

Republican Senators seek action from FDIC to ensure end of Operation Choke Point

Article By:

Barbara S. Mishkin

Thirteen Republican Senators [have sent a letter](#) to FDIC Chairman Jelena McWilliams urging the FDIC to take action to ensure that lawful businesses are no longer at risk of adverse financial consequences as a result of “Operation Choke Point, and its associated culture and Choke Point-like regulatory actions.”

“Operation Choke Point” was a federal enforcement initiative involving various agencies, including the DOJ, OCC, FDIC, and Fed. Initiated in 2012, Operation Choke Point targeted banks serving online payday lenders and other companies that have raised regulatory or “reputational” concerns. In June 2014, the national trade association for the payday lending industry and several payday lenders initiated a lawsuit in D.C. federal district court against the FDIC, Fed, and OCC in which they alleged that certain actions taken by the regulators as part of Operation Choke Point violated the Administrative Procedure Act and their due process rights. In September 2018, pursuant to a joint stipulation of dismissal, the Fed was dismissed from the lawsuit. Cross-motions for summary judgment are currently pending before the court.

In their letter, the Senators ask the FDIC if it is the agency’s official position “that lawful businesses should not be targeted by the FDIC simply for operating in an industry that a particular administration might disfavor” and “[i]f so, what [the FDIC is] doing to make sure that bank examiners and other FDIC officials are aware of this policy and have communicated it to regulated institutions?” They also ask whether there were any communications explaining supervisory expectations of “elevated risk” or “high risk” merchants with regulated institutions that would likely qualify as a rule under the Congressional Review Act that were not properly submitted to Congress and what the FDIC is doing to ensure that its staff does not communicate policy in a matter that is inconsistent with the position of the FDIC’s Board of Directors.

The letter does not reference the FDIC’s January 2015 Financial Institution Letter(FIL) entitled “Statement on Providing Banking Services” that attempted to rectify the damage created by Operation Choke Point. In the Statement, the FDIC “encourages 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.” The Statement followed the FDIC’s July 2014 FIL in which the FDIC withdrew the list of “risky” merchant categories (such as

payday lenders and money transfer networks) that was included in prior guidance on account relationships with third-party payment processors (TPPPs). Consistent with the July 2014 FIL and an October 2013 FIL on TPPP relationships, the 2015 FIL advised banks that they were neither prohibited nor discouraged from providing services to customers operating lawfully, provided they could properly manage customer relationships and effectively mitigate risks. However, unlike the prior FILs, the new FIL expressly acknowledged that “customers within broader customer categories present varying degrees of risk” and should be assessed for risk on a customer-by-customer basis.

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