U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

JUL 07 2015

The Honorable Blaine Luetkemeyer
U.S. House of Representatives
Washington, D.C. 20515

Re: OPR Inquiry Regarding Operation Choke Point

Dear Congressman Luetkemeyer:

In an October 16, 2014 letter addressed to the Department of Justice Office of Professional Responsibility (OPR) and the Office of the Inspector General (OIG), you and 31 other Members of Congress expressed concern that Department of Justice (Department) Civil Division attorneys, acting in concert with federal banking regulators under an initiative known as "Operation Choke Point," abused their authority to conduct civil investigations under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1833a. Attached to your letter was a May 29, 2014 Staff Report issued by the U.S. House of Representatives Committee on Oversight and Government Reform entitled, "The Department of Justice's 'Operation Choke Point': Illegally Choking Off Legitimate Businesses?" (Staff Report).

Your letter and the Staff Report raised the possibility that the Department's Civil Division inappropriately expanded the Department's authority to issue subpoenas pursuant to FIRREA by misusing the statute as a tool to protect consumers from fraud committed *by* banks and their third-party payment processor customers, rather than using it to pursue fraud perpetrated *against* banks. Further, you and the Staff Report raised the possibility that Civil Division attorneys misused FIRREA subpoenas to target lawful Internet payday lenders and thereby to improperly pressure banks not to do business with them. In addition, you and the Staff Report expressed concern that the Department's implementation of Operation Choke Point "compell[ed] banks to terminate longstanding lending and depository relationships with a wide variety" of other lawful businesses. Finally, the Staff Report expressed concern that Department attorneys may have interfered with Congress's legitimate inquiry into Operation Choke Point when they insisted that payday lending was not a primary target of their efforts, and maintained instead that their intent was to generally combat mass-market consumer fraud, and not to specifically single out any particular industry.

By letter dated November 12, 2014, OPR notified you that it would initiate a preliminary inquiry into the issues you raised to determine whether your allegations were within OPR's jurisdiction and, if so, what further inquiry or investigation was warranted. Subsequently, OPR initiated an inquiry into the concerns raised in your letter and the Staff Report. That inquiry now

is complete. Consistent with its previous response, OPR is advising you of its conclusions. OPR is sending an identical response to the other Members who joined in your letter to OPR.

I. Summary of Conclusions

OPR has jurisdiction to investigate allegations of professional misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. As part of its inquiry, and pursuant to its normal practice and procedure, OPR examined whether any of the individuals involved in the decision-making process for Operation Choke Point committed professional misconduct in the performance of their official duties, but did not evaluate whether Operation Choke Point was a worthwhile initiative for the Civil Division to undertake.

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, applicable rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

Pursuant to its analytical framework, OPR finds that an attorney intentionally violates an obligation or standard when the attorney: (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits. An attorney acts in reckless disregard of an obligation or standard when: (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

During the course of its inquiry, among other investigative steps, OPR reviewed the FIRREA statute, its legislative history, related case law, academic commentary, the Staff Report, and applicable standards of conduct. OPR gathered thousands of pages of internal Department documents, including, but not limited to, the documents provided to Congress, the 60 consecutively-numbered FIRREA subpoenas issued during Operation Choke Point, case-related memoranda and documents, and documents relating to the three FIRREA civil actions filed to date as a result of Operation Choke Point. OPR also obtained for the relevant time period the official Department e-mail records of the attorneys most directly involved in Operation Choke Point. OPR also requested and received detailed written responses from those attorneys most directly involved in the design and implementation of Operation Choke Point. OPR posed follow-up questions where necessary, and reviewed and evaluated the supplemental explanations and information provided in response thereto.

Based on the results of its inquiry, OPR concluded that Department of Justice attorneys involved in Operation Choke Point did not engage in professional misconduct.[1] OPR found that the Civil Division's interpretation and use of the FIRREA statute is supported by current case law. Indeed, all courts that have addressed the issue have determined that FIRREA properly may be used to address fraud schemes in which a financial institution suffered no actual monetary loss but increased institutional risk to itself by participating in or facilitating the fraud scheme. Moreover, Operation Choke Point has resulted in three filed cases that have been resolved by negotiated settlements and consent judgments that have been accepted by three U.S. District Courts.

OPR's inquiry further determined that Civil Division attorneys did not improperly target lawful participants involved in the Internet payday lending industry. Neither the design nor initial implementation of Operation Choke Point specifically focused on Internet payday lenders or their lending practices. OPR's review of the 60 subpoenas issued by the Civil Division as part of Operation Choke Point revealed that relatively few related in any way to Internet payday lending. Of that number, it appears that the Civil Division had specific and articulable evidence of consumer fraud for each subpoena it issued. To the extent that Civil Division attorneys involved in Operation Choke Point investigated Internet payday lending, their focus appeared to be on only a small number of lenders they had reason to suspect were engaged in fraudulent practices.

Although OPR concluded that Civil Division attorneys did not engage in professional misconduct, OPR's review of the evidence nevertheless indicated that some of the congressional and industry concerns relating to Internet payday lending was understandable. Some memoranda from the Civil Division's Consumer Protection Branch (CPB) discussed and at times seemed to disparage payday lending practices for reasons unrelated to FIRREA. Some e-mails also corroborated that certain attorneys in the CPB working on Operation Choke Point may have viewed Internet payday lending in a negative light. Nonetheless, the relatively few Operation Choke Point subpoenas related to Internet payday lending were well supported by facts showing that the targets of the subpoenas allegedly were involved in mass-market fraud schemes.

Regarding the concern that Civil Division attorneys issued FIRREA subpoenas in order to compel banks to terminate legitimate business relationships with legally operating businesses, OPR found the evidence did not support that conclusion. Indeed, in all the Civil Division memoranda, subpoenas, and contemporaneous e-mails OPR reviewed, OPR did not find

---

[1] In this letter, OPR explains its conclusions, and has provided a summary of the evidence it gathered during its inquiry. The letter does not exhaustively detail all of the evidence uncovered during the inquiry; and in some circumstances, information and witness names have been omitted because of Privacy Act constraints, other privacy concerns, or the need to protect law enforcement sensitive information. For ease of reference, OPR has attached some of the more relevant documents (some of which are redacted and were attached to the Staff Report), and legal authority on which OPR's conclusions are based. During its inquiry, OPR did not formally interview witnesses because OPR closes an inquiry if it determines that additional investigation will not likely lead to a finding of professional misconduct. In this case, OPR closed its inquiry because, based upon the evidence developed during the inquiry, OPR was satisfied that the evidence did not support a professional misconduct finding against any Department attorney, particularly because OPR's inquiry determined that the Department attorneys involved in Operation Choke Point acted in accordance with controlling case law permitting them to interpret FIRREA as they did.

evidence of an effort to improperly pressure lawful businesses. Although Civil Division attorneys at one point did enclose with issued FIRREA subpoenas regulatory guidance from federal regulators, including one document that contained a footnote listing businesses that the FDIC had described as posing an "elevated risk," OPR's inquiry revealed that the attorneys had a legitimate reason for including such regulatory guidance.

Finally, OPR did not find evidence supporting a conclusion that Department attorneys provided inaccurate information to Congress about the design, focus, or implementation of Operation Choke Point.

II. Background Information Regarding Operation Choke Point

Operation Choke Point's stated goal was "to attack Internet, telemarketing, mail, and other mass market fraud against consumers, by choking fraudsters' access to the banking system."[2] The initial memorandum in November 2012 describing the design of Operation Choke Point made no mention of Internet payday lenders or the non-deposit loan industry. The memorandum began with an overview explaining how "consumers continue to endure substantial harm from fraudulent merchants who can operate only through third-party payment processors." It then discussed the difficulty in addressing the problem by bringing criminal fraud prosecutions, and the shortcomings perceived by prosecutors of approaches taken by the Federal Trade Commission (FTC) and bank regulators. The memorandum then proposed as the solution a "vertical investigation model" focusing on fraudulent merchants, third-party payment processors, and banks, and designed to "choke off" the flow of money to the fraudulent merchants.

In February 2013, the Civil Division issued its first Operation Choke Point subpoenas to financial institutions pursuant to FIRREA. According to the Civil Division, the purpose of Operation Choke Point was to use FIRREA to combat mass-market consumer fraud schemes in which financial institutions were either direct or indirect participants in the fraud scheme. The Civil Division's Consumer Protection Branch (the CPB) was primarily responsible for handling Operation Choke Point and, with the approval of the head of the Civil Division, issued 60 subpoenas between February 2013 and August 2013. To date, the CPB has filed three civil actions against financial institutions alleging violations of FIRREA, and has made criminal referrals as well.

The last FIRREA subpoena issued under Operation Choke Point was issued in August 2013. The CPB informed OPR that it has notified the majority of the banks that received subpoenas that the CPB's reviews of their matters are concluded. The CPB has some civil investigations still viable and open based on information received in response to some of the original subpoenas. Some U.S. Attorney's Offices also have open investigations based at least in part on evidence obtained from the FIRREA subpoenas. At this point the CPB is focused on completing the investigations that arose from that effort. The CPB told OPR, however, that it will open and pursue new investigations if it obtains information that banks, third-party payment processors, and fraudulent merchants might be continuing to break the law.

---

[2] Department Memorandum, OPERATION CHOKE POINT: A proposal to reduce dramatically mass market consumer fraud within 180 days (Nov. 5, 2012).

III. The Civil Division Properly Interpreted and Utilized FIRREA

FIRREA empowers the Department to bring civil lawsuits for violations of (or conspiracies to violate) various white collar criminal offenses enumerated in Title 18 of the United States Code, which are commonly referred to as FIRREA "predicate offenses."[3] The Civil Division attorneys involved in Operation Choke Point focused on the FIRREA predicate offenses of wire and mail fraud. FIRREA provides for civil penalties of up to $1 million per violation, $5 million for continuing violations, or civil penalties reflecting the amount of a defendant's pecuniary gain.[4] Pursuant to FIRREA, Department attorneys are authorized to conduct pre-litigation discovery by issuing administrative subpoenas for documents or testimony.[5] The subpoena power is broad, reaching any testimony or records that the Department attorney "deems relevant or material to the inquiry."[6]

In assessing whether there was evidence to support an allegation that Department attorneys engaged in professional misconduct by misusing and misinterpreting the FIRREA statute, OPR evaluated the FIRREA statute, its legislative history, and most importantly, the way in which FIRREA has been interpreted by the courts. OPR next assessed whether Civil Division attorneys engaged in misconduct by filing cases alleging violations of FIRREA. Based upon this assessment, OPR concluded that the Civil Division did not abuse the legal process and appropriately utilized FIRREA to pursue banks that facilitated allegedly fraudulent financial transactions.

A. Pertinent Case Law and Legislative History Support the Civil Division's Interpretation That FIRREA Applies to Banks Involved in or Facilitating Fraud Schemes

In your letter, you expressed the concern that because "FIRREA was not meant to address consumer fraud," the Civil Division abused its authority under FIRREA by pursuing banks allegedly involved in consumer fraud schemes, contrary to the statute's intent. Applicable case law, however, uniformly supports the Civil Division's interpretation of FIRREA. Three district court cases directly addressed the argument that FIRREA applies only when a financial institution is the *victim* of a fraud scheme. All three courts have rejected that contention. Instead, the courts have uniformly interpreted the language, structure, and legislative history of FIRREA to permit its use not only when the bank is the victim of fraud, but also when the bank itself participates in or facilitates a fraud scheme.

---

[3] The Title 18 FIRREA predicate offenses are: § 1341 (mail fraud), § 1343 (wire fraud), § 1001 (false statements), § 287 (false claims), § 1032 (concealing assets from the Federal Deposit Insurance Corporation (FDIC)), § 1344 (bank fraud), §§ 656 and 657 (bank or credit union embezzlement), §§ 1005 and 1006 (false reports by a bank or credit union agent), § 1007 (false statements to the FDIC), § 1014 (false loan applications), and § 645(a) (false statements to the Small Business Association).

[4] 12 U.S.C. § 1833a(b)(1)-(3).

[5] *Id.* at § 1833a(g)(1)-(3).

[6] *Id.* at § 1833a(g)(1)(C).

In Operation Choke Point, the Civil Division relied on mail and wire fraud as the predicate offenses triggering liability under FIRREA. Mail and wire fraud, however, are FIRREA predicate offenses only when they involve offense conduct "affecting a federally insured financial institution."[7] The courts have interpreted the phrase "affecting a federally insured financial institution" broadly. In each of the three cases that analyzed FIRREA's statutory text, structure, and legislative history, the courts consistently concluded that banks may be liable if they participate in a fraud scheme that increases risk to the bank itself, even if the bank does not suffer actual monetary loss.

Consistent with the courts' analyses, the Civil Division interpreted FIRREA to allow the Department to conduct investigations and pursue civil penalty actions against banks that carried out transactions for third-party payment processors servicing merchants engaged in consumer fraud schemes. The Civil Division reasoned that, even though the banks themselves were not the intended victims of the fraud schemes and suffered no monetary loss, their facilitation of fraudulent transactions "created a variety of risks" to the banks themselves, and the conduct thus "affect[ed] a federally insured financial institution." In essence, the financial institutions' conduct was "self-affecting."

