

## **Alert** | Financial Regulatory & Compliance



May 2024

### **New Florida Law Creates House Bill 3 Complaint, OFR Investigation Process, and Expands Applicability to Additional Financial Institutions**

#### **Go-To Guide:**

- Gov. DeSantis signed 2024 Florida House Bill No. 989 (**HB 989** or the **Bill**) into law on May 2, 2024, creating a customer complaint process with the Florida Office of Financial Regulation (**OFR**), for customers who suspect that a financial institution acted in violation of an “unsafe and unsound practice” standard established in section 655.0323 (2), Florida Statutes created by 2023 Florida House Bill No. 3 (**HB 3**).
- Under HB 989, OFR must inform the financial institution of its receipt of a customer complaint and investigate whether the financial institution’s action violated an “unsafe and unsound practice” standard established in section 655.0323 (2), Florida Statutes. HB 989 requires that financial institutions subject of a customer complaint file a response with OFR within 90 calendar days from receiving notice of the complaint.
- Significantly, HB 989 expands the applicability of HB 3 by requiring that “financial institutions as defined in s. 655.005” of the Florida Statutes, attest their compliance with section 655.0323(1) and (2), Florida Statutes created by HB 3, bringing within its scope federal and out-of-state licensed financial institutions conducting business in Florida that do not hold status as Florida “qualified public depositories.”

- HB 989 does not create new sanctions or penalties that were not already in HB 3. The language creating a private right of action permitting customers to sue financial institutions for damages proposed in a predecessor bill (*i.e.*, Florida House Bill 585) was not incorporated into HB 989.
- HB 989 will become effective **July 1, 2024**.

On May 2, 2024, Florida Gov. Ron DeSantis held a [press conference](#) where he signed [Florida House Bill 989](#) (HB 989 or the Bill) into law. HB 989 amends section 655.0323, Florida Statutes, titled “Unsafe and unsound practices,” which was created by 2023 Florida House Bill No. 3 (HB 3). HB 989 will become effective *July 1, 2024*.

### New Customer Complaint Process

HB 989 creates a new customer complaint process, providing customers with the right to *submit a complaint* to OFR if they *suspect* that a financial institution acted in violation of an “unsafe and unsound practice” standard described in section 655.0323(2), Florida Statutes. Section 655.0323(2), Florida Statutes, establishes the requirement that a financial institution may not deny, cancel, suspend or terminate its services to a person or otherwise discriminate against a person in making such services available, or in the terms or conditions of such services, on the basis of the factors outlined in section 655.0323(2), Florida Statutes created by HB 3.<sup>1</sup>

The customer must submit the complaint on a form prescribed by the Financial Services Commission (**Commission**) and include, at a minimum: (i) the customer’s name and address; (ii) the name of the financial institution; and (iii) the facts upon which the customer bases his/her allegation.

### OFR Investigation Process

HB 989 creates an OFR investigatory process for customer complaints, requiring that OFR begin an investigation of the alleged violation within 90 calendar days of receipt of the complaint. OFR must also notify the financial institution that a complaint was filed.

HB 989 requires that the financial institution file with OFR a complaint response report, containing such information as the Commission will require by rule (**Response Report**) within 90 calendar days after receiving the notice of the complaint from OFR.

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<sup>1</sup> These factors are (a) a person’s political opinions, speech, or affiliations; (b) a person’s religious beliefs, religious exercise, or religious affiliations; (c) any factor if it is not a quantitative, impartial, and risk-based standard, including any such factor related to the person’s business sector; or (d) the use of any rating, scoring, analysis, tabulation, or action that considers a social credit score based on factors, including, but not limited to the person’s (i) political opinions, speech, or affiliations; (ii) religious beliefs, religious exercise, or religious affiliations; (iii) lawful ownership of a firearm; (iv) engagement in the lawful manufacture, distribution, sale, purchase, or use of firearms or ammunition; (v) engagement in the exploration, production, utilization, transportation, sale, or manufacture of fossil fuel-based energy, timber, mining, or agriculture; (vi) support of the state or federal government in combatting illegal immigration, drug trafficking, or human trafficking; (vii) engagement with, facilitation of, employment by, support of, business relationship with, representation of, or advocacy for, any person covered by section (d)(i)-(vi) and (viii) herein; (viii) failure to meet or to commit to meet, or expected failure to meet, any of the following (as long as such person is in compliance with applicable state or federal law: (1) environmental standards, including emissions standards, benchmarks, requirements, or disclosures; (2) social governance standards, benchmarks, or requirements, including, but not limited to, environmental or social justice; (3) corporate board or company employment composition standards, benchmarks, requirements, or disclosures based on characteristics protected under the Florida Civil Rights Act of 1992; or (4) policies or procedures requiring or encouraging employee participation in social justice programming including, but not limited to, diversity, equity or inclusion training.

