



## CONNECTICUT ISSUES “TRUE LENDER” GUIDANCE

The Connecticut Banking Department has issued guidance on the recent amendments to the Connecticut Small Loan Lending and Related Activities Act under P.A. 23-126. See our ALERT of [April 28, 2023](#).

The amendments (i) expanded the definition of “small loan” to include amounts up to \$50,000, (ii) expanded the definition of “small loan” to include *earned wage access* loans and other alternative products that may be subject to “voluntary” tips, membership fees and other alternatives to traditional “interest”, (iii) implemented a federal Military Lending Act (MLA)-style APR [MAPR] calculation and (iv) added anti-evasion provisions for “true lenders” that the Department characterized as being consistent with existing legislation in other states (including IL, ME and NM) and “true lender” principles set forth in case law and enforcement matters. The Department specifically cited *In the Matter of People of the State of New York [Spitzer] v. County Bank of Rehoboth Beach, Del.*, 45 A.D.3d 1136 (2007) (a payday-related “totality of the circumstances” case) and *Cashcall, Inc. v. Morrissey*, No. 12-1274, 2014 WL 2404300, \*5 (W.Va., May 30, 2014) (a high-rate, closed-end installment loan “predominant economic risk” case). Although not noted by the Department, open-end credit card accounts issued by an exempt entity are expressly exempt. See Conn. Gen. Stat. § 36a-555(11), as amended (attached).

Although the Department cited no case law generally favorable to bank partnerships, federal case law and federal regulatory precedents generally should still be taken into account too. The Department stated that it will consider the “true lender” factors in Section 36a-556(d), as amended, and case law precedent construing such factors, to determine whether loans made on and after October 1, 2023, should be exempt or comply with the provisions of the Small Loan Lending and Related Activities Act, including APR limitations.

The Department noted that, previously, loans made by banks were generally exempt. However, persons who service loans made by a bank pursuant to a “true lender” arrangement on and after October 1, 2023, will no longer be exempt from licensure. Persons who engage in front-end processes, set forth in subdivisions (2), (3) and (6) of Section 36a-556(a), for bank-made loans or who purchase, acquire or receive assignment of a small loan made by a bank

pursuant to subdivision (5) of Section 36a-556(a), have always required, and will continue to require, licensure, the Department said.

The Department noted that the “true lender” factors in Section 36a-556(d), as amended, include:

- (1) *Making* a small loan to a Connecticut borrower; or
- (2) *Offering, soliciting, brokering, directly or indirectly arranging, placing or finding* a small loan for a prospective Connecticut borrower; or
- (3) *Engaging in any other activity intended to assist a prospective Connecticut borrower* in obtaining a small loan, including, but not limited to, generating leads; or
- (4) *Receiving payments* of principal and interest in connection with a small loan made to a Connecticut borrower; or
- (5) *Purchasing, acquiring or receiving assignment* of a small loan made to a Connecticut borrower; or
- (6) *Advertising* or causing to be advertised in this state a *small loan or any of the services described* in subdivisions (1) to (5) above.

By statute, the circumstances weighing in favor of deeming a person a “true lender” include, but are not limited to, the person: (A) indemnifying, insuring or protecting an exempt person for any costs or risks related to a small loan; (B) predominantly designing, controlling or operating a small loan program; or (C) purporting to act as an agent, service provider or in another capacity for an exempt person in [Connecticut] while acting directly as a lender in another state.” See *id.* § 36a-556(d), as amended.

The Department stated that it would not take any enforcement action against persons who, as a result of the new law, newly require licensure for small loan activities effective October 1, 2023, so long as such person has filed an application for small loan company licensure in Connecticut on the Nationwide Multistate Licensing System and Registry on or before October 1, 2023. The Department provided further clarifying guidance with regard to loans solicited or applied for before October 1 but closed (made) after that date.

This appears to be the first written guidance provided by a regulator with respect to recently enacted state anti-evasion provisions, of which Connecticut’s is an exemplar of a type. Many terms are not further defined. Insofar as the Connecticut guidance is based upon older case law and (still) unclear legal principles, the

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guidance arguably does not materially change previous advice regarding the inherent risks in bank partnerships as a result of the lack of clear statutory authority or federal/state bank regulatory advice affirmatively addressing the proper structuring of such relationships – nor the strategies and legal theories available for dealing with such risks.

We have been involved in structuring bank partnerships for well over 35 years and are happy to discuss the precedents named by the Department, as well as other relevant state and federal law precedents, other states' anti-evasion provisions, potential strategies for dealing with the myriad issues raised by these statutes and partnership arrangements, and various effective program structuring considerations. Let us assist you!. □

✧ *Mike Tomkies and Mercedes Ramsey*