1. Courts Have Held That Banks May Be Liable Under FIRREA for Participating in Fraud Schemes That Increase Risk to the Bank Itself Even If It Suffers No Actual Monetary Loss

Three cases have directly addressed the question of whether FIRREA applies to circumstances in which a financial institution is itself part of the fraud scheme but has suffered no actual monetary loss as a result of the fraud. In each case, the defendant bank argued that FIRREA was not intended to remedy fraud carried out by the bank itself, but only to protect banks victimized or harmed by the fraudulent conduct of others. In each case, the court rejected the bank's argument and upheld a broader reading of the statute. The courts analyzed FIRREA's plain text, statutory structure, and legislative history, and concluded that FIRREA allows civil penalty actions against banks engaged in fraudulent schemes that affect the bank itself by increasing their risk or legal exposure, even if the bank suffers no actual monetary loss. A brief discussion of these cases follows.

a. *United States v. Bank of N.Y. Mellon*

United States v. Bank of N.Y. Mellon, 941 F. Supp. 2d 438 (S.D.N.Y. 2013) (Kaplan, J.) involved allegations that the defendant bank defrauded its customers by misrepresenting its pricing of foreign exchange trades executed on their behalf.[8] When the government brought suit under FIRREA seeking civil penalties, the court had to answer "the following question of first impression by any court: whether a federally insured financial institution may be held civilly liable under Section 1833a for engaging in fraudulent conduct 'affecting' that same institution."[9]

---

7 *Id.* at § 1833a(c)(2).

8 941 F. Supp. 2d. at 442.

9 *Id.* at 443.

Bank of N.Y. Mellon thus presented the same legal question considered by the Civil Division — whether FIRREA allows claims based on the "self-affecting" theory of liability.

The defendant bank in *Bank of N.Y. Mellon* argued for a narrow interpretation of FIRREA,[10] maintaining that the term "affecting" meant "victimizing," and that "affecting" could mean "indirectly harming," but only if the financial institution were merely a bystander (not a participant), and the harm was caused solely by another person.[11] The court rejected those arguments.[12]

Beginning with the statutory language, the court focused on FIRREA's use of the term "affect." The court reasoned, "If Congress had wanted to limit civil penalties to cases in which the financial institution was the victim, it obviously could have done so; instead, it chose a singularly broad term."[13] Similarly, the court analyzed FIRREA's use of the word "whoever" to identify those who may be liable for fraud schemes that affect a financial institution.[14] It concluded:

> "[W]hoever" is a broad term that the Code specifically defines as including any person, corporation, or other entity. . . . There simply is no warrant in the text to carve out from the scope of the word "whoever" in Section 1833(a) the affected financial institution described in Section 1833a(c)(2).[15]

Turning next to a discussion of FIRREA's statutory structure, the court concluded, "[T]hat 'affecting' might mean something closer to 'involving' is supported by the heading of the subtitle. Section 1833a came from Section 951 of FIRREA, which was the only section of Subtitle E of Title IX of FIRREA. Subtitle E was entitled, 'Civil Penalties for Violations *Involving* Financial Institutions.'"[16] Of the bank's argument that "affecting" could mean "indirect harm" by a third party, the court said, "the point merits little discussion," and it

---

10 *See id.* at 461 ("[The bank] contends that the government's reading therefore would 'turn[] FIRREA on its head, and would convert a statute designed to shield federally insured financial institutions from fraud by others into a weapon to impose punitive civil fines on federally insured financial institutions.").

11 *Id.* at 451.

12 *Id.* at 451, 457.

13 *Id.* at 451 (citing *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997) (interpreting "affected a financial institution" as used for sentencing enhancement to apply "in a wide variety of circumstances" given "the breadth of the word 'affect'")).

14 *See* 12 U.S.C. § 1833a(a) ("Whoever violates any provision of law to which this section is made applicable by subsection (c) of this section shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section.").

15 *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 461.

16 *Id.* at 454 (citations omitted) (emphasis in original).

"decline[d] to conclude that an institution cannot be affected by a fraud solely because it participates in it."[17]

Having concluded that the plain text and statutory structure supported a broader interpretation of FIRREA than the interpretation advocated by the bank, the court in *Bank of N.Y. Mellon* next addressed the bank's argument that FIRREA's legislative history proved that Congress intended the statute only to protect banks victimized by the fraudulent conduct of others. The court began its discussion of the issue as follows: "Where, as here, the text and structure do not support defendants' construction, the Court cannot and should not rely on legislative history to take a different view. Nevertheless, the legislative history does not support defendants' position in any event."[18]

The court reviewed congressional committee reports, and in particular noted that "[t]he very House report on which defendants considerably rely points out that at least some of the fraud at issue was not due to thrift officers seeking to victimize their banks, but rather to save them without any intent to achieve personal gain."[19] Based on that report, the court concluded that Congress sought to broadly address fraud involving financial institutions, even if the fraud scheme was not directed at or intended to victimize the bank:

> Congress was addressing not only frauds by insiders who were trying to harm their employers, but also frauds by insiders seeking to benefit their employers – perhaps through deception of auditors or regulators. In cases of the latter sort, the fraudulent practices cannot be understood to be directed at, or victimizing, the thrifts – after all, the thrifts themselves could have been charged with crimes in those very instances.[20]

The court in *Bank of N.Y. Mellon* also found that FIRREA's legislative history demonstrated that Congress was focused on protecting depositors and taxpayers, in addition to the financial institutions themselves:

> In fact, the legislative history shows who Congress truly believed were the victims of the S & L crisis and whom Congress sought to protect through FIRREA: S & L depositors and federal taxpayers put at risk by the thrifts' fraudulent behavior. . . . Ensuring that taxpayers would not need to bail the industry out again in order to protect the funds of depositors is consistent not only with seeking to prevent fraud perpetrated against the financial institutions, but also with deterring or punishing fraud which occurs as a result of insiders' misguided efforts to benefit their institutions, particularly

---

17 *Id.* at 457.

18 *Id.* at 454 (citing *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011)).

19 *Id.* at 455 (citing H.R. Rep. No. 100-1088, at 34-35).

20 *Id.*

> insofar as those efforts ultimately go on to expose the institutions to new and harmful risks.[21]

Thus, having concluded that FIRREA's use of the broad terms "affecting" and "whoever" permitted claims against a bank that had participated in a fraud scheme, the court turned to the specific effects alleged in the complaint and whether those were cognizable under FIRREA. It concluded that evidence of increased risk to the bank itself was sufficient to satisfy the statutory requirements of FIRREA:

> Courts regularly have concluded that a fraud affects an institution by embroiling it in costly litigation, whether because the fraud causes actual losses to the institution through settlements and attorney's fees or because it exposes the institution to realistic potential legal liability. . . . That liability exposure is sufficient finds support in persuasive holdings that a bank can be "affected" when a scheme exposes the bank to "a new or increased risk of loss," even without showing actual loss.[22]

b. *United States v. Countrywide Fin. Corp.*

United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598 (S.D.N.Y. 2013) (Rakoff, J.) likewise provides support for the "self-affecting" theory of liability under FIRREA. That case involved the sale of allegedly faulty mortgages to the government-sponsored entities Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"). The government filed a civil fraud action under the False Claims Act and FIRREA alleging that Countrywide engaged in a scheme to fraudulently sell loans to Fannie Mae and Freddie Mac – loans for which the bank's own quality control reports showed high defect rates.[23] Relying on the same "self-affecting" theory it had advanced in *Bank of N.Y. Mellon*, the government contended that since Countrywide's conduct was imputed to Bank of America, its parent entity, and Bank of America was a federally insured financial institution, then the wrongful conduct "affected" the bank itself and therefore was actionable under FIRREA.[24]

In its motion to dismiss, Countrywide argued, as the defendant had argued in *Bank of N.Y Mellon*, that because the government's "self-affecting" theory was not intended by Congress when it enacted FIRREA, FIRREA did not apply to the conduct at issue.[25] Thus, the issue before

---

21 *Id.* (citing H.R. Rep. No. 101-54(I), at 301) ("Without adequate supervision, thrifts were free to engage in fraudulent and risky activities, often at the expense of the [Federal Savings and Loan Insurance Corporation].").

22 *Id.* at 458 (internal citations omitted).

23 961 F. Supp. 2d at 606.

24 *Id.*

25 *Id.* at 605.

the court again was the meaning of the term "affecting a federally insured financial institution," and whether a financial institution could "affect" itself.[26]

The court wholly rejected the bank's argument and cited *Bank of N.Y. Mellon* in concluding that the government properly utilized FIRREA to hold liable a financial institution that had engaged in conduct affecting itself. The court concluded that support for the "self-affecting" theory "requires nothing more than straightforward application of the plain words of the statute":

> The key term, "affect," is a simple English word, defined in Webster's as "to have an effect on." The fraud here in question had a huge effect on [Bank of America] itself (not to mention its shareholders). The Amended Complaint itself alleges that [Bank of America] has paid billions of dollars to settle repurchase claims by Fannie Mae and Freddie Mac made [as] a result of the fraud alleged here.
>
> The defendants' endlessly complicated argument that this is somehow not an effect that Congress intended to encompass within the broad phrase "affecting a federally insured institution" rests not on the plain meaning of section 1833a(c)(2), but rather on such things as extended inferences from the omission of the "affecting" limitation from the neighboring subparagraphs of FIRREA, speculation drawn from selected snippets of legislative history, and the like. Though clever, the arguments are utterly unconvincing, for the simple reason that they cannot explain away the plain language of section 1833a(c)(2), which is as unambiguous as it is dispositive.[27]

In a subsequent opinion denying Countrywide's motion for summary judgment, the court confirmed this ruling and took its conclusion a step further. Assessing the sufficiency of the alleged effects of the fraud scheme on Countrywide itself, the court observed that when the FIRREA predicate offense is mail or wire fraud, a bank "automatically exposes itself to potential civil or criminal liabilities as a matter of law."[28] The court concluded, "Such potential liability is enough to satisfy FIRREA, since even the threat of criminal liability (let alone, as here, the actuality of civil liabilities) is bound to affect any federally insured entity in material fashion."[29]

---

26 *Id.* at 604-05.

27 *Id.* (citations omitted).

28 *United States v. Countrywide Fin. Corp.*, 996 F. Supp. 2d 247, 249 (S.D.N.Y. 2014) (Rakoff, J.) (citing 18 U.S.C. §§ 1341, 1343-44, 1962).

29 *Id.* at 249-50.

c. *United States v. Wells Fargo Bank, N.A.*

In the third case addressing FIRREA's use of the term "affecting a federally insured financial institution," the court in *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013) (Furman, J.) cited the courts' holdings and analyses in *Bank of N.Y. Mellon* and *Countrywide*, and likewise concluded that a financial institution could be liable under FIRREA by engaging in conduct affecting itself. *Wells Fargo* involved claims brought under the False Claims Act and FIRREA for alleged misconduct in the origination and underwriting of government-insured home mortgage loans. Wells Fargo Bank allegedly originated and underwrote loans that it falsely stated were eligible for Federal Housing Authority (FHA) insurance, and then sold those FHA-insured loans to third parties knowing that those third parties would submit claims to the government if the loans defaulted.[30] In a motion to dismiss, Wells Fargo Bank argued, as Bank of N.Y. Mellon and Countrywide had argued before it, that the government's FIRREA claims predicated on false statements and mail and wire fraud offenses "fail because the only financial institution the Government has alleged was affected is Wells Fargo itself," and that "[s]uch self-affecting misconduct . . . is not contemplated by the statute."[31]

Noting that "two other courts in this District have considered, and rejected, precisely the same argument," the court rejected Wells Fargo's narrow interpretation of the term "affecting a federally insured financial institution."[32] The court explained: "Wells Fargo's proffered interpretation is unsupported by the text of the statute, which does not exempt from the relevant affected financial institutions those that perpetrate fraud affecting themselves."[33]

The court also pointed out that other courts had rejected a similarly narrow interpretation of the term "affecting" as it is used elsewhere in FIRREA:

> [I]n the context of another FIRREA provision that contains virtually identical language—namely, Section 961(1), which extends the statute of limitations for mail and wire fraud "if the offense affects a financial institution," 18 U.S.C. § 3293(2)—courts have repeatedly rejected Wells Fargo's interpretation in favor of a plain-text reading.[34]

An example of one such case is *United States v. Serpico*, 320 F.3d 691 (7th Cir. 2003). *Serpico* involved various fraud schemes, including a "loans-for-deposits" scheme in which two union officials "deposited large sums of union money in various banks. In exchange, the two received overly generous terms and conditions on personal loans totaling more than

---

30 *Wells Fargo*, 972 F. Supp. 2d at 602-04.

31 *Id.* at 629.

32 *Id.* at 629-30 (citing *United States v. Bank of N.Y. Mellon*, 941 F. Supp. 2d 438, 456-58 (S.D.N.Y. 2013); *United States v. Countrywide Fin. Corp.*, 961 F. Supp. 2d 598, 606 (S.D.N.Y. 2013)).

33 *Wells Fargo*, 972 F. Supp. 2d at 630.

34 *Id.* at 630 (citing *United States v. Serpico*, 320 F.3d 691, 695 (7th Cir. 2003); *United States v. Ghavami*, No. 10 Cr. 1217 (KMW), 2012 WL 2878126, at *5 (S.D.N.Y. July 13, 2012) (collecting cases)).

$5 million."[35] On appeal, Serpico challenged the application of the extended statute of limitations to the scheme, arguing that his scheme did not "affect" a financial institution.[36] Concluding that exposure to new or increased risk of loss is a sufficient effect, the Seventh Circuit rejected Serpico's argument that his schemes did not actually increase risk to the banks involved in the schemes because they benefited from the transactions: "[T]he mere fact that participation in a scheme is in a bank's best interest does not necessarily mean that it is not exposed to additional risks and is not 'affected,' as shown clearly by the various banks' dealings with Serpico."[37]

The *Wells Fargo* court explained that in cases like *Serpico*, "the question . . . was whether a financial institution, through its own misconduct, can affect itself within the meaning of FIRREA. Courts have repeatedly held that it can. There is no reason to deviate from that interpretation here."[38] Accordingly, the *Wells Fargo* court "join[ed] the two other courts to have considered the issue in holding that an institution that participates in a fraud may also be affected by it within the meaning of Title 12, United States Code, Section 1833a(c)(2)."[39]

Finding that the self-affecting theory was supported by the plain text of FIRREA, the court then assessed whether the complaint sufficiently alleged an effect on Wells Fargo cognizable under FIRREA. The government alleged that Wells Fargo's scheme had exposed the bank to considerable legal liability, caused the bank to incur significant legal expenses, and required the bank to indemnify the U.S. Department of Housing and Urban Development "for hundreds of loans it would not otherwise have to indemnify."[40] The court concluded that such allegations were sufficient, observing, "As Wells Fargo concedes, Courts have repeatedly held that in order to allege such an effect, the Government need not allege actual harm, but only facts that would demonstrate that the bank suffered an increased risk of loss due to its conduct."[41]

---

35 *Serpico*, 320 F.3d at 693.

