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NAVIGATING COMPLEXITY IN US CONSUMER FINANCIAL SERVICES:

A look back at 2025

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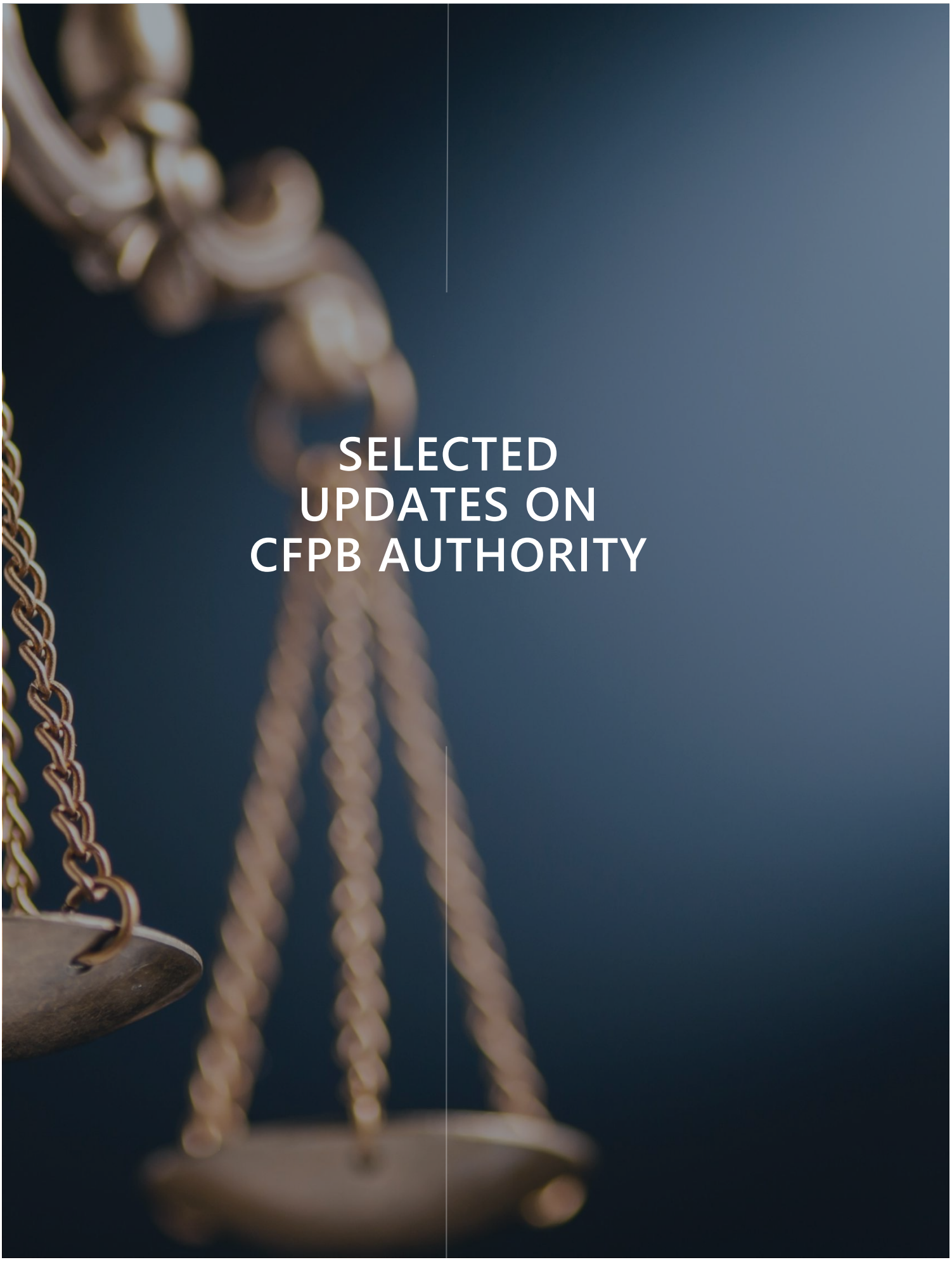
INTRODUCTION

Mayer Brown's broad Financial Services practice has a long history of providing meaningful insights on how rapidly evolving environments for financial products may affect their business activities through both thought leadership publications and client engagements. Our attorneys covering spaces including financial services regulatory advisory, financing and corporate transactions, and litigation and enforcement representation understand that the value we provide consists not only of working within the environment that exists in the moment, but also in active tracking of how environments have changed over time and prediction of how they will continue to shift in the near and longer terms.

The past year presented financial services market participants with numerous legal and regulatory curveballs demanding reasoned reponse. The federal environment generally faced deregulatory pressures, but the path to a more open market has not been particularly smooth. Simultaneously, many state actors have sought to fill various perceived gaps in regulation that federal pullback has exposed. The year that comes is shaping up to be no less challenging. As you navigate 2026, Mayer Brown seeks to be a partner in charting a path that both identifies new opportunities and reasonably mitigates new risks.

In this publication, we offer you a look back at select major developments in the US regulatory requirements applicable to consumer and small business financial products and services. This year's compilation of articles (presented as they were originally published as examples of the kinds of financial services Legal Updates you should expect from Mayer Brown over time) addresses key federal and state regulatory issues that may affect business opportunities and risks across US jurisdictions and/or financial asset classes. Specifically, we have chosen to highlight articles covering CFPB and state law developments, as well as developments affecting bank partnership lending models, automobile financing, buy-now/pay-later (BNPL) financing, earned wage access (EWA) programs, home improvement and solar financing, and small business loans and credit alternatives (such as merchant cash advance programs).

It is our hope that, by revisiting the articles applicable to the types of programs and transactions in which you regularly engage, you will gain a better sense of how US markets are changing over time. Upon review, please feel free to reach out to Mayer Brown—including through the authors of any article of interest for your business or your key client relationship managers—for further analysis of 2025's key developments and/or a sense of what you should expect in the coming year.



SELECTED UPDATES ON CFPB AUTHORITY

IN ANOTHER REVERSAL, THE CFPB DISMISSES CASE AGAINST NATIONAL COLLEGIATE STUDENT LOAN TRUSTS

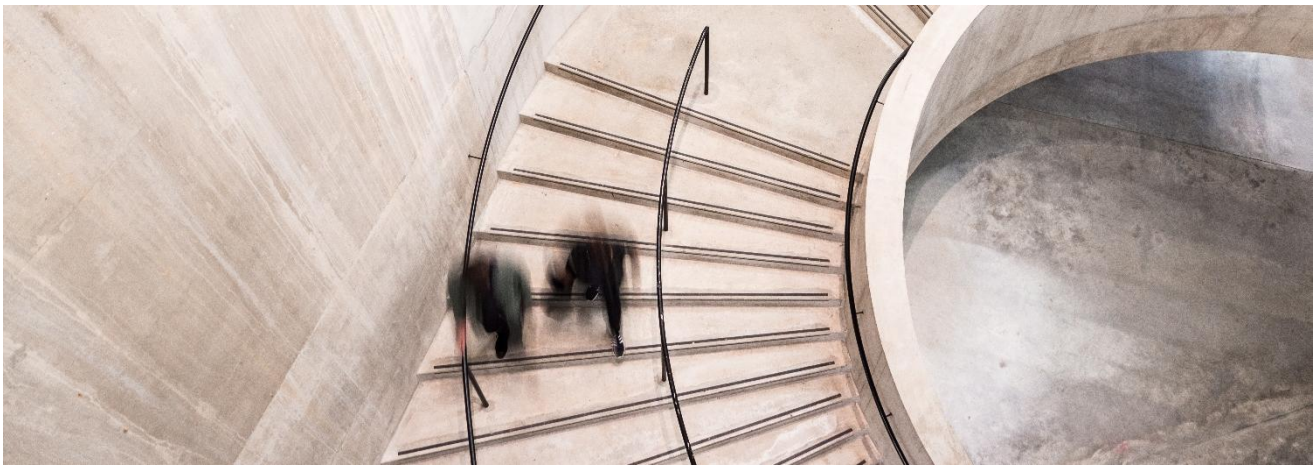
By Christa L. Bieker, Barbara M. Goodstein, and Steven M. Kaplan
Originally Published May 15, 2025

On April 28, 2025, the District Court for the District of Delaware granted a joint motion to dismiss with prejudice a lawsuit brought by the Consumer Financial Protection Bureau ("CFPB" or "Bureau") against the National Collegiate Student Loan Trusts ("Trusts"). Litigation had been ongoing since 2017, and days before President Donald Trump's inauguration, the parties agreed to settle the Bureau's claims for $2.25 million and the implementation of certain practice changes.

BACKGROUND

For background, the Trusts are 15 special-purpose Delaware statutory trusts. From 2001 to 2007, the Trusts acquired and provided financing for over 800,000 private student loans, with a principal amount of more than $15 billion through the issuance of approximately $12 billion in investor notes. In 2017, the CFPB sued the Trusts in federal court, alleging that the Trusts, through the actions of their servicers and sub-servicers, engaged in unfair and deceptive debt collection and litigation practices. Along with the complaint, the CFPB filed a purported consent judgment that the CFPB represented to the court as having been executed by the defendants. After various Trust-related parties intervened, the district court denied the CFPB's motion to enter the consent judgment, finding that the attorneys who executed it on behalf of the defendant Trusts were not authorized to do so by the proper Trust parties.

After various judicial developments, the case made its way to the Third Circuit, and in March 2024, a three-judge panel of the Third Circuit held that the Trusts were "covered persons" subject to the CFPB's enforcement authority under the Dodd-Frank Act because they "engage" in consumer financial products or services; i.e., student loan servicing and debt collection. The Supreme Court declined to review the Third Circuit's decision, and the case was remanded to the district court to begin discovery on the underlying facts of the case.



PROPOSED SETTLEMENT

On January 16, 2025, just four days before President Trump took office, the parties filed a proposed joint stipulated judgment with the court to settle the matter. Among other things, the proposed settlement would have prohibited the Trusts from causing a service provider to collect or seek to collect certain debt, furnish information to consumer-reporting agencies related to that debt, or resell that debt. The proposed settlement also would have required the Trusts to ensure all collectors, including law firms, had sufficient training and documented compliance programs. In addition, the proposed settlement would have required the Trusts to pay $2.25 million in consumer redress and to comply with other provisions that have become standard in CFPB settlements, such as obtaining acknowledgements of the settlement from relevant individuals and responding to written requests from the Bureau regarding the Trusts' obligations under the settlement.

At the Trusts' request, the court agreed to wait to enter the order until noteholders in the Trusts' debt securities had time to object to the settlement.

DISMISSAL WITH PREJUDICE

On April 25, 2025, under Acting Director Russel Vought, the Bureau filed a joint motion to dismiss the lawsuit with prejudice. The court granted the motion and terminated the proceedings on April 28. Dismissing a case with prejudice is significant because it essentially prohibits the Bureau from filing the same claims against the defendant in the future.

This is not the only pending or settled lawsuit the Bureau has moved to dismiss with prejudice since President Trump fired former Director Rohit Chopra, and the dismissal is consistent with a variety of other steps the Bureau has taken in recent months to roll back actions taken under the Biden Administration. For example, earlier this month, the Bureau announced that it will not prioritize enforcement or supervision actions with regard to entities that do not comply with requirements related to the Bureau's non-bank registry, colloquially known as the repeat-offender registry. As another example, in February, the Bureau submitted a motion to withdraw an amicus brief that it filed in the waning days of the Biden Administration which argued that a certain home equity investment product was credit under the Truth in Lending Act. Further, in March, the Bureau moved to vacate a redlining settlement that had already been entered by a court in an action that settled in November 2024. (Read our analysis of this action.)

IMPLICATIONS FOR THE INDUSTRY

This dismissal is the latest in a series of actions taken by the Trump Administration that signal less aggressive enforcement of federal consumer financial protection laws against the consumer credit industry, including secondary market participants. It remains to be seen whether state attorneys general or private plaintiffs may seek to bring actions against securitization trusts using similar theories of liability as the one previously pursued by the CFPB against the Trusts. However, while the Third Circuit's decision remains unchanged, the posture of the new administration suggests a more hands-off approach in dealing with the financial services industry.

COURT DECLINES TO ALLOW CFPB TO VACATE TOWNSTONE SETTLEMENT

By Kris D. Kully and Christa L. Bieker
Originally Published June 13, 2025

On June 12, 2025, Judge Valderrama of the federal district court for the Northern District of Illinois denied the joint motion to vacate the stipulated final judgment reached between the Consumer Financial Protection Bureau ("CFPB") and Townstone Financial, Inc., in an action alleging violations of the Equal Credit Opportunity Act ("ECOA").

As explained in Mayer Brown's Consumer Financial Services Review blog, the CFPB sought to vacate the settlement, in which Townstone agreed to pay a small penalty and take certain actions to resolve a years-long battle related to alleged discouragement of potential mortgage applicants on a prohibited basis. The settlement was entered in November 2024. However, the CFPB's new leadership asserted that although the lawsuit was launched during President Trump's first administration, it did so without substantial evidence of discrimination and based on the expressed political views of the mortgage company's principal. The CFPB's motion to vacate claims that CFPB lawyers at the time misled their superiors, leading them to pursue the litigation based on incomplete or inaccurate information.

Interestingly, Judge Valderrama wrote the opinion that initially dismissed the CFPB's case against Townstone in 2023, holding that ECOA does not apply to prospective applicants for credit. However, the Court of Appeals for the Seventh Circuit reversed that decision and remanded the case to the district court, after which the parties reached their settlement.

In denying the parties' joint motion to vacate that settlement, Judge Valderrama now states that more is at stake than the parties' current alignment. The court must now also consider that the parties were not engaged in a private dispute – rather, the mortgage company's alleged wrongdoing affected the public. In addition, the judge wrote that the court must consider the public interest in the finality of judgments.

The court considered the claims regarding deficiencies in the initial agency decision to bring the case, and the counter-arguments of the 14 nonprofit organizations that filed an amicus brief opposing the motion to vacate. Referring to the agency's present assertion that its case lacked merit, the court called it "an act of legal hara-kiri that would make a samurai blush." The court stated that it would be unprecedented under these circumstances to vacate a settlement voluntarily entered into by the parties, and it declined to take that step.

Recent news reports have indicated that several financial institutions have sought to take advantage of the current administration's apparent willingness to reverse the actions of the prior administration. While one could argue that courts should grant motions filed by both parties, the Northern District of Illinois held that doing so in this case would open a Pandora's box.

CFPB SETTLES FIRST ACTION UNDER NEW LEADERSHIP: CURRENT STATE OF THE CFPB AND A LOOK AHEAD

By Christa L. Bieker, Krista Cooley, Megan S. Webster, and Grace Kim
Originally Published July 18, 2025

The Consumer Financial Protection Bureau ("CFPB" or "Bureau") has seen significant changes since President Donald Trump fired former Director Rohit Chopra in January 2025. Under Acting Director Russell Vought, the CFPB has reversed a substantial number of prior Bureau initiatives, including dismissing actions with prejudice, withdrawing guidance, terminating ongoing consent order obligations, and rescinding rules.

Significantly, earlier this month, the CFPB released its first settlement under Acting Director Vought. The final judgment settles a lawsuit filed by the Biden-era CFPB in 2021 alleging violations of the Military Lending Act ("MLA"), including allegations that the defendant made loans to borrowers in excess of the MLA's maximum allowable annual percentage rate of 36%. The monetary provisions of the order are not trivial. The settlement requires the defendants to pay a civil money penalty of $4 million and reserve $5 million for the purpose of providing redress to impacted consumers.

This Legal Update discusses the current state of the Bureau and what to expect ahead.

CURRENT STATE OF THE CFPB: ACTING DIRECTOR AND STAFFING

Acting Director Vought, who is also the director of the Office of Management and Budget, has served as acting director of the Bureau since February 2025.[1] The Trump Administration initially nominated Jonathan McKernan to be the CFPB's permanent director, but in May 2025, the Administration nominated McKernan for undersecretary of domestic finance at Treasury. The Administration has not announced another nominee for Bureau director, and it is possible that Vought could remain acting director for the foreseeable future.[2]

In April 2025, Acting Director Vought attempted to eliminate approximately 90% of the agency's staff, but this effort is currently on hold pending litigation. Mark Paoletta, the CFPB's chief legal officer, explained that CFPB leadership identified "vast waste" in the agency's size and that the firings were designed to right-size the Bureau to better align with the Trump Administration's policy. If permitted to go forward, approximately 200 employees would remain, with 50 of these employees in Supervision and another 50 in Enforcement. In addition, the newly passed reconciliation act, known as the One Big Beautiful Bill Act, reduces the amount of funding that the CFPB can request from the Federal Reserve from 12 percent of the Federal Reserve annual operating budget to 6.5 percent. This reduction in funding capacity also could impact staffing levels in the future.

[1] Before Acting Director Vought, Scott Bessent served as acting director for less than a week.
[2] The Federal Vacancies Reform Act limits how long an acting officer may fill a vacant presidentially appointed, Senate-confirmed position in an executive agency. Specifically, the Act provides that during presidential inaugural transitions, if a vacancy exists within 60 days after the inauguration, then the acting director may serve up to 210 days, beginning 90 days after inauguration day or 90 days after the date the vacancy occurred, whichever is later. 5 U.S.C. § 3349a. Further, the Act also allows a person to serve for additional 210-day periods after the first or second nomination is rejected, withdrawn, or returned. *Id*. § 3346(b).

In addition, in connection with a lawsuit filed by the National Treasury Employees Union, which represents CFPB employees and certain other federal government employees, the CFPB currently is prohibited from taking other actions, such as destroying certain agency data and enforcing an order that employees stop all work.

SUBSTANTIAL ROLLBACK OF PRIOR ACTIONS

In the first few months of Acting Director Vought's tenure, the Bureau has reversed several prior Bureau actions, including actions taken under Trump-appointed Director Kathy Kraninger.

- *Enforcement*: The Bureau moved to dismiss a number of pending lawsuits with prejudice. Dismissing a case with prejudice is significant because it essentially prohibits the Bureau from filing the same claims against the defendant in the future. In addition, the Bureau terminated certain finalized administrative consent orders entered during the last Administration that were still in effect, waiving any alleged noncompliance with the orders. Along these lines, the Bureau also moved to vacate a settlement previously entered by a federal court. Notably, the lawsuit was filed during President Trump's first term while the Bureau was under the leadership of his appointee, Director Kraninger. The court denied the motion, citing the public interest in the finality of judgments. Along with its motion to vacate the settlement, the Bureau issued a press release asserting that the prior Bureau "abused its power" and acted with "zero evidence" to further the goal of DEI in lending.

These rollbacks indicate that current Bureau leadership may be open to outreach from regulated entities challenging prior CFPB positions. In addition, as discussed below, the Bureau has continued limited public enforcement matters.

- *Rulemaking and Guidance*: The Bureau has engaged in rulemaking to rescind certain effective rules and withdraw certain proposed rules. Among others, the Bureau issued a proposed rule to rescind the rule creating the Repeat Offender Registry.[3] As another example, the Bureau withdrew its proposed data broker rule amending Regulation V.[4] In addition, the CFPB issued an interim final rule to rescind protections and flexibilities added during the COVID-19 pandemic that allowed mortgage servicers to offer more streamlined loss mitigation options to borrowers.[5]

[3] CFPB, "*Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders; Proposed Rescission*," 90 Fed. Reg. 20406 (May 14, 2025). In June 2024, the CFPB finalized a rule requiring nonbank covered persons to provide information about their compliance with certain public orders.

[4] CFPB, "*Protecting Americans From Harmful Data Broker Practices (Regulation V); Withdrawal of Proposed Rule*," 90 Fed. Reg. 20568 (May 15, 2025). In December 2024, the CFPB issued a proposed rule to amend Regulation V which implements the Fair Credit Reporting Act. The proposed rule included requirements related to the flow of consumer information and would have brought companies operating as data brokers and information intermediaries under the FCRA's regulatory umbrella.

[5] CFPB, "*Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X; Rescission*," 90 Fed. Reg. 20791 (May 16, 2025). Some industry groups have called on the CFPB to expand the flexibilities to offer streamlined loss mitigation options to borrowers and make those flexibilities permanent.

Further, in May 2025, the Bureau rescinded approximately 60 guidance documents, including previously issued bulletins, consumer protection circulars, and policy statements, among other guidance documents.[1] The reason for these actions was the new leadership's concern that previously the Bureau used such guidance as *de facto* rulemaking to avoid the requirements of the Administrative Procedure Act. To the extent that was the case, any obligations implicitly imposed by the guidance is no longer in effect. The underlying laws, though, have not changed in most cases.

A LOOK AHEAD: WHAT TO EXPECT FROM THE CFPB

An April 2025 memo outlining the Bureau's 2025 supervisory and enforcement priorities states that the Bureau will focus on protecting servicemembers and their families. It also indicates that the Bureau will prioritize "actual fraud against consumers" and "measurable consumer damages." According to the memo, mortgages will receive the highest priority, with other areas of focus including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and "fraudulent" fees. Further, the memo states that the Bureau will not pursue supervision under novel legal theories and understands that its "primary enforcement tools are its disclosure statutes," possibly signaling that the current CFPB will be less likely to find a practice unfair or abusive if it is clearly disclosed. The Bureau plans to deprioritize areas such as student loans, medical debt, peer-to-peer platforms, and digital payments. The Bureau also stated that it would focus on "getting money back directly to consumers" rather than imposing penalties.

The first CFPB settlement under Acting Director Vought generally is consistent with these priorities. It focuses on protecting servicemembers. On the other hand, even though the Bureau's April 2025 priorities memo indicated that it would focus on consumer redress rather than penalties, the civil money penalties imposed by the settlement are sizeable. As explained above, the defendant will be required to pay a civil money penalty of $4 million, and reserve $5 million for the purpose of providing redress to impacted consumers. The CFPB continues to pursue a limited number of other public enforcement actions.

Reading the tea leaves, it seems likely that we can expect to see a substantially lower level of Bureau enforcement, but that enforcement will not halt altogether and will be particularly focused on traditional fraudulent activities. Further, settlements may continue to impose substantial monetary requirements, including civil money penalties in the millions of dollars.

[1] CFPB, "*Interpretive Rules, Policy Statements, and Advisory Opinions; Withdrawal*," 90 Fed. Reg. 20084 (May 12, 2025).

POTENTIAL FOR INCREASED STATE ACTIVITY

A decrease in CFPB enforcement actions may motivate state regulators to fill the enforcement void. We have not seen a dramatic increase in state actions to date, but it will necessarily take states time to hire staff and initiate investigations that will ultimately lead to public settlements. Notably, there have been reports of former CFPB staff joining various state regulator and attorney general offices.

While states have their own consumer financial laws that they enforce, including UDAP/UDAAP prohibitions, they could also enforce certain federal consumer financial laws. With some limitations on actions against national banks or federal savings associations, Section 1042 of the Dodd-Frank Act provides that state attorneys general may bring a civil action to enforce Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act.[1] Similarly, Section 1042 provides that a state regulator may bring a civil action or other appropriate proceeding to enforce the provisions of Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act with respect to any entity that is state-chartered, incorporated, licensed, or otherwise authorized to do business under state law.[2] With respect to a national bank or federal savings association, Section 1042 provides that state attorneys general may bring an action to enforce a regulation prescribed by the Bureau under Title X of the Dodd-Frank Act.[3]

Enforcing Title X of the Dodd-Frank Act could include enforcing the Act's UDAAP prohibition. Whether states have the authority under the Dodd-Frank Act to enforce the 18 enumerated federal consumer financial laws—such as the Truth in Lending Act and the Fair Credit Reporting Act, and their implementing regulations—is a trickier question.

