

Hot Topics in Bank Regulation and Supervision – Change is in the Air

The UNC Banking Institute

March 26, 2026 (2:15 – 3:30 p.m.)

I. Supervision

A. The focus of supervision under the Federal agencies is being significantly reshaped – from both staffing reductions and sharpening the areas of supervisory focus and areas of criticism.

1. Staffing Changes

a) The Federal Reserve, Federal Deposit Insurance Corporation (“FDIC”), Office of the Comptroller of the Currency (“OCC”) and, particularly the CFPB, have been affected by the broad staffing changes at Federal agencies, with reductions in their workforces impacting the speed at which supervisory or licensing issues may be resolved but also, more generally, resulting in the loss of critical institutional knowledge and subject matter expertise.

b) Changes in examination staff may have an impact on how examinations are conducted, particularly in non-mandated examination areas and may result in more agency reliance on the findings and work of internal audit departments.

2. Sharpening the Focus of Supervision on Material Financial Risks

a) As a general matter, the agencies have announced supervision that will be less focused on risk management policies and procedures and more focused on material financial risks impacting the safety and soundness of the institution.

(1) On October 7, the FDIC and the OCC jointly issued a notice of proposed rulemaking proposing to define the term “unsafe or unsound practice” for purposes of the enforcement powers and to establish minimum criteria that must be met for the agencies to issue matters requiring attention (“MRAs”) to supervised institutions.

(2) The proposed definition of an unsafe or unsound practice would require a practice, act or failure to act that is contrary to generally accepted standards of prudent bank operation and that, if continued, is likely to materially harm the financial condition of the institution or present a material risk of loss to the Deposit Insurance Fund or that has already materially harmed the financial condition of the institution.

- (3) The re-sharpening of regulatory focus has also been echoed by Michelle Bowman, Vice Chair of Supervision at the Federal Reserve.
 - (4) How nonfinancial risk types will be assessed for potential material financial effect on an institution remains an open question.
- b) One of the spaces where this change is being felt is in the issuance or non-issuance of MRAs.
- (1) Under the OCC/FDIC proposal, an MRA may only be issued if a practice, act or failure to act (1) could reasonably be expected to become an unsafe or unsound practice (as defined under the NPR) under current or reasonably foreseeable conditions, or (2) is an actual violation of a banking or banking-related law or regulation.
 - (2) The commentary around this change is for regulators to move away from a check-the-box exercise and to instead focus on material financial risk.
 - (3) Prior to the current administration, the issuance of an MRA was commonplace in an examination. If an examination was completed without an MRA, that could be viewed as unusual. Now examinations appear to be resolved much more frequently without the issuance of MRAs.
 - (4) This change in approach potentially raises the stakes when an MRA is issued. It also raises the question: if the threshold for an MRA has been materially raised, what is left for an MRIA and will there be MRAs and MRIs separate from enforcement actions?
 - (5) Agencies have indicated they are going through their existing MRAs that do not meet the new standard and have promised to release them on their own.
 - (6) The recent AML MRAs and risk governance framework MRAs that are largely procedural / process related could be ripe for this revision.
 - (7) Another area that could be ripe for rescission would be responses to MRAs that are only waiting for sustainability.
3. The impact of the changes to the MRA framework should result in fewer MRAs, which also impact a bank or bank holding company's supervisory ratings.
- a) Changes to the Federal Reserve's rating system for Large Financial Institution (LFI).

(1) The LFI rating scale assesses a large BHCs (i) Capital Planning and Positions; (ii) Liquidity Risk Management and Positions; and (iii) Governance and Controls and assigns one of four rating levels: (i) Broadly Meets Expectations; (ii) Conditionally Meets Expectations; (iii) Deficient-1; and (iv) Deficient-2.

(2) In November, the Federal Reserve finalized revisions to the LFI rating system, loosening the definition of "well managed" to allow firms to hold up to one "Deficient-1" component rating—in capital, liquidity, or governance—while still qualifying as well managed. This change removed the automatic presumption of formal or informal enforcement actions for Deficient-1 ratings, shifting to case-by-case determinations.

