Statement of

Stephen T. Gannon

before

THE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

UNITED STATES SENATE

Washington, D.C.

February 5, 2025

Debanking and Operation Choke Point 2.0: Regulatory Accountability and Remedies

My name is Stephen T. Gannon and I am a partner in the Financial Services practice at Davis Wright Tremaine LLP. I have previously served as a senior legal executive at Citizens Financial Group, Capital One Financial Corporation, and Wachovia Securities. I have spent the last two and a half decades as a legal advisor regarding the strategic decision-making for several of the largest U.S. financial institutions. I represent a wide range of traditional and modern financial services providers and other participants in the financial services market. I am also the co-editor and co-author of a book published in 2024 by the American Bar Association titled *Banking on Blockchain*.

I am here in my individual capacity today and not on behalf of any client. The views I express are my own, and not necessarily those of Davis Wright Tremaine LLP, any client, or any other organization with which I have been or am affiliated.

1. Introduction

Recent events have once more put debanking and "Operation Choke Point" back in the spotlight. "Debanking" is the termination, often without notice or explanation, of banking services for those engaged in politically disfavored, but legal, conduct—such as crypto and other digital assets activities, among many other kinds of activities in the U.S. economy.[1] The most recent iteration of Operation Choke Point, "Operation Choke Point 2.0" ("OCP 2.0") has been an effort to discourage banks from engaging in crypto-related projects based on various regulatory and supervisory policies at the federal banking agencies—the Board of Governors of the Federal Reserve System (the "Federal Reserve Board"), the Federal Deposit Insurance Corporation (the "FDIC"), and the Office of the Comptroller of the Currency (the "OCC").

OCP 2.0 follows Operation Choke Point 1.0 ("OCP 1.0"), which stemmed from an initiative that the U.S. Department of Justice (the "DOJ") began in 2012, and, as described by the FDIC's Office of Inspector General (the "FDIC OIG"), was intended to protect consumers from fraud perpetrated by fraudulent merchants, financial institutions, and financial intermediaries known as third-party payment processors."[2] Unfortunately, they appeared to quickly pivot. According to the House Oversight Committee, "Operation Choke Point was created by the [DOJ] to 'choke out' companies the administration considers a 'high risk' or otherwise objectionable, despite the fact that they are legal businesses."[3]

In August 2013, members of Congress became concerned that the FDIC and DOJ were pressuring financial institutions and third-party payment processors to

[1] This is not to say that debanking is limited to the crypto industry. A review of the Consumer Financial Protection Bureau's (the "CFPB") database indicates over 14,000 complaints regarding account closures for a variety of reasons, including investing or trading in cryptocurrency.

[2] Fed. Deposit Ins. Corp. (hereinafter "FDIC"), Office of Inspector Gen., Office of Audits & Evaluations Report No. AUD-15-008, The FDIC's Role in Operation Choke Point And Supervisory Approach to Institutions that Conducted Business with Merchants Associated with High-Risk Activities i (2015), https://www.fdicoig.gov/sites/default/files/reports/2022-08/15-008AUD.pdf.

[3] House Oversight Committee Report, "The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses?", 1 (May 29, 2014), https://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf.

terminate business relationships with lawful lenders that provided short-term credit options to underserved consumers, such as payday loans.[4]

Debanking and Operation Choke Point are not, technically, the same thing. But there is overlap between the two concepts and, in their most current iteration, they are focused on the same result—slowing or terminating the expansion of digital asset services into the U.S. banking system.

On November 26, 2024, Marc Andreessen, general partner of venture capital firm Andreessen Horowitz, commented on *The Joe Rogan Experience* podcast about alleged debanking which drew interest from founders of and individuals related to crypto and other digital assets companies who had lost their banking relationships, often without notice or explanation. In addition, in early December 2024, the U.S. District Court for the District of Columbia compelled the FDIC to produce a series of "pause" letters that, as a practical matter, acted as directives to banks to cease any crypto business in which they engaged and, at least indirectly, to terminate banking relationships with crypto companies and related individuals.[5]

There also is a purported whistleblower group called "FDIC Exposed" that claims to possess additional documents and recordings that allegedly confirm the FDIC's debanking efforts. While those claims have not been confirmed, government whistleblowers were important in bringing OCP 1.0 to the forefront and, ultimately, to an end.

In addition, in Section 1(a)(iii) of Executive Order 14178 of January 23, 2025, on crypto ("Strengthening American Leadership In Digital Financial Technology"), the second Trump Administration noted that it will support the responsible growth

[4] *Id.* at i–ii (while the FDIC OIG concluded that "With the exception of payday lenders, [it] found no instances among the financial institutions [it] reviewed where the FDIC pressured an institution to decline banking services to a merchant on the high-risk list," nevertheless, "references to specific merchant types in the summer 2011 edition of the FDIC's Supervisory Insights Journal and in supervisory guidance created a perception among some bank executives that [the FDIC OIG] spoke with that the FDIC discouraged institutions from conducting business with those merchants"). *See also*, FDIC Vice Chair Travis Hill, "Charting A New Course: Preliminary Thoughts On FDIC Policy Issues", Speech Before Banking Law Comm. of Am. Bar Ass'n, (January 10, 2025) (hereinafter "Hill Policy Remarks")

[5] Minute Order, *History Associates Inc. v. FDIC*, No. 1:24-cv-1857-ACR (D.D.C. Dec. 12, 2024). The FDIC reproduced the "pause" letters on January 3, 2025, which are available at https://www.fdic.gov/foia/history-associates-inc-v-fdic-fdics-redacted-pause-letters-january-3-2025.

and use of digital assets by, among other things, "protecting and promoting fair and open access to banking services for all law abiding individual citizens and private sector entities alike," suggesting a general concern about debanking.

Allegations of debanking and OCP 2.0 have led to calls for remediation, transparency, and accountability from those who have been affected. However, the framework of statutes, regulations, guidance, and supervisory practices and expectations that exist today makes attaining effective remedies against the federal government challenging or simply too costly for banks and other regulated and supervised entities.[6]

In this review, I first will focus on the regulation and supervision of banks and notable ways that federal banking agencies and other federal regulators have used these tools in unpredictable and unfair ways, notwithstanding the need for effective regulation and supervision of the financial system.

Then I will set forth an analysis of the challenges to and potential remedies for claims against the government for those harmed by debanking and Operation Choke Point 2.0, whether individuals or entities. For example:

- When U.S. citizens have been harmed by federal government misconduct do they have remedies, what are they and how may they be secured?
- Can the victims of government conduct that deprives them of their constitutional rights obtain economic remedies?
- How may government actors from so-called "independent" agencies be held accountable?
- Are there alternative remedial methods that might be employed?

2. Regulation and Supervision of Banks—Conduct that Allows Debanking and OCP 1.0 and OCP 2.0 to Happen

Banks are heavily regulated and supervised unlike any other entities in the United States. Broadly speaking, regulation involves the rules that apply to all regulated entities, while supervision means the entity-specific requirements, expectations, and standards that the federal banking and others may impose on them. Both

[6] For simplicity, we generally refer to "banks," unless otherwise noted.

are motivated by a desire to prevent macro-prudential and micro-prudential risks, promote safety and soundness, prevent financial crimes, consumer harm, and other goals. But while regulation is public, supervision is secret. For instance in regulation, federal agencies prescribe standards that apply to banks generally, such as lending limits; in supervision, examiners scrutinize each bank's specific loan activities and issue confidential criticisms about those loans, their underwriting, concentration, or other factors.