36 *Id.*

37 *Id.* at 695. *See also United States v. Mullins*, 613 F.3d 1273, 1278 (10th Cir. 2010) (holding that "a new or increased risk of loss is plainly a material, detrimental effect on a financial institution, and falls squarely within the proper scope of the statute"); *United States v. Bouyea*, 152 F.3d 192 (2d Cir. 1998) (interpreting requirement that an offense "affects" a financial institution broadly when determining whether the ten-year statute of limitations is applicable).

38 *Wells Fargo*, 972 F. Supp. 2d at 630 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (explaining that where same term appears in two different provisions of same statute, it is "logical to assume" that same term has the same meaning in both provisions)).

39 *Id.* at 630.

40 *Id.* at 630-31.

41 *Id.* (citing *Serpico*, 320 F.3d at 694-95; *Mullins*, 613 F.3d at 1278-79; *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 457-59; *Ghavami*, 2012 WL 2878126, at *5).

2. The CPB's Interpretation of FIRREA Is Consistent with Federal Case Law

The CPB analyzed the Department's FIRREA authority in its September 9, 2013 Six-Month Status Report.[42] The CPB discussed and explicitly relied on *Bank of N.Y. Mellon* in concluding that the Department could pursue financial institutions that facilitated fraudulent transactions that increased risk to the bank even if the bank suffered no actual losses. The Six-Month Status Report did not discuss *Countrywide*, and *Wells Fargo* was not decided until shortly after the Six-Month Status Report was circulated, but those two cases clearly support the view of FIRREA adopted by the CPB in Operation Choke Point.

The Six-Month Status Report began by reporting on Operation Choke Point's "efforts during the past six months to combat mass-market consumer fraud" using "an investigatory focus on third-party payment processors and banks that enable fraudulent merchants to access consumers' bank accounts."[43] Describing FIRREA as "the principal tool we are using to investigate banks and processors under Operation Choke Point," the memorandum then analyzed the Department's authority under FIRREA to issue subpoenas and initiate civil actions against third-party payment processors and banks.[44] The CPB asserted that "[t]he offenses by the banks and payment processors under investigation 'affect a financial institution' under FIRREA in that they create a variety of risks to those institutions."[45] The Six-Month Status Report acknowledged, however, that FIRREA "was not designed principally to address consumer fraud" and the banks targeted under Operation Choke Point "have not suffered any actual monetary losses."[46]

Thus, the CPB's ability to use FIRREA in Operation Choke Point turned on the same two questions about the meaning of "affecting a federally insured financial institution" that were analyzed in *Bank of N.Y Mellon*, *Countrywide*, and *Wells Fargo*: whether financial and reputation risks (rather than actual monetary losses) constituted adequate effects under the statute; and whether a bank could "affect" itself under FIRREA by participating in the allegedly fraudulent scheme.[47] The courts in *Bank of N.Y. Mellon* and *Countrywide* already had answered — and the court in *Wells Fargo* later would soon answer — both questions in the affirmative, as the CPB did: (1) actual monetary losses to a bank are not necessary and increased financial and reputational risks are sufficient effects; and (2) the "self-affecting" theory of bank liability is viable under FIRREA.

---

42 In response to a January 8, 2014 request for documents relating to Operation Choke Point, on March 28, 2014, the Department provided a redacted copy of the Six-Month Status Report to the U.S. House Committee on Oversight and Government Reform, among other documents.

43 Six-Month Status Report at 1.

44 *Id.* at 11.

45 *Id.*

46 *Id.*

47 *Id.*

Even though *Bank of N.Y. Mellon* was the leading case and squarely addressed the relevant issues, the CPB went on to analyze two other cases interpreting the phrase "affect a financial institution" in other statutory contexts. The first case was *United States v. Johnson*, 130 F.3d 1352 (9th Cir. 1997), which interpreted the term "affect a financial institution" not in the FIRREA statute, but under the U.S. Sentencing Guidelines. The CPB understood *Johnson* to support the proposition that "courts have found that the financial institution need not suffer actual harm in order to be 'affected;' a showing of realistic and foreseeable exposure to substantial potential liability is sufficient."[48] The CPB also observed, "Banks that facilitate fraudulent transactions undoubtedly risk this sort of damage to their reputations and operations."[49]

The second case the CPB considered was *United States v. Agne*, 214 F.3d 47 (1st Cir. 2000), another case dealing with the phrase "affect a financial institution" in a non-FIRREA context. Observing that "not all cases interpret the phrase as expansively," the CPB interpreted *Agne* to give "a narrower reading of the phrase as it is used in 18 U.S.C. § 3293(2), which provides a 10-year statute of limitations for fraud offenses that 'affect a financial institution.'"[50] The CPB noted that the bank in *Agne* "suffered no actual financial loss and experienced no realistic prospect of loss," and stated that the court "reject[ed] any argument that the bank was at risk of losing its client and tarnishing its reputation, finding: 'We cannot construe a criminal statute to sweep so broadly as to make one guilty of wire fraud for merely arousing these possibilities.'"[51]

Explaining that the *Agne* court looked to the Random House Dictionary for its interpretation of "affect," the CPB noted, "To the court, this lent 'support to defendant's position that there must be some negative consequence to the financial institution to invoke the statute of limitations.'"[52] Significantly, however, the CPB pointed out that the outcome in *Agne* appeared to be driven by the specific facts of that case, given the court's conclusion that there was no discernible effect on the bank at issue:

> The First Circuit's opinion in *Agne* did not hold that placing a bank at a risk of loss was insufficient to affect a financial institution for purposes of extending the statute of limitation. In fact the court stated: "Even assuming, without deciding, that being exposed to a risk of loss is sufficient to 'affect' a bank, within the ordinary

---

48 *Id.* (quoting *Johnson*, 130 F.3d at 1355). The court in *Bank of N.Y. Mellon* also relied on *Johnson* as support for the following point: "If Congress had wanted to limit civil penalties to cases in which the financial institution was the victim, it obviously could have done so; instead it chose a singularly broad term." *See* 941 F. Supp. at 451 & n.81.

49 Six-Month Status Report at 11.

50 *Id.* at 12.

51 *Id.* (quoting *Agne*, 214 F.3d at 53).

52 *Id.* (quoting *Agne*, 214 F.3d at 51).

> meaning of that term, we cannot agree with the district court that this defendant created such a risk."[53]

After analyzing the opinions in *Bank of N.Y. Mellon*, *Johnson*, and *Agne*, the CPB concluded that the balance of authority weighed in favor of its interpretation of FIRREA's "affecting" requirement, thus allowing the self-affecting theory of liability:

> Although there is a split in the case law, the weight of authority leans toward a broad reading of the phrase "affects a financial institution." The *Bank of New York Mellon* case, cited above, provides strong support for our theory and is the only case interpreting the phrase in the context of FIRREA. Under that case, the financial and reputational risks created when banks facilitate fraud would be sufficient evidence to support a FIRREA case.[54]

In your letter, you expressed concern, as do the authors of the Staff Report, that the CPB ignored congressional intent and adopted a "legally dubious" strategy that constituted a misuse of FIRREA.[55] While it is true that the Six-Month Status Report did not include a specific discussion of FIRREA's legislative history, the CPB was clear that it was relying on *Bank of N.Y. Mellon* for its reading of FIRREA. In that case, as detailed above, the court analyzed not only FIRREA's statutory text and structure, but also its legislative history and purpose.[56]

The authors of the Staff Report also assert, "[W]hile 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." OPR disagrees. The CPB actually went further than "a single recent court case" in its analysis. The Six-Month Status Report included primary authority, Bank of N.Y. Mellon, and the CPB also discussed Johnson as persuasive supporting authority, as well as the possible counter-arguments set forth in Agne. The CPB also acknowledged "a split in the case law." Finally, it recognized two potential weaknesses in its position – first, that FIRREA "was not principally designed to address consumer fraud," signaling that the CPB's application of that statute to consumer fraud was arguably novel; and second, that the banks allegedly involved in the conduct targeted in Operation Choke Point "have not suffered any actual losses."[57] Thus, the CPB's legal analysis was appropriately thorough and balanced, and it led to conclusions that were consistent with and supported by case law analyzing the same legal issues.

---

53 *Id.* (quoting *Agne*, 214 F.3d at 51). OPR notes that the CPB's interpretation of *Agne* is consistent with the Seventh Circuit's reading of that case. In *Serpico*, cited approvingly in *Wells Fargo*, the Seventh Circuit explained that "the [*Agne*] court found that the bank 'experienced no realistic prospect of loss,' so it did not have to reach the question of whether the bank must suffer an actual loss." 320 F.3d at 694.

54 *Id.* at 12.

55 Staff Report at 4 (quoting Frank Keating, *Justice Puts Banks in a Choke Hold*, Wall St. J. (Apr. 24, 2014)).

56 *See Bank of N.Y. Mellon*, 941 F. Supp. 2d. at451-56.

57 *Id.* at 11.

In any event, in addition to *Bank of N.Y. Mellon*, two other courts have analyzed FIRREA, its language, and history, and likewise have concluded that a financial institution can affect itself for purposes of FIRREA. Indeed, no court has ruled otherwise. In the face of this legal authority, which is consistent with circuit court opinions interpreting the phrase "affect a financial institution" in other contexts, the CPB's interpretation of FIRREA was reasonable and did not constitute professional misconduct.

B. Three Civil Actions Filed by the CPB and the Consent Judgments Entered by the Courts in Those Cases Support the CPB's Interpretation of FIRREA

As explained more fully below, the CPB has relied on the "self-affecting" theory, as well as additional theories of liability, in three cases arising from the Operation Choke Point initiative.[58] In *United States v. Four Oaks Fincorp*, for example, the complaint alleged that the consumer fraud scheme "affected numerous federally-insured financial institutions, including the banks of the consumer victims from whom money was taken without authorization, *and Four Oaks Bank itself.*"[59] The complaints in the *CommerceWest* and *Plaza Bank* cases filed by the CPB contain similar allegations.[60] All three cases were resolved through negotiated settlements. In each case, significantly, the district court accepted and entered the parties' consent judgments, which were premised on violations of FIRREA. The entry of the consent judgments lends support to the CPB's legal theory, because courts cannot enter a proposed consent judgment if it, and the allegations on which it is based, are contrary to law.

A consent judgment, or decree, is more than simply an agreement among litigants; it is a "judicial act."[61] Accordingly, "Courts must exercise equitable discretion before accepting litigants' invitation to perform the judicial act."[62] In exercising this discretion, courts generally consider whether the proposed resolution is fair, adequate, and reasonable, and is not illegal or otherwise improper under the circumstances.[63] For example, in *League of United Latin*

---

58 *See United States v. CommerceWest Bank*, No. 8:15-cv-379-AG (C.D. Cal.) (consent judgment entered Mar. 30, 2015); *United States v. Plaza Bank*, No. 8:15-cv-394-AG (C.D. Cal.) (consent judgment entered Mar. 30, 2015); *United States v. Four Oaks Fincorp, Inc, et al.*, No. 5:14-cv-14-BO (E.D.N.C.) (consent judgment entered Apr. 25, 2014).

59 Complaint ¶ 104, *Four Oaks Fincorp* (Jan. 8, 2014) (emphasis added).

60 Complaint ¶ 109, *CommerceWest Bank* (Mar. 10, 2015) ("[fraud scheme] affected numerous federally-insured financial institutions, including the banks of the consumer victims from whom money was taken without authorization, and CWB itself."); Complaint ¶ 11, *Plaza Bank* (Mar. 12, 2015) ("[fraud scheme] affected dozens of federally-insured financial institutions whose customers were defrauded as a result of Plaza's actions. In addition, Plaza itself was and is a federally-insured financial institution and was affected by its own unlawful conduct.").

61 *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (reviewing and rejecting modification to consent decree in antitrust case, explaining, "We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act.").

62 League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 846 (5th Cir. 1993).

63 *See, e.g., United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (explaining that before accepting consent decree in Title VII gender discrimination case, district court "must satisfy itself that the agreement

American Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993), the Fifth Circuit considered a proposed consent decree in a Voting Rights Act case. Explaining that "any federal decree must be a tailored remedial response to illegality,"[64] the court rejected the proposed decree at issue because, in the court's view, the record did not show that the conduct the decree was supposed to remedy was in fact illegal.[65]

1. *United States v. Four Oaks Fincorp, Inc.*[66]

On January 8, 2014, the CPB filed a complaint in the Eastern District of North Carolina against Four Oaks Bank seeking civil penalties under FIRREA and an injunction under the Anti-Fraud Injunction Act. It was the first action brought as part of Operation Choke Point. The complaint alleged that Four Oaks Bank had allowed a third-party payment processor to facilitate payments for fraudulent merchants, primarily Internet payday lenders, despite having specific notice of fraud. A third-party payment processor is an entity serving as an intermediary between the fraudulent merchant and the bank. Internet payday lenders use the Internet to make short-term loans, allowing borrowers to obtain short-term cash to meet expenses.

