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# THE INTERNET IS FOR PORN...OR IS IT?

## FAIR ACCESS TO FINANCIAL SERVICES AND THE NEED FOR *ONLYPORN* LEGISLATION

### ABSTRACT

*Historically, the pornography industry has been the target of countless attempts to delegitimize sex work, but it still endures as a legal industry. Nevertheless, financial service providers such as banks and third-party payment processors have circumvented providing the industry fair access to their services, under vague pretexts such as reputational risk. While porn is not the only marginalized industry affected by unfair treatment from financial service providers, it is among the most targeted. This note gives context to this issue and provides that access to the global marketplace should not be limited by financial institutions functioning as de facto legislators, responsible for determining who is and is not worthy of participation. Rather, Congress should act to legislate fair access to financial services for the pornography and sex work industry.*

### INTRODUCTION

Sex sells. This saying has centuries-old roots but rings especially true today, with internet pornography (hereinafter porn)<sup>1</sup> website Pornhub ranking twelfth among the most trafficked websites in the world behind tech giants such as Google, YouTube, and Facebook.<sup>2</sup> Pornhub's number of global visitors surpasses that of Amazon, Netflix, Reddit, TikTok, Microsoft, and countless other household names.<sup>3</sup>

Porn has been around since mankind learned how to draw,<sup>4</sup> and without porn, neither the internet nor technology would be what it is today.<sup>5</sup> Porn was instrumental in the early adoption of cutting-edge technological innovations,<sup>6</sup> including the accessibility and popularization of streaming and electronic

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1. While there are various mediums that can be utilized for the distribution of pornography, the focus of this note is internet porn.

2. See *Top Websites Ranking*, SIMILARWEB, <https://www.similarweb.com/top-websites/> (last visited Sept. 20, 2022, at 7:50 PM).

3. See *id.*

4. See *The History of Porn*, PORNHUB (Apr. 28, 2015), <https://www.pornhub.com/insights/history-of-porn>.

5. Ross Benes, *How porn has been secretly behind the rise of the internet and other technologies*, BUS. INSIDER (May 7, 2017, 10:12 AM), <https://www.businessinsider.com/porn-behind-internet-technologies-2017-5?amp>.

6. See Jeremy Glass, *8 Ways Porn Influenced Technology*, THRILLIST (Feb. 14, 2014), <https://www.thrillist.com/amphtml/vice/how-porn-influenced-technology-8-ways-porn-influenced-tech-supercompressor-com> (Porn helped advance and make accessible various early technologies such as: the rise of the Super 8 camera (aka 8mm film), the move from Betamax to VHS, the rise of the internet and push toward streaming, the early adaptation of e-commerce, and the various payment formulas that resulted).

commerce (e-commerce).<sup>7</sup> It was also a leader in the innovation of user-generated and advertiser-funded platforms, as well as the now-customary monthly subscription framework.<sup>8</sup> And, while porn is not responsible for the invention of these new technologies and business models, it is an industry that subsists by taking advantage of them before others, thereby introducing them into mainstream culture.<sup>9</sup> The industry's technological sophistication grew out of necessity, and necessity remains the reason that the porn industry continues to find itself at the precipice of these emerging areas.<sup>10</sup> According to author and journalist Patchen Barss, "[t]here's a nimbleness to being in the marginalia' . . . [o]nce technologies and platforms reach mainstream status, they may become less friendly to adult content, and the social stigma attached to porn has repeatedly drawn consumers to new, largely untested technologies . . . ." <sup>11</sup> An example of this unfriendliness is characterized below.

In August 2021, OnlyFans, a popular subscription-based social media platform that has become synonymous with porn,<sup>12</sup> sent shockwaves through the industry and popular culture alike when its founder and CEO, Tim Stokley, announced that the platform would no longer allow its content creators to post "sexually explicit content."<sup>13</sup> Stokley blamed the ban on pressure received from its banking partners, who made it nearly impossible for OnlyFans' adult content creators to get paid.<sup>14</sup> The announcement was met with an outcry from the platform's users and advocates, as "the proposed

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7. See Brad Stone, *An E-Commerce Empire, From Porn to Puppies*, N.Y. TIMES (May 18, 2008), <https://www.nytimes.com/2008/05/18/technology/18gordo.html>.

8. See Robert Weiss, *The Evolution of Pornography*, PSYCH. TODAY (July 2, 2020), <https://www.psychologytoday.com/us/blog/love-and-sex-in-the-digital-age/202007/the-evolution-pornography?amp>; see also Ross Benes, *PORN: The Hidden Engine That Drives Innovation In Tech*, BUS. INSIDER (July 5, 2013), <https://www.businessinsider.com/how-porn-drives-innovation-in-tech-2013-7?amp> ("While the military created the Internet, it would not have found a solid consumer base without porn. Not only did the adult industry find enough early consumers to keep the Internet around, but it then pioneered streaming video, tracking devices and online credit card transactions. The concept of ecommerce . . . owes much of its early existence to porn.").

9. See generally Weiss, *supra* note 8; See also Benes, *supra* note 8.

10. See Kaveh Waddell, *How Porn Leads People to Upgrade Their Tech*, THE ATLANTIC (June 7, 2016), <https://www.theatlantic.com/technology/archive/2016/06/how-porn-leads-people-to-upgrade-their-tech/486032/>.

11. *Id.*

12. See Charlotte Shane, *OnlyFans Isn't Just Porn* ;), THE N.Y. TIMES MAG. (Sept. 28, 2021), <https://www.nytimes.com/2021/05/18/magazine/onlyfans-porn.html>; see also Joshua Espinoza, *OnlyFans Explained: What You Need to Know About the NSFW Site*, COMPLEX (Sept. 20, 2021), <https://www.complex.com/life/what-is-onlyfans-explainer>.

13. See Lucas Shaw, *OnlyFans to Ban Sexually Explicit Videos Starting in October*, BLOOMBERG (Aug. 19, 2021), <https://www.bloomberg.com/news/articles/2021-08-19/onlyfans-to-block-sexually-explicit-videos-starting-in-october> (The official statement made by OnlyFans read "In order to ensure the long-term sustainability of the platform, and to continue to host an inclusive community of creators and fans, we must evolve our content guidelines."); Patricia Nilsson, *OnlyFans To Ban Sexually Explicit Content Over Regulatory Concerns*, FIN. TIMES (Aug. 19, 2021), <https://www.ft.com/content/216c8f47-153c-4d0d-8f01-c46abf06b9c0>.

14. See Nilsson, *supra* note 13.

changes would have been catastrophic for sex workers, who comprise the majority of the creators on the platform.”<sup>15</sup> The timing of the announcement was especially harmful since it impacted users who were among the “tens of thousands [of people who] turned to OnlyFans in the [Covid-19] pandemic . . . [in] acute financial distress,” to earn an income.<sup>16</sup>

Approximately one week after OnlyFans’ announcement, the public experienced headline whiplash when news circulated that the platform had reversed its decision and suspended the ban indefinitely. OnlyFans took to Twitter with no more of an explanation other than the reversal was a result of securing the “assurances necessary” to support its community of creators.<sup>17</sup> OnlyFans’ quick reversal highlighted the power of financial institutions to influence the accessibility of otherwise legal content. Following the dramatic turn of events, there was a noticeable increase in public discourse regarding what many have referred to as financial censorship.<sup>18</sup>

Access to financial services enables individuals and businesses to participate in the global marketplace, and as such, online transactions have become an indispensable part of the economy.<sup>19</sup> The percentage of e-commerce transactions increases every year and is expected to represent a quarter of all global retail sales by 2025.<sup>20</sup> E-commerce payment methods range from credit and debit cards, to third-party payment processors (TPPP) such as PayPal, Venmo, and Square, to direct bank transfers via wire and Automated Clearing House transactions (ACH) (hereinafter all shall be referenced together as financial services).<sup>21</sup> One result of this infrastructure is that the financial service institutions facilitating payments have the ability to act as virtual gatekeepers by way of blocking transactions through their respective networks as they see fit. “Entry points like Venmo may deny you

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15. Jason Parham, *The OnlyFans Porn Ban Reversal Does Not Reassure Creators*, WIRED (Aug. 25, 2021), <https://www.wired.com/story/onlyfans-reverse-porn-ban-creators/>.

16. Jessica Stoya, *What We Can Really Learn From the OnlyFans Debacle*, SLATE (Aug. 25, 2021), <https://slate.com/human-interest/2021/08/onlyfans-sex-banned-allowed-decision-history.html>.

17. The statement, announced on Twitter, read: “Thank you to everyone for making your voices heard. We have secured assurances necessary to support our diverse creator community and have suspended the planned October 1 policy change. OnlyFans stands for inclusion, and we will continue to provide a home for all creators.” OnlyFans (@OnlyFans), TWITTER (Aug. 25, 2021, at 7:56AM), [https://twitter.com/OnlyFans/status/1430499277302816773?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1430499277302816773%7Ctwgr%5E%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fwww.bloomberg.com%2Fnews%2Farticles%2F2021-08-25%2Fonlyfans-drops-plan-to-ban-sexually-explicit-content-amid-uproar](https://twitter.com/OnlyFans/status/1430499277302816773?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1430499277302816773%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.bloomberg.com%2Fnews%2Farticles%2F2021-08-25%2Fonlyfans-drops-plan-to-ban-sexually-explicit-content-amid-uproar).

18. Marta Belcher, *OnlyFans Content Creators Are the Latest Victims of Financial Censorship*, ELEC. FRONTIER FOUND. (Aug. 24, 2021), <https://www.eff.org/deeplinks/2021/08/onlyfans-content-creators-are-latest-victims-financial-censorship>.

19. See generally Daniela Coppola, *E-commerce worldwide - statistics & facts*, STATISTA (Feb. 23, 2022), [https://www.statista.com/topics/871/online-shopping/#topicHeader\\_\\_wrapper](https://www.statista.com/topics/871/online-shopping/#topicHeader__wrapper).

