HB 116

Department of Legislative Services
2010 Session

FISCAL AND POLICY NOTE

House Bill 116 (Delegate Ali, *et al.*)
Economic Matters Finance

Credit Card Blacklisting Prevention Act

This bill prohibits a person from including or enforcing a provision in a consumer credit contract, without the consumer's prior written consent, that triggers a default under the contract or authorizes a party to alter the terms of the contract based on a prohibited risk factor. Violation of the bill is an unfair or deceptive trade practice under the Maryland Consumer Protection Act (MCPA), subject to MCPA's civil and criminal penalty provisions.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues and expenditures due to the bill's imposition of existing penalty provisions. If the Consumer Protection Division of the Office of the Attorney General receives fewer than 50 complaints per year stemming from the bill, the additional workload can be handled with existing resources.

Local Effect: Potential minimal increase in revenues and expenditures due to the bill's imposition of existing penalty provisions.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: The bill defines a "prohibited risk factor" as the identity of a person from whom a consumer lawfully obtains consumer credit, consumer goods, or consumer services; or a person who makes or holds a mortgage loan on a consumer's home. A prohibited risk factor cannot be used to (1) accelerate a payment owed; (2) increase the interest rate payable; (3) reduce the available credit limit; or (4) alter a term of the contract in any other manner adverse to the consumer.

A consumer credit contract that contains an aforementioned provision is void and unenforceable. However, the bill does not prohibit a person from using information to detect or prevent fraudulent activity in connection with the provision of consumer credit.

Current Law: State statutory law is currently silent on the permissibility of accelerated payment or default provisions in consumer contracts. Under the Contracts Clause of the U.S. Constitution and corresponding decisions by the U.S. Supreme Court, new laws generally may not be created that substantially impair an already existing private contractual relationship.

An unfair or deceptive trade practice under MCPA includes any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. The prohibition against engaging in any unfair or deceptive trade practice encompasses the offer for or actual sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer service; the extension of consumer credit; and the collection of consumer debt.

The Consumer Protection Division is responsible for enforcing MCPA and investigating the complaints of aggrieved consumers. The division may attempt to conciliate the matter, hold a public hearing, seek an injunction, or bring an action for damages. A merchant who violates MCPA is subject to a fine of up to $1,000 for the first violation and up to $5,000 for each subsequent violation. In addition to any civil penalties that may be imposed, any person who violates MCPA is guilty of a misdemeanor and, on conviction, is subject to a fine of up to $1,000 and/or imprisonment for up to one year.

Background: Recent reports indicate that, in some cases, credit card companies are making credit determinations based on where a cardholder shops or which mortgage lender a cardholder uses. The bill prohibits a consumer credit provider from using such criteria to trigger a default under, or alter the terms of, a consumer credit contract without the consumer’s prior written consent.

Existing regulations promulgated by the federal Office of the Comptroller of the Currency (OCC) may pose challenges to imposing the bill’s requirements on federally chartered lending institutions. Based on authority of the National Bank Act and Supreme Court interpretations, state laws that limit the operation of national banks have been preempted under the Supremacy Clause when a state law contradicts or impairs the purpose of a federal law. OCC regulations state that national banks may make “non-real estate loans without regard to state law limitations concerning… the terms of credit, including the schedule for repayment of principal and interest, amoritization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan." (*See* 12 C.F.R. section 7.4008(d)(2)(iv).)

However, under *Cuomo v. Clearing House Association*, 557 U.S._(2009) the Supreme Court held that states have the power to enforce their banking-related consumer protection laws against national banks. In *Cuomo*, the Attorney General of New York wanted to investigate banks whose lending practices discriminated against minorities. The OCC argued that the state Attorney General had no legal right to the information due to the federal preemption of state law. Although the Supreme Court in *Cuomo* left a significant amount of the federal preemption provisions of the National Bank Act in place, the court noted that the Act does not prohibit ordinary enforcement of state law. Thus, a state Attorney General may subpoena information if a national bank's lending practices may be violating a state consumer protection law.

On January 20, 2010, the Attorney General of West Virginia filed suit against Capital One Bank, N.A. and four related Delaware subsidiary corporations for unfair or deceptive acts or practices, unlawful debt collection practices, and unconscionable conduct in violation of the West Virginia Consumer Credit and Protection Act. The complaint alleges Capital One Bank engaged in (1) collecting debt disguised as a credit card; (2) issuing multiple low-credit-limit cards, each carrying fees rather than raising credit limits; (3) unconscionable imposition of over-the-limit fees; (4) selling services to consumers who could not benefit from them; (5) billing and attempting to collect for credit cards that were never activated; (6) refusing to allow customers to close accounts; and (7) making and enforcing unconscionable terms or provisions of consumer loans.

Until January 4, 2010, a federal court injunction barred the Attorney General of West Virginia from suing Capital One Bank for its credit card practices. However, the federal judge modified the injunction to allow the Attorney General to sue Capital One Bank to enforce nonpreempted, substantive West Virginia consumer protection laws.

Recent federal legislation provides for additional consumer protections that modify credit card industry practices. President Obama signed the federal Credit Card Accountability Responsibility and Disclosure Act on May 22, 2009; the full provisions of the legislation apply to all credit card companies on February 22, 2010. The Act, among other things, (1) requires credit card companies to give 45 days advance notice of all interest rate increases and bans certain retroactive rate increases; (2) ends "double cycle" billing; (3) requires payments to be allocated proportionally to balances with different interest rates; and (4) prohibits the issuance of credit cards where yearly fixed fees exceed 25% of the credit limit and are charged to the credit card itself.

Additional Information

Prior Introductions: A similar bill was introduced in the 2009 session. HB 1292, as amended, passed the House and received a favorable report, as amended, from the Senate Finance Committee, but no further action was taken.

Cross File: None.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; *Washington Business Journal*; *The Washington Post*; Code of Federal Regulations; U.S. Supreme Court; Department of Legislative Services

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