U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

January 22, 2014

Mr. Jeff L. Plagge
Chairman
American Bankers Association
1120 Connecticut Avenue, NW
Washington, D.C. 20036

Mr. Jason Oxman
Chief Executive Officer
Electronic Transaction Association
1101 16th Street, NW, #402
Washington, D.C. 20036

Dear Messrs. Plagge and Oxman:

I am writing concerning an issue that may be of interest to your members, and specifically to clarify the Department of Justice's policy and approach regarding certain investigations into banks, payment processors, and other institutions that process payments for merchants engaged in fraudulent activities.

The Department of Justice is committed to protecting the American people from fraudulent practices in all industries—without exception. To the extent we have evidence that an entity is violating federal law by engaging in or facilitating fraudulent conduct, we will take appropriate measures to combat that conduct.

As you may be aware, the Department has engaged in various efforts to eliminate fraud in the payment system by holding financial services entities accountable where such entities (contrary to their responsibilities under federal law) engage in fraud or aid others who are engaging in fraud. The Department wishes to make clear that the aim of these efforts is to combat fraud. The Department has no interest in pursuing or discouraging lawful conduct. Our policy is to take the steps necessary to prevent financial institutions from knowingly assisting fraudulent merchants that harm consumers or processing transactions while deliberately ignoring evidence that they are fraudulent. It may be relevant to our inquiry that a financial institution is intentionally disregarding other obligations under federal law.

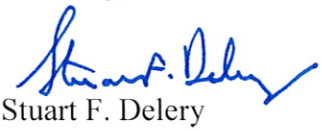
As the FDIC has recently clarified, "Facilitating payment processing for merchant customers engaged in higher risk activities can pose risks to financial institutions and requires due diligence and monitoring, as detailed in prior FDIC and interagency guidance and other information. Financial institutions that properly manage these relationships and risks are neither prohibited nor discouraged from providing payment processing services to customers operating

in compliance with applicable federal and state law." FIL – 43-2013. Moreover, as the FDIC stated, "Those that are operating with the appropriate systems and controls will not be criticized for providing payment processing services to businesses operating in compliance with applicable law." *Id.*

We share these views. The aim of our investigations is to identify and hold accountable financial institutions that are engaged in or facilitate fraud. Our policy is not to prohibit or discourage financial institutions from providing payment processing services to customers operating in compliance with applicable federal and state law, and we are committed to tailoring our investigative efforts accordingly. Finally, we will continue to review our efforts to minimize any impact and collateral consequences on institutions we are not investigating.

We look forward to further engagement with you and your colleagues concerning consumer protection issues of mutual concern.

Sincerely,



Stuart F. Delery
Assistant Attorney General

Stuart
Joni
Tamara

INDEPENDENT COMMUNITY BANKERS of AMERICA®

April 7, 2014

The Honorable Stuart F. Delery, Esq.
Assistant Attorney General, Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Delery:

I am writing to express ICBA's concerns regarding Operation Choke Point, a Department of Justice (DoJ) initiative that targets third-party payment processors and their financial institutions, including community banks, that process payments for businesses engaged in higher-risk, but legal, activities.

Operation Choke Point has an overly broad scope that morphs banks' traditional fraud and risk-mitigation roles into consumer-protection and law-enforcement roles. ICBA strongly believes that the present regulatory environment, which includes the prudential banking agencies, the Federal Trade Commission as well as the Consumer Financial Protection Bureau, is sufficient to ensure that banks implement sound risk management and mitigation, responsive fraud prevention and detection, and adequate consumer protections.

Community banks are in the business of serving their customers and communities by providing financial services, and they share a common concern with law enforcement regarding fraudulent business practices that harm consumers. Community banks dedicate human and technological resources to monitor, identify, and report financial crimes, as required by the Bank Secrecy Act. They also file suspicious activity reports to assist law enforcement in the fight against all types of financial crimes.

ICBA is extremely concerned that Operation Choke Point gives community banks the untenable choices of either severing valuable and legal customer relationships or risking DoJ enforcement actions. ICBA firmly believes that community banks should have the ability to provide indirect payment-processing services to companies engaged in higher-risk, legal activities provided that they demonstrate risk-mitigation actions consistent with risk-based banking, such as initial and ongoing risk assessments, due diligence, and monitoring for changes in customer-transaction patterns.

Regulators and law enforcement should not prohibit or discourage community banks from serving these customers provided adequate and balanced controls are in place. The indiscriminate targeting of community banks offering these services also places community banks at a competitive disadvantage with large banks.

