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# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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STAFF DIRECTOR

January 8, 2014

The Honorable Eric H. Holder Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Attorney General:

The Committee on Oversight and Government Reform is conducting oversight of the Department of Justice's enforcement of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).<sup>1</sup> The Committee is specifically concerned that the Department may be using its civil investigative power under § 951(d) to inappropriately target two lawful financial services: third-party payment processing and online lending. We write to request your assistance with this oversight.

### **Background**

Third-party payment processors are commercial bank customers that provide payment-processing services to merchants and other business entities.<sup>2</sup> These merchant transactions primarily include credit card payments, but also cover automated clearing house (ACH) transactions, remotely created checks (RCC), and debit and prepaid card transactions.<sup>3</sup> The overwhelming majority of merchants who rely on payment processing are honest and legitimate small businesses, including many online merchants for whom payment processing is the sole means of accepting payment for goods and services.

Online lenders specialize in offering consumers small, short-term loans online. According to the most recent data available from the Federal Deposit Insurance Corporation, 28.3% of households in the United States are deemed unbanked or underbanked.<sup>4</sup> For these consumers who have been shut out of the traditional banking system, short-term online loans are often their only realistic way to make ends meet. While online lending, like all financial services,

<sup>1</sup> Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (1989).

<sup>2</sup> Federal Financial Institutions Examination Council, Bank Secrecy Act Anti-Money Laundering Examination Manual, available at [http://www.ffiec.gov/bsa\\_aml\\_infobase/pages\\_manual/OLM\\_063.htm](http://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_063.htm).

<sup>3</sup> *Id.*

<sup>4</sup> FEDERAL DEPOSIT INSURANCE CORPORATION, 2011 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED 3, (Sept. 2012).

can be susceptible to fraud, the overwhelming majority of lenders fully comply with all applicable statutes, regulations, and industry-recognized best practices.<sup>5</sup>

Over the past several months, the Department has initiated a wide-ranging investigation of banks and payment processors that service online lenders, known informally as “Operation Choke Point.”<sup>6</sup> To date, the Department has issued over 50 subpoenas to banks and payment processors.<sup>7</sup> The ostensible goal of the investigation is to combat mass-market consumer fraud by foreclosing fraudsters’ access to payment systems.<sup>8</sup> However, there is evidence that the true goal of Operation Choke Point is to target online lenders and the payment processors who serve them. The Committee is concerned that both the goal and mechanisms of Operation Choke Point may constitute a serious mismanagement and abuse of the Department’s FIRREA authority.

### **Potential Misuse of FIRREA Authority**

The mere threat of a federal investigation under FIRREA can incur enormous reputational and legal costs for targeted institutions. Such investigations should be initiated and conducted with an acute awareness of these impacts, and motivated by a legitimate suspicion of actual fraud. Unfortunately, it appears the Department is using its FIRREA authority to create an indiscriminate dragnet that is wholly decoupled from any concrete suspicion of fraud. On September 17, 2013, the lead trial attorney in Operation Choke Point gave a presentation on the Department’s actions to the Federal Financial Institutions Examination Council (FFIEC).<sup>9</sup> One slide from this presentation detailed the core motivation for the investigations. According to the slide:

- Mass-market scammers need access to payments systems (RCC’s, ACH, CC) to take consumers’ money. Without bank access there are no unauthorized withdrawals.
- Banks are stationary (no “whack-a-mole”), regulated, and are concerned about reputational risk.
- Banks are already required to have systems in place to prevent criminals from accessing the banking system.
- **Cutting off the scammers’ access to the payment systems is relatively efficient and fast, and protects consumers prospectively as we investigate.** [emphasis added]<sup>10</sup>

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<sup>5</sup> See, e.g., Online Lenders Alliance, Best Practices, available at [http://c.yimcdn.com/sites/www.onlinelendersalliance.org/resource/resmgr/best\\_practices\\_2013.pdf](http://c.yimcdn.com/sites/www.onlinelendersalliance.org/resource/resmgr/best_practices_2013.pdf).

<sup>6</sup> 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).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* See also 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 Maame Ewusi-Mensah Frimpong, Deputy Assistant Attorney General, Civil Div., U.S. Dep’t of Justice, on Sept. 20, 2013.

<sup>9</sup> See *supra* note 7.

<sup>10</sup> *Id.*

This admission is stunning in its candor. It appears the Department has indiscriminately targeted an access point to the financial system that countless legitimate merchants rely upon simply because it is “faster” than targeting the actual perpetrators of fraud. While the Justice Department is correct that “without bank access there are no unauthorized withdrawals,” without bank access there are also no *authorized* withdrawals. Furthermore, the Department is knowingly using the threat of reputational damage to force the targeted firm to comply with its demands. Finally, the presentation appears to concede that the Department’s investigation is an exercise in prior restraint, rather than a legitimate investigation into known fraud.

The extraordinary breadth of the Department’s dragnet prompts concern that the true goal of Operation Choke Point is not to cut off actual fraudsters’ access to the financial system, but rather to eliminate legal financial services to which the Department objects. According to Committee sources, line attorneys in the Department’s Civil Division are using the threat of a federal investigation to demand that banks immediately sever *all* relationships with third party payment processors and online lenders. If Department attorneys are making these demands, the Department is needlessly punishing good actors with the bad, and threatening legitimate merchants’ access to the payment transfer system.

