

U.S. House of Representatives

Committee on Oversight and Government Reform

Darrell Issa (CA-49), Chairman



**The Department of Justice's "Operation Choke Point":
Illegally Choking Off Legitimate Businesses?**

Staff Report
113th Congress

May 29, 2014

Key Findings

- Operation Choke Point was created by the Justice Department to “choke out” companies the Administration considers a “high risk” or otherwise objectionable, despite the fact that they are legal businesses. The goal of the initiative is to deny these merchants access to the banking and payments networks that every business needs to survive.
- Operation Choke Point has forced banks to terminate relationships with a wide variety of entirely lawful and legitimate merchants. The initiative is predicated on the claim that providing normal banking services to certain merchants creates a “reputational risk” sufficient to trigger a federal investigation. Acting in coordination with Operation Choke Point, bank regulators labeled a wide range of lawful merchants as “high-risk” – including coin dealers, firearms and ammunition sales, and short-term lending. Operation Choke Point effectively transformed this guidance into an implicit threat of a federal investigation.
- The Department is aware of these impacts, and has dismissed them. Internal memoranda on Operation Choke Point acknowledge the program’s impact on legitimate merchants. Senior officials informed Attorney General Eric Holder that as a consequence of Operation Choke Point, banks are exiting entire lines of business deemed “high risk” by the government.
- The Department lacks adequate legal authority for the initiative. Operation Choke Point is being executed through subpoenas issued under Section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. The intent of Section 951 was to give the Department the tools to pursue civil penalties against entities that commit fraud *against* banks, not private companies doing legal business. Documents produced to the Committee demonstrate the Department has radically and unjustifiably expanded its Section 951 authority.
- Contrary to the Department’s public statements, Operation Choke Point was primarily focused on the payday lending industry. Internal memoranda and communications demonstrate that Operation Choke Point was focused on short-term lending, and online lending in particular. Senior officials expressed their belief that its elimination would be a “significant accomplishment” for consumers.

I. Background

Over the past year, the Department of Justice has initiated a wide-ranging investigation of banks and payment processors, known informally as “Operation Choke Point.”¹ As of December 2013, the Department had issued over fifty subpoenas to banks and payment processors.² The ostensible goal of the investigation is to combat mass-market consumer fraud by foreclosing fraudsters’ access to payment systems.³ However, there is evidence that the true goal of Operation Choke Point is to target industries deemed “high-risk” or otherwise objectionable by the Administration.⁴

Following the launch of Operation Choke Point in spring 2013, a wide variety of fully lawful and legitimate businesses received notices that their bank accounts were being abruptly terminated. The terminations were often attributed to “regulatory trends” or “heightened scrutiny,” and expressly disclaimed any negative assessment of the accountholder’s financial risk.⁵ The sheer breadth of industries affected – including firearms and ammunition sales,⁶ adult entertainment,⁷ check cashing,⁸ and payday lending⁹ – has generated significant concern with the objectives and scope of Operation Choke Point. William Isaac, a former Chairman of the Federal Deposit Insurance Corporation, has characterized the initiative an “attack on market economy,” while *Techdirt* has warned of the propriety of forcing private banks into “dancing to a federal piper.”¹⁰

Writing in *USA Today*, Glenn Reynolds expressed concern with the unforeseen consequences of allowing the Department of Justice to pressure banks to shut down the accounts of legal industries: “while abortion clinics and environmental groups are probably safe under the Obama Administration, if this sort of thing stands, they will be vulnerable to the same tactics if a different administration adopts this same thuggish approach toward the businesses that it dislikes.”¹¹ Such a possibility is far from outlandish: at the same time the Administration is

¹ Presentation by a Trial Attorney in the Consumer Protection Branch, U.S. Dep’t of Justice, to the Federal Financial Institutions Examination Council, Sept. 17, 2013 (slides on file with Committee staff).

² HOCR-3PPP000497.

³ See Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Office of Legis. Affairs, U.S. Dep’t of Justice, to Rep. Blaine Luetkemeyer (Sept. 12, 2013) (stating “[t]he Department seeks to combat fraud and other unlawful practices in the payment system, and our efforts are focused on all those engaged in illegal activity.”); Congressional staff briefing with the Deputy Assistant Attorney General for Consumer Protection, Civil Div., U.S. Dep’t of Justice, on Sept. 20, 2013.

⁴ HOCR-3PPP000458.

⁵ See, e.g., *infra* text accompanying note 30.

⁶ Kelly Riddell, ‘High risk’ label from feds puts gun sellers in banks’ crosshairs, hurts business, WASH. TIMES, May 18, 2014.

⁷ Glenn Harlan Reynolds, *Justice Department shuts down porn money: Column*, USA TODAY, May 26, 2014.

⁸ William Isaac, ‘Operation Choke Point: Way Out of Control’, AMERICAN BANKER, Apr. 27, 2014.

⁹ Jessica Silver-Greenberg, *Justice Department Inquiry Takes Aim at Banks’ Business With Payday Lenders*, N.Y. TIMES, Jan. 26, 2014.

¹⁰ William Isaac, ‘Operation Choke Point: Way Out of Control’, AMERICAN BANKER, Mar. 21, 2014; Timothy Geigner, *DOJ Morality Police May Be Behind Chase Closing Bank Account of Adult Film Actors*, TECHDIRT, May 1, 2014.

