

# Client Alert

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## Senate Legislation to Regulate Small-Dollar Loans and Prepaid Cards

By Donald C. Lampe, Trevor R. Salter, and Ryan J. Richardson

On April 7, 2016, Sen. Jeff Merkley (D-OR) introduced the “Stopping Abuse and Fraud in Electronic Lending Act of 2016,” or “SAFE Lending Act of 2016,” amending the Truth in Lending Act (“TILA”) and the Electronic Fund Transfer Act (“EFTA”) to include new limitations on small-dollar loans and prepaid cards. [S. 2760](#) is cosponsored by Sen. Bernie Sanders (I-VT), Sen. Al Franken (D-MN), and Sen. Elizabeth Warren (D-MA), among others. Significantly, S. 2760 would impose limitations that would be more restrictive than those in the CFPB’s [proposed framework](#) for a payday loan rulemaking (dated March 26, 2015) and its [proposed rulemaking](#) on prepaid cards (dated November 13, 2014).

Highlights of S. 2760 are summarized below.

### SMALL-DOLLAR LOANS

- TILA would define a “small-dollar consumer credit transaction” as a loan of \$5,000 or less that satisfies any of the following criteria: (i) a closed-end loan payable in one or more installments over less than 12 months, (ii) an open-end credit plan in which each advance is fully repayable within a defined time or in connection with a defined event, or (iii) any other loan the CFPB defines as a small-dollar consumer credit transaction by rule. It is clear this definition is aimed at payday lending, but the definition is certainly not limited to payday loans.
- Creditors offering small-dollar consumer credit would be required to register with the CFPB, and the CFPB would be directed to establish procedures for company-level registration, a power that the CFPB already possesses under section 1024(b)(7) of the Dodd-Frank Act, 12 U.S.C. § 5514(b)(7).
- Creditors offering small-dollar consumer credit by Internet, telephone, fax, mail, email, or other electronic communication would be required to comply with applicable laws of the state where the consumer resides related to annual percentage rates, interest, fees, charges, and related matters, as designated by the CFPB. This provision would establish conclusively that the law governing small-dollar consumer credit transactions is the law of the consumer’s state of residence.
- National banks offering small-dollar consumer credit also would be required to comply with applicable laws of the state where the consumer resides related to annual percentage rates, interest, fees, charges, and related matters, as designated by the CFPB. Significantly, this would effectively supersede the interest rate exportation doctrine set forth in the National Bank Act, 12 U.S.C. § 85, for this type of credit.
- Third-party lead generators would be prohibited from facilitating, brokering, arranging, gathering applications for, or distributing certain personal financial information in connection with, small-dollar consumer credit transactions. Only true creditors of small-dollar consumer credit transactions would be permitted to engage in such activities.

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## PREPAID CARDS

- S. 2760 would amend the EFTA to bar persons from charging overdraft fees on general-use prepaid cards. By contrast, under the CFPB's proposed rule governing prepaid accounts, overdraft fees would not be barred outright; instead, overdrafts on prepaid accounts would be treated as a credit card under Regulation Z and would be subject to specified substantive and disclosure requirements.
- The EFTA also would be amended to authorize the CFPB by rule to bar any other fees related to general-use prepaid cards in order to prevent unfair, deceptive, or abusive acts or practices, or to promote the ability of consumers to understand and compare the costs of general-use prepaid cards. By contrast, the CFPB's proposed prepaid rule mandates a disclosure regime relating to fees and requires that certain fees be "reasonable and proportional," rather than prohibiting fees.

## OTHER AMENDMENTS

- Persons would be barred from conditioning extensions of credit upon repayment by any type of electronic fund transfer, not just preauthorized electronic fund transfers.
- An entity would not be able to create a remote check on a consumer's behalf unless the consumer preauthorizes that entity as the consumer's remote check creator. The preauthorization would need to be filed by the consumer in writing with the bank from which the remote check would be drawn.
- Persons would be barred from initiating a payment order, including a remote check, on behalf of a consumer in retaliation for the consumer exercising his/her rights under a federal consumer financial law.

S. 2760 also would require the Government Accountability Office to conduct a study on access to capital and credit on Native American Indian reservations, including the impact of small-dollar consumer credit extended to Native American residents of reservations through Internet and non-Internet means.

As a whole, the bill represents a "wish list" of limitations on short-term, small-dollar consumer loans and electronic payments. Even though the bill is unlikely to move in the current Congress, the issues identified in the bill could remain on the consumer financial protection agenda for some time to come.

We will continue to monitor S. 2760 as it is considered by the Senate Committee on Banking, Housing, and Urban Affairs.

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