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The Tides Are Changing (Again) for US "Fair Access" and "Anti-Debanking" Laws

"Fair access" banking laws, at the epicenter of the debates between ESG and "anti-woke" regulation and federal/state preemption, may see a resurgence under the incoming administration.

In recent years, the landscape of "fair access" banking laws, now also known as "anti-debanking" laws, has changed as quickly as the shifting political climate.

Federal and state fair access laws and regulations are legislative or regulatory measures designed to ensure that financial institutions provide equitable access to services without discrimination based on ideological, political, or social beliefs. They aim to prevent banks and financial service providers from denying access to services or products to individuals or businesses based on their lawful activities or affiliations that may be deemed controversial or politically sensitive. Critics, however, see such initiatives as an attack on environmental, social, and corporate-governance (ESG) policies in the financial system.

For market participants and their boards of directors, understanding these laws involves navigating the complex interplay between regulatory compliance and risk management on the one hand, and the evolving expectations regarding ESG in the financial sector on the other.

Fair Access Laws: A Recent History

Federal Level: OCC

The Office of the Comptroller of the Currency (OCC) under the first Trump administration was at the forefront of federal efforts to implement such fair access regulations.

On January 14, 2021, a few days prior to the change in administrations, the OCC finalized a rule on Fair Access to Financial Services provided by large (i.e., those with more than $100 billion in assets) national banks, federal savings associations, and federal branches and agencies of foreign bank organizations. The rule codified existing OCC guidance 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. The adopting release of the rule cited language included in Title III of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, which charged 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."

In effect, the rule prohibited the largest US banks from denying services to gun manufacturers, cryptocurrencies, energy firms, operators of private prisons, and other controversial industries, absent an individualized risk determination. The rule was unpopular among certain banks and banking trade groups, as well as Democratic party lawmakers who contended that the rule would increase systemic risks to the financial system while discouraging corporate social responsibility.

However, the OCC paused the rule on January 28, 2021, before it became effective, pursuant to a regulatory freeze that the Biden administration issued, and was not published in the Federal Register. The OCC's January 28 notice, however, reiterated the OCC's "long-standing supervisory guidance" that banks should not withhold services from broad categories of customers without conducting individual risk assessments.

State Level Fair Access Legislation

While the OCC's efforts stalled under the Biden administration, states like Florida and Tennessee spearheaded their own initiatives, enacting legislation to curb perceived potential ideological biases in financial services.

Florida

On May 5, 2023, Florida enacted House Bill 3 (H.B. 3), which imposed various restrictions on the use of ESG in the financial sector. It required "financial institutions subject to the financial institutions codes" to submit an annual attestation on a state-prescribed form certifying their compliance with provisions against unsafe and unsound practices. The attestation includes not canceling, suspending, denying, terminating, or otherwise discriminating against the availability or terms/conditions of financial services based on factors such as a person's:

- political beliefs and affiliations;
- religious beliefs and affiliations;
- any factor that "is not a quantitative, impartial and risk-based standard;" or
- a "social credit score," including political opinions or advocacy; religious affiliation; firearm ownership; engagement with fossil fuels; adherence to certain ESG factors; and participation in social justice programing or diversity, equity, and inclusion programs.

The prevailing view was that H.B. 3 applied only to state-chartered financial institutions (for more information, see this Latham Client Alert).

However, on May 3, 2024, Florida Governor Ron DeSantis signed into law H.B. 989 (effective July 1, 2024), which amended H.B. 3 so that the compliance certification process applies to financial institutions as defined in the financial institutions code (655.005). Section 655.005 defines those entities 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."

H.B. 989 also established a complaint procedure for customers who suspect a bank has employed an "unsound practice," subject to investigation by the Florida Office of Financial Regulation, and amended the scope of such unsound practices to include suspension or termination of services on one of the grounds described above.

