September 29, 2022

The Honorable Michael J. Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th St. SW
Washington, DC 20219
Michael.hsu@occ.treas.gov

Dear Acting Comptroller Hsu:

We write today regarding your appointment of Dr. Yue (Nina) Chen as the Chief Climate Risk Officer at the Office of the Comptroller of the Currency (OCC), as well as OCC's general focus on "climate risk" as a special category of risk for the financial system. This action furthers the Biden Administration's clear goal to politicize financial regulation by using financial agencies to promote radical environmental policy that restricts energy production and punishes small businesses and consumers. As Europe's experience with sky-high electricity and fuel prices indicates, climate policy that restricts energy production and weakens energy independence is a significant threat to financial stability.[1] We are writing to inform you that we will closely monitor the Office of Climate Risk and the other actions by your agency. If banks in our states report that federal regulators are pressuring them to cut off services to businesses based upon this administration's environmental agenda, we will investigate, litigate, and work with our Members of Congress on relevant oversight committees to ensure every regulator involved is held accountable. Operation Chokepoint demonstrated that the power and discretion given to federal banking regulators can lead to corruption.[2] We will not stand by if similar abuses of power occur again.

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[1] Joseph C. Sternberg, "The Coming Global Crisis of Climate Policy," WALL ST. J. (Sept. 8, 2022), *available at* https://www.wsj.com/articles/the-coming-global-crisis-of-climate-policy-europe-germany-energy-prices-bankruptcy-winter-subsidies-borrowing-green-nuclear-11662651070.

[2] Letter from Rep. Patrick McHenry and Rep. Blaine Luetkemeyer to Michael J. Hsu, Acting Comptroller of the Currency (Mar. 1, 2020), *available at* https://luetkemeyer.house.gov/uploadedfiles/202-03-01_pmc_bl_to_occ_re_asset_freezes.pdf.

America and the world are currently suffering through sky-high inflation, driven by gas and electricity prices that have increased substantially over the past twelve months. In August, the Consumer Price Index was 8.3% higher than twelve months prior, driven in large part by a 23.8% increase in energy prices (including a 68.8% increase in fuel oil, 15.8% increase in electricity, and 33% increase in piped gas service).[3] As with most macroeconomic phenomenon, many factors contributed to these increases, but a particularly significant one was the years of underinvestment in traditional energy infrastructure and the inefficient allocation of capital to sources of energy that cannot support our needs. Many large financial companies brag that they no longer finance fossil fuel projects, such as coal mining.[4] Not only does this make energy more expensive—the price of coal is up nearly 800% in little over a year—but these financial institutions forego the shareholder profits that could have been made by investing in these commodities.

Europe demonstrates the inevitable consequences of failing to secure access to cheap, abundant energy: prices are skyrocketing, business activity is contracting,[5] and winter months will likely be much harder for the average European than many have ever experienced.[6] The situation is especially acute in Germany, which for years has been trying to decarbonize its economy. "Some 73% of small and medium-sized enterprises in one survey reported feeling heavy pressure from energy prices, and 10% of those say they believe they face 'existential' threats to their businesses over the next six months . . . . A separate survey published this week by the BDI [Federation of German Industries] . . . found 34% of respondents describing energy prices as an 'existential challenge.' Business failures will ripple up and down supply chains and quickly into the banks."[7] If federal regulators in the United States attempt to use their authority to restrict energy production in the U.S. economy, they will create financial instability. Unfortunately, this is the exact course the Biden Administration is charting.

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[3] U.S. Bureau of Lab. Stats., Consumer Price Index Summary (Sept. 13, 2022), https://www.bls.gov/news.release/cpi.nr0.htm.

[4] *See*, *e.g.*, Ken Sweet, "JPMorgan to stop lending to coal companies, arctic drillers," ABC News (Feb. 25, 2020), *available at* https://abcnews.go.com/Business/wireStory/jpmorgan-stop-lending-coal-companies-arctic-drillers-69204845. Indeed, one bank in Australia has gone so far as to announce it will stop making loans for consumers to buy new cars that have internal combustion engines. *See* Adam Morton, "Bank Australia to ditch fossil fuel car loans in push for EV future," GUARDIAN (Aug. 18, 2022), *available at* https://www.theguardian.com/environment/2022/aug/19/bank-australia-to-steer-customers-towards-electric-vehicles-with-halt-to-loans-for-fossil-fuel-cars-in-2025.

