SEN. DAVID VITTER--QUESTIONS FOR THE RECORD
Senate Judiciary Committee on the
Nomination of Stuart F. Delery as Associate Attorney General of the United States
Hearing, November 4, 2015

Background:

Prior to being appointed Acting Associate Attorney General on September 17, 2014, Mr. Delery led the Department of Justice ("DOJ") Civil Division beginning in March 2012 and was appointed its Assistant Attorney General on August 1, 2013.

Many argue short-term lending is vital to tens of millions of Americans because it provides a less expensive avenue to meeting financial commitments than the alternative of incurring overdraft charges. Nonetheless, under Mr. Delery's leadership, the DOJ began threatening banks and other financial institutions with costly investigations over their business relationships with these clients and other law-abiding businesses whose legitimate operations the DOJ has deemed risky. Specifically, the DOJ's actions have targeted credit card repair services, debt consolidation companies, payday lenders, pawn stores, firearm and ammunition dealers, pharmaceutical distributors, and online cigar shops, among others. In fact, a termination letter from a bank to one of these lawful businesses references this intimidation, stating,

> ***Based on your performance, there's NO WAY we SHOULDN'T be a credit provider. Our only issue is, and it has always been, the space in which you operate. It has never been the service that you've provided or the way you operate. You've obviously done a brilliant job. It is the scrutiny that you, AND NOW THAT WE, are under.***

The final outcome of the DOJ's pressure and intimidation, which has no statutory authority, has been the denial of access to the banking system for many law-abiding businesses. Thus, the DOJ has forced many such businesses to close their doors for want of banking services. This harm to legitimate businesses' lawful operations, as well as to those Americans who need their services, could have been prevented had Mr. Delery required the DOJ to gather adequate evidence of wrongdoing before harassing banks about their permissible customers.

RESPONSE: Several of the questions appear to be based on misinformation about the nature of the Department's efforts.

Operation Chokepoint is an effort by the Department of Justice to fight fraud by holding accountable financial institutions that knowingly facilitate illegal activity and the unlawful merchants whose misconduct they facilitate. It has stopped fraud schemes that, until the government stepped in, were actively taking hundreds of millions of dollars out of the bank accounts of more than a million different consumers without authorization. Developed by career prosecutors based on their experience and past successes in combating such fraud schemes, it builds on the actions the Department and its law enforcement partners continue to take against unlawful merchants. The investigations that are part of Operation Chokepoint focus on banks and third-party payment processors that know that money is being taken illegally from people's bank accounts, or are willfully ignorant of that fact, but continue to process those illegal transactions anyway.

First, all of the subpoenas issued and investigations undertaken as part of Operation Chokepoint have been based on specific evidence of unlawful conduct. As the Office of Professional Responsibility (OPR) confirmed after its nine-month investigation relating to Operation Chokepoint, each subpoena was based on "specific and articulable evidence of consumer fraud" developed by career attorneys using traditional investigative methods. OPR Letter at 3. Prosecutors sought information from a small number of banks – around 50 of the roughly 6,000 operating across the country – that were likely to have evidence of consumer fraud schemes, based on information the Department already had obtained from other sources (including statements of cooperating witnesses, tips and referrals from defrauded consumers or banks with customers that were victims, referrals from other agencies, and evidence obtained during investigations of fraudulent merchants). Once these prosecutors saw the evidence banks provided in response to the subpoenas, they opened multiple civil and criminal investigations into the perpetrators of egregious (and, in some cases, ongoing) fraud schemes. In some cases, prosecutors found evidence that a bank was aware of fraud and knowingly permitted the fraudsters to continue their unlawful conduct. In other cases, the information a bank provided included evidence of wrongdoing by a merchant or third-party payment processor, and the bank was informed that it was not itself the subject of investigation.

Second, reports that Operation Chokepoint has targeted any business or category of merchants acting lawfully are wrong. To the contrary, Operation Chokepoint has focused entirely on disrupting illegal fraud schemes. Simply doing business with any particular type of lawful industry is not evidence of fraud. As OPR found, there is no evidence that Operation Chokepoint was intended to, or did, target any lawful businesses: OPR concluded that, "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," OPR Letter at 3-4; "the evidence did not demonstrate that Operation Choke Point compelled banks to terminate business relationships with other lawful businesses," OPR Letter at 34; and "found no evidence establishing that any [Consumer Protection Branch] attorney intentionally targeted any . . . industries," OPR Letter at 34.

