



Opponents Hope to Loosen Grip of Government's 'Choke Point' Program

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Two federal agencies have backed off – slightly – from a program that critics say has been intimidating banks into canceling services for legitimate, law-abiding businesses, making it difficult if not impossible for them to operate.

The Federal Deposit Insurance Corporation and US Department of Justice launched “Operation Choke Point” with no warning or public discussion in March 2013. They deemed businesses in certain industries to be “high risk” and told banks they’d come under tighter government scrutiny and face more liabilities if they provide services to businesses in those industries.

In response, banks have been dropping with no warning businesses in industries including firearms, payday lending, home-based charities, check cashing, and tobacco.

As knowledge of the program has spread, pushback has grown. Congressional hearings have been held, including one in mid-July before the House Financial Services Subcommittee. Two weeks later the FDIC announced firearms retailers and payday lenders were being taken off of Operation Choke Point’s “high risk” list.

‘Chilling Effect Still Exists’

In an Aug. 7 letter to FDIC Chairman Martin Gruenberg, Rep. Blaine Luetkemeyer (R-MO) wrote, “The need for a safe harbor still exists because the chilling effect caused by Operation Choke Point still exists. We must continue to address this issue until a financial institution can operate without fear of retaliation or threat of subpoena for no wrong-doing.”

In subcommittee testimony, Assistant Attorney General Stuart F. Delery explained the basis for the program:

“Consumer fraud comes in many forms—from telemarketing fraud to mortgage fraud, from lottery scams to predatory and deceptive on-line lending—and often strips our most vulnerable citizens of their savings and even their homes.”

“While there is seemingly no limit to the kinds of schemes that perpetrators of fraud invent, many of these schemes have one thing in common: they employ the banking system to take money from their victims. Once a fraudulent merchant can work his way into the banking system, he no longer has to convince unwitting consumers to hand over cash or mail a check.”

‘Similar to Anti-Terror Tactics’

David H. Thompson, managing partner at the Cooper & Kirk law firm in Washington, countered in his testimony:

“DOJ is now using against legitimate American businesses tactics that are strikingly similar to those that have been used against corrupt foreign institutions serving terrorists. Working with DOJ, the Federal Deposit Insurance Corporation (“FDIC”), the Office of the Comptroller of the Currency (“OCC”), and the Board of Governors of the Federal Reserve System (“the Board”) have conspired to choke off and strangle legitimate businesses by depriving them of their access to the financial system. Many of the victims of Operation Choke Point are law-abiding companies, ranging from coin dealers to dating services. With their ability to open a bank account or even to deposit a check now taken from them, these law-abiding companies are being deprived of their right to pursue their chosen trade and of their very right to exist.

“DOJ has undertaken this operation without any Congressional authorization. Although they may disapprove of these businesses, neither FDIC, nor OCC, nor the Board has the power to shut the industry down, or even significantly restrict it, through ordinary, legal means. The statutes under which these three agencies perform their regulatory duties authorize them to ensure the safety and soundness of the banks. While these agencies have the authority to police the banking system, they have no authority to judge and condemn whole industries as unworthy.”

Scott Talbott, senior vice president of government affairs for the Electronic Transactions Association, also declared:

“[E]nforcement actions against payment systems are an inappropriate tool for regulators to use to limit the ability of consumers to access legal but currently disfavored industries. There has been much debate about the attempts by Operation Choke Point and similar regulatory efforts to compel payments companies to sever relationships with a variety of legal but disfavored industries, ranging from coin dealers and short-term lenders, to home-based charities and pharmaceutical sales.

“ETA believes that such efforts unfairly expose institutions to regulatory actions merely for engaging in lawful commerce. Moreover, if the precedent is set that regulators can unilaterally intervene to keep certain lawful industries off payment systems, payments companies will be subject to shifting regulatory exposure as the disfavored industries of regulators shifts with changes in administrations and agency personnel.”

Failed Attempt at Secrecy

The government tried to keep Operation Choke Point secret. It became known by accident, said Brian Wise, senior adviser to the US Consumer Coalition, which opposes the program.

“We eventually were able to identify the program in September of 2013, when a presentation was mistakenly put on a public Web site that detailed the entire program and was actually given to a number of banking regulators as guidelines for how they should approach the banks in their jurisdiction,” Wise said.

Wise said the program “fundamentally changes the liability banks have when they do business with their customers.” He gave as an example casinos.

“If you could imagine, now the bank that a certain casino does business with, that bank is now liable for not only knowing how that casino is receiving their money, but it's also now liable for knowing how the casino's clients are receiving their money,” he said.

In a Cato Institute policy forum on July 8, Rep. Darrell Issa (R-CA), chairman of the House Committee on Oversight and Government Reform, said, “The FDIC’s power in Choke Point, and DOJ’s power in Choke Point, comes from never filing a criminal case and never actually closing down a bank, but simply threatening banks so they get out of something that is lawful and is risky based on this weird situation that you might be embarrassed by a particular enterprise.”