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U.S. Fair Access and Anti-Debanking Laws: What to Expect Under the New Administration

Federal and state "fair access" or "anti-debanking" laws and regulations have been evolving quickly over the last five years, closely tracking the changing U.S. political climate. These laws and regulations are designed to ensure that financial institutions make their services available without discriminating against individuals or businesses engaged in lawful activity that may be viewed as controversial or politically sensitive. The "fair access" requirements generally prohibit financial institutions from denying or cancelling services to customers based on factors such as political opinions, religious beliefs, and environmental, social and governance (ESG) standards. While the intent of such laws and regulations is to promote impartiality, they introduce significant challenges to the financial sector.

Financial institutions should prepare for revived activity on fair access laws at both the federal and state levels under the new administration.

Background

Federal Fair Access Initiatives

During the first Trump Administration, the Office of the Comptroller of the Currency (OCC) released its "fair access" final rule (OCC Final Rule), requiring "covered banks" (*i.e.*, national banks and federal savings associations (FSAs) with at least $100 billion in assets) to:

a. Make financial services available to all persons in their geographic market on "proportionally equal terms;"

b. not deny any person a financial service unless the denial is justified by such person's quantified and documented failure to meet quantitative, impartial, risk-based standards established in advance by the covered bank; and

c. not deny, in coordination with others, any person a financial service the covered bank offers.

The OCC noted that the OCC Final Rule: (a) codified prior OCC guidance providing that banks should conduct a risk assessment of individual customers, rather than make broad-based decisions affecting whole categories or classes of customers, when providing access to services, capital, and credit; and (b) implemented language in Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, charging the OCC with "assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction."

The OCC Final Rule was set to take effect on April 1, 2021, but on Jan. 28, 2021 (shortly after former President Biden took office and imposed a regulatory freeze), the OCC paused the rule's publication in the Federal Register. Regarding this pause, the OCC noted that its "long-standing supervisory guidance stating that banks should avoid termination of broad categories of customers without assessing individual customer risk [would] remain…in effect."

During the Biden administration, a bill titled "Fair Access to Banking Act" was introduced in both the U.S. House and Senate.[1] The Fair Access to Banking Act aimed to require banks with assets of more than $10 billion to provide fair access to financial services "without impediments caused by a prejudice against or dislike for a person or the business of the customer."[2] Failure to do so could result in restrictions on the bank relating to the use of electronic funds transfer systems and lending programs, termination of depository insurance, and civil penalties.[3]

State Fair Access Law Initiatives

While federal efforts to enact legislation and rulemaking stalled under the Biden administration, states such as Florida and Tennessee enacted their own "fair access" or "anti-debanking" legislation.

Florida

In May 2023, the state enacted its "fair access" law through 2023 Florida House Bill No. 3 (FL HB 3). FL HB 3 created new "unsafe and unsound practice" standards for certain financial institutions in Florida,[4] prohibiting them from denying, canceling, suspending, or terminating services to current or prospective customers, or otherwise discriminating against customers, on the basis of:

[1] The legislation was introduced in 2021 (H.R. 1729, 117th Cong. (2021); S. 563, 117th Cong. (2021)) and again in 2023 (H.R. 2743, 118th Cong. (2023); S. 293, 118th Cong. (2023)). The most recent Senate bill had 37 Republican cosponsors, while the House bill had 127 Republican cosponsors.
[2] H.R. 1729, 117th Cong. § 8 (2021); S. 563, 117th Cong. § 8 (2021); H.R. 2743, 118th Cong. § 8 (2023); S. 293, 118th Cong. § 8 (2023).
[3] H.R. 1729, 117th Cong. §§ 4-5 (2021); S. 563, 117th Cong. §§ 4-5 (2021); H.R. 2743, 118th Cong. §§ 4-5 (2023); S. 293, 118th Cong. §§ 4-5 (2023).
[4] FL HB 3 imposed these new "unsafe and unsound practice" standards on state-chartered and state-authorized financial institutions such as Florida-chartered banks, trust companies, credit unions, international bank agencies, branches, representative offices, and administrative offices of foreign banks, banks authorized as "qualified public depositories" in the state, consumer finance lenders, and money services businesses.

a. the customer's political opinions, speech, or affiliations;

b. the customer's religious beliefs, religious exercise, or religious affiliations;

c. any factor if it is not a quantitative, impartial, and risk-based standard, including any factor relating to the customer's business sector; or

d. any rating, scoring, analysis, tabulation, or action that considers a social credit score based on certain factors.

Since July 1, 2023, these affected financial institutions have been required to attest their compliance with the fair access law on an annual basis under penalty of perjury.

In May 2024, Florida expanded its fair access law through 2024 Florida House Bill No. 989 (FL HB 989). FL HB 989: (a) expanded the applicability of the state's fair access law to bring into scope federal and non-Florida licensed financial institutions conducting business in the state that do not hold status as Florida "qualified public depositories;" (b) created a customer complaint process with the Florida Office of Financial Regulation (OFR) for customers who suspect that a "financial institution" violated the "unsafe and unsound practice" standard established in the fair access law; and (c) created an investigatory process with the OFR for customer complaints.

Tennessee

Tennessee enacted its fair access law in April 2024, through 2024 Tennessee House Bill No. 2100 (TN HB 2100), imposing fair access requirements on: (a) state and national banks, savings and loan associations, savings banks, credit unions, industrial loan and thrift companies, and mortgage lenders that have more than $100 billion in assets; and (b) insurers.