In 2022, the CFPB published an interpretive rule taking the position that because Title X declares that it is unlawful for a covered person or service provider to offer or provide any consumer a financial product or service that is not in conformity with the 18 enumerated federal consumer financial laws, states have the authority to bring an action under the Dodd-Frank Act for violations by a covered person or service provider of any of the enumerated consumer financial laws.[4] A federal court has agreed with this view.[5] The current Bureau has taken a different view. In May 2025, the CFPB rescinded its previously issued interpretive rule and took the position that Congress did not intend to permit states to enforce "any provision of any [f]ederal consumer financial law."[6]

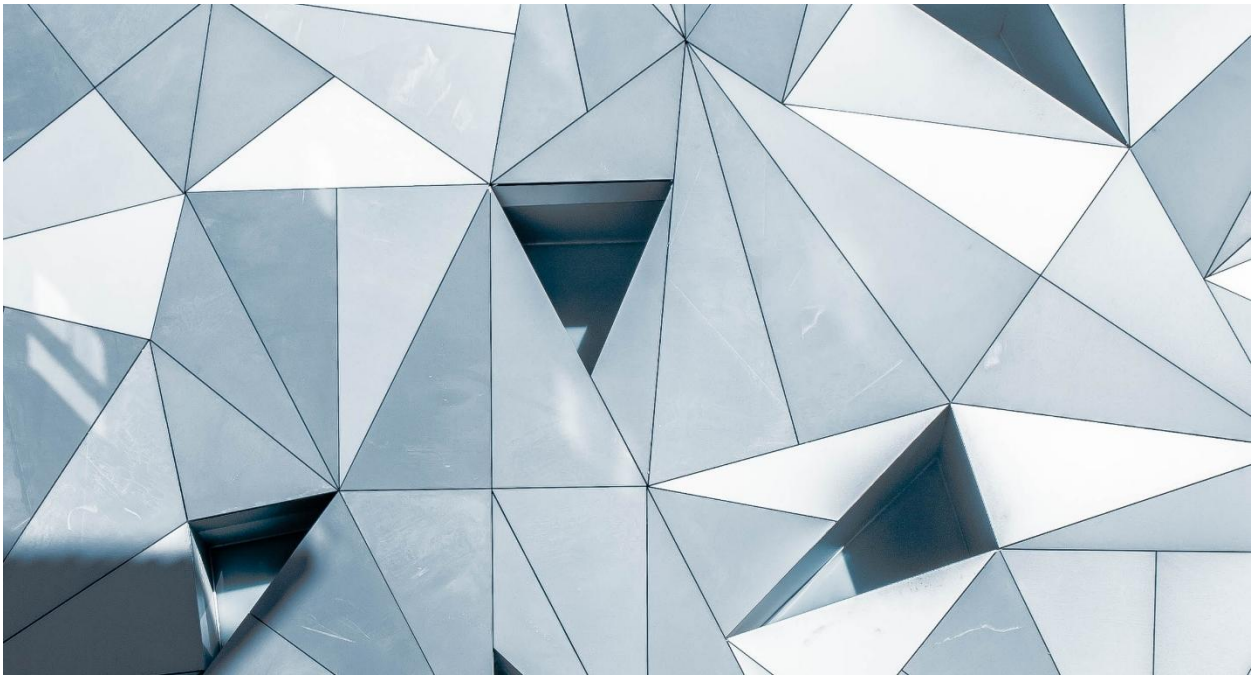
[1] 12 U.S.C. § 5552(a).
[2] *Id*.
[3] *Id*.
[4] CFPB, "*Authority of States To Enforce the Consumer Financial Protection Act of 2010*," 87 Fed. Reg. 31940, 31941 (May 26, 2022).
[5] *Pennsylvania by Shapiro v. Mariner Fin., LLC*, No. CV 22-3253, 2024 WL 169654, at *13 (E.D. Pa. Jan. 12, 2024) (holding that a state could bring an action under Section 1042 to enforce the Truth in Lending Act, one of the enumerated consumer financial laws).
[6] CFPB, "*Authority of States To Enforce the Consumer Financial Protection Act of 2010; Rescission*," 90 Fed. Reg. 20565 (May 15, 2025).

Section 1042 of the Dodd-Frank Act provides that state attorneys general or state regulators must provide notice to the Bureau when initiating an action to enforce Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act. In response, the CFPB may intervene in the state action as a party to prevent state enforcement. The Bureau can remove the action to an appropriate United States district court, be heard on all matters arising in the action, and appeal orders or judgments.[1]

In addition to authority under the Dodd-Frank Act, certain federal consumer financial laws expressly provide state enforcement authority. States, for example, may bring suit under the Fair Credit Reporting Act.[2]

CONCLUSION AND COMPLIANCE CONSIDERATIONS

As the Bureau's trajectory becomes clearer, regulated entities should continue to ensure their practices comply with the law and regulations applicable to the Bureau's stated priorities—including the MLA and the Servicemembers Civil Relief Act. Moreover, this is not the time to skimp on compliance with other consumer financial laws. The applicable statute of limitations can extend well into the future, and it is possible that, in three and a half years, a more aggressive Bureau could bring an action based on an entity's conduct during the current Administration. Further, given the potential for increased state scrutiny, regulated entities should ensure they maintain robust compliance management programs covering both state and federal obligations.



[1] 12 U.S.C. § 5552(b).
[2] 15 U.S.C. § 1681s(c).

NEW ACTION ON NO-ACTION LETTERS – CFPB BEGINS ACCEPTING APPLICATIONS UNDER UPDATED NO-ACTION LETTER PROCEDURES

By Holly Spencer Bunting, and Kelly F. Truesdale
Originally Published June 15, 2025

The US Consumer Financial Protection Bureau (CFPB) is giving no-action letters (NALs) a second chance. On January 8, 2025, the CFPB issued a policy statement setting forth new procedures for companies to request supervisory and enforcement relief through NALs. The policy statement (the "NAL Policy") was issued at the same time as a related policy statement setting forth procedures for companies to seek approvals under the CFPB's Compliance Assistance Sandbox (CAS), which would permit companies to rely on certain statutory safe harbor provisions. Both policy statements reestablish programs that had been established in 2019 and rescinded in 2022, following what the CFPB determined were potential abuses and other challenges in connection with the programs. The new policy statements incorporate updates that the CFPB indicates are intended to address those issues and to otherwise improve the effectiveness of the related programs.

Under the NAL Policy, the CFPB may issue NALs stating that the CFPB will not take supervisory or enforcement action against the recipient under the particular facts and circumstances that serve as the basis for issuance of the NAL. Although NALs represent an exercise of the CFPB's discretion, the NAL Policy makes clear that NALs are not binding on state enforcement authorities or private plaintiffs seeking to enforce relevant provisions of federal consumer financial laws. Under the NAL Policy, the CFPB expects that any new NAL will, among other things:

- Be limited to the identified recipient's product offering described in the NAL, and not to other offerings or aspects of a related product or service.
- Will state that the NAL does not express any legal conclusions regarding the meaning or application of the laws within the scope of the letter or constitute an endorsement by the CFPB of the product or service addressed in the letter.
- Require the recipient to consent to the CFPB's supervisory examination authority, if the recipient is not already subject to such authority.
- Require the recipient to apprise the CFPB of material changes to information in the recipient's application, or to information indicating that the aspects of the product offering described in the application are not performing as anticipated.

- Will state that the CFPB will not make supervisory findings or bring a supervisory or enforcement action based on the recipient's offering of the product or service under the laws identified in the letter or seek retroactive liability for the conduct covered under the letter after its expiration or termination. If the issuance of the NAL does not comply with the Administrative Procedure Act or the recipient's failure to substantially comply with the letter in good faith results in consumer harm, the CFPB indicates that it could bring an action to impose retroactive liability.
- Expire after two years, although the NAL may be terminated at any time by the CFPB and, as noted below, will automatically be rescinded if the recipient's product offering changes so as to no longer fit within the description in the application and as described in the NAL.

Any new NALs issued under the NAL Policy will be subject to certain "Conditions to Promote Innovation, Competition, Ethics and Transparency," which will be incorporated into each individual NAL. These conditions include:

1. Applicants must establish a market problem, in the form of an unmet consumer need (not including claims that the NAL would simply increase access to the applicant's product or service), that the new financial product or service solves, and must articulate the benefit to consumers that flows from the CFPB permitting the product or service to be provided without compliance with the law at issue.
2. The CFPB will not approve a NAL on a topic for a single firm. In particular, the CFPB will reach out to the applicant's competitors and invite them to apply for a NAL on the same topic. As noted in the NAL Policy, "the NAL program must not tilt the competitive playing field by picking winners and losers in markets, or appearing to do so."
3. NAL recipients will be prohibited from marketing or promoting the fact that their product or service received a NAL.
4. NAL applications will be posted publicly for a 60-day comment period. The CFPB acknowledges that it is bound by existing law restricting the disclosure of confidential information.
5. The CFPB will generally not consider applications from former CFPB attorneys representing companies as outside counsel.
6. The CFPB will not consider applications from companies that have been the subject of an enforcement action involving violations of federal consumer financial law in the last five years, or who are subject to a pending enforcement investigation by federal or state authorities.
7. NALs will automatically be rescinded when the recipient materially changes its product or service so that it no longer fits the description provided in the application and described in the NAL.

The Compliance Assistance Sandbox policy contains similar parameters and conditions for CAS approvals and related terms to those summarized above for the NAL Policy.

The NAL Policy (and the related CAS policy) were issued as general statements of policy that are exempt from notice and comment rulemaking; both policy statements became applicable upon their publication in the *Federal Register* on January 10, 2025. In the two-year period when the CFPB previously accepted applications for NALs, the CFPB's granted NALs addressed only four products and services, one of which the CFPB ultimately terminated. With the restrictions in the new NAL Policy—including those requiring supervisory jurisdiction, the requirement that the applicant establish a market problem solved by the applicant's new product or service, the prohibition on marketing the receipt of a NAL, and limited two-year applicability, to name a few—it remains to be seen whether companies will place value on a CFPB NAL under the NAL Policy.

In addition, because the policy statements are not implemented through typical rulemaking processes, they may be rescinded by the CFPB at any time. While the NAL Policy and CAS policy are generally similar to the policies established in 2019, there is no guarantee that the incoming administration will continue these policies in their current form. Even if NAL applications are submitted prior to a change in CFPB leadership in the hope that quick application increases the chance of NAL issuance, it is reasonable to anticipate the CFPB under the new administration may pause and review any policies issued by the CFPB under Director Rohit Chopra before continuing those policies or taking action under them. Thus, it could be a while before we know the impact of this NAL Policy and the related CAS policy.

CFPB PROPOSES NARROWING ECOA REGULATIONS

By Kris D. Kully
Originally Published November 18, 2025

The Consumer Financial Protection Bureau ("CFPB") has issued its proposed rule scaling back the interpretation of and regulations under the Equal Credit Opportunity Act ("ECOA"). While the agency placed the proposal on its official regulatory agenda months ago, conventional wisdom indicated that the rule would address interpretations of the Act's applicability to prospective applicants and to disparate impact claims. The proposal does address those topics and significantly narrows the availability of special purpose credit programs ("SPCPs"). Comments are due on the proposal within a short 30 days (by December 15, 2025).

CFPB PROPOSES NO DISPARATE IMPACT UNDER ECOA

ECOA generally prohibits creditors from discriminating against any applicant, with respect to any aspect of a credit transaction, on the basis of: race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the federal Consumer Credit Protection chapter. While ECOA clearly prohibits intentional discrimination, some have argued that it does not prohibit a creditor's neutral policies or practices that nonetheless result in a disparate impact on a protected class of applicants.

The CFPB took a deep dive and emphasized in the proposed rule that it has preliminarily determined that ECOA does not authorize disparate impact claims. First, the agency explains that, under orders from President Donald Trump, it must eliminate the use of disparate impact in all contexts to the maximum degree possible. With that, the agency looked for any specific mandate from the statute itself to apply it to such claims – and found none.

The CFPB recognized that certain legislative reports do in fact provide evidence that Congress intended ECOA to apply to the "effects" of a creditor's practices (i.e., disparate impact), as well as to intentional discrimination or disparate treatment. The CFPB also recognized that the Supreme Court held (in *Inclusive Communities*) that disparate impact claims are viable under the Fair Housing Act, even though that Act does not include effects-based language. However, the CFPB stated that the Court did not address how that reasoning could or should extend that reasoning to ECOA. The agency expressed concern that the prospect of disparate impact liability may lead creditors to actually consider prohibited characteristics, and to disadvantage some protected classes in an effort to reduce disadvantages for others. The prospect of disparate impact liability also may discourage creditors from innovating or cost-cutting measures.

Accordingly, the agency asserts that authorizing disparate impact claims is not the best reading of ECOA. However, the CFPB recognizes that neutral criteria may function as proxies for protected characteristics, and any such criteria would violate ECOA, but only if the creditor applies those criteria with the intent of treating individuals differently based on protected characteristics.

With this proposed rule, then, the CFPB would change Regulation B under ECOA in the following ways:

- Delete a sentence providing that "[t]he legislative history of the Act indicates that the Congress intended an 'effects test' concept . . . to be applicable to a creditor's determination of creditworthiness";
- Add in its place a sentence stating that ECOA does not provide that the "effects test" applies for determining whether there is discrimination under the Act;
- Clarify in the commentary that ECOA does not prohibit facially neutral policies, except to the extent facially neutral criteria function as proxies for protected characteristics designed or applied with the intention of advantaging or disadvantaging individuals based on protected characteristics; and
- Delete commentary language related to scoring systems that refers to an "effects test."

CFPB PROPOSES A "TAILORED" DISCOURAGEMENT PROHIBITION

Regulation B under ECOA prohibits a creditor from making any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage, on a prohibited basis, a reasonable person from making or pursuing an application. While ECOA itself does not directly address discouraging applicants on a prohibited basis, it directs regulatory agencies to refer matters to the Justice Department upon belief that a creditor has engaged in a pattern or practice of discouraging (or denying) applications in violation of ECOA. The Seventh Circuit Court of Appeals recently upheld the regulation's prohibition against discouragement in the *Townstone Financial* case.

In the CFPB's proposed rule, the agency does not suggest deleting the regulation forbidding the discouragement of potential applicants on a prohibited basis, recognizing that doing so could allow creditors to evade ECOA's core principles. However, the CFPB has "preliminarily determined" that the discouragement prohibition must be properly tailored so as not to unnecessarily infringe upon a creditor's rights and business activities. First, the prohibition should apply only to actual statements or visual images, and not to acts or practices such as where to locate branches or where to advertise.

Second, the prohibition should not apply to statements that encourage certain potential applicants. The CFPB provides an example of advertisements aimed at a particular geographical region, encouraging individuals in that region to apply. The proposed rule would delete a sentence from the commentary providing that "[t]he use of words, symbols, models or other forms of communication in advertising that express, imply, or suggest a discriminatory preference or a policy of exclusion in violation of the Act" would be prohibited.

With this proposed rule, in addition to the deletion described above, the agency would change Regulation B under ECOA to:

- Add language to clarify that a discouraging "oral or written statement" means spoken or written words, or visual images such as symbols, photographs, or videos.
- Replace commentary references to discouraging "acts" or "practices" with references to oral or written statements.
- Add the following examples of statements that do not constitute prohibited discouragement:

- Statements directed at one group of consumers, encouraging that group to apply for credit;
- Statements in support of local law enforcement;
- Statements recommending that, before buying a home in a particular neighborhood, consumers investigate, for example, the neighborhood's schools, its proximity to grocery stores, and its crime statistics; and
- Statements encouraging consumers to seek out resources to develop their financial literacy.

CFPB PROPOSES TO SIGNIFICANTLY NARROW SPCPS

ECOA specifies that it is not a violation of the anti-discrimination prohibition for a creditor to refuse to extend credit offered pursuant to a credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or "any special purpose credit program offered by a profit-making organization to meet special social needs," so long as the program meets the CFPB's regulatory standards. Regulation B requires for-profit organizations' SPCPs to be established and administered to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.

Despite that safe harbor under ECOA for targeting credit toward a certain class of persons, relatively few lenders have voluntarily offered an SPCP, at least as such. Low participation in SPCPs could be due to difficulty in creating the required plan and providing the required data and analysis. Mortgage lenders could be concerned that while such programs may be permissible under ECOA, there is no express safe harbor from liability under the Fair Housing Act. The Department of Justice has, in some actions, treated SPCPs as a way to remedy the alleged exclusion by creditors of certain communities of color, so perhaps lenders have worried that developing an SPCP on their own looks like an admission that they were not otherwise lending to underserved communities.

On January 15, 2021, the CFPB (then under the direction of the Biden Administration) published an Advisory Opinion to address reports of regulatory uncertainty with the express hope that broader creation of SPCPs would help expand access to credit among disadvantaged groups and address seemingly intractable disparities in loan denial rates to Black, Hispanic, and Asian borrowers. Some large mortgage lenders, and Fannie Mae and Freddie Mac, developed special programs. However, in line with President Trump's more recent orders, in March 2025, Federal Housing Finance Agency Director Pulte ordered Fannie Mae and Freddie Mac to terminate any SPCPs they had sponsored.

The CFPB's new proposal parses the regulations and commentary to clearly delineate the permissible bounds of an SPCP going forward, in an effort to more closely align those bounds with ECOA's purpose. The CFPB also asserts that times have changed, and the current standards for SPCPs no longer reflect the legal landscape or current credit markets. In fact, the agency states that SPCPs are currently the only known source in the for-profit credit markets "in which consumers would be 'effectively denied credit' because of their race, color, national origin, or sex." However, the agency specifically requests comments on the nature and extent of any current remaining credit discrimination.

With that, the proposal would generally prohibit SPCPs from using race, color, national origin, or sex as the common characteristic in determining eligibility for credit under the program. The proposal also would include restrictions on the extent to which an SPCP could use religion, marital status, age, or whether income is derived from a public assistance program as eligibility criteria. The CFPB emphasizes that those proposed restrictions related to certain categories are separate and independent from the proposed prohibitions applicable to other categories, repeatedly stating that if the prohibitions are not finalized or become inoperable, the restrictions would remain in place. Importantly, a for-profit institution that seeks to develop an SPCP for participants that share race or national origin, for example, would have to provide evidence for each participant who receives credit through the program that, in the absence of the program, he or she would not receive such credit as a result of his or her race or national origin.

Additionally, the proposed rule would make the following changes to Regulation B's SPCP standards:

- Add new specifications that the written plan must:
    - Provide evidence of the need for the SPCP;
    - Explain why the class of persons would not receive such credit in the absence of the SPCP; and
    - For SPCPs that require persons served by the program to share one or more common characteristics that would otherwise be prohibited classes, explain why meeting special social needs necessitates that its participants share those characteristics and cannot be met otherwise.
- Tighten the provision allowing SPCPs to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.

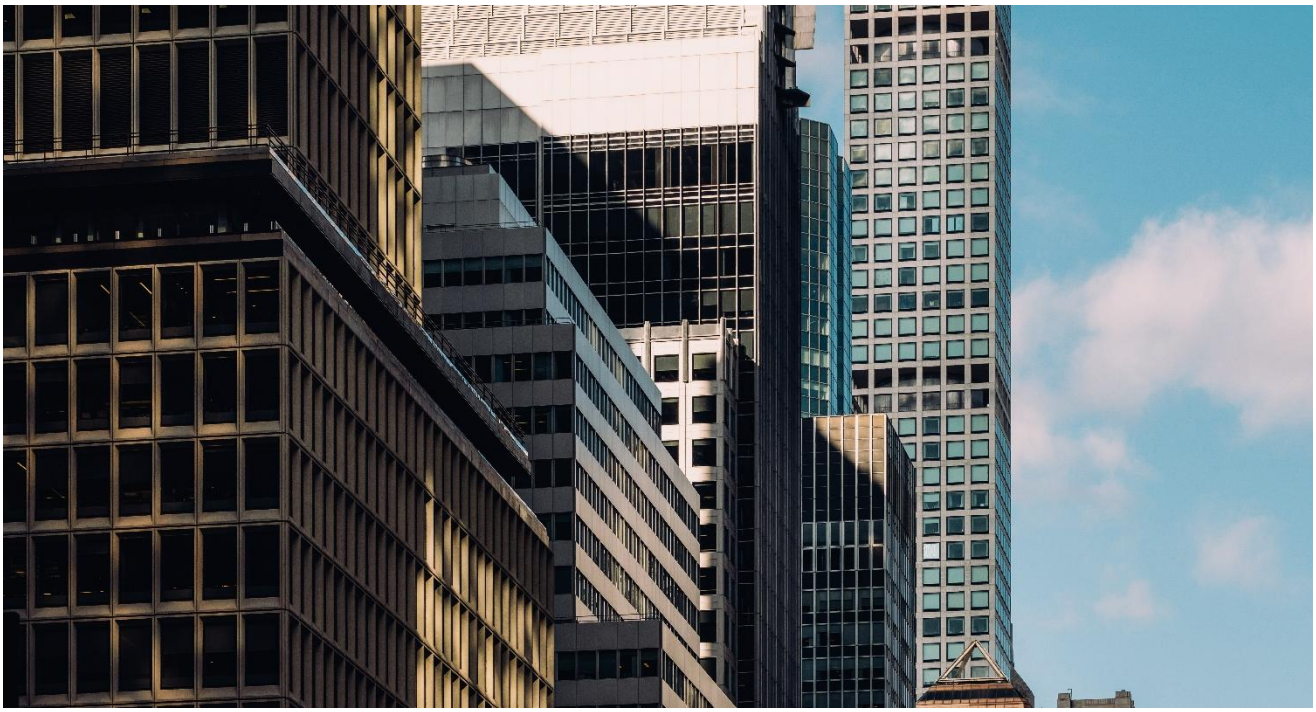
TIMING

The CFPB appears intent on moving quickly with this rulemaking, requesting public comment within just 30 days. Additionally, the agency states that it intends to issue a final rule that would become effective 90 days after that final rule's publication. The CFPB intends to give creditors with existing SPCPs sufficient time to evaluate whether any loans originated after the effective date of a final rule are consistent with these new parameters. Of course, as with all aspects of the proposal, the CFPB requests comment on that timeline.

STATE OF FAIR LENDING ENFORCEMENT

This proposal is one of many efforts to reshape the federal approach to fair lending analysis and enforcement. In response to President Trump's orders, the federal banking agencies have removed references in their supervision and examination materials to disparate impact liability, and the Department of Housing and Urban Development ("HUD") has rescinded several guidance documents and mortgagee letters related to anti-discrimination. HUD also is expected to issue a rulemaking on its disparate impact standards under the Fair Housing Act. The CFPB has even succeeded in at least one instance in convincing a court to release a bank from its continuing obligations under a prior redlining settlement agreement. Although the agency is reportedly running on depleting funds, it is racing to implement its priorities.

