

Online Lending Under Review in New York State

February 26, 2018 | [Latif Zaman](#)

On December 29, 2017, New York Governor Andrew Cuomo signed New York Senate Bill 6593. The legislation would have established a seven-person task force to study online lending in the state and submit a report of findings and recommendations for potential regulatory or legislative action to the governor and lawmakers by April 15, 2018. In legislative materials justifying the bill, lawmakers noted that online lenders issued more than \$20 billion in loans in 2015. While the lawmakers acknowledged that "online loans can provide another avenue for entrepreneurs to acquire capital and grow their small businesses," they determined that there was "significant potential for unscrupulous online lenders to exploit consumers through predatory practices such as unusually high interest rates, lack of disclosure of hidden fees, and unclear loan terms."

Less than a month after the governor signed SB 6593, however, New York legislators introduced AB 8938, which would revise the guidelines of the study and report, eliminate the task force, and assign the New York Department of Financial Services ("DFS") responsibility for conducting the study and issuing a report on or before July 1, 2018. These changes to the legislation, especially the assignment of responsibilities to the DFS, could have negative repercussions for online lenders operating in New York.

The revised legislation provides less detailed guidelines on the scope of the study. Notably, some of the guidelines that would be removed or revised are favorable to the online lending industry. The initial legislation would have required the report to include (among other considerations):

- an examination of how consumers are utilizing online consumer credit to manage existing debt, potentially reduce borrowing costs, or access needed funds;
- an examination of the existing small business credit gap and small businesses' use of credit and credit needs;
- identification of alternatives for consumers and small businesses who are unable to access traditional financing and whether new technologies can enhance access to credit;
- an examination of whether existing federal and state laws already provide appropriate police powers and regulation of small business and consumer lending by online lending institutions; and
- an evaluation of the impact of any contemplated or proposed law or regulation on the small business credit gap, including a quantitative analysis of the amount of increased or decreased credit available to small businesses as a result of such law or regulation, including the extent to which access to credit would be affected under the state's current usury laws.

By comparison, the revised legislation requires the report to include (among other considerations):

A survey of the existing state and federal laws and regulations that apply to the online lending industry, the impact of such laws and regulations on consumers, and the access to credit on online lenders, including but not limited to the availability and cost of such credit opportunities to start up or

emerging businesses.

The initial legislation provided guidelines directing the task force to review specific benefits of online lending and whether existing regulation of the industry is already sufficient. The degree to which this mandate carries over to the revised legislation is not clear.

Under the initial legislation, the task force members would have been appointed as follows:

- three members appointed by the governor;
- two members appointed by the president of the senate; and
- two members appointed by the speaker of the assembly.

The initial legislation stated that the appointed members of the task force should "include individuals representative of the online lending community, the small business community, the financial services industry, and the consumer protection community. Appointments [would] take into consideration the expertise of the other appointees, so that the task force reflects a diversity of experience." It is reasonable to believe that the task force would have included some level of industry perspective. It is unclear to what extent this perspective will be present in a study conducted by a regulator. We note that the proposed revisions provide that the resultant report "shall be prepared in consultation with stakeholders, including online lenders, consumers and small businesses." However, it is unclear how this consultation would occur and what the effect would be.

The DFS has maintained a somewhat antagonistic relationship with the online lending industry. In the summer of 2016 the DFS initiated a widespread inquiry into the operations of online lenders in the state. In addition to a general skepticism of online lending, the DFS has generally sought to promote its regulatory authority where it has found federal regulation insufficient to protect consumers. The DFS has consistently opposed the OCC fintech charter. Superintendent Vullo sued the OCC, claiming that the OCC exceeded its regulatory authority in putting forth the charter proposal. On December 12, 2017, the U.S. District Court for the Southern District of New York dismissed Superintendent Vullo's lawsuit, explaining that the court lacked jurisdiction over the dispute until the OCC actually reaches a final decision on whether to grant a fintech charter.

In December 2017, New York Attorney General Eric T. Schneiderman, on behalf of a coalition of 17 state attorneys general, wrote a letter to President Trump addressing concerns about Trump's choice for Acting Director of the CFPB, Mick Mulvaney. While the letter expressed "unwavering support for the mission of the Consumer Financial Protection Bureau" it also stated that "Attorneys General won't hesitate to protect those we serve - with or without a partner in Washington." Superintendent Vullo issued a press release on January 25th affirming that the "DFS remains committed to its mission to safeguard the financial services industry and protect New York consumers, and will continue to lead and take action to fill the increasing number of regulatory voids created by the federal government."

The public statements from the attorney general and DFS indicate that the state regulators anticipate imposing regulation or pursuing enforcement where they find federal regulation insufficient. Eliminating the task force and having the DFS independently conduct the review of the online lending industry in New York would effectively remove a check on the regulatory authority of the DFS. The revised legislation would put the DFS in a position to unilaterally recommend more onerous regulation over the online lending industry.

New York Senate Bill 6593 and accompanying legislative materials can be found here:

http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08260&term=2017&Summary=Y&Memo=Y.

New York Assembly Bill 8938 and accompanying legislative materials can be found here:

<http://nyassembly.gov/leg/?term=2017&bn=A08938>.

Attorneys General letter to President Trump can be found here:

https://ag.ny.gov/sites/default/files/sign_on_letter_re_cfpb.pdf.

DFS January 25th press release can be found here:

<http://www.dfs.ny.gov/about/statements/st1801251.htm>.

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