



January 18, 2022

FTC BANS MERCHANT CASH ADVANCE PROVIDER FROM BUSINESS

The Federal Trade Commission (“FTC”) has entered into a consent order with a commercial lender and one individual owner to resolve two related charges that the lender, along with one related business defendant and three individual defendants violated: (i) Section 5 of the Federal Trade Commission Act (prohibiting unfair and deceptive acts and practices) by requiring terms it expressly represented it did not require, collecting more than what was owed and using unjustified confessions of judgments and threats on borrowers; and (ii) Section 522 of the Gramm-Leach-Bliley Act (prohibiting fraudulently obtaining customer information of a financial information) by fraudulently obtaining borrowers’ bank information to effect the alleged unfair and deceptive practices. The action against the other three defendants remains ongoing.

The FTC alleged that the defendants violated Section 5 by (i) requiring personal guarantees and upfront fees despite representing that it would not require them, (ii) debiting those fees from promised funds, (iii) using automatic bank withdrawals to take more than what was owed, (iv) using confessions of judgment to file collection suits without a default, and (v) threatening borrowers who objected with violence or fabricated crimes. The same conduct also served as the basis for the alleged violation of Section 521 when the defendants used borrowers’ bank information to withdraw from borrowers’ bank accounts more than the amounts agreed.

The settlement (i) bans one entity and one individual from merchant cash advance business and debt collection, (ii) imposes a \$675,000 penalty and (iii) requires the two settling defendants to cooperate against the remaining business defendant and the two remaining individual defendants in the FTC’s ongoing action.

The consent order is an example of the FTC’s use of its unfair and deceptive practices authority in commercial lending. The FTC has viewed using consumer credit standards in commercial finance favorably. See its 2020 “Strictly Business” commercial finance forum. The FTC has focused its attention on online lending and merchant cash advances because of the potential for abuse. We can assist in developing programs and servicing material to avoid potential unfair and deceptive acts and practices claims. □

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NY DFS DELAYS IMPLEMENTATION OF COMMERCIAL FINANCE DISCLOSURE LAW

The New York Department of Financial Services (“DFS”) announced that the state’s Commercial Financing Disclosure Law, N.Y. Bank § 801 *et seq.* (“CFDL”), will not go into effect until DFS issues final regulations prescribing the format of disclosures. The CFDL requires providers of commercial financing under \$2.5 million to give standardized disclosures about the cost of credit with every offer.

Though the CFDL has an effective date of January 1, 2022, the statute assigns the responsibility of issuing the necessary format requirements to DFS. This implied that a provider could not comply with the obligations to follow DFS rules without the DFS issuing final rules in compliance with New York’s State Administrative Procedure Act. The announcement confirms this interpretation.

In the announcement, DFS also included two insights into their regulatory mindset: (i) that DFS recognizes the complexity of requiring standardized disclosures for highly customized products and (ii) DFS is consulting with the California Department of Financial Protection and Innovation regarding California’s own commercial finance disclosure law. Ideally, the two states will design their requirements such that one form can satisfy both statutes.

We have been developing disclosures for both states with each change in regulations and can help design disclosures for the commercial financing your business offers. □

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