20. See *id.*

21. See *E-commerce Payment Methods*, PENNSTATE EXTENSION (May 4, 2020), <https://extension.psu.edu/e-commerce-payment-methods>.



access” to their services, and “intermediaries [such as banks] like Wells Fargo [etc.] may block particular transactions, certain [categories] of transactions, transactions with certain people or companies, or deny you service entirely.”<sup>22</sup> As a result, these institutions have the ability to “heavily influence what kind of speech can exist online,”<sup>23</sup> and concerns have subsequently been voiced about the abuse of that power.<sup>24</sup>

Notably, while porn is not the only morally dubious business affected by a block of access to financial services, it is among the most targeted.<sup>25</sup> Following this Introduction, Part I of this Note details recent government and legislative actions that have affected the porn industry. Part II cites recent examples of how institutions providing financial services have regulated the porn industry. Part III discusses recent lawmaking proposals meant to promote transparency and provide fair access to financial services. Lastly, Part IV provides that a solution to financial censorship of the porn industry is for Congress to enact narrowly aimed, industry-specific legislation. In addition to addressing the various illegality concerns within the porn industry (as well as other industry-specific regulations), the proposed legislative effort should mandate fair access to financial services subject to individualized general risk calculations and implement uniform compliance regulatory measures for continued access.

## **I. BACKGROUND: GOVERNMENT ACTIONS, LEGISLATIVE HISTORY, AND FINANCIAL INSTITUTION REGULATION OF FINANCIAL SERVICES**

Institutions providing financial services have, both directly and indirectly, participated in the regulation of the porn industry. This influence

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22. Andrew M. Bailey, Bradley Rettler, & Craig Warmke, *Philosophy, politics, and economics of cryptocurrency II: The moral landscape of monetary design*, PHI. COMPASS, 4 (2021), <https://doi.org/10.1111/phc3.12784>.

23. Press Release, Electronic Frontier Foundation, 22 Rights Groups Tell PayPal and Venmo to Shape Up Policies on Account Closures (June 15, 2021), <https://www EFF.org/press/releases/22-rights-groups-tell-paypal-and-venmo-shape-account-freezes-and-closures>.

24. These concerns are detailed in the remainder of this note.

25. Other areas impacted include, but are not limited to, political campaigns and speech, firearms, tobacco, and oil industries. As it pertains to discrimination of the broader sex industry, “[i]n 2012, Paypal pressured the indie publisher Smashwords to stop selling books with adult content. In 2014, JPMorgan Chase terminated the accounts of many involved in the adult film industry. This came on the heels of Chase refusing to process payments for Lovability, an online condom store. And, in 2017, the adult social network FetLife saw its payment services revoked.” Bailey et al., *supra* note 22; “In 2012 TED speaker Cindy Gallop launched a crowdsourced porn site based on her TED Talk, ‘Make Love Not Porn,’ which highlights unrealistic expectations about porn sex. Gallop had raised \$500,000 from an undisclosed angel investor, but discovered her company ‘couldn’t work with PayPal, couldn’t work with Amazon, couldn’t work with Google Checkout, couldn’t work with any of the main merchant partner gateways.’” V. Blue, *PayPal, Square and big banking’s war on the sex industry*, ENGADGET (Dec. 2, 2015), <https://www.engadget.com/2015-12-02-paypal-square-and-big-bankings-war-on-the-sex-industry.html>.

has, in part, been the result of government actions that began in the early 2000s, and which are further detailed below.

#### A. REPUTATIONAL RISK AND OPERATION CHOKE POINT

Recently, reputational risk has been used more frequently by the financial industry to regulate legal yet marginalized businesses such as porn. “Reputational risk is the potential that negative publicity regarding an institution’s business practices, whether true or not, will cause a decline in the customer base, costly litigation, or revenue reductions.”<sup>26</sup> Yet, the implementation and enforcement of reputational risk in the financial service industry, and in particular banking, “is nothing new.”<sup>27</sup>

For several decades, federal and state regulators have published guidance for banking institutions to help them focus on regulating risk when evaluating which customers to service.<sup>28</sup> The principal federal financial regulators include the Office of the Comptroller of Currency (OCC), Federal Reserve, and National Credit Union Administration (NCUA), and each has established guidelines for banks to follow when assessing such risks.<sup>29</sup> At the state level, New York is just one jurisdiction that has incorporated reputational risk into its regulatory approach to banking.<sup>30</sup> Markedly, each of these regulators have published different definitions of reputational risk and varying approaches to evaluating risk.<sup>31</sup>

Since banks are primarily private institutions, deciding not to do business with certain businesses can be viewed as an exercise of their federal rights—so long as they are not discriminating against a protected class under federal or state law.<sup>32</sup> Banks consider this autonomy critically important.<sup>33</sup> According to a Deloitte report on reputational risk, the World Economic Forum found that “on average more than 25% of a company’s market value is directly attributable to its reputation.”<sup>34</sup> However, there is a legitimate concern that the concept of reputational risk has become far more susceptible

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26. BD. OF GOVERNORS OF THE FED. RESRV. SYS., SR 95-51, LEGAL / REPUTATIONAL RISK (Feb. 26, 2021).

27. Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523, 543 (2020).

28. *Id.* at 543–44; see also Rolland Johannsen, *BankThink Managing reputation risk is getting more complicated*, AM. BANKER (Apr. 22, 2019), <https://www.americanbanker.com/opinion/managing-reputation-risk-is-getting-more-complicated>.

29. See Hill, *supra* note 27, at 544–45.

30. *Id.* at 554.

31. *Id.* at 544–49.

32. See Faith Karimi, *Here’s why some businesses can deny you service - but others can’t*, CNN (June 30, 2018), <https://www.cnn.com/2018/06/29/us/when-businesses-can-deny-you-service-trnd/index.html>.

33. See *2014 Global Survey on Reputation Risk*, DELOITTE (2014), [https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx\\_grc\\_Reputation@Risk%20survey%20report\\_FINAL.pdf](https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report_FINAL.pdf).

34. *Id.*

to political control.<sup>35</sup> “Historically, few people have known, or even cared, if a particular bank was doing business with a specific company or financing a specific project. This has changed — and changed dramatically.”<sup>36</sup> Banks losing control of their internal risk management systems to political agendas has become an “emerging reality.”<sup>37</sup>

Today’s highly charged and extremely partisan political environment continues to create additional reputational risk for banks, with activists on both sides of the political spectrum seeking to involve the industry in supporting their particular issues or agenda . . . [T]he impact of politics on a bank’s reputation has expanded to include not only how a bank does business, but increasingly with whom.<sup>38</sup>

As a hotly contested subject of political discussion,<sup>39</sup> the porn industry has become particularly vulnerable to the political pressures placed on banks and other financial institutions to defer to public discourse when analyzing risk assessments.

In the aftermath of the 2007-2008 financial crisis, which included a federal bailout of distressed banks worth approximately \$498 billion, the government narrowed its regulatory focus on domestic financial services.<sup>40</sup> One of the targets of this regulation was payday lending, which had become known for its victimization of consumers and its participation in the laundering of illegal proceeds.<sup>41</sup> In 2009, in order to regulate payday lending, former President Barack Obama created the Financial Fraud Enforcement Task Force (Task Force) within the Department of Justice (DOJ).<sup>42</sup>

The Task Force announced in 2013 that the DOJ was asking banking institutions (and “by extension [TPPPs] relying on those banks”) for “greater cooperation” in taking actions to suspend and deny payday lending access to their services.<sup>43</sup> Specifically, the Task Force requested financial service providers regulate all “businesses or individuals not behaving in an ethical and lawful manner” and to do so by acting as “bottlenecks, or choke-points in the fraud being committed by the targeted business.”<sup>44</sup> They further communicated that the intended result was to choke out or “starve” account

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35. Johannsen, *supra* note 28.

36. *Id.*

37. *Id.*

38. *Id.*

39. Kelsy Burke, *White conservatives use anti-pornography crusades to secure power*, THE WASH. POST, (July 6, 2022), <https://www.washingtonpost.com/made-by-history/2022/07/06/white-conservatives-are-using-anti-pornography-crusades-secure-power/>.

40. Tam Harbert, *Here’s how much the 2008 bailouts really cost*, MIT MGMT. SLOAN SCH. (Feb. 21, 2019), <https://mitsloan.mit.edu/ideas-made-to-matter/heres-how-much-2008-bailouts-really-cost>.

41. Michael J. Bresnick, Exec. Dir., FDIC Fin. Fraud Enf’t Task Force, Speech at the Exchequer Club of Washington, D.C. (Mar. 20, 2013).

42. *Id.*

43. *Id.*

44. *Id.*

holders who presented “red flags indicative of fraud,” including the payday loan servicers that contributed to the financial crisis a few years prior.<sup>45</sup> This controversial practice has since been referred to as “Operation Choke Point.”<sup>46</sup>

Following the introduction of Operation Choke Point, the DOJ and Federal Deposit Insurance Corporation (FDIC) issued over sixty subpoenas to various financial institutions, each including a document from the FDIC and the Office of the Comptroller of Currency (OCC), detailing the reputational risks posed by certain businesses including payday lending and pornography.<sup>47</sup> Once the subpoenas were sent out, the FDIC set up calls and meetings with banks using “what it termed ‘strong moral persuasion’”<sup>48</sup> to encourage banks to terminate services to high-risk industries, citing institutional reputational risk and describing the industries as “unsavory,” “dirty,” or “undesirable.”<sup>49</sup> Thereafter, “[w]hat began as persuasion degenerated into meetings and telephone calls where banks were abusively threatened by an FDIC attorney”<sup>50</sup> with threats of federal investigation.<sup>51</sup> “Banks [were] put in an unenviable position: discontinue longstanding, profitable relationships with fully licensed and legal businesses, or face a potentially ruinous lawsuit by the Department of Justice.”<sup>52</sup>

As expected, the regulatory pressure and threats of reputational risk resulted in reports that banks were closing the accounts of lawfully operating businesses,<sup>53</sup> including the accounts of sex workers in the porn industry who otherwise maintained “good financial standing.”<sup>54</sup> Evidence was also provided that an FDIC Deputy Director advised other FDIC staff involved in the enforcement of Operation Choke Point, that when addressing banks

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45. *Id.*

46. *The U.S. Department of Justice’s “Operation Choke Point”: Hearing Before the Subcomm. On Oversight and Investigations of the Comm. On Fin. Serv.*, 113th Cong. 90 (2014) (statement of N.C. Patrick T. McHenry, Chairman, H. Subcomm. on Financial Serv.).

