

FINANCIAL INSTITUTION CUSTOMER PROTECTION ACT
OF 2015

JANUARY 28, 2016.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. HENSARLING, from the Committee on Financial Services,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 766]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 766) to provide requirements for the appropriate Federal banking agencies when requesting or ordering a depository institution to terminate a specific customer account, to provide for additional requirements related to subpoenas issued under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE AND SUMMARY

H.R. 766, the Financial Institution Customer Protection Act of 2015, prohibits a federal banking agency from formally or informally suggesting, requesting, or ordering a depository institution to terminate either a specific customer account, or group of customer accounts, or otherwise restrict or discourage it from entering into or maintaining a banking relationship with a specific customer or group of customers, unless: (1) the agency has a material reason to do so, and (2) the reason is not based solely on reputation risk. The bill also curbs abuses of the Financial Institutions Reform, Recovery and Enforcement Act of 1989.

BACKGROUND AND NEED FOR LEGISLATION

Operation Choke Point is a law enforcement initiative launched by the Department of Justice's Consumer Protection Branch to combat consumer fraud by "choking off" businesses alleged to have committed fraud from access to the financial system. Rather than investigating and prosecuting the merchants alleged to have committed fraud, the Justice Department subpoenas the institutions that provide financial services to these merchants, which effectively coerces these financial institutions to cease offering the services. The Justice Department has partnered with the Federal Deposit Insurance Corporation (FDIC) to identify merchants that pose a "high risk" for consumer fraud, notwithstanding the fact that these merchants may be operating their businesses legally. In doing so, the FDIC equated legitimate and regulated activities such as coin dealers and firearms and ammunition sales with inherently pernicious or patently illegal activities such as Ponzi schemes, debt consolidation scams, and drug paraphernalia. The legal merchants identified as "high risk" have seen their accounts terminated by banks seeking to avoid civil and criminal liability as well as greater regulatory scrutiny.

H.R. 766 would prevent federal banking agencies from abusing executive power when shutting off law-abiding businesses access to depository institutions.

In a letter of support for H.R. 766 dated June 30, 2015, the Independent Community Bankers of America said the bill "would limit the opportunity for regulators to abuse their discretion and terminate longstanding banking relationships based on biased, unsubstantiated, or subjective notions of "reputational risk."

The Electronic Transactions Association stated their support for H.R. 766 in a letter to the Committee dated July 27, 2015. They said Operation Chokepoint is "harming consumers by forcing financial institutions to stop serving targeted merchant industries that are supplying legal products and services."

HEARINGS

The Committee on Financial Services' Subcommittee on Financial Institutions and Consumer Credit held a hearing examining matters relating to H.R. 766 on June 11, 2015.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on July 28 and 29, 2015, and ordered H.R. 766 to be reported favorably to the House without amendment by a recorded vote of 35 yeas to 19 nays (recorded vote no. FC-43), a quorum being present. An amendment offered by Representative Perlmutter was not agreed to by a voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The sole recorded vote was on a motion by Chairman Hensarling to report the bill favorably to the House without amendment. The motion was agreed

to by a recorded vote of 35 yeas to 19 nays (Record vote no. FC-43), a quorum being present.

Record vote no. FC-43

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling	X			Ms. Waters (CA)		X	
Mr. King (NY)	X			Mrs. Maloney (NY)		X	
Mr. Royce	X			Ms. Velázquez		X	
Mr. Lucas	X			Mr. Sherman	X		
Mr. Garrett	X			Mr. Meeks		X	
Mr. Neugebauer	X			Mr. Capuano		X	
Mr. McHenry	X			Mr. Hinojosa		X	
Mr. Pearce	X			Mr. Clay			
Mr. Posey	X			Mr. Lynch		X	
Mr. Fitzpatrick	X			Mr. David Scott (GA)			
Mr. Westmoreland	X			Mr. Al Green (TX)		X	
Mr. Luetkemeyer	X			Mr. Cleaver			
Mr. Huizenga (MI)	X			Ms. Moore		X	
Mr. Duffy	X			Mr. Ellison		X	
Mr. Hurt (VA)	X			Mr. Perlmutter		X	
Mr. Stivers	X			Mr. Himes		X	
Mr. Fincher	X			Mr. Carney			
Mr. Stutzman	X			Ms. Sewell (AL)		X	
Mr. Mulvaney	X			Mr. Foster		X	
Mr. Hultgren	X			Mr. Kildee		X	
Mr. Ross	X			Mr. Murphy (FL)			
Mr. Pittenger	X			Mr. Delaney		X	
Mrs. Wagner	X			Ms. Sinema			
Mr. Barr	X			Mrs. Beatty		X	
Mr. Rothfus	X			Mr. Heck (WA)		X	
Mr. Messer	X			Mr. Vargas		X	
Mr. Schweikert	X						
Mr. Guinta	X						
Mr. Tipton	X						
Mr. Williams	X						
Mr. Poliquin	X						
Mrs. Love	X						
Mr. Hill	X						
Mr. Emmer	X						