While preventing fraud is a top concern for community banks, it needs to be balanced with ensuring that businesses and consumers that operate in accordance with applicable laws can still access payment systems.

Many payments industry groups are already working to strengthen practices and technologies aimed at protecting consumers from unscrupulous business practices. ICBA supports industry efforts to strengthen internal controls or processes for institutions that provide payment-processing services for customers engaged in higher-risk activities. Law enforcement, regulators and industry groups should work from a common framework with common goals and work together to reduce fraud and its impact on consumers.

ICBA requests that the DoJ suspend Operation Choke Point immediately and focus its resources directly on businesses that may be violating the law, rather than targeting banks providing payment services. DoJ should also allow the marketplace to further implement a coordinated, targeted approach to controlling fraud and bad actors.

We would appreciate the opportunity to meet with you to further express our concerns and to discuss the various ways community banks manage risk, control fraud, and identify and deal with suspicious customer behavior.

Thank you in advance for your consideration of these important matters. I look forward to meeting with you in the future.

Sincerely,

/s/

Camden R. Fine
President and CEO

NAFSA NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION
WWW.MYNAFSA.ORG

August 21, 2013

VIA EMAIL and U.S. MAIL
Maame Ewusi-Mensah Frimpong
Deputy Assistant Attorney General
Consumer Protection Branch
Department of Justice
Civil Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Follow up on meeting with tribal leadership regarding tribal government short-term lending on August 21, 2013

Dear Deputy Assistant Attorney General Frimpong:

I am writing to memorialize the meeting between our tribal membership and you and your colleagues today. We appreciate your willingness to accept our invitation for a meeting to begin a productive dialogue with tribal leadership and to strengthen the government-to-government relationship between tribal governments and the Department of Justice. In recent history, there is a proud tradition of consultation between our governments that was memorialized by Executive Order during the Clinton Administration. Both the George W. Bush and Obama Administrations have continued this legacy of cooperation and respect for the sovereign rights of American Indian tribal governments. President Obama confirmed this commitment on November 5, 2009 by reaffirming Executive Order 13175, requiring all heads of departments and executive agencies to consult with American Indian tribal governments before taking any action which may affect the sovereign rights of an Indian Tribe. The recent Executive Order, dated June 26, 2013, establishing the White House Council on Native American Affairs, specifically acknowledges, "that self-determination--the ability of tribal governments to determine how to build and sustain their own communities-- is necessary for successful and prospering communities."

As we shared with you in today's meeting, our tribal government short-term lending businesses have been severely harmed, and in some cases closed, by recent actions by the Department of Justice's Financial Fraud Task Force. For many of our tribes, these businesses are the primary source of governmental revenues to provide critical services to our communities, such as housing, education, and health care.

We were pleased to hear from you today that your actions are not directed at our tribal government short-term lending businesses. In particular, it was a relief to hear Deputy Assistant Attorney General Frimpong make the statement that, "It didn't occur to me that we should consult with tribes in advance because we are going after fraud. Never have we focused on tribal payday or payday. We go after financial fraud, so we are not going after you." Furthermore, and most importantly, you confirmed to us that, "banks may be mis-construing what they are hearing, that there is perceived risk to them, but that is not true." We were also encouraged to hear that the media reports have been incorrect with regard to DOJ efforts when Joel Sweet assured us that, "the context was us telling the reporter that we were not focusing on tribal or online lending."

We look forward to continuing our dialogue and appreciate the offer to include us in the new Consumer Protection Working Group since tribal governments share your dedication to protecting consumers by offering responsible financial services products and services.

Thank you for again your clear reassurance on these important issues.

If you have any questions, please feel free to contact me directly at JShotton@omdevelopment.org or by phone at (405) 880-5940.

Sincerely on behalf of all the tribes in attendance,

John Shotton
Chairman, Otoe-Missouria Tribe
Chairman, NAFSA

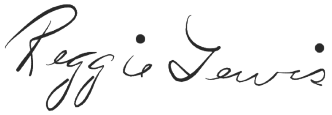
Sherry Treppa
Chairperson, Habematolel Pomo of Upper Lake
Vice Chairwoman, NAFSA

Sandra Knight,Vice Chairwoman
Mechoopda Indian Tribe of Chico Rancheria

Jonathan Windyboy
State Senator, SD 16, Montana Senate

James Williams, Jr.
Tribal Council Chairman, Lac Vieux Desert Band of Chippewa Indians

Sally Peterson
Vice Chairwoman, Middletown Rancheria of Pomo Indians



Reggie Lewis,
Chairman,
Picayune Rancheria of Chukchansi Indians of California

Chance Alberta,
Tribal Council & Chairman of Chukchansi, Inc.