47. Hill, *supra* note 27, 571–73 (“FDIC’s guidance listed ‘credit repair services, debt consolidation and forgiveness programs, online gambling-related operations, government grant or will-writing kits, payday or subprime loans, pornography, online tobacco or firearms sales, pharmaceutical sales, sweepstakes, and magazine subscriptions’ as high-risk businesses . . .”). It is also important to note that these legal industries were also listed among illegal activities such as Ponzi schemes, racist materials, and drug paraphernalia—therefore equating them. See STAFF OF U.S. COMM. ON OVERSIGHT AND GOV’T REFORM, 113th Cong., Rep on *The U.S. Dep’t of Just’s “Operation Choke Point”: Illegally Choking Off Legitimate Businesses?*, at 8 (2014).

48. Hill, *supra* note 27, at 577.

49. Kerry Picket, *Emails Show Obama FDIC Struggled With Legal Basis For Operation Choke Point*, DAILY CALLER (Oct. 19, 2018), <https://dailycaller.com/2018/10/19/operation-choke-point-obama-fdic-emails/>.

50. Hill, *supra* note 27, at 577.

51. STAFF OF U.S. COMM. ON OVERSIGHT AND GOV’T REFORM, *supra* note 47.

52. *Id.* at 9.

53. Hill, *supra* note 27, at 573.

54. Elizabeth Nolan Brown, *DOJ’s ‘Operation Choke Point’ May Be Root of Porn Star Bank Account Closings*, REASON (Apr. 28, 2014), <https://reason.com/2014/04/28/doj-operation-chokepoint-and-porn-stars/>.

regarding the reputational risks of payday lending to always reference pornography “in an effort to convey a ‘good picture regarding the unsavory nature of the businesses at issue. [That] one is judged by the friends one keeps,’ . . . [and] including payday lenders in the same circle as pornographers . . . will ultimately help with the messaging on this issue.”<sup>55</sup>

Lawsuits were eventually initiated against the FDIC and DOJ, and internal investigations into Operation Choke Point were conducted by the House Committee on Oversight and Reform (House Committee).<sup>56</sup> The House Committee found Operation Choke Point to be an abuse of the DOJ and FDIC’s power which eventually led to the end of the initiative. In its official report, the House Committee explained that the DOJ issued Operation Choke Point subpoenas by impermissibly expanding its authority under “Section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 [which was created] to give the [DOJ] the tools to pursue civil penalties against entities that commit fraud against banks, not private companies doing legal business.”<sup>57</sup>

Ultimately, Operation Choke Point raised questions regarding the abuse of regulatory power for political and policy-making agendas.<sup>58</sup> And while the initiative officially came to an end, its residual effects on institutions providing financial services are lasting. Financial service providers have become more cautious in servicing what were previously labeled high-risk businesses and “politically exposed individuals or firms such as those associated with the porn industry.”<sup>59</sup> Citing reputational risk, unclear “blanket rules on sex workers and the platforms that they use” have been internally implemented, causing refusal of payments, paused bank accounts, and permanent closures of accounts owned by sex workers.<sup>60</sup> In October 2021, a representative of the Bank Policy Institute stated that “[p]olicymaking involves . . . achieving societal consensus on difficult issues. That has become harder . . . [and] [w]hen banks decline to deal with a customer because of ‘reputational risk,’ it sometimes means ‘a bank

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55. Picket, *supra* note 49.

56. Hill, *supra* note 27, at 571.

57. STAFF OF U.S. COMM. ON OVERSIGHT AND GOV’T REFORM, *supra* note 47, at 1.

58. See generally *id.*; see also Hill, *supra* note 27; John Berlau, ‘Choke Point’ Is Frightening Precedent for Bank Regulatory Abuse, FORBES (Oct. 31, 2018), <https://www.forbes.com/sites/johnberlau/2018/10/31/choke-point-is-frightening-precedent-for-bank-regulatory-abuse/?sh=31eaf87242b7>.

59. Nic Carter, *OnlyFans Shows How the Banking System Is Politicized*, COINDESK (Aug. 26, 2021), <https://www.coindesk.com/business/2021/08/26/onlyfans-shows-how-the-banking-system-is-politicized/>.

60. Rose Stokes, *How Banks Are Controlling Your Wanks*, VICE (Sept. 21, 2021), <https://www.vice.com/en/article/v7eaw4/banks-influence-on-sex-life>.

regulator [has been] whispering to them, “We don’t like your being in this business.””<sup>61</sup>

## **B. THE DARK SIDE OF PORN AND SECTION 230 OF THE COMMUNICATIONS DECENCY ACT, FOSTA/SESTA**

The labeling of porn as a “high-risk” industry that poses an increased chance of reputational risk partially derives from the industry’s historical susceptibility to illegal activity.<sup>62</sup> In doing business with the porn industry, banks are faced with the difficult task of being “open, accepting, [and] willing to facilitate payments for whomever [without] taking any sort of political or moral stance . . . [while] hav[ing] a very strong responsibility in making sure that they’re not aiding and abetting any sort of crime.”<sup>63</sup>

In 2018, Congress passed a pair of bills to combat illegal sex trafficking online.<sup>64</sup> The legislation amended 47 U.S.C. § 230, the Communications Decency Act of 1996 (Section 230).<sup>65</sup> The House bill is known as the “Allow States and Victims to Fight Online Sex Trafficking Act” (FOSTA)<sup>66</sup> and the Senate Bill is known as the “Stop Enabling Sex Trafficking Act” (SESTA)<sup>67</sup> (hereinafter, together referred to as FOSTA/SESTA). The general aim of Section 230 is to protect online service providers from liability for content that third parties post using their platforms, and to provide the website owner with the ability to screen and block offensive material without violating federal speech protections.<sup>68</sup> However, the addition of FOSTA/SESTA to Section 230<sup>69</sup> was the first carve-out of the law in 22 years,<sup>70</sup> and it effectively “removed website immunity . . . to encourage websites to diligently monitor and remove sex trafficking posts or otherwise be held responsible for

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61. *Credit-card firms are becoming reluctant regulators of the web*, ECONOMIST, (Oct. 12, 2021), <https://www.economist.com/finance-and-economics/credit-card-firms-are-becoming-reluctant-regulators-of-the-web/21805450>.

62. Frank Kehl, *THE 5 BEST MERCHANT ACCOUNTS FOR ADULT ORIENTED PRODUCTS & SERVICES*, MERCH. MAVERICK (Apr. 18, 2022), <https://www.merchantmaverick.com/adult-payment-processing-merchant-account/>.

63. ECONOMIST, *supra* note 61.

64. Aja Romano, *A new law intended to curb sex trafficking threatens the future of the internet as we know it*, VOX (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

65. 47 U.S.C. § 230 (2018).

66. Allow States and Victims to Fight Online Sex Trafficking Act Of 2017, H.R. 1865, 115th Cong. (2018).

67. Stop Enabling Sex Trafficking Act, § 1693, 115th Cong. (2018).

68. Eric Goldman, *The Complicated Story of Fosta and Section 230*, 17 FIRST AMEND. L. REV. 279, 279–80 (2018) (background information about Section 230 and FOSTA); 47 U.S.C. § 230 (2018).

69. FOSTA/SESTA is codified at 18 U.S.C. § 2421A.

70. Goldman, *supra* note 68, at 280.

facilitating” unlawful sex trafficking.<sup>71</sup> Now, online service providers may be held liable for the promotion or facilitation of sex trafficking, even without knowing that they are doing so, if they are deemed to be “act[ing] in reckless disregard of the fact [that their] conduct contributed to sex trafficking.”<sup>72</sup> On its face, the legislation targets fundamental issues in need of regulation, but the language has also been dubbed “incredibly vague” and has led online platforms and their financial partners to withdraw services to the porn industry out of fear that they may be held liable over something they were not privy to.<sup>73</sup> Moreover, in June 2021, the U.S. Government Accountability Office (GAO) published a report analyzing the use of FOSTA/SESTA, which revealed that since the adoption of FOSTA/SESTA, it has rarely been used.<sup>74</sup>

This lack of judicial statutory interpretation of FOSTA/SESTA and the uncertainty relating to its enforcement has contributed to the hesitation of online platforms and banks to conduct business with the porn industry. Since FOSTA/SESTA’s passage, online platforms have been overly cautious in censoring legal “sexual content” out of fear of liability.<sup>75</sup> For the same reasons, websites have restricted their terms of use to ban sexually explicit and pornographic content altogether and banks have followed suit.<sup>76</sup> Payment networks such as Visa and Mastercard have refused to process payments to porn websites, and both TPPPs and banks have restricted payments to accounts affiliated with porn and other sexual content (further detailed below). Content creators in the porn industry have been locked out of their bank accounts with no notice or explanation specifying that the bank had suspected their money was obtained illegally.<sup>77</sup>

Although FOSTA/SESTA was intended to provide protection against illegal activity, it has gravely impacted the people whose livelihoods rely on the porn industry.<sup>78</sup> Sex workers have been forced to conduct their otherwise legal business activities underground, which not only puts their financial stability and overall safety at greater risk but makes it more difficult for law

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71. Heidi Tripp, *All Sex Workers Deserve Protection: How Fosta/Sesta Overlooks Consensual Sex Workers in an Attempt to Protect Sex Trafficking Victims*, 124 PENN ST. L. REV. 219 (2019) (background information about Section 230 and FOSTA).

72. 18 U.S.C. § 2421A(b)(2).

73. Emily White, *Behind Instagram and TikTok’s Censorship of Sex Workers*, 34TH STREET (May 26, 2021), <https://www.34st.com/article/2021/05/tiktok-instagram-shadowban-censor-sex-workers-fosta-sesta>.

74. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-385, SEX TRAFFICKING (OFFICIAL REPORT) ONLINE PLATFORMS AND FEDERAL PROSECUTIONS (June 2021) (FOSTA/SESTA has been employed only once in criminal prosecution and once civil litigation, and in neither case was its use successful).