Third, as I testified at the Committee hearing, I am aware of anecdotal reports that some merchants believe they lost bank accounts as a result of Operation Chokepoint. As reflected in the cases brought to date, the Department's investigations should not have led banks to stop doing business with lawful merchants. Those investigations targeted only illegal conduct that caused hundreds of millions of dollars to be taken out of the bank accounts of more than a million different consumers without their authorization. The reports may confuse the Department's cases with the separate, independent actions taken by financial regulators, or with banks making their own determinations about how structure their businesses, how to comply with their legal obligations, and with whom they do business.

Regardless of the accuracy of these reports, I took them seriously from the time I first became aware of them. Specifically, I communicated internally and externally that the Department's policy is and must be to base investigations on specific evidence that a financial institution is breaking the law by knowingly facilitating fraud, and not on the types of industries with which they do business. I confirmed with the Department's career lawyers handling these investigations and their managers that the banks with which they were in discussions understood that the Department was focused only on fraudulent activity. The cases that have been brought to date, including those against CommerceWest Bank, Plaza Bank, and Four Oaks Bank, show that this was the case. To reinforce that message to Congress, the public, and industry, the Department and I took steps that included:

- A June 23, 2014, video message from the Attorney General posted on the Department's web site, which can be found here: http://www.justice.gov/opa/video/combating-consumer-fraud.
- Posts on the Department of Justice Blog dated May 7, 2014 and March 27, 2015, which can be found here: http://www.justice.gov/opa/blog/holding-accountable-financial-institutions-knowingly-participate-consumer-fraud and http://www.justice.gov/opa/blog/holding-financial-institutions-accountable-fraud.
- Briefings for, and letters to, industry groups, informing the financial industry and other concerned organizations about the Department's focus on illegal conduct; and
- Testimony, briefings, and letters to Congress, beginning immediately when questions about the Department's work in this area were first raised in August 2013, as well as the production to Congress of numerous documents reflecting the Department's policies, as well as the origin and implementation of these efforts.

Again, simply doing business with any particular type of lawful industry is not evidence of fraud. The Department's policy is to base its investigations on specific evidence that consumers are being defrauded, as demonstrated by our cases against Four Oaks Bank; CommerceWest Bank; Plaza Bank; Neil Godfrey; Destiny Research Center, Infogest Direct Marketing, and associated individuals; and CLGE Inc., I.D. Marketing Solutions Inc., and associated individuals.

<u>Questions for Mr. Delery:</u>

1.) According to testimony, there was a lack of specific tangible evidence of wrongdoing in relation to certain sectors, and yet the DOJ appears to have acted beyond its mandated role. Do you believe it is the DOJ's task to monitor banks and other financial institutions in general?

RESPONSE: I do not know to what testimony your question refers. As explained above, all Operation Chokepoint subpoenas and investigations of specific financial institutions, merchants, or individuals were based on clear articulable evidence of fraudulent conduct developed by career attorneys using traditional investigative methods. The Department did not target lawful businesses. The Office of Professional Responsibility's investigation confirmed these facts, finding that "the Civil Division had specific and articulable evidence of consumer fraud for each subpoena it issued." OPR Letter at 3.

It is not the role of the Department of Justice to monitor financial institutions generally, and that is not what Operation Chokepoint was about. It is appropriate, however, for the Department to investigate banks and other financial institutions that facilitate fraud against consumers with knowledge or willful blindness. We follow the facts and the law where they lead us with the goal of holding banks, like any other entities, responsible for their own unlawful conduct.

For example, the Department's complaint against Plaza Bank alleged that Plaza's chief compliance official raised concerns about numerous warning signs of fraud committed using a third-party payment processor's account, but that Plaza's chief operating officer – who, unknown to the compliance officer, also was an owner of the third-party payment processor – chose not to act on those concerns. Later, the complaint alleges, Plaza allowed months to pass while its officials debated whether the revenues generated from the third-party payment processor's fraudulent activities outweighed the possible risk to the bank, finally terminating the account only after receiving more than a thousand consumer complaints about unauthorized withdrawals, processing hundreds of thousands of returned transactions, and facilitating the unauthorized withdrawal of tens of millions of additional dollars from consumer accounts.