2.1. Reputational Risk as an Amorphous Supervisory Tool

Prior to the mid-1990s, bank supervisors did not specifically regulate so-called "reputational risk." Their primary focus was on the fundamental components of safety and soundness, capital, credit, and market risk. However, the OCC and the Federal Reserve Board both began to develop new "risk focused" supervisory approaches. Each federal banking regulator developed its own list of risks, but each chose to include reputational risk. Over time, the regulators broadened the list of "stakeholders" who might be affected by reputational risk to include not only investors and customers, but counterparties, correspondents, employees and the regulators themselves.[7] To demonstrate the breadth of the concept, the Federal Reserve Board explicitly noted that "negative publicity" could present reputational risk, even if the publicity is not true.[8]

Without notice or comment as would be expected for a rulemaking, in 1996 the bank examiners modified the centerpiece of bank supervision, the Uniform Financial Institutions Ratings System known by the acronym "CAMELS" (**C**apital adequacy, **A**sset quality, **M**anagement, **E**arnings, **L**iquidity and **S**ensitivity (to interest rate changes)),[9] to include reputational risk as part of both the asset quality and management ratings. CAMELS was created in 1979 to measure a bank's financial condition and operations. This change would have sweeping consequences for both banks.[10]

[7] OFFICE OF THE COMPTROLLER OF THE CURRENCY (hereinafter, "OCC"), LARGE BANK SUPERVISION HANDBOOK 64 (2018).

[8] BD. OF GOVERNORS OF THE FED. RESERVE SYS. (hereinafter, "Federal Reserve Board"), COMMERCIAL BANK EXAMINATION MANUAL § 4012.1 (2019).

[9] While there are other ratings systems too, for simplicity I focus on CAMELS here.

[10] *See* Julie A. Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523 (2019).

The concept of reputational risk is not consistently clear or based on objective indicia. Reputational risk is thought of as ancillary to credit risk, operational risk and other primary risks managed by banks. But because of its mutable nature, reputational risk is present in every facet of banking.[11] In short, regulators can find reputational risk almost wherever they choose to look. It was ripe for use in a program of debanking.

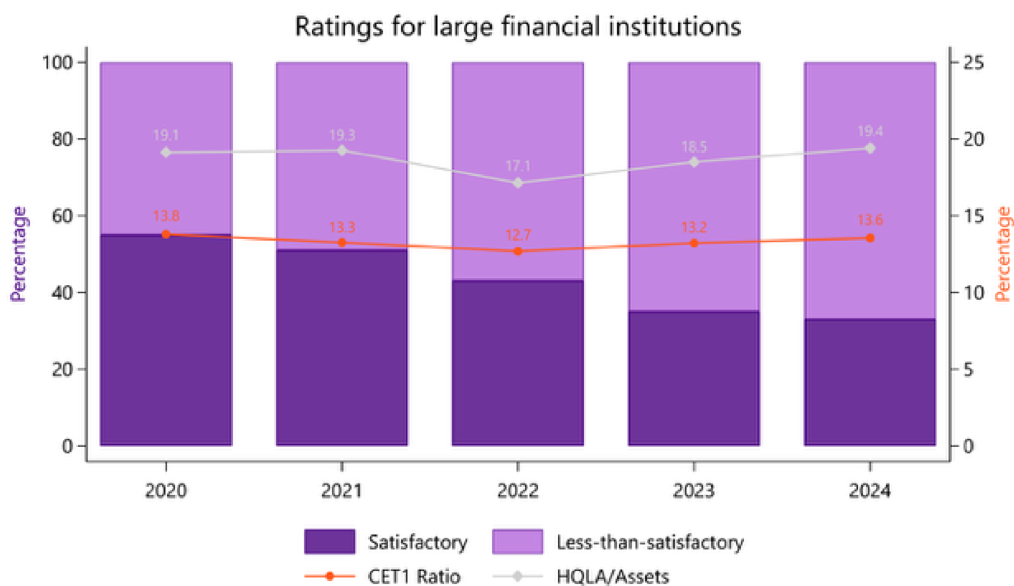
Because regulators list *themselves* as among the so-called "stakeholders" to whom reputational risk is relevant, any finding of reputational risk is—by definition—nearly indisputable.

Reputational risk is not necessarily tied to a violation of law but often arises in connection with Matters Requiring Attention ("MRAs"), which are both issued and resolved outside of the public view and can prompt a downgrade in a bank's Management or composite rating under the CAMELS ratings system. Even if all other rating elements are strong, an unsatisfactory management rating may affect the bank's ability to engage in acquisitions, engage in various activities, or add branches—any or all of which can drive fundamental changes to a bank's strategic plan. These kinds of ratings downgrades are effectively unappealable (appeals processes exist, but chances of success are rather low: in 2024, banks had a win-loss record in appeals of 0–12). For banks, such downgrades are to be avoided at all costs. That, of course, provides tremendous leverage to bank examiners to dictate their desired results. Indeed, the Bank Policy Institute ("BPI") recently opined that "[e]xaminers use the 'M' in 'CAMELS' as a weapon to dictate bank behavior."[12]

The results of such unbound discretion can be seen in the below chart, demonstrating that despite record levels of capital and liquidity, two-thirds of large banks are considered *not* well-managed by the Federal Reserve Board. The disconnect between the regulators' perception and the market is telling.

[11] *Id.* at 552.

[12] *Bank Supervision is Broken. Here's How to Fix It*, BANK POLICY INST. (Nov. 19, 2024), https://bpi.com/bank-supervision-is-broken-heres-how-to-fix-it/.



Note: Large financial institutions are rated according to three components: Capital Planning and Positions; Liquidity Risk Management and Positions; and Governance and Controls. Bars show the percentage of satisfactory and less-than-satisfactory ratings across all components. The 2024 value is as of the end of 2024:Q2. Data are revised since the publication of the May 2024 Supervision and Regulation Report.
Source: Internal Federal Reserve supervisory databases, FR Y-9C.

In Congressional testimony on July 15, 2014, former FDIC Chair William Isaac described OCP 1.0 as "one of the most dangerous programs I have experienced in my 45 years of service as a bank regulator, bank attorney and consultant, and bank board member."[13] He further noted that: "No one really knows what reputational risk means beyond the fact that a bank is doing something that a regulator doesn't like but can't quantify in terms of risk under the CAMELS rating system. This development has been a major factor in shifting the banking agencies from their primary role as guardians of the safety and soundness and stability of the financial system to amorphous financial social welfare agencies."[14] In a 2025 webinar, Mr. Isaac stated that if federal bank regulators wish to make a lawful activity illegal, they should go to Congress and ask that it be made illegal.[15]

[13] Testimony of William M. Isaac, Senior Managing Director, FTI Consulting, Inc. & Former FDIC Chairman, Before the Subcomm. on Fin. Inst. & Consumer Credit of the H. Comm. on Fin. Servs. (July 15, 2014), https://financialservices.house.gov/uploadedfiles/hhrg-113-ba15-wstate-wisaac-20140715.pdf.

[14] *Id.*

[15] *Davis Wright Tremaine Webinar*, Secura Isaac (Jan. 14, 2025), https://securaisaac.com/news/davis-wright-tremaine-webinar. For instance, according to the FDIC's OIG, "in early 2011 the FDIC

a) Negative Impact of Reputational Risk on Banks

The intensified use of reputational risk also had a negative impact on banks themselves because it inserted bank examiners into the actual business of managing a bank as opposed to supervising risks to a bank's safety and soundness. And this was done in ways for which, as noted above, most banks were powerless to object. BPI commented on this non-public regime in 2017, 2020, and again in 2024:

- In 2017, BPI noted that reputational risk is "rarely, and likely never, a safety and soundness risk."[16]
- In 2020, BPI observed that examining for reputational risk can devolve into "examination as political consulting."[17]
- In 2024, that theme was expanded on when BPI opined that bank examiners have expanded their supervisory powers to the point that it "is subject to no checks and balances" and "operates in secret based on the varying views of individual examiners, and the agencies have created their own enforcement regime, not based on rule or law, to impose significant penalties on banks that do not follow their mandates. These penalties can be severe and greatly affect the ability of banks to run their business; they range from limits on the business growth, orders to divest from certain lines and customers, denials of mergers and acquisitions and increases in deposit insurance fees, among other things."[18]

Adding to the challenge, the federal banking agencies can pursue these actions without direct, written orders or other directives. According to Professor Todd

employed extraordinary examination resources in an attempt to identify compliance violations that would require the bank to exit [Refund Anticipation Loans]," specifically the FDIC sent "an unprecedented 400 examiners to examine to 250 tax preparers throughout the country and [one] bank." FDIC, OFFICE OF INSPECTOR GEN., REPORT NO. OIG-16-1001, REPORT OF INQUIRY INTO THE FDIC'S SUPERVISORY APPROACH TO REFUND ANTICIPATED LOANS AND THE INVOLVEMENT OF FDIC LEADERSHIP AND PERSONNEL iii (2016), https://www.fdicoig.gov/sites/default/files/reports/2022-08/OIG-16-001_0.pdf.