U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

MAY 12 2014

The Honorable Tom Miller
Attorney General of Iowa
Hoover Building
Des Moines, Iowa 50319

Dear Attorney General Miller:

Thank you for your letter to Attorney General Eric Holder of February 12, 2014, regarding our series of investigations under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") related to financial institutions and third party payment processors that have knowingly facilitated or participated in consumer fraud through the ACH system. Your letter was forwarded to me for response. We share your concern about this type of consumer fraud.

The Department of Justice is committed to protecting the American people from fraudulent practices in all industries. The investigations referenced in your letter seek to hold accountable financial institutions that knowingly assist fraudulent merchants that harm consumers or that process transactions while deliberately ignoring evidence that they are fraudulent. We appreciate your support of our efforts to protect the public from mass-market consumer fraud by holding accountable those banks and payment processors that violate federal law, and we remain committed to these efforts.

One recent example of our work is the case of *United States v. Four Oaks Fincorp, Inc., and Four Oaks Bank and Trust Company* (E.D.N.C.). In that case, a federal district court issued a civil monetary penalty and entered a permanent injunction against Four Oaks Bank, which the government alleged had unlawfully facilitated consumer fraud through a third-party payment processor and its merchants.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide any assistance regarding this, or any other matter.

Sincerely,

Stuart F. Delery
Assistant Attorney General

U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

MAY 12 2014

The Honorable Mark R. Warner
United States Senate
Washington, D.C. 20510

Dear Senator Warner:

Thank you for your correspondence on behalf of your constituents regarding certain enforcement efforts related to financial institutions and third party payment processors that have facilitated or participated in consumer fraud. Your correspondence was forwarded to me for response.

The letters seem to be referring to a series of investigations under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") undertaken by the Department of Justice ("the Department"). Among other things, FIRREA provides for civil penalties where a federally insured financial institution knowingly participates in a fraud or processes transactions, deliberately ignoring evidence that they are fraudulent, in violation of federal mail fraud and wire fraud statutes. The FIRREA investigations referred to in your constituent's letter relate to the basic principle that a financial institution should not profit from its decision to process fraudulent transactions in violation of federal law, often at great cost to the Americans who are victims of the fraud.

The Department appreciates that American families rely on all sorts of legal financial services. The Department of Justice does not target businesses operating within the bounds of the law and has no interest in pursuing or discouraging lawful conduct. Our policy is to take the steps necessary to prevent financial institutions from knowingly assisting fraudulent merchants that harm consumers or processing transactions while deliberately ignoring evidence that they are fraudulent. We want to protect the public from mass-market consumer fraud by holding accountable those banks and payment processors that violate federal law by facilitating fraudulent transactions.

One recent example of our work is the case of *United States v. Four Oaks Fincorp, Inc., and Four Oaks Bank and Trust Company* (E.D.N.C.). In that case, a federal district court issued a civil monetary penalty and entered a permanent injunction against Four Oaks Bank, which the government alleged had unlawfully facilitated consumer fraud through a third-party payment processor and its merchants.

The Department is also committed to ongoing communication with Indian Tribes and, when appropriate and practicable, to formal consultation before adopting policies that have Tribal implications. The Department therefore appreciates your desire to ensure that there is a proper dialogue between the United States and Indian Tribes. In fact, representatives of the Department have already met with representatives of several Indian Tribes that operate online short-term lending businesses.

Your constituents' letters also refer to activities by the Electronic Payments Association ("NACHA") and the State of New York. We refer you to NACHA and the State of New York for responses related to those various activities.

I hope this information is helpful in responding to your constituents. Please do not hesitate to contact the Department of Justice if we may be of further assistance with future matters.

Sincerely,

Stuart F. Delery
Assistant Attorney General

U. S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

August 22, 2013

Sent via email to jshotton@omdevelopment.org
John Shotton
Chairman, Otoe-Missouria Tribe
Chairman, NAFSA
Native American Financial Services Association
Washington, DC

Dear Chairman Shotton:

Thank you very much for the meeting yesterday with NAFSA leadership and tribal leaders. We appreciated the opportunity to hear directly from you and other tribal leaders regarding your experiences in the online lending industry. In particular, the meeting went a long way to helping us understand your concerns and the challenges your members face.