Tennessee

On April 22, 2024, Tennessee enacted its own fair access law on large financial institutions (those with more than $100 billion in assets). H.B. 2100 (effective July 1, 2024) prohibits financial institutions (defined as a state or national bank, a savings and loan association, savings bank, credit union, industrial loan and thrift company, or mortgage lender) and insurers from denying or cancelling their services on the basis of:

- a person's religious beliefs, religious exercise, or religious affiliations;
- 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
- the use of a rating, scoring, analysis, tabulation, or action that considers a social credit score based on factors including those noted above as well as a person's lawful ownership of a firearm; a person's engagement in the lawful manufacture, distribution, sale, purchase, or use of firearms or ammunition; a person's engagement in the exploration, production, utilization, transportation, sale, or manufacture of fossil fuel-based energy, timber, mining, or agriculture; the person's support of the state or federal government in combatting illegal immigration, drug trafficking, or human trafficking; and a person's failure to meet or 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:
  - Environmental standards, including emissions standards, benchmarks, requirements, or disclosures
  - Social governance standards, benchmarks, or requirements, including environmental or social justice
  - Corporate board or company employment composition standards, benchmarks, requirements, or disclosures based on protected characteristics
  - Policies or procedures requiring or encouraging employee participation in social justice programming, including diversity, equity, or inclusion training

Unlike the Florida laws, Tennessee's H.B. 2100 does not impose an attestation requirement.

Other US State Efforts

Lawmakers in several other states have introduced similar fair access legislation in 2024, including:

- Arizona S.B. 1167
- Georgia H.B. 1205
- Idaho H. 669
- Indiana S.B. 28

- Iowa H.F. 2409
- Kentucky H.B. 452
- Louisiana H.B. 914
- South Dakota H.B. 1247

The OCC's 2023 Response

In response to the proliferation of state fair access laws and bills, the OCC issued a letter on November 9, 2023, expressing concern that such state banking regulations could impair "the ability of national banks and federal savings associations to provide banking services consistent with safety, soundness, and the fair treatment of customers." The OCC emphasized its commitment to "preserving the legal framework for preemption established by Congress, including in the Dodd-Frank Wall Street Reform and Consumer Protection Act."

2024: The US Supreme Court Clarifies Federal Preemption

In May 2024, the US Supreme Court issued a decision that clarified the OCC's preemption authority. In *Cantero v. Bank of America, N.A.*, the Court stated that the general OCC preemption standard in the absence of a state law that discriminates against national banks is as Congress codified it in the Dodd Frank Act, namely whether a state law "prevents or significantly interferes with the exercise by the national bank of its powers." The Court further stated that lower courts should not adopt categorical rules on preemption, but rather should consider how a particular state law compares to the laws analyzed in prior Supreme Court decisions as to whether they prevented or significantly interfered with national bank powers.

The Debate Continues

With the election of Donald Trump as president, it is unclear whether the OCC will pursue preemption over state fair access laws on safety and soundness grounds. Certain lawmakers, however, would welcome such an approach. In July 2024, a bipartisan group of congressmen issued a warning to the OCC, the Department of the Treasury, and the Financial Crimes Enforcement Network that fair access laws pose a risk to the financial sector and national security by harming efforts to address money laundering and terrorism financing risks. "These laws," the lawmakers asserted, "may 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."

The Department of the Treasury's undersecretary for terrorism and financial intelligence responded to the congressmen's letter on July 18, 2024, stating that state fair-access laws may "interfer[e] with financial institutions' ability to comply with national security requirements [and] heighten the risk that international drug traffickers, transnational organized criminals, terrorists, and corrupt foreign officials will use the U.S. financial system to launder money, evade sanctions, and threaten our national security."

The Road Ahead for Federal and State Fair Access Laws in 2025

The resurgence of Republican control of Congress and the return of a Trump administration provides renewed momentum for advancing fair access regulation at the federal level, as the OCC tried to do in January 2021. Legislative efforts that failed under the Biden administration, such as the *Fair Access to Banking Act* (proposed in 2021 and again in 2023) may also be revived in the new congressional session

and may garner stronger support in 2025, if only to reduce potential uncertainty from evolving and differing state fair access laws and requirements.

While proponents and detractors are likely to grapple with the issues of fair access, ESG, and preemption in the years to come, the return of state and even federal fair access laws appears likely under the incoming administration.

Latham & Watkins will continue to monitor developments in this area.

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