HB 989 also expands the scope of “unsafe and unsound practice” under section 280.02(26)(f), applicable to Florida qualified public depositories to include “suspending, or terminating” in addition to denying or canceling services.

HB 989 requires OFR to handle Response Reports indicating the financial institution took action due to suspicious activity reportable to the U.S. Department of the Treasury, Financial Crimes Enforcement Network pursuant to 31 C.F.R. § 1020.320, in accordance with section 655.50, Florida Statutes, titled “Florida Control of Money Laundering and Terrorist Financing in Financial Institutions Act” (**Florida AML Act**). However, if OFR determines during that initial investigation that the financial institution’s action was taken without any basis under the Florida AML Act, the OFR must proceed to determine whether the financial institution acted in violation of an “unsafe and unsound practice” standard established in section 655.0323(2), Florida Statutes.

### Report of Investigation Findings

HB 989 requires that OFR, with 30 calendar days *after completion or cessation of its investigation*, create a report of its findings (**OFR Report**). The OFR Report cannot contain, or must redact, any information that remains confidential and exempt from public disclosure under section 119.07(1) of the Florida Public Records Law, Chapter 119 of the Florida Statutes.

OFR must send the OFR Report *to the customer who submitted the complaint* and to the subject financial institution within 45 calendar days after the completion or cessation of the investigation.

If OFR determines that no violation occurred, the OFR Report will (a) identify the customer complaint for which the OFR Report is made; and (b) state that no violation of an “unsafe and unsound practice” standard of section 655.0323 (2), Florida Statutes has occurred.

If OFR *finds that a violation occurred*, OFR must notify and provide a copy of the OFR Report to: (i) the customer who filed the complaint; (ii) the Florida Department of Financial Services; and (iii) the office of the state attorney for the judicial circuit affected by or in which the violation allegedly occurred, or the Department of Legal Affairs (within the Office of the Attorney General) if the violation affects more than one judicial circuit, or if the state attorney defers, in writing, to the Department of Legal Affairs.

### HB 989 Expands Applicability of HB 3 to Additional Financial Institutions

Section 655.0323 (3), Florida Statutes, created by HB 3, currently provides that “[b]egging July 1, 2023, and by July 1 of each year thereafter, financial institutions **subject to the financial institutions codes** must attest, under penalty of perjury, on a form prescribed by the [C]ommission whether the entity is acting in compliance with subsections (1) and (2)” of section 655.0323.<sup>2</sup>

The reference to financial institutions that are “subject to the financial institutions codes” imposes attestation requirements on Florida-chartered and authorized financial institutions (such as Florida-chartered banks and trust companies, international branches, international representative offices and international administrative offices, among others).<sup>3</sup>

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<sup>2</sup> Section 655.0323(3), Florida Statutes (emphasis added).

<sup>3</sup> Section 655.001(1), Florida Statutes provides that “[t]he financial institutions codes apply to all state-authorized or state-chartered financial institutions.” Banks that are not state-authorized or state-chartered banks, such as out-of-state banks and nationally chartered banks, would not currently be subject to HB 3 unless they hold status as “qualified public depositories” as defined in section 280.02(26), Florida Statutes (**QPDs**).

HB 989, however, strikes “subject to the financial institutions codes” from Section 655.0323 (3), Florida Statutes and inserts “as defined in s. 655.005” in its place. Section 655.005(i), Florida Statutes, defines “[f]inancial institution” as:

a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust entity, international trust company representative office, qualified limited service affiliate, credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. ss. 601 et seq. or Edge Act corporation organized pursuant to s. 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq.

