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BROAD REACH OF THE “CREDIT” LAWS AND POTENTIAL COMPLIANCE PITFALLS

The broad definition of “credit” in consumer protection laws makes them potentially applicable to peripheral credit-related products and services not traditionally viewed as involving “credit” transactions. The authors discuss the application of such laws to a variety of such products and services, including credit card ancillary products, overdraft features of checking accounts and prepaid cards, and trade credit. They close by suggesting that financial services industry participants review all aspects of their operations for compliance with credit laws.

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When it comes to the regulation of “credit,” we reasonably expect the rules to apply to traditional consumer “loan” products such as mortgage loans, credit card debt, consumer loans, and the like. In recent years, however, regulators and enterprising litigants have sought to expand the scope of consumer credit laws far beyond these traditional products to encompass products and activities that have not traditionally been viewed as “credit” transactions. Examples include “add-on” products offered with credit cards, overdraft and deposit advance products, some prepaid card features, furnishing credit history information, professional services payment plans, and trade credit.

The consequences of failing to recognize that credit laws may be applicable to these peripheral credit-related products and activities can be quite significant, as thousands of transactions may occur before a company even becomes aware that compliance procedures are needed. In numerous situations, incorrect assumptions

about the scope of laws governing credit can result in increased regulatory, litigation, and transactional risks.

This article is intended to raise awareness about the broad reach of the credit laws and to help companies avoid compliance pitfalls associated with potential misperceptions.¹ First, we address the broad definition of “credit.” Second, we provide an overview of some of the key credit laws that may have particularly broad reach. Finally, we will discuss examples of peripheral products and services that have been considered or may be considered to constitute credit products under an expansive reading of the credit laws.

¹ This article focuses primarily on certain federal consumer credit protection statutes and is not intended to cover all state and federal laws that could potentially apply to “credit” transactions.

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The Broad Definition of “Credit”

In order to explore the broad reach of the credit laws to peripheral, credit-related products and activities, it is important to understand the definition of an extension of “credit.”

As an initial matter, there is no universally applicable definition of “credit,” and each federal and state statute and regulation is subject to its own statutory definitions, judicial interpretations, and other guidance. A good starting point for considering the scope of an extension of “credit” for purposes of consumer protection laws is the definition of that term in the Consumer Financial Protection Act of 2010 (the “CFPA”).² The CFPA, which established the Consumer Financial Protection Bureau (“CFPB”) and substantially overhauled the federal system for regulation of consumer financial products and services, defines “credit” as “the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase.”³

On its face, this definition is very broad, and it clearly encompasses traditional consumer “loans.” There is no universal definition of a “loan,” but it is often understood to be a delivery of money with an agreement that an equivalent sum will be repaid at a later time.⁴ Indeed, it is well understood that loan products commonly offered by banks and financial institutions –

e.g., mortgage lending, credit cards, student loans, small business lending, payday loans, and unsecured loans – are extensions of credit that are subject to credit laws.

In addition to “loans,” the definition of “credit” covers the right to “purchase property or services and defer payment for such purchase.” Thus, whenever a seller allows a person to obtain a product or service and pay at a later time, an extension of credit has occurred and the credit laws may apply. For example, any time that a merchant or retailer allows a person to obtain goods or services subject to later invoicing, an extension of credit technically occurs. This broad definition of credit could encompass a number of transactions that consumers do not ordinarily view as extensions of credit. For example, incurring medical expenses with an understanding that the person’s insurance will be billed for the service or that person will be invoiced later could be considered an extension of credit to the patient. Likewise, receiving utilities services that are billed after the end of each month constitutes a form of credit. Even a tab at a bar or an account with a local butcher or grocer would technically constitute “credit” under the definitions in certain laws.

Overview of the Regulation of Credit

It is widely known that some types of consumer lending – *e.g.*, mortgage and credit card lending – are subject to extensive federal and state consumer protection regulation. Generally, banks and other lenders that regularly engage in this type of lending are well aware that these are highly regulated activities and employ some type of compliance program to ensure that those laws are followed. But what is less well known is that essentially all forms of credit – even those not ordinarily thought of as standalone “loans” – are subject to some degree of governmental regulation. This is true for both business- and consumer-purpose credit, regardless of whether interest is charged or a finance charge is imposed, or whether the business is licensed as a creditor.

This section provides a high-level overview of some broadly applicable credit laws that may apply to credit-related products and services that are not traditionally thought of as being subject to strict lending regulation. Two of the broadest federal laws that regulate the extension of credit are the Truth in Lending Act (or

² Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203, 124 Stat. 1376 (2010).