75. See Tripp, *supra* note 71, at 237.

76. White, *supra* note 73.

77. *Id.*

78. See generally Liz Tung, *FOSTA-SESTA was supposed to thwart sex trafficking. Instead, it’s sparked a movement*, WHYY (July 10, 2020), <https://whyy.org/segments/fosta-sesta-was-supposed-to-thwart-sex-trafficking-instead-its-sparked-a-movement/>.

enforcement to uncover the illegal activity that the legislation is meant to prevent.<sup>79</sup>

### C. TPPP COMPLIANCE AND RISK MANAGEMENT POLICIES

In response to this regulatory and legislative history, financial service providers have implemented stricter regulations and compliance structures that “dictate anything from what is sold, to whom, and how[,] . . . and reserve the right to cut off relationships with anyone whom they view to be in breach of their terms.”<sup>80</sup>

Following accusations of illegal activity on Pornhub’s network, Mastercard implemented “strong content control measures” to restrict potential abuse of its services.<sup>81</sup> Mastercard updated its “Specialty [Adult] Merchant Registration Requirements” as part of updated compliance mandates to prevent “illegal adult content.”<sup>82</sup> The requirements included:

Document[ing] age and identity verification for all people depicted and those uploading the content, [implementing a] content review process prior to publication, [implementing a] complaint resolution process that addresses illegal or nonconsensual content within seven business days [and] an appeals process allowing for any person depicted to request their content be removed.<sup>83</sup>

Mastercard explained that the new measures were undertaken in an effort “to certify that the seller of adult content has effective controls in place to monitor, block and, where necessary, take down all illegal content.”<sup>84</sup> In addition to its adult merchant requirements, Mastercard has a customer compliance program in place to detect “illegal and brand-damaging transactions, which may pose significant legal/regulatory/fraud risks or may cause reputational damage.”<sup>85</sup> The program categorizes “offensive adult pornography” as a “core category of illegal activity” without providing a further description of what constitutes said “offensive adult pornography.”<sup>86</sup>

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79. See *id.*; see also Tripp, *supra* note 71, at 238.

80. Stokes, *supra* note 60.

81. John Verdeschi, *Protecting our network, protecting you: Preventing illegal adult content on our network*, MASTERCARD (Apr. 14, 2021), <https://www.mastercard.com/news/perspectives/2021/protecting-our-network-protecting-you-preventing-illegal-adult-content-on-our-network/>.

82. *Id.*

83. *Id.*

84. *Id.*

85. These programs include the Business Risk Assessment and Mitigation (BRAM) program and the Member Alert to Control High-Risk Merchants (MATCH) program. Mastercard, *Business Risk Assessment and Mitigation (BRAM)*, YOUTUBE (Sept. 13, 2020), <https://www.youtube.com/watch?v=nnOeuMxo3EU&list=PLjw9YryPdJoaXsXMHD6d7SM5X0Ne1pFhZ&index=12>.

86. *Id.* at 01:41. David L. Hudson, *Obscenity and Pornography*, MIDDLE TENN. STATE UNIV., <https://www.mtsu.edu/first-amendment/article/1004/obscenity-and-> (last visited Aug. 20, 2022) (Generally, “[f]or adults at least, most pornography — material of a sexual nature that arouses many readers and viewers — receives constitutional protection” under the First Amendment. “However, two types of pornography receive no First Amendment protection: obscenity and child



If a merchant is deemed risky, it filters into these compliance programs for investigation and resolution, which can result in frozen accounts and eventual termination.<sup>87</sup> The overgeneralized category of offensive adult pornography is just one example of the subjectivity injected into the financial service risk assessment of customers that has made the porn industry more susceptible to the whims of political agendas.

While Mastercard and other payment networks<sup>88</sup> are committed to cutting off their services to customers engaged in illicit behavior, some financial service providers broadly ban all or nearly all porn-related transactions, irrespective of their lawfulness. For example, American Express has one of the most extreme policies, having drawn a hard line when it comes to porn, refusing to allow the use of its services for all “digital adult content” transactions.<sup>89</sup> Similarly, PayPal’s “Acceptable Use Policy” prohibits the use of its network for transactions that facilitate the purchase of “items that are considered obscene” or “certain sexually oriented materials or services.”<sup>90</sup> PayPal’s policy requires pre-approval of all “Mature Audience Content,” and reserves the right to restrict payments from processing on transactions for “adult DVD’s, magazines and other adult themed products or services.”<sup>91</sup> PayPal also strictly prohibits the purchase or sale of all “sexually oriented digital goods or content delivered through a digital medium . . .

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pornography.” Assuming that Mastercard’s overgeneralized categorization of “offensive” porn was meant to refer to illegal obscenity – “[o]bscenity remains one of the most controversial and confounding areas of First Amendment law, and Supreme Court justices have struggled mightily through the years to define it.” Today, there is no statutory definition of what constitutes “obscenity.” Instead, it is a question for a judge and jury to determine in each instance using what is known as the “Miller Test.”).

87. YOUTUBE, *supra* note 85, at 03:14.

88. Like Mastercard, Visa regulates illegal activity in the porn industry. Per the “Visa Core Rules and Visa Product and Service Rules,” no Visa customer may use Visa-owned marks or transact in any manner that may bring the Visa-Owned Marks or Visa Inc. or its affiliates into disrepute . . . [or] [i]n relation to, or for the purchase or trade of, photographs, video imagery, computer-generated images, cartoons, simulation, or any other media or activities including, but not limited to, any of the following: Child sexual abuse materials, Incest, Bestiality, Rape (or any other non-consensual sexual behavior), [and] Non-consensual mutilation of a person or body part., otherwise, such user will be subject to non-compliance assessment. *VISA CORE RULES AND VISA PRODUCT SERVICE RULES*, VISA (Apr. 23, 2022), <https://usa.visa.com/dam/VCOM/download/about-visa/visa-rules-public.pdf> at 80. Customers that do not comply with the above requirements are subject to further “assessments prescribed under [Visa’s] Global Brand Protection Program.” *Id.* The program “‘manages situations’ where the Visa brand is associated with illegal activities.” *Corp. Responsibility & Sustainability Rep.*, VISA (2020), <https://usa.visa.com/dam/VCOM/download/corporate-responsibility/visa-2019-corporate-responsibility-report.pdf> at 24.

89. *Amex Nixes X-Rated Exchanges*, WIRED (May 26, 2000), <https://www.wired.com/2000/05/amex-nixes-x-rated-exchanges/> (American Express Spokeswoman, Joanne Fisher, explained that the pull of the credit card’s services was because “we’ve examined the digital adult content industry for a year and determined that there was an unacceptably high incidence of disputes about transactions.”).

90. *Acceptable Use Policy*, PAYPAL, <https://www.paypal.com/us/webapps/mpp/ua/acceptable-use-full> (last visited Aug. 20, 2022).

91. *Id.*

[d]ownloadable pictures and videos, along with website subscriptions are examples of digital goods.”<sup>92</sup> “In working with borderline adult site[s] . . . there’s ‘not a lot of upside and a lot of downside’” and so, with “legally tricky” industries such as porn, financial service providers such as American Express and PayPal find it “cheaper [and easier] to issue a blanket ban than pick through every difficult case.”<sup>93</sup>

Recent history has exposed the vulnerability of the porn industry’s relationship with financial service providers. As set forth above, reputational risk has become a prominent consideration in deciding whether to extend services to certain groups of customers. While the policies implemented to reduce those risks are duly focused on protecting the public from illegal behavior, the internal decision-making process for how individual customers are deemed high-risk lacks transparency and exposes entire categories of customers (e.g., sex-workers and those affiliated with the porn industry) to the effects of adverse moral and political influences. Moreover, in shutting out the porn industry from access to mainstream financial services, financial institutions have the effect of quasi-legislating, i.e., deciding which legal customers are worthy of participation in the global marketplace and which are not.<sup>94</sup>

## II. CASE STUDIES

The porn industry has become a “barometer for the general state of payments inclusion.”<sup>95</sup> Therefore, it is critically important to understand how the subjective regulations of financial service providers have directly impacted the industry’s major players before presenting a proposed solution.

### A. PORNHUB

In 2019, PayPal “stopped payment support to PornHub’s models after it found the adult entertainment website made certain payments without the

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92. *How can we help?*, PAYPAL, <https://www.paypal.com/us/smarthelp/article/what-is-paypal%E2%80%99s-policy-on-transactions-that-involve-sexually-oriented-goods-and-services-faq569> (last visited Aug. 20, 2022).

93. *ECONOMIST*, *supra* note 61.

94. The practice of financial service providers cutting off services to entire categories of legal businesses/customers is often referred to as “financial censorship.” *Financial Censorship*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/issues/financial-censorship#:~:text=Financial%20Censorship%20When%20financial%20institutions%20and%20payment%20intermediaries,can%20have%20serious%20ramifications%20for%20free%20expression%20online> (last visited Aug. 20, 2022) (“[P]ayment processors, banks, and credit card companies like Visa and Mastercard—can heavily influence what kind of speech can exist online. Yet these institutions are ill-suited to consider and balance the consequences their decisions may have. Business incentives that may drive these institutions to shutter or limit accounts don’t align with the concerns of a society trying to promote diverse perspectives in an online world.”).