While the federal agencies may be scaling back their interpretations and enforcement of certain anti-discrimination principles, ECOA provides for a private right of action for aggrieved applicants, including via class actions, and a court may award such plaintiffs actual and punitive damages, equitable relief, costs, and attorney fees. Accordingly, courts may have an opportunity to opine on the CFPB's proposed interpretations, if and when they are finalized. In addition, lenders should remain mindful of state anti-discrimination laws, which regulators and courts may interpret as potential remedies for disparate impact or broad discouragement claims.



CFPB WITHDRAWS PLAN TO RESCIND RULES DETAILING PROCEDURES FOR STATE ACTIONS UNDER THE DODD-FRANK ACT

By Christa L. Bieker
Originally Published September 22, 2025

A decrease in Consumer Financial Protection Bureau ("CFPB" or "Bureau") enforcement activity may motivate state regulators to fill the enforcement void, including by bringing actions under the Dodd-Frank Act. Earlier this year, as part of its deregulatory efforts, the CFPB issued a direct final rule rescinding procedures by which a state official must notify the Bureau when the official takes an action to enforce the Dodd-Frank Act. Because of comments the Bureau received in response to the rule, the CFPB has withdrawn its plan to rescind these notification procedures.

STATE AUTHORITY TO BRING ACTIONS UNDER THE DODD-FRANK ACT

With some limitations on actions against national banks or federal savings associations, Section 1042 of the Dodd-Frank Act provides that state attorneys general may bring a civil action to enforce Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act.[1] Similarly, Section 1042 provides that a state regulator may bring a civil action or other appropriate proceeding to enforce the provisions of Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act with respect to any entity that is state-chartered, incorporated, licensed, or otherwise authorized to do business under state law.[2] With respect to a national bank or federal savings association, Section 1042 provides that state attorneys general may bring an action to enforce a regulation prescribed by the Bureau under Title X of the Dodd-Frank Act.[3]

It is commonly understood that enforcing Title X of the Dodd-Frank Act includes enforcing the Act's prohibition on unfair, deceptive, or abusive acts or practices ("UDAAP"). States may choose to bring actions under the Dodd-Frank Act because it authorizes certain remedies for violations of the Act, including recission or reformation of contracts, refunds of money, and disgorgement or compensation for unjust enrichment, among other remedies.[4]

[1] 12 U.S.C. § 5552(a).
[2] *Id.*
[3] *Id.*
[4] *Id.* § 5565(a)(2).

In addition to the UDAAP prohibition, it is possible that Section 1042 give states the authority to bring actions to enforce the 18 enumerated federal consumer financial laws, such as the Truth in Lending Act and the Fair Credit Reporting Act and their implementing regulations. In 2022, the CFPB published an interpretive rule taking the position that—because Title X declares that it is unlawful for a covered person or service provider to offer or provide any consumer a financial product or service that is not in conformity with the 18 enumerated federal consumer financial laws—states have the authority to bring an action under the Dodd-Frank Act for violations by a covered person or service provider of any of the enumerated consumer financial laws.[1] A federal court has agreed with this view.[2] The current Bureau has taken a different view. In May 2025, the CFPB rescinded its previously issued interpretive rule and took the position that Congress did not intend to permit states to enforce "any provision of any [f]ederal consumer financial law."[3]

NOTICE REQUIREMENT

Section 1042 of the Dodd-Frank Act provides that states must provide notice to the Bureau when initiating an action to enforce Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act.[4] The notice must be provided "timely" in the ordinary course, or "immediately upon instituting the action or proceeding in the case of an emergency."[5] In addition, the rules provide that the notification must include, at a minimum, the identity of the parties, the alleged facts, and whether there may be a need to coordinate the prosecution.[6]

In 2012, the CFPB promulgated rules that provide procedures states must follow when providing the required notice.[7] The Bureau explained that its rescission of the rules was part of its efforts to "eliminate unnecessary regulations" and stated that the rules "merely restate the notification requirements codified" in the Dodd-Frank Act.

Notably, the rules go beyond what is expressly required by the Dodd-Frank Act. While the statute requires that, in the ordinary course, states must notify the Bureau "timely" of an action, the rules specify that states must provide notice within 10 days. The rules also expand the information states must include in the notification.

Industry groups pushed back against the rescission of the rules arguing that the rules promote consistent enforcement, with some urging the Bureau to expand the notice requirement to more than 10 days.

[1] CFPB, "Authority of States To Enforce the Consumer Financial Protection Act of 2010," 87 Fed. Reg. 31940, 31941 (May 26, 2022).
[2] *Pennsylvania by Shapiro v. Mariner Fin., LLC*, No. CV 22-3253, 2024 WL 169654, at *13 (E.D. Pa. Jan. 12, 2024) (holding that a state could bring an action under Section 1042 to enforce the Truth in Lending Act, one of the enumerated consumer financial laws).
[3] CFPB, "Authority of States To Enforce the Consumer Financial Protection Act of 2010; Rescission," 90 Fed. Reg. 20565 (May 15, 2025).
[4] *Id.* § 5552(b).
[5] *Id.*
[6] *Id.*
[7] 12 C.F.R. § 1082.1.

BUREAU INTERVENTION IN STATE ACTIONS

If a state brings an action under Section 1042, the CFPB has the right to intervene and remove the action to federal court, be heard in the action, and appeal any order or judgment, to the same extent as any other party in the proceeding.[8] As states become more active in enforcing federal consumer finance law, it is possible that we will see the Bureau increasingly intervene in such actions.

[8] 12 U.S.C. § 5552(b).


SELECTED
UPDATES ON
STATE ACTIVITY

POTENTIAL FOR INCREASED STATE CONSUMER FINANCE ENFORCEMENT

By Christa L. Bieker
Originally Published August 08, 2025

A decrease in Consumer Financial Protection Bureau ("CFPB") enforcement actions may motivate state regulators to fill the enforcement void. We have not seen a dramatic increase in state actions to date, but it will necessarily take states time to hire staff and initiate investigations that will ultimately lead to public settlements. Notably, there have been reports of former CFPB staff joining various state regulator and attorney general offices.

While states have their own consumer financial laws that they enforce, including UDAP/UDAAP prohibitions, they could also enforce certain federal consumer financial laws. With some limitations on actions against national banks or federal savings associations, Section 1042 of the Dodd-Frank Act provides that state attorneys general may bring a civil action to enforce Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act.[1] Similarly, Section 1042 provides that a state regulator may bring a civil action or other appropriate proceeding to enforce the provisions of Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act with respect to any entity that is state-chartered, incorporated, licensed, or otherwise authorized to do business under state law.[2] With respect to a national bank or federal savings association, Section 1042 provides that state attorneys general may bring an action to enforce a regulation prescribed by the Bureau under Title X of the Dodd-Frank Act.[3]

Enforcing Title X of the Dodd-Frank Act could include enforcing the Act's UDAAP prohibition. Whether states have the authority under the Dodd-Frank Act to enforce the 18 enumerated federal consumer financial laws—such as the Truth in Lending Act and the Fair Credit Reporting Act, and their implementing regulations—is a trickier question.

In 2022, the CFPB published an interpretive rule taking the position that, because Title X declares that it is unlawful for a covered person or service provider to offer or provide any consumer a financial product or service that is not in conformity with the 18 enumerated federal consumer financial laws, states have the authority to bring an action under the Dodd-Frank Act for violations by a covered person or service provider of any of the enumerated consumer financial laws.[4] A federal court has agreed with this view.[5] The current Bureau has taken a different view. In May 2025, the CFPB rescinded its previously issued interpretive rule and took the position that Congress did not intend to permit states to enforce "any provision of any [f]ederal consumer financial law."[6]

[1] 12 U.S.C. § 5552(a).
[2] *Id*.
[3] *Id*.
[4] CFPB, "*Authority of States to Enforce the Consumer Financial Protection Act of 2010*," 87 Fed. Reg. 31940, 31941 (May 26, 2022).
[5] *Pennsylvania by Shapiro v. Mariner Fin., LLC*, No. CV 22-3253, 2024 WL 169654, at *13 (E.D. Pa. Jan. 12, 2024) (holding that a state could bring an action under Section 1042 to enforce the Truth in Lending Act, one of the enumerated consumer financial laws).
[6] CFPB, "*Authority of States to Enforce the Consumer Financial Protection Act of 2010; Rescission*," 90 Fed. Reg. 20565 (May 15, 2025).

Section 1042 of the Dodd-Frank Act provides that state attorneys general or state regulators must provide notice to the Bureau when initiating an action to enforce Title X of the Dodd-Frank Act or regulations issued under Title X of the Dodd-Frank Act. In response, the CFPB may intervene in the state action as a party to prevent state enforcement. The Bureau can remove the action to an appropriate US district court, be heard on all matters arising in the action, and appeal orders or judgments.[7]

In addition to authority under the Dodd-Frank Act, certain federal consumer financial laws expressly provide state enforcement authority. States, for example, may bring suit under the Fair Credit Reporting Act.[8]

Given the potential for increased state scrutiny, regulated entities should ensure they maintain robust compliance management programs covering both state and federal obligations.

[7] 12 U.S.C. § 5552(b).
[8] 15 U.S.C. § 1681s(c).

MASSACHUSETTS AG SETTLES FAIR LENDING ACTION BASED UPON AI UNDERWRITING MODEL

By Kris D. Kully
Originally Published June 20, 2024

While federal regulatory agencies retreat from enforcing disparate impact discrimination, at least one state agency has stepped forward. Massachusetts Attorney General Andrea Joy Campbell announced on July 10, 2025 a settlement with a student loan company, resolving allegations that the company's artificial intelligence ("AI") underwriting models resulted in unlawful disparate impact based on race and immigration status.

The disparate impact theory of discrimination in the lending context has been controversial. It has been 10 years since the Supreme Court held in *Inclusive Communities* that disparate impact is available under the Fair Housing Act if a plaintiff points to a policy or policies of the defendant that caused the disparity. In the fair lending context, then, disparate impact applies to mortgage loans. However, for other types of consumer credit – like auto loans or student loans – a plaintiff or government enforcer claiming discrimination would need to rely on the Equal Credit Opportunity Act ("ECOA"). While ECOA prohibits discrimination against an applicant with respect to any aspect of a credit transaction, there has been much debate over whether it applies to discrimination in the form of disparate impact. The federal government for years relied heavily on ECOA to bring credit discrimination actions. The Biden Administration pursued a vigorous redlining initiative against mortgage lenders. The government used the vast amount of data obtained under the Home Mortgage Disclosure Act ("HMDA") and compared the activities of various lenders within a geographic area to determine whether a lender was significantly lagging its peers in making loans to certain protected groups. The government then looked to the lender's branch locations, advertising strategies, the racial/ethnic make-up of its loan officers, and other factors to assert that the lender had discouraged loan applicants from protected classes. Through that redlining initiative, the government settled dozens of cases, resulting in well over $100 million in payments.

HMDA data provides extensive, if imperfect, demographic data on mortgage lending activities and has been key to building claims of lending discrimination, particularly disparate impact. However, that level of data is not generally available for other types of lending, like student loans. Without such data, the Office of the Massachusetts Attorney General ("OAG") in this case reviewed the lender's algorithmic rules, its use of judgmental discretion in the loan approval process, and internal communications, which the Attorney General described as exhibiting bias.

DISPARATE IMPACT BASED ON RACE, NATIONAL ORIGIN

In that review, the OAG looked back to the scoring model the lender used prior to 2017, which relied in part on a Cohort Default Rate – the average rate of loan defaults associated with specific higher education institutions. The OAG asserted that use of that factor in its underwriting model resulted in disparate impact in approval rates and loan terms, disfavoring Black and Hispanic applicants in violation of ECOA and the state's prohibition against unfair or deceptive acts or practices ("UDAP"). The public settlement order did not provide the level of statistical disparities. In addition, until 2023, the OAG asserted that the lender also included immigration status in its algorithm, knocking out applicants who lacked a green card. That factor "created a risk of a disparate outcome against applicants on the basis of national origin," and as such violated ECOA and UDAP according to the OAG. The settlement order prohibits the lender from using the Cohort Default Rate or the knock-out rule for applicants without a green card (although it appears the lender had discontinued those considerations years ago).

The OAG's settlement order also asserted that the lender failed to take actions to mitigate fair lending risks, by failing to test the algorithmic models and their weighted inputs for disparate impact; failing to test the judgmental underwriting processes for fair lending concerns; training the model on arbitrary, discretionary human selections on particular variables without appropriately determining whether the variables were predictive of default; and failing to ensure compliance with existing fair lending policies.

The lender agreed to pay $2.5 million to settle the allegations without making an admission to any of the OAG's allegations, and agreed to develop, implement, and maintain a corporate governance system of fair lending testing, controls, and risk assessments for the use of AI models. The lender also must develop written compliance policies to ensure that its models comply with fair lending requirements. The settlement order included a detailed roadmap for the lender's use of AI models going forward. Those steps include:

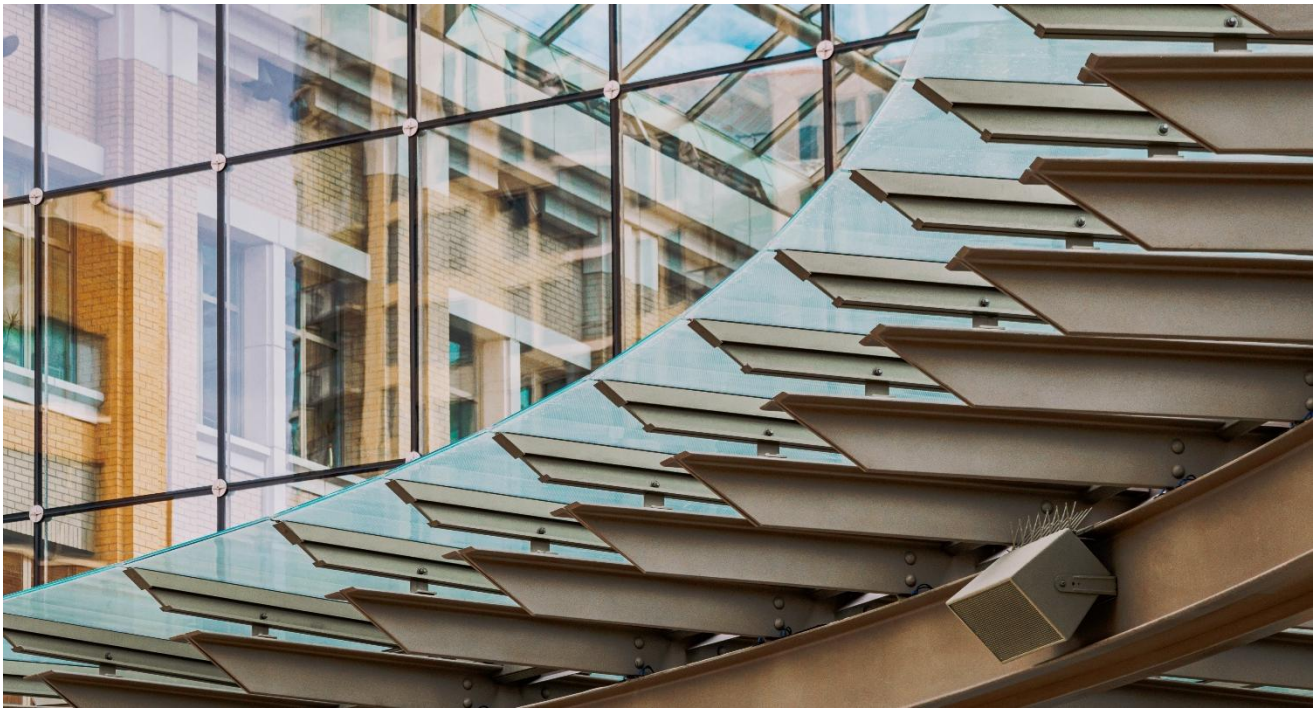
- Conducting an inventory at least annually of all underwriting models, including:
    - Algorithms used to train each model;
    - Data used to train and test each model;
    - The parameters of each model in active use;
    - The dates each model was in active use; and
    - Fair lending testing results of each model.
- Testing, monitoring, training, retraining, or otherwise modifying all algorithmic models to ensure compliance with fair lending and consumer protection laws.
- Identifying trigger events (e.g., model updates, complaints, regulatory changes) that would require additional fair lending testing.
- Documenting all algorithmic underwriting decisions and retaining that documentation for four years.

- Maintaining account level data including the underwriting inputs, the model results, the outcome (approval or denial), and the pricing and performance of loans.

For the lender's judgmental underwriting processes, the OAG is requiring it to ensure the underwriters receive fair lending training and that the lender monitors and documents their decisions, including overrides or adjustments to scores or prices, to ensure they do not violate fair lending or consumer protection laws.

VERMONT ADDRESSES DISCRIMINATION BASED ON CITIZENSHIP, IMMIGRATION STATUS

As Massachusetts focuses on algorithmic bias in student lending, other states also are prioritizing anti-discrimination in housing and lending. Vermont recently enacted legislation amending its antidiscrimination statute by adding the protected classes of citizenship and immigration status. Accordingly, among other prohibitions, it is unlawful in the state to discriminate against a person in the making of mortgage loans based on the person's citizenship or immigration status. However, the amendment clarifies that it is not unlawful discrimination for a mortgage lender to consider an applicant's immigration status to the extent such status has bearing on the lender's rights and remedies regarding loan repayment, so long as such consideration is consistent with applicable federal law or regulation.



CONTROVERSIAL NYC DEBT COLLECTOR RULES ON HOLD INDEFINITELY, WHILE NEW RULES LOOM

By Krista Cooley, Francis L. Doorley, and Daniel B. Pearson
Originally Published October 08, 2025

The pressure is off for collectors of debts owed by New Yorkers for now, under a New York City regulation that has been years in the making, and which has already seen its effective date postponed twice before. The New York City Department of Consumer and Worker Protection (DCWP) has announced that the effective date of its expansive new regulations—which were finally set to take effect October 1—have been postponed indefinitely.

THE FINAL RULES

As Mayer Brown reported in December, the DCWP adopted a multitude of new practice requirements for debt collectors in 2024 (the "Final Rules"). Importantly, the adopted rules also included a definition of "debt collector" that appeared to reach first-party debt collectors—i.e., persons collecting their own debts on their own behalf. The Final Rules were originally set to take effect December 1, 2024, but were repeatedly postponed before taking effect. Most recently, the rules were set to take effect October 1, 2025, but the DCWP postponed them again over the summer—this time indefinitely. According to current public guidance, the DCWP "has not yet determined the new effective date of this rule." The agency advised that it will provide a minimum of three months before these rules take effect.

THE PROPOSED RULES

In the midst of all this, and as a response to it, the DCWP proposed additional amendments to clarify the definition of a debt collector in November 2024, and then revised them in March 2025 ("the Proposed Rules"). The comment period for the Proposed Rules closed June 10. While the Final Rules remain in limbo, the future of the Proposed Rules is unclear.

The Proposed Rules would amend substantive debt collection practice requirements in New York City relating to recordkeeping, unconscionable and deceptive trade practices, restrictions on time and frequency of communications with consumers, consumer consent to receive electronic communications, disclosures, time-barred debts, and other topics. The Proposed Rules also address the topic that has prompted the most consternation from the financial services industry: the definition of a "debt collector." This definition had been amended previously under the Final Rules.

In response to stakeholders' objections to the breadth of the "debt collector" definition adopted within the Final Rules, the Proposed Rules would narrow the definition somewhat to include only those persons engaged in certain acts "after the initiation of debt collection procedures." Even when narrowed in this manner, the Proposed Rules would still define a debt collector to include first-party debt collectors in some circumstances. Specifically, the Proposed Rules would define a debt collector to mean:

> Any person, including any natural person or organization, including a debt collection agency, who: (A) is engaged in any business the principal purpose of which is the collection of any debts, or (B) after the initiation of debt collection procedures, regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another person, or *debts owed or due or asserted to be owed or due to the person collecting or attempting to collect the debts*. (emphasis added)

A "debt collector" also includes debt buyers and creditors collecting their own debts while using fictitious names. "Debt collection procedures" are defined to mean any attempt to collect a debt after one of several indicia of delinquency or default has occurred. The Proposed Rules would also insert the "after the initiation of debt collection procedures" qualifier into several substantive practice provisions in the rules—e.g., relating to prohibitions on unconscionable and deceptive trade practices—so as to limit their applicability to activities conducted after the initiation of debt collection procedures, potentially providing a helpful exception for servicers of performing accounts and certain creditors.

INDUSTRY RESPONSE

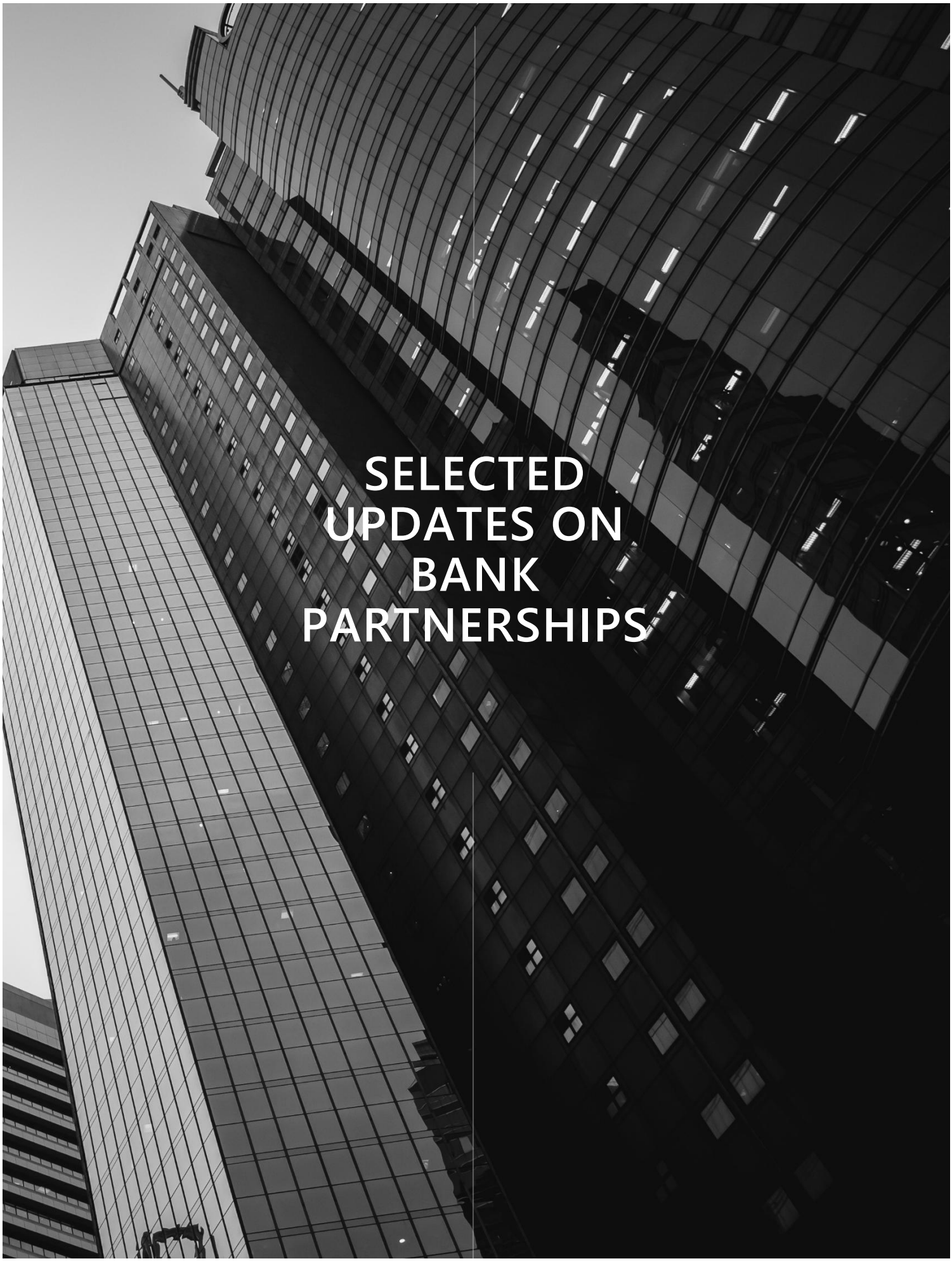
Behind these delays is an ongoing fight between the financial services industry and the DCWP over the scope and substance of the rules. The DCWP stated publicly that it "has always intended that its rules apply to collectors collecting on their own debts," a claim that some in the industry have taken issue with. Stakeholders, including financial services providers and industry groups, submitted comments to the DCWP objecting to both the postponed Final Rule and the pending Proposed Rule—particularly, the broad definitions of a debt collector in each—on a number of law- and policy-related bases.

