to set forth any plausible claim, *see* § IV *supra*, Plaintiffs' due process count fails for the additional

[20] *See* n. 3, *infra* (citing to OCC Deputy Chief Counsel Daniel P. Stipano's July 15, 2014 testimony to the Subcommittee on Oversight and Investigations, House Committee on Financial Services).

reason that Plaintiffs cannot, as a matter of law, set forth a constitutional due process claim based on the OCC's issuance of generalized risk management guidance or its alleged involvement in Operation Choke Point. Indeed, even if OCC Bulletin 2013-29 constituted a final agency action, which it does not, Plaintiffs still would not have any cause of action under the due process clause. Even in cases where a plaintiff has adequately alleged a final agency action with regard to generalized policy matters, courts have disallowed claims premised on due process rights. As the D.C. Circuit noted in *Natural Defense Council v. E.P.A.*, 859 F.2d 156 (D.C. Cir. 1988), unlike adjudicatory proceedings involving only one or a small number of parties, "due process restrictions [are] not applicable to legislative activities of [an] administrative agency." *Id.* at 194 (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (Holmes, J.)); *see also Brown v. McGarr*, 583 F. Supp. 734, 736 (N.D. Ill. 1984) ("[i]n the context of rulemaking . . . the fifth amendment's requirements of individualized due process do not apply"). Plaintiffs allege that the OCC has engaged in conduct that has affected the payday lending industry as a whole. *See*, *e.g.*, Am. Complt. ¶ 148 (alleging that the OCC has imposed a stigma "upon CFSA's members and other law-abiding responsible payday lenders"); *id.* ¶ 149 (alleging an attack by the OCC on "the reputation of payday lenders"). The Supreme Court has held that constitutional procedural due process protections simply do not apply to generalized regulatory policy decisions. In *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973), the Supreme Court rejected a procedural due process challenge to an order of the Interstate Commerce Commission that was "applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act" and "[n]o effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances." *Id.* at 245-46; *see also id.* at 245 (observing "distinction in administrative law between proceedings for the

purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other"). *See also National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 881 n.4 (D.C. Cir. 1987) ("due process imposes no constraints on informal rulemaking beyond those imposed by the statute"). Accordingly, Plaintiffs' procedural due process claim fails.

CONCLUSION

For the foregoing reasons, the OCC's motion should be granted and Plaintiffs' claims against the Office of the Comptroller of the Currency and Thomas J. Curry should be dismissed

Respectfully submitted,

AMY S. FRIEND
Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

HORACE G. SNEED
Director of Litigation

GREGORY F. TAYLOR
Assistant Director of Litigation

/s/ Peter C. Koch
PETER C. KOCH
Counsel – Litigation Division
Office of the Comptroller of the Currency
400 7th Street SW
Washington DC 20219
Telephone: (202) 649-6313
Facsimile: (202) 649-5709

August 18, 2014

CERTIFICATE OF SERVICE

I, Peter C. Koch, an attorney of record, do hereby certify that a copy of this Memorandum in Support of the OCC's Motion to Dismiss was served this 18th day of August 2014 by electronic filing pursuant to Local Civil Rule 5.4.

/s/ Peter C. Koch
PETER C. KOCH
Counsel – Litigation Division
Office of the Comptroller of the Currency
400 7th Street SW
Washington DC 20219
Telephone: (202) 649-6313
Facsimile: (202) 649-5709

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., et al.

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,

Defendants.

Civil Action No. 14-953 GK

[PROPOSED] ORDER

Upon consideration of the Motion To Dismiss Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief filed by defendants Office of the Comptroller of the Currency and Thomas J. Curry in his official capacity as Comptroller of the Currency (collectively "OCC") and for good cause shown, it is hereby

ORDERED that the OCC's Motion To Dismiss is hereby GRANTED.

Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief as against the OCC is accordingly dismissed with prejudice.

Dated: ___________, 2014

____
Hon. Gladys Kessler
United States District Judge