[16] Greg Baer, *Rethinking Safety and Soundness Supervision*, BANK POLICY INST. (Aug. 31, 2017), https://bpi.com/rethinking-safety-and-soundness-supervision.

[17] Greg Baer, *How and Why Regulators Protecting the Reputations of Banks?*, BANK POLICY INST. (Jan. 10, 2020), https://bpi.com/how-and-why-are-regulators-protecting-the-reputations-of-banks.

[18] *Bank Supervision is Broken. Here's How to Fix It*, supra note 10.

Zywicki of George Mason University's Antonin Scalia Law School, "What banks understand is the government just doesn't make suggestions. When the government suggests something, everyone understands that's an order, and that's how banks respond."[19]

The 2024 BPI article further examines how reputational risk enables bank examiners to abuse their power: "Today's examiners are using the examination process to push banks out of legitimate activity that benefits economic growth.… [B]ank examiners now feel empowered to tell individual banks how to run their businesses by shedding business lines or clients as they have a strong incentive to find problems and prevent banks from taking risk."[20]

For instance, in anti-money laundering examinations, agencies "can designate certain industries or companies [such as crypto] as 'high risk,' a designation that comes with so high a compliance burden as to force the bank to expel the customers from the bank."[21] And this conduct is not limited to politically unpopular businesses as noted above. In fact, examiners also have pushed banks out of the mortgage servicing business, leveraged lending, synthetic risk transfers, and relationships with third-party non-bank service providers.

b) Knock-on Effects

The misuses of reputational risk and debanking are by no means restricted to the crypto community. Banks are in the business of making loans that are safe and sound and which stimulate economic growth. Outside of financial crimes, sanctions and related contexts—when regulators interpose themselves between a bank and its customers by, in effect, telling banks which customers it may or may not bank, all parties suffer. Moreover, there is little predictability or logic to the regulators' decisions, and therefore they are not helpful to industry participants looking to understand the contours of permissible activities and other articulated policies.

Thus, MRAs should be redefined to be limited to a *material and present financial* risk to a bank and not simply the latest "flavor-of-the-month" risk (*e.g.*, reputational, climate, third-party, talent, compensation, governance risk) unless such risk

[19] Rupa Subramanya, *The Debanking of America*, THE FREE PRESS (Oct. 17, 2024), https://www.thefp.com/p/debanking-america-melania-barron-trump-january-6-muslims.

[20] *Bank Supervision is Broken. Here's How to Fix It*, supra note 10.

[21] *Id.*

also meets the objective test of a likelihood of material and present financial harm.[22] Indeed, the "M" element of the CAMELS system has become so subjective and so dominant that it suggests a need for either replacement of that element with a more objective standard or a rethinking of current CAMELS framework.

In a similar vein, federal bank regulators use the term "safety and soundness" in a rather malleable way, covering activities which they do not like and can connect to nearly any form of risk. Notably, "unsafe or unsound practice" is not defined in the Federal Deposit Insurance Act, but courts have generally interpreted the term as referring to two components: (1) an imprudent act (2) that places an abnormal risk of financial loss or damage on a banking institution.[23] Many MRAs referring to safety and soundness simply do not make the connection to this serious level of *financial* risk. Often, other concepts such as "operational risk" stand in as a substitute. Yet, for instance, the banking industry is among the most organized and resilient against cyberattacks.

And, reconsidering the above chart, Federal Reserve Board guidance says that a well-managed firm "has sufficient financial and operational strength and resilience to maintain safe and sound operations through a range of conditions, including stressful ones."[24] Therefore, if the same agency is correct that approximately two-thirds of the large banks in the United States are *not* well managed, then those findings either amount to a major crisis or are meaningless.

2.2. Confidential Supervisory Information Used Overbroadly

Supervisory scrutiny takes place out of public view primarily through implied or express threats to issue MRAs and downgrade CAMELS ratings from prudential regulators. These decisions and the communications surrounding them fall under Confidential Supervisory Information ("CSI") protections, which the federal

[22] This would also limit the use of "industry MRAs" which are, in fact, another form of rulemaking which is executed outside the protections of the Administrative Procedure Act and the Congressional Review Act.

[23] *See Seidman v. Office of Thrift Supervision (Matter of Seidman)*, 37 F. 3d 911, 926-27 (3d Cir. 1994); *Michael v. FDIC*, 687 F. 2d 337, 352 (7th Cir. 2012); *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000).

[24] *See, e.g.*, 83 Fed. Reg. 58729 (November 21, 2018).

banking agencies have codified in regulation.[25] CSI includes reports of examination and inspection, confidential operating and condition reports, and any information derived from, relating to, or contained in them and any documents prepared by, or on behalf of, or for the use of the agencies.[26] It essentially covers any examination activity. Regulators consider CSI their property and that the unauthorized disclosure of CSI is prohibited and punishable as a felony.[27]

Under this veil of supervisory secrecy, the federal banking agencies could pursue a policy of debanking while publicly stating that they neither prohibit nor discourage banks from doing business with any specific industries or businesses. Bank examiners have been able to use reputational risk and CSI to achieve policy goals to penalize unfavored industries or individuals without the individuals having either any effective recourse or even knowledge as to why they were debanked.

There is a complete absence of any process allowing an individual to contest such a decision. Other critics maintain that this practice also violates the Administrative Procedure Act ("APA") because it acts as a *sotto voce* alternate for rulemaking. This cuts against the need for transparency in rulemaking. As noted by the previous Federal Reserve Board Vice Chair for Supervision, in delegating to federal banking agencies the significant power to write regulations, Congress also codified "a regulatory process that emphasizes transparency. … This transparency is intended to prevent arbitrary, capricious, and thus ineffective regulation by inviting broad public participation and mandating a deliberate public debate over the content of proposed rules. … Transparency is central to our ability to assert that our rules are fair."[28]

2.3. OCP 1.0 and Banking (2013–2017)

Debanking first arose during the Obama Administration when legal but politically disfavored businesses with activities involving payday lending, firearms,

[25] *See* 12 C.F.R Part 4 Subpart C (OCC); 12 C.F.R. Part 261 Subpart C (Federal Reserve Board); 12 C.F.R. Part 309 (FDIC); *see also* 12 C.F.R. Part 1070 (CFPB).

[26] *Id.* at 121.

[27] 18 U.S.C. § 641.

[28] Randall K. Quarles, Vice Chair for Supervision, Board of Governors of the Federal Reserve System, "Spontaneity and Order: Transparency, Accountability, and Fairness in Bank Supervision," Speech Before Banking Law Comm. of Am. Bar Ass'n (January 17, 2020), https://www.federalreserve.gov/newsevents/speech/quarles20200117a.htm.

tobacco, fossil fuels, among others, began to receive negative attention from federal banking agencies. Examiners allegedly encouraged banks to end their relationships with these businesses, thus “choking” them off from the financial system.

For banks, OCP 1.0 was essentially governed by bank regulators’ subjective perceptions of which businesses were unsavory and, therefore, might pose so-called “reputational risk” to banks that had them as customers. It had two general components: (1) agencies would publish informal guidance, and (2) exert pressure on banks within the highly confidential confines of examinations.[29]

a) OCP 1.0 Is Challenged in Court

In 2014, OCP 1.0 was challenged in the U.S. District Court for the District of Columbia by a trade association of payday lenders which sued the FDIC, the OCC and the Federal Reserve Board.[30]

While denying the APA claim, the court ruled that plaintiffs had stated an appropriate due process claim under the Fifth Amendment. The court found that the plaintiffs’ interest in conducting a legal business was protected as an interest in property. The court noted that the stigma applied by the regulators which caused plaintiffs to lose their bank account was a colorable allegation of a property interest in a bank account which was sufficient to support a due process claim.[31] The court found that “where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”[32]

b) Congressional Review and Criticism of OCP 1.0

At the same time, Congressional and trade group criticism of OCP 1.0 substantially increased, with senior legislators such as Representative Jeb Hensarling issuing warnings that the newly defined concept of reputational risk could easily “be invoked to compel a depository institution to sever a customer relationship with a small business operating in accordance with all applicable laws and regulations, but

[29] David H. Thompson et al., *Operation Choke Point 2.0: The Federal Bank Regulators Come for Crypto*, Cooper & Kirk, PLLC (Mar. 24, 2023), https://www.cooperkirk.com/wp-content/uploads/2023/03/Operation-Choke-Point-2.0.pdf.