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 766 will restore the rule of law by requiring federal banking agencies to justify requests to terminate customer bank accounts maintained by depository institutions and requiring civil subpoenas issued by the Department of Justice in investigations affecting a federally insured financial institution to be supported by facts.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 4, 2015.

Hon. JEB HENSARLING,
*Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 766, the Financial Institution Customer Protection Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Sarah Puro.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 766—Financial Institution Customer Protection Act of 2015

H.R. 766 would prohibit federal banking regulators from requesting or requiring that a depository institution terminate certain customer accounts except in specific circumstances affecting national security. Based on information from the federal banking regulators, enacting H.R. 766 would not alter the actions those regulators take under current law. As a result, CBO estimates that there would not be any change in staffing levels or administrative costs to those agencies and that there would be no effect on the federal budget.

Enacting H.R. 766 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 766 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Sarah Puro. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

H.R. 766 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(g) of H. Res. 5, 114th Cong. (2015), the Committee states that no provision of H.R. 766 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, 114th Cong. (2015), the Committee states that H.R. 766 contains no directed rulemaking.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This Section cites H.R. 766 as the “Financial Institution Customer Protection Act of 2015.”

Section 2. Requirements for deposit account termination requests and orders

This Section prohibits a federal banking agency from formally or informally suggesting, requesting, or ordering a depository institution to terminate either a specific customer account, or group of customer accounts, or otherwise restrict or discourage it from entering into or maintaining a banking relationship with a specific customer or group of customers, unless: (1) the agency has a material reason to do so, and (2) the reason is not based solely on reputation risk. The materiality requirement is satisfied if a federal banking agency believes that a specific customer or group of customers poses a threat to national security, including any belief that they are involved in terrorist financing.

This section also requires a federal banking agency that requests or orders a depository institution to terminate an account or group of accounts to provide the request or order to the institution in writing and accompany the request or order with a written justification for why such termination is needed, including any specific laws or regulations the agency believes are being violated. Such justification may not be based solely on the reputation risk of the depository institution. Neither the agency nor the institution is required to inform a customer of the justification accompanying the agency’s request for the customer’s account termination. Notice to a customer is prohibited if the federal banking agency requests or orders a depository institution to terminate a customer account (or a group of customer accounts) based upon a belief that customer or those customers pose a threat to national security. Each appropriate federal banking agency must issue an annual report to Congress stating the aggregate number of specific customer accounts that the agency requested or ordered a depository institution to terminate during the previous year and the legal authority on which the agency relied in making such requests or orders.

Section 3. Amendments to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

This section amends section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1833a) to replace the phrase “affecting a federally insured financial institution” with “against a federally insured financial institution or by a federally insured financial institution against an unaffiliated third person.” This section also revises requirements for summoning witnesses and requiring production of books or other records the Attorney General deems relevant or material to a civil investigation in contemplation of a civil proceeding which may result in civil penalties for specified violations.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill,

as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**FINANCIAL INSTITUTIONS REFORM, RECOVERY, AND
ENFORCEMENT ACT OF 1989**

* * * * *

**TITLE IX—REGULATORY ENFORCE-
MENT AUTHORITY AND CRIMINAL EN-
HANCEMENTS**

* * * * *

**Subtitle E—Civil Penalties For Violations
Involving Financial Institutions**

SEC. 951. CIVIL PENALTIES.

(a) **IN GENERAL.**—Whoever violates any provision of law to which this section is made applicable by subsection (c) shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section.

