Welcome to 2024: DIDMCA Opt-Out and True Lender Legislative Proposals to Watch

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The new year brings with it four new jurisdictions to watch regarding proposed true lender legislation and Depository Institutions Deregulation and Monetary Control Act (DIDMCA) opt-outs. The District of Columbia, Florida, Maryland, and Washington are the most recent jurisdictions to have introduced true lender legislation in 2024 and towards the tail-end of 2023. Uniquely, the District introduced a bill that couples true lender legislation with a DIDMCA opt-out, taking a very hard stance on efforts to restrict interest rates imposed on loans made to residents of the District.

The following are summaries of each jurisdiction's proposed legislation. We will continue to monitor for updates, but please let us know if you have any questions.

District of Columbia

On November 30, 2023, the District introduced B 25-0609, entitled the Protecting Affordable Loans Amendment Act of 2023 (PALs Act), that proposes to opt the District out of sections 521-523 of the DIDMCA. The PALs Act is intended to enhance and strengthen consumer protection and limit the interest that out-of-state lenders can charge to the District's 24% maximum usury amount. If the bill passes and the PALs Act is enacted, the District will join Iowa, Puerto Rico, and most recently, Colorado (effective July 1, 2024) in the list of jurisdictions that have opted out of DIDMCA.

Sections 521-523 of DIDMCA empower states by allowing FDIC or NCUA insured, state-chartered banks and credit unions to contract for the interest rate permitted by the state where the bank is located and export that interest rate into other states pursuant to its home state's interest-rate authority. Conversely, section 525 of DIDMCA permits states to opt out of sections 521-523 via legislation. Opting out would then require application of the state law where the loan is "made."

If the PALs Act were to be enacted, out-of-state, state-chartered banks and credit unions would ostensibly be required to follow the District's interest rate and fee restrictions on consumer loans to the District's residents if the loans are deemed to be made in the District. However, the effectiveness of this legislation is unclear. Federal interpretations of DIDMCA Section 521 establish where a loan is made based on the parties' contractual choice-of-law and the location where certain non-ministerial lending functions are performed, such as where the credit

decision is made, where the decision to grant credit is communicated from, and where the funds are disbursed. This guidance creates a question regarding whether an opt-out actually impacts loans made in other states.

Additionally, the legislation contains amended definitions of a predominant economic interest standard that would apply the provisions of the law to entities other than the lender, including certain bank agents and servicers, and a totality of the circumstances test to determine the "true lender" of a "loan." The proposed definition of "lender" includes any person that offers, makes, arranges, or facilitates a loan or acts as an agent for a third party in making or servicing a loan. This includes "any person engaged in a transaction that is in substance a disguised loan or a subterfuge for the purpose of avoiding this chapter, regardless of whether or not the entity or person is subject to licensing," and that

(a) holds "directly or indirectly, the whole, predominant, or partial economic interest, risk or reward" in a loan,

(b) markets or brokers the loan and has a right to acquire an interest in the loan, or,

(c) based on the "totality of the circumstances" should be considered a lender.

The proposed definition of "loan" includes "money or credit provided to a consumer in exchange for the consumer's agreement to a certain set of terms, including, but not limited to, any finance charges, interest, or other payments, closed-end and open-end credit, retail installment sales contracts, motor vehicle retail installment sales contracts, and any deferred deposit transitions."

We note that B 25-0609 was introduced by the District of Columbia Council on November 30, 2023, and on December 5, 2023, was referred to the Council's Committee on Business and Economic Development.

Florida

On October 9, 2023, Florida introduced SB 146 to add a new section to the Florida Consumer Finance Act (FL-CFA), section 516.181. The new sections are aimed at "bank models" that focus on making, offering, assisting, or arranging a consumer finance loan with a higher rate or amount than is authorized under Florida law or receiving interest, fees, charges, or other payments in excess of those authorized under Florida law, regardless of whether the payment purports to be voluntary. This could potentially capture "tips" and Earned Wage Access (EWA) products as well since the definition of "consumer finance loan" includes both loans and extensions of credit.

SB 146 also introduces a "true lender" test with language similar to other recent legislation, including the predominant economic interest standard, the prohibition applicable to bank agents and servicers, and a totality of the circumstances test. SB 146 also provides that if a loan exceeds the consumer usury limit, a person is deemed to be a lender if any of the tests are met.