[5] Joe Wallace et al., "European Manufacturers Reel from Russian Gas Shutoff," WALL ST. J. (Sept. 11, 2022), *available at* https://www.wsj.com/articles/europe-manufacturers-factories-russia-gas-11662938614.

[6] Avi Salzman, "How Europe's Energy Crisis Could Play Out," BARRON'S (Sept. 9, 2022), *available at* https://www.barrons.com/articles/europe-energy-crisis-russia-gas-oil-war-51662758380.

[7] Sternberg, *supra* note 1.

Background

Appointing a Chief Climate Risk Officer is the latest in a series of moves that seek to turn the financial system, and federal financial regulators, into environmental regulators. The Biden Administration declared a "whole-of-government" approach to this issue.[8] Among other things, the administration made clear that financial regulation would be included in its goal to "achieve[] a carbon pollution-free power sector by 2035 [that] puts the United States on an irreversible path to a net-zero economy by 2050,"[9] by naming the Secretary of the Treasury—your superior—to the administration's newly created National Climate Task Force.[10] This task force is responsible for "the organization and deployment of a Government-wide approach to combat the climate crisis," including "planning and implementation of key Federal actions to reduce climate pollution."[11] As a member of the task force, the Treasury Secretary is also required to "prioritize action on climate change in their policy-making . . . processes."[12]

According to the International Energy Agency (IEA), achieving a net-zero economy by 2050 would involve multiple radical steps. Current energy sources such as natural gas, oil, and coal must decline from nearly 80% of total energy supply to 20%.[13] No internal combustion passenger cars may be sold after 2035, no new investment may be made in fossil fuel supply projects, and global energy usage somehow must decline by 8% even while serving an economy twice as large.[14] As the IEA euphemistically states, these "changes will affect multiple aspects of people's lives."[15] Promoting such goals through the financial regulatory system is an abuse of power.

Yet the Biden Administration continues to use financial agencies to pursue the radical goal of achieving the "target of a net-zero emissions economy by no later than 2050."[16] In May 2021, the President issued an executive order requiring the financial regulatory system to focus on the issue. Among other things, the President ordered

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[8] The White House, "FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government" (Jan. 27, 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government.

[9] *Id.*

[10] Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008 (Jan. 27, 2021).

[11] *Id.*

[12] *Id.*

[13] Int'l Energy Agency, Net Zero by 2050: A Roadmap for the Global Energy Sector (May 2021), https://www.iea.org/reports/net-zero-by-2050.

[14] *Id.*

[15] *Id.*

[16] Climate-Related Financial Risk, Exec. Order 14,030 (May 20, 2021).

the Secretary of the Treasury to lead the Federal Stability Oversight Council (FSOC) in considering various climate-related issues.[17] Consistent with this instruction, FSOC issued a controversial report in October 2021 identifying "climate-related financial risk [as] an emerging threat to the financial stability of the United States."[18]

Many experts found the report seriously lacking. For example, John H. Cochrane, the Rose-Marie and Jack Anderson senior fellow at the Hoover Institution at Stanford University, called the proposal "an affront to effective financial regulation."[19] According to Cochrane, climate change could not possibly be considered a risk to the financial system, because it does not present the potential for "a shock so big, so pervasive, and so fueled by short-term debt that it sparks a widespread run, a wave of defaults, and threatens the ability of the whole system to function."[20] Cochrane further argued that the threat of regulatory action related to climate change could significantly threaten business activity, since "[t]he FTC might break you up. Labor, Justice, EEOC, EPA, might descend and close down your business and make your loans worthless. A wave of questionable product-liability-litigation losses might bankrupt you. Financial regulators might decide to starve you."[21]

Soon after FSOC issued its report, your office published draft "Principles for Climate-Related Financial Risk Management for Large Banks."[22] Among other things, the draft guidelines encourage banks to incorporate concern about climate-related financial risks into all aspects of bank operations, including creating "new structures for climate-related financial risks."[23] The guidelines specifically instruct banks to "consider climate-related financial risks as part of the underwriting and ongoing monitoring of portfolios" and to consider "physical and transition risks" as part of the risk management process.[24] The draft guidelines also ask for comment on potential "scenario analysis exercises" that OCC might impose to test climate-related financial risk.[25] OCC requested feedback on the draft, and, as far as we are aware, has not produced a final document.

