LEGAL UPDATES

PUBLISHED: DECEMBER 10, 2025

Petition for Rehearing Filed in Colorado DIDMCA Opt-Out Case

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A group of trade associations has filed a petition for rehearing en banc asking the Tenth Circuit to review a panel decision holding that a state's right to opt out under Section 525 of the federal Depository Institutions Deregulation and Monetary Control Act (DIDMCA) applies broadly to loans when either the lender or borrower is located in the opt-out state. If the panel's majority decision stands, out-of-state state banks may not be able to rely on federal interest rate preemption when making loans to borrowers located in opt-out states like Colorado.

In the petition, filed on December 10, 2025, the trade associations explained that rehearing en banc is warranted because the panel's majority decision (1) creates a circuit split with an Eighth Circuit decision interpreting the same language in a related statute, (2) incorrectly applied a presumption against preemption, and (3) incorrectly decided an issue that is critical to consumer lending and interstate banking. The petition asserts that the panel's majority decision endangers state banks' competitive equality with national banks and the U.S. dual banking system, which is not what Congress intended when enacting DIDMCA. Accordingly, the petition argues the DIDMCA opt-out provision should not be interpreted in a manner that places state banks at a competitive disadvantage relative to national banks.

The Tenth Circuit is not required to grant a rehearing en banc. A majority of the active circuit judges must grant the rehearing. By rule, a rehearing en banc is "not favored," and according to the Tenth Circuit, considered an "extraordinary procedure."

At its core, this case poses a statutory interpretation question of an ambiguous phrase in a federal banking law. The trade associations have argued, and the federal district court and the Tenth Circuit panel's dissent have agreed, that the better reading of the phrase "loan made" in a state depends on where the

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lender performs its loan-making functions, not where the borrower is located. Thus, a state's opt out under Section 525 of DIDMCA should not reach loans made by an out-of-state state bank and such banks should be able to still rely on federal interest rate preemption in the opt-out state.

Acknowledging this is an issue of first impression, the Tenth Circuit panel disagreed, interpreting the phrase "loan made" in a state under Section 525 to also include any loans made to a borrower located in an opt-out state. This interpretation broadens the scope of loans subject to a state's DIDMCA opt out and weakens state banks' ability to rely on federal rate preemption in states that choose to opt out of DIDMCA.

This case involves an important banking law question that could put state banks at a disadvantage relative to national banks. It remains to be seen whether the Tenth Circuit will recognize the exceptional importance of determining the reach of states' DIDMCA opt outs and grant a rehearing en banc. The petition for rehearing is an initial effort by the industry to address the unfavorable interpretation rendered by the Tenth Circuit panel.

Contact us

We regularly advise banks and Fintechs on federal bank preemption questions. If you have questions about the Tenth Circuit proceedings, the Colorado DIDMCA opt out, or banks' interest rate preemption authority, please contact Susan Seaman, Becky Bavlsik, or your Husch Blackwell attorney.

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