(3) Now, a holding company with at least two “Broadly Meets Expectations” or “Conditionally Meets Expectations” component ratings and no more than one Deficient-1 component rating would be considered well managed under the LFI Framework, which impacts a bank’s licensing position with the Federal Reserve for acquisitions and other expansionary-related filings.

(4) The changes in the LFI scale are expected to result in more banks seeking to engage in expansionary activities.

4. But there needs to be a change to the bank CAMELS rating scale for there to be a real difference.

a) If a depository institution subsidiary continues to be assigned supervisory ratings under the CAMELS framework that indicate it is not well managed, its holding company no longer qualifies as a financial holding company and faces restraints on its ability to engage in expansionary activities.

b) The Adopting Release estimates that, although seven LFIs would move into well-managed status as a result of the changes in the LFI rating system, only three would be in a position to fully regain their eligibility as an FHC due to the presence of a less-than-satisfactory composite or management rating of its subsidiary bank(s) under the CAMELS rating system.

B. In addition to changes, and potential changes, to the usage of MRAs and rating assessment systems, the OCC also recently proposed changes to its heightened risk management standards for covered large banks, limiting the number of institutions to which it would apply and raising whether the standards should be entirely rescinded. When adopted, these standards resulted in significant shifting of

personnel to align to the standards' concept of three lines of risk management defense.

1. The OCC has proposed increasing the threshold at which heightened standards apply from \$50 billion to \$700 billion – bringing the number of covered banks down to 8 from the current 38. The OCC could still apply the heightened standards to other banks with highly complex operations or that otherwise present heightened risk.¹
 2. The OCC has questioned in its proposal whether the heightened standards should be rescinded for all banks, but it is unclear where the questioning will lead to changes for the largest institutions.
 3. If heightened standards are rescinded, it would not prevent institutions from complying with elements of them. The three lines of defense are embedded in most major institutions at this point. It is difficult to envision the lines of defense would be abandoned entirely if for no other reason than the possibility of leadership and priority changes with a change of administration.
 4. It will give at least some institutions flexibility to adopt a line of defense structure that they believe makes the most sense for their business and capabilities of their risk structure and personnel. This may look like it does today. However, in its proposal the OCC noted that institutions excluded from heightened standards may make staffing reductions to eliminate redundant risk management processes. In addition, institutions may also develop bespoke risk frameworks for coverage of functions or areas requiring highly technical and limited expertise.
- C. The OCC recently issued a notice of proposed rulemaking to revise its appellate process for material supervisory determinations. This NPR was issued less than a month after the FDIC adopted updates to its guidelines for appeals establishing the Office for Supervisory Appeals.
1. There is some overlap in the types of things that can be challenged, including examination ratings, findings of violations of laws, and MRAs.
 2. The reviews will be conducted *de novo* and decisions will be published. The FDIC places the burden on the appealing bank while the OCC is requesting comments on where the burden should be.
 3. There is some hope that this review process will discourage supervisors from taking positions that are not aligned with laws or regulations.

¹ OCC Requests Comments on Proposed Amendments to Heightened Standards (Dec. 23, 2025), <https://www.occ.treas.gov/news-issuances/news-releases/2025/nr-occ-2025-134.html>.

4. While there is optimism in the industry, it is unclear which institutions will be the first to utilize it and potentially test the anti-retaliation provisions.
- D. Concerns have also been raised about the potentially unhelpful limitations on information created by CSI restrictions.
1. The Federal Reserve is reviewing its rules under which confidential supervisory information can be shared to help banks better coordinate fraud prevention efforts and mitigate the potential for supervisory abuse.
 2. Michelle Bowman has focused on the lack of transparency for supervision as creating a need for changes to CSI. She has noted that, “Labeling information as CSI results in significant restrictions on its disclosure—banks and bank employees are subject to criminal penalties if they disclose CSI without regulatory approval even if doing so would serve beneficial purposes for bank safety and soundness.”²
 - a) Revision to the current scheme can help with fraud prevention by allowing institutions to more broadly share information.
- E. Regulation that has driven banks out of the market has been another point of focus. One example of this has been the rescission of the leveraged lending guidance.
1. In December, the agencies rescinded the 2013 guidance and a 2014 FAQ on the guidance.³ The guidance outlined “high-level principles” related to safe-and-sound leveraged lending activities. However, the FDIC and OCC said the documents impeded banks’ application of risk management principles to leveraged lending.
 - a) “This resulted in a significant drop in leveraged lending market share by regulated banks and significant growth in leveraged lending market share by nonbanks, pushing this type of lending outside of the regulatory perimeter”.