Four Oaks Bank had received hundreds of notices from consumers' banks, including sworn statements by account holders, indicating that the people whose accounts were charged had not authorized the debits. According to the complaint, Four Oaks Bank also had evidence that merchants had tried to conceal their true identities and that more than a dozen merchants served by the payment processor had return rates of over 30 percent, clear indications that the bank was facilitating repeated fraudulent withdrawals. Despite these signs of fraud, Four Oaks Bank permitted the third-party payment processor to originate approximately $2.4 billion in debit transactions against consumers' bank accounts. The CPB alleged this scheme "affected numerous federally-insured financial institutions, including the banks of the consumer victims from whom money was taken without authorization, and Four Oaks Bank itself."[67]

On April 25, 2014, the court approved a settlement agreement between the Department and Four Oaks Bank and entered a consent judgment resolving the case. The consent judgment

---

'is fair, adequate, and reasonable' and 'is not illegal, a product of collusion, or against the public interest.' In considering the fairness and adequacy of a proposed settlement, the court must assess the strength of the plaintiff's case." (citations omitted)); *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir.1990) (explaining in fishing rights case that before accepting consent decree, "a district court must be satisfied that it is at least fundamentally fair, adequate and reasonable. In addition, because it is a form of judgment, a consent decree must conform to applicable laws." (citation omitted)). *See also S.E.C. v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 294-95 (2d Cir. 2014) ("A court evaluating a proposed S.E.C. consent decree for fairness and reasonableness should, at a minimum, assess (1) the basic legality of the decree; (2) whether the terms of the decree, including its enforcement mechanism, are clear; (3) whether the consent decree reflects a resolution of the actual claims in the complaint; and (4) whether the consent decree is tainted by improper collusion or corruption of some kind." (citations omitted)).

64 *Clements*, 999 F.2d at 847 (citing *Shaw v. Reno*, 509 U.S. 630 (1993)).

65 *Id.* ("We are asked to remand for this determination although we are not persuaded that there is any illegality.").

66 *United States v. Four Oaks Fincorp, Inc., et al.* No. 5:14-cv-14-BO (E.D.N.C.) (filed Jan. 8, 2014).

67 Complaint ¶ 104, *Four Oaks Fincorp* (Jan. 8, 2014).

required Four Oaks Bank to pay a $1 million civil money penalty, make a $200,000 payment in lieu of administrative forfeiture, and agree to continued cooperation with the Department, among other provisions.

2. *United States v. CommerceWest Bank*[68]

On March 10, 2015, in its second FIRREA action under Operation Choke Point, the CPB filed a civil complaint in the Central District of California against CommerceWest Bank. As in the *Four Oaks Bank* case, the CPB sought civil money penalties under FIRREA and injunctive relief under the Anti-Fraud Injunction Act. According to the complaint, from December 2011 through July 2013, CommerceWest Bank worked with a third-party payment processor that processed transactions for fraudulent merchants, including a fraudulent telemarketing company and a company that charged several hundred thousand victims for a payday loan referral fee they had never authorized. The complaint alleged that CommerceWest ignored clear warning signs indicating that the processor and its merchants were defrauding consumers, including for example, a 50 percent return rate on debit transactions. Many of those returned transactions included sworn affidavits, in which victims stated that the withdrawals on their accounts were unauthorized. CommerceWest Bank also received complaints and inquiries from other banks, which expressed their belief that the processor's transactions were fraudulent.

According to the complaint, although by May 29, 2013 a CommerceWest Bank official had determined that all of the payment processor's transactions appeared to be fraudulent and unauthorized, CommerceWest Bank did not terminate its business relationship with the payment processor until the Department notified the bank that it intended to seek an emergency injunction. As in the *Four Oaks Bank* complaint, the CPB alleged that the fraud scheme "affected numerous federally-insured financial institutions, including the banks of the consumer victims from which money was taken without authorization, and [CommerceWest Bank] itself."[69]

On March 30, 2015, the court entered a consent judgment resolving the case. CommerceWest Bank and the Department agreed to a $4.9 million civil and criminal resolution.

3. *United States v. Plaza Bank*[70]

On March 12, 2015, just two days after filing the CommerceWest complaint, the CPB filed a complaint in the Central District of California against Plaza Bank seeking civil money penalties under FIRREA and injunctive relief under the Anti-Fraud Injunction Act. The complaint alleged that from July 2007 to mid-2010 Plaza Bank knowingly facilitated consumer fraud by permitting a third-party payment processor to make millions of dollars of unauthorized withdrawals from consumer bank accounts on behalf of fraudulent merchants. According to the complaint, the unauthorized withdrawals led to an abnormally high return rate, which hovered at between 50 and 55 percent; hundreds of consumer complaints each month including sworn

---

68 *United States v. CommerceWest Bank*, No. 8:15-cv-379-AG (C.D. Cal.) (filed Mar. 10, 2015).

69 Complaint ¶ 109, *CommerceWest Bank* (Mar. 10, 2015).

70 *United States v. Plaza Bank*, No. 8:15-cv-394-AG (C.D. Cal) (filed Mar. 12, 2015)

affidavits stating that the withdrawals were unauthorized; and inquiries from other banks and law enforcement personnel concerned that the transactions were fraudulent. According to the complaint, Plaza Bank knew of the potential for fraud, but debated whether the revenues generated by the payment processor relationship outweighed the possible risk to the bank. Plaza Bank ultimately terminated the relationship, but according to the complaint, the termination occurred only after more than 1,000 consumer complaints had been lodged, hundreds of thousands of transactions had been returned, and tens of millions of additional dollars had been withdrawn without authorization from consumer accounts. The CPB alleged that the fraud scheme "affected dozens of federally-insured financial institutions whose customers were defrauded as a result of Plaza's actions. In addition, Plaza itself was and is a federally-insured financial institution and was affected by its own unlawful conduct."[71]

As with the other Operation Choke Point cases described above, the *Plaza Bank* case was resolved by entry of a consent judgment on March 30, 2015. Plaza Bank had to pay a $1 million civil penalty, an additional $225,000 in lieu of administrative forfeiture, and enter into a permanent injunction to reform the bank's practices, among other provisions.

C. The CPB's Legal Theory Has Not Been Rejected by Any Court and the Cases Supporting the CPB's Interpretation of FIRREA Have Not Been Criticized, Distinguished, or Overruled by Other Courts

No court has overturned, distinguished, or criticized the reasoning or holdings in *Bank of N.Y. Mellon*, *Countrywide*, or *Wells Fargo*. OPR is therefore unable to conclude that by interpreting FIRREA as it did, the CPB attorneys abused the legal process and committed a violation of professional standards of conduct. Moreover, OPR cannot conclude that the CPB's approach was lacking in substance, lacked the possibility of success on the legal merits, or was otherwise inappropriate under the circumstances. To the contrary, each court that has been called upon to enter a consent judgment in an Operation Choke Point case has done so, and every court that has analyzed the "self-affecting" theory of liability under FIRREA has permitted it. Accordingly, OPR concluded that the CPB reasonably utilized FIRREA to investigate and hold financial institutions liable for conduct that affected the institutions themselves.

IV. Evidence Does Not Demonstrate That Operation Choke Point Misused FIRREA Subpoenas to Target Lawful Internet Payday Lenders

Your letter and the Staff Report expressed concern that the Civil Division attorneys improperly targeted lawful participants in the Internet payday lending industry and improperly pressured banks not to do business with them. The evidence OPR gathered, however, established that the design and initial implementation of Operation Choke Point were not specifically focused on Internet payday lenders or lending practices. OPR's review of the 60 subpoenas issued by the CPB as a part of Operation Choke Point showed that relatively few related in any way to Internet payday lending, and that the CPB had specific and articulable evidence of consumer fraud for each subpoena it issued. To the extent that the CPB attorneys involved in Operation Choke Point investigated Internet payday lending, their focus was on those lenders suspected of being engaged in fraudulent practices.

---

[71] Complaint ¶ 11, *Plaza Bank* (Mar. 12, 2015).

For example, in the civil action filed by the CPB concerning Four Oaks Bank, which resulted in a settlement and court-approved consent judgment, the bank allowed a third-party payment processor to facilitate payments for fraudulent merchants, primarily Internet payday lenders, despite having specific notice of fraud. The bank received hundreds of notices from consumers' banks, including sworn statements by account holders, indicating that the people whose accounts were charged had not authorized the debits.

As described more fully below, the evidence gathered by OPR established that Operation Choke Point had as its primary purpose combating mass-market consumer fraud where financial institutions were liable under FIRREA. The evidence further indicated that the CPB investigated banks involved with Internet payday lenders only when there appeared to be specific indicia of fraudulent conduct for purposes of a FIRREA predicate offense.

A. Third-Party Payment Processors and Mass-Market Consumer Fraud[72]

By way of background, mass-market consumer fraud schemes normally use the Internet, mail, or telephone to make misleading offers for products or services to large groups of people, quite often targeting the elderly. The fraudulent merchant's goal is to induce the consumer to divulge personal payment information, such as a credit card or bank account number. Mass-market consumer fraud is a significant problem in the United States. According to an FTC report, approximately 25.6 million people – or approximately 10.8% of all U.S. adults – were victims of consumer fraud in 2011, with their losses totaling in the tens of billions of dollars.[73]

Even when in possession of a consumer's personal payment information, a fraudulent merchant must also have access to the national banking system in order to gain access to the consumer's money. The fraudulent merchant must have a relationship with a bank that will originate debit transactions through the national banking system by which money will be withdrawn from the consumer's bank and transferred to the merchant's account. Because of "know-your-customer" statutes and regulations and reputational interests, however, banks often will refuse to open an account for a merchant with a suspicious background, or one who is engaged in what they deem a high-risk business.[74]

---

[72] The information set forth in this subsection is derived from consumer protection information publicly-disseminated by the Federal Bureau of Investigation (FBI), the FTC, and consumer protection agencies, as well as from civil and criminal actions successfully brought by the Department. The CPB Operation Choke Point documents OPR reviewed as well as the written responses OPR received from the attorneys most involved in Operation Choke Point also broadly corroborate this information.

[73] *See* Keith B. Anderson, Fed. Trade Comm'n, Consumer Fraud in the United States, 2011: The Third FTC Survey (2013). At the merchant level, large-scale telemarketing and Internet fraud poses difficult challenges for law enforcement. The victims are dispersed geographically, leading to state, federal, and international jurisdictional confusion. In almost all cases, the victims have had no face-to-face contact with the fraudulent merchant and usually cannot identify a defendant in court. The fraudulent merchants frequently incorporate off-shore and change corporate names, and sell a large number of constantly-changing products.

[74] *See* Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, and implementing regulations. For instance, a bank is required to have a Customer Identification Program (CIP) in place to insure that it knows the true identity of each of its customers, and it must collect information about the customer's business sufficient to allow it to determine whether a customer poses a threat of criminal conduct. *See also* Fed. Fin. Inst. Examination Council, Bank Secrecy

A third-party payment processor can solve this problem for fraudulent merchants by serving as an intermediary between the fraudulent merchant and the bank. The third-party payment processor, and not the fraudulent merchant, has the business account with the bank. At the fraudulent merchant's direction, the third-party payment processor enters the victim's account information and the debit amount into the automated clearing house (ACH) system, or issues a "remotely created check" or "remotely created payment order" with the victim's name and account information, which are then processed like ordinary checks. The bank itself has no problematic, direct business relationship with the fraudulent merchant, and indeed may profit from the transaction fees generated by all the funds transfers initiated by the third-party payment processor.

Fraudulent third-party payment processor transfers generate red flags for the banks in the form of high "return rates," which include transactions identified by victim account holders as unauthorized. Law enforcement and regulators consider high return rates to indicate potential fraud. As the U.S. Department of the Treasury has advised:

> High numbers of consumer complaints about Payment Processors and/or merchant clients, and particularly high numbers of returns or charge backs (aggregate or otherwise), suggest that the originating merchant may be engaged in unfair or deceptive practices or fraud, including using consumers' account information to create unauthorized RCCs [remotely created checks] or ACH [automated clearing house] debits.[75]

Industry average return rates range from between 0.5% to 1.5%; however, some third-party payment processor transaction return rates have exceeded 30%, or even 50%.

B. Payday Lending

Payday loans are a way for often low-income borrowers with poor credit ratings to obtain short term cash to meet expenses.[76] Some providers of payday loans operate from storefront businesses, but many operate over the Internet. (Operation Choke Point was concerned only with fraudulent Internet-based payday lenders, and not the storefront businesses.) According to the FTC, payday loans work as follows:

Act/Anti-Money Laundering Examination Manual 21 (2006) (listing types of customer information that banks are required to learn).

[75] *See* Fin. Crimes Enforcement Network, U.S. Dep't Treasury, Risks Associated with Third-Party Payment Processors (2012); *see also* Fed. Dep. Ins. Corp., FIL-127-2008, Guidance on Payment Processor Relationships (Nov. 7, 2008) (FDIC advises member banks to be wary of third-party payment processors with "higher return rates or charge backs, which are often evidence of fraudulent activity," to scrutinize their third-party payment processor customers' target clientele, and to require third-party payment processors to provide the banks information sufficient to assure that merchants operating through the third-party payment processors are engaged in legitimate businesses); Fed. Dep. Ins. Corp., FIL-44-2008, Guidance for Managing Third-Party Risk (June 2008).

[76] See Pew Charitable Trusts, Payday Lending in America: Who Borrows, Where They Borrow, and Why (July 19, 2012).

