



April 28, 2023

STATE ANTI-EVASION PROPOSALS MULTIPLY

Add Connecticut, Minnesota and South Carolina to your scorecard of states proposing broad anti-evasion provisions for licensing statutes. See Connecticut SB 1033: [SB1033 | Connecticut 2023 | AN ACT CONCERNING VARIOUS REVISIONS TO THE BANKING STATUTES. | TrackBill](#); Minnesota SF 1635: [S1635-1 \(mn.gov\)](#); South Carolina S 518: [Bill Text: SC S0518 | 2023-2024 | 125th General Assembly | Introduced | LegiScan](#). These states follow Illinois, Hawaii, New Mexico and Maine, which have already adopted versions of such provisions. See, e.g., our Alert of [July 20, 2021](#). These broad provisions are typically targeted at disfavored “bank partnership”, fintech and other lending programs.

State anti-evasion provisions are not new. Many licensing statutes often address attempted evasion “by any device, subterfuge or pretense whatsoever”. See, e.g., Va. Code § 6.2-303(E). The breadth of the new provisions is notable, however. The new anti-evasion statutes attempt to make state licensing statutes applicable to nonbanks where programs may otherwise be structured to avoid state licensing requirements. Under most recently enacted state anti-evasion statutes, a nonbank may be required to obtain a state license where the nonbank (i) purports to act as an agent, service provider or in another capacity for a bank and (ii):

- The person holds, acquires or maintains, directly or indirectly, the “predominant economic interest” [undefined] in the loan;
- The person markets, brokers, arranges or facilitates the loan and holds the right, requirement or first right of refusal to purchase the loans, receivables or an interest in the loans; or
- The totality of the circumstances indicate that the person is the lender and the transaction is structured to evade the requirements of state law.

Many states list various factors that can lend support to a finding of evasion. Minnesota adds an atypical supporting factor: [the person] “holds the trademark or intellectual property rights in the brand, underwriting system, or other core aspects of a lending business”. Careful planning can address even these broadly written laws.

Whether the Connecticut, Minnesota or South Carolina provisions will pass into law remains to be seen. Such provisions are often grafted onto other legislation such as rate cap bills to improve

the possibility of passage. Industry has successfully fought state rate cap provisions, attending hearings and submitting letters, but, so far, has not shown much conviction to challenge anti-evasion provisions, which often are speciously sold to unsuspecting legislators as “helpful” to combating disfavored payday and high rate closed-end online loans, without disclosure of the potential adverse effect of such provisions on other programs. Reliance on prosecutorial discretion to separate “good” from “bad” programs is cold comfort to banks and nonbanks trying to serve the needs of consumers everywhere compliantly.

State licensing is not a trivial matter and obtaining licenses in some states can have important implications in other states. Consequently, anti-evasion provisions can have unforeseen consequences for various types of loans, such as private label or “white label” programs marketed at prime, near prime and super prime consumers, effectively limiting the availability of some favorable consumer finance programs like deferred interest home improvement loans that are not typically offered to subprime borrowers. We continue to monitor emerging legislation and advise clients with regard to their responses to such legislation. Let us know how we can assist you!

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