II. Prudential Requirements

- A. While we have spent a lot of time discussing changes to how the agencies supervise institutions, there are significant changes expected in the prudential rules covering capital and liquidity.
1. Changes to the stress testing regime are already well underway.

² Speech by Michelle W. Bowman, Federal Reserve Vice Chair for Supervision “Modernizing Supervision and Regulation: 2025 and the Path Ahead” (Jan. 7, 2026), <https://www.federalreserve.gov/newsevents/speech/bowman20260107a.htm>.

³ Leveraged Lending: Interagency Statement on Rescission of Interagency Leveraged Lending Guidance Issuances (Dec. 5, 2025), <https://www.occ.gov/news-issuances/bulletins/2025/bulletin-2025-44.html>.

a) Last April, the Federal Reserve proposed a rule that would average stress test results over two consecutive years in calculating an institution's stress capital buffer to avoid large swings in capital requires from year to year.⁴

b) Last October, the Federal Reserve released a notice of proposed rulemaking to enhance the transparency and accountability of its supervisory stress test models. Under the proposal, the Federal Reserve would annually disclose the model documentation and scenarios and invite public comment on the scenarios and any material changes to the models. The proposed changes followed litigation by industry trade groups and would also (i) allow banks more time to prepare and plan for the tests by shifting the jump-off date of the stress tests from December 31 to September 30 and (ii) modify Y-14A/Q/M reporting forms to reduce the required documentation, according to Federal Reserve estimates, by over 10,000 pages per firm. The Federal Reserve also requested comment on the proposed 2026 supervisory stress test scenarios.⁵

c) In February, the Federal Reserve finalized the hypothetical scenarios for its 2026 stress test and announced that it would maintain large banks' current stress capital buffer requirements until 2027, when new requirements can be calculated based on models that take public feedback into consideration.⁶

d) The OCC and FDIC released the scenarios for their supervised institutions around the same time.

e) Industry associations have filed comment letters that are largely supportive of the changes but advocate the Federal Reserve go farther – including by proposing all model changes for public comment (instead of only material changes).⁷

f) Criticism of the proposal includes that it will incentivize banks to game the system by making changes solely to influence stress testing

⁴ Modifications to the Capital Plan Rule and Stress Capital Buffer Requirement (Apr. 22, 2025), <https://www.federalregister.gov/documents/2025/04/22/2025-06863/modifications-to-the-capital-plan-rule-and-stress-capital-buffer-requirement>.

⁵ Enhanced Transparency and Public Accountability of the Supervisory Stress Test Models and Scenarios; Modifications to the Capital Planning and Stress Capital Buffer Requirement Rule, Enhanced Prudential Standards Rule, and Regulation LL (Nov. 18, 2025), <https://www.federalregister.gov/documents/2025/11/18/2025-20211/enhanced-transparency-and-public-accountability-of-the-supervisory-stress-test-models-and-scenarios>.

⁶ Federal Reserve Board finalizes hypothetical scenarios for its annual stress test and votes to maintain the current stress test-related capital requirements until public feedback can be considered (Feb. 4, 2026), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20260204a.htm>.

⁷ Comment Letter from BPI, American Bankers Association, Financial Services Forum, SIFMA, ISDA, and U.S. Chamber of Commerce (Feb. 20, 2026), <https://bpi.com/fed-proposal-marks-progress-in-improving-stress-test-transparency/>.

results (causing them to be non-representative) and cause the models to become static.⁸

2. The revised Basel III endgame proposal is expected to be issued by the end of the first quarter.⁹
3. The proposal has been described as a “right sizing of capital charges” and “capital neutral.” The agencies have not said much about what the proposal will include. Vice Chair for Supervision said the agencies drew from commentary on the 2023 Basel III endgame proposal to address the concerns noted.

a) That commentary included issues around driving certain activities outside of the regulatory perimeter because of the punitive capital treatment, double counting of the same risks for capital purposes, and “gold-plating” of already robust international standards.