[30] *Comm. Fin. Servs. Ass’n of Am. v. FDIC*, 132 F. Supp. 3d 98 (D.D.C. 2015).

[31] *Id.* at 121.

[32] *Id.* (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

whose industry is deemed reputationally risky for no other reason than it has been the subject of unflattering press coverage, or that certain executive branch agencies disapprove of its business model[,]" while others described it as an "illegal and abusive practice."[33] And, in a highly critical staff report issued in May 2014, the Committee on Oversight and Government Reform concluded that OCP 1.0 forced banks to terminate relationships with a wide variety of entirely lawful and legitimate merchants and that the DOJ lacked adequate authority for the initiative.[34] Ultimately, this pressure caused the FDIC to amend its guidance on these matters, in 2017 the DOJ informed Congress it was ending OCP 1.0, and the civil litigation was ultimately resolved during the first Trump Administration in 2019.

However, while this may have appeared to be a win for plaintiffs and for those affected, there was no lasting accountability for this regulatory misconduct for the federal banking agencies.

2.4. What Is Old Is New Again: OCP 2.0 (2021–2024)

Even after the end of OCP 1.0, the federal banking agencies leveraged their supervisory powers to effectively direct bank conduct in ways that have been difficult to counter. Without lasting accountability for the federal agencies,[35] and with the encouragement of the Biden Administration, these same tools were available when federal banking agencies perceived the rising popularity of digital assets as a threat in OCP 2.0.

There has been a recent outpouring of alleged examples of debanking on social media by commenters involved in the digital asset industry—as well as the fintech industry more broadly. These commenters claim that they were not only debanked but were denied access to products such as payment services and card processing.

[33] Letter from Rep. Jeb Hensarling, Chairman, H. Comm. on Fin. Servs., to Janet Yellen, Chair, Federal Reserve Board (May 22, 2014); Press Release, Rep. Blaine Luetkemeyer, Luetkemeyer Reintroduces Legislation to Protect More Americans from Operation Choke Point (Feb. 15, 2015), https://luetkemeyer.house.gov/news/documentsingle.aspx?DocumentID=398536.

[34] Press Release, Federal Reserve Board et al., Joint Statement on Crypto-Asset Risks to Banking Organizations (Jan. 3, 2023), https://www.federalrserve.gov/newsevents/pressreleases/files/bcreg20230103a1.pdf.

[35] *See* C. Boyden Gray, *The FDIC's "Operation Choke Point" Settlement Doesn't Make Victims Whole*, REAL CLEAR MARKETS (June 26, 2019), https://www.realclearmarkets.com/articles/2019/06/26/the_fdics_operation_chokepoint_settlement_doesnt_make_victims_whole_103798.html.

Some observers also claim that the overall debanking effort in OCP 2.0 had a direct connection to the failure of both Silvergate Bank and Signature Bank, both of which had provided significant services to the crypto industry through their respective 24/7 crypto settlement layers, SEN and SigNet. For instance, some believe Silvergate Bank's growth was fatally undermined by the imposition of a non-public limit on crypto customer deposits to no more than 15 percent of the bank's total deposits, making its business model unsustainable. Silvergate Bank described it in a more anodyne (though chilling) fashion in its Chapter 11 filing, stating: "[T]he federal bank regulatory agencies would not tolerate banks with significant concentrations of digital asset, customers, ultimately preventing Silvergate Bank from continuing its digital asset focused business model."

Signature Bank was put into receivership while *still solvent*, over the protests of its board member, former House Financial Services Committee Chair Barney Frank, who opined that Signature Bank's closure was "just a way to tell people, 'We don't want you dealing with crypto.'"[36] The FDIC noted that the reason for the closure of Signature Bank was rooted in what the FDIC perceived to be "poor management" and communication.[37] Remarkably, the FDIC refused to sell off Signature Bank's crypto-focused deposits or its SigNet product,[38] contrary to its policy of maximizing value for taxpayers and minimizing costs to the Deposit Insurance Fund by selling assets at the best possible prices.

Notably, other crypto-friendly banks and their customers, were subsequently targets of regulatory action. Moreover, OCP 2.0 may provide an explanation for why the OCC denied national trust bank charters—via the expiration of time—to both Protego and Paxos after they had been conditionally approved. OCP 2.0 may also be connected to the denial of Fed Master Account services (ACH/FedWire) to state-chartered novel institutions like Custodia Bank (a special-purpose depository

[36] Geoff Mulvihill, *Barney Frank Coauthored the Dodd-Frank "Too Big to Fail" Law. Now He Says His Bank's Failure Was A Message About "Dealing With Crypto."*, FORTUNE (Mar. 13, 2023).

https://fortune.com/2023/03/13/signature-bank-seized-to-send-a-message-crypto-barney-frank.

[37] FDIC, FDIC'S SUPERVISION OF SIGNATURE BANK (Apr. 28, 2023), https://www.fdic.gov/news/press-releases/2023/pr23033a.pdf.

[38] Nic Carter, *Insider the Biden Admin's Plot to Destroy Silvergate and Debank Crypto For Good*, PIRATE WIRES (Sept. 25, 2024), https://www.piratewires.com/p/inside-biden-admin-plot-to-destroy-silvergate-and-debank-crypto-for-good-nic-carter.

institution chartered under Wyoming law).[39] Finally, it also may provide insight into why a consent order was issued to Customers Bank and why Metropolitan Bank stopped serving crypto customers. The message was simple: banks and crypto are not to be mixed.[40]

In 2023, the regulators issued a joint statement briefly saluting the concept that banks "are neither prohibited nor discouraged from providing banking services to customers of any specific class or type ..." while at the same time stating that the issuing or holding of crypto assets "… is highly likely to be inconsistent with safe and sound banking practices."[41] Under that standard, even the holding of stablecoins backed 100 percent by U.S. dollars or U.S. Treasuries would be deemed to be inconsistent with safety and soundness principles. Thus, if Federal Reserve Board Chairman Powell's recent statement that banks are "perfectly able" to serve crypto customers is the policy of the Federal Reserve Board,[42] the Federal Reserve Board should withdraw the language from the 2023 joint statement.

Nonetheless, understanding regulatory actions in this space requires a balanced approach. There is no question that digital assets carry risk, and that regulation has a crucial role to play in ensuring that fair disclosures are made regarding those risks, safety and soundness is promoted, and practical measures are implemented to combat money laundering, terrorism financing, and related criminal activity. However, friction has arisen regarding how to achieve these goals in a way that is consistent with the beneficial features of this new technology and its

[39] Notably, Custodia Bank was denied access to the Federal Reserve Board's payment systems even though deposits are 100 percent reserved and Custodia Bank complies with all of Wyoming's investor protection standards, including compliance standards evidenced by a 700 page manual. Custodia is in litigation with the Federal Reserve Board and the Federal Reserve Bank of Kansas City. It is notable that in that litigation, defendants claim that Regional Federal Reserve Banks (which are not federal agencies) have complete discretion as to whether to grant or deny a Master Account to any applicant. Thus, as a practical matter, it appears that the government contends that access to a payment system established and paid for by the government can be denied by a non-government actor with no appeal or recourse.

[40] Dan Ellis, *Custodia Takes A Step Back Ahead of Trump Term*, Banking Dive (Nov. 26, 2024), https://www.bankingdive.com/news/custodia-caitlin-long-fed-sec-trump-crypto-court/734068.

[41] Press Release, Federal Reserve Board et al., Joint Statement on Crypto-Asset Risks to Banking.

Organizations (Jan. 3, 2023), https://www.federalrserve.gov/newsevents/pressreleases/files/bcreg20230103a1.pdf.

