

LEGAL UPDATES

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Illinois Bill Seeks to Add Consumer-Type Disclosures and Broad Enforcement to Commercial Financing

On February 16, 2023, the Illinois House introduced a bill titled the Small Business Truth in Lending Act. This proposed legislation, similar to statutes that have been enacted in other states, was written with the stated purpose of protecting small business owners from predatory lending through heightened disclosure requirements in commercial financing agreements. The bill sets forth disclosure requirements similar to that of the federal Truth In Lending Act, which applies primarily to consumer lending. And, speaking of consumer lending, the bill also (somewhat disjointedly) could be read to create additional regulatory and rulemaking authority in the consumer-lending context. While the bill is only in its infancy, should it pass, it would create new compliance headaches for nonbank commercial lenders in Illinois and add to the regulatory burden that consumer lenders in Illinois have dealt with for decades.

Aim of the bill

On the surface, the crux of the bill is to require consumer-style disclosures for various types of commercial financing, including specifically open-end financing, closed-end financing, sales-based financing, and factoring transactions. The provisions would apply to “providers,” defined to include a person who extends a specific offer of commercial financing to a small business. The term “provider” is not restricted to traditional lenders; it includes anyone (unless exempt) that solicits and presents a specific offer of commercial financing on behalf of a third party. The bill utilizes terms from the federal Truth In Lending Act and requires disclosures in commercial financing transactions of information such as the total amount of the

financing, financing charges, the annual percentage rate, the total repayment amount, the term of the financing, and, in the case of payoffs or refinancing, descriptions of additional finance charges or fees.

Notably, the disclosures must also provide the small business with a clear and conspicuous notice for how it can file a complaint with the Illinois Department of Financial and Professional Regulation (the Department). This requirement reminds us of warnings and disclosure requirements that have existed for some time under Illinois consumer-lending statutes (such as the Consumer Installment Loan Act and the Payday Loan Reform Act). Banks, federal savings banks, and federal and state credit unions would be exempt from the reach of the new act, as would providers that engage in five or fewer commercial financing transactions in a twelve-month period. The bill would also exempt commercial financing secured by real estate and commercial financing of at least \$50,000 involving vehicle dealers and car-rental companies. There is also a monetary cap: the act would exempt any commercial financing transaction above \$2,500,000.

The bill grants authority to the Department in regulating the commercial financing marketplace. For example, the bill gives the Department power to define terms and to interpret provisions of the act and to make rules to support its enforcement activities. The bill would enable the Department to define improper and fraudulent business practices in commercial financing.

Notably—in extremely broad and potentially unrelated fashion—the Department would be given authority to adopt “rules appropriate for the protection of consumers.” It is unclear if the drafters intended for the word “consumers” to refer only to a small business that is the recipient of financing. If that was not the intention of the drafters (and if this is not made clear through the legislative process), this *commercial* financing bill would then empower the Department with new authority to protect individual consumers in *consumer* lending. Notably, Illinois seems to be attempting exactly that through the introduction of another bill on February 17, 2023—the Consumer Financial Protection Law—which would give the Department rulemaking authority to target general unfair, deceptive, or abusive acts or practices (UDAAP). This reminds us of California’s passage a little while back of a statute establishing a state “mini” Consumer Financial Protection Bureau (CFPB).

As to the specifics of the enforcement power, under the proposed Small Business Truth in Lending Act in Illinois the Department would be given authority to fashion cease-and-desist orders, to order restitution and disgorgement against violators, to impose civil penalties of up to \$10,000 per violation and \$20,000 per willful violation, and to even prohibit certain providers from participating in the commercial financing marketplace. Financing agreements that violate the act would be considered null and void. The Department would also be empowered to conduct investigations and examinations, and require providers to register with the Department, to engage in reporting, and to pay registration fees.

The threat of civil litigation is also a part of the bill. The bill allows for private civil actions against providers of commercial financing where prevailing parties can recover reasonable attorneys' fees and costs. Further, it considers a violation of the proposed act to also constitute a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The Illinois Attorney General can bring an action to enjoin a violation of the act, or to seek civil liability under the Illinois Consumer Fraud and Deceptive Business Practices Act.

Analysis of the proposed legislation

While the bill was just recently introduced, and there could be significant changes throughout the legislative process, concerns over the reach of the bill have already been raised within the industry.

At an initial glance, the bill has similarities with commercial financing disclosures enacted in other states, including regulatory strongholds like New York and California. For example, like California and New York, the proposed Illinois legislation sets forth different disclosure requirements for different types of commercial financing. Similar to the New York Commercial Financing Disclosure Law, larger transactions of over \$2,500,000 are exempt from the requirements.

Still, like the Illinois regulatory environment as a whole, the bill is unique in several important ways. For example, there is the requirement for providers of commercial financing to include a clear and conspicuous notice for how to file a complaint with the Department. The notice seems designed to further increase oversight and encourage enforcement actions. While Utah has a similar requirement, the bill's registration requirement for providers of commercial financing also distinguishes the bill from other existing state commercial financing statutes.

Additionally, while perhaps not unique in and of themselves, the new powers that the bill would give to the Department are worrisome. Illinois has already taken an active role in regulating financial marketplaces and seemingly needs no additional encouragement to be aggressive in this area. Indeed, Illinois brought—and we defended—the first state-regulatory action under the federal Dodd Frank Consumer Protection Act of 2010. Whether it be through the bill, or through the proposed Consumer Financial Protection Law referenced above, Illinois appears keenly interested in providing the Department with additional authority to regulate *consumer* transactions and to target UDAAPs.

The bill also empowers private parties to bring civil actions against providers of commercial financing related to disclosures. This adds another layer of enforcement on top of the state's powers.

What this means to you

Monitoring the status of this legislation and what provisions ultimately become law will prove interesting, especially as it relates to the potential for Illinois to empower the Department to police consumer lending through a commercial lending law. Given the potential notable deviations of the

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Illinois bill from other similar state laws, industry players in Illinois may be hoping for final legislation that puts Illinois more in line with the commercial financing disclosure laws in other states.

Contact us

Husch Blackwell regularly counsels and defends clients in regulatory and private-litigation matters involving lending and other forms of financing in Illinois. For more information, contact Scott Helfand, Brandon Stein*, or your Husch Blackwell attorney.

**Practice temporarily authorized pending admission under Rule 39(b). Supervision by Megan Irwin, a member of the State Bar of Arizona.*