

South Dakota's New APR Cap Raises Concerns for Lenders

November 11, 2016

On November 8, 2016, South Dakota voters approved Initiated Measure 21, which amends the Money Lender law, S.D. Code §§ 54-4-36, *et seq.*, to bar licensees from contracting for or receiving greater than a 36% maximum finance charge on loans made pursuant to the Money Lender law. The finance charge calculation, like the Military Lending Act APR calculation (referred to as the "MAPR"), is an "all-in" calculation, and would include all interest, fees, and charges, including any ancillary products or services. A loan made in violation of the 36% finance charge cap would be deemed void and uncollectable, and the lender could face a misdemeanor charge.

The Money Lender law previously did not include a maximum finance charge for licensees, and this amendment will apply the new 36% usury limit to all loans, both consumer and commercial purpose, made pursuant to the Money Lender law. However, the 36% usury limit will not apply to "regulated lenders," which includes, among other entities, state or federal banks, certain wholly owned subsidiaries of a state or federal bank, other federally insured financial institutions, or businesses that provide financing for goods and services that they sell. See S.D. Codified Laws §§ 5-3-13, 5-3-14, 54-4-64.

In addition to prohibiting lenders from making loans with a finance charge greater than 36%, the usury limit may also apply to some sales finance companies, as the statute prohibits licensees, which include entities purchasing retail installment contracts, from *receiving* a finance charge greater than 36%. See S.D. Code § 54-4-40, 54-4-44, 54-4-36. However, the Attorney General's statement accompanying Initiated Measure 21 appears to reference only direct lenders making loans.

We reached out to the regulator, the South Dakota Department of Labor and Regulation, Division of Banking, to obtain guidance on the application of the amended statute in this context, as well as to determine whether the rate cap is applicable to all loans already made by licensees. In response, the regulator confirmed that a formal policy statement will be released within the next several days to clarify the application of Initiated Measure 21. Please reach out to us if you would like us to provide you with a copy of the policy statement once it is released. The potential applicability of the 36% usury limit to sales finance companies raises unique concerns due to the inclusion of fees for ancillary products in the 36% limit.

Under South Dakota procedural rules, Initiated Measure 21 is set to become effective November 15, 2016, the last day for South Dakota county canvass of election returns. As a result, any licensed lender, and potentially licensed sales finance companies, must act quickly to ensure that they are not exceeding the new usury limit after November 15.

For further information on this topic, please contact a member of the firm's Consumer Financial Services Group.

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