[42] Jerome Powell, Chair, Federal Reserve Board, Transcript of Press Conference (Jan. 29, 2025), https://www.federalreserve.gov/mediacenter/files/FOMCpresconf20250129.pdf.

opportunities. Fortunately, proposed rulemaking and legislative solutions are already part of the public record, and they can provide a solid foundation on which to build a workable and reasonable program of regulatory oversight and compliance.

OCP 2.0 appears to have been broader and more coordinated than OCP 1.0 and may ultimately prove more difficult to unwind. Below we examine some of the tools used by the federal banking agencies in their debanking efforts in this more recent iteration.

2.5. Subregulatory Action: Shrouded In Secrecy and Lacking a Legal Basis

a) Guidance—Generally

Federal agencies produce a wide range of materials. So-called legislative rules in administrative law are substantive regulations that agencies issue to implement statutory authorities, and subject to some exceptions, federal agencies must generally conduct notice-and-comment rulemaking before adopting legislative rules under the APA.[43] Non-legislative rules include interpretive rules and policy statements, which are often called guidance documents.[44] They include "letters, 'Frequently Asked Questions,' bulletins, and other informal guidance that exist on websites, manuals, and everywhere in between … [c]ritics have called [them] 'regulatory dark matter.'"[45]

Technically, "[s]ubregulatory guidance isn't law—it's just paper."[46] But in an era of deference to federal agencies under the now repudiated *Chevron* doctrine (court deference to agencies for rulemakings) and the not-yet-repudiated *Auer* doctrine (court deference to agencies for their own guidance), there is "a real risk that guidance can, practically speaking, end up having the same effect as regulation."[47]

[43] ADMIN. CONFERENCE OF THE UNITED STATES, INFORMATION INTERCHANGE BULL. NO. 34, DISTINGUISHING BETWEEN LEGISLATIVE RULES AND NON-LEGISLATIVE RULES (2024), 34 Distinguishing Between Legislative Rules and Non-Legislative Rules.pdf.

[44] *Id.*

[45] Claire McCusker Murray, Principal Deputy Associate Attorney General, Remarks at the Compliance Week Annual Conference (May 20, 2019), https://www.justice.gov/opa/speech/remarks-principal-deputy-associate-attorney-general-claire-mccusker-murray-compliance.

[46] *Id.*

[47] *Id.*

b) When Mere Paper is Treated as the Law

It may seem unusual that unenforceable guidance—mere paper—has such power over banks as well as their vendors and customers. A significant part of the reason for this practice stems from the difficulty banks have in challenging the actions of federal regulators because federal banking agencies claim that all examination materials amount to CSI. According to the federal banking agencies, all materials conveyed by them and all materials produced by a bank (even those which have been generated by the bank itself) are CSI.[48] Thus, much if not all of the reasoning for material supervisory determinations made by the regulators is hidden from the public.

Indeed, the regulators take the view that CSI is their "property," and therefore, the disclosure of CSI is a criminal violation of 18 U.S.C. § 641, which prohibits the *theft* of government property. Bank examiners state this proposition as if it is settled law, but it is far from clear. Indeed, as this committee has heard in previous testimony, the absence of support in federal law "for many of the secrecy traditions of the banking regulators will surprise many who have accepted them as if they were contained in hallowed texts."[49] In fact, "the federal banking regulators used the passage of FOIA in the mid-1960s, a statute meant to expand the scope of information available to the public, to expand their zone of confidentiality beyond the scope of the traditional bank examination."[50] Moreover, the federal regulators' reliance on federal law as a buttress for their claims of confidentiality is less than strong: "There is no federal statute that explicitly prohibits anyone other than bank examiners from disclosing the bank examination or parts of it, such as CAMELS or other ratings."[51] While there is a federal criminal statute that prohibits *bank examiners* from disclosing the results of an examination, there is no comparable statute

[48] *See, e.g.*, 12 C.F.R. § 4.32(b)(1)(i)(A) (defining non-public OCC information to include "a record created or obtained … [b]y the OCC in connection with the OCC's performance of its responsibilities, such as a record concerning supervision, licensing, regulation, and examination of a national bank.").

[49] STATEMENT OF MARGARET E. TAHYAR BEFORE THE S. COMM. ON BANKING, HOUSING, & URBAN AFFAIRS (Apr. 30, 2019), https://www.banking.senate.gov/imo/media/doc/Tahyar%20Testimony%204-30-19.pdf (hereinafter, "Tahyar Statement").

[50] Tahyar Statement, at 3.

[51] *Id.* at 6.

imposing a similar requirement on the bank being examined.[52] However, the Comptroller of the Currency, if not satisfied with the response of a national bank, may disclose an examination.[53] Thus, the statutory burden for keeping examinations confidential falls far more upon the federal regulators than the banks.

That is not, however, the current state of play. As any bank or practitioner knows, the current "informal nonpublic shadow system of regulation is neither transparent nor accountable."[54] What the current confidentiality strictures consist of "are not rules at all, but a series of oral principles, not made public nor written down, but which reflect the views of some legal staff at a moment in time."[55] Thus, as in the case of debanking, confidentiality shields the supervisors' actions from public scrutiny. It is one thing if confidentiality is chosen to protect financial stability, national security, trade secrets, or the like. But when it is chosen to protect the regulator from public scrutiny, it is not appropriate.

Moreover, the entire concept of CSI is on uncertain legal ground. Whether 18 U.S.C. § 641 provides support for the regulators' claim that bank examination materials (including those generated by the bank in the ordinary course of business) is dependent on whether such information amounts to "property" of the government. A robust line of U.S. Supreme Court cases makes clear that only traditional forms of property count as "property" for purposes of federal criminal law and have rejected efforts to apply the federal fraud statutes to matters involving "intangible" rights.[56] Recently, in *Kelly v. United States*, the U.S. Supreme Court unanimously held that, if the object of a fraud was not traditional property, then any "incidental" effects on property are insufficient to support wire fraud liability.[57] After *Kelly*, the

52 *Id.* at 6 n.11; *see* 18 U.S.C. § 1906.

53 Tahyar Statement, at 6 n.11; *see* 12 U.S.C. § 481.

54 Tahyar Statement, at 11.

55 *Id.*

56 *See Cleveland v. U.S.*, 531 U.S. 12, 24 (2000) (re-affirming that federal statutes cannot be used to punish loss of "intangible rights unrelated to money or property"); *McNally v. U.S.*, 483 U.S. 350, 360 (1987) (holding that mail fraud statute is "limited in scope to the protection of property rights"); *Carpenter v. U.S.*, 484 U.S. 19, 25–26 (1987) (requiring the object of a fraud to be something that has "long been recognized as property"). Additionally, while Congress may delegate its authority to agencies to define criminal punishments, it must "make[] the violation of regulations a criminal offense." *Loving v. United States*, 517 U.S. 748, 768 (1996). Here, Congress has never made violation of the banking agencies rules a crime.

57 590 U.S. 391, 400–404 (2020).

government changed its position in similar "property" cases. In the year before *Kelly* was decided, the Second Circuit held that certain confidential regulatory information was government property under the federal statutes.[58] As a result of *Kelly*, the DOJ changed positions, telling the Second Circuit that confidential regulatory information does not bear any direct connection to traditional concepts of property.[59] The Second Circuit agreed with that confession of error, holding that the prosecution in that case was invalid under *Kelly.*[60]

Moreover, the assertion of criminal liability in connection with CSI has significant constitutional concerns. It amounts to an across-the-board gag rule essentially creating a system of prior restraint contrary to the First Amendment. Prior restraints on speech imposed by the government almost never survive constitutional challenge.[61] And here, it is clear that disclosure of CSI by banks is speech. Moreover, content-based restrictions on speech trigger the highest level of strict scrutiny.[62] The principle of lenity supports this reading of the statute.[63] And, as Justice Sotomayor recently explained in *Dubin v. United States*, the government's "boundless" interpretation of a statutory text stands in contrast to the Court's traditional restraint in assessing the reach of a criminal statute.[64] Creative interpretations are disfavored when criminal penalties are at stake: "[c]rimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language."[65]

58 *United States v. Blaszczak*, 947 F.3d 19 (2d Cir. 2019).

59 Appellee's Br. at 7–9, *United States v. Blaszczak*, No. 18–2811 (2d Cir. Apr. 2, 2021), ECF No. 453.

60 *United States v. Blaszczak*, 56 F.4th 230, 243 (2d Cir. 2022).