Consistent with your agency's new focus on "climate-related financial risk," and the administration's desire to limit the country's carbon emissions, you created

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[17] *Id.*

[18] Fin. Stability Oversight Council, Report on Climate-Related Financial Risk 3 (Oct. 2021), *available at* https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf.

[19] John H. Cochrane, "A Convenient Myth: Climate Risk and the Financial System," NAT'L REV. (Nov. 17, 2021), *available at* https://www.nationalreview.com/2021/11/a-convenient-myth-climate-risk-and-the-financial-system/.

[20] *Id.*

[21] *Id.*

[22] Off. of Comptroller of the Currency, OCC Bull. 2021-62, Principles for Climate-Related Financial Risk Management for Large Banks (2021), *available at* https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62a.pdf.

[23] *Id.* at 2.

[24] *Id.* at 4.

[25] *Id.* at 7.

the Office of Climate Risk, headed by the Chief Climate Risk Officer, to manage climate-change related programs. On September 12, 2022, you appointed Dr. Chen to that position.

Financial Regulators Cannot Direct Environmental Policy

Based on the above actions, the Biden administration appears intent on converting the country's financial regulatory apparatus into an environmental regulator. But the law does not allow that. The Supreme Court has repeatedly ruled against the administration's attempts to use statutory authority in ways that were never intended or authorized by Congress. The same will happen here.

Any attempt to use the financial system as a backdoor means of reducing carbon emissions will fail. Congress gave OCC statutory authority to "assur[e] the safety and soundness of" the banks your agency regulates.[26] OCC is authorized to assure safety and soundness through a variety of means, including supervision and examination of regulated institutions.[27] But this authority is not unlimited. Like all federal agencies, OCC "must be subordinate to the law from which [it] received [its] authority."[28] While OCC has been granted discretion, "the congressional grant of authority does not empower arbitrary and capricious action, nor does it contemplate abuse of that discretion."[29]

Any attempt by OCC to use the financial regulatory system to achieve the administration's net-zero emissions goals would be arbitrary and capricious, an abuse of discretion, and exceed any lawful grant of authority. These efforts will meet the same end as the Biden Administration's prior failures with the CDC, OSHA, and EPA. As explained below, OCC's claimed power to regulate greenhouse gas emissions (under the guise of managing "climate-related financial risk") was not authorized by Congress and is an unprecedented exercise of OCC's authority to regulate national banks. Further, OCC's agenda seeks to "exercise powers of 'vast economic and political significance'" without clear congressional authority to do so.[30] Just like OSHA, your agency is seeking to address what you describe as a society-wide concern, and achieve outcomes outside the area in which your agency is authorized to regulate, "simply because" energy companies must use the banking system as part of their business.[31] Just like the EPA, your agency is claiming broad authority with

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[26] 12 U.S.C. § 1(a).

[27] *See*, *e.g.*, 12 U.S.C. §§ 481, 1463.

[28] *Webster Groves Tr. Co. v. Saxon*, 370 F.2d 381, 387 (8th Cir. 1966); *cf. Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 667 (2022) ""(Gorsuch, J., concurring) ("This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.").

[29] *Webster Groves*, 370 F.2d at 387.

[30] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

[31] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

substantial "economic and political significance," which provides ample "reason to hesitate before concluding that Congress meant to confer such authority."[32]

State Attorneys General have stopped this administration's overreach many times before. In January of this year, the Supreme Court invalidated an administration mandate that required many employers to compel their employees to either undergo COVID-19 vaccination or take weekly COVID-19 tests. The Court held that, although OSHA was empowered by Congress "to set *workplace* safety standards," the regulation at issue was a "broad public health measure[]" that exceeded the agency's authority.[33] Specifically, the Court explained that the threat of COVID-19 was not an "*occupational* hazard," because the virus can and does spread in many other places: "Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."[34] And, the Court found it "telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind."[35] The unprecedented nature of the agency's action, "coupled with the breadth of authority that the Secretary now claims," demonstrated that the mandate was not a legitimate exercise of agency authority.[36]

And just this past June, the Court invalidated the Biden Administration's attempt to use the Clean Air Act to regulate carbon emissions nationwide. Although the statutory regime at issue was extremely complex, the Court's resolution of the case was guided by a simple question: "whether Congress in fact meant to confer the power the agency has asserted."[37] The Court stated that the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[38] In line with these principles, the Court rejected the EPA's assertion that the Clean Air Act authorized it to regulate carbon emissions nationwide. Simply put, the Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"[39]

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[32] *W. Va. v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)) (internal quotation marks omitted).

