



December 8, 2022

CFPB ISSUES A NOTICE OF INTENT TO MAKE PREEMPTION DETERMINATION UNDER TILA

In response to a written request by the Small Business Finance Association, the Consumer Financial Protection Bureau published a notice of intent to make a preemption determination regarding whether the Truth in Lending Act preempts the New York Commercial Finance Disclosure Law with respect to certain provisions. See our Alerts dated [Sept. 29, 2022](#) and [Dec. 14, 2020](#) for our discussion of the New York law. The CFPB also provided notice that it is considering whether to make a preemption determination regarding state laws in California, Utah and Virginia that are potentially similar to the New York law. See our ALERTS dated [June 15, 2022](#) (California) and [May 6, 2022](#) (Utah and Virginia) for our discussion of these laws. The CFPB is soliciting public comment on the preemption issue. Comments must be received on or before January 20, 2023.

In the notice the CFPB set forth the preemption standard under TILA and summarized the requestor's position. The CFPB quoted the preemption standard as set forth by the Board of Governors of the Federal Reserve System, which formerly administered TILA, as follows: "A state law is contradictory, and therefore preempted, if it significantly impedes the operation of the federal law or interferes with the purposes of the federal statute." The Board further detailed two categories of "contradictory" state laws: (i) laws requiring the use of the same term to represent a different amount or a different meaning than federal law, or (ii) laws requiring the use of a term different from that required in the Federal law to describe the same item. The CFPB is seeking comments whether and how it should clarify the Board's articulation of the applicable preemption standard in this and future determinations.

According to the CFPB, the requestor asserted that TILA preempts the New York law with respect to its use of the terms "finance charge" and "annual percentage rate" ("APR") as these terms are defined and calculated differently under the New York law. The requestor stated that these types of differences could lead to variances in the disclosures required under state and federal law. The requestor asserted that these inconsistencies between TILA and the New York law could lead to confusion or misunderstanding among borrowers, including small business owners who may use

both consumer credit and commercial financing.

The CFPB stated in the notice that it has made a preliminary conclusion that TILA does not preempt the New York law. The CFPB based its conclusion on the fact that TILA applies to consumer transactions and the New York law applies to commercial financing. The CFPB stated in the notice that it disagrees with the requestor's position that the New York law significantly impedes the operation of TILA or interferes with the purposes of the federal scheme.

We will follow the CFPB's preemption determination process. Although commercial financing disclosure laws apply to a different category of transactions than those to which TILA applies, varying standards for disclosures in different states that apply to different types of transactions will confuse borrowers and will be operationally difficult for lenders.

Please let us know if you have questions regarding the preemption determination process or the state commercial financing disclosure laws. ☐

✧ *Elizabeth Anstaett and Ben Hurford*

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

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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