As another example, the Department's case against CommerceWest Bank resulted in an agreed statement of facts in which CommerceWest acknowledged that the bank knew about, but chose to ignore, multiple warning signs of illegal activity. Hundreds of individual customers filed notices under penalty of perjury that they had not authorized charges taken out of their accounts through transactions initiated by CommerceWest at the request of its merchant clients. Several CommerceWest clients had return rates of over 50 percent, meaning that more than half of the charges that those clients initiated were rejected or could not go through, a strong sign that the bank was facilitating repeated fraudulent withdrawals. Other banks, including Bank of America and Wells Fargo, complained that CommerceWest was allowing fraudulent withdrawals from their customers' accounts. In response to those complaints, CommerceWest agreed to stop allowing further charges to customers at the banks that complained – while allowing the fraudulent merchants to continue charging the accounts of the customers of other banks that had not yet complained. CommerceWest attempted, but was unable, to obtain evidence that a payment processor processed legitimate transactions. By continuing to facilitate fraudulent conduct despite clear evidence that the fraud was taking place, CommerceWest violated the law, and the Department's action held the bank accountable for its own unlawful conduct.

As these cases demonstrate, our efforts have proved very successful in protecting consumers and disrupting multiple massive, multi-million dollar fraud schemes.

2.) Under your leadership at the DOJ, how many law-abiding businesses have reported termination of access to banking services, and thus operations entirely, as a result of pressure the DOJ has placed on banks and other financial institutions to terminate business relationships with what the DOJ has deemed "high risk" entities?

RESPONSE: Operation Chokepoint is focused exclusively on illegal conduct, and should not have caused any bank to close the accounts of legal businesses. At no time was any identification of an industry as "high risk" a basis for any enforcement decision by the Department of Justice. The reports your question references may confuse the Department's cases with the separate, independent actions taken by financial regulators, or with banks making their own determinations about how structure their businesses, how to comply with their legal obligations, and with whom they do business.

3.) Given that many Americans depend on short-term lending to meet financial obligations, and the fact that most of the above-mentioned businesses are operating pursuant to current law, will the DOJ continue to interfere with lawful businesses' access to banking services in the absence of identified fraud?

RESPONSE: The Department has not interfered with access to banking services by lawful businesses, and will not do so in the future. Operation Chokepoint focuses entirely on disrupting illegal fraud schemes. Its objectives include leveling the playing field for law-abiding merchants, including lawful short-term lending businesses, and protecting American consumers, including those who need short-term lending services, from fraud.

4.) Provided the DOJ's subpoenas to banks and other financial institutions did not mention specific tangible evidence of fraudulent activity or perpetrators, how does the American ideal of presumption of innocence comport with the DOJ's targeting of these lawful industries?

RESPONSE: To the contrary, all of the subpoenas issued and investigations undertaken as part of Operation Chokepoint were based on specific evidence of unlawful conduct. As the Office of Professional Responsibility found, "the Civil Division had specific and articulable evidence of consumer fraud for each subpoena it issued." OPR Letter at 3. I confirmed with the Department's career lawyers handling these investigations and their managers that the banks with which they were in discussions understood that the Department was focused only on fraudulent activity. If after receiving information in response to a subpoena the prosecutors determined not to proceed further with an investigation of the financial institution (including where the information included evidence of wrongdoing by another entity), the Department notified the financial institution of this determination.

A subpoena itself does not need to, and typically does not, recite the evidence justifying the decision to issue it. The Department has been clear that its Operation Chokepoint investigations are focused solely and squarely on fraud. The cases brought to date, which have resulted in consent decrees and guilty pleas approved by federal courts, have held the entities and individuals in question responsible for their own unlawful conduct.

5.) As Associate Attorney General, what sort of self-imposed parameters will you utilize to prevent partisan ideology from unnecessarily harming lawful businesses not actually conducting fraudulent activity?

RESPONSE: Operation Chokepoint was developed by career prosecutors, who were motivated by their desire to disrupt fraud schemes targeting American consumers, not by partisan ideology. Partisan political considerations have no place in law enforcement decisions of any kind. I commit that I will continue to support an environment in which the Department's actions are based on fair consideration of the facts and the law and in which open, respectful discourse about our work is promoted.