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The Honorable Spencer Bachus
United States House of Representatives
2246 Rayburn Building
Washington, DC 20515

The Honorable Hank Johnson
United States House of Representatives
2240 Rayburn HOB
Washington, DC 20515

**Re: Hearing on Operation Chokepoint**

Dear Chairman Bachus and Ranking Member Johnson:

I am Adjunct Professor of Law at the Law School of the University of Pennsylvania and the founding partner of Langer Grogan & Diver, P.C. I have spent the last eight years in cases involving banks, third party payment processors and mass market frauds. I was lead counsel in *Faloney v. Wachovia Bank* in which the bank paid full damages to some 750,000 victims of approximately 130 mass market frauds who had had money debited from their accounts. Wachovia had given the frauds access to the banking system through the use of several third party payment processors that Wachovia knew had taken on mass market frauds as customers. Over $150 million was recovered from Wachovia, representing the full amount taken from the victims' accounts. The victims could also file claims for overdraft fees that resulted from the funds having been taken from their accounts.

The behavior of Wachovia has been repeated over and again by other banks. Operation Chokepoint merely represents the continuation, albeit more intensively, of government actions seeking to curb banks and third party payment processors from enabling mass market fraud. This is no mere effort to recover from the deep pockets. In the cases I describe below the banks were fully on notice—actually aware—that they were enabling frauds through the accounts they serviced for third party payment processors.

*Wachovia* involved each of the elements at issue in Operation Chokepoint: a bank, third party payment processors, and multiple mass market frauds. Wachovia maintained the account of one payment processor, Payment Processing Center ("PPC"), even after its own due diligence report disclosed an:

> "article regarding a coupon scam in 1989 and 900-Line scam in 1991 involving Donald Hellinger [the principal of PPC]. The accused pled guilty to the coupon scam on October 24, 1989 for which he would face 8 years imprisonment...Information was also found regarding a suit filed by the FTC allegedly involving a company owned by Donald Hellinger...for deceptively promoting credit cards and other products via 900 numbers."

Each of the principals of PPC pled guilty to criminal charges growing out of their activities taken through Wachovia. Wachovia itself entered into a deferred prosecution agreement. Three other payment processors involved with Wachovia—Your Money Access, Suntasia, and Amerinet—were also subjects of government proceedings.

Following *Wachovia*, the Comptroller of the Currency brought an action against T-Bank of Dallas for engaging in the same conduct. T-Bank provided accounts to a third party payment processor known as Giact Systems, which like PPC, had many mass market frauds as customers. As in the case of Wachovia, T-Bank was required to make full restitution to all the victims whose accounts had been raided by the frauds. See, http://www.occ.gov/static/enforcement-actions/ea2010-067.pdf

The Justice Department, in a joint action with banking regulators, brought an action against the First Bank of Delaware for engaging in identical activity. It opened accounts for a series of third party processors all of which engaged in servicing mass market frauds. These included Landmark Clearing, Inc., Automated Electronic Checking, Inc., Check Site, Inc., and Check 21.com, LLC. See, Complaint, *United States v. First Bank of Delaware*, Civil Action No. 12-6500 (E.D. Pa. 11/19/12) The government was unable to obtain full restitution for the victims of the frauds that had raided victims' account through First Bank of Delaware because the bank lacked sufficient assets. Its charter was revoked. *See,* http://www.fincen.gov/news_room/nr/html/20121119.html.

The Committee is familiar with the successful Justice Department action against *Four Oaks* which also enabled frauds through a third party payment processor.

My own firm has brought an action against Zions First National Bank a large bank located in Utah. Zions used a wholly owned third party processor for which it opened accounts in order to bank accounts that it acknowledged it would never have accepted directly. Not surprisingly 49% of revenue of the payment processor, known as Modern Payments ("MP/ND"), was derived from mass market frauds ultimately shut down by the FTC or the Justice Department. The type of businesses Modern Payments serviced is described in *F.T.C. v. NHS Sys., Inc.,* 936 F. Supp. 2d 520, 526 (E.D. Pa. 2013). In the case against Zions, the district court found that the plaintiffs had pled facts establishing Zions' knowledge of the fraud of the entities it was servicing:

> Reyes has sufficiently pleaded his § 1962(c) claims against the Zions Defendants. He alleges Zions Bank and MP/ND each serve independent and crucial roles in conducting an enterprise with the common purpose of earning fees for facilitating fraudulent telemarketing schemes. …In alleging the Zions Defendants knew the transactions were fraudulent, Reyes pleads facts showing Zions Bank and MP/ND were aware of several blatant indications of fraud, including NHS's and related telemarketers' staggeringly high rates of ACH returns, and in particular, rates of return for lack of authorization. Reyes asserts Zions Bank discussed the high return rates with MP/ND, and MP/ND communicated frequently with the allegedly fraudulent telemarketers about their return rates. Reyes also alleges Zions Bank and MP/ND received notification from another bank they were violating NACHA's rule prohibiting ACH TEL transactions for outbound telemarketing…

*Reyes v. Zion First Nat. Bank,* CIV.A. 10-345, 2012 WL 947139 (E.D. Pa. Mar. 21, 2012)

The court subsequently denied class certification in the *Zions* action and the Third Circuit has accepted interlocutory review of the decision. If *Zions* is successful in sustaining the district court's decision on appeal, cases like those brought under Operation Chokepoint becomes all the more important since victims otherwise would lack a means of redress. The AARP, the Consumer Federation of America, The National Consumer Law Center, Senators Casey, Blumenthal and Markey and others have filed friend-of-court briefs supporting reversal of the denial of class certification in *Zions.*

The cases discussed above underscore the importance of Operation Chokepoint. The various frauds migrated from bank to bank. The very same persons who operated the NHS fraud through Zions had operated a similar fraud through Wachovia. Several of the frauds involved in the T-Bank and First Bank of Delaware cases had simply migrated to Zions. Had the banks engaged in the most rudimentary due diligence they would have turned up these migrating frauds. Wachovia and Zions both obtained the fraudulent customers through what are known as account brokers. The account broker who brought PPC to Wachovia testified that four other banks had refused to open accounts for PPC before Wachovia accepted it. The perpetrator of the NHS fraud testified that he was approached by an account broker who brought his account to Zions within twenty-four hours of losing his prior access to the banking system, through a court order freezing PPC's accounts at Wachovia. The banks engaged in servicing these frauds did not innocently stumble into the business when a new depositor simply walked through the doors and asked to open an account.

Nor is the Department of Justice requiring anything new of banks. For years the Comptroller of the Currency has made it clear that banks had a special obligation to undertake particularly careful due diligence in taking on third party processors accounts. This is set out in detail in the government's complaint against *Four Oaks*, so I do not repeat it here. The fact that the government has stepped up enforcement should be endorsed by Congress, not criticized. It is only when banks follow the regulatory requirements of due diligence in accepting accounts that such mass fraud will stop. The frauds will lose access to the victims' bank accounts.

It is not surprising that the recently formed association of third party payment processors urges action against Operation Chokepoint. The many actions I have described above confirm the warnings that the banking regulators have been providing to banks that accepting accounts of third party payment processors are fraught with risks. At least eleven different third party payment processors are identified in the complaints described above as having served as conduits for hundreds of millions of dollars in mass market fraud.

The representatives of the payday lending industry also urge that Operation Chokepoint be shut down. As the Committee knows, payday lending is outlawed in many states, like my own state, Pennsylvania. Payday lenders charge exorbitant interest rates, often exceeding 100%, and only the most desperate avail themselves of such usurious loans. But putting that aside that most basic moral concern, experience in the above cases shows that payday lending has been associated with mass market frauds. Certain of the frauds at issue in the *Zions* matter were payday loan referral cites which obtained victims' bank account information and used the information to raid victims' accounts through the electronic debit system. Worse, it is common for such frauds to exchange these illicitly compiled lists with each other. A so- called "legitimate" payday lender and payday loan referral site, Money Mutual, has a small print "privacy" policy on its website which makes explicit that it may sell the banking information it obtains to telemarketers:

> If you choose to provide personal information, ... We reserve the right to share, rent, sell or otherwise disclose your information with/to third parties in accordance with applicable laws and as described herein. These third party businesses may include, but are not limited to: providers of direct marketing services and applications, including ...; e-mail marketers; ... and telemarketers. Information collected by us may be added to our databases and used for future instant messaging, telemarketing....

It is difficult to understand why anyone, let alone public servants, would undertake any action on behalf of such entities to curb the very type of enforcement activity citizens expect from government. I hope that the Committee will find from the above that there is good reason for the Department of Justice to pursue the course undertaken in Operation Chokepoint.

While I will be teaching abroad from August 3 through August 18, the committee should not hesitate to contact me should it want to explore the matters discussed above.

Respectfully,

Howard Langer

cc: Members of the House Judiciary Committee
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law