As we discussed, the Department of Justice is committed to protecting consumers from fraudulent practices in all industries—without exception. To the extent we have evidence that any entity is engaged in fraudulent conduct and is harming consumers—in the short-term lending industry or in any other industry—we will use appropriate legal and equitable measures to combat that conduct.

As I emphasized in our meeting yesterday, the focus of our efforts at the Department of Justice has been combatting fraud; we have not singled out tribal government short-term lending businesses as an area of focus where such businesses engage in honest business practices. As we described, our efforts are aimed at eliminating fraud in the payment system by holding banks and processors accountable to their responsibilities under federal law not to engage in fraud or to aid others in engaging in fraud.

We do not understand our consultation obligations to require consultation with NAFSA or individual members concerning potential investigations of civil or criminal violations of law. Moreover, because our investigations are evidence-based and case-specific, we are not in a position to evaluate generally the lawfulness of tribal government short-term lending businesses.

We were nevertheless encouraged to hear from you that you believe NAFSA members all comply with federal laws intended to protect consumers.

We appreciate your attempt to memorialize our meeting in your letter of yesterday, but I do feel compelled to note that your letter appears to mischaracterize some aspects of the discussion that we had. Your letter suggests that we stated that NAFSA members are off the table in our investigations. We did not. As I stated, we are focused on fraud, and to the extent that any NAFSA member is engaged in fraud, clearly that would be a concern for us. In addition, your letter suggests that we stated that the short-term lending the NAFSA members engage in poses no risk to banks. We did not make such a statement and are not in a position to make such a statement. It is the purview of the banks and the agencies that regulate them to assess the risk—if any—posed by the NAFSA members' lending models, and the Department of Justice will consider taking action against any bank or payment processor that knows or turns a blind eye to fraudulent proceeds passing through their accounts.

Finally, your letter suggests that we believe that the media incorrectly stated the aims of our initiative. In fact, the media report at issue accurately quoted a Department of Justice official as follows: "'We are changing the structures within the financial system that allow *all kinds of fraudulent merchants* to operate,' a Justice Department official said, with the intent of 'choking them off from the very air they need to survive.'"[1] It was your letter to the banks of August 14, 2013, as well as the White Paper you circulated yesterday, which incorrectly stated that we seek to "choke the air" of lenders or of tribal government short-term lending businesses. As the full quote makes clear, we seek to choke the air of "all kinds of fraudulent merchants." As discussed, this could include any entity engaged in fraud using the payment system, and does not exclude any lenders engaged in fraud.

Thank you for giving us the opportunity to clarify these points. Again, we found the dialogue extremely valuable, and look forward to a continued dialogue with you and your colleagues regarding consumer protection issues of mutual concern.

Very truly yours,

Maame Ewusi-Mensah Frimpong
Deputy Assistant Attorney General
Civil Division

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[1] Alan Zibel and Brent Kendall, "Probe Turns Up Heat on Banks," *Wall Street Journal*, August 7, 2013.

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

JUN - 6 2014

The Honorable Jack Reed
United States Senate
Washington, D.C. 20510

Dear Senator Reed:

Thank you for your correspondence on behalf of your constituents regarding their concerns related to enforcement efforts of financial institutions and third party payment processors. Your correspondence was forwarded to me for response.

The letter your constituent sent you seems to be referring to a series of investigations under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") undertaken by the Department of Justice ("the Department"). Among other things, FIRREA provides for civil penalties where a federally insured financial institution knowingly participates in a fraud or processes transactions, deliberately ignoring evidence that they are fraudulent, in violation of federal mail fraud and wire fraud statutes. The FIRREA investigations referred to in your constituent's letter relate to the basic principle that a financial institution should not profit from its decision to process fraudulent transactions in violation of federal law, often at great costs to Americans who are victims of fraud.

The Department appreciates that American families rely on all sorts of legal financial services. The Department of Justice does not target businesses operating within the bounds of the law and has no interest in pursuing or discouraging lawful conduct. Our policy is to take the steps necessary to prevent financial institutions from knowingly assisting fraudulent merchants that harm consumers or processing transactions while deliberately ignoring evidence that they are fraudulent. We want to protect the public from mass-market consumer fraud by holding accountable those banks and payment processors that violate federal law by facilitating fraudulent transactions in violation of federal law and often at a great costs to the Americans who are victims of the fraud.