61 *See Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

62 *See, e.g.*, *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015) ("Content-based laws ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

63 *See Wooden v. United States*, 595 U.S. 360, 383–97 (2022) (Gorsuch, J., concurring). Moreover, as the Framers saw it, "subjecting … men to punishment for things which, when they were done, were breaches of no law … ha[s] been, in all ages, the favorite and most formidable instrument of tyranny." THE FEDERALIST NO. 84 (Alexander Hamilton).

64 599 U.S. 110 (2023).

65 *Id.* at 129–30 (quoting *United States v. Spears*, 729 F.3d 753, 758 (7th Cir. 2013)).

In short, when it comes to CSI, it appears increasingly likely that the government's reach has exceeded its grasp and that reach may soon be further truncated by the courts.

In any event, such resistance to disclosure appears contrary to the second Trump Administration's actions concerning transparency in financial services regulation to-date. For example, in a January 9, 2025 speech, Federal Reserve Board Governor Michelle Bowman stated plainly: "Regulators should operate in a transparent way and carefully and meticulously follow administrative procedures when making revisions to the regulatory framework there we go we should take a similar approach to shifts in supervisory focus. Doing so promotes trust and accountability to the public ....".[66]

2.6. Limits on Crypto Imposed By Regulatory Statements

In July 2020, the OCC determined in a series of interpretive letters that (1) cryptocurrency custody services for customers, (2) holding stablecoin reserves, and (3) the use of independent node verification networks and stablecoins for payment activities, are permissible activities for national banks and federal savings associations.[67] These interpretive letters have never been rescinded and still provide direction to national banks, federal savings associations, and any state banks that can engage in the same activities as national banks under so-called "wild card" state statutes.

But in a series of subsequent interpretive letters, the federal banking agencies appointed themselves as gatekeepers for all bank-related crypto activity.[68] It became obvious that the gate was not going to open as long as the bank regulators had

[66] Michelle W. Bowman, Governor, Federal Reserve Board, Reflections on 2024: Monetary Policy, Economic Performance, and Lessons for Banking Regulation, Speech Before California Bankers Association 2025 Bank Presidents Seminar (Jan. 9, 2025), https://www.federalreserve.gov/newsevents/speech/bowman20250109a.htm.

[67] OCC, Interpretive Letter 1170 (July 22, 2020); OCC, Interpretive Letters 1172 (Sept. 21, 2020); OCC, Interpretive Letter 1174 (Jan. 4, 2021).

[68] *See* Federal Reserve Board, Supervision and Regulation Letter SR 22-6/CA 22-6 (Aug. 16, 2022); FDIC, Financial Institutions Letter FIL-16-2022 (Apr. 7, 2022); OCC, Interpretive Letter 1179 (Nov. 18, 2021). As a technical matters, these releases are guidance and therefore unenforceable. Press Release, Federal Reserve Board et al., Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018), https://www.fdic.gov/news/press-releases/2018/pr18059a.pdf. However, in the event, they were enforced and followed.

anything to say about it. This was reenforced by President Biden's Executive Order 14067 ("Ensuring Responsible Development of Digital Assets") and culminated in the January 2023 interagency "Joint Statement on Crypto-Assets Risks to Banking Organizations," in which the federal banking agencies told the banking industry that crypto activity would be seen as "highly likely to inconsistent with safe and sound banking practices." For any bank that cared about its CAMELS ratings, the message was clear.

a) The Pause Letters

That messaging (which, despite a promised "crypto sprint"[69] was never followed by any guidelines as to how crypto activities might be *approved*), was amplified when the federal banking regulators began a process of contacting banks to tell them to "pause" or stop the crypto activities in which they may have been engaged. In November 2023, Coinbase submitted a FOIA request to the FDIC asking for copies of those letters. The FDIC opposed the production of those letters, forcing Coinbase to go to court. When the court ultimately ordered the FDIC to produce those letters, they were heavily redacted, and Coinbase returned to court to get an order lifting the redactions. As noted above, these "pause" letters appear to demonstrate that the regulators made a concerted effort to convince banks to abandon their crypto activity, despite the fact that the activity itself was, and remains, legal.[70]

3. The Impact of Debanking

The absence of accountability by government actors is a difficult fact for many to comprehend. Examples abound, but a recent one will suffice. The cumulative losses for the failures of Silicon Valley Bank and Signature Bank exceeded $25 billion. There has been broad acknowledgment that the federal banking agencies overseeing those banks missed (or did not adequately supervise the banks for) the actual

[69] Press Release, Federal Reserve Board et al., Joint Statement on Crypto-Asset Policy Sprint Initiative and Next Steps (Nov. 23, 2021), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20211123a1.pdf.

[70] The FDIC responded that these letters were simply routine provisions for guidance while the agency analyzed the safety and soundness impact of such activity on banks. However, most of the letters are dated in early 2022 and nearly three years later no such analysis has been forthcoming. Because the FDIC was not obligated to end its "pause" within any period of time it could simply wait until the projects at hand were abandoned, as nearly all of them were. But according to the current FDIC Acting Chair, the pause letters were sent "to more than 20 banks *instructing* them to refrain from all 'crypto related activity'." (emphasis added). Hill Policy Remarks.

interest rate risk that drove those failures. Yet, individual and institutional accountability appears to be absent. This raises serious questions. In the absence of accountability, what impact might instances like this have on the public trust in the U.S. financial regulatory framework?[71]

Losing a banking relationship in today's digitally integrated economy is more than an inconvenience. It deprives one of the ability to hold money safely, pay employees, transfer money to pay bills or support family members and friends, make charitable contributions, and enjoy the typical pleasures of modern life. It can also impact credit scores and impair, if not destroy, the ability to operate a small business or non-profit organization.

The nature of this harm was recognized by Judge Gladys Kessler in connection with OCP 1.0, noting that if plaintiffs' losses caused by the banking agencies were to continue, they would be cut off from the banking system and/or put out of business.[72] Notably, the current Acting Chair of the FDIC agrees, recently noting that "[a]ccess to a bank account is essential for individuals and businesses to participate in many aspects of the modern economy."[73]

[71] This concern is both old and current, as noted in 2023 by Philip K. Howard, Marc Andreessen, and Thomas Sowell. *See* PHILIP K. HOWARD, NOT ACCOUNTABLE 7 (2023) ("The absence of accountability … is a recipe for a cynical and ineffective organization."); Marc Andreessen, *The Techno-Optimist Manifesto*, ANDREESSEN HOROWITZ (Oct. 16, 2023) ("Our enemy is …. the know-it-all credentialed expert worldview … unelected and unaccountable—playing God with everyone else's lives, with total insulation from the consequences."), https://a16z.com/the-techno-optimist-manifesto; *Consequences Matter: Thomas Sowell on "Social Justice Fallacies"*, HOOVER INST. (Sept. 15, 2023) ("[O]ne of the real problems is that you have people making decisions for which they pay no price when they're wrong, no matter how high a price other people pay."), https://www.hoover.org/research/consequences-matter-thomas-sowell-social-justice-fallacies. In 2018, well after OCP 1.0 had ended, former Oklahoma Governor and President of the American Bankers Association, Frank Keating, wrote about OCP 1.0: "We must demand answers from those accountable and a remedy for the harm done.... Otherwise, we risk setting a terrible precedent that ideology and partisan bias can control our regulatory agenda at the expense of banks and small businesses alike." Frank Keating, *Operation Choke Point Reveals True Injustices of Obama's Justice Department*, THE HILL (Nov. 7, 2018), https://thehill.com/blogs/congress-blog/politics/415478-operation-choke-point-reveals-true-injustices-of-obamas-justice. To my knowledge, there is no public record of any individual or institutional accountability for Operation Choke Point 1.0. *See The Federal Deposit Insurance Corporation's Role Operation Choke Point: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 114th Cong. (Mar. 24, 2015).

[72] *Advance Am. Cash Advance Ctrs., Inc. v. FDIC*, 251 F. Supp. 3d 78 (D.D.C. 2017).

[73] Hill Policy Remarks.

