

April 27, 2016

RE: Oppose S. 2790 (Cruz) which will restrict efforts to protect consumers and banks from fraud, money-laundering and other illegal activities

Dear Senator:

The undersigned community, consumer and civil rights organizations strongly oppose S. 2790, the Financial Institution Customer Protection Act of 2016, introduced by Senator Cruz. The bill will hamper critical Department of Justice and banking regulator efforts to detect fraud and money laundering, putting consumers and financial institutions at risk of serious financial loss.¹

We were deeply troubled that the House of Representatives passed a similar bill, H.R. 766 earlier this year, even after a Department of Justice Office of Professional Responsibility inquiry found absolutely no evidence of misconduct or targeting of legal businesses by Operation Choke Point.² A following report from the Federal Deposit Insurance Corporation Inspector General found that the FDIC's involvement in Operation Choke Point was inconsequential to the direction and outcome of the initiative.³

To the contrary, every case brought by DOJ as part of its investigation clearly indicated that the banks and payment processors involved were knowingly engaged in fraudulent activity that resulted in millions of dollars drained from consumers' bank accounts.

The Administration strongly opposes the version of this bill that passed the House stating⁴:

This bill would constrain Federal banking regulators' ability to appropriately engage with the financial institutions they regulate for compliance with and enforcement of U.S. legal and regulatory requirements that are designed to protect the United States financial system from money laundering, terrorist financing, and other serious financial crimes.

We urge you to oppose S. 2970 and ensure that consumers and financial institutions are protected from payments fraud.

¹ Saunders, Lauren. "What Is Operation Choke Point? Stopping Banks and Payment Processors from Helping Scammers Raid Your Bank Account." Washington, D.C.: National Consumer Law Center, September 2015. http://www.nclc.org/images/pdf/banking_and_payment_systems/payment-fraud/ib_what_is_operation_choke_point52815.pdf.

² US Department of Justice Office of Professional Responsibility. "OPR Inquiry Regarding Operation Choke Point," July 7, 2015. <http://big.assets.huffingtonpost.com/ChokePointOPRReport.pdf>.

³ "The FDIC's Role in Operation Choke Point and Supervisory Approach to Institutions That Conducted Business with Merchants Associated with High-Risk Activities." Washington, DC: Federal Deposit Insurance Corporation Office of the Inspector General, September 2015. <https://www.fdicig.gov/reports15%5C15-008AUD.pdf>.

⁴ "STATEMENT OF ADMINISTRATION POLICY H.R. 766 – Financial Institution Customer Protection Act of 2015," February 2, 2016. https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr766h_20160202.pdf.

S. 2970, the Financial Institution Customer Protection Act of 2015, would limit DOJ's ability to address fraud

S. 2970 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 penalties for and investigative authority into unlawful conduct "affecting" federally insured financial institutions. Instead, agencies could only penalize or 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.⁵ The bill also imposes new procedural hurdles to investigations into FIRREA violations of any kind.

The bill could inhibit actions like the Federal Reserve Board's cease and desist order this month against CommerceWest Bank. After a DOJ Operation Choke Point action revealed that the bank permitted its customer to deposit millions of dollars of fake checks against consumer accounts, the Board appropriately ordered the bank to identify customers who pose a heightened risk of conducting illicit activities through the bank, to conduct enhanced due diligence of those accounts, and to determine whether the bank was properly filing suspicious activity reports.⁶

S. 2970 would 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 involvement with fraud or illegal activity. The bill would require the agency to justify that it has a "material reason" other than reputational 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 reputational risk also 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 reputational 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 the bank's customers.

How Operation Choke Point has worked to protect consumers

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.

⁵ 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.

⁶ Cease and Desist Order Issued Upon Consent Pursuant to the Federal Deposit Insurance Act at 5, In re CommerceWest Bank, No. 16-005-B-SM (Bd. of Gov. of the Fed. Res. Syst. and Calif. Dept. of Bus. Oversight, Apr. 12, 2016), <http://www.federalreserve.gov/newsevents/press/enforcement/enf20160419a1.PDF>.

All three Operation Choke Point cases involving financial institutions showed that, without a doubt, the banks knowingly 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*.