Like Florida, Tennessee's fair access law requires these institutions to make determinations about the provision of services based on an analysis of risk factors unique to the current or prospective customer, and prohibits them from denying or cancelling services, or otherwise discriminating against a person in making available such services or in the terms or conditions of such services, on the basis of[5]

a. the person's political opinions, speech, or affiliations;

b. the 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 factor relating to the person's business sector; or

d. the use of a rating, scoring, analysis, tabulation, or action that considers a social credit score based on certain factors.

While TN HB 2100 does not provide for a customer complaint process, it gives customers a right to request a statement from the financial institution detailing the specific reasons for the refusal, restriction, or termination within 90 days of receiving notice.

In 2024, at least 10 other states introduced fair access legislation, including Arizona, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Nebraska, South Dakota, and West Virginia.

[5] TN HB 2100 excludes loans from the definition of "services." TN HB 2100 § 1 and Tenn. Code Ann. § 45-1-128(a)(2)(B).

Federal Preemption Concerns

In November 2023, the OCC issued a letter expressing concern about state fair access law initiatives and the impact these may have on the national banking system, noting that the OCC is "carefully monitoring the proliferation of competing and potentially inconsistent requirements…[and that it is] concerned about their impact on the ability of national banks and FSAs to provide banking services consistent with safety, soundness, and the fair treatment of customers." On July 17, 2024, following the Supreme Court decision in *Cantero v. Bank of America*,[6] Michael Hsu, the Acting Comptroller of the Currency, stated that the OCC will continue to "fortify and vigorously defend core preemption" of federal law over state banking laws.

A debate has also evolved as to whether state fair access laws interfere with a financial institution's ability to comply with federal anti-money laundering laws. On July 8, 2024, a bipartisan group of congressmen issued a letter to the OCC, Department of the Treasury, and Treasury's Financial Crimes Enforcement Network (FinCEN) to express concerns that state fair access laws "may conflict with federal laws intended to combat money laundering and terrorist financing…[and] pose significant challenges to compliance with critical regulations such as the Bank Secrecy Act (BSA), and the Anti-Money Laundering (AML) Act, potentially threatening national security." On July 18, Treasury responded, noting it shared the congressmen's concerns, including concerns that state laws similar to FL HB 989 "may materially undermine compliance with the important AML/CFT and sanctions requirements administered by [FinCEN] and Office of Foreign Assets Control (OFAC)."

Looking Forward

As the second Trump administration takes office, Republicans take control of Congress, and leadership at the federal banking regulatory agencies changes, financial institutions should prepare for a shift in regulatory priorities. On Jan. 20, 2025, when Travis Hill became Acting Chairman of the Federal Deposit Insurance Corporation (FDIC), he immediately issued a statement outlining the matters the FDIC expects to focus on in "the coming weeks and months." He included among these matters "work[ing] to ensure law-abiding customers have, and do not lose, access to bank accounts and banking services."

The Acting Chairman previously indicated in a speech he gave as Vice Chairman on Jan. 10 that access to a bank account is essential for participation in the modern economy and that regulators should reevaluate their approach to implementing the BSA, noting that "[w]hile we all share the goal of ensuring criminals and terrorists are not using the banking system to fund drug trafficking, terrorism, and other serious crimes, the current BSA regime creates an incentive for banks to close accounts rather than risk massive fines for inadequate BSA compliance." He further noted that "[t]hese issues, along with others in the BSA realm, warrant attention and scrutiny during the [new] Administration."

The FDIC appears to be positioning itself to evaluate "debanking" and fair access to banking services, and we anticipate the other prudential federal banking agencies will follow suit.[7] The Comptroller of the Currency has not been nominated to date, but the new nominee may reconsider the OCC Final Rule and its implementation. Additionally, with Republican majorities in both the U.S. House of Representatives

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[6] *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024). In *Cantero*, the U.S. Supreme Court reviewed the issue of whether the National Bank Act preempted state laws that purported to impose a minimum rate of interest on mortgage escrow accounts. The Court indicated that, to reach preemption decisions, lower courts should make a "practical assessment" of whether the state law "prevents or significantly interferes with" a national bank's power and instructed lower courts to make this determination by comparing state laws at issue to those the Court had analyzed in previous preemption decisions. The Court noted, but did not address, the OCC's role in making determinations about whether a state law regulating a national bank is preempted.

[7] The U.S. prudential bank regulators generally attempt to align policies and supervisory approaches to ensure, among other things, consistent application of regulatory standards across jurisdictions.

and the U.S. Senate, we may see renewed attempts to enact the Fact Access to Banking Act or similar fair access or "debanking" laws in the new Congress. President Trump recently signed an executive order outlining policies for the digital asset industry, one of which is "protecting and promoting fair and open access to banking services for all law-abiding individual citizens and private-sector entities alike[.]"[8]

In light of these developments, Financial institutions should prepare for increased federal regulatory scrutiny and rulemaking efforts regarding fair access.

In addition to federal actions, state-level fair access law initiatives continue shaping the regulatory landscape, further complicating the patchwork of compliance requirements for financial institutions. This dual regulatory framework underscores the importance of financial institutions continuing to monitor developments at both federal and state levels, and for those that have not done so, to review their current policies, procedures, and controls to determine whether any changes need to be made to prepare for the new regulatory environment and anticipated scrutiny over fair access to services.

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[8] Strengthening American Leadership in Digital Financial Technology – The White House