

JOHN L. MICA, FLORIDA
MICHAEL R. TURNER, OHIO
JOHN J. DUNCAN, JR., TENNESSEE
PATRICK T. McHENRY, NORTH CAROLINA
JIM JORDAN, OHIO
JASON CHAFFETZ, UTAH
TIM WALBERG, MICHIGAN
JAMES LANKFORD, OKLAHOMA
JUSTIN AMASH, MICHIGAN
PAUL A. GOSAR, ARIZONA
PATRICK MEEHAN, PENNSYLVANIA
SCOTT DesJARLAIS, TENNESSEE
TREY GOWDY, SOUTH CAROLINA
BLAKE FARENTHOLD, TEXAS
DOC HASTINGS, WASHINGTON
CYNTHIA M. LUMMIS, WYOMING
ROB WOODALL, GEORGIA
THOMAS MASSIE, KENTUCKY
DOUG COLLINS, GEORGIA
MARK MEADOWS, NORTH CAROLINA
KERRY L. BENTIVOLIO, MICHIGAN
RON DeSANTIS, FLORIDA

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
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051

<http://oversight.house.gov>

CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
STEPHEN F. LYNCH, MASSACHUSETTS
JIM COOPER, TENNESSEE
GERALD E. CONNOLLY, VIRGINIA
JACKIE SPEIER, CALIFORNIA
MATTHEW A. CARTWRIGHT, PENNSYLVANIA
L. TAMMY DUCKWORTH, ILLINOIS
ROBIN L. KELLY, ILLINOIS
DANNY K. DAVIS, ILLINOIS
PETER WELCH, VERMONT
TONY CARDENAS, CALIFORNIA
STEVEN A. HORSFORD, NEVADA
MICHELLE LUJAN GRISHAM, NEW MEXICO
VACANCY

LAWRENCE J. BRADY
STAFF DIRECTOR

June 9, 2014

The Honorable Martin J. Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429-9990

Dear Mr. Chairman:

The Committee on Oversight and Government Reform is conducting oversight of the Federal Deposit Insurance Corporation. The Committee has obtained substantial evidence suggesting that as a result of coordinated actions by the FDIC and the Department of Justice, banks are terminating relationships with entirely legitimate and licensed businesses.¹ We write to request your assistance with the Committee's oversight of this matter.

FDIC Designation of "High Risk" Businesses

In 2011, the FDIC Division of Risk Management Supervision published an article entitled "Managing Risks in Payment Processor Relationships."² The article advises financial institutions to adequately monitor and address the risks associated with certain categories of merchants. Merchant categories expressly labeled as "high-risk" include:

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

¹ Staff Report, H. Comm. on Oversight and Gov't Reform, *The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses?* (May 29, 2014).

² Michael Benardo, Chief, Cyber-Fraud and Financial Crimes Section, Div. of Risk Management Supervision, Federal Deposit Insurance Corporation, et al., *Managing Risks in Third-Party Payment Processor Relationships*, 8 SUPERVISORY INSIGHTS 3 (Summer 2011).

While the FDIC provided no explanation for the inclusion of any single identified merchant category, the article offered four criteria associated with high-risk activity: 1) the consumer's lack of familiarity with the merchant; 2) uncertainty with respect to the quality of goods and services being offered; 3) online or telephonic sales; and 4) the consumer's ability to verify the identity or legitimacy of the merchant. However, these vague standards provide no explanation for the implicit equation of such legitimate and regulated activities as *coin dealers* and *firearms and ammunition sales* with such pernicious or patently illegal activities as Ponzi schemes, racist materials, or drug paraphernalia. In January 2012, the FDIC formalized this guidance through Financial Institution Letter 3-2012.³

Operation Choke Point and High-Risk Businesses

In spring 2013, the Department of Justice initiated a wide-ranging investigation of banks and payment processors, known as "Operation Choke Point." The ostensible goal of the program is to combat mass-market consumer fraud by foreclosing fraudsters' access to the banking and payment system. However, following the launch of Operation Choke Point, a wide variety of fully licensed 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.⁴ The sheer breadth of industries affected – including firearms and ammunition sales,⁵ adult entertainment,⁶ check cashing,⁷ and payday lending⁸ – has generated significant concern with the objectives, scope, and impacts of Operation Choke Point.