One recent example of our work is the case of *United States v. Four Oaks Fincorp, Inc., and Four Oaks Bank and Trust Company* (E.D.N.C.). In that case, a federal district court issued a civil monetary penalty and entered a permanent injunction against Four Oaks Bank, which the government alleged had unlawfully facilitated consumer fraud though a third-party payment processor and its merchants.

The Department is also committed to ongoing communication with Indian Tribes and, when appropriate and practicable, to formal consultation before adopting policies that have Tribal implications. The Department therefore appreciates your desire to ensure that there is a proper dialogue between the United States and Indian Tribes. In fact, representatives of the Department have already met with representatives of several Indian Tribes that operate online short-term lending businesses.

Your constituents' letters also refer to activities by the Electronic Payment Association ("NACHA") and the State of New York. We refer you to the NACHA and the State of New York for responses related to those various activities.

I hope this information is helpful in responding to your constituents. Please do not hesitate to contact the Department of Justice if we may be of further assistance with future matters.

Sincerely,

Stuart F. Delery
Assistant Attorney General

U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

MAY 12 2014

The Honorable Barbara A. Mikulski
United States Senate
Washington, D.C. 20510

Dear Senator Mikulski:

Thank you for your letter on behalf of your constituent, (b) (6) regarding certain enforcement efforts related to financial institutions and third party payment processors that have knowingly facilitated or participated in consumer fraud. Your letter was forwarded to me for response.

We appreciate that American families rely on a variety of legal financial services and we do not target businesses that operate within the bounds of the law. We have no interest in pursuing or discouraging lawful conduct, but our policy is to take the steps necessary to prevent financial institutions from knowingly assisting fraudulent merchants that harm consumers or processing transactions while deliberately ignoring evidence that they are fraudulent. We want to protect the public from mass-market consumer fraud by holding accountable those banks and payment processors that violate federal law by facilitating fraudulent transactions.

One recent example of our work is the case of *United States v. Four Oaks Fincorp, Inc., and Four Oaks Bank and Trust Company* (E.D.N.C.). In that case, a federal district court issued a civil monetary penalty and entered a permanent injunction against Four Oaks Bank, which the government alleged had unlawfully facilitated consumer fraud through a third-party payment processor and its merchants.

The Department also is committed to ongoing communications with Indian Tribes and, when appropriate and practicable, to formal consultation before adopting policies that have Tribal implications. In fact, Department representatives have met with representatives from several Indian Tribes that operate online short-term lending businesses.

Your constituent may want to contact New York State Superintendent Lawsky and the Electronic Payments Association ("NACHA") regarding your concerns about actions by Mr. Lawsky and NACHA.

I hope this information is helpful in responding to your constituent. Please do not hesitate to contact the Department of Justice if we may be of further assistance with future matters.

Sincerely,

Stuart F. Delery
Assistant Attorney General

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

MAY 12 2014

Mr. Dennis Shaul
Community Financial Services Association
515 King Street, Suite 300
Alexandria, Virginia 22314

Dear Mr. Shaul:

Thank you for your letter to Attorney General Eric Holder of October 2, 2013, regarding certain enforcement efforts related to financial institutions and third party payment processors that have facilitated or participated in consumer fraud. Your letter was forwarded to me for response. We apologize for our delay in responding to your letter.

The Department of Justice is committed to protecting the American people from fraudulent parties in all industries. We appreciate that American families rely on a variety of legal financial services and we do not target businesses that operate within the bounds of the law. We have no interest in pursuing or discouraging lawful conduct, but our policy is to take the steps necessary to prevent financial institutions from knowingly assisting fraudulent merchants that harm consumers or processing transactions while deliberately ignoring evidence that they are fraudulent. We want to protect the public from mass-market consumer fraud by holding accountable those banks and payment processors that violate federal law by facilitating fraudulent transactions.

One recent example of our work is the case of *United States v. Four Oaks Fincorp, Inc., and Four Oaks Bank and Trust Company* (E.D.N.C.). In that case, a federal district court issued a civil monetary penalty and entered a permanent injunction against Four Oaks Bank, which the government alleged had unlawfully facilitated consumer fraud through a third-party payment processor and its merchants.

I hope this information is helpful to you and your members. Please do not hesitate to contact the Department of Justice if we may be of further assistance with future matters.

Sincerely,

Stuart F. Delery
Assistant Attorney General