



Americans for Financial Reform
1629 K St NW, 10th Floor, Washington, DC, 20006
202.466.1885

July 31, 2014

Representative
United States House of Representatives
Washington, DC 20515

Re: Oppose H.R. 4986 (Luetkemeyer), which would thwart Operation Choke Point and other efforts to fight payment fraud

Dear Representative:

Americans for Financial Reform and the undersigned community, consumer and civil rights groups urge you to oppose H.R. 4986, a bill that seeks to thwart efforts to ensure that banks and payment processors comply with longstanding due diligence requirements so that they can avoid facilitating illegal activity by knowing their customers, monitoring return rates, and being alert for suspicious activity. Please oppose this bill and any effort to block funding for the Department of Justice's Operation Chokepoint or to weaken other regulator efforts to fight payment fraud. Prohibiting the use of longstanding legal tools to fight data breaches, identity theft, scams, frauds, money laundering and other illegal conduct would harm the public interest.

Problematic safe harbor for banks that willfully ignore signs of fraudulent activity

H.R. 4986 would immunize banks that ignore signs of illegal conduct and would undermine essential efforts to fight money laundering, payment fraud and illegal activity. H.R. 4986 provides a problematic safe harbor for financial institutions that knowingly process payments for unlicensed merchants and fraudsters or that willfully ignore signs of illegality. The bill also curtails the Department of Justice's ability to compel the production of important information necessary to determine if banks are facilitating illegal activity.

The bill forbids regulators from prohibiting, restricting or discouraging financial institutions from providing any product or service to an entity that:

- is licensed and authorized to offer such product or service;
- is registered as a money transmitting business; or
- has a "reasoned" legal opinion from a state-licensed attorney that purports to demonstrate the legality of the entity's business.

As long as an entity falls into one of those three categories, H.R. 4986 would prevent regulators from warning about the risks of serving the entity, even if the financial institution observed alarmingly high levels of payments challenged as unauthorized, was warned by federal or state law enforcement officials that the entity appeared to be engaged in fraudulent or deceptive conduct, knew that the entity had numerous court orders against it, or saw signs that the entity was attempting to conceal unlawful activity. It essentially treats the three listed criteria as sufficient to guarantee the legality of a firm's operations, conduct and legal controls, even in the face of evidence to the contrary, despite the fact that none of these criteria in fact provides such a guarantee.

Both licensed and unlicensed merchants may initiate fraudulent transactions

The fact that an entity holds a state license is no guarantee that it will not engage in unlawful activity. CashCall, Inc. for example, is a licensed lender in many states. But the CFPB has charged that CashCall, acting as a servicer and debt collector on payday loans made by Western Sky, debited consumer checking accounts for money they did not owe and continued debiting accounts even after Western Sky shut down its operations in response to numerous state enforcement actions and court orders.[1] CashCall has also faced prosecution by state attorneys general for its own lending activities, and California is in the process of revoking its license.

Under the ACH system and the Federal Reserve Board's rules for remotely created checks, financial institutions warrant the validity of the payments they process. They are liable for chargebacks if a payment is unauthorized or the authorization is invalid due to fraud or illegality. Yet, under H.R. 4986, regulators would not be permitted to advise financial institutions of the risks of processing payments for entities facing government enforcement activity or operating in areas with a high risk of fraud and illegality.

A money transmitter license alone does not stop money laundering

Similarly, even if an entity is registered as a money transmitting business, it could be violating the law or failing to comply with controls needed to prevent money laundering, consumer fraud, or other illegal activity. For example, Western Union, a licensed money transmitter, was recently forced to remain under the supervision of a monitor and face the possibility of new financial penalties after Arizona Attorney General Tom Horne found sufficient controls to prevent money laundering.[2] Western Union had previously paid \$94 million to settle charges that it permitted organized criminal cartels to smuggle money across the Arizona border. Attorney General Horne took the action to protect Arizonans from border violence, gun running, and human and narcotic smuggling along the southwest border.

As this example shows, a license is no guarantee that a money transmitter is following the law, and when banks provide payment processing services to money transmitters, they play an important role to help stop money from being sent to criminals. Under H.R. 4986, if a financial institution was serving a licensed money transmitter that was at risk of facilitating money laundering, regulators could not discourage the activity or advise the financial institution of the risks.

A legal opinion from an attorney should not supercede compliance with the law

In addition, virtually any criminal can find an attorney to defend its conduct. A legal opinion by an attorney that an activity is permissible should not absolve a financial institution from its obligation to conduct due diligence on of the third parties with which it does business and to keep its eyes open for suspicious activity. Financial institutions have clear guidance from regulators about how to manage relationships with third parties, including payments processors, and a letter from the third party's attorney cannot trump that guidance.

The DOJ must have every tool at its disposal to prevent illegal activity, including the ability to subpoena financial institutions

Finally, H.R. 4986 also curtails the Department of Justice's ability to issue subpoenas in connection with its investigations of financial fraud. A subpoena is merely a request for information. If a financial institution is potentially facilitating illegal activity, a subpoena is an important tool to determine the facts. Abusive practices, especially in cases of payments fraud, are hard to detect. For fraudsters, this is by design – the best scams are those that go undetected for as long as possible – so we cannot tie the hands of the regulators charged with enforcing the law. Regulators must have the ability to examine financial institutions, ensure that appropriate compliance procedures are in place, and when necessary, issue subpoenas, to detect fraud and investigate potential abuses.

Oppose H.R. 4986

Fighting payment fraud should not be controversial. Everyone benefits from efforts to stop illegal activity that relies on the payment system. We urge you to oppose H.R. 4986 and other measures that would undermine efforts to ensure that banks comply with know-your-customer requirements, conduct due diligence on high-risk activities, and keep an eye out for signs of illegality.

Sincerely,

Americans for Financial Reform
Arkansans Against Abusive Payday Lending
California Reinvestment Coalition
Center for Responsible Lending
Consumer Action
Consumer Assistance Council of Cape Cod and the Islands
Consumer Federation of America
Consumer Federation of California
Consumer Federation of the SE
Consumers for Auto Reliability and Safety
Consumers Union
Delaware Community Reinvestment Action Council, Inc.

Florida Alliance for Consumer Protection
Jesuit Social Research Institute
Mississippi Center for Justice
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
NC Justice Center
Reinvestment Partners
The National Consumer League
Virginia Citizens Consumer Council
Woodstock Institute