SB 146 was filed in the Florida Senate on October 9, 2023, referred to committees on October 17, 2023, and introduced to the Florida Senate on January 9, 2024.

Maryland

On January 10, 2024, Maryland introduced two bills, HB 254 and HB 246. Through HB 254, Maryland intends to create a new subtitle, "True Lender Act, to Maryland Commercial Law," that will impose a true lender test on extensions of credit made to Maryland residents. The law would apply to national bank associations, state-chartered banks, state-chartered credit unions, and any person that extends loans or credit to Maryland residents. As the subtitle is named, HB 254 incorporates true lender principles, including predominant economic interests, totality of circumstances, marketing or facilitating the loan or extension of credit, and anti-evasion provisions. HB 254 would also seek to void any loan or extension of credit that violates its provisions.

HB 246, entitled Earned Wage Access and Credit Modernization, proposes to amend Title 12 of the Maryland Commercial Law to govern EWA products by adding a new subtitle. A person providing direct-to-consumer earned wage access requires a license, and employer-integrated earned wage access requires a registration with the Office of Financial Regulation through the Nationwide Mortgage Licensing System (NMLS). Further, HB 246 restricts the acceptance of "tips," as defined by certain lenders, and tips are included in the definition of "interest." A consumer loan lender who gives consumers an option to provide the lender a tip is required to set the default tip at zero. A consumer loan lender who receives a tip that would otherwise create a rate of interest above that allowed is not in violation of the law if the lender returns the exceeding amount within 30 calendar days after receiving the tip.

Hearings were held on January 23, 2024, for both HB 254 and 246.

Washington

On December 5, 2023, HB 1874 was pre-filed for introduction to amend the Washington Consumer Loan Act (WA-CLA). The Washington bill, like the Florida bill discussed above, is aimed at "bank model" lending programs that are making, offering, assisting, or arranging loans with rates that exceed those permitted by the WA-CLA by codifying both a predominant economic interest test and a totality of the circumstances test.

HB 1874 proposes a new definition of "loan" as "money or credit provided to a borrower in exchange for the borrower's agreement to a certain set of terms including, but not limited to, any finance charges, interest, or other charges, conditions, or considerations." Also, the proposed law governs whether the lender has legal recourse against the borrower in the event of nonpayment and whether the transaction carries required charges or payments. HB 1874 amends the applicability of the WA-CLA from a "resident" of Washington to any loan made to a person "physically located in Washington." Additionally, on January 2, 2024, SB 5930 was also pre-filed, following the same concepts.

On December 11, 2023, HB 1918 was pre-filed to proposed amendments to the laws that govern small loans under payday loan lending laws and also include true lender principles for small loans. These are loans of $700 or 30% of the borrower's gross monthly income, whichever lower. The legislation also proposes an APR cap of 36% on such loans. On January 2, 2024, HB 2083 was pre-filed and contains the same proposed amendments as HB 1918 except for adding of an emergency declaration and providing an immediate effective date if passed.

HB 1874 and HB 2083 are both in the House Committee on Consumer Protection & Business, and a public hearing was held on January 10, 2024. On January 8, 2024, HB 1918 was referred to the House Committee on Consumer Protection & Business, and SB 5930 was referred to the Senate Committee on Business, Financial Services, Gaming & Trade.

The Takeaways

These early proposed bills, like the bill proposed in the District, indicate that we will see more jurisdictions explore whether to follow Colorado's lead on opting out of DIDMCA, even though the law is nearing 44 years old. Jurisdictions are also continuing to explore adopting true lender legislation that mirrors legislation in Illinois, Maine, Minnesota, and New Mexico. These legislative proposals appear to be gaining steam as bank partner programs have grown and expanded across the United States.

The District's PALs Act is interesting, however, in that it seeks to adopt both a DIDMCA opt-out and a true lender test, whereas prior legislation elected one or the other. We would expect that other jurisdictions will continue these trends and explore similar legislation and that the regulatory scrutiny and the potential for enforcement and litigation would be greater where such legislation has been enacted or is in the pipeline.

While there is still some question about the effectiveness of the DIDMCA opt-outs, financial services companies should be aware of the changing landscape as products, services, and programs are developed and maintained.

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