¹¹ Glenn Harlan Reynolds, *Justice Department shuts down porn money: Column*, USA TODAY, May 26, 2014.

pressuring banks to terminate relationships with legal industries, it is providing formal guidance to banks on how to provide financial services to the marijuana industry.¹²

Concerned that both the goal and mechanisms of Operation Choke Point constitute a serious abuse of the Department's civil investigative authority, on January 8, 2014, Chairman Issa and Subcommittee Chairman Jordan requested documents and communications related to Operation Choke Point. In response, the Department of Justice provided 853 pages of internal memoranda, email communications, and presentations. These internal documents confirm that the Operation Choke Point is an inappropriate exercise of the Department's legal authorities, and is being executed in a manner that unfairly harms legitimate merchants and individuals.

II. The Department Lacks Adequate Legal Justification for Operation Choke Point

The Department is implementing Operation Choke Point through subpoenas issued under Section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).¹³ Section 951 authorizes the Attorney General to seek civil money penalties against entities that commit mail or wire fraud "affecting a federally insured financial institution."¹⁴ The Attorney General is further authorized, in contemplation of such a proceeding, to issue administrative subpoenas for the production of documents and the deposition of witnesses. Such subpoenas are not subject to judicial authorization, and apply to all records and witnesses the Attorney General "deems relevant or material to the inquiry."¹⁵ Congress enacted FIRREA – and its extraordinary grant of civil investigative authority – in response to the savings and loan crisis of the late 1980s. The intent of Section 951 was to give the Department the tools to pursue civil penalties against individuals and entities that commit fraud *against* depository institutions.¹⁶

Documents produced to the Committee indicate that, in furtherance of Operation Choke Point, the Department has radically and inappropriately expanded its own authority under FIRREA. In a memorandum on Operation Choke Point prepared for Stuart F. Delery, the Assistant Attorney General for the Civil Division, senior officials candidly discuss the legal authority for the program. The discussion begins by flatly conceding that "[Section 951] was not designed principally to address consumer fraud . . . FIRREA penalties are paid to the Treasury, and the statute does not include a provision for restitution to victims of fraud."¹⁷ The memorandum further acknowledges that Section 951 requires that the alleged fraud "[affect] a federally insured financial institution." In an end-run around this requirement, the memorandum posits that providing normal banking services to an allegedly fraudulent merchant creates a variety of "risks," and that these risks may "affect" the institution. The memorandum even concedes that these risks are strictly hypothetical, candidly admitting that "[t]he financial

¹² See Financial Crimes Enforcement Network, U.S. Dep't of the Treasury, Guidance: BSA Expectations Regarding Marijuana-Related Businesses, Feb. 14, 2014; *see also* Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

¹³ 12 U.S.C. § 1833a.

¹⁴ *Id.* at § 1833a(c)(2).

¹⁵ *Id.* at § 1833a(f)(1)(C).

¹⁶ Allyson B. Baker and Andrew Olmem, Venable LLP, *FIRREA: The DOJ's Expansive (and Expensive) Tool of Choice*, 29 WESTLAW J. OF CORP. OFFICERS AND DIRECTORS LIABILITY 3 (2013).

¹⁷ HOCR-3PPP000336.

institutions we are investigating have not suffered any actual losses.”¹⁸ While the memorandum does cite a single recent court case, the Department’s analysis clearly reflects the inherent legal error of using an anti-*bank fraud* statute to combat *merchant fraud*.

Frank Keating, president and CEO of the American Bankers Association and a former U.S. Attorney and Associate Attorney General, has called the Department’s strategy “legally dubious.”¹⁹ In a recent op-ed in *The Wall Street Journal*, Mr. Keating explained:

[The Department] is pressuring banks to shut down accounts without pressing charges against a merchant or even establishing that the merchant broke the law. It’s clear enough that there’s fraud to shut down the account, Justice asserts, but apparently not enough for the highest law-enforcement agency in the land to prosecute.

...

[The Department] is now blurring these boundaries and punishing the banks that help them fight crime. If a bank doesn’t shut down a questionable account when directed to do so, Justice slaps the institution with a penalty for wrongdoing that may or may not have happened. The government is compelling banks to deny service to unpopular but perfectly legal industries by threatening penalties.²⁰

Ultimately, the Department’s tortured legal analysis has turned FIRREA on its head: Section 951 was intended to help the Department *defend* banks from fraud; instead, the Department is using it to *forcibly conscript* banks to serve as the “policemen and judges” of the commercial world.²¹

III. Impacts on Financial Services, Businesses, and Consumers

a. Documents Show the Department is Targeting Legal Financial Services

The Department has consistently stated that the goal of Operation Choke Point is to combat mass-market consumer fraud. In a letter to the American Bankers Association and the Electronic Transaction Association on January 22, 2014, Assistant Attorney General Delery was unequivocal: “The Department wishes to make clear that the aim of these efforts is to combat fraud. The Department has no interest in pursuing or discouraging lawful conduct.”²² The Department reaffirmed this position in a letter to Chairman Issa and Subcommittee Chairman Jordan on January 24, 2014.²³ Documents produced to the Committee call into question the

¹⁸ *Id.*

¹⁹ Frank Keating, Op-Ed., *Justice Puts Banks in a Choke Hold*, WALL ST. J., Apr 24, 2014.

²⁰ *Id.*

²¹ *Id.*

²² Letter from Stuart F. Delery, Assistant Attorney General, Civil Div., Dep’t of Justice, to Jeff L. Plagge, Chairman, American Bankers Ass’n, and Jason Oxman, Chief Executive Officer, Elec. Transaction Ass’n (Jan. 22, 2014).