A fourth Operation Choke Point case was a criminal prosecution of a scammer, Neil Godfrey, who admitted that he was an *expert in finding banks that were willing to ignore the red flags* raised by the fake checks that he was deposited to steal people's money.

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 no 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"⁷ 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."⁸ Unfortunately, controls over cash deposits, international money transmitters and know-your-customer requirements are more important than ever.

A DOJ inquiry conducted at the request of Rep. Luetkemeyer and other members found no evidence of misconduct or targeting of legal businesses

At the request of Rep. Luetkemeyer and other members of the House, the Department of Justice Office of Professional Responsibility conducted a review of the allegations that DOJ staff had wrongly forced banks to terminate their relationships with legal businesses. The findings of that inquiry, released earlier this month, showed conclusively that there was no evidence of misconduct.⁹ The inquiry determined that

⁷ 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/FiSCAHearingOralStmntGol dman_6_21_06.pdf.

⁸ 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.

⁹ Weinsheimer, G. Bradley. "Department of Justice OPR Inquiry Regarding Operation Choke Point," July 9, 2015. <http://huff.to/1GLapKI>.

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the cases brought forward by DOJ since Operation Choke Point began were well supported and that the companies and people involved were knowingly involved in mass-market fraud schemes.

The inquiry also determined that the Department of Justice properly used FIRREA to address mass-market fraud and that the FIRREA subpoenas issued as part of Operation Choke Point were not used to compel financial institutions to terminate their relationships with legal business and only a small number of subpoenas involved payday lenders.

Conclusion

With escalating data breaches, terrorism threats and internet fraud, we need to encourage, not discourage, efforts to deprive criminals of access to the banking system. S. 2970 will only frustrate the efforts of Federal regulators that to date, have successfully halted numerous mass-market fraud schemes, protected countless consumers from the financial hardship that follows fraud and have done so without any evidence of misconduct or targeting of lawful businesses.

We urge you to oppose S. 2970 and other efforts to hinder critical federal agency activities to protect the public.

Yours very truly,

Americans for Financial Reform
Center for Digital Democracy
Center for Responsible Lending
Consumer Action
Consumer Federation of America
NAACP
National Association of Consumer Advocates
National Council of La Raza
National Consumer Law Center (on behalf of its low-income clients)
National People's Action
Public Citizen
Southern Poverty Law Center
U.S. PIRG

Alaska Public Interest Research Group, AK
Alabama Appleseed Center for Law & Justice, Inc., AL
Arkansans Against Abusive Lending, AR
Arizona Community Action Association, AZ
Southwest Center for Economic Integrity, AZ
California Reinvestment Coalition, CA
Consumer Federation of California, CA
Consumers for Auto Reliability and Safety, CA
Law Foundation of Silicon Valley, CA
The Bell Policy Center, CO
Delaware Alliance for Community Advancement, DE
Florida Alliance for Consumer Protection, FL
Iowa Citizens for Community Improvement, IA

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Chicago Consumer Coalition, IL
Woodstock Institute, IL
Indiana Association for Community Economic Development, IN
Indiana Assets & Opportunity Network, IN
Jesuit Social Research Institute, LA
Consumer Assistance Council, Inc. (Cape Cod and the Islands), MA
Massachusetts Consumer Council, MA
Maryland Consumer Rights Coalition, MD
Maine Center for Economic Policy, ME
Montana Organizing Project, a project of Alliance or a Just Society, MT
North Carolina Justice Center, NC
Reinvestment Partners, NC
North Dakota Community Action Partnership, ND
North Dakota Economic Security & Prosperity Alliance, ND
Sen. Tim Mathern, North Dakota State Senate, ND
New Jersey Citizen Action, NJ
Progressive Leadership Alliance of Nevada Action Fund, NV
New Economy Project, NY
COHHIO, OH
Policy Matters Ohio, OH
VOICE, Oklahoma City, OK
Pennsylvania Public Interest Research Group (PennPIRG), PA
Texas Appleseed, TX
Virginia Citizens Consumer Council, VA
Virginia Organizing, VA
West Virginia Center on Budget and Policy Council, WV
West Virginia Citizen Action, WV