

EFTA Statement on Operation Choke Point

Operation Choke Point is a campaign spearheaded by the Department of Justice (DOJ) in conjunction with several federal consumer protection and banking regulatory agencies (e.g., the Federal Trade Commission (FTC) and the Federal Deposit Insurance Corporation (FDIC)) to hold acquirer financial institutions and their payment processor partners responsible for allegedly illegal acts committed by merchants and other third-party payees.

The Electronic Funds Transfer Association (EFTA) fully supports focused government investigations of activities that knowingly facilitate consumer fraud or other unlawful activities within the payments sector. However, EFTA is increasingly concerned that the government's efforts are causing unintended consequences. By targeting legal activities that are perceived by some prosecutors and regulators as undesirable, the government has extended its efforts beyond unlawful conduct, which in turn has led to denial of access to businesses and financial services providers who operate lawfully.

Operation Choke Point has come under fire from Members of Congress, financial institutions, and merchants. After several congressional hearings, some Members found that Operation Choke Point, while initially aimed at the payday lending industry, was in fact being used to apply pressure to legal industries that were deemed "unsavory" by the Government.

Reducing access for entire industry segments simply because of assumptions of high-risk activity or political unpopularity can have detrimental effects on the U.S. economy. Operation Choke Point has the potential to substantially diminish continued economic growth stemming from electronic commerce and raises legitimate questions about the effect on the broader economic recovery if lawful businesses (especially small businesses) are denied access to the payments system and mainstream financial services.

EFTA is also concerned that any costly mandates on the payments system that are imposed as a result of Operation Choke Point will likely trickle down to businesses (and ultimately, consumers) in the form of higher transaction prices, reduced services and fewer payment options. They are also unnecessary.

EFTA members are committed to protecting consumers and the payments system from merchants engaged in illegal business practices and employ vigorous due diligence, risk mitigation, fraud detection, fraud prevention and transaction monitoring standards to help protect consumers and the overall payments system from fraud and other inappropriate activities. Before payments systems participants can initiate or accept electronic payments, they are screened by acquirer financial institutions and third-party payment processors, as required by bank regulatory guidance and the rules of the payments networks. These risk-based procedures are designed to determine and appropriately size the risks an individual company may pose to the payments system. Some participants never make it past this initial screen. Additionally, the financial services industry invests heavily in sophisticated risk

management tools to monitor accounts for risks and potentially illegal activities. That said, the payments system was designed to safely and efficiently process payment transaction data and facilitate commerce, it was not intended to also function as the arbiter of what businesses are (or are not) perceived to be facilitating “public good.”

In fact, after the aforementioned Congressional hearings, the FDIC reissued guidance “clarifying its supervisory approach” toward banks establishing relationships with third-party payments processors, presumably in response to criticisms of Operation Choke Point related actions and recognition of the concerns that legal industries had experienced unintended consequences resulting from Operation Choke Point. In the change announced on July 28, 2014, the FDIC sought to clarify that the list of examples provided in earlier guidance and articles was not meant to be a list of merchant types that were discouraged or disallowed by the FDIC.

Given the robust regulatory regime that governs the electronic payments industry, EFTA encourages federal policymakers and regulatory and enforcement agencies to realign their efforts to address illegal businesses practices using the existing enforcement tools. EFTA will continue to strongly support federal law enforcement efforts to identify and catch bad actors that willingly commit fraud and scam American consumers.

The Electronic Funds Transfer Association (EFTA) is a non-profit professional association dedicated to the advancement of electronic payments and electronic commerce. EFTA’s nearly 300 members include the nation’s leading financial institutions, electronic payment networks, card associations, ATM owners, operators and manufacturers, transaction processors, equipment, card and software manufacturers and vendors, state governments and federal agencies. Its objective is to inform debate over the consumer, business and policy implications of new and existing payments technology. EFTA accomplishes this through public outreach to Congress, the administrative agencies, regulators, consumers and the media.