WINSTON & STRAWN LLP

CLIENT ALERT

Banks Operating in Florida Should Be Aware of New Florida Rule Before Closing Customer Accounts

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On May 2, 2024, Florida Governor DeSantis signed Florida House Bill 989 (**HB 989**) into law. Among other things, HB 989 amends section 655.0323 of the Florida Statutes, titled "Unsafe and unsound practices," which the Florida Legislature adopted in 2023 pursuant to Florida House Bill 3 (**HB 3**).[1] The provisions of HB 989 will become effective on July 1, 2024.

WHAT BANKS AND OTHER FINANCIAL INSTITUTIONS NEED TO KNOW ABOUT HB 989

- ***Expanded Applicability.*** Existing Florida banking law (as added by HB 3) at section 655.0323(3), Florida Statutes states:

> Beginning 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 [Financial Services Commission (**Commission**)] whether the entity is acting in compliance with subsections (1) and (2) [of section 655.0323].

Fla. Stat. § 655.0323(3) (emphasis added).

Until the passage of HB 989, only Florida-licensed institutions (which are subject to the Florida financial institutions codes) were captured by HB 3's annual compliance-attestation requirement. This is because non-Florida-licensed and -chartered institutions that are not qualified public depositories are not "subject to the [Florida] financial institutions codes." HB 989 erases the phrase "subject to the financial institutions codes" and inserts in its place "as defined in s. 655.005." "Financial institution," as defined in section 655.005, means:

> 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.

Fla. Stat. § 655.005(i) (emphasis added).

The broad definition of "financial institution" in section 655.005(i) leaves unclear whether the Florida legislature intended for HB 989 to apply to (i) federal and non-Florida state-licensed financial institutions with one or more offices in Florida or (ii) federal and non-Florida state-licensed financial institutions with no offices in Florida but that maintain accounts for Florida residents. The text of the press release that accompanied the Governor's signing of HB 989, although not part of the legislative record, states that HB 989 is meant to "[i]ncrease[] protection for customers of financial institutions ***operating in Florida*** from unwarranted account" termination and suspension.[2] The "operating in Florida" language makes clear that, from the perspective of the executive branch of Florida government, and at the very least, federal financial institutions and non-Florida state-licensed financial institutions with one or more offices in Florida are subject to section 655.0323 (as amended by HB 989).

- ***Expanded Triggering Events.*** HB 989 expands the definition of "unsafe and unsound practice" found in section 655.0323(2), Florida Statutes, by clarifying that account suspension or termination by a financial institution—not just account denial or "cancellation" (which were the terms used in HB 3)—is an "unsafe and unsound practice" if the suspension, termination, denial, or cancellation decision was made on the basis of (1) the person's political opinions, speech, or affiliations; (2) the person's religious beliefs, religious exercise, or religious affiliations; (3) any rating, scoring, analysis, tabulation, or action that considers a social credit score based on certain factors; or (4) any factor that is not a quantitative, impartial, and risk-based standard, including any such factor related to the person's business sector.
- ***New Complaint Process Before the OFR.*** HB 989 also adds a new complaint process in favor of customers as set forth in section 655.0323(4), Florida Statutes. If a customer or member of a financial institution ***suspects*** that the institution closed or suspended the account in violation of the "unsafe and unsound practice" standard, then the customer or member has the right to submit a complaint to the Florida Office of Financial Regulation (**OFR**) within 30 days after such an action. At a minimum, the complaint must contain the name and address of the customer or member, the name of the financial institution, and the facts upon which the customer or member bases his or her allegation.
- ***New OFR Investigation Process.*** HB 989 adds a new investigation process as set forth in section 655.0323(5), Florida Statutes. After receipt of a customer's or member's complaint, the OFR must notify the financial institution that a complaint has been filed. Once notified, the financial institution has 90 days to file a complaint response report containing information that the Commission will require by rule with the OFR. The OFR has 90 days from the date it receives a complaint to begin an investigation of the alleged violation.[3]
- ***New OFR Adjudicatory Process.*** After the investigation is completed or ceases to be active, the OFR has 30 days to create a report on the findings of the investigation. If the OFR determines that no violation of the "unsafe and unsound practice" standard occurred, the report must only (1) identify the complaint for which the report was made and (2) state that a determination has been made that no violation has occurred. The OFR has 45 days after the completion or cessation of the investigation to send the report to the customer or member who submitted the complaint via certified mail, return receipt requested, delivery restricted to the addressee, and to the subject financial institution. Notably, HB 989 does not create any new appropriation or other funding for the OFR to hire new staff to process these HB 989 customer complaints. It is not clear how the OFR, which has a limited staff, will find additional resources to process the inevitable raft of customer complaints.
- ***Referral to a Florida Enforcement Authority.*** If the OFR determines that a violation of the "unsafe and unsound practice" standard has occurred, the OFR must provide notice of the violation and provide a copy of the report to (1) the customer or member, (2) the Department of Financial Services, and (3) the "enforcing authority" as defined in section 501.203(2), Florida Statutes. Part II of Chapter 501 of the Florida Statutes is the Florida Deceptive and Unfair Trade Practices Act (the **FDUTPA**). The term "enforcing authority" in the FDUTPA means (i) the office of the state attorney (the **Florida State Attorney**) if a violation occurs in or affects the judicial circuit under the Florida State Attorney's jurisdiction or (ii) the Department of Legal Affairs within the Office of the Attorney General if the violation occurs in or affects more than one judicial circuit or if the Florida State Attorney defers to the Department of Legal Affairs in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the Florida State Attorney.

Notably, the final version of HB 989 dropped the provisions that would have conferred a private right of action for affected customers to sue a financial institution for damages, which appeared in a predecessor bill (Florida House

Bill 585) to HB 989.

NEXT STEPS

Financial institutions – regardless of their charter or license type or whether they have a physical presence in Florida – should make a legal determination before July 1, 2024 whether they are subject to the new requirements of HB 989. To the extent such financial institutions are subject to HB 989's new requirements, financial institutions should:

- carefully review their account suspension and termination policies and procedures and consider whether enhancements should be implemented thereto in light of HB 989's processes, and
- at a minimum, shortly before or contemporaneous with any account closure or suspension, prepare a documented decision that explains why the account was closed or suspended.

Winston & Strawn LLP is focused on providing guidance to financial institutions doing business in Florida and HB 989's impact on their regulatory and compliance obligations.

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[1] Winston previously reported on HB3 in briefings, which can be found here and here.

[2] *Governor DeSantis Signs Legislation to Strengthen Florida's Protections Against the Agenda of the Global Elite*, OFF. OF THE GOVERNOR OF FLA. (May 2, 2024), https://www.flgov.com/2024/05/02/governor-desantis-signs-legislation-to-strengthen-floridas-protections-against-the-agenda-of-the-global-elite/.

[3] If the complaint response report indicates that the financial institution took action due to suspicious activity as defined in section 655.50(3), Florida Statutes, the initial investigation must be handled by the OFR in accordance with section 655.50, titled "Florida Control of Money Laundering and Terrorist Financing in Financial Institutions Act." However, if the OFR determines that the financial institution's action was taken without any basis under section 655.50, the OFR must continue to investigate the financial institution's action and determine whether the financial institution has acted in violation of the "unsafe and unsound practice" standard.

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