4. We do have some details on the proposed treatment of mortgage servicing assets (MSAs), which is intended to bring mortgage origination, lending, and servicing back to banks.¹⁰

a) Vice Chair for Supervision Bowman has previewed the proposal would remove the requirement to deduct MSAs from regulatory capital. It would maintain the 250 percent risk weight assigned to these assets and seek comment on the appropriate risk weight for these assets.

b) The proposal is also expected to seek ways to increase the risk sensitivity of capital requirements for mortgage loans on bank books, such as by using loan-to-value (LTV) ratios to determine the applicable risk weight for residential real estate exposures, rather than applying a uniform risk weight regardless of LTV.

⁸ Comment Letter from Dennis M. Kelleher, President, Co-founder, and CEO of Better Markets, Inc. (Feb. 20, 2026), https://bettermarkets.org/wp-content/uploads/2026/02/BetterMarkets_Comment_Letter_Fed_Stress_Test_Model.pdf.

⁹ American Banker, Fed’s Bowman says Basel proposal still on track for end of Q1 (Feb. 18, 2026), <https://www.americanbanker.com/news/feds-bowman-says-basel-proposal-still-on-track-for-end-of-q1>.

¹⁰ Speech by Michelle W. Bowman, Federal Reserve Vice Chair for Supervision “Revitalizing Bank Mortgage Lending, One Step with Basel” (Feb. 16, 2026), <https://www.federalreserve.gov/newsevents/speech/bowman20260216a.htm>.

5. The GSIB surcharge¹¹ proposal is likely to revive measures in the rule proposed by the agencies in 2023 but never finalized.¹² This rule will likely be released at the same time as, or close in time to, the revised Basel III endgame proposal (as it was in July 2023).
 - a) The 2023 proposed rule shifted the reporting of certain systemic indicators used in GSIB method 1 and 2 score calculations to averages over a month or quarter rather than as of December 31 of the previous calendar year. This was intended to more accurately reflect risk profiles and remove incentives to manage the indicators to reduce the surcharge.
 - b) The proposed rule also would have replaced the 100 basis points increments for systemic risk scores (each of which correspond to a specific surcharge) with 20 basis points. This was intended to make the surcharge more risk sensitive and reduce the “cliff effects” of significant changes in capital requirements when crossing from one band to another.
 - c) Other areas that have been the subject of criticism from banks are the fixed coefficients applied in method 2, which have caused the surcharges to increase over time without a corresponding increase in risk. A suggestion the Fed appears to be exploring is to deflate the GSIB scores by nominal GDP growth since the surcharges were implemented.¹³
6. The agencies have not given a timeline for liquidity reform. It will likely be next on their list after they complete the proposed capital measures.
 - a) On February 10, 2026, the agencies rescinded the public FAQs related to the LCR rule, noting they “anticipate seeking comment on the issues addressed in the FAQs, as well as on proposed regulatory changes, in the future.”¹⁴
 - b) On March 3, 2026, Vice Chair for Supervision Bowman gave a speech previewing that reform efforts will likely focus on the Liquidity Coverage Ratio (LCR) – a buffer large banks must maintain of high-quality liquid assets that at least equal their projected net cash outflows during a

¹¹ The GSIB surcharge is calculated as the higher of two methods. Method 1 is a computation based on systemic indicators in five categories associated with systemic importance – size, interconnectedness, cross-jurisdiction activity, substitutability, and complexity. It aligns with international standards and generally results in a lower surcharge than Method 2, which is a U.S.-specific approach that replaces substitutability with a measure of reliance on short-term wholesale funding. Method 2 also uses fixed coefficient values for each of the systemic indicators. 12 C.F.R. §§ 217.405-406.

¹² Regulatory Capital Rule: Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies; Systemic Risk Report (FR Y-15), 88 FR 60385 (Sept. 1, 2023), <https://www.federalregister.gov/documents/2023/09/01/2023-16896/regulatory-capital-rule-risk-based-capital-surcharges-for-global-systemically-important-bank-holding>.

¹³ Not in publicly available statements from Fed officials, but mentioned by Mark Van Der Weide, FRB General Counsel, at ABA Banking Law Committee meeting.