Commenters argued that the DCWP's decision to include first-party collectors in the new rules was unexpected and inconsistent with prior messaging, and that the rulemaking process is being conducted hastily without adequate time for public input. They claim that the short notice period provided by the DCWP—and the DCWP's purported failure to consider conflicting laws and compliance costs for the Proposed Rules—violate NYC's Administrative Procedure Act. Others commented that restrictions on call times and frequency in the new rules were unconstitutionally content-based, and that the rules are preempted by the federal Fair Debt Collection Practices Act (FDCPA), the National Bank Act, and New York state law. A trade group brought suit against New York City in response to the Final Rules, arguing they violated their members' constitutional free speech and due process rights, but voluntarily dismissed the suit when the revised March 2025 Proposed Rules were published.

Some stakeholders argued that the DCWP's concerns about abusive debt collection practices were largely inapplicable to creditors, or first-party collectors, who are already disincentivized from engaging in harassing communications with borrowers who are their current clients and may apply for additional credit in the future. They claim that the Proposed Rules would cause consumer confusion and illogical regulation by shoehorning a first-party debt collector definition into a regulatory regime originally intended to apply only to third-party collectors. Still others commented that the rules' restrictions on electronic communications would be overly cumbersome and harmful to consumers, who largely prefer electronic communications over snail mail. Commenters also objected to the absence of an exemption for banks.

TAKEAWAYS

The DCWP's indefinite delay of the implementation of the amended New York City debt collection rules could foreshadow additional revisions to the adopted Final Rules and the pending Proposed Rules to address industry concerns and clarify scope. Alternatively, the DCWP may be holding the Final Rules in abeyance until it can adopt a version of the Proposed Rules, with all amendments taking effect at once. Regardless, companies engaged in debt collection activities with New York City consumers should expect future developments that may affect their compliance burden in the jurisdiction.



SELECTED UPDATES ON BANK PARTNERSHIPS

DIDMCA OPT-OUT UPDATE—TENTH CIRCUIT REVERSES COLORADO PRELIMINARY INJUNCTION

By Eric T. Mitzenmacher
Originally Published November 12, 2025

Litigation involving Colorado's opt-out from the interest exportation provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) has taken an adverse turn for the financial services industry. On November 10, the United States Court of Appeals for the Tenth Circuit issued a ruling reversing a preliminary injunction imposed by the United States District Court for the District of Colorado in June 2024 that prevented enforcement of Colorado's usury restrictions against parties to the litigation, including any members of various industry association parties—the National Association of Industrial Bankers, American Financial Services Association and American Fintech Council—with respect to loans in which the lender was not located, for interest exportation purposes, in Colorado. Subject to further proceedings, the Tenth Circuit's ruling re-opens the door for loans originated by state-chartered banks and similar financial institutions to be subject to Colorado usury restrictions when *either*: (i) the borrower is located in the state; or (ii) subject to certain exceptions, the lender is located in the state, regardless of the location of the borrower. The ruling will become effective, if at all, only after issuance of the Tenth Circuit mandate, which may be stayed pending further appellate proceedings as discussed below.

As addressed in our prior discussion of the Colorado DIDMCA opt-out and related litigation, DIDMCA provides the basis, under federal banking law, for state-chartered, FDIC-insured banks and certain similar financial institutions to "export" the Interest-related requirements of their home or, in certain cases, branch office (host) states when lending elsewhere. Both national banks and state-chartered banks have such authority, but DIDMCA conditions state-chartered banks' authority on the ability of individual states to opt out of the interest exportation regime under 12 U.S.C. § 1831d. Iowa and Puerto Rico have had longstanding opt-outs; certain other states initially opted out but later repealed such opt-outs; and Colorado enacted an opt-out that would have become effective July 1, 2024, but for litigation by industry participants that resulted in the June 2024 preliminary injunction.

On its face, the Colorado opt-out would apply state-specific interest restrictions to any consumer credit transaction made in the state. Based on longstanding interpretations of the scope of the term "interest" for exportation purposes, this would include restrictions not only on periodic rates, but also various fees (such as origination fees, late fees, and NSF fees) that compensate the lender for the extension of credit or the risk of default. For closed-end consumer loans and non-credit card open-end loans, annual percentage rates typically would be capped by the Colorado Consumer Credit Code at the greater of 21% or certain higher values permissible for smaller loans based on application of a tiered rate structure to outstanding balances or, for loans not exceeding $1,000, application of an alternate fee structure involving the combined effects of an acquisition charge imposed at origination and dollar-denominated monthly charges, rather than a traditional periodic interest rate.

The Colorado opt-out does not apply, on its face, to business-purpose loans or loans to business entities. It also does not apply to loans made by national banks, as their interest exportation authority derives from the National Bank Act, which does not have a state opt-out structure similar to that under DIDMCA. While the Colorado opt-out does apply, on its face, to credit card products, the Colorado legislature largely deregulated rates on general purpose consumer credit cards under state law simultaneous to its adoption of its DIDMCA opt-out, such that application of state-specific rates to such products should not, in most cases, be materially limiting.

It remains to be seen how the industry association plaintiffs will respond to the Tenth Circuit's ruling. It is possible that further procedural steps, such as petitioning for review of the panel decision by the Tenth Circuit sitting *en banc* or petition for certiorari could result in further stays of the effectiveness of the Colorado DIDMCA opt-out while such processes are pending. If the plaintiffs timely petition for rehearing *en banc*, typical practice would be for the mandate effecting the Tenth Circuit's ruling to be stayed pending the outcome of such petition. On the other hand, if the plaintiffs petition for certiorari, typical Tenth Circuit practice would be for the mandate to be stayed only if the court determined that certiorari had a significant chance of being granted. Alternatively, it is possible that, having been remanded to the District Court for further proceedings, the matter could proceed to a decision on the merits in the District Court before making its way back through the appellate process. Under any of these paths, there will be a period of continued uncertainty, both as to the final outcome of the DIDMCA opt-out litigation and as to edge issues, such as the treatment of loans originated between the original July 1, 2024 opt-out effective date and the date on which any preliminary injunction or stay formally is lifted. We will continue to provide updates on this matter as it progresses.

OHIO WALKS BACK PRIOR SMALL LOAN ACT GUIDANCE, EASES LICENSING POSITION FOR BANK PARTNERSHIPS

By Ian Brown, Francis L. Doorley, and Eric T. Mitzenmacher
Originally Published November 09, 2025

Around Christmas 2024, the Ohio Division of Financial Institutions ("DFI") left a lump of coal in marketplace consumer lenders' proverbial stockings by issuing guidance that asserted a license under the Ohio Small Loan Act ("SLA") was required to arrange consumer loans of $5,000 or less in exchange for compensation—even if those loans were issued by federally insured banks pursuant to their authority under federal banking law. Expanded guidance and FAQs issued in January 2025 further supported DFI's position that a license would be required for many parties engaged in arranging or brokering Ohio loans. Combined, the issuances left some market participants—particularly those operating under bank partnership models—scrambling to determine whether their programs were subject to the SLA under the DFI's new position, whether to apply for a license, and whether obtaining a license would then impose material substantive limitations on affected lending programs.

In a positive development for consumer lending platforms (among other industry participants), the DFI appears to have withdrawn the 2024 guidance, albeit subject to the regulator's ongoing consideration of underlying issues.

As of October 31, 2025, the DFI has updated its guidance on the application of the SLA to bank partnerships, reversing course from its earlier interpretation of the statute. The updated guidance states that the DFI will not require any non-bank entity that is compensated for arranging bank loans in any amount to obtain a license under the SLA or to otherwise engage in such activity. Critically, the guidance also provides that the DFI does not intend to pursue enforcement action against any entity for engaging in such activity in calendar year 2025 without a valid license (whether or not such entity pursued a license application following the December 2024 and January 2025 guidance issuances).

With respect to licensing requirements, the updated guidance also states that the DFI will not require any entity that makes or arranges loans of $5,000 or less, but does not charge interest, to obtain a license under the SLA to engage in this activity. By statute, the licensing obligation continues to apply to any non-exempt entity that engages in the business of lending money in amounts of $5,000 or less or contracts for or receives, directly or indirectly in connection with such loans, "interest and charges that in the aggregate are greater than the interest and charges that the lender would be permitted to charge … if the lender were not a licensee" (typically an 8% annualized rate for consumer loans in the state unless alternative interest rate authority exists).

Beyond addressing the basic requirement to obtain a license, the updated guidance also states that the DFI will not enforce or seek to apply Section 1321.141 of the Ohio Revised Code against any entity engaging in activity that, as a result of the updated guidance, is not subject to licensure. That section of the Code prohibits SLA licensees from (i) making loans of $1,000 or less or a duration of one year or less or (ii) engaging in any act or practice to evade this prohibition, including by assisting a borrower to obtain a loan on terms that would be prohibited. It had been a material point of contention for lending platforms operating through bank partnerships where the originating bank was not subject to a loan duration limitation itself, but application of substantive requirements under Ohio's licensing regime when a non-bank platform was involved in loan arrangement or brokerage could have resulted in indirect application of such a restriction.

The recent update is a welcome departure from the guidance it previously issued. Consistent with past updates, the DFI did not provide explanation for its updated guidance aside from stating that it had continued to engage with the industry and monitor ongoing developments. The new release suggests that a détente of sorts may have been reached for now, though further monitoring of the situation may be warranted as the DFI continues to engage on bank partnership issues.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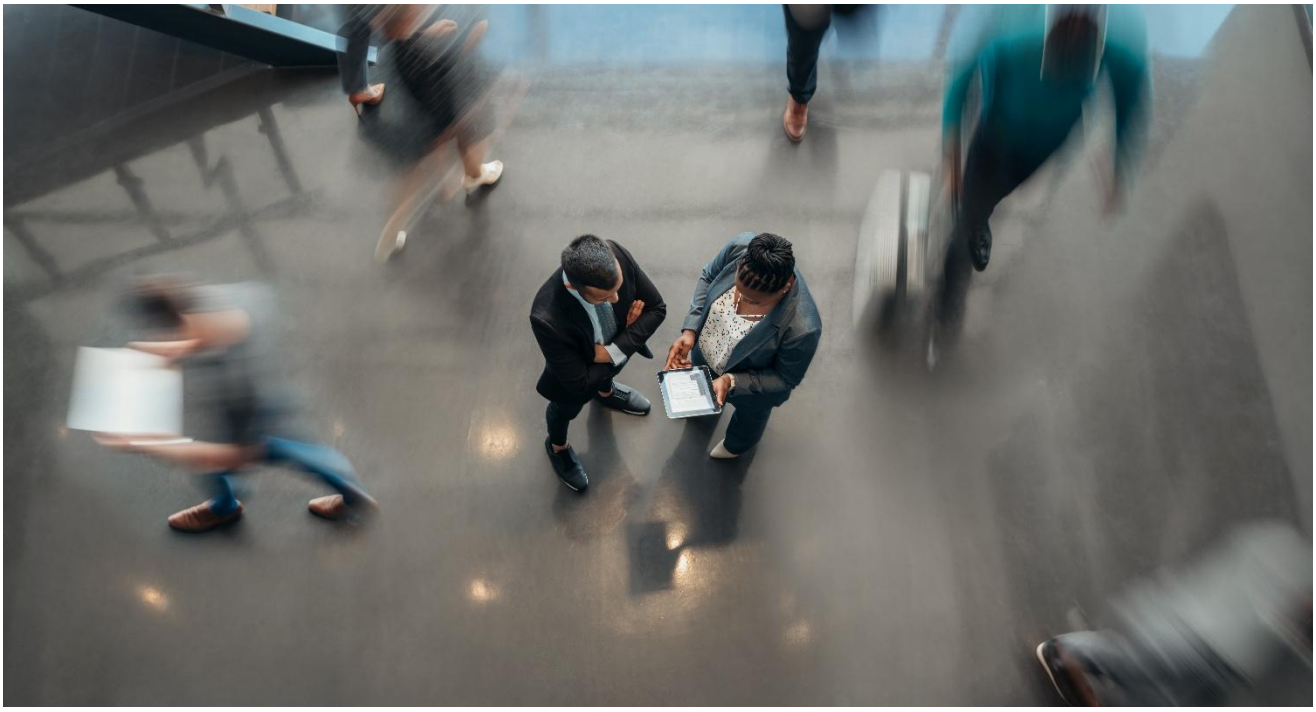
UPDATES ON
LICENSING

NORTH DAKOTA BROADENS LICENSING LAW TO INCLUDE ALTERNATIVE FINANCING

By Kris D. Kully
Originally Published June 11, 2025

North Dakota recently enacted legislation that amends the state's main non-mortgage lender licensing law, the North Dakota Money Brokers Act (the "Act"), to define a "loan" to include any "alternative financing product" that is identified by the state's Department of Financial Institutions (the "DFI"). The amendment (House Bill 1127) becomes effective August 1, 2025, although the timing and content of a future DFI order to designate one or more financial products as an "alternative financing product" subject to the law is uncertain. What seems more clear is that the amendment could broadly expand the scope of the state's Money Broker Act beyond typical lending activities.

The North Dakota Money Brokers Act has historically served as the state's primary statute for licensing loan brokers and lenders and regulating consumer- and commercial-purpose loans. While the state enacted legislation in 2023 to separately license residential mortgage lending and servicing activities, the Money Brokers Act otherwise has required licensing of nonexempt persons arranging or providing any loans or leases, regardless of dollar amount, loan or lease purpose, or the rate of interest or charges. The Money Brokers Act also imposes substantive requirements and limitations on loans made by licensed money brokers, including prohibiting finance charges at an annual rate exceeding 36% per year and requiring lenders to provide the loan disclosures mandated under the federal Truth in Lending Act ("TILA") regulations.



Prior to the adoption of House Bill 1127, neither the Money Brokers Act nor DFI regulations defined a "loan." One could have reasonably concluded, then, that the Money Brokers Act applied to typical loan transactions in which one person agrees to provide a sum of money to another, who then incurs an enforceable obligation to repay it at a future time. The only public guidance on what constitutes a "loan" for Money Brokers Act purposes relates to litigation financing: the DFI states on its website that "products that take an interest in potential future proceeds from civil proceedings are generally *not* considered a loan if payment is contingent on a monetary award and not required in the event the funds from the civil proceedings are insufficient to repay the amount financed." Similarly, the term "loan" would generally not include types of arrangements like factoring transactions, earned wage access, or merchant cash advances where any repayment obligation (to the extent one exists) is either contingent or is otherwise not absolute and unconditional.

However, the DFI apparently will have the authority to decide whether those or other arrangements will constitute covered "alternative financing products" subject to the Money Brokers Act once House Bill 1127 takes effect. The effect of the DFI designating a particular financial product as an "alternative financing product" will be to subject providers (and, potentially, brokers) of those products to licensing as a money broker in order to offer such products to North Dakota residents.

It is unclear whether the DFI will solicit any public input during its deliberations, as is the extent to which the agency could attempt to apply the Act's substantive requirements to non-loan transactions. Subjecting certain non-loan transactions, such as merchant cash advances or earned wage access, to the Act's 36% loan rate cap and TILA loan disclosure requirements could present significant challenges for providers and may result in limiting the availability of those financing alternatives in North Dakota.

The Money Brokers Act does not apply to depository institutions, insurance companies, licensed residential mortgage lenders, trust companies, institutions chartered by the Farm Credit Administration, licensed pawnbrokers, certain nonprofit organizations, or any other person or business regulated and licensed to lend money by the State of North Dakota. (The state otherwise licenses collection agencies, money transmitters, deferred presentment service providers, and debt settlement service providers.) However, depending on the actions of the DFI, the Act could apply to a much larger swath of financing providers going forward.

LEAVING LAS VEGAS? NEW EXEMPTIONS FROM NEVADA IN-STATE OFFICE RULE SET TO TAKE EFFECT

By Ian Brown and Francis L. Doorley
Originally Published August 27, 2025

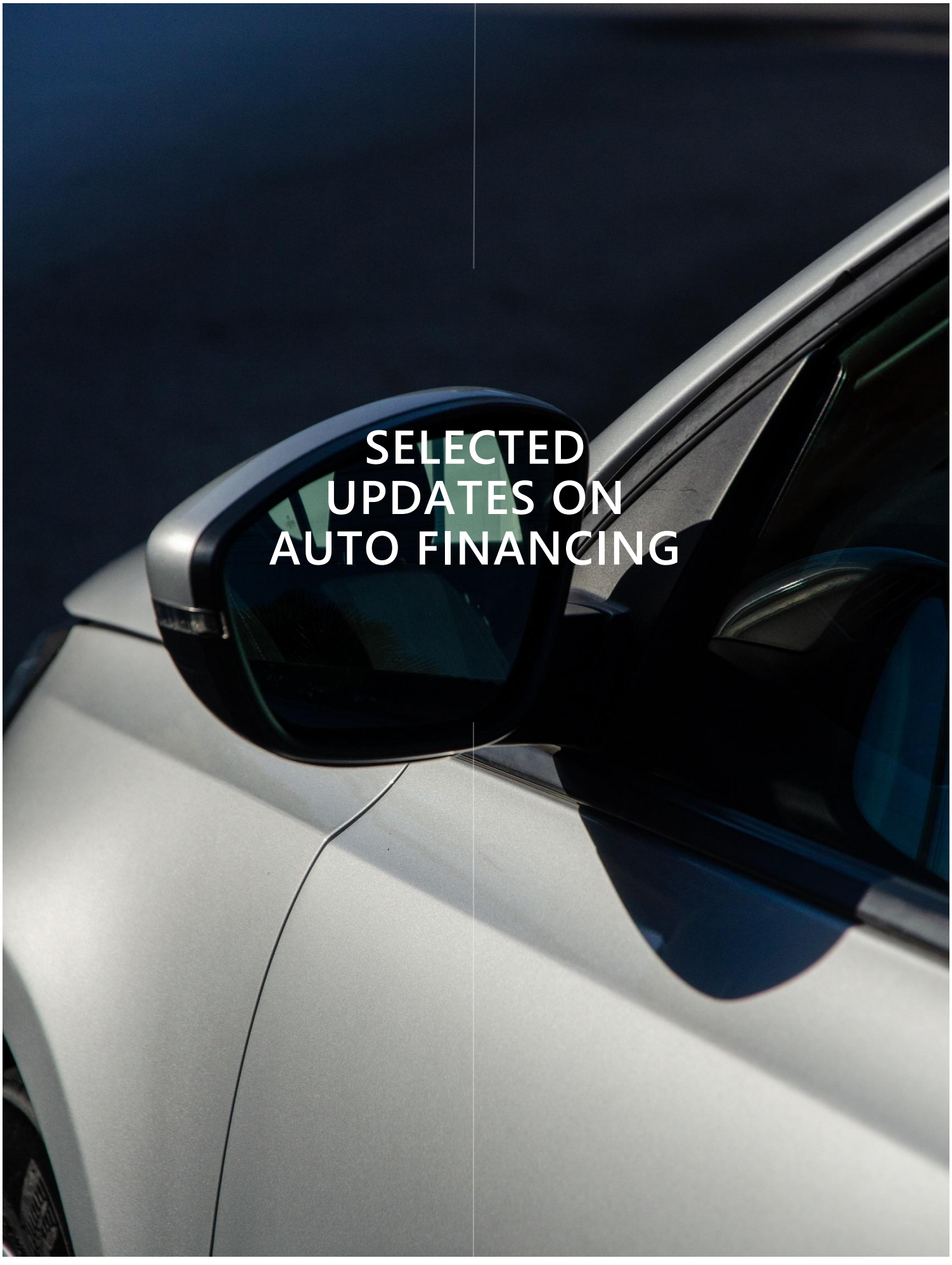
On October 1, 2025, Nevada Senate Bill 437 takes effect, which will amend the Nevada Installment Loan and Finance Act ("ILFA") to significantly streamline licensing and operational requirements for consumer lenders that engage in business exclusively through the internet—most notably, the requirement for companies applying for an Installment Loan Company license to maintain a "brick and mortar" office in Nevada.

The IFLA requires a license to engage in the "business of lending" in Nevada of any dollar amount, and includes both commercial- and consumer-purpose loans within its coverage. Unlike nearly all other states' laws that license and regulate non-real estate secured lending, the ILFA requires consumer lenders seeking to obtain a license to operate from an out-of-state location to also maintain a licensed office in Nevada as a condition of applying for and obtaining a company license. The Nevada Financial Institutions Division ("Division") strictly interprets the in-state office requirement; the Division requires the licensed office to be (i) open to the public during normal business hours on Mondays through Fridays; (ii) staffed by at least one employee of the company that is trained and knowledgeable on the company's products and services; and (iii) have adequate signage to allow customers and regulators the ability to locate the office. Even maintaining a co-working or shared office space is not sufficient to satisfy the in-state office requirement. As a result, the in-state office requirement can be a material impediment to some internet-based lenders' abilities to obtain the ILFA license.

While the Nevada legislature amended the ILFA in 2020 to create an exemption from the in-state office requirement for an "Internet business lender" that makes commercial loans solely through the Internet, the legislature did not create a similar exemption for internet-based lenders that also originated, or exclusively originated, consumer loans. Senate Bill 437, which was approved by Governor Joe Lombardo on May 28, 2025, adds the term "Internet consumer lender" as a defined term to the ILFA. The bill defines an "Internet consumer lender" as a person who makes, solicits, brokers, arranges, or facilitates consumer loans exclusively through the internet. The bill permits an Internet consumer lender to apply for a license for a place of business located outside of Nevada even without any licensed location in the state, exempting Internet consumer lenders from the ILFA's in-state brick-and-mortar office requirement.