Operation Choke Point is predicated on the theory that providing normal banking services to "high risk" merchants may be sufficient to trigger a subpoena from the Justice Department. Accordingly, the initiative effectively transformed the FDIC guidance on high-risk businesses into an implicit threat of a federal investigation. 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 Justice Department. Financial institutions are extremely responsive to the threat of a federal investigation, and the mere designation of an industry as "high-risk" by the FDIC is causing many banks to terminate all relationships within that industry. This unnecessarily punishes legitimate merchants with the bad, and discourages and inhibits entirely lawful and licensed businesses.

Documents produced to the Committee by the Department of Justice confirm this precise scenario. In fact, senior DOJ officials informed the Attorney General himself of such

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

⁴ 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).

⁵ Kelly Riddell, 'High risk' label from feds puts gun sellers in banks' crosshairs, hurts business, WASH. TIMES, May 18, 2014.

⁶ Glenn Harlan Reynolds, *Justice Department shuts down porn money: Column*, USA TODAY, May 26, 2014.

⁷ William Isaac, 'Operation Choke Point: Way Out of Control', AMERICAN BANKER, Apr. 27, 2014.

⁸ Jessica Silver-Greenberg, *Justice Department Inquiry Takes Aim at Banks' Business With Payday Lenders*, N.Y. TIMES, Jan. 26, 2014.

consequences. Briefing notes on Operation Choke Point, prepared for the Attorney General in November 2013, include the following notations:

- [Bank] regulators are also taking action, and reinforcing their longstanding guidance on what are “high-risk merchants” and what due diligence banks should do on such merchants.
...
- We have also learned from industry sources that many banks are taking note of our activity and that of the regulators and doing what they should have done all along – due diligence to know their customers. Some are also exiting “high-risk” lines of business.⁹ [emphasis added]

FDIC Response to Congressional Oversight

Last month, the FDIC’s Acting General Counsel, Richard J. Osterman, testified at a House Financial Services Committee hearing on federal financial regulatory policy. Over the course of the hearing, Mr. Osterman repeatedly disclaimed any substantive involvement by the FDIC with Operation Choke Point. Mr. Osterman had the following exchanges with Members:

Mr. Clay: Can you assure me that this was not what you intended when you went after illegal businesses?

Osterman: Congressman, I can assure you that FDIC was not -- I mean, what we were trying to do, actually, with the Operation Choke Point, which actually was not our program -- **it was a DOJ program** -- was to help them to stop illegal activity. [emphasis added]

Mr. Westmoreland: And so the chokepoint is -- has no reality to it?

Osterman: The chokepoint, as I've said before sir, **is a Department of Justice program** that was going after illegal activity, and we were asked to provide more information, and that's what we did to address illegal activity. [emphasis added]

Mr. Sherman: What is the target of Operation Choke Point?

Osterman: Congressman, I'm really not in a position to answer that. **Because it's not an FDIC program.** [emphasis added]

⁹ HOCR-3PPP000455-458.

Mr. Ross: Operation Choke Point talks about making sure that illegal entities are not giving the banking relationships, but has there been any guidance for legal entities in that regard under Operation Choke Point? Mr. -- Mr. Osterman?

Osterman: Well, again, **Operation Choke Point is a Department of Justice action** going after illegal activities. What we have said at the FDIC is, as long -- our efforts are not going to be targeted -- we're not targeting legitimate business.¹⁰ [emphasis added]

Mr. Leutkemeyer: Are you aware that the Division of the (inaudible) Consumer Protection actually loaned two attorneys for a period of time to Operation Choke Point?

Osterman: No, I'm not, sir. I don't believe that's correct.¹¹

Documents produced to the Committee by the Department of Justice call into question the sincerity and truthfulness of Mr. Osterman's testimony. In fact, the FDIC has been intimately involved in Operation Choke Point since its inception. From the initial proposal for Operation Choke Point:

DOJ, through the Consumer Protection Branch, should take the lead in implementing this strategy. Partner agencies should include the FTC, FDIC, OCC, FinCEN (Treasury), Federal Reserve Banks¹²

From the DOJ's *Eight Week Status Report* on Operation Choke Point:

. . . attorneys from the FDIC's Division of [Depositor and] Consumer Protection contacted us to share ideas about the law relating to payday lending and potential investigative approaches. We are scheduled to meet shortly with Marguerite Sagatelian, head of the Compliance and Enforcement group of the FDIC's Division of Depositor and Consumer Protection, to continue this discussion.¹³

From the DOJ's *Four Month Status Report* on Operation Choke Point:

We have designed a process to review the banks' document productions and to distill information that will assist us in deciding whether further investigation or action is appropriate. For each bank, we prepare a

¹⁰ *Who's in Your Wallet: Examining How Washington's Red Tape Impairs Economic Freedom: Hearing before the H. Comm. On Fin. Services*, 113th Cong. (Apr. 8, 2013).