(b) **MAXIMUM AMOUNT OF PENALTY.**—

(1) **GENERALLY.**—The amount of the civil penalty shall not exceed \$1,000,000.

(2) **SPECIAL RULE FOR CONTINUING VIOLATIONS.**—In the case of a continuing violation, the amount of the civil penalty may exceed the amount described in paragraph (1) but may not exceed the lesser of \$1,000,000 per day or \$5,000,000.

(3) **SPECIAL RULE FOR VIOLATIONS CREATING GAIN OR LOSS.**—
(A) If any person derives pecuniary gain from the violation, or if the violation results in pecuniary loss to a person other than the violator, the amount of the civil penalty may exceed the amounts described in paragraphs (1) and (2) but may not exceed the amount of such gain or loss.

(B) As used in this paragraph, the term “person” includes the Bank Insurance Fund, the Savings Association Insurance Fund, and after the merger of such funds, the Deposit Insurance Fund, and the National Credit Union Share Insurance Fund.

(c) **VIOLATIONS TO WHICH PENALTY IS APPLICABLE.**—This section applies to a violation of, or a conspiracy to violate—

(1) section 215, 656, 657, 1005, 1006, 1007, 1014, or 1344 of title 18, United States Code;

(2) section 287, 1001, 1032, 1341 or 1343 of title 18, United States Code, **[affecting a federally insured financial institution]** *against a federally insured financial institution or by a federally insured financial institution against an unaffiliated third person*; or

(3) section 16(a) of the Small Business Act (15 U.S.C. 645(a)).

(d) **EFFECTIVE DATE.**—This section shall apply to violations occurring on or after August 10, 1984.

(e) **ATTORNEY GENERAL TO BRING ACTION.**—A civil action to recover a civil penalty under this section shall be commenced by the Attorney General.

(f) **BURDEN OF PROOF.**—In a civil action to recover a civil penalty under this section, the Attorney General must establish the right to recovery by a preponderance of the evidence.

(g) **ADMINISTRATIVE [SUBPOENAS] INVESTIGATIONS.**—

(1) **IN GENERAL.**—For the purpose of conducting a civil investigation in contemplation of a civil proceeding under this section, the Attorney General may—

(A) administer oaths and affirmations;

(B) take evidence; and

[(C) by subpoena, summon witnesses and require the production of any books, papers, correspondence, memoranda, or other records which the Attorney General deems relevant or material to the inquiry. Such subpoena may require the attendance of witnesses and the production of any such records from any place in the United States at any place in the United States designated by the Attorney General.]

(C) summon witnesses and require the production of any books, papers, correspondence, memoranda, or other records which the Attorney General deems relevant or material to the inquiry, if the Attorney General—

(i) requests a court order from a court of competent jurisdiction for such actions and offers specific and articulable facts showing that there are reasonable grounds to believe that the information or testimony sought is relevant and material for conducting an investigation under this section; or

(ii) either personally or through delegation no lower than the Deputy Attorney General, issues and signs a subpoena for such actions and such subpoena is supported by specific and articulable facts showing that there are reasonable grounds to believe that the information or testimony sought is relevant for conducting an investigation under this section.

(2) **PROCEDURES APPLICABLE.**—The same procedures and limitations as are provided with respect to civil investigative demands in subsections (g), (h), and (j) of section 1968 of title 18, United States Code, apply with respect to a subpoena issued under this subsection. Process required by such subsections to be served upon the custodian shall be served on the Attorney General. Failure to comply with an order of the court to enforce such subpoena shall be punishable as contempt.

(3) **LIMITATION.**—In the case of a subpoena for which the return date is less than 5 days after the date of service, no person shall be found in contempt for failure to comply by the return date if such person files a petition under paragraph (2) not later than 5 days after the date of service.

(h) STATUTE OF LIMITATIONS.—A civil action under this section may not be commenced later than 10 years after the cause of action accrues.

* * * * *

MINORITY VIEWS ON H.R. 766

H.R. 766 requires notice from banking regulators when they request that a financial institution close an account and substantially undermines the Department of Justice's ("Department") ability to issue administrative subpoenas and bring civil actions against financial institutions for financial wrongdoing committed by financial institutions under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA").

