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financial services alert

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Appropriations Act Authorizes More Than Millions

Tucked in among the earmarks of millions of dollars in appropriations for the Department of Energy, the Department of Interior and other federal agencies, the Omnibus Appropriations Act (the “Act”) provides a grant of authority for state attorneys general (“AGs”) that affects every creditor and retail installment seller that discloses the cost of credit under the Truth in Lending Act (“TILA”). As such, if you provide your customers with TILA disclosures, you should be aware of this new authority, which is already in effect, for state AGs to bring claims on behalf of their state residents.

I. The Act Provides New Powers for Attorneys General

Prior to the amendments made by the Act, state AGs had limited authority to bring actions under TILA in a representative capacity. Two notable examples of an AG’s use of this authority are the former and current New York Attorneys General, Eliot Spitzer and Andrew Cuomo, respectively. Both exercised this authority with some regularity and with some measure of success. Nevertheless, despite the regularity with which they exercised this authority, TILA previously permitted such representative suits only in the context of high cost or “HOEPA” mortgage loans. Section 626(b) of the Act, however, expands this authority to apply to all disclosure requirements arising under TILA, including, arguably, advertising disclosures.

More specifically, Section 626(b) of the Act provides state AGs with the authority to bring civil actions on behalf of the residents of the AG’s state to enforce:

- Required disclosures on closed-end loans;
- Any mortgage loan regulation issued by the Federal Trade Commission; or
- "Any other" provision under TILA.

Arguably, the “any other provision” language permits the state AGs to bring claims for any violation of TILA – including violations of the advertising requirements.

To bring such a claim, the AG need only show that the state “has reason to believe that the interest of the residents of the state have been or are being threatened or adversely affected by a violation” of TILA or its implementing regulation, Regulation Z. Prior to initiating an action, an AG must provide 60-

days advance notice to the Federal Trade Commission ("FTC"). Upon receiving notice of such action, the FTC may intervene in the case. The exercise of this authority does not affect the ability of state AGs to use any powers they currently possess under state law to investigate or issue subpoenas for violations of a state law.

Jurisdiction for such actions that the state AGs may bring in their representative capacities is the judicial district where the defendant is "found," inhabits, or transacts business or wherever jurisdiction is proper under federal law. Additionally, process may be served without regard to territorial limits of the state where the action is instituted.

It is unclear whether the Act, given that it amends federal law, gives AGs the ability to enforce claims against national banks, federal savings associations and their operating subsidiaries, which entities generally enjoy preemption against AGs exerting visitorial powers against them. This ambiguity, however, is likely to be tested by aggressive AGs such as New York's Attorney General and others, who are opposed to federal preemption.

Generally speaking, damages available in a civil action under TILA include actual damages, statutory damages and attorneys fees. The amount of statutory damages available, however, varies depending on the type of loan at issue (i.e. mortgage loan, student loan, etc.). The availability of statutory damages also varies depending on the type of disclosure requirement violated. For example, no statutory damages are available for non-mortgage advertising violations. (Note, however, that recent changes made by the Federal Reserve Board to Regulation Z may have created liability for advertising in the mortgage context.)

II. Who Should Care About These New Powers?

Any "creditor" that makes (or is required to make) disclosures under TILA should take note of the Act's amendments to TILA. A "creditor" includes any person that regularly extends consumer credit payable by written agreement in more than four installments or for which a finance charge is or may be required. As such, any seller of goods that permits a customer to pay for his purchase over time is a creditor for purposes of TILA – even if the seller does not impose a finance charge.

Although it is difficult to predict with any degree of certainty how aggressively the state AGs will flex this new enforcement muscle outside of the mortgage context, every creditor making TILA disclosures should consider the Act's amendments as a new source of legal and reputation risk.