The bill also exempts Internet consumer lenders from the ILFA's prohibition on licensees engaging in the business of making loans within any office or place of business in which any other business is solicited or engaged, unless the licensee has received approval from the Division to conduct the separate non-lending business. Previously, the ILFA only exempted Internet business lenders from the "other business" prohibition. The exemptions implemented by Senate Bill 437 should offer an opportunity for new consumer lenders to (virtually) enter the state and obtain licenses under the ILFA.

Last, Senate Bill 437 implements a new requirement that any contract between an Internet consumer lender and a resident of Nevada for the provision of a loan (i) provide that the contract is governed by the laws of Nevada, and (ii) require that any litigation, arbitration, or other process for the resolution of disputes arising out of the contract occur in Nevada, in each case to the extent not preempted by federal law. Any provision in such a contract that conflicts with this requirement is void and unenforceable.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UPDATES ON
AUTO FINANCING

FIFTH CIRCUIT VACATES THE FTC'S CARS SHOPPING RULE

By Kris D. Kully
Originally Published January 29, 2025

On January 27, 2025, the Fifth Circuit Court of Appeals held that the Federal Trade Commission's rule to curb certain practices in the automobile dealer industry was invalid on procedural grounds because the agency did not issue an advance notice of proposed rulemaking.

On January 4, 2024, the Federal Trade Commission ("FTC") published a final "Combating Auto Retail Scams Trade Regulation Rule," or "CARS Rule." The rule was scheduled to become effective on July 30, 2024. The FTC issued that rule after publishing a proposed rule for public comment in July 2022 and after a series of public roundtables with input from industry participants, consumers, and others.

The final rule provides that certain acts or practices of motor vehicle dealers are prohibited as unfair or deceptive, including misrepresentations about the costs or terms of purchasing, financing, or leasing a vehicle or of any add-on product or service (such as extended warranties, service and maintenance plans, payment programs, guaranteed automobile or asset protection ("GAP") agreements, emergency road service, VIN etching and other theft protection devices, or undercoating). The final rule also would prohibit misrepresentations regarding many other aspects of purchasing or financing a vehicle, or the circumstances under which a vehicle may be repossessed.

The final rule also provides that it is a prohibited unfair or deceptive act or practice not to disclose in advertisements or consumer communications a vehicle's full cash offering price (excluding only government charges), or not to disclose that an add-on product or service is voluntary (if true). When making any representations about the amount of monthly payments for vehicle financing, the final rule provides that the dealer must disclose the total amount the consumer will pay after making all payments, including the amount of any down payment or trade-in.

As to add-on products or services, the final rule provides that it is a prohibited unfair or deceptive act or practice for a dealer to charge for any such product or service that provides no benefit to the consumer, including certain nitrogen-filled tire-related products or services; products or services that are merely duplicative of otherwise applicable warranty coverage; or any item without the consumer's express, informed consent.

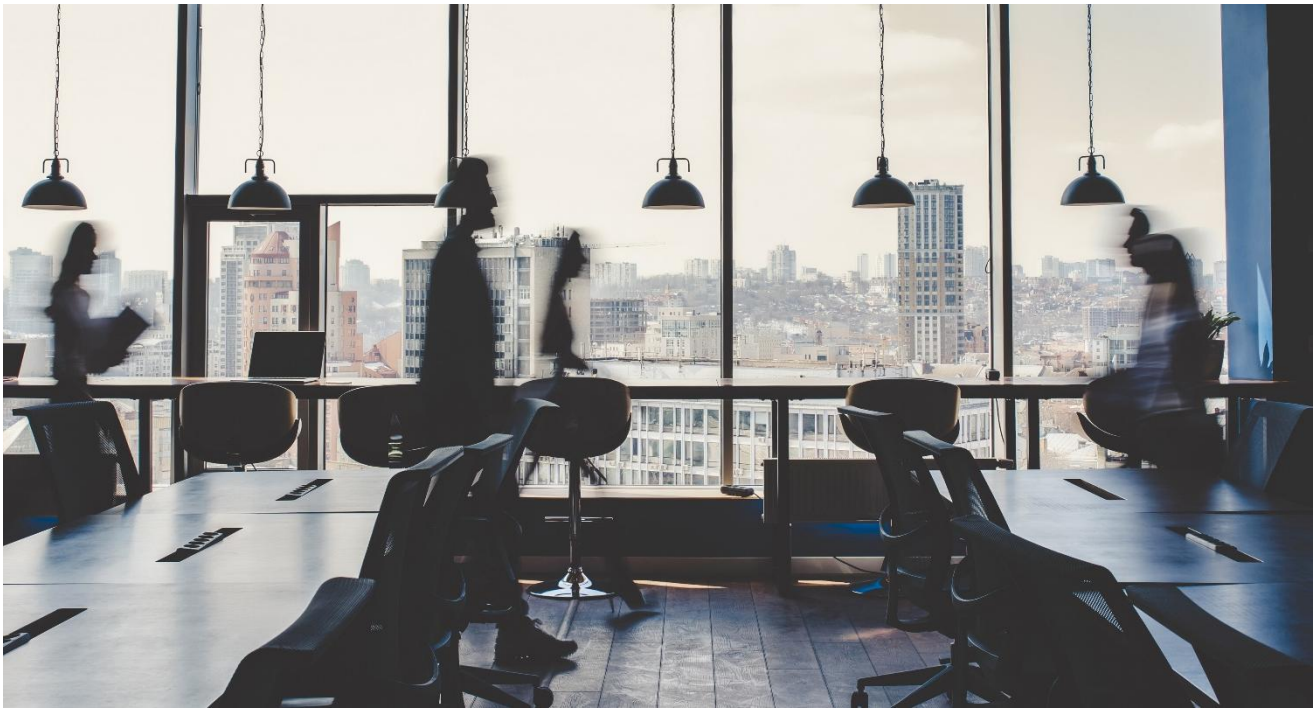
The auto dealer and finance industries quickly objected to the rule, arguing in part that the FTC did not adequately consider the costs of the rule and that the rule is arbitrary and capricious. The FTC then determined that it was in the interests of justice to stay the rule's effective date to allow for judicial review.

The Fifth Circuit did not address the validity of the rule's substantive provisions, or the FTC's authority to declare those or other practices as unfair or deceptive. However, the court held that the final rule is invalid because the FTC did not issue an advance notice of proposed rulemaking ("ANPRM") prior to issuing its proposed rule.

An ANPRM is not a requirement under the Administrative Procedure Act ("APA"), but rather an additional step agencies may take for obtaining early public input in a rulemaking. However, the Fifth Circuit held that the FTC Act and the agency's own regulations require the extra step of an ANPRM when promulgating regulations declaring acts or practices to be unfair or deceptive. The FTC admitted in its brief that it generally must follow those additional procedures unless Congress specifies otherwise. The FTC argued, though, that Congress — through the Dodd-Frank Act — specified that the agency may rely on the APA and omit the additional ANPRM process in authorizing the agency to prescribe rules for auto dealers.

Although the Dodd-Frank Act states that the FTC is authorized to prescribe rules "in accordance with" the APA related to auto dealers and unfair and deceptive acts or practices, the court held that the FTC Act, and not the Dodd Frank Act, provided the substantive authority for the CARS Rule. As such, the court held that failure to begin the rulemaking process with an ANPRM was a fatal procedural flaw.

The FTC, under the new leadership of Chairman Andrew Ferguson, has not yet stated whether it will pursue the rulemaking anew or whether the issues are a priority for the new administration



A POST-CARS RULE BRAKE? NOT SO FAST. BUCKLE UP FOR NEW REGULATORY ACTIVITY IN THE MOTOR VEHICLE SPACE

By Kris D. Kully, Jeffrey P. Taft, and Joy Tsai
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The Fifth Circuit vacated the Federal Trade Commission's ("FTC") Combating Auto Retail Scams Trade Regulation Rule ("CARS Rule") on January 27, 2025, determining that the FTC failed to follow its own procedural requirements in rulemaking. While the CARS Rule never came to effect, the FTC's and state Attorney Generals' scrutiny of the auto lending industry through enforcement actions—as well as recent state legislative activity—nonetheless signal regulatory concerns about some of the practices that the CARS Rule was intended to target.

CARS RULE

The FTC issued its final CARS Rule in January 2024, which would have prohibited certain acts or practices of motor vehicle dealers as unfair or deceptive, including misrepresentations about the costs or terms of purchasing a vehicle or of any add-on product or service, failure to disclose the offering price (i.e., the actual price anyone may pay to purchase the car), as well as charging consumers for add-on products that do not provide a benefit. Trade associations filed suit in the Fifth Circuit arguing that the FTC failed to adequately consider the costs of the rule, and that the rule is arbitrary and capricious. The Fifth Circuit agreed and vacated the CARS Rule on procedural grounds, determining that the FTC violated its own regulations under Section 18(b) of the FTC Act, which required issuance of an advance notice of proposed rulemaking ("ANPRM") when establishing regulations that declare certain acts or practices to be unfair or deceptive. The Fifth Circuit rejected the FTC's argument that it had promulgated the CARS Rule under the Dodd-Frank Act, finding that, while the Dodd-Frank Act allowed the FTC to bypass statutory ANPRM requirements, it did not eliminate the FTC's own procedural obligations including issuance of an ANPRM.

Although the Fifth Circuit in effect nullified the CARS Rule, and the FTC may pursue a different rulemaking agenda under the new administration, auto dealers remain subject to existing FTC rules, several of which prohibit conduct that the CARS Rule was intended to target. For example, Section 5 of the FTC Act's prohibition against unfair or deceptive acts or practices ("UDAP") would prohibit a dealer from misrepresenting costs associated with purchasing a vehicle, as well as from engaging in "bait and switch" tactics such as advertising a vehicle for sale at a lower price than what is actually available.

STATE ENFORCEMENT ACTION

State attorneys general ("AGs") could increase their scrutiny of the auto lending industry and pursue enforcement actions against dealers and/or lenders under their state statutory UDAP authority, particularly those who view the Fifth Circuit CARS Rule decision as a setback in consumer protection. Nineteen state AGs[1] filed an amicus brief in support of the FTC's defense of the CARS Rule, in which they argued that the high volume of consumer complaints, lawsuits, and regulatory enforcement actions—which have failed to eliminate dealerships' bait-and-switch advertising and assessment of hidden fees—warrant additional regulation to stem deceptive practices in automotive sales.

Over the past few years, states have filed enforcement actions against auto dealers for alleged misconduct targeted by the CARS Rule—sometimes jointly with the FTC—and often focusing on dealerships that allegedly advertised vehicles at low prices that were not actually available, sold add-on products and services that consumers did not want, and failed to disclose issues with vehicles sold as-is:

- In December 2024, the Illinois AG and the FTC entered into a $20 million settlement with an operator of 10 dealerships. The FTC indicated this was its largest settlement to date involving UDAP by auto dealers. The Illinois AG and the FTC alleged that the dealerships engaged in bait-and-switch tactics by advertising low prices, but then requiring consumers to purchase pre-installed add-on products or charging consumers for those products without their knowledge or permission. The settlement agreement also required the dealerships to disclose the offering price for vehicles in marketing materials, as well as provide the total cost of the vehicle when discussing leasing or financing with consumers.
- In August 2024, the Arizona AG and the FTC announced a $2.6 million settlement against an auto dealer, alleging that the dealer falsely advertised prices online at significant discounts, but charged for add-on products that were allegedly pre-installed on the car, as well as other fees that sales representatives indicated were required to purchase the car. The Arizona AG and the FTC also alleged that the dealer discriminated against Latino consumers given that, on average, Latino consumers paid nearly $1,200 more in interest and add-on charges than non-Latino, white consumers.
- In June 2024, the New York AG entered into a $350,000 settlement against auto dealers that allegedly overcharged consumers in connection with auto leases. The AG alleged that the dealerships added additional fees in the form of "dealership fees" or "administrative fees," or increased the vehicle's price when consumers attempted to purchase the vehicle at the end of the lease term.

[1] The states are: Arizona, California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Washington, and the District of Columbia.

- In November 2023, the Pennsylvania AG announced a lawsuit against a Delaware-based used vehicle dealer for allegedly failing to disclose issues with vehicles that it sold "as is," and failing to provide buyers with title documentation. The Pennsylvania AG sought $1,000 for each violation of Pennsylvania consumer protection law, and $3,000 in each case a violation involved consumers age 60 or older. The complaint indicated that the AG took action after receiving numerous complaints from Pennsylvania consumers about their vehicle defects.

STATE LEGISLATIVE ACTIVITY

In addition to enforcement actions, states may also address concerns with auto dealership practices through legislation. On February 21, 2025, California introduced Senate Bill 766, the California Combating Auto Retail Scams Act ("California CARS Act"), which echoes the FTC CARS Rule both in title and content. The Act would prohibit dealers from misrepresenting material information about vehicle sales, require dealers to make certain disclosures clear and conspicuous (including the offering price, total amount the consumer will pay, down payment, and the fact that add-on products are not required), and prohibit add-on products that do not benefit the consumer (such as duplicative warranty coverage or nitrogen-filled tires). The California CARS Act extends the FTC CARS Rule by including an additional requirement of a 10-day right of cancellation for used vehicles. It is possible that other jurisdictions may introduce similar legislation in the coming months.

While the FTC CARS Rule was pending before the Fifth Circuit, the Pennsylvania legislature passed amendments to the Pennsylvania Automotive Industry Trade Practices, which became effective in August 2024. The amendments updated the definition of "advertisement" for motor vehicles to include online statements and representations, and required written disclosure of certain conditions that the advertiser or seller knows or should know about the vehicle, such as flood damage, or damages to the vehicle's frame or engine. While the regulations focus on disclosures related to a vehicle's condition rather than pricing or financing terms, the legislation followed the November 2023 Pennsylvania AG lawsuit described above alleging dealership failure to disclose issues with vehicles sold "as is"—an indication that AG lawsuits and enforcement actions may prompt regulatory change.

The Massachusetts AG, which in recent years has been active in filing lawsuits against subprime auto lenders, issued a regulation in March 2025 providing that it is an unfair practice for a seller to misrepresent or fail to disclose the "total price" of a product.[1] The "total price" of a product is the maximum price a consumer must pay for a product, inclusive of all fees, charges, or other expenses, including any mandatory ancillary product offered as part of the same transaction. The "total price" disclosure is similar to the CARS Rule disclosure of the offering price, which is the full cash price for which the dealer will sell or finance the vehicle to any consumer—a requirement which the auto dealer industry found difficult, as dealers typically display the Manufacturer Suggested Retail Price. Although the regulation does not specify that it is intended to target auto dealerships or auto lenders, it demonstrates how state regulators may use their existing UDAP authority to address aspects of consumer financial products and services that they find problematic.

[1] 940 Code Mass. Reg. 38.04.

CONCLUSION

The FTC CARS Rule appears to be in the rearview mirror, but for auto dealers and lenders, prohibitions against UDAP under federal and state law remain rules of the road. In light of the FTC and state AGs' recent enforcement actions, in addition to the state legislative activity related to dealership practices, auto dealers and lenders should continue monitoring practices that the FTC CARS Rule was intended to target, including pricing disclosures and the marketing and sales of ancillary products.

NEW CALIFORNIA CARS ACT

By Kris D. Kully, and Joy Tsai
Originally Published October 07, 2025

The new California Combating Auto Retail Scams (CARS) Act, which Governor Newsom signed on October 7, 2025, mirrors the thwarted efforts of the Federal Trade Commission ("FTC") to address concerns about unfair or deceptive acts or practices among motor vehicle dealers. The California CARS Act will become effective on October 1, 2026, and will prohibit dealers from making misrepresentations about the costs or terms of purchasing, financing, or leasing a vehicle, or about any costs, limitation, benefit, or other aspect of any add-on product or service.

APPLICABILITY

The California CARS Act will constitute a new title within the state's Civil Code[1] and will apply generally to motor vehicle dealers in the state. However, the new protections will not apply to "commercial purchasers" of vehicles, meaning those that purchase five or more vehicles from the dealer per year for use primarily for business or commercial purposes. They also will not apply to vehicles with a gross vehicle weight rating of 10,000 pounds or more.

TOTAL PRICE

One of the key aspects of the California CARS Act (as with the FTC's fallen CARS Rule) is the requirement to disclose the "total price." Specifically, the Act will require dealers to disclose, clearly and conspicuously in connection with the sale or financing of a vehicle, the vehicle's total price. That total price includes the total sales price of the vehicle, excluding taxes, fees, and charges; any dealer price adjustment; and the cost of any item installed on the vehicle at the time of the advertisement or communication. It does not include any deduction for a rebate. The total price must be included in any advertisement of a specific vehicle for sale, or that represents any monetary amount or financing term for a specific vehicle. In addition, the total price must be included in the first written communication with a consumer about a specific vehicle, such as the dealer's first response to a consumer regarding the vehicle. The total price disclosure requirement does not, however, apply to used vehicles sold at auctions.

OTHER DISCLOSURES

In addition to the disclosure of the total price of specific vehicles in advertisements and communications, dealers must disclose in any written representation during a negotiation to purchase or lease a specific vehicle that any add-on products or services the dealer mentions are not required. The disclosure must be clear and conspicuous and in writing. If the negotiation is taking place primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, the disclosure that the consumer may purchase or lease the vehicle without the add-on product or service must also be provided in that language.

[1] Commencing with new Cal. Civ. Code § 1784.20.

When making any written representation about the amount of monthly payments to purchase or lease a specific vehicle, the dealer must disclose in writing the amount the consumer will pay after making all those monthly payments. If the dealer makes written comparisons between payment options that include lower monthly payments, the dealer must explain that those lower payments often increase the total amount the consumer will pay.

ADD-ON PRODUCTS OR SERVICES

In addition to the requirement that dealers disclose whether add-on products or services are voluntary, as mentioned above, the California CARS Act will prohibit a dealer from charging for an add-on product or service if the purchaser or lessee would not benefit from the product or service. That will apply to any product or service that is not provided to the purchaser or lessee or installed on the vehicle by the manufacturer and for which the dealer, directly or indirectly, charges the purchaser or lessee in connection with the vehicle sale, lease, or financing transaction. The CARS Act provides certain examples, including nitrogen-filled tire-related products or services that contain less than 95% nitrogen purity; a service contract if the service contract is void due to preexisting conditions; oil changes for electric vehicles or catalytic converter markings for a vehicle that does not have a catalytic converter; or surface protection products that void the manufacturers' warranties for the paint job. The Act explains, however, that dealers may charge for a product or service that the purchaser or lessee chooses to obtain, even if the purchaser or lessee ultimately does not use it or if a coverage event does not occur.

THREE-DAY RIGHT TO CANCEL – USED VEHICLES UP TO $50,000

The California CARS Act provides that in connection with the sale or lease of a used vehicle at retail at a price of up to $50,000, a dealer will be required to provide the buyer or lessee with a right to cancel the purchase or lease within three calendar days or 400 miles, whichever comes first. If the consumer exercises that right to cancel, the dealer may collect a restocking fee but must generally otherwise refund the consumer as required within 48 hours. The dealer also must return the consumer's trade-in vehicle, if applicable, or its value or sales price if the vehicle has been sold. The CARS Act establishes requirements for determining the value under those circumstances. The dealer of such a used vehicle must provide the buyer or lessee a separate disclosure notifying the consumer of his or her right to cancel.

The dealer is prohibited from impeding the buyer or lessee from exercising the right to cancel, from overcharging the restocking fee, or from withholding the downpayment or trade-in vehicle after the right to cancel has been exercised. The prohibitions include claiming that the person authorized to return the downpayment or trade-in vehicle is not available.

Under California's existing Automobile Sales Finance Act and its Vehicle Code, sellers under conditional sales contracts or dealers of used vehicles of less than $40,000 for a consumer purpose must generally offer a two-day contract cancellation option. The seller or dealer may charge a fee for the option. However, the new CARS Act will repeal the requirement to offer a contract cancellation option and will require the seller or dealer to provide the three-day right to cancel as described above if the transaction relates to a used vehicle up to $50,000.

Similarly, the state's Vehicle Leasing Act, which applies to consumer-purpose lease contracts exceeding four months, currently requires those contracts to notify the lessee that the state imposes no cooling-off period. However, the new California CARS Act will repeal that notice requirement in favor of the requirement to offer the three-day right to cancel a consumer lease for a used vehicle up to $50,000.

In addition, the CARS Act will require dealers to display a notice in each sales office and cubicle where written terms of a specific sale or lease are discussed, and in each room of a dealer's established place of business where sale and lease contracts are regularly executed. The signs, which must be in at least 36-point type, must notify customers of the three-day cancellation period for applicable vehicles, and encourages them to ask the dealer for more information.

As indicated above, the three-day right to cancel will not apply to commercial purchasers or vehicles of 10,000 pounds or more.

RECORDKEEPING

Dealers subject to the CARS Act will need to create and retain for two years records of their communications and advertisements of vehicles' total price; copies of all purchase orders, financing and lease documents; records demonstrating that buyers were advised of the optional nature of add-on products; copies of cancellation requests and proof of refunds; and copies of all written complaints from consumers relating to the sale, financing, leasing, or cancellation requests.

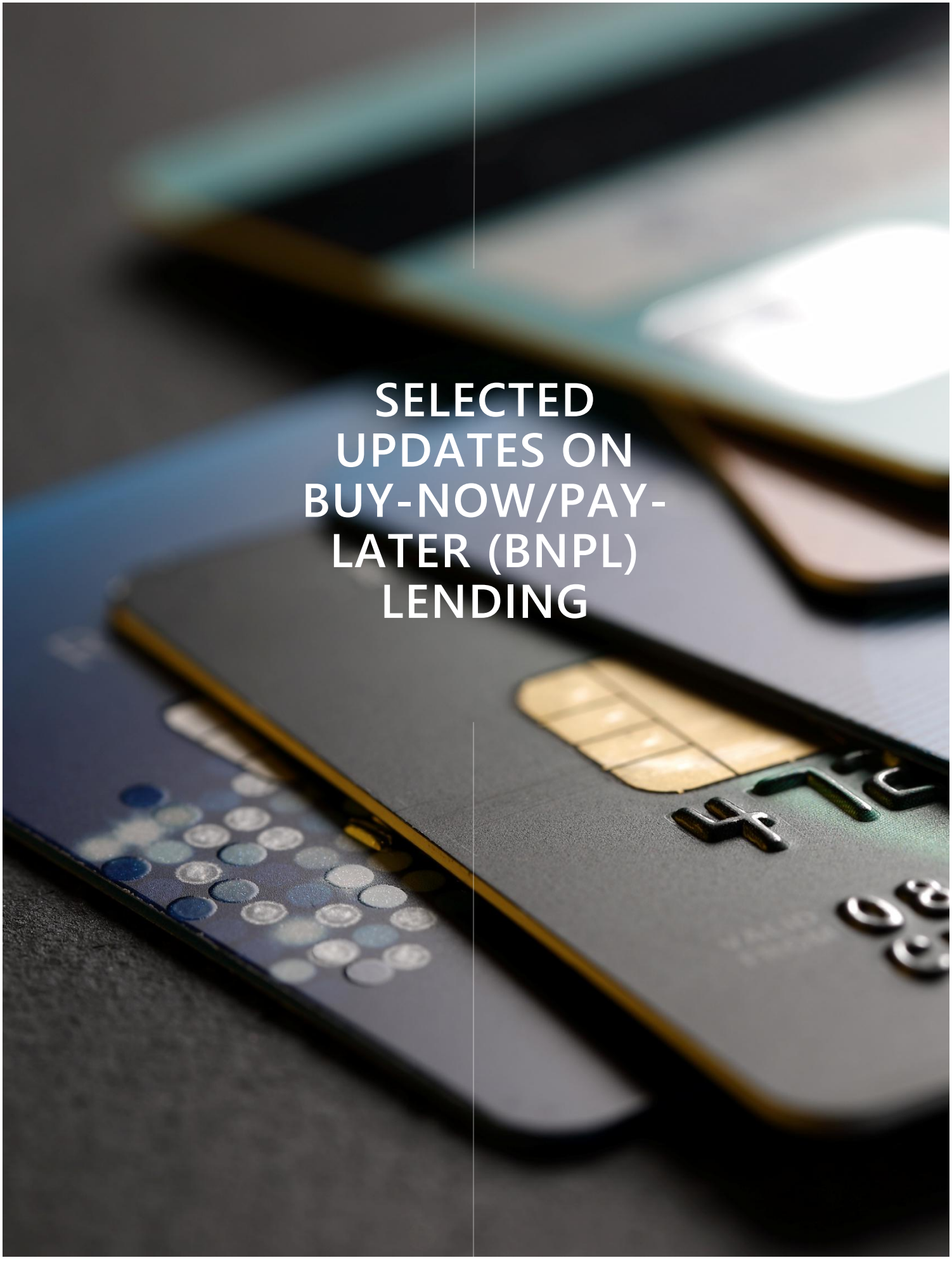
NO EXPRESS PRIVATE RIGHT OF ACTION

Previous versions of the CARS Act expressly included a private right of action under the Consumer Legal Remedies Act and the Unfair Competition Law. However, the enacted version does not include that express provision.

