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The Tides Are Changing For Fair Access Banking Laws

By **Betty Huber, Arthur Long and Pia Naib** (February 4, 2025, 3:36 PM EST)


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

In recent years, the landscape of fair access banking laws, now also known as "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 policies in the financial system.

In the absence of federal action, certain states have already enacted their own fair access laws, with others proposed for this year.

With the return of a Trump administration and Republican control of Congress, however, fair access regulation or legislation at the federal level is a real possibility.

For market participants and their boards of directors, understanding these laws involves navigating the complex interplay between regulatory compliance and risk management on 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 under the first Trump administration was at the forefront of federal efforts to implement such fair access regulations.

On Jan. 14, 2021, a few days prior to the change in administrations, the OCC finalized[1] a rule on "Fair Access to Financial Services" provided by large national banks (i.e., those with more than $100 billion in assets), 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 Act, 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 U.S. 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 lawmakers who contended that the rule would increase systemic risks to the financial system while discouraging corporate social responsibility.

However, the OCC paused[2] the rule on Jan. 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 Jan. 28 notice,[3] 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

In May of 2023, Florida enacted[4] 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 or conditions of financial services based on factors such as:

- A person's political beliefs and affiliations;
- A person's 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.[5]

However, on May 2, 2024, Florida Gov. Ron DeSantis signed into law H.B. 989[6] (which became effective July 1), which amended H.B. 3 so that the compliance certification process applies to financial institutions as defined in the financial institutions code.

Section 655.005 defines such entities broadly.[7]

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, i.e. those with more than $100 billion in assets.

H.B. 2100,[8] which became effective July 1, prohibits financial institutions — defined as state or national banks, savings and loan associations, savings banks, credit unions, industrial loans and thrift companies, or mortgage lenders — and insurers from denying or canceling their services on the basis of a person's "religious beliefs, religious exercise, or religious affiliations"; or "any factor if it is not a quantitative, impartial, and risk-based standard, including any such factor related to the person's business sector."

It also prohibits such institutions from denying or canceling services on the basis of a person's "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 several other factors.[9]

Lastly, it prohibits the denying or canceling of services based on 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:
>
> (i) Environmental standards, including emissions standards, benchmarks, requirements, or disclosures;
> (ii) Social governance standards, benchmarks, or requirements, including environmental or social justice;
> (iii) Corporate board or company employment composition standards, benchmarks, requirements, or disclosures based on protected characteristics; or
> (iv) 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 State Efforts

Lawmakers in several other states introduced similar fair access legislation in 2024, including Arizona, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana and South Dakota.

The OCC's 2023 Response

In response to the proliferation of state fair access laws and bills, the OCC issued a letter[10] on Nov. 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 U.S. Supreme Court Clarifies Federal Preemption

In May, the U.S. Supreme Court **issued** a decision[11] that clarified the OCC's preemption authority.

In Cantero v. Bank of America NA, 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 Dodd-Frank, 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, a bipartisan group of members of Congress issued a warning[12] to the OCC, the U.S. 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 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 lawmakers asserted.

The Department of the Treasury's undersecretary for terrorism and financial intelligence responded[13] to the letter on July 18, 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, which was proposed in 2021[14] and again in 2023,[15] 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 new administration.

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[1] https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8a.pdf.

[2] https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html.

[3] https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html.

[4] https://www.flsenate.gov/Session/Bill/2023/3/BillText/er/PDF.

[5] https://www.lw.com/admin/upload/SiteAttachments/Florida-Law-to-Restrict-the-Use-of-Certain-ESG-Factors-by-Asset-Managers-and-Financial-Institutions.pdf.

[6] https://laws.flrules.org/2024/140.

[7] "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."

[8] https://www.capitol.tn.gov/Bills/113/Bill/HB2100.pdf.

[9] "[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; [a] person's support of the state or federal government in combatting illegal immigration, drug trafficking, or human trafficking."

[10] https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-ceo-letter.pdf.

[11] https://www.supremecourt.gov/opinions/23pdf/22-529_1b7d.pdf.

[12] https://d12t4t5x3vyizu.cloudfront.net/gottheimer.house.gov/uploads/2024/07/Bipartisan-Letter-to-Treasury-FinCEN-OCC-re-National-Security-Concerns-with-State-Banking-Laws.docx.pdf.

[13] https://www.moneylaunderingnews.com/wp-content/uploads/sites/12/2024/07/JG-letter-1.pdf.

[14] https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-cramer-colleagues-introduce-fair-access-to-banking-act/.

[15] https://www.cramer.senate.gov/news/press-releases/sen-cramer-demand-grows-for-fair-access-to-banking-act.