95. J.P. Koning, *Was the OnlyFans Ban a Symptom of Creeping Financial Censorship?*, AM. INST. OF ECON. RSCH. (Sept. 9, 2021), <https://www.aier.org/article/was-the-onlyfans-ban-a-symptom-of-creeping-financial-censorship/>.

permission of the payment processor.”<sup>96</sup> PayPal provided no further details, which led to speculation that the financial service provider may have been influenced by the recent passage of FOSTA/SESTA and terminated the relationship out of fear of legal liability (and presumably the resulting reputational harm).<sup>97</sup>

The following year, New York Times journalist, Nicholas Kristof, exposed what he termed the “dark side” of Pornhub.<sup>98</sup> Kristof’s article identified Pornhub, in bone-chilling detail, of hosting child sex-trafficking, assault, and rape videos.<sup>99</sup> One instance of the detailed illegal content was when a fourteen-year-old California girl appeared to be sexually assaulted in videos posted on Pornhub, and the videos were found and reported to the authorities by the girl’s classmates, as opposed to the website.<sup>100</sup> Kristoff’s article conceded that while there is no “neat solution” to the problem of the “dark side of porn,” there are various protocols that can be implemented to help control the problems, including: (1) allowing only verified users to post videos; (2) prohibiting downloads; and (3) increasing moderation.<sup>101</sup>

Although Pornhub denied the broad-sweeping allegations as portrayed in Kristoff’s article, the website soon announced that it had “enacted the most comprehensive safeguards in user-generated platform history.”<sup>102</sup> Pornhub indicated that it had “banned unverified uploaders from posting new content, eliminated downloads, and [had] partnered with dozens of non-profit organizations, among other major policy changes.”<sup>103</sup> Still, despite the steps taken by Pornhub, TPPPs Visa and Mastercard followed in PayPal’s footsteps, conducting their own investigations into the accusations and ultimately terminating their relationships with Pornhub and its affiliates.<sup>104</sup>

96. *Urgent: PayPal payouts no longer supported*, PORNHUB (Nov. 14, 2019), <https://www.pornhub.com/blog/9122>; *see also PayPal halts payment support to Pornhub models* REUTERS (Nov. 14, 2022), <https://www.reuters.com/article/us-paypal-pornhub-idUSKBN1XO2SV>.

97. Noah Manskar, *Paypal turns off payments to Pornhub models*, N.Y. POST (Nov. 15, 2019), <https://nypost.com/2019/11/15/paypal-turns-off-payments-to-pornhub-models/>.

98. *See* Phil Lord, *Pornhub: Opening The Floodgates?*, 11 HOU. L. REV. 54 (2021); *see also* Nicholas Kristof, *The Children of Pornhub*, THE N. Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html>.

99. *See* Kristof, *supra* note 98 (“After a 15-year-old girl went missing in Florida, her mother found her on Pornhub — in 58 sex videos. Sexual assaults on a 14-year-old California girl were posted on Pornhub and were reported to the authorities not by the company but by a classmate who saw the videos . . . . A search for ‘r\*pe,’ turns up 1,901 videos. ‘Girl with braces’ turns up 1,913 videos and suggests also trying ‘exxxtra small teens.’ A search for ‘13yo’ generates 155,000 videos. To be clear, most aren’t of 13-year-olds, but the fact that they’re promoted with that language seems to reflect an effort to attract pedophiles.”).

100. *Id.*

101. *Id.*

102. *The latest on our commitment to trust and safety*, PORNHUB, <https://www.pornhub.com/blog/11422> (last visited Nov. 6, 2022).

103. *Id.*

104. Noor Zainab Hussain & Munsif Vengattil, *Mastercard, Visa halt payments on Pornhub over allegations of child sex-abuse content*, REUTERS (Dec. 10, 2020), <https://www.reuters.com/article>

Pornhub called the actions “disappointing,” since they came well-after the site implemented extensive safeguards.<sup>105</sup> Following the decisions of PayPal, Visa, and Mastercard, Pornhub’s limited payment selections include only direct deposit, paper checks, international payment processors Paxum and Cosmo, and cryptocurrencies Verge and USDT (Tether).<sup>106</sup>

## B. ONLYFANS

OnlyFans is a popular subscription-based social media platform well-known for its popularity among sex workers.<sup>107</sup> Its business model is structured as a traditional social media website, except its creators operate behind a paywall, and users must pay a subscription fee to access their content.<sup>108</sup> Upon subscribing to creator’s pages, users may communicate with creators and (often for an additional fee) request custom pre-recorded content or live experiences.<sup>109</sup> Creators and users are then able to transact directly for content through the OnlyFans platform.<sup>110</sup>

OnlyFans was founded in 2016 and grew its business exponentially during the Covid-19 pandemic.<sup>111</sup> “Tens of thousands [of sex workers] . . . turned to OnlyFans in the pandemic, many [in] acute financial distress . . . [and] these sex workers helped the platform explode.”<sup>112</sup> For example, Jessica Stoya, a self-described writer, performer, and pornographer, explained, “I set up an OnlyFans page early in the pandemic to rebuild the income I had suddenly lost as the coronavirus descended on the world.”<sup>113</sup> Now, OnlyFans boasts over 150 million registered users, upwards of 1.5 million content creators, and pays out over \$5 billion dollars annually to its creators.<sup>114</sup> “OnlyFans has upended the mainstream porn industry, where producers usually pay performers a flat-fee for reusable content, and has allowed

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/us-pornhub-mastercard/mastercard-to-stop-processing-payments-on-pornhub-cites-unlawful-content-idUSKBN28K30C.

105. *Id.*

106. *Earnings and Payments*, PORNHUB, <https://help.pornhub.com/hc/en-us/articles/360046090414-Earnings-and-Payments> (last visited Nov. 6, 2022).

107. See Espinoza, *supra* note 12.

108. See *How it Works*, ONLYFANS, <https://onlyfans.com/how> (last visited Aug. 21, 2022).

109. See *id.*

110. See *id.*

111. Alice Hancock and Patricia Nilsson, *OnlyFans feels the lockdown love as transactions hit £1.7bn*, FIN. TIMES (Apr. 26, 2021), <https://www.ft.com/content/6d4562f8-166f-4a89-a3cb-db97123a6cf0?accessToken=zwAAAXkSj8qgkc9tRWL4Fm9KidOjy9uXEjps8A.MEUCIQDLiFQGc8KTgwzQhNOpbe12DIIaYfZZL7BLD2OqWYlgIgP8toIf88oDCh2h5cn2yVZVycLweyBfMEhKg2VUVX8Y&sharetype=gift?token=b6477b68-6c85-494a-9797-f24eaeac0a92> (“OnlyFans, the platform for sex workers and celebrities to sell subscription content, has boomed during the pandemic, with transactions rising seven-fold to £1.7bn . . . . The UK-based company said its revenues rose 553% to £281m in the year to November.”).

112. Stoya, *supra* note 16.

113. *Id.*

114. See *Our Team and Goals*, ONLYFANS, <https://onlyfans.com/about.html> (last visited Nov. 6, 2022).

creators to monetize their social-media followings.”<sup>115</sup> “OnlyFans . . . allows people who are rarely hired by mainstream production companies to support themselves financially . . . it’s connected many of the most vulnerable and marginalized workers directly to their market, clearing the beliefs of studio heads about what sells out of the way.”<sup>116</sup> Although the platform received its initial and primary recognition due to its affiliation with porn, it has since “ballooned into a world of its own where artists, entertainers, sex workers, and others can monetize their influence.”<sup>117</sup>

On August 19, 2021, OnlyFans founder and CEO, Tim Stokely, announced that OnlyFans would no longer allow content creators to post “sexually explicit content.”<sup>118</sup> As defined by U.S.C. § 2256(2), “sexually explicit” content means “actual or simulated sexual intercourse . . . masturbation . . . lascivious exhibition of the anus, genitals, or pubic area of any person . . . [etc.].”<sup>119</sup> Stokely’s explanation for the sudden change was that the banks were to blame, “the change in policy, we had no choice — the short answer is banks,”<sup>120</sup> the decision was made “to comply with the requests of our banking partners and payout providers.”<sup>121</sup> He reasoned, “we pay over one million creators over \$300 million every month and making sure that these funds get to creators involves using the banking sector.”<sup>122</sup> He further claimed that these institutions place an increased burden on the platform by outright refusing to do business with them and citing reputational risk as the reason.<sup>123</sup>

Specifically, Stokely called out the Bank of New York Mellon for having “flagged and rejected” all transactions that took place in connection with OnlyFans, which made it “difficult to pay its creators.”<sup>124</sup> He also pointed to

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115. Anna Cooban, *OnlyFans has boomed during lockdown. Users spent \$2.4 billion on the adult-entertainment site in 2020, and 120 million people now use it.*, BUS. INSIDER (Apr. 27, 2021), <https://www.businessinsider.com/onlyfans-lockdown-boom-transactions-hit-24b-revenue-up-553-2021-4>.

116. Stoya, *supra* note 16.

117. See Espinoza, *supra* note 12; see also Natalie Jarvey, *How OnlyFans Has Become Hollywood’s Risque Pandemic Side Hustle*, HOLLYWOOD REP. (Dec. 11, 2020), <https://www.hollywoodreporter.com/business/digital/how-onlyfans-has-become-hollywoods-risque-pandemic-side-hustle-4101534/> (“[Bella Thorne], Cardi B, Tyga, Austin Mahone, *Teen Wolf* actor Tyler Posey and *Real Housewives of New York City* stars Dorinda Medley and Sonja Morgan are just a handful of the talent who have created OnlyFans accounts in the past year, offering up exclusive (largely SFW [Suitable for Work]) content to people willing to pay for a monthly subscription to their feed.”).

118. See Shaw, *supra* note 13; Nilsson, *supra* note 13 (“The official statement made by OnlyFans also read “[i]n order to ensure the long-term sustainability of the platform, and to continue to host an inclusive community of creators and fans, we must evolve our content guidelines.”).

119. 18 U.S.C. § 2256(2)(A) (2018).

120. Patricia Nilsson, *OnlyFans founder blames banks for ban on porn*, FIN. TIMES (Aug. 24, 2021), <https://www.ft.com/content/7b8ce71c-a87a-440e-9f3d-58069ca0480b>.

121. Nilsson, *supra* note 13.

122. Nilsson, *supra* note 120.

123. *Id.*

124. *Id.*

JPMorgan Chase as being “particularly aggressive in closing accounts of sex workers or . . . any business that supports sex work.”<sup>125</sup> Mastercard also sought to put in place stricter compliance efforts for high-risk adult merchants that have a high “brand-risk” or otherwise be “associated with any brand-damaging activities.”<sup>126</sup>

Like Pornhub, OnlyFans criticized Mastercard’s decision, asserting that they were already “fully compliant” with the current and soon to be updated regulatory demands.<sup>127</sup> What was surprising to many was that OnlyFans had not experienced public accusations of hosting illegal content on the extreme level that Pornhub had earlier in the year, but financial service providers still aggressively sought to distance themselves from the porn industry altogether.<sup>128</sup> The decision of OnlyFans to remove itself from the porn industry and succumb to financial services providers’ ability to cut off access to their services was met with an outcry of criticism and pushback from creators, users, and sex work advocates alike.<sup>129</sup> Then, only one week after OnlyFans’ announcement, creators experienced a whiplash-like effect when OnlyFans backtracked and announced that the impending ban would be suspended because the platform had secured the “assurances necessary” to support its community of creators.<sup>130</sup> Notably, no further explanation was provided.<sup>131</sup> Currently, OnlyFans supports transactions through Visa, Mastercard, and other similar payment networks: however, PayPal is not used, and TPPPs are prohibited.<sup>132</sup>

The OnlyFans and Pornhub examples highlight the ability of banks and payment processors “to block pretty much any payment they please.”<sup>133</sup> This

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125. *Id.*

126. *Mastercard Introduces Revised Standards for Adult Merchants*, WEB SHIELD (Apr. 21, 2021), <https://www.webshieldltd.com/post/mastercard-introduces-revised-standards-for-adult-merchants>.