Documents reviewed by the Committee, including one subpoena served on a targeted bank, support this conclusion. The subpoena, signed by Acting Assistant Attorney General Stuart F. Delery, requires the production of an enormous universe of documents related to every conceivable aspect of the bank’s relationship with payment processors and merchant-clients.<sup>11</sup> Furthermore, the subpoena demonstrates that the Department is relying on a wildly over-inclusive criterion to trigger FIRREA investigations. Specifically, the subpoena requests virtually all documents related to payment processors and/or merchant-clients that experienced a transaction return rate of *three percent* or greater in any one month period.<sup>12</sup> Such a criterion is wholly inappropriate to trigger a federal investigation. First, the subpoena defines a “return” as any attempted debit transaction against a consumer’s bank account that has been returned “*for any reason.*”<sup>13</sup> Under this definition, every chargeback – including those for non-sufficient funds, account closed, bad routing number, etc. – is considered evidence of a fraudulent transaction. In fact, only debits returned as *unauthorized* constitute evidence of a fraudulent transaction. Second, the “three percent” standard is far too low to serve as a reasonable indication of potential fraud. NACHA, the cooperative organization that administers and governs the ACH payment transfer network, recently proposed an amendment to its operating rules indicating that a return rate of *fifteen percent* is necessary to trigger suspicion of fraudulent activity.<sup>14</sup>

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<sup>11</sup> Subpoena Duces Tecum for the Production of Documents, signed by the Acting Assistant Attorney General of the Civil Division (on file with Committee staff).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> NACHA – The Electronic Payments Association, ACH Network Risk and Enforcement Topics, Proposed Modifications to the Rules, Nov. 11, 2013, *available at* <https://www.nacha.org/page/request-commentrisk#overlay-context=page/request-commentquality>.

### Targeting of the Online Lending Industry

The Department has consistently stated that its goal is to combat mass-market consumer fraud.<sup>15</sup> However, there is ample evidence that the true target of Operation Choke Point is the online lending industry, not actual fraudsters. Initial press reports of the Department's investigations support such an understanding. The *Wall Street Journal*, citing an interview with a Department official, reported that the Department considers online payday lending to be a "questionable financial venture."<sup>16</sup> This report explicitly concluded that Department prosecutors were "target[ing] firms that process payments for online lenders," among others.<sup>17</sup>

This conclusion accords with public statements by the Department prosecutor leading the investigations. In the September 17, 2013 presentation to the FFIEC, the lead prosecutor characterized the investigation's impact on "Internet Payday lending" as "*collateral benefits*" to Operation Choke Point.<sup>18</sup> Given that the vast majority of online lenders are legitimate and legally compliant, such a statement is irreconcilable with the Department's stated claim that the sole goal is to combat fraud.

The strongest evidence for the true motivation of Operation Choke Point can be found in the Department's own representations to the targeted banks. One such bank, the National Bank of California, made the following statement in a press release:

The Bank must also have resolved certain pending inquiries by the US Department of Justice (DOJ) concerning its ACH services to third party processors who may have processed payments for certain companies making short term loans commonly called "payday lenders." **These inquiries are part of an industry-wide DOJ investigation of ACH services provided to payday lenders.**<sup>19</sup> [emphasis added]

The only reasonable inference is that the Department informed the bank that the primary target of the investigations is the online lending industry. Such an inference is supported by additional anecdotal reports that Department prosecutors are pressuring subpoenaed banks to immediately sever their relationships with all online lenders, regardless of any suspicion of fraud. The use of § 951(d) subpoena power to eliminate a legitimate and legal financial service, rather than to combat actual fraud, is a significant abuse of the Department's FIRREA authority.

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<sup>15</sup> 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."). See also Congressional Staff Briefing with Maame Ewusi-Mensah Frimpong, Deputy Assistant Attorney General, Civil Div., U.S. Dep't of Justice.

<sup>16</sup> 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.

<sup>17</sup> *Id.*

<sup>18</sup> 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).

<sup>19</sup> Press Release, National Bank of California, NCAL Bancorp Announces the Signing of a Definitive Agreement for \$25 Million Recapitalization (Sept. 16, 2013).

To enable the Committee to better understand the Department's general policies with respect to FIRREA enforcement, we request that you provide the following information:

1. All documents and communications since January 1, 2011, referring or relating to "Operation Choke Point."
2. All documents and communications since January 1, 2011, referring or relating to the Department's FIRREA enforcement authority with respect to the online lending industry.
3. All documents and communications since January 1, 2011, between employees of the Department and employees of any other agency, referring or relating to the online lending industry.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

Please provide all responsive material as soon as possible, but no later than 5:00 p.m. on January 22, 2014. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers to receive all documents in electronic format.

If you have any questions about this request, please contact Brian Daner or David Brewer of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa  
Chairman



Jim Jordan  
Chairman  
Subcommittee on Economic Growth,  
Job Creation and Regulatory Affairs

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Matthew A. Cartwright, Ranking Minority Member  
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

ONE HUNDRED THIRTEENTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (202) 225-5074  
Minority (202) 225-5051

**Responding to Committee Document Requests**

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
  - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,  
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,  
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### **Schedule Definitions**

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.