

## CFPB's Notice of Intent Regarding Preemption of State Commercial Financing Disclosure Laws\*

On December 15, 2022 the Consumer Financial Protection Bureau (CFPB) published a notice of its intent to make a preemption determination involving the federal Truth in Lending Act (TILA) (the "Preemption Notice"). 87 FR 76551. The CFPB published the Preemption Notice in response to a request from a trade organization asking the CFPB to determine whether TILA preempts certain provisions of New York's Commercial Financing Law requiring certain disclosures to be provided to borrowers (the "NY Commercial Financing Disclosure Law").

Specifically, the NY Commercial Financing Disclosure Law require lenders licensed under New York's Commercial Financing Law to provide certain disclosures to borrowers prior to the consummation of certain covered transactions. While similar to TILA, the disclosures required by the NY Commercial Financing Disclosure Law apply to commercial financing transactions, not just consumer credit transactions. Notably, the requirements imposed by the NY Commercial Financing Disclosure Law appear to be similar to what is required by California's commercial financing disclosure law codified in the California Financial Code Sections 22800-22805 (the "California Commercial Financing Disclosure Law").

In the Preemption Notice, the CFPB formally announced it has decided to initiate a proceeding to make a formal preemption determination regarding the NY Commercial Financing Disclosure Law. Additionally, the CFPB has indicated it is considering whether to make a preemption determination regarding state laws similar to the NY Commercial Financing Disclosure Law, such as the California Commercial Financing Disclosure Law. The Preemption Notice expresses the CFPB's preliminary analysis on the question of whether TILA preempts these state laws.

Notably, the CFPB indicated that the NY Commercial Financing Disclosure Law and TILA do not appear "contradictory" for preemption purposes, and thus it appears that TILA does not preempt the New York law. Additionally, the CFPB has conducted a preliminary review of other state laws (such as the California Commercial Financing Disclosure Law) and indicated that such laws also do not appear to be preempted by TILA.

While the CFPB seems to be leaning towards making a determination that TILA does not preempt these state financing disclosures laws, the Preemption Notice is not the CFPB's final determination. The CFPB is requesting comments from the public until January 20, 2023.

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It should also be noted that the California Commercial Financing Disclosure Law does not apply to banks or other depository institutions, although subsidiaries of banks that are licensees under California's Financing Law (California Fin. Code Section 22000 et seq.) may be subject to the California Commercial Financing Disclosure Law.

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