

April 27, 2015

Senator
U.S. Senate
Washington, DC 20510

Re: Oppose S. 477 (Rubio) and other efforts to restrict Operation Choke Point or bank regulator anti-money laundering and payment fraud work

Dear Senator:

The undersigned civil rights and consumer organizations urge you to oppose any measures to restrict the Department of Justice's Operation Choke Point or bank regulator efforts to prevent money laundering and payment fraud. S. 477 (Rubio), the Firearms Manufacturers and Dealers Protection Act 2015, and similar bills would make it harder for government agencies to protect the public. In these days of escalating data breaches, terrorism threats, and internet fraud, we need to encourage, not discourage, efforts to deprive criminals of access to the banking system.

Operation Choke Point is focused only on banks that help scammers and other illegal activity. Separately, bank regulators enforce the Bank Secrecy Act's anti-money laundering rules that apply when customers deposit large amounts of cash or transmit money overseas. Regulators also require financial institutions and payment processors to avoid facilitating illegal or fraudulent conduct by knowingly giving fraudsters access to the payment system. None of these efforts are aimed at curtailing legal businesses, whether the business involves payday lending, pawn brokers, gun sales or any other legal business.

All three Operation Choke Point cases to date target banks that helped to process transactions despite clear evidence of fraud:

- **CommerceWest Bank** ignored explicit notice from other banks about *fraud schemes targeting the elderly*, allowing one of its clients to steal tens of millions of dollars from consumers' bank accounts.
- **Plaza Bank's** chief operating officer, who was secretly the part-owner of a payment processor, brushed aside warnings from the bank's compliance officer and allowed *fraudsters unfettered access to the bank accounts* of tens of thousands of consumers.
- **Four Oaks Bank & Trust** facilitated illegal payments taken out of consumer accounts for a *Ponzi scheme, a scam operation targeted by the FTC, and illegal and fraudulent payday loans*.

Bank regulators' efforts to stop money laundering and payment fraud are not part of DOJ's Operation Choke Point. But enforcement of money laundering and know-your-customer rules has similar benefits. *Drug dealers and terrorists* win if a bank has loose controls over cash-intensive customers or international money transmission. Similarly, banks that fail to vet their customers or look the other way when they process payments despite clear red flags of fraud or illegal activity permit *scams to flourish and enable criminals to profit from data breaches*.

Payment fraud harms not only consumers but businesses and banks as well, especially small ones. Banks are on the hook when a consumer disputes an unauthorized charge. The customer service costs are substantial as well, especially for small banks. According to NACHA, it *costs a small bank* \$100 to \$500 for each unauthorized payment challenged by its customers, compared to \$5 for a larger bank.

DOJ and bank regulators are not pressuring banks to close the accounts of legal businesses.

DOJ has brought enforcement actions against banks complicit in payment fraud, and has issued subpoenas to other banks that it has reason to suspect might be involved in similar conduct. But there is zero evidence that DOJ has pressured any bank to close the account of a legal operation. Similarly, bank regulators are doing their job by enforcing anti-money laundering laws and requiring financial institutions to be alert to signs that a bank account is being used for illegal activity.

Complaints about banks closing the accounts of check cashers, pawn dealers, money transmitters and others stem from the *2001 Bush Administration USA Patriot Act*, not Operation Choke Point, which began in 2013. In 2006, FiSCA, the trade association of neighborhood financial service providers, testified: “For the past six years banks have been abandoning us - first in a trickle, then continuously accelerating so that now few banks are willing to service us”¹ Also in 2006, the National Pawnbroker Association complained to FinCEN that “Pawn industry members have lost longstanding lines of credit as well as demand deposit relationships in most parts of the country since 2004.”² Unfortunately, controls over cash deposits, international money transmitters and know-your-customer requirements are more important than ever.

Legal payday lenders and other legal businesses are not a target.

Internet payday lenders that operate illegally without state licenses may have trouble with banking relationships. Affiliation with a tribe does not make unlicensed lending legal. The Supreme Court made clear in 2014 that tribes must comply with state laws, including license requirements, for off-reservation conduct. But we see no evidence that regulators are pressuring banks to discontinue legal payday operations. However, payday lenders are often cash-intensive businesses and also may be involved in international money transmitting, and they could be impacted by individual bank business decisions or by enforcement of the Patriot Act against noncompliant financial institutions.

Gun dealers are not the focus of DOJ or the banking agencies.

Operation Choke Point has nothing to do with gun dealers. Not one of the voluminous DOJ documents produced in the House of Representatives’ inquiry about Operation Choke Point mentioned a focus on gun dealers. DOJ’s focus is entirely on banks that are complicit in payment fraud. Similarly, gun dealers may be impacted indirectly by Patriot Act enforcement not because they are selling guns but because they may be cash-intensive businesses. Regulators may order a bank or credit union to stop serving cash-heavy businesses until the institution remedies failures in money-laundering efforts. But the idea that agencies are on a moral crusade against gun sales is a pure conspiracy theory.