¹⁴ Liquidity Coverage Ratio FAQs (Updated Feb. 10, 2026), <https://www.federalreserve.gov/supervisionreg/topics/liquidity-coverage-ratio-faqs.htm>.

30-day stress period – and the Federal Reserve discount window.¹⁵ The LCR has generated complaints regarding its lack of usability because it must be maintained even in a stress scenario. The discount window has long been associated with a stigma where banks opt not to use it out of fear of sending a signal to the market that they are in stress.¹⁶

c) A proposed rule may include incorporating credit prepositioned at the discount window into the LCR – recognizing that a bank that does so would be able to quickly borrow from the discount window and withstand a run.¹⁷

B. Another area where there has been significant criticism and signaling of changes has been in recovery and resolution planning.

1. Recovery and resolution planning has been in the news often over the past year. The agency heads have raised it in public comments and in revisiting the 2023 bank failures. However, the only actual changes so far are specific to IDI resolution plans submitted to the FDIC.
2. In April 2025, the FDIC issued FAQs and exemptions of certain content requirements in advance of IDIs’ initial submissions under its revised resolution planning rule.¹⁸
3. This reduced the burden in preparing the plans and removed some of the content requirements that had been critiqued in the rulemaking process as more onerous and speculative – including, for the larger, “Group A” CIDIs (total assets of \$100B or more):
 - a) Using a failure scenario;
 - b) Providing “meaningful optionality” for the execution of their strategy across different scenarios; and
 - c) Conducting a valuation analysis.
4. The FDIC has indicated it intends to revise the IDI resolution planning rule to, at the very least, codify the FAQs and potentially make broader reductions of the content requirements. The FDIC has floated whether the GSIBs need to make IDI resolution planning submissions because they all

¹⁵ 12 C.F.R. § 50.21(f).

¹⁶ Speech by Michelle W. Bowman, Federal Reserve Vice Chair for Supervision “Liquidity Resiliency, Financial Stability, and the Role of the Federal Reserve” (Mar. 3, 2026), <https://www.federalreserve.gov/newsevents/speech/bowman20260303a.htm>.

¹⁷ Not in publicly available statements from Fed officials, but mentioned by Alex LePore, FDIC Deputy to the Chairman for Policy, at ABA Banking Law Committee meeting.

¹⁸ FDIC Modifies Approach to Resolution Planning for Large Banks (Apr. 18, 2025), <https://www.fdic.gov/news/press-releases/2025/fdic-modifies-approach-resolution-planning-large-banks>.

use a SPoE strategy, under which the bank would not fail, and submit 165(d) plans every other year under the Dodd-Frank Act.¹⁹

5. In anticipation of the rule being amended, the FDIC issued an FIL in December stating:²⁰
 - a) IDIs scheduled to submit by April 1 or July 1 will make their submissions as planned, except that GSIB IDI subsidiaries only need to provide content equivalent to an interim supplement; and
 - b) IDIs scheduled to submit by October 1 will not have to submit until after a final rule is issued.
6. All other potential changes are only in proposed form or discussion at this point.
7. The OCC issued a proposed rule in October 2025 to rescind its recovery planning guidelines applicable to national banks with \$100B or more in assets.²¹
 - a) It seems likely this will move forward as planned.
 - b) The lack of recovery planning guidance will reduce the documentation burden, although many of the capabilities detailed in them will live on as they may be connected to resolution planning, operational resilience, stress testing, and contingency funding planning.
8. In comments at the ABA Banking Law Committee meeting in January, Comptroller Gould advocated for (i) eliminating IDI resolution plans as lacking statutory authority, (ii) reducing the frequency of 165(d) submissions (e.g., to every five or ten years), and (iii) either rescinding the 165(d) resolution planning guidance or putting it out for public comment as a proposed rule.²²
 - a) The FRB and FDIC have not made any public statements indicating they are revisiting 165(d) resolution planning requirements. The first

¹⁹ Acting Chairman Hill, Resolution Readiness and Lessons Learned from Recent Large Bank Failures (Oct. 15, 2025), <https://www.fdic.gov/news/speeches/2025/resolution-readiness-and-lessons-learned-recent-large-bank-failures>.