¹¹ *Id.*

¹² Memorandum from an Assistant United States Attorney, Eastern District of Pennsylvania, to the Acting Assistant Attorney General for the Civil Division, U.S. Dep't of Justice (Nov. 5, 2013) [HOCR-3PPP00019]

¹³ Memorandum from the Director of the Consumer Protection Branch to the Acting Assistant Attorney General for the Civil Division, U.S. Dep't of Justice (Apr. 17, 2013) [HOCR-3PPP000051]

summary of the bank's processor relationships, return rate history, merchant identification and consumer history (based on the FTC's Sentinel database), and other pertinent information. When completed, our DOJ team considers alternative courses of action for each bank, including criminal prosecution, FIRREA civil actions, and referral to an appropriate regulator. **The FDIC has volunteered two attorneys from its Depositor and Consumer Protection Branch to assist with this review.**¹⁴ [emphasis added]

From a DOJ internal memorandum on Operation Choke Point, prepared for the Office of the Attorney General, the Office of the Deputy Attorney General, and the Office of the Associate Attorney General, in November 2013:

We have served the subpoenas along with copies of the most recent third-party payment processor guidance and advisory material from the FDIC, OCC, and FinCEN. This assists the banks to understand the nature of our investigation and the basis of our concerns. We have sometimes also requested that the bank's federal regulator provide recent examination reports and exam work papers relating to third-party payment processors, excessive return rates, and related issues.¹⁵ [emphasis added]

...

The FDIC, OCC, and Federal Reserve Board all regulate the banks that we are investigating. We are in communications with these regulators with respect to specific banks. We also are engaged with these agencies about broader issues, such as the potential regulation of remotely-created checks (payment devices frequently used to commit fraud), proposed guidance to banks, and their own enforcement matters.¹⁶

To enable the Committee to better understand the impact of the FDIC's policies on financial institutions' relationships with legitimate and lawful businesses, we request that you provide the following information:

1. All documents and communications since January 1, 2011, between employees of the FDIC and employees of the Civil Division of the Department of Justice.
2. All documents and communications since January 1, 2011, referring or relating to the development of Financial Institution Letter FIL-3-2012.

¹⁴ Memorandum from the Director of the Consumer Protection Branch to the Acting Assistant Attorney General for the Civil Division, U.S. Dep't of Justice (July 8, 2013) [HOCR-3PPP000168]

¹⁵ Memorandum from the Deputy Assistant Attorney General for Consumer Protection, Civil Division to the Staff of the Office of the Attorney General, the Staff of the Office of the Deputy Attorney General, and the Staff of the Office of the Associate Attorney General (Nov. 21, 2013) [HOCR-3PPP000497]

¹⁶ *Id.* [HOCR-3PPP000503]

The Honorable Martin J. Gruenberg

June 9, 2014

Page 6

3. All documents and communications since January 1, 2011, referring or relating to the development of the article *Managing Risks in Third-Party Payment Processor Relationships*, published in Supervisory Insights in summer 2011.
4. All documents and communications referring or relating to risks created by financial institutions' relationships with firearms or ammunition businesses.
5. All documents and communications referring or relating to risks created by financial institutions' relationships with short-term lenders.
6. All documents and communications referring or relating to risks created by financial institutions' relationships with money services businesses.

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.

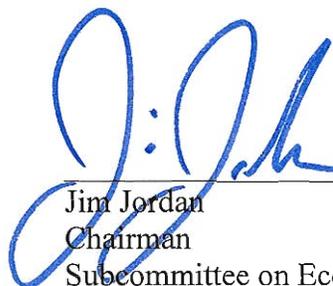
Please provide all responsive material as soon as possible, but no later than 5:00 p.m. on June 23, 2014. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn 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 Michael Kiko of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.



Darrell Issa
Chairman

Sincerely,



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) 225-5974
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.