STATES STEPPING IN

As mentioned above, in 2024, the FTC issued a CARS Rule that would have addressed many similar acts or practices – including prohibiting misrepresentations about the costs or terms of the sale of vehicles or add-on products or services, prohibiting charging consumers for add-on products or services that do not provide a benefit, and requiring certain disclosures about the actual price of the vehicle. However, as we described here, in January 2025 the Fifth Circuit Court of Appeals vacated the FTC's CARS Rule on procedural grounds, and the agency has not attempted to resurrect the rulemaking. That ruling has not prevented the agency from pursuing actions against individual dealerships related to add-on products and concerns about deceptive practices.

Still, states are stepping in to address their concerns through statutes and regulations. For instance, Pennsylvania amended its Automotive Industry Trade Practices law, effective August 19, 2024, to expand the definition of "advertisement" for motor vehicles to include online statements and representations, and require written disclosure of certain vehicle conditions. Massachusetts issued regulations in March 2025 broadly requiring clear disclosures of the "total price" of a product and restricting hidden fees, reflecting the CARS Rule principles of price transparency. In May 2025, Oregon revised its motor vehicle retail installment contract statute to require notice to the buyer of the right to void the contract if a lender does not agree to purchase the contract on the exact negotiated terms within 10 calendar days. Other states are similarly poised to address hidden fees and other unfair practices in auto sales and financing and more broadly.



SELECTED UPDATES ON BUY-NOW/PAY-LATER (BNPL) LENDING

CFPB INDICATES THAT IT WILL RESCIND BUY NOW, PAY LATER INTERPRETATIVE RULE

By Eric T. Mitzenmacher and Joy Tsai
Originally Published March 29, 2025

Consistent with expectations for lighter regulation under the Trump administration, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") indicated in a March 26, 2025 court filing that it intends to revoke an Interpretative Rule it issued in May 2024 that would regulate certain Buy Now, Pay Later ("BNPL") products as credit cards for the purposes of the federal Truth in Lending Act ("TILA").

As discussed in an earlier Mayer Brown blog post, the Bureau previously issued an Interpretative Rule clarifying that lenders who issue "digital user accounts" that allow consumers to access credit for retail purchases are considered "card issuers" who must comply with additional disclosure and substantive requirements under TILA and its implementing regulation, Regulation Z. Prior to the issuance of the CFPB's Interpretive Rule, providers of what has become the "core" BNPL product in the US—a closed-end loan that does not bear a finance charge and is repayable in not more than four installments—generally took the position that their activities did not trigger Regulation Z compliance obligations. The Interpretive Rule, however, explained that certain Regulation Z requirements nevertheless apply where a credit card is involved, and characterized "digital user accounts" as credit cards. The Interpretive Rule followed over three years of market research on the BNPL industry during which the CFPB determined that consumers often used BNPL as a substitute for conventional credit cards, and represented an attempt to close what it characterized as a regulatory loophole, notwithstanding various ways in which typical BNPL accounts differ materially from credit cards in the way in which consumers access credit.

A trade group consisting of several of the largest BNPL providers who had been subject to the CFPB's BNPL market monitoring orders filed suit in the US District Court for the District of Columbia in October 2024, alleging that the Bureau failed to follow the notice-and-comment procedure required under the Administrative Procedure Act, and in effect imposed new substantive obligations on BNPL providers under the guise of an "interpretative rule." The trade group also alleged that the Bureau acted outside its statutory authority by setting an effective date that contravenes TILA's effective date requirement for new disclosure requirements and by imposing obligations beyond those permitted under TILA. Finally, the trade group argued that the Interpretive Rule was arbitrary and capricious because credit card regulation is "a poor fit for BNPL products."

The trade group indicated its intent to move for summary judgment on the Interpretative Rule, and, in response, the CFPB and Acting Director Russell Vought requested that the US District Court refrain from setting a briefing schedule while the Bureau's new leadership reviewed the Interpretative Rule. The Bureau indicated that it would submit a status report indicating whether it intended to defend the rule. In the March 26, 2025 court filing, the Bureau confirmed that it plans to revoke the Interpretive Rule, and would provide the court a further status report regarding its progress by June 2, 2025.

What appears to be a reversal in the Bureau's approach should come as a welcome relief to BNPL providers. However, consumer advocates who have expressed concerns about credit overextension and the lack of meaningful credit disclosures for BNPL transactions are likely to criticize deregulation coupled with expansion of BNPL offerings as risky to consumers. Attorneys representing consumers may seek to pursue similar arguments as the CFPB asserted in its Interpretive Rule as TILA claims in litigation, even in the absence of the Interpretive Rule itself; and states may feel additional pressure to adopt state-specific regulatory requirements for BNPLs, as New York is considering, as the CFPB's action opens a partial regulatory void.

NEW YORK ENACTS FIRST-OF-ITS-KIND LAW TO LICENSE BUY-NOW-PAY-LATER LENDERS

By Francis L. Doorley, Eric T. Mitzenmacher, and Jeffrey P. Taft
Originally Published June 06, 2025

On July 18, 2024, the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") issued a proposed interpretive rule (the "Proposed Rule") purporting to clarify the application of the Truth in Lending Act ("TILA") and Regulation Z to earned wage access ("EWA") programs. Unlike other interpretive rules issued by the Bureau, including the interpretive rule on the application of certain TILA and Regulation Z "credit card" provisions to buy now, pay later products, the Proposed Rule is styled as a proposal and request for comment that will not become effective until after the CFPB considers comments and issues a final interpretive rule. In this blog post, we discuss the important features of the Proposed Rule.

STRUCTURE OF EWA PROGRAMS

Before diving into the Proposed Rule, we briefly remind readers of the basic structure of EWA programs. Earned wage access is a service that allows workers to obtain wages that they have earned, but have not yet been paid, prior to the worker's regularly scheduled payday. EWA programs have grown in popularity in recent years, and many large employers now partner with EWA providers to offer the providers' programs as an employee benefit, with the goal of promoting employees' financial well-being and offering employees access to a lower-cost alternative to payday loans or short-term loans. EWA programs typically do not charge interest, and many do not require the payment of any mandatory fees. Instead, it is common for EWA programs to allow consumers to voluntarily pay a fee for expedited delivery of the proceeds of an advance (although the consumer always may elect to receive an advance for free that is delivered at "regular" speed), and some programs allow consumers to leave a "tip" or gratuity if the consumer so chooses.

As an emerging product, EWA programs present novel financial regulatory issues. The most significant of these issues is the status of an EWA transaction as a non-credit transaction. Regardless of the model, EWA programs typically restrict the amount that can be advanced to a user to the amount of wages that the user has actually earned and has a property right to, and the transaction carries no recourse to the user if the provider cannot recoup the advance. These features differentiate an EWA transaction from a traditional consumer loan. In fact, several states have recently enacted legislation that provides, as a matter of law, that EWAs which are offered in compliance with state law are presumptively not credit for purposes of state lender licensing and usury laws.

THE PROPOSED RULE

The Proposed Rule appears to be a significant step toward the Biden administration CFPB's efforts to regulate EWA programs as consumer credit. Prior to the issuance of the Proposed Rule, the CFPB had taken the position that certain EWA programs likely were not "credit." First, the CFPB's 2017 payday lending rule contained an express exemption for certain "wage advance" or "no cost advance" products. In the preamble to the payday lending rule, the CFPB noted that instances when "an employer allows an employee to draw accrued wages ahead of a scheduled payday and then later reduces the employee's paycheck by the amount drawn" "may not be credit at all." The CFPB specifically noted that "[t]his is especially likely where the employer does not reserve any recourse upon the payment made to the employee other than the corresponding reduction in the employee's paycheck." Next, in December 2020, the CFPB issued an Advisory Opinion which concluded that certain "covered" EWA transactions that met specific criteria set forth in the advisory opinion were not "credit" under TILA and Regulation Z. While the Advisory Opinion, by its terms, did not provide that EWA programs that did not meet the specific criteria were likewise not "credit," it also did not provide that such programs were credit per se. Since then, CFPB officials have stated that they believed the advisory opinion resulted in regulatory uncertainty and noted that the CFPB intended to "clarify" the advisory opinion. The Proposed Rule appears to function as this "clarification"; in the preamble to the Proposed Rule, the CFPB stated that the Proposed Rule is intended to "overturn and replace" the 2020 Advisory Opinion.

TILA applies to a "creditor" that extends "consumer credit." The first issue the Proposed Rule addresses is whether an EWA involves "credit" for purposes of TILA. TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." The Proposed Rule sets forth the CFPB's view that EWA programs are "credit" under TILA, notwithstanding that a typical EWA does not, by its terms, create an absolute and unconditional obligation to repay, because "the consumer incurs an obligation to pay money at a future date." In the CFPB's view, the fact that an EWA transaction is subject to one or more contingencies does not necessarily mean that a transaction is not subject to TILA.

Even if a transaction is "credit" for purposes of TILA, the transaction does not subject a person to regulation under TILA as a "creditor" unless (i) the transaction is repayable by a written agreement in more than four installments; (ii) the "consumer credit" is subject to a "finance charge"; or (iii) the transaction involves use of a "credit card" (broadly defined by TILA to include cards and other physical or virtual access devices that permit a consumer to obtain credit from time to time).

EWA products currently in-market typically do not establish, by written agreement, a schedule of required payments, let alone a schedule involving more than four installments. Additionally, they typically do not involve use of any access device to obtain advances that might reasonably be considered a "credit card." Each of these is a fact-based determination for any given program, but the key trigger for EWAs to be subject to TILA requirements under the [Proposed Rule] would, for most programs, be whether any fee or other monetization of the program would be treated as a "finance charge."

Under TILA, a "finance charge" is defined as "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." The Proposed Rule sets forth the CFPB's view that whether a fee or payment is a "finance charge" is not based solely on a determination of whether payment of the fee was voluntary, but whether a payment that is exacted by the creditor is "substantially connected" to the extension of credit. Although the CFPB appears to acknowledge that voluntary expedited payment fees or "tips" are not charges that are imposed "as a condition" of credit, the Proposed Rule sets forth the CFPB's view that expedited payment fees and "tips" are "substantially connected to the extension of credit," notwithstanding that these payments are voluntary and an EWA may be obtained on the same terms without payment of these amounts, they are nevertheless "imposed" as an "incident to" credit and are therefore "finance charges" under TILA and Regulation Z. The CFPB stated in a footnote to the Proposed Rule that it believes that a cost may be "imposed" on a consumer even if the cost is not required for the extension of credit.

That being said, the Proposed Rule appears to leave open the possibility that some "tips" nevertheless are not "finance charges" even under the Proposed Rule's broad interpretation of a "finance charge." Instead, the Proposed Rule suggests that the determination of whether a "tip" is imposed as an "incident to" the extension of credit requires a nuanced analysis that can include consideration of whether the provider (i) solicits a "tip" before or at the time of a credit extension (rather than some significant time after it); (ii) labels the solicited payment with a term (such as "tip") that carries an expectation that the consumer will make such a payment in the normal course; (iii) sets default "tip" amounts or otherwise making it practically more difficult for the consumer to avoid leaving a "tip"; (iv) suggests "tip" amounts or percentages to the consumer; (v) repeatedly solicits "tips," even in the course of a single transaction; and (vi) states or otherwise implies, directly or indirectly, that tipping may impact subsequent access to or use of the product.

The scope of the Proposed Rule is limited to interpreting TILA and Regulation Z's application to EWA programs. It does not address whether EWA programs are "credit" under any other federal or state consumer financial regulatory laws, though various federal consumer financial laws and regulations (including the Equal Credit Opportunity Act, for example) incorporate definitions of "credit" reasonably similar to the TILA definition; and it also does not address the treatment of any other products under TILA and Regulation Z, though courts or the CFPB itself could pursue similar treatment of other products involving contingent payment obligation as an extension of the Proposed Rule through additional rulemakings or enforcement activity. The CFPB is also analyzing options for workers to more easily access and permission their payroll data separately from the Proposed Rule, as part of what the CFPB states is an effort to "facilitate more competition for paycheck advance products and other loans."

The application of state and federal consumer financial laws to EWA programs also may be addressed through legislation. The Earned Wage Access Consumer Protection Act, introduced in the U.S. House of Representatives in February 2024, would, if enacted, would exclude EWA transactions offered in compliance with the law from the definition of "credit" (and exclude any voluntary fees, tips, or gratuities paid by the consumer from the definition of a "finance charge") under TILA and Regulation Z. A number of states, including Kansas, Missouri, Nevada, South Carolina, and Wisconsin, have recently enacted legislation that offers EWA programs offered in compliance with state law a presumption that the programs do not involve the extension of credit for purposes of state lender licensing and usury laws.

The CFPB will be receiving comments on the Proposed Rule through August 30, 2024. The CFPB intends to publish a final interpretive rule after considering comments received.

HUD REQUESTS INFORMATION ON BUY/NOWPAY-LATER

By Kerri Webb, Eric T. Mitzenmacher, and Krista Cooley
Originally Published June 27, 2025

On July 18, 2024, the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") issued a proposed interpretive rule (the "Proposed Rule") purporting to clarify the application of the Truth in Lending Act ("TILA") and Regulation Z to earned wage access ("EWA") programs. Unlike other interpretive rules issued by the Bureau, including the interpretive rule on the application of certain TILA and Regulation Z "credit card" provisions to buy now, pay later products, the Proposed Rule is styled as a proposal and request for comment that will not become effective until after the CFPB considers comments and issues a final interpretive rule. In this blog post, we discuss the important features of the Proposed Rule.

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As an emerging product, EWA programs present novel financial regulatory issues. The most significant of these issues is the status of an EWA transaction as a non-credit transaction. Regardless of the model, EWA programs typically restrict the amount that can be advanced to a user to the amount of wages that the user has actually earned and has a property right to, and the transaction carries no recourse to the user if the provider cannot recoup the advance. These features differentiate an EWA transaction from a traditional consumer loan. In fact, several states have recently enacted legislation that provides, as a matter of law, that EWAs which are offered in compliance with state law are presumptively not credit for purposes of state lender licensing and usury laws.

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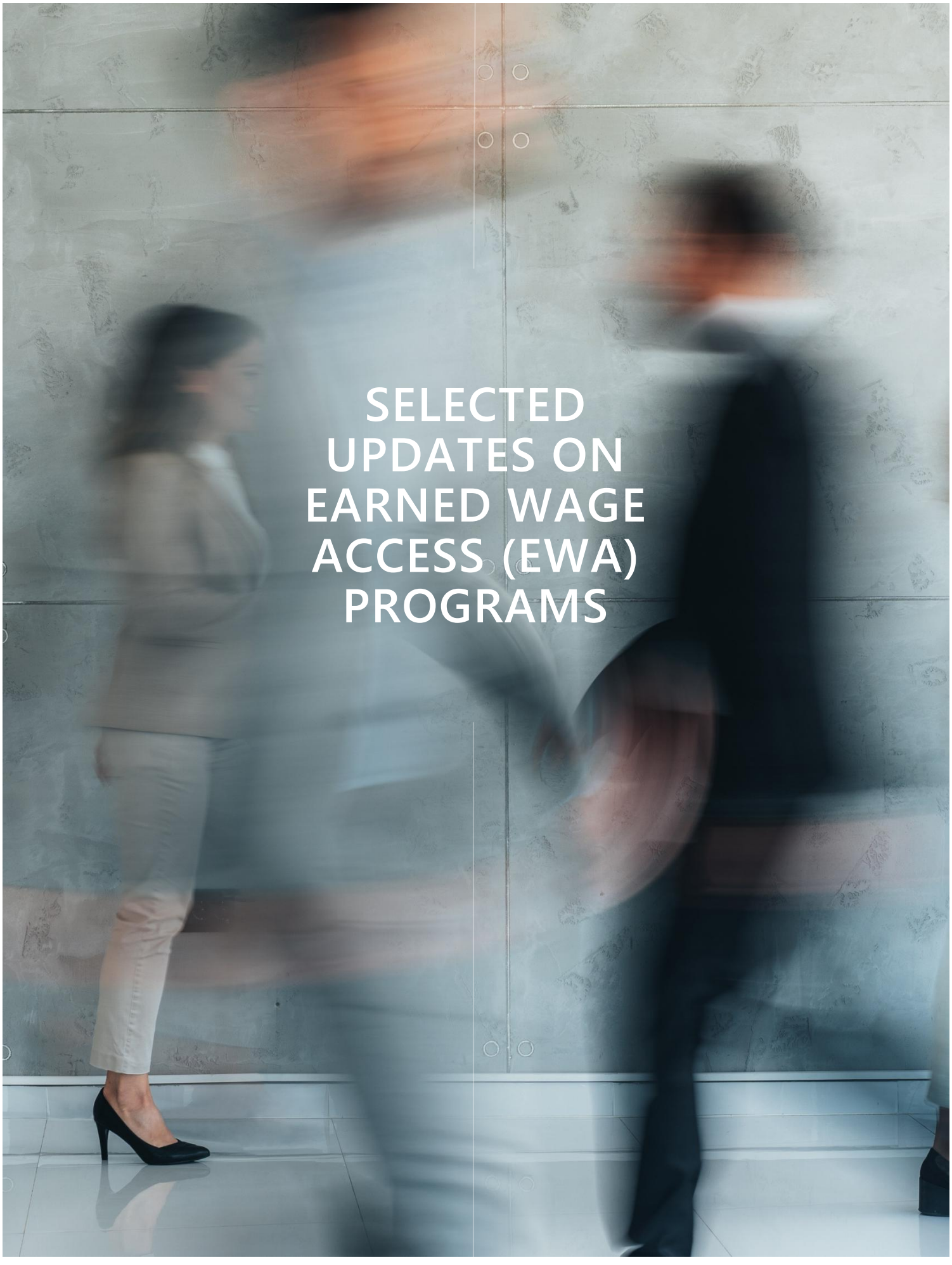

SELECTED UPDATES ON EARNED WAGE ACCESS (EWA) PROGRAMS

ARKANSAS AND UTAH ENACT LAWS TO REGULATE EARNED WAGE ACCESS PROVIDERS

By Krista Cooley, Francis L. Doorley, and Daniel B. Pearson
Originally Published April 21, 2025

Just days apart, Arkansas and Utah enacted laws to regulate providers of earned wage access ("EWA") services, joining the handful of states that have enacted legislation to regulate these products since 2022. Arkansas House Bill 1517 and Utah House Bill 279 were signed into law on March 20, 2025, and March 25, 2025, respectively. As EWA products have gained popularity as an alternate source of short-term liquidity for consumers, several states have enacted laws to regulate these products and enact consumer protection requirements. Some important takeaways from the new Utah and Arkansas EWA laws are discussed below.

UTAH HB 279

Utah's newly enacted Earned Wage Access Services Act requires providers of EWA products to register with the Utah Division of Consumer Protection (the "Division") and renew their registration annually. The registration process will require the payment of an application fee, submission of a copy of the applicant's EWA services agreement for use with consumers, submission of fingerprints by an applicant's principal for a criminal background check, and any other information required by the Division.

In addition to the registration requirement, the Utah Earned Wage Access Services Act also imposes practice requirements on EWA providers. Among other requirements, providers of EWA services will be required to:

- Clearly and conspicuously disclose: the consumer's rights; all fees; any voluntary tip, gratuity or donation opportunities (if the EWA program involves "tips" or other gratuities); the voluntary nature of any tips and confirmation that the availability of EWA services is not contingent on tips;
- Disclose to a consumer at the time of a consumer's request for funds: the anticipated timing for the consumer's receipt of funds; the amount of funds requested; the amount of the fee charged; the amount of funds the consumer will receive; the account that will receive the funds; and the date the provider is authorized to withdraw funds from the consumer's account, including fees and voluntary payments;
- Implement procedures to address consumer questions and complaints, and provide information to consumers regarding how to file a complaint with the Division; and
- Allow a consumer to cancel at any time without penalty.

EWA providers will also be subject to a number of restrictions, including, but not limited to, prohibitions on the following practices:

- Compelling a consumer to repay funds through the threat or use of litigation, outbound calls, third-party debt collectors, or debt sales; reporting nonpayment to consumer reporting agencies or threatening to do so; or charging or threatening to charge interest, charges, fees or other penalties for nonpayment;
- Using a consumer's credit score to determine eligibility for EWA services;
- Conditioning the consumer's receipt of funds on tips, gratuities or donations, or misleading a consumer about the voluntary nature of tips, gratuities, or donations; and
- Charging a fee, interest or other penalty for failure to repay funds.

The legislation defines a provider to exclude employers that advance earned wages directly to employees or independent contractors, and service providers that do not fund earned wages. The Utah legislation provides a broad exemption from the EWA law for a person regulated under Utah's financial institutions statutes, which regulate certain banks, money transmitters, industrial banks, escrow agents, check cashers, title lenders, and commercial financers. In addition, EWA providers subject to the Utah Earned Wage Access Services Act are exempt from the Utah statutes regulating financial institutions and are presumed not to be extending credit if they do not otherwise qualify as creditors or lenders.

With an effective date of May 7, 2025, HB 279 does not provide much runway for providers that will be subject to the law's requirements to register and bring their practices into compliance with the law. However, the Utah legislature has provided some accommodation for the industry: EWA providers doing business in Utah on May 7, 2025, may continue doing business if they apply for a registration by October 6, 2025, and otherwise comply with the legislation's substantive requirements.