²⁰ FDIC Provides Update on IDI Resolution Planning for Large Banks, FIL 63-2025 (Dec. 31, 2025), <https://www.fdic.gov/news/financial-institution-letters/2025/fdic-provides-update-idi-resolution-planning-large-banks>.

²¹ Rescission of OCC Guidelines Establishing Standards for Recovery Planning by Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches, 90 FR 51587 (Nov. 18, 2025), <https://www.federalregister.gov/documents/2025/11/18/2025-20199/rescission-of-occ-guidelines-establishing-standards-for-recovery-planning-by-certain-large-insured>.

²² Remarks of Jonathan V. Gould, Comptroller of the Currency, American Bar Association Banking Law Committee Meeting (Jan. 16, 2026), <https://occ.gov/news-issuances/speeches/2026/pub-speech-2026-4.pdf>.

indications of their thinking on this point may come from feedback on the GSIBs' and large domestic and foreign banks' 2025 filings this year.

b) All signs coming from the FDIC are that IDI resolution planning will continue for all but the largest institutions and be focused on giving the FDIC the information it needs to effectively resolve a large bank. It seems unlikely that the FDIC will eliminate this requirement altogether given its view after the 2023 bank failures that it needed more information.

III. State Law Developments & Preemption

A. We are now almost two years removed from the Supreme Court's decision in *Cantero* setting out the framework to evaluate the National Bank Act's preemption of state consumer financial laws, and we are also seeing states increasingly seeking to regulate the activities of banks in this space, sometimes in novel ways.

1. Fees and Charges

a) The ability of a bank to set the fees and charges for its services is a fundamental component of its ability and willingness to offer its products and services, and, historically, courts have generally held that the NBA preempts application of state laws that seek to dictate these charges for national banks. However, it is still an area where states have, and are seeking, to exercise greater control.

b) The banking industry challenged Illinois' Interchange Fee Prohibition Act ("IFPA") due to its prohibition on banks receiving interchange fees on the amount of a card transaction related to taxes and tips.

(1) While the U.S. District Court initially granted a preliminary injunction from Illinois enforcing the prohibition against national banks (and state banks), it recently declined to make the injunction permanent after concluding that that NBA preemption did not extend to the transaction fees because the fees are set, not by the banks, but by the card networks.

(2) By focusing on who sets the fees, the District Court was able to distinguish application of OCC regulations that have long provided national banks with significant discretion in setting their non-interest fees and charges. In fact, the District Court noted that the case would be much simpler if the bank set the interchange fee, citing cases holding state laws are preempted that restricted ATM and check-cashing fees.

(3) Notwithstanding the involvement of the card networks, the IFPA does, ultimately, work to restrict the fees and charges a national bank can receive for deposit and payment services and on its face

would suggest a greater level of interference than the New York law the Supreme Court found to be preempted in *Franklin National Bank v. New York* that imposed advertising restrictions. The Seventh Circuit has accepted an expedited appeal of the District Court's ruling.

2. Risk Management Standards

a) While most state legislative efforts directly focus on a bank's interactions with its customers with respect to fees, disclosures, loss mitigation efforts, etc., we have seen increased efforts by states to legislate the risk management activities of banks.

(1) In addition to prohibiting discriminatory or unfair outcomes from the use of a certain AI systems, Colorado's comprehensive artificial intelligence law also establishes standards and requirements for the management of such risks.

(2) A Delaware law (Delaware SB 156) seeks to restrict lenders from using medical debt information contained in credit reports.

b) These efforts appear to encroach on the authority that Congress delegated to the OCC, not to the states, for establishing safe and sound practices for national banks (12 U.S.C. 1831p-1).

c) Notably, the OCC, regardless of the Administration, has indicated it will defend preemption in areas such as this, with former Comptroller Hsu noting that Federal preemption in safety and soundness areas is "legally absolute and non-negotiable" and the OCC more recently reiterated more generally that it will vigorously defend Federal preemption in its response to a demand from the Conference of State Banking Supervisors that it rescind its preemption regulations.

3. Shifting the Costs of Fraud

a) As the costs and number of victims of fraud have skyrocketed, we have seen increased efforts by states to shift the costs of fraud onto banks.