Section 2 of H.R. 766 attempts to respond to growing concerns about financial institutions closing customer accounts. While account closures raise a number of legitimate concerns, Section 2 of H.R. 766 would not address the root causes of account closures. Closures are often based upon a bank's internal determination of the relative costs, compliance risks, and the benefits of a particular account instead of requests from regulators. Furthermore, the Federal Deposit Insurance Corporation ("FDIC") responded to industry concerns regarding account closures with guidance on July 28, 2014, that specifically states that it does not prohibit or discourage banks from maintaining accounts for any customer or industry that is operating in compliance with applicable law. In light of the steps already taken by the FDIC and the actual circumstances that lead to account closures, Section 2 of H.R. 766 is unnecessary.

Section 3 of H.R. 766 is highly problematic as it: 1) would substantially narrow the scope of activity that would allow for the Department to issue administrative subpoenas and initiate civil actions against financial institutions under FIRREA; and, 2) undermines the Department's ability to conduct investigations by requiring that administrative subpoenas either be issued pursuant to a court order or personally through the Attorney General or Deputy Attorney General.

In amending Section 1833(a) of FIRREA by replacing the "affecting a federally insured financial institution" language with "against a federally insured financial institution", H.R. 766 attempts to narrow the scope of offenses that trigger FIRREA. The combination of FIRREA's ten-year statute of limitations, substantial fines and lower burden of proof have become one of the Department's most valuable tools for investigating the kind of financial wrongdoing that led to the financial crisis. FIRREA is currently triggered if a violation of federal law is either committed against a federally insured financial institution or if it affects such an institution. The proposed language in Section 3 would only trigger FIRREA in cases where someone violated federal law against a federal insured financial institution, but it would not trigger liability in cases where the financial institution itself violates federal law.

Striking Section 1833(a)'s "affecting" language would also effectively overrule a series of cases affirming the Department's broad authority under FIRREA to investigate violations of federal law

committed by financial institutions. In the wake of the financial crisis, Section 1833(a)'s broad administrative subpoena authority has proven to be an important tool in civil enforcement actions against financial institutions for crisis-related mortgage fraud, and absent such authority, the Department of Justice's ability to investigate wrongdoing committed by financial institutions would have been substantially undermined. To date, FIRREA subpoenas have played a central role in helping the Department secure a number of high-profile settlements including a \$13 billion settlement against JP Morgan Chase, the Department's \$16.65 billion settlement against Bank of America, and its recent \$1.4 billion settlement against Standard and Poor's.

The second provision of Section 3 seeks to further restrict the Department's subpoena authority by either first requiring a court order before issuing a subpoena or by only allowing the Attorney General or Deputy General to issue FIRREA subpoenas effectively eliminating the ability of any other federal prosecutors from issuing subpoenas.

Administrative subpoenas allow regulators to investigate potential wrongdoing that can form the basis for future regulatory action. Regulators generally have broad authority to conduct investigations and to issue administrative subpoenas for requesting documents and other information from a regulated entity without having to first obtain a court order.

Financial institutions have recourse when they receive a FIRREA subpoena, as they can challenge a subpoena should they take issue with them. Federal courts have also imposed meaningful limitations on the issuance of administrative subpoenas requiring that they be relevant to the Department's investigation and that they not be unreasonably broad or burdensome. Other than restraining the Department's investigative authority, supporters of H.R. 766 have yet to provide a compelling policy rationale for injecting courts into the process by which the Department issues administrative subpoenas for their own investigations.

In the alternative, instead of court approval for administrative subpoenas, H.R. 766 allows the Department to issue the subpoenas without a court order, but only if they are issued by two people: the Attorney General or the Deputy Attorney General of the United States. Currently, any of the Department's 93 United States Attorneys or Deputy United States Attorneys can issue an administrative subpoena pursuant to FIRREA. H.R. 766 would eliminate the authority of thousands of federal prosecutors to issue administrative subpoenas for the purpose of investigating financial institutions for potential wrongdoing under FIRREA drastically reducing the Department's ability to investigate financial institutions for violating federal law.

For the foregoing reasons, the Minority opposes H.R. 766.

MAXINE WATERS.
RUBÉN HINOJOSA.
GWEN MOORE.
KEITH ELLISON.
CAROLYN B. MALONEY.
STEPHEN F. LYNCH.
WM. LACY CLAY.