ARKANSAS HB 1517

In contrast to the Utah bill, the new Arkansas Earned Wage Access Services Act does not require EWA providers to obtain a license or registration. Instead, the Arkansas legislation only requires providers to comply with certain practice requirements. A provider that complies with the Arkansas legislation's prohibited practices provisions will not be deemed to be engaging in lending, money transmission, or debt collection, and will not be deemed in violation of Arkansas laws governing the sale or assignment of earned but unpaid income as a result of the provider's EWA activities. (While Arkansas does not license non-real estate-secured consumer lending, it does license certain money transmission and debt collection activities.)

The specific practice requirements that HB 1517 imposes on EWA "providers" overlap with those found in the Utah legislation, as well as several other states' EWA laws. Among other requirements, the Arkansas law requires EWA providers to:

- Clearly and conspicuously disclose and provide in the service contract that any tips, gratuities or donations are voluntary, and disclose that EWA services are not contingent on the payment of any such amounts;
- Address complaints expediently and develop policies and procedures to respond to consumer questions;
- Offer at least one "reasonable" no-cost EWA option to the consumer;
- Fully disclose the consumer's rights under the agreement and all fees associated with the EWA product before entering into an agreement; and
- Allow the consumer to cancel at any time without a fee.

An EWA provider is also subject to a number of prohibitions under the Arkansas legislation, including, but not limited to, a prohibition on: the sharing of tips with a consumer's employer; requiring a credit report or score to determine consumer eligibility; charging a late fee or other charge; attempting to collect through litigation, third parties, or the sale of balances to a third- party debt collector or debt buyer; or engaging in misleading or deceptive advertising practices.

A provider is defined to exclude employers that advance earned wages directly to employees or independent contractors, and service providers that do not fund earned wages. A provider also does not include entities that offer or provide EWA services and that also report the consumer's repayment activity to a consumer reporting agency.

HB 1517 will take effect the 91st day after the adjournment of the 2025 Arkansas legislative session.

LOOKING AHEAD

The EWA industry should expect similar moves from additional states in the future. In addition to Utah, six states now require a license or registration to offer EWA products—California, Kansas, Missouri, Nevada, South Carolina and Wisconsin. Other states are likely to follow by enacting their own laws to regulate EWA services. Bills to license or regulate EWA products are pending in at least 21 states, including Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Massachusetts, Maryland, Maine, Missouri, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Texas, Utah, Vermont, and Washington.

SELECTED UPDATES ON HOME IMPROVEMENT AND SOLAR FINANCING

CALIFORNIA SENATE BILL 784 BUILDS OUT SOLAR AND HOME IMPROVEMENT FINANCING REGULATIONS

By Joy Tsai, Eric T. Mitzenmacher, and Grace Kim
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A bill that would substantially expand solar and home improvement financing requirements is making its way through the California legislature. Senate Bill 784 ("SB 784") passed the California Senate on June 2, and is now under consideration by the California Assembly. The bill, which would impose new consumer protection requirements for solar and home improvement lending in addition to the state's existing statutes regulating consumer lending, home solicitation sales, and home improvement contractors, represents an escalation of state interest in the industry. If enacted in the current legislative session without amendment, the bill would become effective January 1, 2026. California's consideration of the bill follows increased regulatory and private action pressure on solar and home improvement dealer oversight and financing company economics that have been building at the state and federal level over several years, and seeks to codify substantive and procedural constraints on certain aspects of the market that consumer advocates have targeted for reform.

This Legal Update examines SB 784 in market context and provides a summary of how its requirements could affect the solar and home improvement financing industry going forward. We will continue to monitor updates to the bill—as well as other state actions in the solar and home improvement financing space—and provide additional updates as warranted.

MARKET CONTEXT

Financing sources in the solar and home improvement financing industry often rely on third-party contractors and dealers for consumer-facing solicitation, customer acquisition, and document execution. As a result, the consumer-facing practices of these contractors and dealers have attracted recent regulatory scrutiny of whether contractors and dealers have engaged in improper sales practices or other misconduct. Regulators and private plaintiffs have alleged fairly frequently, for example, that dealers may sell defective equipment or fail to complete proper installations, resulting in consumers having loan repayment obligations for home improvements that are non-functioning or underperforming. Similarly, allegations that dealers have misrepresented financing terms as they engage in high-pressure tactics to complete sales have become more common over time. Through enforcement, litigation, or legislation, parties have sought to constrain these alleged abuses, including through attempt to impose liability or control obligations on parties other than the dealers themselves (such as lenders, sales finance companies, program managers, or investors).

Another issue that has received significant attention from the Consumer Financial Protection Bureau ("CFPB"), state attorneys general, and consumer advocacy groups is the role that "dealer fees" play in the market for solar and home improvement financing. Dealer fees typically refer to costs that are imposed by financing sources on dealers in exchange for permitting dealers to participate in a financing program. Regulators and consumer advocacy groups have alleged that the presence of dealer fees, which may range between an equivalent of 10% and 30% of the cash price of the financed equipment in solar

financing transactions, increases the cost of a financed project above a potential "cash sale price" (i.e., the price at which the same products and services would otherwise be available if the transaction were not financed). Regulators and private plaintiffs have alleged that dealers charge more for financed transactions than cash transactions (even if agreements between financing sources and dealers prohibit such pricing differences) or that dealer fees result in pricing increases across all transactions as dealers account for such costs in their overhead. Regulators have also alleged that the fact that dealer fees have been included in the price of the financed equipment is not adequately disclosed to consumers and represents a "hidden finance charge" or undisclosed interest under federal[1] or state laws. Other allegations made by regulators in prior actions and public statements include allegations of dealers making misleading claims about energy savings from solar systems based on overstatements about the amount of electricity that panels will produce and/or assumptions that homeowners will qualify for federal tax credits, without considering whether the consumer actually has tax liability or qualifies for the tax credit.

We discussed regulatory and private actions in the solar industry in greater detail in our prior Legal Update, "Regulatory Clouds on the Horizon for Solar Financing? Programs Face Headwinds, but the Future Still Looks Bright."

CURRENT TEXT OF SB 784

SCOPE

SB 784 mostly applies to "home improvement loans," which it defines as a consumer loan that will be disbursed to a contractor in connection with a home solicitation contract to finance a home improvement, but excluding Property Assessed Clean Energy financing and certain mortgage loans. However, the right to cancel period applies more generally to home improvement contracts, which could include both retail installment contracts ("RICs") as well as contracts for the sale of home improvement goods or services that are not financed. Under the home improvement loan model, a consumer borrows directly from a lender who disburses loan proceeds for the project to the contractor or dealer. Under the RIC model, the consumer purchases the goods or services on credit with the seller, who may later sell or assign the RIC to a lender.

[1] Treatment of dealer fees under federal law depends on the structure of the financing offered, as well as how such dealer fees are imposed. In particular, the "finance charge" determined under the federal Truth in Lending Act and its implementing regulation, Regulation Z, excludes "seller's points," which are fees imposed by a creditor on a non-creditor seller of goods or services rather than on the consumer. This exclusion covers dealer fees in loan transactions (under typical models in which the lender does not *require* the fee to be passed through to the consumer) even if the seller chooses to recoup some or all of the cost of the fee by passing it through to the consumer as an element of pricing or as a separate fee. The same treatment *does not apply* where the seller is the creditor, as would be the case in a program implemented through retail installment transactions. 12 C.F.R.§ 1026.4(c)(5) (and associated Official Interpretations).

REQUIREMENTS

The California legislation intends to address many of the consumer regulatory risks alleged in prior regulatory actions, private litigation, and consumer advocacy research. Provisions addressing home improvement loans impose new obligations and liabilities on the lender or restrictions on the loan itself. Provisions addressing home improvement contracts impose new obligations on contractors. Other parties that may be involved in financing activities, such as brokers, salespeople, investors, servicers, and collectors, are not directly regulated by the new provisions (though activities by brokers or salespeople may be relevant to determinations of lender liability in certain cases, as summarized below regarding "Borrower Claims and Defenses")).

Key provisions of the bill include:

- **Requirement of lender confirmation call**: The version of SB 784 that has passed through the California State Senate would require a home improvement lender to obtain a copy of the home improvement contract between the dealer and buyer, and complete a video or telephone confirmation call with the buyer that confirms that all property owners have received a copy of the home improvement contract, reviews key terms of the loan agreement, and ensures that the buyer understands terms of the loan and the underlying contract for home improvement services before the buyer executes a home improvement loan. An amended version under consideration by the California State Assembly varies these requirements slightly by limiting the confirmation regarding parties that have received a copy of the home improvement contract to the consumer, rather than all property owners. Such calls have not previously been formal regulatory requirements, though some financing providers have implemented welcome call processes for at least a portion of their originations as one of several possible controls against consumer misunderstanding and certain forms of fraud or improper dealer behavior.
- **Extension of a buyer's right to cancel a home improvement transaction**: Existing California law provides a buyer the right to cancel certain home solicitation contracts—meaning those entered into outside of the seller's usual place of business—until midnight of the third business day after the day on which the buyer signs an agreement to purchase goods or services, and five business days for buyers who are senior citizens. SB 784 extends the cancellation period to five days and seven days, respectively. Federal law provides a three-day cancellation period for home solicitation sales (subject to various exemptions), and many states mirror that time frame even if they extend cancellation rights to a broader set of sales—such as all home improvement contracts rather than just home solicitation sales. If SB 784 were enacted in its current form, California would join a relatively short list of states with longer cancellation periods. This requirement applies to the home improvement contract between the seller and the consumer, rather than to the home improvement loan between the consumer and the lender. The extended rescission period would apply to contracts entered into on or after January 1, 2026. Current rescission periods would apply to contracts entered into before January 1, 2026, even is such rescission period ran into the first few days of 2026.

- **Disclosure of dealer fees**: SB 784 requires home improvement lenders to provide both oral and written disclosures about "dealer fees" before a consumer executes a home improvement loan. It defines "dealer fee" as a charge associated with a home improvement loan that is treated by the lender as seller's points pursuant to the Truth in Lending Act ("TILA") and its implementing Regulation Z (i.e., fees imposed by a creditor on a non-creditor seller of financed goods or services, even if the fee is passed through to the borrower, in whole or in part, at the non-creditor seller's discretion). The bill prescribes specific language and formatting requirements for the disclosure as provided below, requires consumers to initial the disclosure acknowledging receipt, and requires the lender to obtain a copy of the signed disclosure statement from the buyer before executing a home improvement loan. The disclosure required by the version of the bill that has passed through the California State Senate is as follows:

The amount of your loan may include a dealer fee that is not included as a finance charge for the purpose of calculating the annual percentage rate (APR) of the loan. This means that the true cost of this loan may be higher than indicated by the APR. If you seek financing from another lender that does not have a relationship with your contractor, the loan is unlikely to include a dealer fee but may have a higher interest rate or other finance charges. For this reason, you are encouraged to shop around and compare the costs of different loans before deciding which to use for this project. The dealer fee for this loan is $____. You will be required to pay this back. The dealer fee in addition to the payment or payments made by the lender to the contractor for their work on this project, which for this loan is $____.

A slightly amended version of this language is under consideration by the California State Assembly. The amended language would clarify that the consumer will be required to pay back dealer fees only if the contractor added any portion of the dealer fees to the underlying home improvement contract, rather than stating a requirement to pay back dealer fees as universal.

While TILA and Regulation Z require disclosure of the finance charge on a consumer credit transaction, "seller's points," which could include dealer fees, are excluded from the finance charge even if the seller passes on the fees to the buyer in the form of a higher sale price for the financed property.[1] Certain aspects of the language required by SB 784 may be open to challenge under an argument grounded in TILA's preemption standards, which displaces state laws and regulations that are inconsistent with Regulation Z, including through use of terms to refer to other concepts. In particular, the statement that inclusion of a dealer fee means "that the true cost of this loan may be higher than indicated by the APR" could be read to conflict with Regulation Z's treatment of APR as the primary disclosed "cost of credit" and/or to overshadow required disclosures. This could be true even if the remainder of the disclosure is not preempted—though whether the disclosure will be finalized as-is or challenged on this ground upon becoming effective remains to be seen.

[1] 12 C.F.R. § 1026.4(a).

- **Loan Payment Schedules Tied to Project Completion**: The version of SB 784 that has passed through the California State Senate would prohibit lenders from requiring a borrower to make a payment on a home improvement loan until the lender has confirmed that have all permitting agencies have issued final approval of all home improvements financed under the loan and that the improvements are operational. An amended version under consideration by the California State Assembly varies these requirements slightly, requiring confirmations regarding permitting and operational status only for home improvements not involving a solar energy system and treating a confirmation that Permission to Operate has been granted as the sole requirement for a home improvement project involving a solar energy system. Under either version of the bill, the lender would be prohibited from reporting the consumer's payment obligation on the loan to consumer reporting agencies until the consumer's repayment obligations have started, in accordance with SB 784.
- **Borrower Claims and Defenses**: The version of SB 784 that has passed through the California State Senate expands a lender's vicarious liability for certain violations of law by a contractor, salesperson or broker. In particular, a consumer could assert any claim or defense regarding misrepresentation of loan terms that a consumer could have brought against such persons against the lender as well. This provision is similar to the Federal Trade Commission's ("FTC") Holder Rule, which eliminates "holder in due course" protection from defenses and claims that a consumer could have asserted against the original seller of goods or services for any assignee of a purchase-money consumer loan or RIC. Unlike the FTC Holder Rule, however: (i) liability is not limited to amounts paid by the consumer; (ii) expanded vicarious liability appears to apply only to the initial lender and not to subsequent holders of the loan; and (iii) a lender may not be held vicariously liable if it has cured the third party's misrepresentation through a telephone or video call. An amended version under consideration by the California State Assembly strips this provision from the bill, such that its ultimate inclusion remains uncertain.

BROADER REGULATORY MOVEMENT ON SOLAR AND HOME IMPROVEMENT FINANCING ISSUES

California's proposal follows steps taken by other states to further regulate solar financing.

For example, effective June 6, 2024, Washington adopted the Solar Consumer Protection Act ("SCPA"), which—like portions of California's SB 784—also focused on dealer fee disclosure issues. The SCPA requires a solar energy contractor or salesperson to provide consumers a written contract that includes material terms and disclosures regarding the installation of a solar energy system. Among other requirements, the contract must disclose the exact amount a contractor or salesperson paid to any lender or third-party financing company in the form of a "dealer fee" or other similar inducement to obtain financing.[1] The SCPA defines "dealer fee" as the "amount paid by a solar energy contractor or solar energy salesperson to a lender in order to offer a customer credit to finance the purchase and installation of a solar energy system."[2] The contract must also include a separate line item disclosing any financing that is incorporated directly into the contract, including terms, conditions, interest rates, annual percentage rate, the amortization schedule, and information about how the loan is secured.[3] Additionally, solar energy installation contracts must include notices, some of which consumers must acknowledge and initial, including those regarding the consumer's right to cancel a contract within three business days, the use of residential clean energy tax credits, and a payment schedule based on project completion milestones.[4] While the coverage of the Washington SCPA is limited to solar contractors and salespersons, the statute addresses regulatory scrutiny of dealer fees in a manner similar to California's SB 784.

Similarly, effective March 1, 2025, Rhode Island's Residential Solar Energy Disclosure and Homeowners Bill of Rights Act[5] requires solar retailers to register with the Rhode Island Department of Business and submit their roster of employees and third-party sales representatives engaged in selling solar systems, provide specific disclosures to consumers that include projected estimates of savings and the bases of such calculations, and provide consumers with a right to cancel the transaction within seven business days. Unlike SB 784 and the Washington SCPA, the Rhode Island law applies to persons who originate solar leases and power purchase agreements, rather than persons who provide financing for the solar systems, and suggests that regulatory concerns around dealer practices extend to the leasing and power purchase arrangements.

[1] *See* Wash. Rev. Code Ann. § 19.95.020(4)(c).
[2] *Id.* § 19.95.010(2).
[3] *See id.* § 19.95.020(4)(b).
[4] *See e.g.*, *id.* § 19.95.020(4)(f), (r), and (t).
[5] R.I. Gen. Stat. §§ 5-93-1 *et seq.*

Additionally, Nevada Senate Bill 379, which becomes effective October 1, 2025, will impose new consumer protections for solar installations and applies to solar loans, leases, and power purchase arrangements. The Nevada legislation will require a solar financing company to ensure that its dealers hold the requisite contractors' licenses, and that failure to confirm licensing results in the solar contract being voidable by the consumer. The Nevada legislation will also prohibit solar lenders from making certain payments to dealers prior to PTO, extends the cancellation period for consumers who are 60 years of age or older, among other requirements.

These states' movement on this issue may signal the early stages of a trend as regulatory scrutiny in the solar and home improvement financing space intensifies over time.

SELECTED UPDATES ON SMALL BUSINESS FINANCING

1071 SMALL BUSINESS DATA COLLECTION RULE STAYED (AGAIN)

By Tori K. Shinohara, Jeffrey P. Taft, and Francis L. Doorley
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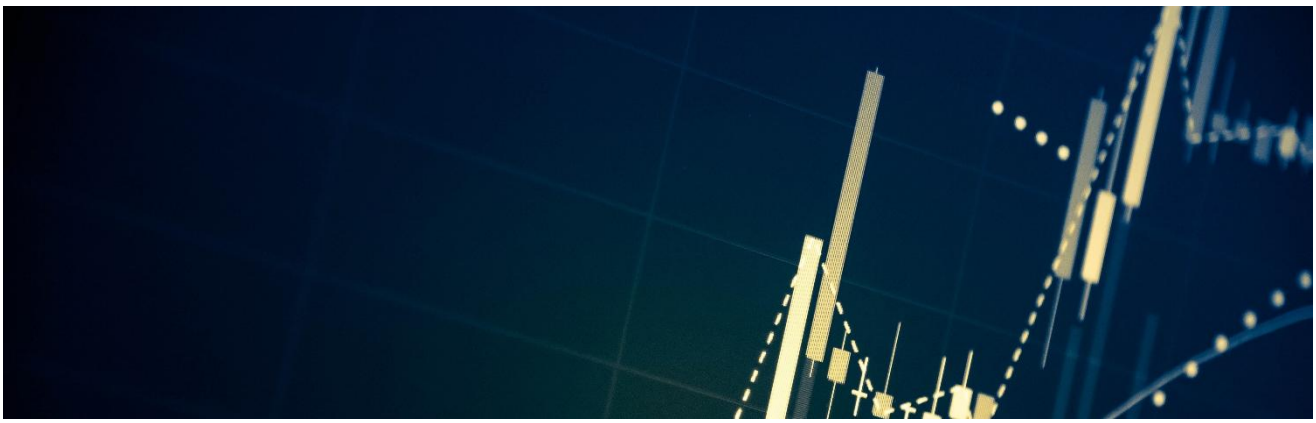
As we reported earlier this week, the CFPB's new Acting Director and Treasury Secretary, Scott Bessent, has directed Bureau employees not to make any filings or appearances in litigation, other than to seek a pause in the proceedings. This directive played out almost immediately this week—including in a case before the Fifth Circuit brought by several trade associations challenging the Bureau's small business data collection final rule ("1071 rule"). The case was slated for oral arguments before the Fifth Circuit on February 3, but in light of the directive from the Acting Director, CFPB counsel appeared and, without addressing the merits of the case, notified the court that they had been instructed by new leadership not to make any appearances in litigation except to seek a pause in proceedings. The court then directed each side to announce, in writing, its posture regarding the current status of the case. In response, the CFPB stated in writing that it no longer opposes the plaintiffs' motion to stay the 1071 rule's compliance deadlines (the first of which is in July 2025) for 90 days to give the Acting Director time to consider the issues. Today, the Fifth Circuit issued an order granting plaintiffs' motion for a stay pending the appeal, but subject to modification at any time. As a result, the 1071 rule's compliance deadlines are tolled for plaintiffs' and intervenors in the litigation.

Notably, this is the second time that the 1071 rule has been stayed by a federal court. We previously reported on the prior nationwide stay, which ultimately resulted in the Bureau delaying the original compliance deadlines by 290 days.

Although the stay is a welcome relief for covered small business lenders—many of whom have been working industriously to get ready for the July compliance deadline—it creates additional uncertainty in the industry regarding the implementation of the 1071 rule. Because the 1071 rule became effective in August 2023, it is not subject to the new administration's regulatory freeze, nor is it subject to the Acting Director's directive to halt new rulemakings that have not yet become effective. It remains to be seen what actions the Bureau's new leadership may take with respect to the substantive requirements set forth in the 1071 rule.



REMINDER: CALIFORNIA'S NEW COMMERCIAL DEBT COLLECTION PROTECTIONS TAKE EFFECT JULY 1, 2025

By Daniel B. Pearson and Jeffrey P. Taft
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Companies that service or collect commercial debt are reminded that new practice requirements are taking effect in California starting July 1, 2025. As Mayer Brown reported when California Senate Bill 1286 was enacted in 2024, the legislation will amend the California Rosenthal Fair Debt Collection Practices Act (the "Rosenthal Act") so as to subject persons collecting certain commercial debts in amounts of $500,000 or less to some of the Rosenthal Act's practice requirements and restrictions on unfair and deceptive debt collection practices.

This Legal Update summarizes some of the more significant requirements that will apply to collectors of certain commercial debts starting July 1, and takes a closer look at the particular transactions and activities that are subject to—and excluded from—the amended Rosenthal Act, including certain nuances around the law's scope.

RESTRICTIONS ON PRACTICES

Similar to the federal Fair Debt Collection Practices Act (FDCPA), the amended Rosenthal Act prohibits a broad range of unfair and deceptive debt collection practices by debt collectors, in addition to imposing a number of practice obligations. The provisions that will apply to collectors of certain commercial debts include, but are not limited to, restrictions or prohibitions on the following:

- Using threatening or profane language with debtors, harassing a debtor, or threatening to take unlawful conduct to collect a debt;
- Making certain false representations to debtors;
- Collecting time-barred debts without providing certain notice to the debtor; Collecting fees or charges from debtors that are not permitted by law;
- Collecting delinquent debt without possessing appropriate documentation substantiating the debt; and
- Failing to provide certain debt validation information to a delinquent debtor upon the debtor's written request.

POINTERS ON THE SCOPE OF AMENDMENTS

In advance of the effective date, commercial financers and servicers have been examining the potential impact of the amendments to their collection activities. Below are some reminders as to the law's applicability and a discussion of certain nuances for industry to consider when applying the new requirements:

- The amended Rosenthal Act applies to commercial debts in amounts of $500,000 or less.