This revision brings within the scope of HB 3 and HB 989 additional financial institutions that conduct business in Florida that were not initially within the scope of HB 3. These financial institutions include non-Florida and federal-licensed financial institutions that are not QPDs, and requires that they comply with: (i) the “unsafe and unsound practice” standards established in sections 655.0323(1) and (2), Florida Statutes of HB 3; (ii) the attestation requirements of 655.0323(3), Florida Statutes created by HB 3; and (iii) the costumer complaint and response requirements now being established by HB 989.<sup>4</sup>

Notwithstanding the above, the jurisdictional limit of HB 989 for this new group of financial institutions remains unclear. Specifically, HB 989 does not address whether a financial institution would be subject to HB 989 only if it maintains physical presence in the state of Florida or, alternatively, would be subject to HB 989 if it provides services to customers residing or with principal addresses in Florida, even if the institution has no physical presence in the state. Similarly, it is unclear which customers would have a right to file complaints and seek relief under HB 989 - whether this would apply only to Florida residents and entities with principal addresses in Florida or would include customers located outside of Florida.

### **Fines and Penalties**

Fines and penalties for failing to comply with the “unsafe and unsound practice” standards established in sections 655.0323(1) and (2), Florida Statutes, remain unchanged from those currently provided under HB 3. Failure to comply with HB 989 constitutes a violation of the Florida financial institutions codes and could result in fines and penalties provided for therein.<sup>5</sup> Additionally, engaging in an “unsafe and unsound practice” may constitute a violation of the Florida Deceptive and Unfair Trade Practices Act, which can subject the financial institution to sanctions and penalties provided thereunder, as well as attorney fees and costs to be paid to the Florida Attorney General if the action is successful.

The language creating a private right of action permitting customers to sue financial institutions for damages that was proposed in a predecessor bill (*i.e.*, Florida House Bill 585) was not incorporated into HB 989.

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<sup>4</sup> While HB 989 expands the applicability of HB 3 to additional financial institutions that were not understood to be subject to HB 3 last year, 655.0323(3), Florida Statutes would continue to reference a requirement that attestations must begin by July 1, 2023, and continue by July 1 of each year thereafter. The OFR will need to address, among other things, its expectations for attestation requirements for these new entities that were not understood to be subject to HB 3 as of July 1, 2023.

<sup>5</sup> Relevant Florida financial institutions codes include Chapter 655 (for Financial Institutions Generally), Chapter 657 (for Credit Unions), Chapter 658 (for Banks and Trust Companies), Chapter 660 (for Trust Business), Chapter 662 (for Family Trust Companies), Chapter 663 (for International Banking), Chapter 665 (for Capital Stock Associations) and Chapter 667 (for Savings Associations).

## Notice of Development of Rulemaking

On May 6, 2024, the Florida Department of Financial Services (**DFS**) issued a **Notice of Development of Rulemaking (Notice of Rulemaking)** to amend existing rules implementing HB 3 and create new rules to implement HB 989. With the Notice of Rulemaking, the DFS published: (i) **preliminary text of the proposed rules to implement HB 989**; (ii) the **Form OFR-U-323 - Attestation of Compliance**; (iii) preliminary text for the **Customer Complaint Form** to be filed with OFR; and (iv) preliminary text for the **Response Report** that financial institutions would use to respond to customer complaints.

The Notice of Rulemaking and accompanying proposed rules and forms still require review and approval by the Commission in its next cabinet meeting, to be held on June 11, unless an interim meeting is called for before then.

## Considerations for Financial Institutions

HB 989 and the Notice of Rulemaking leave several issues unanswered, including:

- a. the applicability of section 655.0323, Florida Statutes, to financial institutions that are not chartered or licensed by the OFR, but that either maintain physical presence in Florida or that do not maintain physical presence in Florida, but provide services to customers in Florida;
- b. how the OFR intends to oversee compliance with section 655.0323, Florida Statutes, by affected financial institutions (and particularly, newly affected institutions);
- c. the OFR's investigation process and expectations for accessing books and records of financial institutions whose primary regulator is not the OFR; and
- d. OFR's expectations for responses to customer complaints.

Notwithstanding the above, and in light of the July 1st implementation deadline, financial institutions should be assessing whether they may be affected by HB 989. Financial institutions required to comply with HB 989 should consider, among other things, (i) reviewing their customer onboarding, termination and suspension policies to ensure decision-making is consistent with HB 989; (ii) developing policies and procedures to timely review and respond to customer complaints initiated under HB 989; (iii) ensuring policies and procedures are implemented to comply with annual attestation requirements; (iv) identifying qualified staff to be responsible for the institution's day-to-day compliance with HB 989; and (v) conducting training, as appropriate, to support effective implementation of controls developed to comply with HB 989.

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