127. Nilsson, *supra* note 120.

128. Stoya, *supra* note 16.

129. See Tali Arbel & Barbara Ortutay, *Onlyfans reverses explicit content ban after outcry*, AP NEWS (Aug. 25, 2021), <https://apnews.com/article/technology-business-arts-and-entertainment-d10b111007731f7679ad8954af0ba027>.

130. The statement, announced on Twitter, read: “Thank you to everyone for making your voices heard. We have secured assurances necessary to support our diverse creator community and have suspended the planned October 1 policy change. OnlyFans stands for inclusion and we will continue to provide a home for all creators.” OnlyFans (@OnlyFans), TWITTER (Aug. 25, 2021, 7:56AM), [https://twitter.com/OnlyFans/status/1430499277302816773?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1430499277302816773%7Ctwgr%5E%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fwww.bloomberg.com%2Fnews%2Farticles%2F2021-08-25%2Fonlyfans-drops-plan-to-ban-sexually-explicit-content-amid-uproar](https://twitter.com/OnlyFans/status/1430499277302816773?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1430499277302816773%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.bloomberg.com%2Fnews%2Farticles%2F2021-08-25%2Fonlyfans-drops-plan-to-ban-sexually-explicit-content-amid-uproar).

131. *See id.*

132. *See Community Guidelines*, ONLYFANS, <https://onlyfans.com/help/2/13/46> (last visited Aug. 21, 2022); *see also Community Guidelines*, ONLYFANS, <https://onlyfans.com/help/2/13/153> (last visited Aug. 21, 2022).

133. David Morris, *OnlyFans’ Porn U-Turn Is a Victory Against Banking Censorship*, COINDESK (Aug. 25, 2021), <https://www.coindesk.com/markets/2021/08/25/onlyfans-porn-u-turn-is-a-victory-against-banking-censorship/>.

has further intensified a public (albeit not novel) conversation about the threat of banking and financial censorship<sup>134</sup>—especially of the porn industry.<sup>135</sup>

### III. RELEVANT RULE MAKING

Financial censorship and access to financial services have been the focus of recent administrative agency and congressional efforts to mitigate its negative effects on entire categories of lawful business.<sup>136</sup> In 2020, the OCC proposed a rule entitled “Fair Access to Financial Services,” which was not directed at any industry in particular, but would have had residual effects on the porn industry by making it more difficult for financial institutions to deny access to entire categories of lawful businesses on the basis of reputational risk alone, and instead mandating a case-by-case customer analysis.<sup>137</sup> Although the proposed rule has been indefinitely put on hold, there have been other legislative efforts presented in Congress echoing similar policy objectives.<sup>138</sup>

Instead of taking an industry-specific approach (e.g., focusing on the porn industry), much of the proposed rulemaking and legislation has more generally addressed fair access to financial services for legal businesses with the aim of delegitimizing choke point-style reputational risk initiatives.<sup>139</sup> However, in 2021 the House of Representatives passed House Bill 1996, entitled the SAFE Banking Act of 2021, which took an industry-specific approach and addressed similar issues facing the Cannabis industry. The act’s aim is to protect banks and other financial service institutions “who choose to service cannabis-related businesses operating within their state’s legal and

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134. See ELEC. FRONTIER FOUND., *supra* note 94; See Koning, *supra* note 95.

135. See PORNHUB, *supra* note 96.

136. Fair Access to Financial Services, 85 Fed. Reg. 75261 (proposed Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55) reads:

In some cases, banks appear to have denied persons access to financial services without even attempting to price the financial services to reflect the perceived risk. Particularly in light of the now-discredited Operation Choke Point, in which certain government agencies (but not the OCC) were revealed to have pressured banks to cut off access to financial services to disfavored (but not unlawful) sectors of the economy, the OCC believes these criteria are not, and cannot serve as, a legitimate basis for refusing to grant a person or entity access to financial services.

*See also* SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021) as it pertains to fair access to financial services for the cannabis industry: “The purpose of this Act is to increase public safety by ensuring access to financial services to cannabis-related legitimate businesses and service providers and reducing the amount of cash at such businesses . . . [and] to create protections for financial institutions that provide financial services to cannabis-related legitimate businesses and service providers for such businesses, and for other purposes.”

137. See Fair Access to Financial Services, 85 Fed. Reg. 75261 (proposed Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55).

138. See Fair Access to Banking Act, H.R. 1729, 117th Cong. (2021); *see also* Fair Access to Banking Act, S. 563, 117th Cong. (2021).

139. Examples of these legislative efforts are detailed below.

regulatory frameworks.”<sup>140</sup> Notably, the act contains a broader fair access provision limiting the ability of financial institutions to discriminate against lawful businesses based on their potential public perception and their perceived reputational risk.<sup>141</sup>

These legislative efforts, discussed in further detail below, seek to codify the end of financial service institutions making “categorical decisions” regarding its service to customers, “often as a reaction to pressure from political advocates ‘whose policy objectives are served when banks deny certain categories of customers access to financial services.’”<sup>142</sup>

## A. FAIR ACCESS TO FINANCIAL SERVICES

### 1. The Proposal of Fair Access to Financial Services

In November 2020, the Acting Comptroller of the OCC announced a proposed rule entitled “Fair Access to Financial Services.”<sup>143</sup> The mission of the proposed rule was to “ensure fair access to banking services provided by national banks, federal savings associations, and federal branches and agencies of foreign bank organizations.”<sup>144</sup> The OCC maintained its authority to establish the proposed rule under Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>145</sup> an amendment to 12 U.S.C. § 1 (the National Bank Act), which established the OCC as an office within the Department of Treasury, tasked with “assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.”<sup>146</sup>

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140. Lewis Koski, *The SAFE Banking Act: What Is It And Where Does It Stand?*, FORBES (Dec. 3, 2021), <https://www.forbes.com/sites/lewiskoski/2021/12/03/the-safe-banking-act-what-is-it-and-where-does-it-stand/?sh=40d46cad2baf>.

141. See SAFE Banking Act of 2021, H.R. 1996, at § 13(1); see also “Choke Point” Language Added to Cannabis Legislation, NAT’L AM. FIN. SERVS. ASS’N (Sept. 20, 2019), <https://nativefinance.org/news/choke-point-language-added-to-cannabis-legislation/#:~:text=According%20to%20Politico%2C%20Democratic%20leadership%20added%20language%20on,to%20attract%20Republican%20support%2C%20namely%20in%20the%20Senate>.

142. Jeffrey L. Hare, Isabelle Ord & Noah Schottenstein, *Office of the Comptroller of the Currency pauses Fair Access to Financial Services Rule*, DLA PIPER (Jan. 22, 2021), <https://www.dlapiper.com/en/us/insights/publications/2021/01/occ-finalizes-rule-to-ensure-fair-access-to-financial-services/#:~:text=According%20to%20the%20OCC%2C%20the%20Fair%20Access%20Rule,certain%20categorie%20of%20customers%20access%20to%20financial%20services.%E2%80%9D>.

143. Fair Access to Financial Services, 85 Fed. Reg. 75261 (proposed Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55).

144. Press Release, Off. of the Comptroller of Currency, Proposed Rule Would Ensure Fair Access to Bank Services, Capital, and Credit (Nov. 20, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-156.html>.

145. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.).

146. 12 U.S.C. § 1; see also Fair Access to Financial Services, 85 Fed. Reg. at 75262 (to be codified at 12 C.F.R. pt. 55).



The draft of the proposed rule received approximately 35,700 public comments, of which 4,200 reflected comments in support of the proposal and 31,290 comments in opposition of it (of the opposing comments, “approximately 28,000 were from letters collected by a single organization”).<sup>147</sup> The OCC published its final rule on January 14, 2021, and was set to take effect on April 1, 2021.<sup>148</sup> However, just under a week later, on January 20, 2021, the then newly-elected President Biden and his administration published a memorandum announcing a “Regulatory Freeze Pending Review.”<sup>149</sup> The freeze effectively paused all pending legislation from the former Trump administration that had not yet been published in the Federal Register, “until a department or agency head appointed or designated by the President . . . review[ed] and approve[d] the rule.”<sup>150</sup> Since the regulatory freeze, the proposed rule has not been publicly addressed, and so its future remains uncertain.<sup>151</sup>

## 2. Overview of Fair Access to Financial Services Legislation

The OCC’s proposed rule promoted individual customer risk evaluation (i.e., on a case-by-case basis) rather than broad categorical exclusions of “organizations involved in politically controversial but lawful businesses” and who are otherwise “entitled to fair access to financial services under the law.”<sup>152</sup> The OCC emphasized that individual customer risks can be appropriately calculated and managed using “basic risk management” skills, as opposed to presumptuous risk evaluations based on the industry of a customer’s operations.<sup>153</sup> The OCC further explained that banks had denied access to financial services based on “criteria unrelated to safe and sound banking practices [such as] personal beliefs on substantive policy,” which should be left to the legislature instead of private banks’ “ungrounded quantitative, risk-based analysis, and assessments premised on assumptions about future legal or political changes.”<sup>154</sup> The agency also conceded that

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147. Hare et al., *supra* note 142.