(1) There have been legislative efforts in several states, such as North Carolina and Maryland, to amend the provisions of their UCC to provide customers with refund and payment protection rights for authorized, but fraudulently induced, wire transfers.

(2) A bill proposed in California (Senate Bill 784) would similarly condition a consumer's obligation to repay a lender's extension of some home improvement loans on the lender taking steps to ensure the contractor's completed improvements were operational. Another proposed bill in California would limit the

liability of the elderly for fraudulently induced financial transactions.

b) Whether states can unilaterally shift the costs of fraud onto banks raises preemption questions because it directly affects the safe and sound operation of national banks.

B. It was unclear after the Supreme Court issued its opinion in *Cantero* how lower courts would apply its preemption analysis framework.

1. Unfortunately, but likely as expected, courts are still grappling with how to utilize Supreme Court precedent and apply the analysis.

a) The Ninth and First Circuits have each recently issued decisions on National Bank Act preemption and upheld state interest on escrow laws – although only the First Circuit reached a decision on the merits in *Conti v. Citizens Bank*, while the Ninth Circuit reached the decision on procedural grounds in *Kivett v. Flagstar Bank*.

b) In both cases and in *Illinois Bankers Association v. Raoul*, the courts observed that Supreme Court precedent cited by *Cantero* for use in these analyses was not particularly helpful given the limited number of cases.

2. Things will likely stay uncertain for some time – and there is a chance the Circuit Courts may again be split if the Second Circuit, contrary to the reasoning of the First Circuit’s decision in *Conti*, finds preemption of New York’s interest on escrow law following the remand of its prior decision in *Cantero*. The decision remains pending.

a) We also note that the Ninth Circuit has agreed to rehear *Kivett en banc* and address the substantive question the *Kivett* panel concluded it was not authorized to decide.

C. What is the industry looking for from the courts?

1. Banks need clear rules of the road in understanding the compliance obligations that apply to their activities.

2. And while *Cantero* noted that bright line rules favoring preemption are not permissible, courts should also account for the fact that *Cantero* also noted that the use of any bright line rule *against* preemption was equally unjustified.

3. Preemption shouldn’t be contingent on a bank-by-bank and law-by-law showing of “significant interference.” Courts should be able to consider the impact of categories of laws in making preemption determinations and make the determination as a question of law, rather than as point in time factual questions applicable only to a specific bank – in other words, courts

should utilize the common sense, practical assessment called for by *Cantero*.

4. Courts also should apply the mandated nuanced comparative analysis of Supreme Court precedent and avoid overly restrictive readings of their relevancy, which is particularly important given the limited number of cases.

IV. New Regulatory Challenges

A. We have been talking a lot about how certain actions the administration has taken have or may lessen the regulatory burden. There are some new actions that may increase that burden. Debanking / Fair access to banking, an issue originally starting at the state level, has become a primary issue at the federal level after the President's executive order.

1. On August 7, 2025, President Trump signed an executive order, "Guaranteeing Fair Banking For All Americans", to prohibit banks from denying services based on political, religious, or lawful business affiliations.²³

a) The order directs federal regulators to remove "reputation risk" from examination guidelines and forces banks to use objective, individualized risk assessments.

b) It was issued among the backdrop of three states—Florida, Tennessee, and Idaho—already having a law in place designed to prevent decision making based on nonfinancial factors.²⁴

B. Reputational risk is another place where banks have had to pivot how things were handled under the previous administration.

1. There has been a general effort to remove DEI initiatives across the industry and corporate America more generally.
2. As with all executive orders, it is unclear whether their mandates will remain in place after the change in administration. There are some concerns that actions taken in this space will result in enforcement actions on the change of administration.
3. It is unclear whether the prohibition against reputational risk just eliminates consideration of reputational factors by the government agency or if it

²³ Executive Order "Guaranteeing Fair Banking for All Americans" (Aug. 7, 2025), <https://www.whitehouse.gov/presidential-actions/2025/08/guaranteeing-fair-banking-for-all-americans/>.

²⁴ Florida Financial Institutions Reform Act (2023 amendments); Tennessee Financial Institution Fair Access Act (2024); and Transparency in Financial Services Act (2025).

prohibits financial institutions from considering any non-financial reputational factors in its decision making.