¹ Gerald Goldman, General Counsel of FiSCA, “Summary Of speech before the U.S. House Committee on Financial Services, Subcomm.on Fin’l Inst’ns & Consumer Credit , Regarding Banking Services to MSBs (June 21, 2006), http://www.fisca.org/Content/NavigationMenu/GovernmentAffairs/TestimonySpeeches/FiSCAHearingOralStmtGldman_6_21_06.pdf.

² Letter from Fran Bishop, President, National Pawnbroker Association to Robert W. Werner, Director, Financial Crimes Enforcement Network (FinCEN) (May 9, 2006), http://www.fincen.gov/statutes_regs/frn/comment_letters/71fr12308_12310/msb_51_bishop.pdf.

S. 477, the Firearms Manufactures and Dealers Protection Act 2015, would cut off critical funding to prevent fraud.

S. 477 would prohibit federal agencies from using any funds to carry out Operation Choke Point – no matter what illegal conduct is targeted – or any program designed to discourage financial institutions from providing credit or payment processing for firearms or ammunition dealers. As discussed above, neither Operation Choke Point nor bank regulator efforts are aimed at gun dealers. Yet H.R. 1413 would completely defund DOJ’s payment fraud activities, such as the cases described above against fraudsters who targeted seniors and others.

S. 477 would also inhibit federal agencies from enforcing the Bank Secrecy Act and the Patriot Act if a financial institution’s noncompliance or lax money-laundering controls happened to involve an account held by a firearm or ammunition dealer. Criminals could hide money laundering in the guise of gun sales. The bill could also restrict efforts to stop a bank account from being used for illegal activity if owner of the account is a firearm or ammunition dealer.

H.R. 766, the Financial Institution Customer Protection Act of 2015, would limit DOJ’s ability to prevent fraud.

While there is presently no Senate companion bill to H.R. 766, that could change. The bill would eliminate the authority that DOJ used to investigate and bring the cases against CommerceWest Bank, Plaza Bank and Four Oaks Bank & Trust for helping scammers to debit consumers’ bank accounts. The bill would amend the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) to eliminate subpoena and other investigative authority into conduct “affecting” federally insured financial institutions. Instead, agencies could only investigate illegal conduct “against” a financial institution or “by” the institution against a third party. In other words, DOJ could not use FIRREA authority to look into signs that a bank is knowingly helping scammers to take money out of the accounts of seniors, because the scammers are not targeting the bank and the bank is not targeting the senior. The bill would frustrate efforts to protect not only the public but also insured financial institutions. The bill shows a fundamental lack of understanding of the risk that payment fraud poses to banks, which by law warrant the legality of payments when the bank serves as an intermediary between payors and payees.³

H.R. 766 would also make it more difficult and burdensome for a banking agency to discourage a financial institution from maintaining a banking relationship with a customer that shows significant signs of being involved with fraud or illegal activity. The bill would require the agency to justify that it has a “material reason” other than reputation risk for asking or encouraging an institution to terminate an account; to provide written justification to the financial institution with legal authority; and to issue annual reports to Congress. But reputation risk leads to other risks, and it is appropriate for regulatory agencies to warn financial institutions if conduct supporting scammers, drug dealers or other criminals could endanger the institution’s reputation and lead to a loss of business. More importantly, even if the agency has concerns beyond reputation risk, the bill would impose new, burdensome requirements before an agency could warn a financial institution about red flags of fraudulent conduct by one of its customers.

³ See Testimony of Adam J. Levitin, Professor of Law, Georgetown University Law Center, Before the United States House of Representatives, Judiciary Committee, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, “Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department’s Operation Choke Point” at 9-10 (July 17, 2014), http://judiciary.house.gov/_cache/files/f6210f6f-68eb-49b6-b617-167eecdfe3b/levitin-testimony.pdf.

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DOJ's Operation Choke Point and bank regulators' enforcement of the BSA and work against payment fraud protect the public from fraud, terrorism, data breaches, drug dealers and other illegal activity. None of these activities are aimed at lawful businesses. Congress should not hinder these critical federal agency activities to protect the public.

Yours very truly,

National Signatories:

Americans for Financial Reform
Center for Responsible Lending
Consumer Action
Consumer Federation of America
The Leadership Conference on Civil and Human Rights
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
U.S. PIRG

State and Local Signatories:

Arkansans Against Abusive Payday Lending, AR
Arizona Community Action Association, AZ
California Reinvestment Coalition (CRC), CA
SALAAMI FIRM, CA
Law Office of T. A. Taylor-Hunt, LLC, CO
Connecticut Association for Human Services, CT
Florida Alliance for Consumer Protection, FL
Chicago Consumer Coalition, IL
Kentucky Equal Justice Center, KY
Financial Protection Law Center, NC
Center for Economic Integrity - New Mexico Office, NM
Empire Justice Center, NY
COHHIO, OH
Oregon Consumer League, OR
SC Appleseed Legal Justice Center, SC
Texas Appleseed, TX
Virginia Poverty Law Center, VA