²³ Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, Dep’t of Justice, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, and Jim Jordan, Chairman,

accuracy of these statements. Specifically, internal memoranda on Operation Choke Point clearly demonstrate that the Department's primary target is the short-term lending industry – an indisputably lawful financial service.

The idea for the initiative originated in the Consumer Protection Working Group of the Financial Fraud Enforcement Task Force. The working group's mission statement included a list of priorities:

[T]his new Working Group will examine a wide variety of areas where consumers may be vulnerable to fraud. Those may include: identity theft, third-party payment processors and other payment fraud, student-consumer fraud, cramming, business opportunity schemes, data privacy, payday lending, counterfeiting, and schemes targeting servicemembers and their families.²⁴

There is no explanation for why payday lending and payment processing – two legal financial practices – are included in a list of explicitly fraudulent activities.

After Operation Choke Point was underway, regular status reports reflect the initiative's intense focus on short-term lending. The *Eight-Week Status Report* on Operation Choke Point, prepared for Assistant Attorney General Delery on April 17, 2013, framed payday lending as the primary target of the initiative. In fact, it is the sole type of financial service mentioned in the memorandum.²⁵ The *Four-Month Status Report* on Operation Choke Point, prepared for Assistant Attorney General Delery on July 8, 2013, expressly identifies Internet payday lending as a fraudulent "scam" being targeted by the initiative.²⁶

The strongest evidence that the Department is targeting certain lawful financial practices can be found in internal discussions of settlement negotiations. In an email dated October 1, 2013, the Director of the Consumer Protection Branch and the Deputy Assistant Attorney General for Consumer Protection discussed ongoing negotiations with subpoenaed banks.²⁷ The email notes that the Department's settlement proposals have included "specific bans [on] doing business" with whole categories of lawful financial services.²⁸ The email describes "specific language" on payday lending, debt relief companies, foreclosure rescue companies, and credit repair companies:

Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs, H. Comm. on Oversight and Gov't Reform (Jan. 24, 2014).

²⁴ HOCR-3PPP000001.

²⁵ HOCR-3PPP000048-52 (The conclusion of the memorandum, entitled "Related Areas of Inquiry," does include a brief discussion of other financial services and products: "In addition to evaluating the payday lending industry, we are attempting to develop a better understanding of consumer fraud risk posed by emerging payment systems.").

²⁶ HOCR-3PPP000166.

²⁷ HOCR-3PPP000401.

²⁸ *Id.*

From: Blume, Michael S.
Sent: Tuesday, October 01, 2013 10:55 AM
To: Frimpong, Maame Ewusi-Mensah (CIV)
Subject: TPPP

Maame

FYI – Rich, Joel, and I had a conversation about following up on Stuart’s suggestions from last night. I’m happy to discuss in more detail, but the short of it is that they are already where Stuart wants them to be (i.e., pushing for the alternative, non-specific language rather than the specific language on payday lending). There are some nuances that we need to think through, which we are doing. For example, some proposals to banks have included specific bans doing business with debt relief companies, foreclosure rescue companies, and credit repair companies, and finding alternative, non-specific language presents unique challenges.

Mike

Such blanket prohibitions on entire industries are wholly inconsistent with the Department’s repeated assertion it is merely pursuing fraudsters, and has “no interest” in discouraging lawful conduct.²⁹

Operation Choke Point is having its desired effect –legitimate merchants in legal industries are being choked-off from the financial system. In a statement to the House Committee on Financial Services, a trade group of licensed money service businesses and lenders submitted recent account termination letters in which the bank explicitly attributed the termination to Operation Choke Point.³⁰ A sample of these letters includes:

- **Bank of America:** “[W]e reviewed the nature of your business in light of current regulatory trends affecting your industry. After careful consideration we’ve decided to close your existing Small Business checking account” (January 14, 2014)
- **Bank of Hawaii:** “Bank of Hawaii has made a business decision to close your above-referenced business deposit accounts. The primary reason for this account closure is the Bank’s increasing business expenses involved with servicing this type of account for a customer that operates as a money service business and/or payday lender.” (December 6, 2013).
- **Hancock Bank | Whitney Bank:** “We are unable to effectively manage your Account(s) on a level consistent with the heightened scrutiny required by our regulators for money service businesses due to the transactional characteristics of your business.” (February 26, 2014)
- **Fifth Third Bank:** “During recent reviews of the payday lending industry, we have determined that the services provided by clients in this industry are outside of our risk

²⁹ See *supra* note 22.

³⁰ Statement of the Financial Service Centers of America to the U.S. House of Representatives Committee on Financial Services, Regarding the Impact of Recent Regulatory Supervisory and Enforcement Actions on Consumer Financial Services, Exhibit “A” (April 8, 2014).

tolerance. As such, we will no longer be able to provide financial services to businesses that operate in that industry.” (March 18, 2014)

Documents produced to the Committee demonstrate that this reaction is the precise goal of Operation Choke Point. The *Six-Month Status Report* on Operation Choke Point, prepared for Assistant Attorney General Delery on September 9, 2013, notes:

Many of the banks that have received our FIRREA subpoenas have reported extensive relationships with Internet payday lenders, via payment processors. Several banks have informed us that, as a result of our subpoenas, they have taken a deeper look at these Internet payday lenders and their business practices. Finding substantial questions concerning the legality of the Internet payday lending business models and the loans underlying debits to consumers’ bank accounts, **many banks have decided to stop processing transactions in support of Internet payday lenders. We consider this to be a significant accomplishment and positive change for consumers**³¹ [emphasis added]

. . .

