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DOJ Memo Leaves No Doubt About Choke Point's Motives

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Two House Committees – Financial Services and Judiciary – held hearings this week on the legislation intended to rein in Operation Choke Point. Implemented nearly two years ago by the Department of Justice in coordination with some bank regulators, Operation Choke Point denies essential banking services to companies engaged in lawful business activities that some government officials don't like. I testified in favor of the bill, H.R. 4986, sponsored by Missouri Republican Blaine Luetkemeyer, at both hearings.

Operation Choke Point is a particularly egregious example of an unconstitutional abuse of power that ought to alarm and frighten each of us, irrespective of our ideology, party affiliation, or view of the particular products or services being cut off.

Some claim that Choke Point does not impose any new burdens or responsibilities on banks or their customers – that banks are already responsible for knowing and policing their customers under the Bank Secrecy Act and anti-money laundering laws. The most obvious flaw in this assertion is that if it were correct, Operation Choke Point would not be needed.

The BSA/AML law has been around for decades. Banks are required to know their customers well enough to detect suspicious flows of funds that could signal illegal drug or terrorist activity and to report those suspicious funds flows. If banks are lax in meeting these responsibilities their regulators can and do impose substantial penalties.

BSA/AML does not impose a duty on banks to ensure that their business customers are complying with every law in every state or that the businesses are treating their customers fairly and delivering good value. A bank will likely choose not to do business with customers who it believes are treating people unfairly or might be violating the law, but that is a judgment best left to the management and directors of individual banks.

The Luetkemeyer bill would not relieve banks of any of their responsibilities under BSA/AML or any other law or regulation. Conversely, the bill states clearly that banks will retain the discretion to refuse to do business with any customer for any reason.

The indisputable truth is that Operation Choke Point is not about BSA/AML in any respect. We do not have to speculate about the strategy and motives behind Operation Choke Point, as they are set forth quite clearly in a Sept. 9, 2013 memo written by Michael Blume, director of the consumer protection branch of the DOJ, to Stuart Delery, assistant attorney general in the DOJ's civil division, providing a status report on Choke Point. Mr. Blume describes the strategies in these terms on page 14 of the report:

We principally are pursuing civil, rather than criminal, investigations. Criminal investigations can take considerably longer to complete and generally require a more intensive investigation. Only if an investigation presents particularly egregious criminal conduct are we opening it as a criminal investigation.
We are targeting banks more than payment processors, and payment processors more than merchants. Any one case, whether against a bank, a processor, or a merchant, takes substantial time and attention from our team. Bank cases will deter other banks, thereby stopping the processing of transactions for fraudulent merchants and the processors with which they work. This may mean filing civil complaints or criminal cases against banks based on transactions with fraudulent merchants and/or processors – but not filing actions against the underlying fraudulent merchants or processors. This practice is not optimal and may present litigation risks. But it may be necessary to prevent the initiative from grinding to a halt due to resources used pursuing the merchants and processors.

These words are chilling to anyone who has any regard for due process and the rule of law. Mr. Blume explains that the DOJ prefers using civil complaints rather than criminal complaints because the burden of proof is much lower and requires less investigation into the facts. And he explains that the DOJ is going after the banks who are not violating the law instead of the merchants who may be violating the law because the DOJ can do much more damage with much less effort by coercing the banks.

As for the claim by some that the DOJ is actually doing the banks a favor by protecting them from potential liability, Mr. Blume puts that notion to rest with this passage on page 11:

The financial institutions we are investigating have not suffered any actual losses, but such actual losses are not necessary under [the Financial Institutions Reform, Recovery and Enforcement Act]. There is only one case interpreting the phrase "affecting a financial institution" in the context of FIRREA, and that case supports our theory.

Mr. Blume addresses on page 10 of his report the damage being done to lawful businesses that are being denied essential banking services:

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.

Contemplate Mr. Blume's assumption that in America a business is guilty until it proves itself innocent. There is no allegation of wrongdoing by the business that can be disproved. The company is simply in a business that, while legal, has been determined "undesirable" and therefore "high risk" by the federal bureaucracy.

FinCEN and the federal banking agencies expect banking organizations that open and maintain accounts for money services businesses to apply the requirements of BSA, as they do with all accountholders, on a risk-assessed basis. Operation Choke Point has led to blanket terminations of all firms within an industry without regard to the prescribed individualized risk assessments.

Congress should approve the Luetkemeyer bill without delay, as Operation Choke Point is doing severe and irreparable harm to firms engaged in lawful businesses.

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