> A borrower writes a personal check payable to the lender for the amount the person wants to borrow, plus the fee they must pay for borrowing. The company gives the borrower the amount of the check less the fee, and agrees to hold the check until the loan is due, usually the borrower's next payday. Or, with the borrower's permission, the company deposits the amount borrowed — less the fee — into the borrower's checking account electronically. The loan amount is due to be debited the next payday. The fees on these loans can be a percentage of the face value of the check — or they can be based on increments of money borrowed: say, a fee for every $50 or $100 borrowed. The borrower is charged new fees each time the same loan is extended or "rolled over."[77]

Instead of paper checks, Internet payday lenders obtain borrowers' bank account information and set up electronic debits for loan repayment. The FTC notes that, "if you agree to electronic payments instead of a check . . . the company would debit the full amount of the loan from your checking account electronically, or extend the loan for an additional [fee]."[78] With the fees, the loans can quickly result in interest rates of 100% or higher.[79]

The Staff Report characterizes payday lending as an "indisputably lawful financial service," and many providers do in fact appear to operate lawfully and responsibly. For instance, a recent *Financial Times* article documented two Internet loan companies that service borrowers who need to "bridge cash shortages of a couple of weeks" – perhaps due to some sudden expense like "a broken boiler, [or] a bereavement" – and that offer loans with well-disclosed terms as well as the opportunity to develop credit ratings sufficient to "graduate to the mainstream banking system," with access to "credit cards, unsecured loans, and mortgages."[80] In the article, a satisfied payday loan customer in Dallas, Texas was interviewed. Her credit was ruined after she lost her job and declared personal bankruptcy, but she gratefully used payday loans as needed to meet unexpected expenses and to slowly improve her credit rating.[81]

Some Internet payday loan providers, however, engage in practices that are abusive or fraudulent.[82] Sometimes, borrowers are "misled to believe that the loan will end in a limited

---

77 Fed. Trade Comm'n, *Payday Loans* (March 2008), *available at* www.consumer.ftc.gov/articles/0097-payday-loans.

78 *Id.*

79 *Id.*

80 Ben McLannahan, Payday Lenders Take Aim at Grubby End of U.S. Debt Market, Fin. Times, June 7, 2015.

81 *Id.*

82 *See generally,* Pew Charitable Trusts Report, *Fraud and Abuse Online: Harmful Practices in Internet Payday Lending*, in Payday Lending in America (Oct. 2, 2014) (hereinafter, Pew Report) (finding, among other things, that some Internet payday lenders engage in fraud and make unauthorized withdrawals from borrowers' bank accounts).

period of time, but lenders manipulate [electronic] debits from the borrowers' accounts so that the borrower ends up paying much more in interest and other fees than the borrower anticipated." The Consumer Financial Protection Bureau (CFPB) has similarly found that some payday lenders rely on "debt traps," by which they purposefully "collect payment from consumers' bank accounts in ways that tend to rack up excessive fees," resulting in loans that continuously roll over with additional, ever-increasing fees.[83] According to one survey, 32 percent of online borrowers report that money was withdrawn from their bank accounts without authorization.[84] Both the FTC and the Office of the Comptroller of the Currency (OCC) have successfully brought enforcement actions against multiple payday lenders for providing misleading information about the cost of loans and other abusive or illegal conduct.[85] Abuses in the payday lending industry also have been the subject of congressional hearings and proposed legislation.[86]

C. Initial FIRREA Subpoenas

Operation Choke Point commenced with the issuance of eight subpoenas. Five of the eight subpoena recipients were banks. For each subpoena, a memorandum set forth the reasons the banks were suspected of dealing with third-party payment processors with fraudulent merchant clientele. Among others, the reasons included that: one subpoena recipient was the subject of an active FTC investigation and multiple other banks had filed Suspicious Activity Reports (SARs) regarding the bank, some relating to unauthorized electronic debits from elderly depositors' accounts; certain subpoena recipients were known to have acted as third-party processors for multiple fraudulent merchants, some with return rates as high as 50 to 70 percent; and another subpoena recipient was a merchant and payment processor who had been the subject of consumer complaints and faced Better Business Bureau accreditation revocation for "taking money out of complainants' bank accounts without authorization." Based in part on the evidence obtained by one of these subpoenas, the CPB brought a FIRREA action against CommerceWest Bank that resulted in a $4.9 million settlement and other significant relief.

Besides the eight subpoenas discussed above, a ninth FIRREA subpoena was issued to a bank that had previously operated its own subsidiary third-party payment processor, which was known to conduct a "vast number of automated clearing house transactions" for fraudulent merchants operating by telephone or the Internet. One of the bank's customers was the marketer of a fraudulent "health discount card" and had been the subject of an FTC enforcement action.

---

83 *See* Consumer Fin. Prot. Bureau, Factsheet: The CFPB Considers Proposal to End Payday Debt Traps (Mar. 26, 2015). The CFPB has proposed for comment regulations on payday and short term lenders. *See* Jessica Silver-Greenberg, *Consumer Protection Agency Seeks Limits on Payday Lenders*, N.Y. Times (Feb. 8, 2015).

84 Pew Report at 15.

85 *See generally* Fed. Trade Comm'n Consumer Information, *Online Payday Loans*, *available at* www.consumer.ftc.gov/articles/0249-online-payday-loans (listing FTC cases); www.occ.gov/topics/consumer-protection/payday-lending/index-payday-lending.html (describing and collecting OCC cases).

86 See, e.g., Payday Loans: Short-term Solution or Long-term Problem?: Hearing Before Spec. Comm. On Aging, 113th Cong. (July 2013).

D. The Subject of Internet Payday Lending Arises in Operation Choke Point

As previously discussed, Internet payday lending does not appear to have been a focus of Operation Choke Point when it was first designed and implemented. Of the first nine subpoenas issued under Operation Choke Point, only one appears to have been motivated even in part by concern about a payday lender. Furthermore, significant concern existed regarding the bank to which the subpoena was directed, apart from any involvement with payday lenders; that bank was known to do business with numerous third-party payment processors, and it had high return rates. Payday lending appears only to have been a tangential factor in issuing the subpoena, and was included because of separate FTC litigation against the payday lender.

According to a Department attorney working on Operation Choke Point, after Operation Choke Point was underway and the first subpoenas had been issued, CPB attorneys attended a meeting in which one topic discussed was civil suits and FTC actions alleging that some Internet payday lenders were deceiving borrowers and initiating unauthorized debits from their accounts via third-party payment processors. The CPB attorneys concluded that such alleged conduct was within the scope of Operation Choke Point. CPB management, however, expressly instructed that Operation Choke Point would investigate banks involved with Internet payday lenders only when the evidence indicated that the lenders were engaged in fraudulent conduct for purposes of a FIRREA predicate offense, and not when the lenders engaged solely in possible violations of state usury laws or regulatory violations.

E. Second Round of FIRREA Subpoenas

In a memorandum dated April 29, 2013, the CPB requested authority to issue FIRREA subpoenas to three additional entities. Based on information received as a result of a previously issued subpoena and from a federal regulator, the memorandum reported that one bank had processed billions in ACH transactions on behalf of more than two dozen third-party payment processors, and that the bank's regulator had determined that well more than 50 percent of the bank's merchants were what the regulator termed "high risk," including payday lenders, check cashers, international money transmitters, and money-services businesses. The memorandum also stated that the bank's return rate was 20 percent, compared to the industry average of about 1.02 percent.

The other two recipients were third-party payment processors. Regarding one subpoena, the memorandum asserted:

> [It] is a payment processor heavily involved in the epidemic of predatory Internet-based payday lending. . . . The loans are often made at interest rates in excess of 500 percent, which violate most states' lending laws. State law enforcement is hampered in their enforcement efforts due to jurisdictional limitations, an inability to locate and serve process on the Internet lenders, and other legal obstacles. We are exploring several legal theories relating to Internet-based payday lending, including potential FIRREA offenses.

Regarding the third subpoena issued to the second third-party payment processor, the memorandum merely stated that "we suspect that it originates a substantial number of potentially fraud-tainted ACH transactions, and that it is similar to [the other third-party payment processor] with respect to its client base."

Because the April 29, 2013 memorandum did not specifically discuss suspected violations of FIRREA predicate offenses, OPR sought additional information from the CPB regarding why the two third-party payment processors were selected to receive subpoenas. A CPB supervisor told OPR that the financial institution that received one subpoena was associated with a third-party payment processor whose payday lender customers had been the subject of a successful FTC enforcement action, indicating that the lenders had misled borrowers regarding payments to be withdrawn from their bank accounts. The enforcement action established that, rather than withdrawing scheduled loan payments on the promised dates, the lenders initiated withdrawals from the accounts on multiple occasions, assessing additional finance fees each time, thereby causing the borrower to pay significantly more money to satisfy the loan than had been disclosed.

Regarding the second third-party payment processor, the CPB determined that it was one of the many third-party payment processors doing business with the recipient of a previously issued subpoena. That bank was known to process ACH debits on behalf of multiple third-party payment processors involved with suspicious merchants, and it had a return rate many times the national average, a reliable indicator of consumer fraud.

F. Third Round of FIRREA Subpoenas

The CPB issued subpoenas to 31 banks in May 2013; included with each subpoena was regulatory guidance contained in three documents previously issued by federal regulators. In a memorandum dated May 14, 2013, the CPB requested authority to issue the subpoenas:

> Using a variety of sources, we have identified thirty-one (31) banks that originated debit transactions against consumers' accounts on behalf of fraudulent merchants, or engaged in discussions with suspected scammers about such activity. Some of the banks also processed debit transactions on behalf of Internet payday lenders who collect potentially unlawful debts in violation of state and possibly federal laws and regulations.

The line about "payday lenders who collect potentially unlawful debts" in violation of state laws and regulations is presumably a reference to state usury laws, which are not predicate FIRREA offenses. The reference to "possibly federal laws," however, could include mail and wire fraud under 18 U.S.C. §§ 1341 and 1343, both FIRREA predicates.

The memorandum cited the FTC as the source for the information based upon which the first 14 subpoena recipient banks were selected. The memorandum stated only that "[t]he FTC has provided us with e-mails in which processors and/or merchants discuss banks that are providing access to the payment system, and also prospective banks that may be willing to originate debit transactions against consumer accounts to further their schemes," without

providing specific factual information for each bank. Accordingly, OPR sought and obtained additional information from the CPB to understand the bases for issuing the subpoenas. In each case, the CPB provided information to support their conclusion that there was sufficient reason to suspect fraudulent activity, thus justifying their issuance of the subpoenas. One of these subpoenas was issued to Plaza Bank, which later entered into a negotiated settlement after the Civil Division filed a civil action pursuant to FIRREA. None of this group of 14 banks appears to have had any connection to payday lending; rather, each appears to have been selected to receive a subpoena based on evidence that it was connected to typical consumer mass-market fraud.

The next eleven subpoena recipient banks identified in the May 14, 2013 approval request memorandum were selected based on information received from the Federal Reserve Bank of Atlanta in "Dashboard Reports" for the time period of January through June 2012.[87] When the CPB was able to gather corroborating evidence that a bank listed in the Dashboard Reports also had third-party payment processors or merchants engaged in mass-market consumer fraud as customers, the CPB would include the bank on the list to receive a FIRREA subpoena. As discussed below, the CPB ultimately brought and resolved a FIRREA action against the bank recipient of one subpoena, Four Oaks Bank. Again, OPR found no evidence that any of these eleven banks were selected to receive FIRREA subpoenas because of any connection to payday lending, but rather that their selection to receive subpoenas was based only on their high return rates and other indicia of their possible involvement in mass-market consumer fraud.

The next three subpoena recipient banks identified in the May 14, 2013 request for approval memorandum were selected based on information provided in response to a previously issued subpoena. According to the CPB, some documents received in response to that prior subpoena indicated that some of that bank's former third-party payment processor customers may have migrated over to conduct business with other financial institutions.

The final three subpoena recipient banks identified in the May 14, 2013 request for approval memorandum were selected based on information received relating to an FTC enforcement action against a company that defrauded consumers via the Internet and telemarketing. OPR found no evidence that these entities and individuals were involved in payday lending.

G. Fourth and Final Round of FIRREA Subpoenas

In a series of three memoranda written in July 2013, the CPB requested authority to issue the final subpoenas in furtherance of Operation Choke Point. The first of the memoranda, dated July 8, 2013, sought authority to issue one subpoena. The subpoena sought information that could lead to the discovery of business websites associated with the third-party payment processor recipient of another subpoena. Two of the websites were operating as online payment processors, and both had been the subject of complaints regarding unauthorized debits to

[87] The Federal Reserve Bank of Atlanta serves as a clearing house for a large number of the country's ACH and check transactions, and it produces monthly "Dashboard Reports" identifying banks that exceed a certain monthly threshold of unauthorized and/or invalid returns, which, as noted, is a well-recognized potential indicator of fraud.

consumers' bank accounts. One of the websites was simultaneously being investigated by the FTC. Two other websites appeared to the CPB to be "portals" to payday loan providers, "by which consumers would submit their personal information, which is then sold to the highest bidder amongst competing payday lenders." One of the payday loan portal websites had been the subject of numerous consumer complaints.

The second memorandum, also dated July 8, 2013, requested authority to issue subpoenas to five banks. Each of the banks had been identified as originating debit transactions against consumers' bank accounts on behalf of fraudulent businesses. None of the businesses described in this memorandum appeared to involve payday lending.

The third memorandum, dated July 16, 2013, requested authority to issue subpoenas to 12 banks. The first four of the banks were identified in relation to a criminal investigation. The CPB identified the fifth FIRREA subpoena recipient bank listed in the July 16, 2013 memorandum as a result of a previous subpoena that had been issued to one of the banks flagged in the Federal Reserve Bank of Atlanta Dashboard Reports. Information received in response to the previous subpoena revealed that the bank had a payday lender client which had engaged in a misleading practice known as "surprise pulls" (debiting a consumer bank account other than the one the lender was supposed to debit), and had also initiated debits on unscheduled dates. The information also indicated that the client had moved its business to another bank. This subpoena sought information regarding this lender from the new bank.

