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OCC Bulletins Announce Plans to Eliminate Debanking

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On September 8, the Office of the Comptroller of the Currency (OCC) issued two bulletins aimed at eliminating "politicized or unlawful debanking" by the banks it supervises. The OCC's guidance is "consistent with" President Donald Trump's recent executive order (EO) 14331, which directs "Federal banking regulators," including the OCC, to remediate past instances and prevent against future acts of politicized or unlawful debanking.[1]

The first bulletin reminds banks that debanking activities may be considered in reviews of Community Reinvestment Act (CRA) performance and licensing filings for corporate activities, such as opening new branches or completing mergers and acquisitions, and the second reminds banks of their legal obligations regarding the release of customer financial records and the voluntary submission of suspicious activity reports (SARs). Ina press release, the OCC states that the bulletins "affirm that banks should provide access to financial services based on individualized, objective, and risk-based analyses," a mandate that has become a recent focus of the Trump administration.

The OCC also revealed in the press release additional actions toward eliminating debanking, including that it had requested information from its nine largest banks on their activities as part of an "ongoing review to assess" politicized or unlawful debanking. The OCC is also reviewing consumer complaint data and data from other government and third-party sources to "further refine" its examination efforts; reviewing its approaches to Bank Secrecy Act (BSA) and anti-money laundering (AML) supervision; and has updated its online customer complaint website to facilitate reporting of unlawful debanking activities.

OCC bulletin on the RFPA and SAR filings

In the first bulletin, the OCC reiterates banks' obligations under the Right to Financial Privacy Act (RFPA)[2] and the proper usage of voluntary SAR filings.

Right to financial privacy

Under the RFPA, banks may not disclose customers' financial records to a government authority unless the government follows specific procedures. Generally, to obtain the records, a government authority must certify in writing that it has complied with the RFPA by obtaining either customer authorization; an administrative subpoena or summons; a judicial subpoena; a search warrant; or a formal written request from a government agency if no administrative summons or subpoena authority is available (and follow other obligations as set out in the RFPA). The OCC reminds banks that proper processes must be followed before disclosing customers' financial information, even if the information is requested by the government. As apparent impetus for the bulletin, the OCC references alleged prior instances of banks coordinating with federal law enforcement "to surveil and share the private financial information of persons engaged in transactions commonly associated with certain political affiliations" after January 6, 2021.

Voluntary SARs

Generally, banks must file a SAR within 30 calendar days after detecting facts that may constitute a basis for SAR filing, such as detecting a known or suspected federal criminal violation against the bank or involving a transaction conducted through the bank that meets certain requirements as set forth by the Financial Crimes Enforcement Network (FinCEN).[3] The bulletin reminds banks that while they voluntarily may file a SAR with respect to any suspicious transaction they believe is relevant to a possible violation of law or regulation but that is not required to be filed under FinCEN rules, banks should not utilize voluntary SARs as a "pretext" to improperly disclose customers' financial information or evade compliance with the RFPA. A bank should only submit a voluntary SAR "where it identifies concrete suspicious activity, such as activity that could form the basis for filing a SAR except that it is under the applicable threshold."

OCC bulletin on CRA reviews

The second bulletin states that the OCC may consider "politicized or unlawful debanking" in bank licensing applications and CRA performance reviews.

Licensing filings

As the OCC explains in the bulletin, the OCC considers certain “evaluative factors” in reviews of licensing filings by banks seeking bank branches, changes in control or other corporate activities, or by entities looking to obtain a federal charter or license. Debanking activity by banks may implicate certain of these factors, such as “the convenience and needs of the community to be served, fair access to financial services, fair treatment of customers, and the transaction’s impact on depositors, other creditors, and customers.” The OCC notes that during its licensing reviews, it may consider a bank’s record of politicized or unlawful debanking and its policies and procedures designed to avoid engaging in debanking.

CRA reviews

Pursuant to the CRA, the OCC examines its supervised banks’ activities to confirm that they are meeting the credit needs of the communities in which they do business.[4] In determining a bank’s CRA rating, the OCC may consider as one factor whether a bank has engaged in politicized or unlawful debanking.

Looking ahead

As we’ve previously noted, the OCC’s announcement follows other state and federal efforts to eliminate “politicized and unlawful debanking” and promote fair access to banking. The OCC had already taken action to remove references to “reputation risk” from its guidance materials and handbooks, and noted it will propose a rule to remove reputation risk references from its regulations.

The OCC’s guidance follows the response from the Small Business Administration (SBA) to the Trump EO; the SBA sent a letter directing its network of more than 5,000 lenders to identify past occurrences of debanking, remediate such instances and cease any current policies or practices that facilitate debanking. Other prudential bank regulators, including the Federal Deposit Insurance Corporation (FDIC) and Federal Reserve, have announced similar reviews and removals of references to “reputation risk,” and we expect to see the FDIC and Federal Reserve follow the OCC in taking additional steps to execute the debanking EO.

Notes

1. “Federal banking regulators” refers to “the Small Business Administration (SBA) and the Federal member agencies of the Financial Stability Oversight Council with supervisory and regulatory authority over banks, savings associations, or credit unions.”
2. 12 USC §§ 3401-3423.
3. 12 CFR 21.11(c). See also 31 CFR 1020.320.
4. 12 US Code § 2901.

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