3.1. Relief May Be On the Horizon—But Are Available Tools Fit For Purpose?

Even before these revelations, OCP 2.0 had been criticized by members of Congress, commenters, and regulators themselves.

More recently, Representative French Hill, the new Chair of the House Financial Services Committee has made it plain that "[l]egal businesses in the United States ... should have the freedom to bank and have financial services." Indeed, Rep. Hill has laid out a series of *Banking Principles*, the very first of which states in part that the "federal prudential regulators should not be able to order institutions to terminate a customer's account without a material reason for doing so in order to reverse the weaponization of government as demonstrated by Operation Choke Point."[74] He further pledged to "fully investigate conduct of agency personnel" regarding OCP 2.0.[75] Indeed, in announcing this hearing as chairman, Senator Tim Scott echoed similar concerns.[76]

a) The Path Forward

That policy is about to change. And while prior harm cannot be undone, there are a number of practical steps the second Trump Administration and Congress can take to ensure that the prior policy is quickly reversed and does not come back. Given the complexity and secretive nature of supervision to accomplish OCP 2.0, comprehensive remedies are needed—more than passing a law or issuing new agency policies. In the end, lasting change will be grounded in accountability and transparency. I set forth below a few of those steps and encourage others to offer other suggestions:

- **Publish the Fair Access Rule in the Federal Register**. This will fulfill the policy requirements of the Dodd-Frank Act and will level the playing field.

[74] Press Release, Rep. French Hill, Rep. Hill Outlines Principles to Make Banking Great Again (Nov. 14, 2024), https://hill.house.gov/news/documentsingle.aspx?DocumentID=9376.

[75] *Id.*

[76] Press Release, Tim Scott, Chair, Senate Banking Committee, Banking Committee Will Investigate Debanking (Jan. 24, 2025) ("Debanking is un-American – every legal business deserves to be treated the same regardless of their political beliefs. Unfortunately, under Operation [Choke Point] 2.0, Biden regulators abused their power and forced financial institutions to cut off services to digital asset firms, political figures, and conservative-aligned businesses and individuals. This is unacceptable."), https://www.banking.senate.gov/newsroom/majority/scott-banking-committee-will-investigate-debanking.

Moreover, a Fair Access Rule could be extended to the FDIC and the Federal Reserve Board.

The OCC's Fair Access Rule would "codify more than a decade of OCC guidance stating that banks should conduct risk assessments of individual customers, rather than make broad-based decisions affecting whole categories or classes of customers, when providing access to services, capital, and credit."[77] The OCC halted publication of the final rule on January 28, 2021, "to review the final rule and the public comments the OCC received, as part of an orderly transition."[78] It has never finished its review. Today, the Fair Access Rule, is a final rule that has never been published.

- **Restore transparency and use new regulatory reform functions**. Lift the curtain with respect to what actually happened in OCP 2.0. Drop all objections to existing FOIA requests. Agencies should use regulatory reform officers and task forces to establish the actual record. Require the senior legal officer or the Inspector General of each federal banking agency to report on these efforts promptly. Impose penalties for bad faith resistance to FOIA requests (similar to anti-retaliation statutes binding government agencies). Launch a major and comprehensive report on OCP 2.0, led by the new "Crypto Czar." Report on how debanking was approved and developed within the relevant agency, and craft internal policies and procedures to ensure it cannot be repeated.
- **Remove the ambiguity and vagueness from bank supervision**. Make definitions of key terms, such as "reputational risk," "safety and soundness," and "management" far more objective. Return to a ratings system focused on the potential for material and present harm to the financial condition of the bank, and focus on actual risks posed by customers not by categories of business. The second Trump Administration could begin with an Executive Order mandating the removal of all opaque references to reputational risk from examination manuals to be replaced with objective safety and soundness standards and measurements.

[77] Press Release, OCC, OCC Puts Hold on Fair Access Rule (Jan. 28, 2021), https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html.

[78] *Id.*

- **Remove the regulatory gatekeeping function.** Amend (or repeal) OCC Interpretive Letter 1179, FDIC FIL-16-2022, and Federal Reserve Board SR 22-6 to make clear that these standards are not intended to be insurmountable barriers to reasonable compliance efforts.
- **Develop a new standard to govern potential account closures that are not related to national security concerns or criminality.** For instance, a challenged account could remain open but subject to enhanced monitoring for a set period such as six months. The customer pays a fee for the cost of the enhanced review. If after that period there are no grounds to close the account, the fee is returned plus reasonable market interest.
- **Provide reasonable notice of account closures**. This notice would include an opportunity for the customer to respond/appeal.
- **Enhance communication**. Require agencies to hold public meetings with industry leaders every six months to receive feedback about the supervisory process. Appoint an interagency "Innovation Council" to develop programs (*e.g.*, "sandboxes") to both educate the agencies and develop programs to foster safe and sound innovation, enabling the United States to catch up to countries like Brazil, Nigeria and Singapore that already have launched such programs.
- **Acknowledge items of "guidance" that are actually rules and make standards more objective**. Direct a review and identification of past "guidance" on this subject (*e.g.*, FIL-41-2014) that amounts to rules under the APA or CRA and require that they go through the appropriate processes. Require that any rulemaking on what constitutes reputational risk uses objective standards, particularly with regard to the assessment of the "Management" component of the CAMELS rating. Analyze how bank supervision has developed since the advent of "reputational risk" and report publicly on which practices amount to rulemaking subject to the APA and the CRA. Acknowledge that rules that have not been scrutinized under the CRA have no force or effect.[79]

[79] 5 U.S.C. §§ 801–808. *See also* Paul Larkin, *The Reach of the Congressional Review Act*, HERITAGE FOUNDATION (Feb. 8, 2017), https://www.heritage.org/government-regulation/report/the-reach-

- **Empower those injured by regulatory conduct**. Adopt legislation providing a civil cause of action against federal regulatory agencies that have harmed citizens through conduct adjudged to be illegal. Consider creation of a United States Court of Appeals for Administration, as called for in the 1940 Walter–Logan Act, allowing for more direct and timely challenges to administrative actions which fall outside of, or are in violation of, an agency's jurisdictional boundaries or other limiting requirements.

- **Other considerations**. The new Administration could consider new Executive Orders and federal banking agency policies to implement the changes noted above as well as damages and restoration of the *status quo ante* for those entities damaged by OCP 2.0, as well as settling outstanding litigation in a manner that preserves safety and soundness but permits innovation. It could also explore liberalizing exceptions to CSI rules when there are allegations of inappropriate examiner conduct, as well as whether CSI must in fact be treated as so confidential Revising each agencies' supervisory appeals process for meaningful relief could also help a great deal.

- **Congressional actions to support the new Administration's actions**.
    - Continue investigations by appropriate Senate and House Committees.
    - Acknowledge the uniqueness of digital assets and blockchain and hold hearings on the development of a "Digital Asset Commission" whose sole responsibility would be the development rules for crypto issuers and exchanges and the banks that serve them.
    - Enact Section 10(b) of the SAFER Banking Act, to ban a federal banking agency from requesting the termination of a deposit account unless it had a valid reason to do so, and reputational risk could not be used as a dispositive reason for such a request.[80]

the-congressional-review-act; Paul Larkin, *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL'Y 187 (2019). Notably, if Congress passes a Joint Resolution of Disapproval and the President signs the Joint Resolution, the rule is invalidated and the agency cannot promulgate a new rule that is "substantially the same" as the one invalidated. *Id.*

80 S. 2860, 118th Congress (2023).

3.2. Agency Accountability and Customer Remediation

Notwithstanding these promising developments and potential fixes, a glaring gap remains. Is there a remedy for those who already have been harmed by past governmental conduct? Given the existing barriers to securing compensation from the federal government and its agents for violation of one's constitutional rights, which may prove too heavy to bear for small businesses and individuals, I suggest an alternative method for providing economic remediation to those harmed by debanking and OCP 2.0.

a) Transparency at the Federal Banking Agencies

An initial step would be transparency at the agencies (including production of records) and an analysis of the drivers of OCP 2.0 by those responsible, senior-level agency personnel.[81] There is an argument that in light of recent legal developments that "independent" agencies, such as the FDIC, are not immune from oversight by the Executive Branch as once thought. In 2019 the Department of Justice's Office of Legal Counsel issued an opinion indicating that "independent" agencies were, in fact, subject to Presidential directives regarding regulatory planning. The U.S. Supreme Court's decisions in *Seila Law*[82] and *Collins*[83] also clarified the right of the President to remove both principal officers and inferior officers of independent agencies, provided they performed executive functions, and further expanded "cause" removals to include disobedience to an Executive Order.[84] The recent Executive Order[85] to readopt Schedule F to remove civil service protections for senior career officials serving in policy making roles further fortified those powers. The exercise of newly-clarified powers should make it easier and faster to determine appropriate accountability for any wrongdoing that may be found.