Although we recognize the possibility that banks may have therefore decided to stop doing business with legitimate lenders, we do not believe that such decisions should alter our investigative plans. Solving that problem – if it exists – should be left to legitimate lenders themselves who can, through their own dealings with banks, present sufficient information to the banks to convince them that their business model and lending operations are wholly legitimate.³² [emphasis added]

Such an expectation – “if they are legitimate, they can prove it” – is patently absurd, and reminiscent of the formulation that “if one is *not* a witch, then they will sink rather than float.” Furthermore, given that the Department has ordered banks to cease doing business with all short-term lenders in its settlement negotiations, no amount of evidence of legitimacy will be “sufficient” to secure a banking relationship.³³

b. Banks are Terminating Relationships with Legal Industries, Often Leaving Businesses with No Recourse

Operation Choke Point threatens countless legal businesses well outside of consumer finance. The Department’s radical reinterpretation of its authority under FIRREA, in conjunction with recent policy announcements by bank examiners, is compelling banks to terminate longstanding lending and depository relationships with a wide array of lawful businesses and individuals. In 2012, the Federal Deposit Insurance Corporation issued revised guidance for FDIC-supervised institutions concerning their relationships with payment processors.³⁴ The guidance identified a variety of businesses who pose “elevated . . . legal,

³¹ HOGR-3PPP000333.

³² HOGR-3PPP000335.

³³ *Id.*

³⁴ Federal Deposit Insurance Corporation, Financial Institution Letter, FIL-3-2012, Jan. 31, 2012.

reputational, and compliance risks” to depository institutions.³⁵ According to the FDIC, these businesses include:

... credit repair companies, 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.³⁶

An earlier announcement posted to the FDIC website provided an even more expansive list of “high-risk activity.”³⁷

Some merchant categories that have been associated with high-risk activity include, but are not limited to:

- | | |
|----------------------------|-------------------------------|
| • Ammunition Sales | • Life-Time Memberships |
| • Cable Box De-scramblers | • Lottery Sales |
| • Coin Dealers | • Mailing Lists/Personal Info |
| • Credit Card Schemes | • Money Transfer Networks |
| • Credit Repair Services | • On-line Gambling |
| • Dating Services | • PayDay Loans |
| • Debt Consolidation Scams | • Pharmaceutical Sales |
| • Drug Paraphernalia | • Ponzi Schemes |
| • Escort Services | • Pornography |
| • Firearms Sales | • Pyramid-Type Sales |
| • Fireworks Sales | • Racist Materials |
| • Get Rich Products | • Surveillance Equipment |
| • Government Grants | • Telemarketing |
| • Home-Based Charities | • Tobacco Sales |
| • Life-Time Guarantees | • Travel Clubs |

As with the formal guidance, FDIC provided no explanation or warrant for the designation of particular merchants as “high-risk.” Furthermore, there is no explanation for the implicit equation of legitimate activities such as *coin dealers* and *firearm sales* with such patently illegal or offensive activities as Ponzi schemes, racist materials, and drug paraphernalia.

Operation Choke Point rendered the FDIC’s policy announcements extremely significant. The initiative is predicated on a radical reinterpretation of FIRREA – that merely providing normal banking services to certain merchants creates a “reputational risk” that is an actionable violation under Section 951.³⁸ As a consequence of this reformulation, Operation Choke Point effectively transformed the FDIC guidance into an implicit threat of a federal investigation. Suddenly, doing business with a “high-risk” merchant is sufficient to trigger a subpoena by the

³⁵ *Id.* at 1.

³⁶ *Id.*

³⁷ Federal Deposit Insurance Corporation, Supervisory Insights, *Managing Risk in Third-Party Payment Processor Relationships* (Summer 2011).

³⁸ See *supra* text accompanying note 17.

Department of Justice. Banks are 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.

Documents produced to the Committee demonstrate that the Department was counting on this reaction. The initial internal proposal for Operation Choke Point argued that banks would be “sensitive” to the risk of a federal investigation, and could be expected to “scrutinize immediately” their relationships.³⁹ Recent news reports have detailed the consequences of this scrutiny. A May 18, 2014 article in *The Washington Times* describes how a number of firearms merchants – a category identified as “high risk” by the government – abruptly had their bank accounts frozen or terminated.⁴⁰ One such example is particularly telling:

T.R. Liberti, owner and operator of Top Gun Firearms Training and Supply in Miami, has felt the sting firsthand. Last month, his local bank, BankUnited N.A., dumped his online business from its service.

An explanatory email from the bank said: “This letter in no way reflects any derogatory reasons for such action on your behalf. But rather one of industry. Unfortunately your company’s line of business is not commensurate with the industries we work with.”⁴¹

The FDIC’s policy statements on firearm and ammunition sales carry additional weight in light of FDIC’s active involvement in Operation Choke Point. Documents produced to the Committee indicate that in April 2013, the head of the Compliance and Enforcement Group of FDIC’s Division of Depositor and Consumer Protection reached out to the Department to discuss “potential investigative approaches” with respect to banks and payment processing.⁴² Later, the FDIC volunteered two attorneys to assist in the Department’s investigations.⁴³ The FDIC’s close coordination with the Department was well-reported, and likely contributed to the banks’ understanding that the FDIC policy statements carried with them the threat of a federal investigation.⁴⁴

On May 7, 2014, the Department of Justice offered the following statement on Operation Choke Point: “Of course, we recognize that most of the businesses that use the banking system are not fraudsters. We’re committed to ensuring that our efforts to combat fraud do not discourage or inhibit the lawful conduct of these honest merchants.”⁴⁵ The experience of firearms and ammunition merchants – an industry far

³⁹ HOCR-3PPP000018.

