LEGAL UPDATES

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Colorado Bill Introduced to Opt Out of Federal Interest Rate Preemption

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SUSAN M. SEAMAN
MADISON:
608.255.4440
SUSAN.SEAMAN@
HUSCHBLACKWELL.COM

MARCI V. KAWSKI
MADISON:
608.234.6051
MARCI.KAWSKI@
HUSCHBLACKWELL.COM

On March 27, Colorado legislators introduced a bill (H.B. 1229) to opt out of federal banking laws that permit federally insured state chartered banks and credit unions to charge Colorado residents the "interest" permitted under the depository institutions' home state laws. The bill, as originally introduced, also required a creditor to include certain additional charges in the maximum finance charge rate limitation under the Consumer Credit Code (Code) creating a so-called "all-in" rate cap. The "all-in" rate cap does not appear in the current version of the bill. Finally, H.B. 1229 adjusts fee amounts and conditions under an alternative finance charge provision in the Code for smaller-dollar consumer loans.

If the bill is passed, out-of-state state banks and credit unions could be required to follow Colorado's interest rate and fee restrictions on consumer loans to Colorado residents if the loans are deemed to be made in Colorado. This bill represents another effort by Colorado to stymie bank partnerships and limit charges on consumer loans.

Opt-Out to Federal Interest Rate Exportation

H.B. 1229 proposes to opt Colorado out of Sections 521 to 523 of the federal Depository Institutions Deregulation and Monetary Control Act (DIDMCA), which gave federally insured state banks, state credit unions, and state savings institutions the ability to export the "interest" permitted under their home state laws to borrowers in other states notwithstanding any "interest" limitations in the borrower's state. Section 525 of DIDMCA permits a state to opt out of this federal interest rate exportation authority with respect to any loans made in the state. As recognized by the Federal Deposit Insurance Corporation and a Colorado appellate court, a state's opt-out of federal interest rate exportation under DIDMCA is effective only with respect to loans made in the state.

Colorado was one of the original states to opt out of federal interest rate exportation, but later repealed the opt-out. H.B. 1229 is an attempt to restore Colorado's opt-out. Notably, the bill seeks to limit federal interest rate preemption only for consumer credit transactions made in Colorado. This means that the preemption opt-out would apply to consumer loans and consumer credit sales with an amount financed of $75,000 or less. As currently written, the opt-out would not reach credit extended primarily for business purposes. H.B. 1229 also does not affect the federal interest rate exportation authority of national banks or federal credit unions because federally chartered depository institutions' federal rate exportation authority is not based on DIDMCA.

If Colorado passes this opt-out, it would join Iowa and Puerto Rico as jurisdictions where out-of-state state depository institutions may not be able to rely on federal interest-rate preemption to charge "interest" on its credit products. At the end of 2022, the Iowa Attorney General entered into an Assurance of Discontinuance with a Utah bank alleging that the bank charged finance charges on Iowa loans in its partnership program that exceeded the permitted maximum finance charge under the Iowa Consumer Credit Code. Although the Assurance of Discontinuance does not include all of the relevant program facts, the Assurance of Discontinuance may evidence that the Iowa Attorney General takes a broad view of Iowa's opt-out to federal interest-rate exportation under Section 525 of the DIDMCA.

The purpose of Sections 521 to 523 of DIDMCA was to put state depository institutions on more equal footing and allow them to compete with federally chartered depository institutions by giving state depository institutions substantially similar federal rate preemption authority. State opt-outs could again place state depository institutions at a competitive disadvantage relative to their federally chartered counterparts.

Removed "All In" Rate Cap Proposal

The original H.B. 1229 further endeavored to restrict charges by revising the maximum finance charge limit for consumer loans and consumer credit sales under the Code to include certain additional charges in the limit. In addition to charges that meet the definition of "finance charge," the original bill would have included the following charges in the maximum finance charge limit:

1. Any credit insurance premium or fee, any charge for single premium credit insurance, any fee for a debt cancellation contract, or any fee for a debt suspension agreement;

2. Any other charges for insurance listed in Section 5-2-202(1)(b) and (3) of the Code (regarding additional charges for insurance written in connection with a consumer credit transaction, other than insurance protecting the creditor against the consumer's default or other credit loss, if certain conditions are met);

3. Any fee for a credit-related ancillary product sold in connection with a credit transaction;
4. Any application fee charged to a consumer who applies for consumer credit; and
5. Charges for other benefits conferred on a consumer as described in Section 5-2-202(1)(d) of the Code.

Including these charges in the maximum finance charge limit would have restricted a creditor's ability to charge these fees and offer any associated product or service.

While the April 11 version of H.B. 1229 no longer includes an "all in" rate cap proposal, such a proposal could appear in future sessions. An "all in" rate cap may only be momentarily sidelined in Colorado.

Other Efforts to Limit Loan Charges in Colorado

Colorado has a history of challenging loan charges assessed by out-of-state state depository institutions, particularly in bank partnership programs. As noted above, Colorado was one of the original states to opt out of federal rate exportation pursuant to Section 525 of DIDMCA. In 2017, the Colorado Attorney General initiated lawsuits against two bank partnership programs challenging the loan charges on the personal loans offered in the programs. The lawsuits argued that federal interest rate preemption could not be utilized in the programs because the bank was not the "true lender" of the loans, and separately, federal rate preemption authority is not assignable to a nonbank when a loan is assigned (a "valid when made" challenge). According to the Colorado Attorney General, the bank partnership programs were subject to and violated the Colorado Consumer Credit Code. The programs settled the litigation with the Colorado Attorney General in 2020. H.B. 1229's proposed opt-out to federal rate preemption tries to achieve the same end result as these lawsuits—limiting bank partnership programs to the rates and fees permitted under the Code on loans to Colorado residents.

Contact Us

We regularly advise banks, credit unions, and licensed lenders on permissible rates and fees for their credit products. If you have questions about permissible rates and fees or federal interest rate preemption including states' ability to opt out of federal rate exportation, contact Susan Seaman, Marci Kawski, or your Husch Blackwell attorney.