[81] The "FDIC Exposed" group is insistent that most FDIC personnel work hard to do their jobs and have no culpability for OCP 2.0.

[82] *Seila Law v. CFPB*, 591 U.S. 197 (2020).

[83] *Collins v. Yellen,* 594 U.S. 220 (2021).

[84] *See* Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 Cornell L. Rev. 843, 889 (2024).

[85] Exec. Order No. 14,171, 90 Fed. Reg. 8,625 (Jan. 31, 2025).

b) Claims for Damages

Second, there is an outside possibility of making a tort claim under the Federal Tort Claims Act ("FTCA") against the agency. However, constitutional claims under the Due Process Clause fall outside the definition of a "tort" in the classic sense, making the FTCA a poor fit. Moreover, under the FTCA, a claimant must first exhaust his administrative remedies. Claims for violations of constitutional rights could be brought under the *Bivins* doctrine,[86] a judicially-created implied right of action allowing a claimant to pursue both compensatory and punitive damages, but *Bivins* claims have fallen into disfavor and they now are limited to three instances in which relief has been granted in the past.[87] It is not likely to be favorably considered by the courts.

c) Another, Innovative Way

The harm done by debanking and OCP 2.0 is troubling. Individuals and entities engaging in lawful businesses were deprived of an essential tool needed in order for them to meaningfully participate in the U.S. market. Banks were pressured by their supervisors to do so within the confines of a secrecy and the threat of supervisory criticisms and public enforcement actions. It would seem that under such circumstances (1) banks should have meaningful means to challenge federal banking regulators that impose such pressures on them and (2) for bank customers traditional protections should be modified to allow for remedial compensation.[88]

With other paths difficult as a practical matter, the Trump Administration, acting through the Crypto Czar and in conjunction with the consent of the federal banking agencies, could consider establishing a commission (or similar body) to review and process OCP 2.0 and debanking claims in an efficient and fair manner.[89]

[86] *Bivins v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[87] (1) Unconstitutional home searches, (2) gender discrimination, and (3) denial of medical treatment to federal prisoners. The Court confirmed these limitations in *Egbert v. Boule*, noting that any thought that the Court might expand its view in the absence of Congressional action was a "false hope." 596 U.S. 482 (2022).

[88] As Professor Philip Hamburger has pointed out in *Is Administrative Law Unlawful?*, the protection of government officials from damages actions is to designate them as a "specially protected class" and to elevate them above the law. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 302 (2014).

[89] Similar methods will soon be employed by the Trump Administration. The January 20, 2025 Executive Order "Ending The Weaponization Of The Federal Government" requires that the

The commission would not have the power to order compensation—that would take Congressional action. Rather, it would *recommend* compensation to be paid from the U.S. Treasury with adjustments to agency budgets, as necessary.[90] The members of this commission would serve without pay and would have a mandate to complete their work within a specified amount of time (*e.g.*, no later than December 31, 2025).[91]

The process would be simple:

- A claimant would submit to the commission a form, signed under penalty of perjury and with consent to a meaningful fine if the claim was false, explaining the details of the claim. Each claimant would attach information regarding damage suffered, direct and indirect.
- The commission would notify the federal banking agency, which would have an opportunity to respond promptly but in a reasonable amount of time (*e.g.*, 14 days), or the claim would be deemed agreed to by the agency.
- The commission could ask for one round of additional information from the claimant, the agency or both, to be provided in another prompt but reasonable time period (*e.g.*, 14 days).
- The commission could then make its recommendation as to compensation to be recommended, if any (*e.g.*, in instances where the harm was merely nominal, temporary, or speculative, remedial compensation would not be recommended). The commission also would be required to take into account any actions of the agency to mitigate the harm to the claimant.

Attorney General "take appropriate action to review the activities of all … agencies exercising civil or criminal enforcement authority of the United Sates and identify any instances where an … agency's conduct appears to have been contrary to the purposes and policies of this order" and to prepare a report "with recommendation for appropriate remedial actions …." Exec. Order No. 14,147, 90 Fed. Reg. 8,235 (Jan. 28, 2025).

[90] There is an existing mechanism for payment. The Judgement Fund, which is administered by the Bureau of the Fiscal Service, pays court judgments and compromise settlements against the government. *See* 31 U.S.C § 1304.

[91] If this body qualified as an advisory body, it would have to comply with the Federal Advisory Committee Act, 5 U.S.C. § 1001, and implementing regulations, 41 C.F.R. Part 102–103.

- In extraordinary cases (to be defined) the commission could recommend a punitive damages award.
- As part of its recommendation, the commission also would have the ability to make findings concerning the conduct of individual agency members, particularly whether they had acted in bad faith.
- Once the recommendation was made, the agency would have a prompt but reasonable period (*e.g.*, 14 days) to either accept the recommendation, deny it, or agree to a different amount.
- In all cases of denials (in whole or in part), the agency would need to explain its reasoning.
- In the event the recommendation indicated a finding of misconduct with respect to an individual within the agency, the agency would be required to make a decision on whether such individual would continue his or her employment.
- All denials would be referred to the appropriate Congressional committees, such as this committee, for further review and the commission and agencies would make other reports to Congress.

Unless legislation is enacted, these recommendations would be just that—recommendations without the force of law. However, the transparency and speed of the process coupled with the revelation of the harm done, should provide sufficient moral suasion to result in reasonable compensation for those individuals and institutions who have been harmed and can prove it. More than 110 years later, it remains true that "sunlight is the best disinfectant."[92]

The process would not be perfect, and it would not be a judicial decision, but it would move swiftly and should have a better chance of achieving "rough justice" within a short time frame.[93]

[92] Louis Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY (Dec. 20, 1913); *see also* JAMES BRYCE, THE AMERICAN COMMONWEALTH (1888) ("[I]njustice [and] tricks … of all sorts shun the light; to expose them is to defeat them.").

[93] Among other considerations, to ensure administrative transparency and completeness, and to comply with any federal recordkeeping requirements, the commission also could have the power

4. Conclusion

Justice delayed is justice denied. The harm caused by OCP 2.0 and debanking has been suffered now for years and is ongoing. The government should fix what it has broken.

For banks, supervisory reform is needed to prevent federal banking agencies from exerting informal pressure on banks that amount to secret law that is not widely known or articulated or meaningfully appealable. Congress has a number of legislative proposals on both sides of the aisle that could go far. In addition, the agency heads that are sympathetic today to the Executive Orders that have recently been revived, which add more procedural and substantive protections for regulated entities—notably Executive Order 13892—should consider implementing those principles in meaningful and robust final regulations. These regulations would codify the provisions of the Executive Orders and, ideally, should include procedures for good faith disagreements and resolutions with the federal banking and related agencies. Once promulgated, those regulations would not merely disappear with a new administration and any changes to them would be subject to the strictures of the APA.

For customers, if the usual tools are employed, the usual result—slow, expensive, and insufficient—will be achieved. Inspired by the principles driving the regulatory reform initiative, remedial fixes can be done in a way that is fast, relatively inexpensive, and dispenses reasonable justice.

Of course, the ideas outlined here are just a start and modifications may be in order. Nonetheless, a process to provide compensation for these harms should be begun without delay—if not this process, then another one.

But a meaningful remedy would be a refreshing sign that the United States is committed to innovation and financial modernization that is developed in a responsible and safe manner, with a cooperative government as an ally, not an adversary. It is important that regulatory credibility be restored. That can only be done through accountability and full transparency. To settle for anything less is to simply to create a temptation to do it all over again.

to employ, at the agency's expense, a claims administrator who would process and keep records with respect to each individual claim as well as its consideration and disposal.