⁴⁰ Kelly Riddell, ‘High risk’ label from feds puts gun sellers in banks’ crosshairs, hurts business, WASH.TIMES, May 18, 2014.

⁴¹ *Id.*

⁴² HOCR-3PPP000051.

⁴³ HOCR-3PPP000168.

⁴⁴ Alan Zibel and Brent Kendall, *Probe Turns Up Heat on Banks: Prosecutors Target Firms That Process Payments for Online Payday Lenders, Others*, WALL ST. J., Aug. 7, 2013.

⁴⁵ Posting of the Civil Division’s Consumer Protection Branch to The Justice Blog, <http://blogs.justice.gov/main/archives/3651> (May 7, 2014).

removed from consumer finance fraud – calls into question the sincerity of the Department’s statements.

IV. Frustration of Congressional Oversight

The immediate and serious impact of Operation Choke Point prompted intense Congressional scrutiny. On August 22, 2013, Representative Blaine Luetkemeyer and thirty Members of Congress wrote a letter to Attorney General Holder and FDIC Chairman Gruenberg. Citing a recent article in the *Wall Street Journal*, the Members expressed concern that the Department’s actions amounted to an effort to “choke off short-term lenders.”⁴⁶ In its response of September 12, 2013, the Department expressly challenged the fundamental premise of Representative Luetkemeyer’s letter – that Operation Choke Point was focused on online lending: “[t]he Department’s efforts in this regard are not targeted at any one of these scams; rather, we are targeting fraud and unlawful practices in all of them.”⁴⁷ Expressing a desire to “clarify an apparent misunderstanding,” the Department accused the authors of misinterpreting the contents of the *Wall Street Journal* article.

Documents produced to the Committee demonstrate the accuracy of the Representative Luetkemeyer’s interpretation, and call into question the sincerity of the Department’s response. As an initial matter, the internal memoranda and status reports described above show that payday lenders, and online lenders in particular, were a primary target of Operation Choke Point. More damning, however, is that senior Department officials had precisely the same understanding of the *Wall Street Journal* article as did Representative Luetkemeyer. In a series of emails from August 6, 2013, senior officials in the Civil Division discussed the Department’s cooperation with the *Wall Street Journal* reporter. The Director of the Consumer Protection Branch summarized the initial inquiry as follows:

This is connected to our third party payment processing initiative, in which we have been starting to pay closer attention to banks and processors who deal with payday lenders. **My view is that getting the message out that DOJ is interested in on-line payday lenders and the potential abuses is important.**⁴⁸
[emphasis added]

The Deputy Assistant Attorney General for Consumer Protection further described the Department’s cooperation with the *Wall Street Journal* inquiry:

We want to give you a heads up that [the Director of the Consumer Protection Branch] is doing a background interview this afternoon at 4pm **on online pay day lending. As we described for you at last week’s meeting, we are engaged in a third-party payment processor initiative in which we are looking into banks that deal with processors who work for payday lenders of all types.**⁴⁹

⁴⁶ Letter from Rep. Blaine Luetkemeyer, et al., to Attorney General Eric H. Holder, Jr. (August 22, 2013).

⁴⁷ Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, Dep’t of Justice, to Rep. Blaine Luetkemeyer (Sept. 12, 2014).

⁴⁸ HOCR-3PPP000307.

⁴⁹ HOCR-3PPP000308.

It is entirely unacceptable for the Department to formally accuse Members of Congress of “misunderstanding” the focus of a major Department initiative, when senior officials in charge of that initiative shared precisely the same understanding.

Nonetheless, such obfuscation was repeated at a Congressional staff briefing on September 20, 2013. In response to questions concerning the targets of Operation Choke Point, the Deputy Assistant Attorney General for Consumer Protection repeatedly stated that the target of Operation Choke Point was mass-market consumer fraud and that the Department was not singling out any particular industry.⁵⁰ Furthermore, the Deputy Assistant Attorney General refused to provide basic information unrelated to specific investigations, such as the level of return rate sufficient to trigger an investigation, or the identity of the individual to whom the Attorney General had delegated his Section 951 subpoena authority.

Documents produced to the Committee provide context for the nature of the Department’s response to Congressional oversight. In a November 21, 2013 memorandum on Operation Choke Point addressed to the Office of the Attorney General, the Office of the Deputy Attorney General, and the Office of the Associate Attorney General, senior officials in the Civil Division indicated their belief that Congressional oversight of this matter was being “directed and funded primarily by the owner of a particular payment processor presently under investigation.”⁵¹ Such an accusation is both offensive and irresponsible, and reflects negatively on the Department’s response to Congressional oversight of a major Department initiative.

V. Conclusion

Forceful prosecution of those who defraud American consumers is both responsible and admirable. However, Department of Justice initiatives to combat mass-market consumer fraud must be legitimate exercises of the Department’s legal authorities, and must be executed in a manner that does not unfairly harm legitimate merchants and individuals.

Operation Choke Point fails both these requirements. The Department’s radical reinterpretation of what constitutes an actionable violation under § 951 of FIRREA fundamentally distorts Congress’ intent in enacting the law, and inappropriately demands that *bankers* act as the moral arbiters and policemen of the commercial world. In light of the Department’s obligation to act within the bounds of the law, and its avowed commitment not to “discourage or inhibit” the lawful conduct of honest merchants, it is necessary to disavow and dismantle Operation Choke Point.

