

THOUGHT LEADERSHIP

LEGAL UPDATES

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CFPB Finds Truth-in-Lending Act Does Not Preempt State Commercial Financing Disclosure Statutes; Seeks Public Input

On December 7, 2022, the Consumer Financial Protection Bureau (CFPB) issued a notice for public comment on its preliminary determination that the federal Truth-in-Lending Act (TILA) does not preempt the New York Commercial Finance Disclosure Law (NY-CFDL) and substantially similar statutes in California, Utah and Virginia with respect to use of the terms “finance charge” and “annual percentage rate (APR).” Comments are due on January 20, 2023.

Regulation Z permits interested parties to request that the CFPB determine whether a state law requirement is preempted by TILA and Regulation Z. TILA and Regulation Z do not preempt state laws except to the extent that a state law is inconsistent with TILA or Regulation Z and only to the extent of the inconsistency. Regulation Z and agency guidance explains what “inconsistent” means.

A small business finance trade association requested that the CFPB make a TILA preemption determination regarding the NY-CFDL. The trade association argued that material differences between how TILA and the New York law use the terms “finance charge” and “APR” should cause TILA to preempt the NY-CFDL because the laws are inconsistent. The trade association also argued that TILA’s definition of “finance charge” and “APR” have such specific meanings with credit offerings that failing to enforce TILA’s definitions across different financing types, whether credit is extended for commercial or consumer purposes, would impede TILA’s goal of providing uniform credit disclosures and would cause confusion or misunderstanding for

small business owners, who use both consumer credit and commercial financing to fund their businesses.

The CFPB rejected these arguments, noting that TILA and Regulation Z apply to consumer credit and the NY-CFDL applies to commercial financing. The statutes govern different transactions and, therefore, do not contradict each other. According to the CFPB, the New York law does not frustrate the purpose of TILA because lenders are not required to provide disclosures under the NY-CFDL to individuals seeking consumer credit. These individuals should receive only TILA disclosures.

On its own initiative, the CFPB also considered whether TILA/Regulation Z preempts commercial financing disclosure statutes in California, Utah and Virginia. For the same reasons, the CFPB preliminarily concluded no TILA preemption with respect to the use of the terms “finance charge” and “APR.” After receiving public input, the CFPB must publish its final preemption determination to the Federal Register.

Considerations beyond the request for comment

The CFPB’s notice for public comment highlights some of the challenges with the new commercial financing disclosure requirements in California, New York, Utah and Virginia. Heralded as TILA-like disclosures for commercial credit and other funding, the new statutes incorporate terminology and some calculations from TILA and Regulation Z, but the statutes also require the use of disclosure calculations and assumptions that are materially different from TILA and Regulation Z. As noted by the trade association, these differences could cause confusion among small business borrowers because of small business owners’ familiarity of the meaning of the terms “finance charge” and “APR” with consumer credit products. The cost of credit disclosure differences could also disadvantage small business lenders.

Deciding to respond to this preemption request is another effort by the CFPB to increase the guidance that it provides to the marketplace. Under the Biden Administration, the CFPB has issued a significant number of advisory opinions, interpretative rules, CFPB circulars, and other guidance on existing federal consumer financial laws. Much of this guidance falls outside of the formal rulemaking process. We do not expect the CFPB to slow the pace of issuing guidance in the near term, especially as other aspects of the CFPB’s supervisory or enforcement authority may be handicapped by constitutional questions.

What this means to you

The CFPB likely will finalize its determination that state commercial financing disclosure statutes are not preempted by TILA and Regulation Z. The status quo should not change. Companies offering

funding primarily for commercial or business purposes should verify whether they are subject to the new commercial financing disclosure statutes in California, New York, Utah and Virginia.

Contact us

Our team will continue to analyze the applicability of and requirements under these state statutes and will continue to monitor state law developments. If you have questions regarding TILA's preemption of state laws or state commercial financing disclosure statutes, please contact Susan Seaman, Maureen Clark or your Husch Blackwell attorney.