³ 12 U.S.C. § 5481(7). This definition is similar to the definition of credit in Regulation Z, 12 C.F.R. pt. 1026, the implementing regulation for the federal Truth in Lending Act, 15 U.S.C. §§ 1601-1667f. Regulation Z defines “credit” as “the right to defer payment of debt or to incur debt and defer its payment.” 12 C.F.R. § 1026.2(a)(14).

⁴ See, *e.g.*, *U.S. v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, AFL-CIO, 817 F. Supp. 337, 344 (S.D.N.Y. 1993), *aff’d*, 14 F.3d 183 (2d Cir. 1994) (a “loan” is defined as “[d]elivery by one party to and receipt by another party of a sum of money, upon agreement, express or implied, to repay it with or without interest,” quoting Black’s Law Dictionary).

“TILA”) and the Equal Credit Opportunity Act (or “ECOA”).

The Truth in Lending Act, which is implemented by Regulation Z, is the primary federal consumer credit protection law.⁵ Generally, TILA applies to all extensions of credit, by a person who regularly extends such credit, where a finance charge is imposed or the credit is repayable by agreement in more than four installments, including “credit sales.”⁶ Among its most widely recognized requirements is the disclosure of the finance charge and an Annual Percentage Rate or “APR,” but TILA has many other disclosure and other requirements, some of which are applicable even on loans with no finance charge.⁷

Even broader in scope than TILA is the ECOA.⁸ ECOA prohibits discrimination based on race, color, religion, national origin, sex or marital status, or age, as well as other factors, in any aspect of an extension of credit.⁹ ECOA also requires, among other things, that certain notifications be given to borrowers regarding the action taken on an application for credit, including notification of the reasons for any “adverse action” taken on an application for an extension of credit.¹⁰ ECOA applies generally to “creditors” – defined broadly to include any person who “regularly extends, renews, or continues credit” – and to “any aspect of a credit transaction.”¹¹ ECOA applies to all forms of credit, including consumer lending and business-purpose lending, and secured and unsecured credit. The anti-discrimination requirement in ECOA applies to all forms of credit, regardless of whether the credit is scheduled to be repaid in regular installments or whether there is any finance charge, although certain other provisions of ECOA do not apply to “incidental credit,” defined as credit not associated with a credit card account, not payable by agreement in more than four installments, and not subject to a finance charge.¹²

Another federal consumer protection law that applies to extensions of credit to consumers, as well as certain other consumer financial products and services, is the

CFPA prohibition against unfair, deceptive, and abusive acts or practices (“UDAAP”).¹³ This nebulous prohibition applies to all covered persons who offer consumer financial products or services, including those involving, generally, “extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit” to consumers.¹⁴ The CFPB has used its UDAAP authority extensively in enforcement actions aimed at allegedly unfair and deceptive marketing and billing relating to so-called credit card “add-on” products that, while not themselves extensions of credit, are ancillary to other credit offerings. The CFPA contains some limited and complex jurisdictional exceptions for credit extended for certain purposes by certain persons, including tax preparers and merchants of non-financial products, but several of these exceptions are limited to credit that does not involve a finance charge.¹⁵

Violations of TILA and ECOA can result in enforcement actions, private lawsuits (including class actions), actual and punitive damages, and injunctive and other relief.¹⁶ Violations of the UDAAP prohibition can result in enforcement actions, civil penalties, and injunctive and other relief.¹⁷

In addition to TILA, ECOA, and the UDAAP prohibition, a number of other federal, state, and local laws and regulations apply to certain extensions of credit. These laws include not only substantive laws that require certain disclosures or prohibit certain conduct, but also reporting and licensing statutes. Companies that conduct transactions involving extensions of credit should familiarize themselves and ensure compliance with all applicable laws and regulations.

Peripheral Credit-related Products and Activities that May Be Considered Regulated Extensions of “Credit”

Below are examples of specific products and services where regulators, litigants, or courts have taken an expansive approach with respect to applying “credit” laws, or areas where the authors believe that increased awareness of the applicable credit laws may be beneficial.

⁵ 15 U.S.C. §§ 1601-1667f; 12 C.F.R. pt. 1026.

⁶ 15 U.S.C. § 1602(g)(1); 12 C.F.R. § 1026.2(a)(16), (a)(17)(i).

⁷ *See, e.g.*, 12 C.F.R. § 1026.18.

⁸ 15 U.S.C. §§ 1691-1692a.

⁹ 15 U.S.C. § 1691(a).

¹⁰ 15 U.S.C. § 1691(d).

¹¹ 15 U.S.C. §§ 1691a(e), 1691(a).