- In the case of open-end debt, the transaction amount is the maximum commitment—or "maximum amount that is enumerated" under the agreement—for purposes of computing the $500,000 threshold, rather than credit outstanding.
- The $500,000 threshold is computed by aggregating transactions between the same parties. Specifically, the $500,000 metric includes all covered *and "noncovered"* commercial credit transactions owed by the debtor or other person obligated under the transactions to the same lender. Although not specifically defined, "noncovered" transactions implicitly would include debts that are not specifically covered by SB 1286, potentially including:
    - Debts owed under commercial credit transactions that are in amounts greater than $500,000; and
    - Commercial debts of any amount owed to business organizations guaranteed by the same natural person guarantor who is obligated under a covered commercial credit transaction.
- The amended Rosenthal Act applies equally to first- and third-party debt collectors—meaning persons that collect on debts they own, on their own behalf, as well as persons collecting debts owned by another person.
- The amendments apply to commercial debts that are owed by a "debtor," defined as a natural person who guarantees a qualifying commercial debt. While the amendments are unclear, the legislative history suggests that debts owed by sole proprietorships or general partners/partnerships, in addition to natural persons, are subject to the amended Rosenthal Act given that in each case a natural person is an obligor.
- The protections of the amended Rosenthal Act appear limited to commercial debts due as a result of a "commercial credit transaction," such that other non-traditional forms of financing like merchant cash advances (MCA) and non-recourse factoring may fall outside the statute's scope.

As a reminder, real-estate-secured debt is not generally excluded from the amended Rosenthal Act. The statute also does not provide blanket exemptions for depository institutions or other regulated or licensed entities. Legislation introduced on March 18, 2025, would, if enacted, provide a new exemption from the Rosenthal Act's commercial debt collection requirements for commercial financing transactions of $50,000 or more in which the recipient is a motor vehicle dealer as defined under California law or affiliate thereof. This proposed exemption is similar to a common exemption that appears in the state commercial finance disclosure laws, including California, enacted in recent years.

PENALTIES

The penalties for violations of applicable provisions of the Rosenthal Act will extend to persons collecting in-scope commercial debt when the legislation takes effect on July 1. The potential penalties for violations of the Rosenthal Act include:

- damages sustained by a debtor in an action brought under the Rosenthal Act's private right-of-action (only individual and not class actions may be brought to enforce these provisions);

- attorney's fees and costs; and
- an additional penalty in such an action not exceeding $1,000 for willful and knowing violations.

Debt collectors have a 15-day cure period to avoid liability after discovery of a violation, and can avoid civil liability with a proper showing that a violation was unintentional, despite the maintenance of appropriate procedures. The enforceability of a debt is not impaired by any violation of the Rosenthal Act.

EFFECTIVE DATE

SB 1286's amendments to the Rosenthal Act apply only to commercial credit or debts "entered into, renewed, sold, or assigned on or after July 1, 2025." Thus, while a person servicing or collecting existing commercial debts will not be required to comply with the new requirements so long as the debts are not renewed, sold, or assigned on or after July 1, 2025, commercial financers may need to update their practices in order to service new accounts going forward.

TAKEAWAYS AND REGULATORY LANDSCAPE

Commercial financers and servicers of small business debt that do not also collect consumer debt may lack significant experience complying with the relatively extensive practice requirements that apply to many consumer debt collectors under the federal Fair Debt Collection Practices Act (FDCPA) and state collection laws. These companies may need to devote additional resources to compliance by July 1 if they are subject to the amended Rosenthal Act, although some of the Rosenthal Act's provisions echo the Federal Trade Commission Act's prohibitions on unfair or deceptive acts or practices (UDAP), which are not limited to consumer-purpose debts.

Relatedly, providers of commercial financing should recall that in 2023 California's Department of Financial Protection and Innovation (DFPI) promulgated regulations imposing California's own flavor of UDAAP (unfair, deceptive or abusive acts or practices) prohibitions on a broad range of commercial finance providers, as discussed in a prior Legal Update. The DFPI's UDAAP provisions echo the UDAAP standard enforced at the federal level by the Consumer Financial Protection Bureau (CFPB), but also incorporate California's unfair competition law and relevant case law. The 2023 rules also require certain providers of commercial financial products or services to file an annual report with the agency each March 15. Shortly after these rules were adopted, California enacted legislation prohibiting providers or brokers of commercial financing from charging certain fees to a defined set of small businesses, including, but not limited to a fee for account statements, an origination fee without a clear corresponding service provided, and limitations on UCC lien filing fees.

As all of these developments show, California's scrutiny of the small business financing industry shows no signs of flagging.

TEXAS COMMERCIAL FINANCING DISCLOSURE AND REGISTRATION LAW THREATENS SALES-BASED FINANCING INDUSTRY

By Daniel B. Pearson and Eric T. Mitzenmacher

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Texas has enacted a law that has the potential to place substantial impediments on sales-based financing providers, including merchant cash advance companies, seeking to operate in Texas. The new Texas law prohibits sales-based financing providers and brokers from establishing a mechanism to automatically debit a recipient's deposit account to recoup receivables unless the provider or broker holds a perfected first-lien security interest in this account—which very few sales-based financing programs are designed to do. In addition, the law specifically excludes sales-based financing transactions from being able to benefit from Texas's unique exemption from its usury law that applies to "account purchase transactions." Both provisions have the potential to significantly restrict or impair many sales-based financing programs from offering financing to Texas businesses.

The new law will also require providers and brokers of commercial financing to make disclosures to recipients, becoming the tenth state to enact a commercial finance disclosure law since 2018. Like some but not all of the other nine states' commercial finance laws, Texas House Bill 700—which was signed into law by the state's governor on June 20—also requires providers and brokers of "sales-based financing" to register with the state.

Below we discuss how the Texas legislature has addressed the application of state usury limits to the sales-based financing transactions that are subject to the new law (the "Act"), as well as details on the Act's registration requirement; the timing and content of required disclosures; new UDAAP prohibitions; restrictions on automatic debits for payments; exemptions from the Act; the law's effective date and how the law will be administered and enforced.

REGISTRATION

The Act requires providers and brokers of sales-based financing to register with the Texas Office of Consumer Credit Commissioner (OCCC). The Texas law defines sales-based financing as:

> a transaction that is repaid by the recipient to the provider of the financing:
> (A) as a percentage of sales or revenue, in which the payment amount may increase or decrease according to the volume of sales made or revenue received by the recipient; or
> (B) according to a fixed payment mechanism that provides for a reconciliation process that adjusts the payment to an amount that is a percentage of sales or revenue.

The Act's registration requirement makes it the first Texas law to license commercial-purpose finance activities. Notably, unlike the Act's disclosure requirements, the registration obligation is not limited to persons that transact sales-based financing in an amount less than $1 million. Thus, a company that solely provides or brokers sales-based financing transactions of $1 million or more could be required to register, but not to provide disclosures, unless another exemption applies.

The registration form must include the company's name; any DBA name; principal office address; designated agent contact information; and any judgment, memorandum of understanding, cease and desist order, or conviction related to a violation of law, act of fraud, breach of trust, or money laundering against the company or its directors, officers or controlling persons. The Act directs the OCCC to set the registration fee and adopt a registration form by rule.

Registrations must be renewed annually on or before January 31. If the information submitted on a registration form changes, the registration must be updated within 90 days.

DISCLOSURE REQUIREMENTS

The Act's disclosure requirements are somewhat similar to the sales-based financing disclosure laws enacted in Connecticut and Virginia in recent years. At a high level, the Texas law requires a provider extending a specific offer of sales-based financing in an amount of less than $1 million to disclose the following information to the recipient:

- the total amount of the financing;
- the disbursement amount;
- the finance charge;
- the total repayment amount;
- the estimated period for the periodic payments to equal the total repayment amount under the terms of the financing;
- the payment amounts, whether payments are fixed or variable;
- a description of all other potential fees and charges not included in the finance charge, including draw fees, late payment fees, and returned payment fees;
- any finance charge the recipient is required to pay if the recipient pays off or refinances before the transaction is scheduled to be repaid in full;
- any additional fees, not included in the finance charge, the recipient will be required to pay upon prepayment;
- a description of any collateral requirements or security interests; and
- a statement outlining whether the provider will pay compensation directly to a commercial sales-based financing broker and the amount of such compensation.

Additional information must be disclosed if the provider requires the recipient to pay off an existing sales-based financing as a condition of obtaining new financing. The disclosures must be signed by the recipient before the application for sales-based financing is finalized.

Although the Act authorizes administrative rulemaking to implement the UDAAP and registration provisions, it does not specifically direct regulators to adopt a template disclosure form. As such, industry participants may be responsible for designing their own disclosures.

RESTRICTIONS ON AUTOMATIC DEBITS

It is relatively common for sales-based financing providers to recoup their purchased receivables through preauthorized electronic debits from one or more of the recipient's operating accounts. One of the most notable features of the Act is its prohibition on providers or brokers of sales-based financing from establishing a mechanism to automatically debit a recipient's deposit account unless the provider or broker holds a perfected security interest in such account with first-lien priority. Since many merchants or companies receiving sales-based financing may have existing financing arrangements that are secured by an "all assets" lien, it is unlikely that a significant number of sales-based financing transactions would be able to take a first-lien security interest in a recipient's deposit account. The Act does not expressly prohibit (i) "split pay" structures, where a sales-based financing provider receives its receivables directly from a payment processor or credit card processor; (ii) arrangements where receivables are recouped prior to the amounts ever reaching a recipient's deposit account(s); or (iii) receivables that are transmitted by a recipient through a recipient-initiated electronic transfer.

REMOVAL OF USURY EXEMPTION

In a unique and somewhat unprecedented move, the Act goes beyond registration and disclosure requirements to also regulate substantive transaction terms and practices of sales-based financing agreements. Texas has a unique provision in its Finance Code which provides that the parties to an "account purchase transaction," which is defined as an agreement under which a person engaged in a commercial enterprise sells accounts, instruments, documents, or chattel paper subject to this subtitle at a discount, (regardless of whether the person has a repurchase obligation related to the transaction), may agree to characterize their transaction as a purchase and sale and, if they do, then there is a conclusive presumption that the transaction is not a loan. The Texas Finance Code also provides that the amount of the discount at which a provider purchases accounts is not interest for purposes of Texas's usury law. Over the years, courts interpreted the "account purchase transaction" provisions to apply not only to traditional factoring transactions, but also to merchant cash advances and sales-based financing products. This led to Texas being viewed as a jurisdiction that had relatively beneficial regulatory treatment of sales-based financing.

In an unusual provision, the Act specifies that a sales-based financing transaction does not qualify as an "account purchase transaction." While the Act stops short of declaring sales-based financing to be a *per se* loan or credit transaction, sales-based financing transactions will no longer benefit from the conclusive presumption that they are not loans, and that the discount charged under a sales-based financing transaction is not interest. The Act does not amend the general definition of a "loan" in the Texas Finance Code, which is "an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligor has an obligation to pay the creditor."

The Act also prohibits the Finance Commission of Texas from adopting a maximum APR, finance charge, or fee for sales-based financing transactions. It remains to be seen whether the regulator will interpret this provision—and the exclusion of sales-based financing from characterization as an "account purchase transaction"—to mean that sales-based financing transactions are subject to Texas' usury law and its 18% annual interest rate limit.

UDAAP PROHIBITIONS

The Act authorizes the OCCC to bring enforcement actions for violations of the Act, and requires a different regulator—the Finance Commission of Texas—to adopt rules that identify unfair, deceptive, or abusive acts or practices (known as "UDAAP" in the federal context) related to transactions that are subject to the Act. Texas's application of UDAAP principles to small business financing echoes recent developments in other states. For example, California subjected certain providers of commercial financial products or services to UDAAP prohibitions in a 2023 rulemaking, and legislation is pending in New York that would enact UDAAP protections for small businesses.

EXEMPTIONS

The Act provides some, but not all, of the exemptions we have come to expect from state commercial finance disclosure laws. Notably absent is a *de minimis* exemption (e.g., for a company that makes or brokers five or fewer transactions in a single year). The Act exempts:

- a bank, out-of-state bank, bank holding company, credit union, federal credit union, out-of-state credit union, or any subsidiary or affiliate of those financial institutions;
- a person acting in the capacity of a technology services provider to an exempt entity if the person has no interest, arrangement, or agreement to purchase any interest in program transactions;
- transactions secured by real property;
- leases (as defined under the Texas Uniform Commercial Code);
- transactions of $50,000 or more made to a motor vehicle dealer, motor vehicle rental company or affiliate of a motor vehicle rental company;
- manufacturers and captive finance companies; and
- lenders regulated under the Farm Credit Act of 1971.

EFFECTIVE DATE, ADMINISTRATION AND ENFORCEMENT

Non-exempt providers and brokers of sales-based financing must register with the OCCC by December 31, 2026. The remaining requirements of the Act—including the disclosure requirement and prohibition on automatic debits—take effect much sooner, on September 1, 2025, although it is possible that Texas may decide to follow the example of other states and provide a "grace period" to allow sales-based financing providers and brokers to come into compliance with the law and develop compliant disclosures. Providers and brokers of sales-based financing should not rely on this possibility, however.

With fully 20% of the states now having enacted some variety of commercial finance disclosure law—and no significant movement to impose uniform disclosure requirements at the federal level—providers and brokers of commercial financing will have to continue navigating a growing patchwork of state regulatory regimes, now including Texas, for the foreseeable future.

LOUISIANA NOW REQUIRES DISCLOSURES FOR REVENUE-BASED FINANCING TRANSACTIONS

By Jeffrey P. Taft and Daniel B. Pearson
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Effective August 1, 2025, Louisiana will subject revenue-based financing transactions to new disclosure requirements, joining the still-growing ranks of states passing commercial finance disclosure laws in recent years. But unlike other states' laws, Louisiana House Bill 470, enacted on June 8, is devoid of "outs" for providers hoping to avoid the law's application. The law does not exempt any types of entities, nor does it include a maximum dollar amount above which the law does not apply, making it one of a kind among the laws of its type enacted to date.

Like Texas's own recently enacted sales-based financing disclosure law, the Louisiana law applies only to financing that can be characterized as a merchant cash advance ("MCA"), and excludes credit transactions such as loans. HB 470 applies to "revenue-based financing transactions," defined as "an agreement under which a person engaged in a commercial enterprise sells or agrees to forward a percentage of sales, revenue, or income, and the person's payment obligation increases and decreases according to the volume of sales made or revenue or income received."

Compared to some other states' laws, the Louisiana law is favorable to the industry in certain respects. For example, HB 470 does not require providers of commercial financing to register with the state; does not impose restrictions on automatic debits; requires disclosures to be made in relatively simple form that does not require disclosure of an APR; and contains a presumption that revenue-based financing transactions are not regulated as credit products or subject to Louisiana's statutory interest rate limitations. The lack of exemptions is where HB 470 differs from other state laws.

The state commercial finance disclosure laws enacted thus far by other states each contain a number of exemptions for certain companies and transactions. For example, other states commonly provide exemptions for: depository institutions, and in some cases subsidiaries thereof; licensed money transmitters; providers making no more than a small number of transactions in a set period; and transactions in amounts exceeding a certain dollar amount, ranging from $250,000 to $2.5 million, depending on the state.

With its absence of exemptions, Louisiana's is the first commercial finance disclosure law that does not exempt any banks or other depository institutions. It is also the first law with no dollar amount maximum to limit the law's scope to small business financing. Because the law is limited to revenue-based financing transactions, the absence of an exemption for insured depository institutions and their affiliates is not a significant concern.

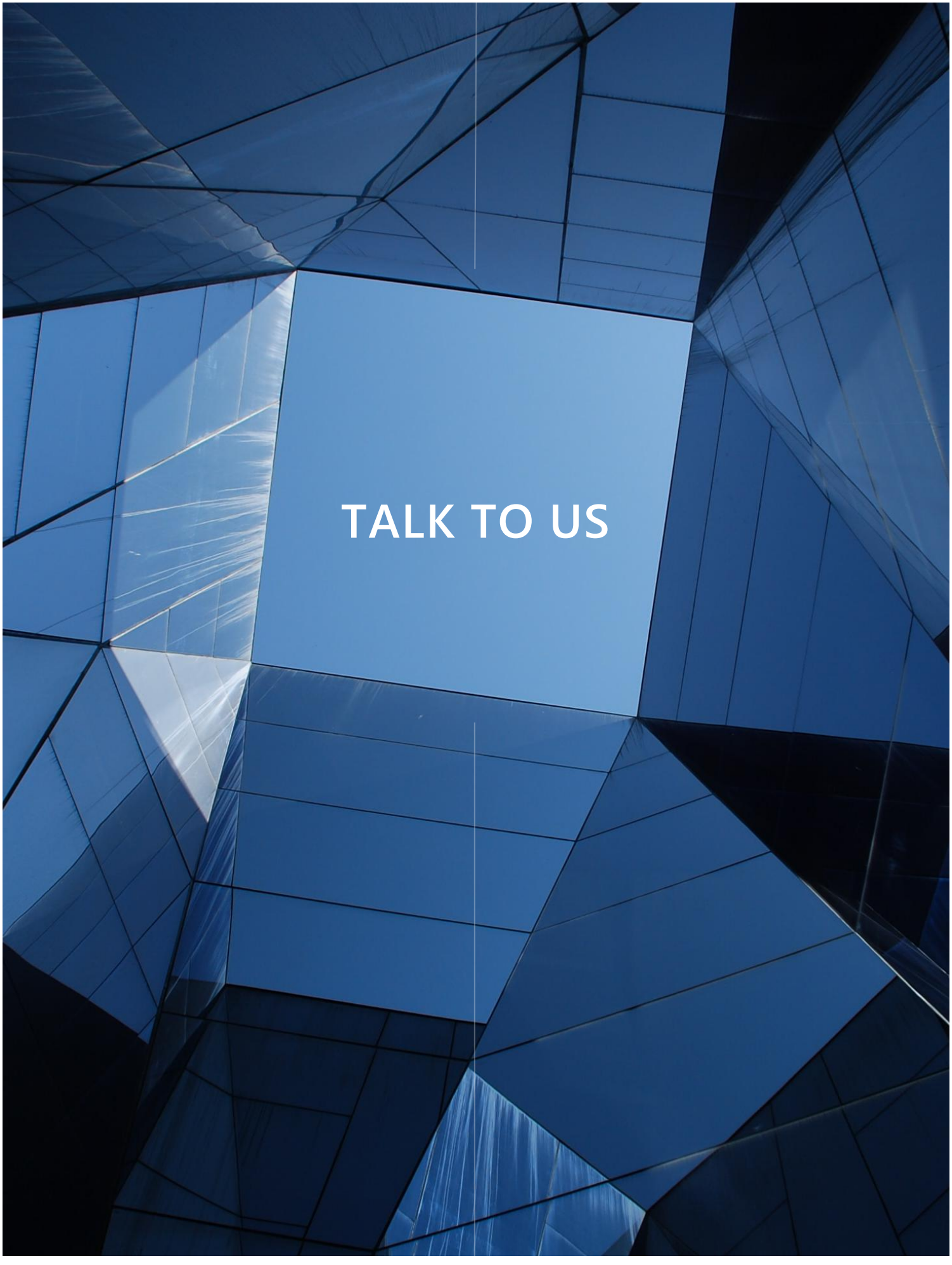
Although the bill as it was originally introduced did not impose disclosure requirements, amendments adopted in early June, and enacted with the final legislation, require a revenue-based financing transaction to "include" a written disclosure of the following terms:

- The total amount of funds provided to the commercial enterprise under the terms of the agreement;
- The total amount of funds disbursed to the commercial enterprise if less than the amount specified above (as a result of any fees deducted or withheld at disbursement, any amount paid to the provider to satisfy a prior balance, and any amount paid to a third party);
- The total amount to be paid to the provider under the terms of the agreement;
- The total dollar cost to the recipient under the terms of the agreement, calculated as the difference between the total funds provided and the total funds to be repaid;
- The manner, frequency, and amount of each payment; or if the amount of the payments vary, the manner and frequency of the payments, the estimated amount of the initial payment, a description of the methodology for calculating any variable payment, and the circumstances under which payments may vary; and
- Whether there are any costs or discounts associated with prepayment, including a reference to the provision in the transaction agreement that creates the contractual rights of the parties related to prepayment.

These disclosures closely mirror those required under a number of other states' commercial finance disclosure laws. The disclosure is to be provided at or before the consummation of a transaction. Only one disclosure is required for each revenue-based financing transaction, and new disclosures need not be provided as a result of a modification, forbearance, or change to a consummated revenue-based financing transaction.

Because the operative disclosure requirements apply whenever a revenue-based financing transaction is consummated, without regard to the parties involved, it is not clear whether the disclosure requirements should apply to a broker as well as a provider. Because the law is ambivalent about which party provides the disclosures, it may best be interpreted as requiring merely that the recipient of financing receives the required disclosures from some party at or before consummation of the transaction, without regard to which party provides them.

As HB 470 does not authorize any administrative agency to promulgate rules to implement the law, providers of revenue-based financing in Louisiana will likely be responsible for designing their own disclosures. Louisiana disclosures were required beginning August 1, 2025.


TALK TO US

TEAM

PARTNER

AMANDA BAKER

NEW YORK +1 212 506 2544
AMANDA.BAKER@MAYERBROWN.COM

PARTNER

CHRISTA BIEKER

WASHINGTON, DC +1 202 263 3438
CBIEKER@MAYERBROWN.COM

ASSOCIATE

IAN BROWN

WASHINGTON, DC +1 202 263 3031
IBROWN@MAYERBROWN.COM

PARTNER

HOLLY BUNTING

WASHINGTON, DC +1 202 263 3380
HBUNTING@MAYERBROWN.COM

PARTNER

KRISTA COOLEY

WASHINGTON, DC +1 202 263 3315
KCOOLEY@MAYERBROWN.COM

PARTNER

FRANCIS DOORLEY

WASHINGTON, DC +1 202 263 3409
FDOORLEY@MAYERBROWN.COM

PARTNER

BARBARA GOODSTEIN

NEW YORK +1 212 506 2264
BGOODSTEIN@MAYERBROWN.COM

PARTNER

STEVEN KAPLAN

WASHINGTON, DC +1 202 263 3005
SKAPLAN@MAYERBROWN.COM

ASSOCIATE

GRACE KIM

WASHINGTON, DC +1 202 263 3892
GKIM@MAYERBROWN.COM

PARTNER

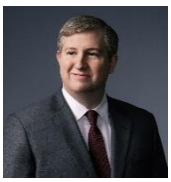
KRIS KULLY

WASHINGTON, DC +1 202 263 3288
KKULLY@MAYERBROWN.COM

PARTNER

ERIC MITZENMACHER

WASHINGTON, DC +1 202 263 3317
EMITZENMACHER@MAYERBROWN.COM



ASSOCIATE

DANIEL PEARSON

WASHINGTON, DC +1 202 263 3764
DPEARSON@MAYERBROWN.COM

PARTNER

JAN STEWART

CHICAGO +1 312 701 8859
JSTEWART@MAYERBROWN.COM

PARTNER

JEFFREY TAFT

WASHINGTON, DC +1 202 263 3293
JTAFT@MAYERBROWN.COM

ASSOCIATE

KELLY TRUESDALE

WASHINGTON, DC +1 202 263 3294
KTRUESDALE@MAYERBROWN.COM

COUNSEL

JOY TSAI

WASHINGTON, DC +1 202 263 3037
JTSAI@MAYERBROWN.COM

ASSOCIATE

KERRI WEBB

WASHINGTON, DC +1 202 263 3252
KWEBB@MAYERBROWN.COM

PARTNER

MEGAN WEBSTER

CHICAGO +1 312 701 8633
MEGAN.WEBSTER@MAYERBROWN.COM

MAYER | BROWN

AMERICAS | ASIA | EMEA

MAYERBROWN.COM