The next four banks listed in the July 16, 2013 memorandum were identified based on information received from the FTC indicating that the banks "currently or historically provided banking services to fraudsters," or that they had "been targeted by fraudsters to be approached [to] provide ACH and/or check payment services." A CPB supervisor provided OPR with additional information indicating that these bank recipients were associated with third-party payment processors for multiple fraudulent merchants, some with return rates as high as 50 to 70 percent.

The final two banks listed in the July 16, 2013 memorandum were merely reissued subpoenas resulting from the misidentification of two previous subpoena recipient banks. The new banks had names very similar to the banks previously subpoenaed, and the CPB inadvertently served the wrong bank in both instances.

The CPB included in twelve bank subpoenas a demand for "all documents concerning whether the third-party payment processor is: (a) licensed as a transmitter; and (b) registered with the United States Department of the Treasury as a Money Services Business." On its face, this request appears to call for documents unrelated to any FIRREA predicate offense; instead, it calls for information directly relevant to a separate, specific Title 18 felony offense -- 18 U.S.C. § 1960 (operating an unlicensed or unregistered money transmitting business). Moreover, one CPB memorandum relating to Operation Choke Point stated:

> We also asked several banks to identify within their respective productions, or otherwise produce, any documents relating to payment processor licensing and/or registration, as this is relevant to whether the entity violated 18 U.S.C. § 1960.

Accordingly, OPR asked the CPB to explain the purpose and legal basis for including the request in the FIRREA subpoenas issued to these 12 banks. OPR was advised that the information regarding third-party payment processor licensure and registration was directly relevant to the CPB's investigations of the banks for a FIRREA predicate fraud offense. As a Department attorney working on Operation Choke Point explained:

> A bank's knowledge whether a payment processor customer was operating illegally as an unlicensed money transmitter, or as an unregistered money services business, . . . would be probative of the bank's compliance with its obligations to know its customers, and thus whether it was willfully blind to a fraud scheme.

A CPB supervisor further explained:

> If a bank knows that its payment processors are sending millions of dollars through its accounts and failing to submit themselves to government oversight [in the form of licensure and registration], this evidence, coupled with other evidence, could demonstrate deliberate evidence of fraud.

The CPB attorneys pointed out that precisely such evidence of fraudulent intent was brought to bear in the *Four Oaks Bank* case, discussed above, in which bank officials ignored internal concerns and "purposefully chose to look the other way for fear that they would learn something they did not like" regarding whether their third-party payment processor clients possessed the proper licenses.

H. Operation Choke Point Six-Month Status Report

In a memorandum dated September 9, 2013, the CPB provided a six-month status report concerning Operation Choke Point. As explained in the memorandum, the CPB had served subpoenas on 50 banks and six payment processors, and asserted that "we have determined that we are accurately identifying banks and processors engaged in illicit conduct." The memorandum also reported that, solely because of "our subpoenas and our engagement with banks and processors," "segments of the banking industry that had been doing business with third-party payment processors have chosen to exit or severely curtail that business, thereby making it harder – and in some cases, impossible – for untold numbers of merchants who prey on consumers to run their illegitimate operations." The memorandum briefly summarized the civil FIRREA investigations opened on a subset of ten of the 50 banks subpoenaed. Criminal investigations initiated against four third-party payment processors, their principals, and one bank were also noted.

A significant section of the memorandum discussed the Internet payday lending industry. Internet payday lenders were criticized for charging high interest rates ("400 to 1,800 percent"), manipulating ACH debits from borrowers' accounts "so that the borrower ends up paying much more in interest and other fees than the consumers anticipated," and evading "state usury and

other laws by claiming to operate from overseas, or by claiming the protection of tribal sovereign immunity."[88] The memorandum further reported:

> 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. . . .

The memorandum acknowledged congressional concerns about over-deterrence in the Internet payday lending industry and, in general, "sweeping too broadly with our enforcement brush," but concluded that those concerns did not warrant any change in approach:

> [W]e are focused on fraud and not legitimate lending businesses. Because of our efforts, many banks have realized that they have opened the payment system to potentially fraudulent merchants without sufficient due diligence and monitoring. As a result, processors and merchants will face additional scrutiny from banks, which are now more focused on the legal, systemic, and reputational risks associated with these relationships. This scrutiny has led some banks to determine that it is not in their best interests – from a risk assessment and risk tolerance perspective – to continue to do business with Internet lenders. 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 the 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.

---

[88] A lengthy subsection of the memorandum deals with the CPB's concerns about Internet payday lenders who "sought tribal affiliation as a shield to state usury laws that bar the high interest rates they charge borrowers," and the legal complexities and ambiguities of claims of tribal sovereign immunity. The memorandum asserted, however, that the CPB had "no intention of prosecuting a tribe or tribal entity," and instead was "focused on banks and the responsibilities they have to ensure that they are not aiding fraudulent schemes."

Operation Choke Point's results up to that date were summarized in the memorandum as follows:

> All signs indicate that Operation Choke Point is having an unprecedented effect on banks doing business with illicit third-party payment processors and fraudulent merchants. We believe we already have denied fraudsters access to tens, if not hundreds, of millions of dollars from consumers' bank accounts, and that the amount will increase daily and indefinitely. This unparalleled level of deterrence is corroborated by payment processors and banks that have informed us that they have stopped providing services to fraudulent merchants; undercover recordings of fraudulent operators – including those who provided Internet payday loans – who, citing pressure from our initiative, have decided to shut down their operations; and FTC attorneys describing increased cooperation from banks and processors in FTC investigations.
>
> Most importantly, we have learned directly from many sources that banks that have received our subpoenas, and others aware of our efforts, are scrutinizing their relationships with high risk third-party payment processors. In several cases, after receiving a subpoena, banks and processors have self-disclosed potentially problematic relationships and have informed us they have taken corrective action. We have encouraged this type of positive conduct. As a consequence, we have a backlog of matters in which the bank or processor has agreed to stop bad conduct and has indicated an interest in attempting to negotiate an agreed resolution.

I. November 21, 2013 Overview Memorandum

In a memorandum dated November 21, 2013, the CPB provided a broad overview of Operation Choke Point to the staffs of the Attorney General, Deputy Attorney General, and Associate Attorney General. The memorandum gave general background information regarding mass-market consumer fraud and described how third-party payment processors and complicit banks can facilitate the fraud. It then provided a history of Operation Choke Point, covering its staffing, points and authorities in support of the use of FIRREA, and other information. It also included a discussion of the CommerceWest Bank investigation as an illustrative example of "Choke Point In Action."

Most relevant to OPR's inquiry, included in the memorandum was a lengthy defense of the CPB's efforts regarding Internet payday lenders. The memorandum recounted reports of "astronomically high return rates" and "widespread fraud and abuse in the Internet payday lending industry," and it discussed the difficulties that state attorneys general have encountered in policing payday lenders purporting to operate offshore or that affiliate with Indian tribes

claiming sovereign immunity. The memorandum included a description of Operation Choke Point's deterrent effect:

> As word began to spread through the financial industry about Operation Choke Point, banks began scrutinizing their merchant relationships in a much more focused way than ever before. Like the banks that received our subpoenas, many of these other banks have determined that fraudulent online payday lenders, with their extraordinarily high return rates and suspicious efforts to conceal their true identities, present an unacceptable risk to the bank. We have received word from multiple sources, corroborated by undercover recordings of those in the fraudulent payday lending industry, that banks are terminating large swaths of deceptive payday lending businesses from their account portfolios. Some of these banks have ceased doing business with all Internet payday lenders, but we are unaware of any terminated merchants that operated in a wholly legitimate fashion with terms that are transparent to consumers.

Finally, the memorandum included a reference to congressional and industry concerns that Operation Choke Point was "sweeping too broadly with our enforcement brush," but reasserted that the Department's focus was "exclusively on fraud," and not on the "entire Internet payday lending industry, including purported lawful lenders." The memorandum concluded:

> We recognize the possibility that some banks may decide to exit relationships with payday lenders that claim to be operating lawfully. We do not, however, believe that this possibility should alter our investigative activities. Addressing that situation – if it exists – should be left to the individual payday lenders who presumably can present sufficient information to a bank to convince the bank that its lending operation is lawful and a worthy risk.

J. Operation Choke Point Did Not Impermissibly Target the Internet Payday Lending Industry

Based on its review of the information it gathered during its inquiry, OPR concluded for numerous reasons that the evidence does not support a finding that Department attorneys involved in Operation Choke Point improperly targeted participants in the *lawful* Internet payday lending industry. First, Internet payday lending was simply not part of the initial design and focus of Operation Choke Point. The initial memorandum proposing Operation Choke Point does not mention Internet payday lending, and only one of the first round of FIRREA subpoenas was even tangentially factually related to any Internet payday lender. Contemporaneous CPB attorney e-mails from when Operation Choke Point was first implemented also indicate that Internet payday lending was not a focus. Instead, the e-mails and other evidence developed by OPR show that Internet payday lending became a topic of interest only after Operation Choke Point was already underway.

Second, and more significantly, OPR's review of each of the 60 subpoenas that the CPB issued as a part of Operation Choke Point does not indicate that *lawful* Internet payday lenders were specifically targeted solely because they were engaged in payday lending. Instead, the subpoenas were consistent with the stated purpose of Operation Choke Point, and the subpoena recipients were selected based on articulable and reliable indicia of mass-market consumer fraud, such as a bank doing business with third-party payment processors with extraordinarily high return rates. Of the 60 Operation Choke Point subpoenas that were issued, the overwhelming majority had no discernible connection to any Internet payday lender. Of those that did, nearly half were related to the CPB's investigation of one bank in particular, which in turn was involved with dozens of third-party payment processors and a number of fraudulent merchants, only a few of which had anything to do with Internet payday lending. Of the remaining bank subpoenas having anything to do with Internet payday lending, the CPB provided sufficient detailed evidence to indicate that each payday lender was reasonably suspected of engaging in fraudulent practices, such as repeatedly debiting borrowers' accounts on unauthorized dates in order to dramatically increase fees, or deceptively causing loans to repeatedly roll over.

Third, contemporaneous CPB attorney e-mails supported the attorneys' assertions that only Internet payday lenders that were engaged in fraudulent conduct were pursued as a part of Operation Choke Point. For instance, a February 28, 2014 e-mail from a CPB supervisor to a Department attorney working on Operation Choke Point stated that only Internet payday lenders "engaged in factoring, substantial and suspicious foreign transactions, name-changes to avoid account cut-off, or other suspicious activity" (among other factors) would be possible CPB targets. A later e-mail to the attorney reemphasized that the CPB was only looking at Internet payday lenders where borrowers "are plagued by debits that are not loan repayments and that are otherwise unauthorized," and that, "for FIRREA purposes, we'd like to identify lenders who are associated with that activity as it opens the door to pure fraud."

Although OPR concluded that evidence does not establish that CPB attorneys engaged in professional misconduct, OPR's review of the evidence nevertheless indicated that some of the congressional and industry concerns relating to Internet payday lending were understandable. Multiple memoranda from the CPB discussed and at times seemed to disparage payday lending practices for reasons unrelated to FIRREA. For instance, the April 17, 2013 "eight-week update" memorandum discussed subpoenas directed at two third-party payment processors, "both of which we understand are heavily engaged in processing for the payday loan industry," but did not mention any suspected fraudulent conduct. The memorandum merely stated that the CPB wished to issue the subpoenas for "exploratory purposes." In fact, the CPB had substantial additional information suggesting that the targets of the subpoenas might be engaged in fraudulent conduct.

In an April 29, 2013 memorandum, the CPB referred to the "epidemic of predatory Internet-based payday lending," but again failed to mention fraud. The CPB's use of the description "predatory" is an apparent reference to the fact that payday lenders sometimes charge high interest rates, but that fact does not necessarily indicate that those lenders engage in fraud. Although memoranda dated May 14, 2013, and July 8, 2013, both discussed the potential unlawfulness of Internet payday lending, they referred only to a banking regulation and state usury laws, but not fraud. Regulatory offenses and usury are not FIRREA predicates and should not be the sole bases for FIRREA subpoenas. Multiple Operation Choke Point memoranda

included discussions of the deterrent effect that Operation Choke Point was having on banks doing business with Internet payday lenders, an effect that clearly pleased some of the CPB attorneys.[89]

OPR's review of contemporaneous e-mails also corroborated that certain attorneys working on Operation Choke Point may have viewed Internet payday lending in a markedly negative light, even apart from any alleged participation in fraud for FIRREA predicate purposes. As noted in the Staff Report, on September 17, 2013, a Department attorney working on Operation Choke Point gave a speech and delivered a PowerPoint presentation in which he characterized Internet payday lenders losing their banking relationships as a "collateral benefit" of Operation Choke Point.[90]

Perhaps as a result of this generally negative view of Internet payday lending on the part of some CPB attorneys working on Operation Choke Point, the CPB, while making efforts later to assure Congress and the public that Operation Choke Point was not targeting lawful businesses, did not do as much as it could have initially to explicitly emphasize that Operation Choke Point was concerned with fraudulent Internet payday lending practices, not lawful Internet payday loan businesses. Instead, in its early implementation of Operation Choke Point, the CPB left that potential problem for the "legitimate lenders themselves," assuming that they could, "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." In the later months of Operation Choke Point, the Department was much more explicit in the distinction between lawful Internet payday lending and unlawful Internet payday lending and emphasized that only the latter was a focus.[91]

Despite the apparent negative view held by some attorneys in the CPB, OPR nevertheless concluded that Department attorneys did not improperly target lawful participants of the Internet payday loan industry through Operation Choke Point. Both in internal memoranda seeking authorization for the subpoenas and in public statements, Department attorneys made clear that their focus was on illegal Internet payday lenders who were engaged in fraud schemes. The subpoenas issued and cases brought support this conclusion. Relatively few Operation Choke Point subpoenas even related to Internet payday lending, and those that did were well supported

---

89 For example, a memorandum dated July 8, 2013 reported as a positive development that "a large Internet payday lender decided recently to exit the business due to difficulties securing a bank or payment processor relationship." Similarly, in the September 9, 2013 Six-Month Status Report, the CPB reported that "several banks," as a result of receiving FIRREA subpoenas, had "taken a deeper look at these Internet payday lenders and their business practices," and that many of the banks had "decided to stop processing transactions in support of Internet payday lenders." The memorandum expressly stated, "We consider this to be a significant accomplishment and positive change for consumers. . . ."