148. OFF. OF COMPTROLLER OF CURRENCY, Fair Access to Financial Services (final rule) (Jan 14, 2021) (The final rule was never published in the federal register because the regulatory freeze went into effect prior. A link to the final rule as published by the OCC can be found at: <https://occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8a.pdf>); For further information on the regulatory freeze in place at the time of this publication, *see also* M. MAUREEN MURPHY, CONG. RSCH. SERV., LSB10571, OFFICE OF THE COMPTROLLER OF THE CURRENCY’S FAIR ACCESS TO FINANCIAL SERVICES RULE (Feb. 5, 2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10571>.

149. Memorandum on Regulatory Freeze Pending Review, 86 Fed. Reg. 7424 (Jan. 28, 2021).

150. *Id.* at 7424.

151. Brendan Pederson, *Tough choice for next OCC chief: Erase or redefine ‘fair access’ rule*, AM. BANKER (Feb. 8, 2021), <https://www.americanbanker.com/news/tough-choice-for-next-occ-chief-erase-or-redefine-fair-access-rule>.

152. Fair Access to Financial Services, 85 Fed. Reg. 75261, 75264 (proposed Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55).

153. *Id.* at 75262.

154. *Id.* at 75263.

neither the OCC nor banks are “well-equipped to balance risks unrelated to financial exposures and operations required to deliver financial services,” and should be left to the purview of Congress.<sup>155</sup>

The new rule would have applied to larger, “covered banks” with more assets “because they are most likely to have both the ability to influence the price of financial services and the depth of expertise to serve a broad range of industries.”<sup>156</sup> A covered bank was defined as “any OCC-regulated entity with the ability to (1) raise the price a person has to pay to obtain an offered financial service from the bank or from a competitor or (2) significantly impede a person, or a person’s business activities, in favor of or to the advantage of another person.”<sup>157</sup> For the purposes of the rule, the OCC defined “financial services” as including “financial products and services,” and defined a person as “any natural person; or any partnership, corporation, or other business or legal entity.”<sup>158</sup> In order to comply with the rule and provide fair access to financial services, a covered bank would have to

(1) Make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms; (2) not deny any person a financial service the [covered] bank offers except as justified and documented by measurable, empirical, quantifiable data evaluated under the bank’s established, impartial risk-management standards established in advance by the bank; (3) any person a financial service the bank offers when the effect of the denial is to prevent, limit, or otherwise disadvantage the person from entering or competing in a market or business segment or in such a way that benefits another person or business activity in which the bank has a financial interest; and (4) not deny, in coordination with others, any person a financial service the bank offers.<sup>159</sup>

Still, a covered bank may choose not to do business with an individual customer; however, that decision would need to be based on an “objective, quantitative and individualized risk analysis,”<sup>160</sup> “as opposed to indirect or generalized risks that should be balanced by the political branches of government or by price signals and other market forces.”<sup>161</sup> The OCC continued, “[c]onclusory, inconsistent, or categorical assertions in any substantive area not tied to the bank’s specific risk profile reflect poor risk management and unsafe and unsound behavior.”<sup>162</sup>

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155. *Id.* at 75264.

156. OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 148, at 7.

157. *Id.*

158. *Id.* at n. 2.

159. *Id.* at 7–8.

160. *Id.* at 31.

161. *Id.* at 25.

162. OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 148, at 7.

### 3. Comments on the Proposed Legislation

Individuals, banks, financial organizations, and academics contributed to the proposed rule's approximate 35,700 public comments, which expressed mixed sentiments of support and criticism.<sup>163</sup>

#### *i. Comments in Opposition of Fair Access to Financial Services*

The threshold issue raised in opposition to the proposed rule was whether the OCC had adequate legal authority to implement its efforts.<sup>164</sup> Most commenters argued that the OCC's reliance on the Dodd-Frank Act within the National Bank Act (hereinafter together referred to as "Act") was inadequate because although the legislation charged the OCC with "assuring the safety and soundness of, and compliance with the laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction," they argued this was nothing more than a general mission statement.<sup>165</sup> The comments cited to *Chevron v. U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which provides agencies with the ability to fill in gaps left by Congress where there has been an express or implied delegation of powers unless such interpretation is "arbitrary, capricious, or manifestly contrary to the statute."<sup>166</sup> The commenters argued that the Act's language that the OCC is "charged with assuring the safety and soundness" of the laws and regulations it oversees, provides neither an explicit nor implicit delegation of powers, and instead functions as a statement of mission and, therefore, *Chevron* should not apply.<sup>167</sup> Still, the commenters argued, even if the Act's language could be construed as an implicit delegation of authority, such broad-sweeping powers would indeed "strain credulity and is likely [to be considered] arbitrary and capricious."<sup>168</sup>

Other comments expressed concerns about the proposed rule's potential to negatively affect well-established banking principles of safety and

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163. Hare et al., *supra* note 142.

164. For comments that support this argument, See John Berlau, *CEI Comments on OCC Proposed Rule on "Fair Access to Financial Services"*, COMPETITIVE ENTER. INST. (Jan. 4, 2021), [https://cei.org/regulatory\\_comments/cei-comments-on-occ-proposed-rule-on-fair-access-to-financial-services/](https://cei.org/regulatory_comments/cei-comments-on-occ-proposed-rule-on-fair-access-to-financial-services/); Adam J. Levitin, *Levitin Comments on OCC Fair Access Rule*, CREDIT SLIPS (Dec. 18, 2020), <https://www.creditslips.org/files/levitin-comments-on-occ-fair-access-rule.pdf>; ABA Letter to OCC on Fair Access to Financial Services Proposal, AM. BANKERS ASS'N (Jan. 4, 2021), <https://www.aba.com/advocacy/policy-analysis/aba-letter-to-occ-fair-access-to-financial-services>; *OCC Fair Access Proposal Issue Summary*, BANK POL'Y INST. (Dec. 2, 2020), <https://bpi.com/occ-fair-access-proposal-issue-summary/>.

165. National Bank Act, 12 U.S.C. § 1; See Levitin, *supra* note 164, at 2.

166. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

167. Levitin, *supra* note 164, at 2–4.

168. AM. BANKERS ASS'N., *supra* note 164, at 2.

soundness.<sup>169</sup> Generally, it was alleged that banks have been tasked with identifying and managing risk for years, and limiting the banks' ability to calculate risk would detrimentally "preclude . . . consideration of any non-quantifiable or soft underwriting factors, including reputational risk."<sup>170</sup> Reputational risk is just one of many categories of risk that banks must consider as "meticulous risk managers that approach customer and product segments in a careful and managed way."<sup>171</sup> By precluding such considerations, it would become nearly impossible for banks to deny services based on legitimate business judgment concerns such as shareholder interest or concentration risk.<sup>172</sup>

Some comments suggested that the proposed rule "unconstitutionally compels speech by banks and their owners in violation of the free exercise and free speech clauses of the First Amendment."<sup>173</sup> As such, a bank's servicing of a business may "reasonably be viewed as an endorsement of the business,"<sup>174</sup> and, as private, non-government entities, banks would be forced to associate with certain businesses they do not wish to do business with. This was flagged as being especially harmful to smaller banks that specialize in sector-specific financing, as it would effectively obligate them to support businesses or industries outside their area of expertise.<sup>175</sup>

There were various additional arguments made in opposition to the proposed rule, although the above-referenced comments were among the most prevalent. Still, an additional issue raised was the "near impossibility" of identifying whether a bank is declining to service a client based on industry bias,<sup>176</sup> since risk-based decisions and personal biases are nearly always intertwined and "disentangling personal opinion from business concerns" would be an extremely difficult task.<sup>177</sup> Moreover, "operational, compliance and legal costs" would inevitably increase as a result.<sup>178</sup>

All in all, the common theme throughout the opposition comments to the proposed rule was the concern that banks would lose their autonomy to conduct business in the best interest of themselves and their shareholders.

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169. See Levitin, *supra* note 164, at 4; See also AM. BANKERS ASS'N, *supra* note 164; BANK POL'Y INST., *supra* note 164.

170. Levitin, *supra* note 162.

171. BANK POL'Y INST., *supra* note 164.

172. See AM. BANKERS ASS'N *supra* note 164 ("The Proposed Rule's requirement to offer services to the public on 'proportionally equal terms' would have the unsafe effect of forcing banks to provide services to all potential customers in the market, even though such service may lead to unacceptably risky concentrations.").

173. Levitin, *supra* note 164, at 9.

174. *Id.* at 8.

175. Sonny Mazzone, *Biden Administration Suspends Rule Protecting Businesses From Banking Discrimination*, THE JAMES MADISON INST. (Feb. 22, 2021), <https://www.jamesmadison.org/biden-administration-suspends-rule-protecting-businesses-from-banking-discrimination/>.

176. Berlau, *supra* note 164.

177. *Id.*

178. AM. BANKERS ASS'N, *supra* note 164.

This concern further emphasizes the importance of the proposed rule's general mission by highlighting the ability of banks and other financial institutions to discriminate against certain stigmatized customers based on non-financial considerations.

