



March 28, 2022

OPPFI STRIKES BACK, FILES SUIT AGAINST CA DFPI

On March 7, 2022, Opportunity Financial, LLC (“OppFi”) sued Clothilde Hewlett in her official capacity as Commissioner of the California Department of Financial Protection and Innovation (“DFPI”) seeking declaratory judgement and injunctive relief for threatened enforcement of California’s Fair Access to Credit Act (“AB 539”). Complaint, *Opportunity Financial, LLC, v. Hewlett*, No. 22STCV08163 (Cal. Super. Ct., March 7, 2022). AB 539 became effective on January 1, 2020, amending the California Financing Law (“CFL”) and imposing an interest rate cap of 36% for covered loans between \$2,500 and \$10,000 made by “finance lenders” subject to the CFL.

The complaint alleges that the Enforcement Division of the DFPI indicated to OppFi that the loan program, a partnership with FinWise Bank, was in violation of the CFL because OppFi was the “true lender” and was charging interest rates in excess of those permitted under the CFL. OppFi further alleges in its complaint that the DFPI has threatened to and is using AB 539 as a weapon to wage war against OppFi and other FinTechs operating similar bank partnership programs.

In defense of the bank partnership loan program, the complaint provided several reasons why the DFPI’s threats were unsupported by the law and the facts. First, according to the complaint, program loans are constitutionally and statutorily exempt from California’s maximum interest rate caps because the loans are made by a FDIC-insured state-chartered bank located in Utah. Second, OppFi does not make loans under the program in California. As such, it is not a “finance lender” under the CFL with respect to its program related activities, and, therefore, is not subject to the interest rate caps in the CFL. Third, Section 27 of the Federal Deposit Insurance Act, Section 1831d, preempts application of the CFL rate caps to bank program loans.

To support these positions, the complaint contains a list of the bank’s responsibilities including approving all underwriting criteria, funding all loans, owning all loans through the entire lifecycle of the loans and approving all marketing. The complaint also contains a list of responsibilities that OppFi performs as a technology service provider to the bank to support the position that the bank is the true lender. These activities include website services, marketing services, technology-enhanced underwriting services and customer

support services.

The complaint seeks a declaration that the CFL rate caps do not apply to bank program loans. The complaint also seeks a declaration that Section 27 of the Federal Deposit Insurance Act, Section 1831d, preempts application of AB 539 to bank program loans.

The complaint illustrates the need for regulatory clarity regarding the “true lender” issue as it relates to bank partnership loan programs. We will monitor this case and provide updates of significant developments. Please let us know if you have any questions or need assistance regarding bank partnership lending and deposit programs or “true lender” issues. □

✧ *Elizabeth Anstaett and Nathan Copeland*

Darrell L. Dreher
ddreher@dtlaw.com

Elizabeth L. Anstaett
eanstaett@dtlaw.com

Nathan D. Copeland
ncopeland@dtlaw.com

Susan L. Ostrander
sostrander@dtlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DTLAW.COM

To see previously sent ALERTS, visit our website at www.dtlaw.com

To decline future ALERTS, please contact us at ALERTS@DLTLAW.COM.
This ALERT has been prepared for informational purposes only. It does not constitute legal advice and does not create an attorney-client relationship.

Michael C. Tomkies
mtomkies@dtlaw.com

Benjamin J. Hurford
bhurford@dtlaw.com

Mercedes C. Ramsey
mramsey@dtlaw.com

Judith M. Scheiderer
jscheiderer@dtlaw.com

Robin R. De Leo
robin@deher-la.com