

March 1, 2022

The Honorable Janet Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, D.C. 20220

Mr. Him Das
Acting Director
Financial Crimes Enforcement Network
2070 Chain Bridge Road
Vienna, VA 22182

Dear Secretary Yellen and Acting Director Das:

The Obama Administration launched “Operation Choke Point” to apply pressure on financial institutions to cut off financial services to certain licensed, legally operating industries. After years of congressional investigations and civil litigation, the record with respect to Operation Choke Point is clear: political appointees and bureaucrats at the Justice Department and several independent federal agencies used threats to force banks to terminate their relationships with politically disfavored businesses. What remains unclear is whether those agencies have taken steps to ensure the federal government cannot abuse its authority to regulate the financial sector in other ways.

As you know, in Operation Choke Point, the Federal Deposit Insurance Corporation (FDIC) and the Department of Justice used their respective supervisory and law enforcement authorities to shut down legal businesses. FDIC officials, for instance, informed banks that the government considered certain types of their customers “high risk,” which implied the FDIC would conduct extra audits or investigations and invoked the possibility of additional operating restrictions or civil and criminal charges.¹ Those risk determinations were initially predicated on federal anti-fraud authorities; the FDIC subsequently claimed the accounts in question implicated anti-money laundering statutes.² Predictably, several financial institutions severed their relationships with those customers in response to the FDIC’s pressure.

In a settlement with a group of affected businesses, the FDIC acknowledged “regulatory threats, undue pressure, coercion, and intimidation designed to restrict access to financial

¹ See, e.g., Norbert Michel, *Newly Unsealed Documents Show Top FDIC Officials Running Operation Choke Point*, FORBES, Nov. 5, 2018, <https://www.forbes.com/sites/norbertmichel/2018/11/05/newly-unsealed-documents-show-top-fdic-officials-running-operation-choke-point/?sh=40cc06b61191>.

² Dennis Shaul, *There's no downplaying the impact of Operation Choke Point*, AMERICAN BANKER, Nov. 28, 2018, <https://www.americanbanker.com/opinion/theres-no-downplaying-the-impact-of-operation-choke-point>.

services for lawful businesses have no place at the FDIC.”³ The FDIC identified steps to clarify its policies on providing services to lawful businesses and indicated it will conduct additional training of its examination workforce on such policies by the end of 2019.⁴

There are, however, other forms of leverage and financial surveillance that the federal government can use to chill constitutionally protected activities. For instance, in Canada, Prime Minister Justin Trudeau declared a national emergency⁵ and instructed banks and other financial services providers to freeze accounts associated with any person attending an illegal protest or providing supplies to demonstrators. Pursuant to the Prime Minister’s emergency order, any suspicious transactions must also be reported to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).⁶

The United States has a similar framework of authorities available to the President pursuant to an emergency declaration, including an extraordinary set of anti-terrorism powers designed to target bank accounts associated with designated entities and individuals. But it is unclear whether there are guardrails in place to prevent the Executive Branch from misusing those tools to achieve extra-judicial domestic policy objectives.

These concerns are heightened by the fact that the Biden Administration has resisted the implementation of regulations to do just that. In November 2020, the Office of the Comptroller of the Currency (OCC) released a notice of proposed rulemaking that would prohibit national banks and federal savings associations from categorically declining to provide financial services to industries engaged in lawful business activities. In one of its first official acts, however, the Biden Administration “paused publication” of the rule on January 28, 2021, and U.S. financial services providers may accordingly cut off politically disfavored customers in response to public pressure, or for no reason at all.⁷

Again, recent events in Canada show what can happen absent such protections. According to an audio recording, a representative for Royal Bank of Canada (RBC) told a long-standing customer who was seeking a mortgage, “the bank has been, you know, trying to pry away from certain, you know, clients” because of their “controversial” nature.⁸ The RBC representative subsequently identified the customer’s conservative media organization, and companies involved in oil and gas exploration, as subject to the bank’s new policy to scrutinize politically sensitive applications.⁹

The House of Representatives and the Senate are both considering bills (H.R. 1729 and S. 563, both titled *Fair Access to Banking Act*) to ensure that persons involved in politically unpopular businesses that operate in a manner consistent with federal laws receive fair access to

³ Letter from Floyd Robinson, Deputy General Counsel, FDIC to David H. Thompson, Counsel to Plaintiffs (May 22, 2019), www.fdic.gov/news/press-releases/2019/pr19040a.pdf&clen=256959.

⁴ *Id.*

⁵ Proclamation Declaring a Public Order Emergency, PC Number: 2022-0106 (Feb. 14, 2022).

⁶ SOR/2022-22 (Feb. 15, 2022).

⁷ OCC News Release 2021-14, “OCC Puts Hold on Fair Access Rule” (Jan. 28, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html>.

⁸ Transcript of call between Ezra Levant and RBC Representative (on file with Committee).

⁹ *Id.*

financial services. Pursuant to the Anti-Money Laundering Act of 2020, Acting Director Das is required to appear before the Committee in March and to answer questions related to FinCEN's anti-money laundering work, among other things. To assist Congress as we consider the aforementioned bills, and to help us understand what other tools may be available for the federal government to shut down lawful businesses and chill First Amendment activities, please address the following in your written testimony and be prepared to answer the following questions during the hearing:

1. Has the agency reviewed and clarified, as appropriate, existing policy and guidance pertaining to the provision and termination of banking services?
2. Has the agency, or the agency's office of inspector general, assessed the effectiveness of its supervisory policies and approaches relating to the termination of banking services? If so, please describe any relevant findings.
3. Does the agency coordinate with other relevant federal agencies to align supervisory policy and guidance on moral suasion?
4. What authorities are available to the agency to affect the ability of U.S. citizens to engage in financial transactions under normal conditions, and what additional authorities would become available in the event of a declaration of national emergency?
5. Does the agency have existing policies and guidance pertaining to freezing or otherwise restricting access to the assets and accounts of U.S. citizens? If so, please describe those policies, to include when they were most recently updated.

Thank you for your attention to this important matter.

Sincerely,



Patrick McHenry
Ranking Member



Blaine Luetkemeyer
Ranking Member
Subcommittee on Consumer
Protection and Financial Institutions

cc: The Honorable Maxine Waters, Chairwoman