90 Although apparently no transcripts or recordings of the speech can be found, the attorney told OPR that, "in the context of the entire presentation, it would have been obvious that I was referring to illegal payday lenders (regardless of the theory of illegality)." A CPB supervisor echoed that assertion, emphasizing to OPR that the entire presentation dealt with fraud and the role of banks and third-party payment processors therein.

91 *See, e.g.*, Motion Hearing Transcript at 3-5, *Four Oaks Fincorp* (Jan. 17, 2014) (Department attorney emphasizing that not all payday lending is unlawful, and that the Department's focus is solely on unlawful practices).

by facts showing that the targets of the subpoenas allegedly were involved in mass-market fraud schemes.

V. Evidence Does Not Establish That Operation Choke Point Compelled Banks to Terminate Business Relationships with Other Lawful Businesses

OPR also concluded that the evidence did not demonstrate that Operation Choke Point compelled banks to terminate business relationships with other lawful businesses, a concern raised in your letter and the Staff Report. Indeed, OPR found no evidence establishing that any CPB attorney intentionally targeted any of the industries listed in the Staff Report (including credit repair companies, debt consolidation and forgiveness programs, online gambling-related operations, government grant or will-writing kits, pornography, online tobacco or firearms sales, pharmaceutical sales, sweepstakes, magazine subscriptions, etc.). None of the subpoenas or memoranda issued or drafted in connection with Operation Choke Point focused on specific categories of purportedly fraudulent businesses, except for fraudulent Internet payday lending, to the limited extent discussed above. Moreover, the CPB attorneys' e-mail records contained no discussion or even mention of targeting any such specific industries.

The concern that Operation Choke Point was designed to compel banks to terminate business relationships with lawful businesses largely stems from the fact that CPB attorneys attached to some subpoenas three documents containing regulatory guidance from the FDIC and other federal regulators. One of the letters included a footnote that identified what the FDIC termed "elevated risk" businesses. The contemporaneous documents reviewed by OPR, however, corroborated CPB attorneys when they informed OPR that when they attached the regulatory guidance from federal regulators to some subpoenas, they did not intend to discourage banks from doing business with specific categories of lawful businesses.

Starting in May 2013, the CPB began including with the FIRREA subpoenas it issued three documents containing regulatory guidance regarding third-party payment processors, with a cover letter that read in part:

> Enclosed is a subpoena requiring the production of documents in connection with an investigation of consumer fraud. We look forward to your cooperation with our investigation.
>
> For your information, also enclosed is regulatory guidance concerning risks posed to banks and consumers by third-party payment processor relationships. *See* Risk Associated with Third-Party Payment Processors (FIN-2012-AOI0) (October 22, 2012), Payment Processor Relationships-Revised Guidance (FDIC FIL-3-2012) (January 31, 2012), and Payment Processors-Risk Management Guidance (OCC-2008-12) (April 24, 2008).

The second of the enclosed documents, the FDIC "Financial Institution Letter" on "Payment Processor Relationships – Revised Guidance," contained a footnote that read:

> Examples of telemarketing, online businesses, and other merchants that may have a higher incidence of consumer fraud or potentially

> illegal activities or may otherwise pose elevated risk include credit repair services, 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. This list is not all-inclusive.[92]

The other two enclosed regulatory guidance documents dealt generally with the risk of third-party payment processors and consumer fraud, but contained no such list of what the FDIC termed "elevated risk" industries.

The authors of the Staff Report and various press accounts note that in some instances, businesses, at least some of which had no obvious connection to Operation Choke Point's stated core mission ("combating mass market consumer fraud by focusing on payment systems vulnerabilities"), lost their business banking relationships possibly as a result of Operation Choke Point.[93]

In certain instances, it was difficult to determine the extent to which specific terminations of banking relationships were due in whole or in part to Operation Choke Point. Nevertheless, OPR requested an explanation from the CPB regarding why starting in May 2013 it enclosed the regulatory guidance with the FIRREA subpoenas it issued. The primary reason, according to a Department attorney working on Operation Choke Point, was "to assist the subpoena recipient to understand what we meant by our use in the subpoena of the term 'third-party payment processor.'" According to the attorney, in matters he handled involving consumer fraud and third-party payment processors prior to Operation Choke Point, he had found that some financial institutions did not have a common understanding of the term. He believed that enclosing the regulatory guidance "grounded and focused our discussions with subpoena recipients and assisted them to understand how to respond to the subpoena." CPB supervisors offered OPR the same explanation for including the regulatory guidance with Operation Choke Point subpoenas.

The Department attorney further explained that including the regulatory guidance with Operation Choke Point subpoenas also served to educate banks about the fraud risks associated with some third-party payment processors, and to put the bank FIRREA subpoena recipients "on notice" of the risks associated with consumer fraud and certain third-party payment processors.

---

92 As the Staff Report notes, the FDIC had previously disseminated on its Internet website an even longer list of what it called "merchant categories that have been associated with high-risk activity." *See* Staff Report at 8. Language from an earlier draft of the FDIC's Financial Institution Letter containing the caveats that each business should be judged "according to its own facts and circumstances" and that "some of these activities may be legitimate" was deleted from the final version of the FDIC letter that was sent to banks. On July 28, 2014, the FDIC retracted its list of high-risk merchants. *See* Fed. Dep. Ins. Corp., FIL-41-2014, FDIC Clarifying Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Payment Processors (July 28, 2014). On January 28, 2015, the FDIC officially superseded the Financial Institution Letter with a new version. *See* Fed. Dep. Ins. Corp., FIL-5-2015, Statement on Providing Banking Services (Jan. 28, 2015). The new letter "encourage[s] supervised institutions to take a risk-based approach in assessing individual customer relationships, rather than declining to provide banking services to entire categories of customers without regard to the risks presented by an individual customer or the financial institution's ability to manage the risk." *Id.*

93 *See generally* Staff Report at 6-7.

According to the attorney, he understood from prior cases that some banks receiving substantial fee income from third-party payment processors were "willfully blind" to fraud schemes. Thus, according to the attorney, "if we found a bank to be ignoring a fraud scheme after having received the regulatory guidance, it could be further evidence of an intentional effort to ignore the fraud."

The Department attorney denied that the footnote in the FDIC Financial Institution Letter with the list of what the FDIC called "elevated risk" businesses had anything to do with the CPB's decision to include regulatory guidance with the FIRREA subpoenas:

> I state categorically that I never had a discussion with anyone, within or without DOJ, concerning the existence or significance of this footnote in connection with our FIRREA subpoenas. Indeed, if we were intending to highlight this footnote, we would not also have included the FinCEN guidance or the OCC guidance, which I believe do not contain a similar statement.

A CPB supervisor told OPR, "[W]e did not include the guidance to suggest or encourage, let alone strong arm, banks to cut off so-called high risk merchants."

Based on its review of the evidence, OPR did not conclude that the Department attorneys involved in Operation Choke Point improperly compelled banks to terminate relationships with other lawful businesses. OPR found no evidence establishing that any Department attorney intentionally targeted any of the industries listed in the Staff Report. None of the subpoenas or memoranda issued or drafted in connection with Operation Choke Point focused on specific categories of purportedly fraudulent merchants, except for fraudulent Internet payday lending to the limited extent discussed above. Moreover, the CPB attorneys' official e-mail accounts revealed no e-mails containing discussions or even a mention that any such specific industries should be targeted or focused upon. Thus, contemporaneous documents corroborated the Department attorneys when they informed OPR that the CPB did not include the regulatory guidance in order to intentionally encourage banks not to do business with specific categories of merchants.

For many reasons, OPR further found that the CPB attorneys did not act in reckless disregard of a professional obligation or standard when they enclosed regulatory guidance with some FIRREA subpoenas. First, as previously noted, Department attorneys informed OPR that the main purpose for enclosing the regulatory guidance was to educate the recipient banks about the focus of the subpoenas (fraud facilitated by third-party payment processors) so that the banks would return relevant, responsive documents without undue burden. That purpose was valid.

Second, OPR did not find that the CPB attorneys should have known or anticipated that enclosing the FDIC Financial Institution Letter, with its footnoted list of what the FDIC purported to be "elevated risk" industries, would lead any banks to prophylactically terminate their relationships with other lawful businesses solely because the FDIC Financial Institution Letter was included with the subpoena. The FDIC itself had disseminated to financial institutions the Financial Institution Letter on January 31, 2012, 16 months before the first FIRREA subpoena enclosing it was issued. Moreover, as the authors of the Staff Report note,

the group of industries listed in the Financial Institution Letter footnote was a subset of an even longer list of what the FDIC called "high risk merchant categories," which the FDIC had disseminated even before January 2012.[94] In addition, other agencies had disseminated substantively similar information still earlier.[95] Thus, the CPB attorneys could not have readily foreseen that banks, upon receiving the same information once again, would terminate, as opposed to perhaps examine more closely, their relationships with businesses that regulatory guidance had identified as "elevated risk."

Third, Department attorneys repeatedly sought to explain that Operation Choke Point was designed to focus on investigating consumer fraud involving third-party payment processors, fraudulent merchants, and banks generally, and not on specific businesses or industries. For example, on November 8, 2013, a CPB supervisor gave a speech to the National Consumer Law Center (NCLC) during which he commented, "Based on this type of evidence, we are identifying instances in which banks knew that they were processing payments for merchants engaged in unlawful activity or turned a blind eye to that fact." In another example, on January 22, 2014, Civil Division Assistant Attorney General Stuart Delery sent a letter to the Chairman of the American Banker Association and the CEO of the Electronic Transactions Association, in which he wrote:

> 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. Our policy is to take the steps necessary to prevent financial institutions from knowingly assisting fraudulent merchants that harm consumers or processing transactions while deliberately ignoring evidence that they are fraudulent.

In a third example, the CPB posted a blog entry on the Department's website highlighting the civil resolution in the *Four Oaks* case, "an important result in one of the first civil cases we have brought against a financial institution for unlawfully facilitating a fraudulent scheme to take money from consumers' bank accounts." Finally, in June 2014, then-Attorney General Eric H. Holder, Jr. posted a web video in which he described the Department's "work to protect consumers from scam artists by investigating financial institutions and third party processors that assist in, or willfully ignore, fraudulent behavior" and indicated that the Department "will keep

---

[94] *See* Fed. Dep. Ins. Corp., Supervisory Insights, Managing Risk in Third-Party Payment Processor Relationships (Summer 2011), *cited in* Staff Report at 8.

[95] *See, e.g.*, Fed. Fin. Inst. Examination Counsel, Bank Secrecy Act/Anti-Money Laundering Examination Manual: Third-Party Payment Processors (2010) (advising banks to "be aware of the heightened risk of unauthorized returns and use of services by higher-risk merchants," and listing such merchants as "mail and telephone order companies, telemarketing companies, illegal online gambling operations, online payday lenders, businesses that are located offshore, and adult entertainment businesses"). The Federal Financial Institutions Examination Council (FFIEC) is an umbrella agency comprised of federal banking regulatory agencies, which prescribes uniform principles, standards, and report forms for the federal examination of financial institutions.

moving forward — guided by the facts and the law — to eliminate fraud targeting consumers while mitigating any impact on institutions not under investigation."[96]

VI. Department Attorneys Did Not Mislead Congress Regarding the Focus of Operation Choke Point

The authors of the Staff Report express concern that Department attorneys frustrated congressional oversight by responding as they did to a letter from Members of Congress and during a congressional staff briefing concerning Operation Choke Point. In their responses to congressional requests for information, Department attorneys stated that Operation Choke Point was focused on mass-market consumer fraud generally, and that the initiative did not specifically target particular industries, including the Internet payday lending industry. The authors of the Staff Report allege that those representations were false, and that Operation Choke Point specifically targeted Internet payday lenders. OPR has examined this issue and concluded that Department attorneys did not mislead Congress when they stated that Operation Choke Point was not targeting the Internet payday lending industry.

The concern articulated in the Staff Report rests on the premise that Operation Choke Point was in fact targeting the Internet payday lending industry broadly. As detailed above, OPR's inquiry has not found that to be the case. Concerns about the Internet payday lending industry were not the focus or a part of the initial design of Operation Choke Point. Thereafter, Operation Choke Point FIRREA subpoenas did not target any Internet payday lenders that were operating lawfully.

The authors of the Staff Report assert that two internal August 6, 2013 e-mails between Department officials regarding an interview request they had received from the *Wall Street Journal* demonstrate that Operation Choke Point was in fact targeting lawful Internet payday lenders. OPR disagrees. The *Wall Street Journal* reporter sought background information about, in the reporter's words, "a probe of online/tribal payday lending."[97] In the first cited e-mail, a CPB supervisor offered his view that the CPB should grant the interview request, stating that "getting the message out that DOJ is interested in on-line payday lenders *and the potential abuses* is important."[98] The newspaper thereafter quoted from its interview with him as follows:

> We are changing the structures within the financial system that allow *all kinds of fraudulent merchants* to operate," a Justice Department official said, with the intent of "choking them off from the very air they need to survive."[99]

---

96 Eric H. Holder, Jr., *Combating Consumer Fraud*, U.S. Dep't of Justice Office of Public Affairs (June 23, 2014), *available at* www.justice.gov/opa/video/combating-consumer-fraud.

