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## **Q&A with Peter Weinstock: CFSA files lawsuit to end Operation Choke Point**

The Community Financial Services Association of America (CFSA), the payday lenders trade association, and its member company Advance America, filed a lawsuit on 5 June accusing US regulators of adopting guidance that exceeds their statutory authority and using enforcement authority in an arbitrary and capricious manner, as part of Operation Choke Point. Sophie Cameron of E-Finance & Payments Law & Policy spoke to **Peter Weinstock, Partner at Hunton & Williams**, about the grounds for the CFSA's lawsuit and the likelihood that they will succeed in shutting down Operation Choke Point.

### **Q: On what grounds is the CFSA suing US banking regulators?**



**Peter Weinstock:** The CFSA is alleging that the bank regulators have adopted guidance that exceeded its statutory authority, and enforced such guidance in a way that created damages to CFSA members. Those members, among other things, lost banking relationships and incurred higher fees to continue operations. The CFSA is also alleging that Operation Choke Point was a politically motivated and coordinated campaign to use enforcement authority in an arbitrary and capricious manner.

### **Q: Do you think that the CFSA has a strong case?**

**PW:** It is always difficult to 'fight City Hall.' Courts defer to government agencies in the interpretation of the agencies' own statutes and regulations. The question is whether the government actions exceed their statutory authority or were otherwise arbitrary and capricious. The bar on the arbitrary and capriciousness standard is high. The CFSA can show actual damages based on the government's action. It is often difficult in such cases to show both causation and damages. Nonetheless, the CFSA has formulated a well reasoned cause of action. The DOJ's acknowledgement of the harm to legitimate businesses and their cavalier attitude that such firms will somehow just be alright were naïve at best.

### **Q: Has Operation Choke Point been successful in cutting off access to payments systems?**

**PW:** Operation Choke Point has had a DDT-like effect on access to the banking system. It has created a new catch phrase: 'De-risking the customer base.' Banks cannot charge customers who are likely to draw regulatory scrutiny sufficient fees to make profitable their business. Accordingly, bankers are pursuing the path of cutting off such customers from banking services.

As discovery of internal DOJ communications show, the DOJ anticipated that Operation Choke Point would have the effect of causing banks to disassociate from customers engaged in lawful behaviour as well as customers whose activities may be fraudulent.

**Q: Do you think Operation Choke Point unfairly targets online lenders?**

**PW:** The provision of services online is not in and of itself illegal activity. Many of the online lenders were licensed, examined and supervised by state authorities. Others relied on licenses and association with Indian tribes. A number of such lenders took the position that they were exempt from state licensing laws. Clearly the government did not buy such assertions. The US Supreme Court's dismissal of the State of Michigan's lawsuit against the Bay Mills Indian Community over an off-reservation casino confirms that there may, in fact, be legitimate arguments in favour of the position that the online lenders have taken. The point bankers are raising is why are they being put in the position of having to be judge and jury on matters that are susceptible to complicated constitutional issues (the US Supreme Court ruled 5 to 4 in favour of the Bay Mills Indian Community), instead of having the DOJ do its job and pursue such parties directly?

**Q: Is Operation Choke Point a positive initiative to combat dubious merchants?**

**PW:** Operation Choke Point is the legal equivalent of the impact on dolphins of trawler net fishing. Even though the trawler nets may catch desired game fish, the side effect is to accidentally drag to death dolphins and other protected species. Such an approach is inconsistent with the bedrock tenet that 'better that 10 guilty persons escape than that one innocent suffer.'