¹² 12 C.F.R. § 1002.3(c).

¹³ 12 U.S.C. § 5536(a)(1)(B).

¹⁴ 12 U.S.C. § 5481(15)(A)(i).

¹⁵ 12 U.S.C. § 5517.

¹⁶ *See generally* 15 U.S.C. §§ 1640; 1691e.

¹⁷ *See* 15 U.S.C. §§ 5563-5565.

As an initial matter, it may be helpful to bear in mind that there are two general situations where compliance risk can arise from a mistaken impression about the scope of the credit laws. On the one hand, banks and other financial institutions that are generally familiar with credit compliance laws may have credit compliance programs for typical “loan” products but may not be aware that certain products and services that they offer are covered by the credit laws. On the other hand, businesses that do not specialize in consumer financial products and services – including retailers, as well as businesses that deal primarily with other businesses – may not realize that they offer *any* products and services that are subject to credit laws, and thus they may have little or no credit compliance awareness and controls. Both types of oversights can result in significant regulatory and litigation risk to the company.

- **Ancillary Products.** Credit card issuers and banks sometimes offer ancillary products to consumers, including debt protection, identity theft protection, and credit score tracking. The CFPB has taken the position that the offering of ancillary products by financial institutions is subject to its UDAAP enforcement authority, and it has aggressively used that authority in bringing enforcement actions against major credit card banks for solicitation, enrollment, cancellation, and billing practices associated with ancillary products.¹⁸ It is less clear, however, whether and how other laws, such as ECOA and other fair lending laws, apply to the offering of some ancillary products. The CFPB has stated (rather ambiguously) that in the mortgage servicing context, “[t]argeted marketing of [optional] products on the basis of race, for example, *may* indicate an increased risk of potential ECOA

violations and *require further inquiry.*”¹⁹ Likewise, a CFPB bulletin states that lenders should take steps to see that “[a]pplicants are not required on a prohibited basis to purchase add-on products as a condition of obtaining credit.”²⁰

- **Overdraft and Deposit Advance.** Traditional deposit accounts would not ordinarily be considered an extension of credit. However, federal bank regulators have taken the position that overdraft features on checking accounts are subject to the requirements of ECOA, and that “steering or targeting certain consumers on a prohibited basis for overdraft protection programs while offering other consumers overdraft lines of credit or other more favorable credit products or overdraft services, will raise concerns under the ECOA.”²¹ Additionally, the FDIC has indicated that overdraft fee waivers will be assessed for compliance with the fair lending laws.²² Likewise, the OCC recently issued final guidance expressing regulatory expectations on “deposit advance” products, defined as “small-dollar, short-term credit product[s]” that a bank makes available to customers whose deposit account reflects recurring direct deposits, which are subject to ECOA and TILA.²³
- **Prepaid Cards.** Like checking accounts, some prepaid cards allow for overdrafts or other credit features. These features, while relatively rare, have attracted regulatory scrutiny. In July 2012, the Office of the Comptroller of the Currency entered into a written agreement with Urban Trust Bank, which offered prepaid cards issued with an overdraft protection feature. The written agreement required Urban Trust to prepare a written analysis of the

¹⁸ See *In re Capital One Bank, (USA) N.A.*, Stipulation and Consent Order No. 2012-CFPB-0001 (CFPB July 18, 2012) (agreement that bank would pay \$140 million in payments to consumers and a \$25 million civil penalty, settling allegations that the bank engaged in deceptive marketing practices relating to ancillary credit-card products); *In re Discover Bank Greenwood, Delaware*, Joint Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty Nos. FDIC-11-548b, FDIC-11-551k, 2012-CFPB-0005 (FDIC and CFPB Sept. 24, 2012) (agreement that bank would pay \$200 million to consumers and a \$14 million civil penalty, settling allegations that the bank engaged in deceptive telemarketing and sales practices relating to ancillary credit-card products); *In re JPMorgan Chase Bank, N.A. and Chase Bank USA, N.A.*, Consent Order No. 2013-CFPB-0007 (CFPB Sept. 19, 2013) (agreement that bank would pay \$309 million to consumers, settling allegations that the bank engaged in unfair billing practices relating to ancillary credit-card products).

¹⁹ Consumer Fin. Prot. Bureau, *CFPB Supervision and Examination Manual*, at Mortgage Servicing, Procedures 9 (Vol. 2.0 2012) (emphasis added).

²⁰ Consumer Fin. Prot. Bureau, CFPB Bulletin 2012-06, Marketing of Credit Card Add-on Products (2012).