*ii. Comments in Support of Fair Access to Financial Services*

Several comments were also offered in support of the proposed rule. One argument presented in favor of the proposal emphasized the general tenets of a capitalist economy, “the central purpose of a private-sector capital market [being the] allocation of capital to the most productive (highest economic return) uses possible” and an overall maximization of the competitiveness within capital markets.<sup>179</sup> A comment supporting this argument reasoned that by following a capitalist principle based on financial considerations, banks and other financial service providers would be better enabled to carry out their primary purpose without outside political influence, ultimately furthering larger social goals of capital growth and efficiency.<sup>180</sup> The comment also contended that “the ‘reputation risk’ justification for lending discrimination against certain economic sectors is wholly circular at a conceptual level, and is purely political in that it is based upon a political unpopularity.”<sup>181</sup> It continued, “[t]he proposed rule appropriately would constrain the effects of political pressures to engage in discrimination, as forbearance of such negative favoritism in lending in effect would ratify the political pressures exerted by the opponents of . . . disfavored borrowers, despite the fact that their activities are wholly legal.”<sup>182</sup> Indeed, by constraining the ability of financial institutions to discriminate against entire sectors of lawful business, the proposed rule “would stabilize the industrial structure of the capital market, improve the allocation of capital, and yield a wealthier [more efficient] economy over time.”<sup>183</sup> Other comments echoed this sentiment, holding that unfair treatment by financial institutions has the ability to “severely interrupt . . . business operations,” and that “all legal businesses [should be allowed] to establish themselves within the traditional financial system.”<sup>184</sup>

In addition to promoting a competitive marketplace, other comments noted that different businesses within certain sectors each have “unique

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179. Benjamin Zycher, *Comment letter to OCC on Rule for Fair Access to Financial Services*, AM. ENTER. INST. (Dec. 29, 2020), <https://www.aei.org/articles/comment-letter-to-occ-on-rule-for-fair-access-to-financial-services/>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Kristin Smith, *Comments on the Office of the Comptroller of the Currency's Notice of Proposed Rulemaking on "Fair Access to Financial Services"*, BLOCKCHAIN ASS'N (Jan. 4, 2021) <https://theblockchainassociation.org/wp-content/uploads/2021/01/BA-Response-to-OCC-2020-0042.pdf>.

business models that present unique risks.”<sup>185</sup> Therefore, the rule’s focus on individualized assessments allows financial service institutions the ability to provide each customer with the necessary attention to make a sound assessment of the potential risks posed.<sup>186</sup> Supporters of the proposed rule also pushed back against those that argued the OCC lacked the requisite authority to promulgate the rule. They explained that the risk of banks departing from “sound principle[s] of assessing a person or company’s individual characteristics when deciding whether to provide access to financial services poses a threat” to the principle of “fair access,” subsequently bringing it within the purview of the authority delegated to the OCC in 12 U.S.C. § 1.<sup>187</sup>

The OCC’s Fair Access to Financial Services proposed and final rule received significant attention from critics, supporters, and general commentators alike. Although the rule’s future remains uncertain, the fight for fair access to financial services continues.

## **B. FAIR ACCESS LEGISLATION**

Since the OCC’s Fair Access to Financial Services rule was placed on hold, additional efforts have been made to address discrimination based on reputational risk in the financial service industry.

In March 2021, the Senate Banking Committee and House Committee on Financial Services were presented with a pair of identical bills entitled the “Fair Access to Banking Act” (hereinafter referred to as a single bill).<sup>188</sup> The aim of the bill is to “restrict certain banks, credit unions, and payment card networks from refusing to do business with a person who is in compliance with the law.”<sup>189</sup> The same month as its congressional introduction, the bill was referred to the appropriate Senate and House committees for further review and hearings, but as of August 2022, it remains dormant.<sup>190</sup>

Also introduced in both the House and Senate in March 2021 was a bill entitled the “SAFE Banking Act of 2021.”<sup>191</sup> The bill, which had previously been introduced and passed in the House on four other occasions, had a narrower aim, focusing on fair access to financial services for the cannabis industry. The bill was meant to “generally prohibit a federal banking

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185. *Id.*

186. *Id.*

187. Anne Bradbury, *Fair Access to Financial Services*, AM. EXP. & PROD. COUNCIL (Jan. 4, 2021), <https://www.axpc.org/wp-content/uploads/2021/01/FINAL-AXPC-COMMENT-LETTER-OCC-FAIR-ACCESS-PROPOSAL-.pdf>.

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

189. *Id.*

190. See Fair Access to Banking Act – All Actions, S.563, 117<sup>th</sup> Cong., <https://www.congress.gov/bill/117th-congress/senate-bill/563/all-actions> (last visited Oct. 5, 2022); see also Fair Access to Banking Act– All Actions, H.R.1729, <https://www.congress.gov/bill/117th-congress/house-bill/1729/all-actions> (last visited Oct. 5, 2022).

191. SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021).

regulator from penalizing a depository institution for providing banking services to a legitimate cannabis-related business.”<sup>192</sup> The bill included language which might have effectively codified the end of Operation Choke Point.<sup>193</sup> The SAFE Banking Act language stated that:

an appropriate Federal banking agency may not formally or informally request or order a depository institution to terminate a specific customer account or group of customer accounts or to otherwise restrict or discourage a depository institution from entering into or maintaining a banking relationship with a specific customer or group of customers . . . based solely on reputation risk.<sup>194</sup>

In April 2021, the bill passed in the House for the fifth time but was stalled in the Senate after it was referred to an internal committee.<sup>195</sup> Still, the bill was later incorporated as an amendment to the National Defense Authorization Act for Fiscal Year 2023 (NDAAFY23), and in July 2022, it again passed in the House.<sup>196</sup> As of the date of publication of this note, the NDAAFY23 is pending in the Senate.<sup>197</sup>

The above federal and legislative efforts are just a few recent examples of efforts being made to address the issue of providing fairer access to financial services for traditionally marginalized customers.

#### IV. A SOLUTION

The above discussion provides an overview of the ongoing and complex conversation surrounding the concept of financial censorship. Porn is just one example of a legal, marginalized industry that has become a victim of heightened reputational risk concerns. In cutting off access to financial services based on the reputation of the industry, financial institutions have become de facto legislators. “For as long as legislation lags, financial

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192. *Id.*

193. *See House Passes SAFE Banking Act, Which Includes Provisions to Stop ‘Operation Choke Point’*, NATIVE AM. FIN. SERV. (Apr. 28, 2021), <https://nativefinance.org/news/house-passes-safe-banking-act-which-includes-provisions-to-stop-operation-choke-point/>.

194. SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021) § 13.

195. *See* SAFE Banking Act of 2021 –Actions Overview, H.R. 1996, 2021 Sess., <https://www.congress.gov/bill/117th-congress/house-bill/1996/actions> (last visited Oct. 5 2022); *see also* SAFE Banking Act of 2021 – All Actions, S. 910, 2022 Sess., <https://www.congress.gov/bill/117th-congress/senate-bill/910/all-actions> (last visited Oct. 5 2022) (committee hearings were held on September 8, 2022); Dan Ennis, *Cannabis banking measure couched in House-passed defense bill*, BANKING DIVE (Sept. 22, 2021), <https://www.bankingdive.com/news/cannabis-banking-measure-couched-in-house-passed-defense-bill/607005/>.

196. National Defense Authorization Act for Fiscal Year 2023 (All Actions), H.R.7900, 2022 Sess., <https://www.congress.gov/bill/117th-congress/house-bill/7900/actions> (last visited Aug. 23, 2022) (The House passing the NDAAFY23 marked the seventh time the SAFE Banking Act was approved by the House).

197. *See id.*

institutions will be left in a difficult position: accused either of being the ‘moral police’ . . . or of enabling wrongdoing.”<sup>198</sup>

In choking off the porn industry from access to an official, highly monitored, and highly regulated financial system, the business is pushed further underground and into the shadows. This increases the likelihood of industry-wide unsafe practices and effectively creates a financial black market outside the purview of the DOJ and other government policing institutions. Thus, efforts to altogether eliminate access to the established financial system for sex-workers engaged in porn is not a viable or safe solution.<sup>199</sup>

To protect the integrity of the marketplace, it is imperative that persistent flaws in the current system be addressed by appropriate government action. For that reason, it is crucial that Congress address the matter, rather than it being left vulnerable to the whims of financial institutions, whereby their subjective analysis can easily be injected with political motivations behind locked doors without consequence. As the OCC previously acknowledged, neither they nor the banks are well-equipped to balance risks unrelated to financial exposure. Instead, mandating access to financial services by marginalized businesses is clearly within the purview of Congress. Specifically, Congress should enact legislation focusing on sex work in all its dimensions—including porn—addressing the various issues facing the industry today (e.g., access to financial services, labor rights, health and wellbeing, child pornography, sex trafficking, money laundering, etc.). Legislation targeting individual industries and providing for better access to financial services is not novel, as shown by the SAFE Banking Act, and it has now become essential that similar legislation is enacted to address sex work.

The proposed legislation should eliminate the factoring in of reputational risk based on the porn industry’s reputation and provide for individualized treatment by financial institutions of each customer – like that suggested in the OCC’s Fair Access rule. “Broad regulation of reputation risk is unnecessary and harmful,” but an individualized assessment is necessary for the calculation of general risk when it comes to providing financing.<sup>200</sup>

Financial institutions would still be autonomous in conducting their business in the best interest of their shareholders through monitoring and basing their business decisions on individual risk factors, but financial access would be provided to historically marginalized, but legal businesses in a

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198. THE ECONOMIST, *supra* note 61.

199. See *CHILD PORNOGRAPHY SUBJECT OF HOUSE AND SENATE COMMITTEE HEARINGS*, WOMEN’S CONG. POL’Y INST., <https://www.wcpinst.org/source/child-pornography-subject-of-house-and-senate-committee-hearings/> (last visited Dec. 21, 2021) (This recap of a hearing held by the Senate Banking, Housing, and Urban Affairs Committee is an example of past legislative efforts to block the porn industry’s access to financial services.).

200. Hill, *supra* note 27, at 603.



transparent and predictable way. Eliminating the broad-sweeping industry reputational risk as a consideration from a financial institution's calculations ensures equal and consistent access to all legal businesses to necessary financial services. To ensure that financial institutions are addressing the risk posed by businesses or individuals, the legislative efforts should, in part, implement a uniform scheme for banks to follow when calculating general risk for this on a case-by-case basis for the specific industry.

Furthermore, the proposed legislation should offer compliance structure guidelines for financial institutions servicing the porn industry. This would remedy the general inconsistencies across financial institutions' compliance regimes and the opacity in the way that they are carried out. By providing industry-specific statutorily mandated compliance structures, Congress can encourage efficiency for both financial service providers and the porn industry.

## CONCLUSION

The internet may be for porn,<sup>201</sup> but financial services are not. While porn is a fundamentally legal industry, it has historically been a target for discriminatory treatment among financial service providers. Sex workers' access to the global marketplace should not be limited by financial institutions functioning as de facto legislators, responsible for determining who is and is not worthy of participation. Rather, Congress must act to legislate access to financial services not only for the porn industry, but for the sex work industry more broadly. In doing so, Congress can formally address a swath of legal concerns, while providing a transparent and predictable scheme for financial institutions and sex workers alike.

*Emily Pollak\**

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201. ROBERT LOPEZ & JEFF MARX, *The Internet is for Porn*, on AVENUE Q (Sony Masterworks 2003).

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