97 HOGR-3PPP000307. Citations to "HOGR" refer to the Bates-stamped pages from the 853 pages of documents produced by the Department to the House Committee on Oversight and Government Reform on March 28, 2014.

98 *Id.* (emphasis added).

99 HOGR-3PPP000310 (emphasis added).

Thus, the internal e-mail and newspaper quote are consistent with one another and with responses provided by the Department to Congress. The CPB's focus was on fraud, and not an entire industry.

The second cited e-mail, read in context, is not inconsistent. In the e-mail, a Civil Division senior manager notified the Department's Office of Tribal Justice of the *Wall Street Journal*'s inquiry, presumably in light of the reporter's interest in tribal payday lending. The e-mail merely explained that the CPB did not intend to single out tribal payday lending: "We think that the reporter is interested in tribal online payday lending, but we plan not to focus on tribal payday lending, but online payday lending in general." The purpose of the communication was not to set forth the full universe of fraud to be addressed by Operation Choke Point. Instead, the e-mail was merely meant to provide, in the senior manager's words, a simple "heads up" to the Office of Tribal Justice concerning a press query within its area of responsibility and expertise. The e-mail merely indicated that tribal payday lending was not a particular focus relative to Internet payday lending in general. In context, it did not indicate that Internet payday lending itself was a major focus relative to other types of businesses.

Moreover, OPR found that Department attorneys responding to congressional requests for information appropriately described Operation Choke Point. In response to an August 22, 2013 letter from you and 30 other Members of Congress seeking clarification about Operation Choke Point's focus, for example, the Office of Legislative Affairs explained:

> The 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. We are particularly concerned about instances in which banks and others know or turn a blind eye to fraud against consumers, and the proceeds of that fraud are passing through their accounts.
>
> . . . .
>
> While we will not be able to discuss the specifics of any particular investigation, we look forward to providing your staff with a briefing of our efforts. We will contact your staff in order to schedule a briefing.[100]

Thereafter, on March 28, 2014, in response to a request from the House of Representatives Committee on Oversight and Government Reform Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, the Department produced over 800 pages of documents concerning Operation Choke Point. Those documents included redacted copies of the subpoena authorization memoranda, the Six-Month Status Report, slides from PowerPoint presentations, internal Department e-mails, and external correspondence.

Following publication of the Staff Report, Department attorneys responded to additional congressional requests for information concerning Operation Choke Point. For example, on

---

[100] Department Letter to Rep. Luetkemeyer (Sept. 12, 2013).

July 15, 2014, Civil Division Assistant Attorney General Stuart Delery testified before the House of Representatives Committee on Financial Services, Subcommittee on Oversight and Investigations, at a hearing entitled, "The Department of Justice's 'Operation Choke Point.'"[101] Following the hearing, Assistant Attorney General Delery provided the Committee with written responses to questions for the record.[102] Assistant Attorney General Delery also testified on July 17, 2014, before the House of Representatives Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, at a hearing entitled, "Guilty Until Proven Innocent? A Study of the Propriety and Legal Authority for the Department of Justice's Operation Choke Point."[103]

OPR's review of the correspondence, prepared remarks, testimony, and other information indicated that Department attorneys described Operation Choke Point as an effort designed to focus on mass-market consumer fraud in general, and not on specific industries, such as the Internet payday lending industry. Evidence OPR gathered, including internal Department memoranda, contemporaneous e-mails, subpoenas and case file documents, and statements made by Department attorneys involved in the design and implementation of Operation Choke Point supported the representations Department attorneys made about the focus of Operation Choke Point.

VII. Conclusion

Based on the results of its inquiry, OPR concluded that Department of Justice attorneys involved in Operation Choke Point did not engage in professional misconduct. OPR found that the Civil Division's interpretation and use of the FIRREA statute is supported by current case law. Indeed, all courts that have addressed the issue have determined that FIRREA properly may be used to address fraud schemes in which a financial institution suffered no actual monetary loss but increased institutional risk to itself by participating in or facilitating the fraud scheme. Moreover, Operation Choke Point has resulted in three filed cases that have been resolved by negotiated settlements and consent judgments that have been accepted by three U.S. District Courts.

OPR's inquiry further determined that Civil Division attorneys did not improperly target lawful participants involved in the Internet payday lending industry. Neither the design nor initial implementation of Operation Choke Point specifically focused on Internet payday lenders or their lending practices. OPR's review of the 60 subpoenas issued by the Civil Division as part of Operation Choke Point revealed that relatively few related in any way to Internet payday lending. Of that number, it appears that the Civil Division had specific and articulable evidence of consumer fraud for each subpoena it issued. To the extent that Civil Division attorneys

---

[101] See Memorandum from Majority Staff, House Committee on Financial Services, to Financial Services Committee Members, July 15, 2014, Oversight and Investigations Subcommittee Hearing Entitled "The Department of Justice's 'Operation Choke Point'" (July 10, 2014).

[102] Department Letter to House Committee on Financial Services Chairman Jeb Hensarling (Sept. 26, 2014).

[103] Guilty Until Proven Innocent? A Study of the Propriety and Legal Authority for the Department of Justice's Operation Choke Point, Hearing of the U.S. House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, 113th Cong. (2014).

involved in Operation Choke Point investigated Internet payday lending, their focus appeared to be on only a small number of lenders they had reason to suspect were engaged in fraudulent practices.

Although OPR concluded that Civil Division attorneys did not engage in professional misconduct, OPR's review of the evidence nevertheless indicated that some of the congressional and industry concerns relating to Internet payday lending was understandable. Some memoranda from the Civil Division's Consumer Protection Branch (CPB) discussed and at times seemed to disparage payday lending practices for reasons unrelated to FIRREA. Some e-mails also corroborated that certain attorneys in the CPB working on Operation Choke Point may have viewed Internet payday lending in a negative light. Nonetheless, the relatively few Operation Choke Point subpoenas related to Internet payday lending were well supported by facts showing that the targets of the subpoenas allegedly were involved in mass-market fraud schemes.

Regarding the concern that Civil Division attorneys issued FIRREA subpoenas in order to compel banks to terminate legitimate business relationships with legally operating businesses, OPR found the evidence did not support that conclusion. Indeed, in all the Civil Division memoranda, subpoenas, and contemporaneous e-mails OPR reviewed, OPR did not find evidence of an effort to improperly pressure lawful businesses. Although Civil Division attorneys at one point did enclose with issued FIRREA subpoenas regulatory guidance from federal regulators, including one document that contained a footnote listing businesses that the FDIC had described as posing an "elevated risk," OPR's inquiry revealed that the attorneys had a legitimate reason for including such regulatory guidance.

Finally, OPR did not find evidence supporting a conclusion that Department attorneys provided inaccurate information to Congress about the design, focus, or implementation of Operation Choke Point.

Thank you for bringing this important matter to OPR's attention. Please do not hesitate to contact OPR or the Department's Office of Legislative Affairs if we may provide additional assistance regarding this or any other matter.

Sincerely,

G. Bradley Weinsheimer
Deputy Counsel

Enclosures

OPR Inquiry Regarding Operation Choke Point

Attachments 1-39

Index of Attachments

Number	Document
1	Office of Professional Responsibility Analytical Framework
2	*United States v. Bank of N.Y. Mellon*, 941 F. Supp. 2d 438 (S.D.N.Y. 2013)
3	*United States v. Countrywide Fin. Corp.*, 961 F. Supp. 2d 598 (S.D.N.Y. 2013)
4	*United States v. Countrywide Fin. Corp.*, 996 F. Supp. 2d 247 (S.D.N.Y. 2014)
5	*United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013)
6	Civil Complaint, *United States v. First Bank of Delaware*, No. 2:12-CV-6500 (E.D. Pa.)
7	Complaint for Injunctive Relief and Civil Money Penalties, *United States v. Four Oaks Fincorp, Inc., et al.*, No. 5:14-CV-14 (E.D.N.C. Jan. 8, 2014)
8	Transcript of Motion Hearing, *United States v. Four Oaks Fincorp, Inc. et al.*, No. 5:14-CV-14 (E.D.N.C. Jan. 17, 2014)
9	Consent Order for Permanent Injunction and Civil Money Penalty, *United States v. Four Oaks Fincorp, Inc., et al.*, No. 5:14-CV-14 (E.D.N.C. Apr. 25, 2014)
10	Judgment, *United States v. Four Oaks Fincorp, Inc., et al.*, No. 5:14-CV-14 (E.D.N.C. Apr. 25, 2014)
11	Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, *United States v. CommerceWest Bank*, No. 8:15-CV-379 (C.D. Cal. Mar. 10, 2015) (with Information, Deferred Prosecution Agreement, and related attachments)
12	Consent Decree for Permanent Injunction and Civil Money Penalty, *United States v. CommerceWest Bank*, No. 8:15-CV-379 (C.D. Cal. Mar. 30, 2015)
13	Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, *United States v. Plaza Bank*, No. 8:15-CV-394 (C.D. Cal. Mar. 12, 2015)
14	Consent Decree for Permanent Injunction and Civil Penalty, *United States v. Plaza Bank*, No. 8:15-CV-394 (C.D. Cal. Mar. 30, 2015)
15	Information, *United States v. Godfrey*, No. 2:15-CR-285 (E.D. Pa. June 6, 2015)

Number	Document
16	U.S. Attorney's Office for the Eastern District of Pennsylvania press release for *Godfrey* case
17	Information, *United States v. Adrian Rubin*, No. 2:15-CR-238 (E.D. Pa. June 9, 2015)
18	U.S. Attorney's Office for the Eastern District of Pennsylvania press release for *Rubin* case
19	Memorandum from AUSA Joel Sweet to Acting AAG for the Civil Division Stuart F. Delery, *OPERATION CHOKE POINT: A proposal to reduce dramatically mass market consumer fraud within 180 days* (Nov. 5, 2012), with cover memo and cover sheet
20	Memorandum from Michael S. Blume to Stuart F. Delery, *Payment Processor Investigation – Request for Issuance of Subpoenas to Payment Processors and Banks used to Process Fraudulent Payments* (Feb. 8, 2013)
21	Memorandum from Michael S. Blume to Stuart F. Delery, *Operation Choke Point: Eight-Week Status Report* (Apr. 17, 2013)
22	Memorandum from Michael S. Blume to Stuart F. Delery, *Payment Processor Investigation – Request for Issuance of Subpoenas in Connection with Investigation of Payment Processors and Banks used to Process Fraudulent Payments* (Apr. 29, 2013)
23	Memorandum from Michael S. Blume to Stuart F. Delery, *Payment Processor Investigation – Request for Issuance of Subpoenas to Banks* (May 14, 2013)
24	Memorandum from Michael S. Blume to Stuart F. Delery, *Operation Choke Point: Four-Month Status Report* (July 8, 2013)
25	Memorandum from Michael S. Blume to Stuart F. Delery, *Payment Processor Investigation – Request for Issuance of Subpoena to Internet Website Registrar* (July 8, 2013)
26	Memorandum from Michael S. Blume to Stuart F. Delery, *Payment Processor Investigation – Request for Issuance of Subpoena to Banks Identified as Originating Debits on Behalf of Fraudulent Merchant* (July 8, 2013)
27	Memorandum from Michael S. Blume to Stuart F. Delery, *Payment Processor Investigation – Request for Issuance of Subpoena to Banks* (July 16, 2013)

Number	Document
28	Memorandum from Michael S. Blume to Stuart F. Delery, *Operation Choke Point: Six-Month Status Report* (Sept. 9, 2013)
29	Memorandum from Maame Ewusi-Mensah Frimpong, Deputy Attorney General, Civil Division, to Attorney General's Staff, Deputy Attorney General's Staff, and Associate Attorney General's Staff, *Operation Choke Point* (Nov. 21, 2013)
30	Fed. Dep. Ins. Corp., FIL-3-2012, Payment Processor Relationships Revised Guidance (Jan. 31, 2012).
31	Fed. Dep. Ins. Corp., FIL-41-2014, FDIC Clarifying Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Payment Processors (July 28, 2014).
32	Fed. Dep. Ins. Corp., FIL-5-2015, Statement on Providing Banking Services (Jan. 28, 2015).
33	Letter from DAAG Maame Ewusi-Mensah Frimpong to John Shotton, Chairman, Otoe-Missouria Tribe (Aug. 22, 2013)
34	OLA AAG Peter Kadzik Letter to Rep. Blaine Luetkemeyer (Sept. 12, 2013)
35	AAG Stuart F. Delery Letter to Jeff L. Plagge and Jason Oxman (Jan. 22, 2014) (enclosed with OLA AAG Peter Kadzik's letter to Reps. Darrell E. Issa and Jim Jordan on Jan. 24, 2014)
36	Letter from OLA AAG Peter Kadzik to Reps. Darrell E. Issa and Jim Jordan (Jan. 24, 2014).
37	Letter from OLA AAG Peter Kadzik to Oversight and Government Reform Committee Chairman Darrell E. Issa and Subcommittee Chairman Jim Jordan (Mar. 28, 2014)
38	Statement of Stuart F. Delery Before the House Subcommittee on Oversight and Investigations, Committee on Financial Services, for a Hearing Related to "Operation Choke Point: (July 15, 2014)
39	Statement of Stuart F. Delery Before the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on Judiciary, for a Hearing Related to "Operation Choke Point: (July 17, 2014)