²¹ Fed. Deposit Ins. Corp., FIL-47-2010, Overdraft Payment Programs and Consumer Protection, Supplemental Information, at 3-4 (2010) (citing the 2005 Joint Guidance on Overdraft Protection Programs adopted by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and National Credit Union Administration).

²² *Id.* at 4.

²³ Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 Fed. Reg. 70,624, 70,626 (Nov. 26, 2013).

bank's prepaid debit card program to "more fully assess[] the risks and benefits" of the prepaid card business line, including controls, policies and procedures, and oversight of third parties. The Comptroller stated that the bank "has a relationship with a payday lending and check cashing operation to sell prepaid cards and ancillary overdraft credit products" at that lender's locations, which, coupled with the features of the overdraft protection product, "raise heightened risks to the Bank."²⁴ Also, the CFPB has solicited comments specifically on credit features on prepaid cards, indicating that such features may be the subject of future consumer protection rulemaking and regulation.²⁵

- **Furnishing Credit History Information.** Many lenders choose to furnish credit history information to credit reporting bureaus, and it is well known that such furnishing is subject to the Fair Credit Reporting Act. However, lenders might not be aware that the furnishing of credit history information is also subject to the anti-discrimination provision of ECOA and specific rules in Regulation B mandating that furnishers provide information to identify the borrower's spouse if the spouse is an authorized user on the borrower's account.²⁶ Moreover, the CFPB recently issued a compliance reminder to furnishers of credit history information signaling its willingness to take enforcement actions against furnishers for violation of any federal consumer financial laws and regulations.²⁷

- **Payment Plans for Professional Services.** Plans for deferred payment of professional services provided to consumers (*e.g.*, medical and dental services) generally constitute an extension of "credit" under the general definition, as such plans allow the consumer to "purchase . . . services and defer payment for such purchase." As such, these deferred payment plans are, at a minimum, subject to ECOA's anti-discrimination provision. Moreover, if a plan involves a finance charge or is repayable by agreement in more than four installments (regardless of whether there is a finance charge), it is subject to certain disclosure requirements under the Truth in Lending Act. Violations could be asserted by state or federal enforcement agencies or patients/consumers, possibly as a defense to collection.
- **Trade Credit.** "Trade credit" is a "financing arrangement that involves a buyer and a seller – such as a supplier who finances the sale of equipment, supplies, or inventory" where the seller is not a bank or financial institution.²⁸ While business-purpose trade credit is generally outside the scope of TILA and the CFPB's jurisdiction with respect to consumer financial protection products, trade credit is nonetheless subject to the anti-discrimination requirement in ECOA. Also, trade credit is subject generally to Regulation B provisions addressing adverse action notification requirements and record retention, some of which specifically reference trade credit.²⁹ Given the fact that trade credit is more lightly regulated than consumer credit, and the fact that providers of trade credit are by definition not financial institutions, companies that extend trade credit may not be aware that these transactions are subject to ECOA.

²⁴ Letter from Thomas J. Curry, Comptroller of the Currency, to Lauren K. Saunders, *et al.* (Aug. 23, 2012), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/letter-occ-check-smart-urban-trust-bank.pdf.

²⁵ Elec. Fund Transfers (Reg. E), 77 Fed. Reg. 30,923 (May 24, 2012) (advanced notice of proposed rulemaking regarding general purpose reloadable ("GPR") prepaid cards, stating that "some GPR card programs do allow cardholders to opt in to an overdraft program in which the issuer may authorize overdrafts and charges an overdraft transaction fee" and "seek[ing] public input on the costs, benefits, and consumer protection issues related to any credit features that may be offered by GPR cards.").

²⁶ 12 C.F.R. § 1002.2(m) (regulation implementing ECOA stating that "credit transaction" includes "every aspect of an applicant's dealings with a creditor regarding an . . . extension of credit" including "furnishing of credit information"); § 1002.10 (ECOA regulation addressing "Furnishing of credit information").

²⁷ CFPB Bulletin 2013-09 (Sept. 4, 2013).

CONCLUSION

Laws governing extensions of "credit" apply broadly and may apply to a number of products and services that one typically does not view as lending activity subject to consumer protection regulation. In light of recent increased regulatory scrutiny and litigation relating to these issues, as well as the potential consequences of failing to mitigate compliance risks in this area, financial services industry participants and other businesses may wish to review their practices to ensure that all relevant aspects of their operations are in compliance with the credit laws. ■

²⁸ 12 C.F.R. pt. 1002, Supp. I, ¶ 9(a)(3) cmt 2.

²⁹ 12 C.F.R. § 1002.9(a)(3)(ii); § 1002.12(b)(5).