⁵⁰ Congressional Staff Briefing with the Deputy Assistant Attorney General for Consumer Protection, Civil Div., U.S. Dep’t of Justice, on Sept. 20, 2013.

⁵¹ HOCR-3PPP000501.



OBAMA'S 'OPERATION CHOKE POINT' SEEKS TO DESTROY SECTORS OF PRIVATE LENDING INDUSTRY

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by MICHAEL PATRICK LEAHY (/COLUMNISTS/MICHAEL-PATRICK-LEAHY) 8 Jan 2014 105
 POST A COMMENT (/BIG-GOVERNMENT/2014/01/08/OBAMA-ADMINISTRATION-S-OPERATION-CHOKE-POINT-ON-MISSION-TO-DESTROY-KEY-SECTORS-OF-PRIVATE-LENDING-INDUSTRY#COMMENTS)



Breitbart News has learned that in 2013 the Obama administration launched an under-the-radar project, 'Operation Choke Point,

([http://www.microbilt.com/communications/FDIC-](http://www.microbilt.com/communications/FDIC-OCC-DOJ-Presentation(91713).pdf)

[OCC-DOJ-Presentation\(91713\).pdf](http://www.microbilt.com/communications/FDIC-OCC-DOJ-Presentation(91713).pdf)) which is designed to destroy three sectors of the private lending industry: third party payment processors ("TPPPs"), payday lenders, and online lenders.

The operation is headed by political operatives and career bureaucrats at the Department of Justice, the FDIC, and the new Consumer Financial Protection Bureau ("CFPB"). It appears to be the latest example of the Obama administration's successful efforts to weaponize the apparatus of the federal government against people and industries it opposes ideologically.

According

(<http://online.wsj.com/news/articles/SB10001424127887323838204578654411043000772>) to the *Wall Street Journal*, the federal initiative now known as 'Operation Choke Point' is an outgrowth of the *President's Financial Fraud Task Force* (<http://www.stopfraud.gov/>), established by President Obama by Executive Order in 2009. It also appears to have been kicked off in secret by the Department of Justice, FDIC, and the CFPB in early 2013 without the requisite statutory authority. Officials at the Department of Justice have withheld information about the program from Congress, though they have eagerly shared details with federal financial institution examiners authorized to supervise and discipline the nation's banks and related financial institutions.

On August 22, thirty-one members of Congress sent a [letter](#)

([https://www.google.com/url?](https://www.google.com/url?sa=t&rcf=i&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.stopfraud.gov%2F)

[sa=t&rcf=i&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCwQFjAA&url=http%3A%](https://www.google.com/url?sa=t&rcf=i&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.stopfraud.gov%2F)

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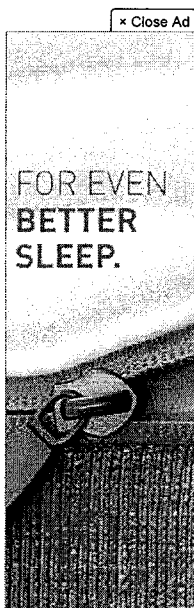
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In the letter, which was organized by Congressman Kevin Yoder (R-KS) and Congressman Blaine Luetkemeyer (R-MO), the members of Congress stated "[i]t has come to our attention that the DOJ and the FDIC are leading a joint effort that according to a DOJ official is intended to 'change the structures within the financial system...choking [online short term lenders] off from the very air they need to survive.' "

"We are especially troubled by reports that the DOJ and FDIC are intimidating some community banks and third party payment processors with threats of heightened regulatory scrutiny unless they cease doing business with online lenders," the letter read. "As a result, many bank and payment processors are terminating relationships with many of their long-term customers who provide underserved consumers with short-term credit options," it continued.

The members of Congress warned Holder and Gruenberg that these actions were undertaken by their respective agencies without statutory authority. "Your actions to 'choke off' short-term lenders by changing the structure of the financial system are outside your congressional mandate," they wrote. "With the enactment of the Dodd-Frank Act, Congress acknowledged the need for short-term credit products and did not try to limit online lender's or storefront operators' ability to offer such products."

Congress, they wrote, actually wanted to limit these type of actions. "Dodd-Frank also included a specific provision designed to prohibit the Consumer Financial Protection Bureau from imposing rate limitations on short-term loans. Neither Dodd-Frank, nor any other legislation passed by Congress, has given the DOJ/FDIC or any other federal agency the authority to 'take away the very air' that online lenders' need to survive.' "

The letter closed by requesting a briefing of Congressional staff members on the project by Department of Justice and FDIC officials.

In response to that letter, a Department of Justice official met with Congressional staff members at the Capitol in late September, but refused to answer any questions about the project. Sources with knowledge of the meeting tell Breitbart News that the official also told Congressional staffers that the Department of Justice was under no obligation to tell Congress anything about the program. The official also refused to state her name, which was discovered only after she left her business card on the table as she left the event. Sources tell Breitbart News that the name on the card was Deputy Assistant Attorney General, Consumer Protection Branch [Maame Ewusi-Mensah Frimpong](http://www.linkedin.com/pub/maame-ewusi-mensah-frimpong/77/695/456) (<http://www.linkedin.com/pub/maame-ewusi-mensah-frimpong/77/695/456>).

On Tuesday, Breitbart News contacted Deputy Assistant Attorney General Frimpong to confirm or deny these reports. She responded promptly by email, stating "Thank you for your inquiry. I am referring it to Wyn Hornbuckle, in our Office of Public Affairs. Please follow up with him directly."

Breitbart News followed up with Mr. Hornbuckle, who acknowledged our inquiry but has not yet provided a response.