[33] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (emphasis in original).

[34] *Id.* (emphasis in original)

[35] *Id.* at 666.

[36] *Id.*

[37] *W. Va. v. 'EPA*, 142 S. Ct. at 2608 .

[38] *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159–60).

[39] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

Your Actions Undermine Faith in Financial Regulation

Faith in America's financial system stems in large part from the public's belief that the financial regulatory system is not used for political purposes, but instead solely to ensure the integrity of the system. Numerous experts have explained how the recent focus by central banks and financial regulators on climate change is at best misguided[40] and at worst affirmatively harmful[41] to the very financial systems they are trying to protect. As Stuart Kirk, the former Head of Responsible Investing at HSBC noted, regulators too often impose unnecessary and burdensome climate-related requirements on financial institutions and worry too much about climate change and not enough about inflation and economic growth.[42]

Using the financial regulatory apparatus to achieve political ends, as in Operation Chokepoint, will lead to an escalating abuse of financial supervision. The financial regulatory system requires trust and support across the country and across political parties. Targeting specific industries and states will result in the wholesale undermining of the authority of financial regulators.

We Will Work to Oppose Your Harmful Agenda

We will not sit idly by if you choose to abuse your authority to harm our states and their citizens. Our states have a sovereign interest in ensuring a vibrant financial system. We also have the sovereign duty to protect the interests of our citizens from overreach by the federal government. Any regulatory efforts that exceed your agency's statutory authority, that reduce the resilience of our financial institutions by restricting the entities they can do business with, or that misallocate risks to fit a political agenda harm our state, our communities, and our consumers. Such actions are unlawful, and our states can rightly challenge them. Each of the Supreme Court cases described above involved a state plaintiff, and we will not hesitate to use the courts to once again vindicate our rights.

To help monitor your conduct, we will forward this letter to our state banking associations and request that those associations take and preserve detailed notes

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[40] *See, e.g.*, Christina Parajon Skinner, *Central Banks and Climate Change*, 74 VAND. L. REV. 1301 (2021) (arguing that the U.S. Federal Reserve has limited legal authority to address climate change); Ian Harrison, Climate Change and the Risk to Financial Stability 5, Tailrisk Econ. (Oct. 2021), *available at* http://www.tailrisk.co.nz/documents/ClimatechangeandFinancialStability.pdf ("Our conclusions are very clear. We have reviewed a large number of documents and despite the best efforts of many supervisors none have been able to come up with convincing evidence that climate change represents a threat, let alone a systemic threat.").

[41] *See, e.g.*, Rupert Darwall, Climate-Risk Disclosure: A Flimsy Pretext for a Green Power Grab 2, RealClear Found. (Nov. 2021) (arguing that "backdoor climate regulation" by financial regulators "[s]ubvert[s] the role of investors and capital markets to price and allocate capital [and] would move the U.S. economy further along the road to becoming a centrally planned economy").

[42] Financial Times, Money Moral Summit Europe Conference, *HSBC's Stuart Kirk tells FT investors need not worry about climate risk*, YOUTUBE (May 20, 2022), https://www.youtube.com/watch?v=bfNamRmje-s.

when communicating with federal compliance officers. In particular, we will ask our state banking associations to identify any federal officers who use supervision criteria to harm a bank's balance sheet, restrict access to capital, or otherwise promote a political agenda through the banking supervision system.

We will investigate, litigate, and work with our congressional delegations in conducting oversight to ensure that OCC does not abuse its authority to pressure banks to cut off access to capital to our communities.

Sincerely,

Sean D. Reyes
Utah Attorney General

Steve Marshall
Alabama Attorney General

Mark Brnovich
Arizona Attorney General

Christopher M. Carr
Georgia Attorney General

Todd Rokita
Indiana Attorney General

Derek Schmidt
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