Though the Department of Justice official identified by Breitbart News's sources as Deputy Assistant Attorney General Frimpong refused to provided details of the under-the-radar operation to Congressional staffers, that same week, on September 17, her subordinate, Department of Justice Trial Attorney Joel M. Sweet (an Assistant United States Attorney in the Eastern District of Philadelphia on detail to the Consumer Protection Branch of the Department of Justice in Washington), was eager to provide specific details of 'Operation Choke Point' ([http://www.microbilt.com/communications/FDIC-OCC-DOJ-Presentation\(91713\).pdf](http://www.microbilt.com/communications/FDIC-OCC-DOJ-Presentation(91713).pdf)) to an important meeting of bank examiners held in Northern Virginia and sponsored by the [Federal Financial Institutions Examination Council](http://www.ffiec.gov/about.htm) (FFIEC). (<http://www.ffiec.gov/about.htm>) (FFIEC).

According to the FFIEC's website, the organization plays a critical role in influencing the behavior of banks and financial institutions around the country:

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The Council is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the Consumer Financial Protection Bureau (CFPB) and to make recommendations to promote uniformity in the supervision of financial institutions.

Bank examiners are in key positions to influence the conducts of banks and financial institutions through the application of threats and pressure.

In a presentation to that group, Sweet unveiled the new name for the project, 'Operation Choke Point,' and outlined the accomplishment over the past several months. Sweet revealed that "important steps forward" included "guidance to banks from FDIC, OCC, and FinCen" as well as "Financial Fraud Enforcement Task Force/Consumer Protection Branch efforts to choke-off fraudsters' access to payment systems."

Sweet confirmed that the other agencies involved included "DOJ, FTC, FDIC-OIG, USPIS, [and] the FBI."

Accomplishments of 'Operation Choke Point' to date, Sweet told his audience, included "more than 50 subpoenas issued to banks and TPPPs [and] several active criminal and civil investigations." As a result of this pressure, Sweet stated "banks are self-disclosing problematic TPPP relationships... and terminating TPPP relationships."

In an exclusive interview with Breitbart News on Monday, Richard Manning, Director of Communications for Americans for Limited Government, criticized the Obama administration's efforts to destroy the payday loan industry. "Their intent," Manning said, "is to create a government sanctioned means of driving private industry out of the business of providing payday loans. They've never shown a great willingness to be restrained by free market principles over the use of government sanctions."

Peter Barden of the Online Lenders Association agrees that the Obama administration's influence on bank regulators has overstepped its legal authority. "It should also send a troubling message to banks that at any point regulators can force them to stop processing legal transactions simply because they don't like a particular merchant or industry," he said

(<http://online.wsj.com/news/articles/SB10001424127887323838204578654411043000772>).

Third party payment processors, "TPPPs," have become so troubled by the Obama administration's overreach they decided in September to establish their own trade association to fight back.

Marsha Jones, director of the recently formed Third Party Payment Processors Association told (<http://www.isoandagent.com/media/pdfs/19Dec2013ISOAgent.pdf?ET=isoandagent:e18375:a:&st=email>) *ISO & Agent Weekly* last month that "small businesses often transact through the accounts of third-party processors, and interrupting their payments would damage the economy."

Jones claims that, due to 'Operation Choke Point' "many banks won't take on such merchants."

In addition, Jones says that "curbing third-party processors would also harm community banks that are too small to maintain the staffing to take on high-risk clients that third-party processors handle."

But the Obama administration's attack on TPPPs and payday loan providers is not limited to providing pressure on bank examiners. Sources tell Breitbart News that a new Consumer Financial Protection Bureau rule designed to crush the payday loan industry (<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=3170-AA40>) is expected to be announced in January.

The abstract of the proposed rule governing Payday Loans and Deposit Advance Products states "[i]n April 2013, the CFPB issued a white paper summarizing the CFPB's initial findings from its analysis of payday loan and deposit advance products. The white paper, which was based on supervisory data, highlighted a number of consumer protection concerns, including consumers' "sustained use" of these short-term, high-cost products. The CFPB is considering whether rules governing these products are warranted under CFPB authorities, and if so what types of rules would be appropriate. Rulemaking might include disclosures or address acts or practices in connection with these products."

At the FDIC, the official in charge of 'Operation Choke Point' is Mark Pearce, a highly partisan operative with ties to Senator Elizabeth Warren (D-MA), the intellectual force behind the Dodd-Frank legislation whose nomination to head up the new Consumer Financial Protection Bureau was withdrawn because Ms. Warren did not have enough political support in the Senate at the time to obtain confirmation.

Pearce was named (<http://www.fdic.gov/news/news/press/2010/pr10225.html>) director of the FDIC's newly created Division of Depositor and Consumer Protection in 2010. According to the agency's press release, "The FDIC Board of Directors approved the creation of the DCP last August to help carry out its responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act."

As the FDIC press release announcing his appointment acknowledges, "Mr. Pearce spent more than ten years with the Center for Responsible Lending in Durham, North Carolina, one of the nation's leading sources of expertise in consumer protection in financial services."

The Center for Responsible Lending's operations have been very controversial. Financial journalist Lawrence Meyers, for instance, wrote in 2009 (<http://www.bloggernews.net/120329>) that "The Center for Responsible Lending (CRL) has a history of distorting the truth concerning payday loans (PDLs), used by 6 million Americans to meet short-term credit needs. However, the CRL is merely a front for the Self-Help Foundation, a credit union in direct competition with payday lenders, whose founders were principal purveyors of destructive subprime mortgages."

In an August 22 editorial (<http://p.washingtontimes.com/news/2013/aug/22/editorial-obamas-endrun/>), the *Washington Times* became the first media outlet to alert the public to this issue. "The president," the *Times* wrote, "doesn't like payday lenders, and neither, particularly, do we. But rather than seek changes by legislation or an open rule-making process to propose reform, the White House simply cracked down on payday lending."

The trouble with this, as the *Times* pointed out, is the precedent it establishes. "[Our] system of checks and balances was put in place to prevent such abuses. Mr. Obama is determined to lend himself as much power as he can. If Congress won't assert its constitutional authority by blocking such behavior, it will never retrieve the power and authority the Constitution gave it."

The Obama administration, by treating Congress with disdain and failing to provide evidence of the statutory authority for its actions, is signaling that it has no intention of stopping. Up next for the administration is the expansion of the tactics used in 'Operation Choke Point' to a whole host of industries the Obama administration does not like and has identified for targeting, including manufacturers of guns and ammunition.

****UPDATE****

After this story was published, Justice Department spokesman Wyn Hornbuckle provided a statement to Breitbart News in response to our request to Deputy Assistant Attorney General Frimpong that she confirm or deny the reports of her conduct at a meeting with Congressional staff members in late September:

As a matter of policy, the department does not comment on the existence of ongoing law enforcement investigations with the media or with Congressional staff. Department contacts with members of Congress are handled through the Office of Legislative Affairs. When meetings are scheduled, OLA informs Congressional staffers the name and role of department employees they may be meeting with.

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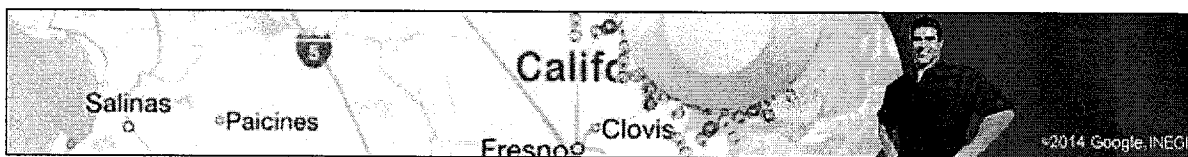
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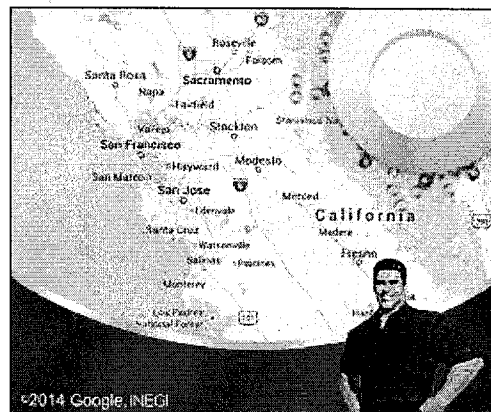
“Operation Choke Point”



By Todd Zywicki May 24

The Justice Department’s “Operation Choke Point” initiative has been shrouded in secrecy, but now it is starting to come to light. I first heard about the program in January through this article and since then it has been difficult to discover details about it. It is so named because through strangling the providers of financial services to the targeted industries, the government can “choke off” the oxygen (money) needed for these industries to survive. Without an ability to process payments, the businesses – especially online vendors – cannot survive.

The general outline is the DOJ and bank regulators are putting the screws to banks and other third-party payment processors to refuse banking services to companies and industries that are deemed to pose a “reputation risk” to the bank. Most controversially, the list of dubious industries is populated by enterprises that are entirely, or at least generally, legal. Tom Blumer’s extremely informative post summarizing what is known to date about Operation Choke Point reproduces the list, which includes things such as ammunition sales, escort services, get-quick-rich schemes,



on-line gambling, “racist materials” and payday loans. Quite obviously, some of these things are not like the other; moreover, just because there are some bad apples within a legal industry doesn’t justify effectively destroying a legal industry through secret executive fiat.

Especially ironic, of course, is that while the DOJ and bank regulators are choking off financial services to legal industries, they are also encouraging banks to provide banking services to *illegal* marijuana sales.

The ability to destroy legal industries through secret actions to deprive them of banking services has obvious political consequences. For example, it was reported last week that firearms shops are alleging that Operation Choke Point is being used to pressure banks into refusing to providing financial services. There are also reports that porn stars (and here) have had their bank accounts terminated for “moral” reasons related to the “reputation risk” of banking individuals in the porn industry. IRS officials must already be salivating about ways to apply Operation Choke Point to tea party groups.

In principle, of course, the logic of Operation Choke Point could be extended to groups not currently targeted. Notably absent from the FDIC’s hit list, for example, are abortion clinics, radical environmental groups, or, well, marijuana shops, for that matter. Something similar was done to cut off credit-card payments to support the operation of WikiLeaks.

The larger legal and regulatory issue here is the expansive use of the vague and subjective standard of “reputation risk” to target these industries. In a letter to Janet Yellen, the chair of the Federal Reserve, last week, House Financial

Services Committee Chairman Jeb Hensarling expressed concern over the growing use of “reputation risk” as a vehicle for attacking legal businesses. Is there any discernible principle as to why, for example, a payday lender or firearms dealer poses a “reputation risk” and an abortion provider does not?

So far, one of the porn stars has sued to try to determine why his loan application was denied. Given that Operation Choke Point seems to be doing exactly what was its alleged intent — to choke the life out of the businesses in the covered industries — I expect more lawsuits to come that will shed some light on this initiative.

