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THE CONSUMER CREDIT PROTECTION ACT

A. INTRODUCTION

In the late 1960s, Congress, after many years of discussion, passed legislation that intruded into the long-standing province of the states in regulating consumer transactions by enacting the Consumer Credit Protection Act, 15 U.S.C. § 1601 *et seq.* (CCPA). At that time, the intrusion, though significant, involved only limited baseline substantive restrictions on garnishment (15 U.S.C. § 1671 *et seq.*), one substantive right of rescission for second or lesser priority mortgages on the home (15 U.S.C. § 1635), and certain disclosures mandated by the so-called Truth in Lending Act (TILA) (15 U.S.C. § 1637 *et seq.*). However, once the ice was broken, further acts followed under the CCPA umbrella requiring disclosure and often setting forth substantive requirements for the following situations: consumer leases (15 U.S.C. § 1667 *et seq.*); consumer credit reporting (15 U.S.C. § 1681 *et seq.*), credit cards (15 U.S.C. § 1642 *et seq.*), and credit billing (15 U.S.C. § 1666 *et seq.*); discrimination in credit on prohibited bases (Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*); debt collection by third-party debt collectors (including lawyers) (15 U.S.C. § 1692 *et seq.*); and electronic fund transfers from consumer accounts

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(15 U.S.C. § 1693 *et seq.*). Moreover, TILA subsequently was amended several times to add additional required disclosures; for example, in 2001, disclosures for reverse mortgages were added to reflect the growing use of such instruments by the elderly as a source of capital. The disclosures under TILA are especially important for an elderly consumer who may need additional clarity in disclosure information. (15 U.S.C. § 1648; Regulation Z, 12 C.F.R. § 226.1). Also, amendments added substantive provisions beyond disclosure, such as prohibiting use of the so-called “Rule of 78” (15 U.S.C. § 1615), mandating “restitution” for some disclosure errors (15 U.S.C. § 1607e), and limiting freedom of contract in connection with so-called “high-rate” mortgages and home equity plans (15 U.S.C. §§ 1639, 1647). The overall result clearly was a very significant intrusion on state law. This intrusion was not limited to the subjects covered in the CCPA, as other federal initiatives (discussed in the next chapter) occurred at the same time, such as the Magnuson-Moss Act and Real Estate Settlement Procedures Act.

Perhaps because these intrusions represented a perceived change of some magnitude in federal/state relations, Congress—in the subjects covered in the CCPA—did not broadly preempt state law but rather, though the standards used are not the same in every enactment, preempted state law only if a person subject to both the federal and state laws could not comply with both. *See, e.g.*, 15 U.S.C. § 1610. The result was a “Swiss cheese” effect on state law. In this context, a lawyer had to first determine the applicability of the federal law. If the determination was in favor of applicability, the lawyer then had to match state law to federal law to discern what portion of state law was preempted. This was often very difficult, and the Federal Reserve Board assisted from time to time by rendering interpretations. *See* Regulation Z, 12 C.F.R. § 226.28 (preempting much state law in the area; for more detail *see* Rohner and Miller, *Truth in Lending*, Chapter 14, 2003 Supplement). The federal/state law mix from this process then had to be applied to the transaction. Of course, in many instances the result was one not intended by either Congress or the legislature of the state whose law had been thus modified.

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Congress also sought to mitigate adverse reaction to its enactments in another way. In many instances, the federal law allows a state to “opt out” of the federal law (that is, to be governed by state, not federal, law). *See, e.g.*, 15 U.S.C. § 1633. For that to occur, the state law, as determined by the Federal Reserve Board, must be at least equal to the federal law in terms of consumer protection and must provide adequate means for enforcement. In the case of TILA, five states exercised the option. It is a mixed blessing. On the whole, the resulting state enforcement, if adequately funded, is better than the federal effort, but there is a constant task in keeping the state law in tandem with the federal. Overall, the option has not been widely used.

Finally, contributing to the complexity this scheme imposed on consumer transactions was a “multiple source of law” problem. As discussed, federal and state law might both apply, as well as a body of law on preemption. Congress also tended to write these statutes somewhat generally and thus a great deal of detail was left for the Federal Reserve Board, which was given very broad power (in 15 U.S.C. § 1604, for example), to “fill in” by regulation. The Board used this authority to promulgate regulations containing more detail about requirements under the statutes, such as Regulation Z under TILA. (*Compare Mourning v. Family Publications Serv.*, 411 U.S. 356 (1973), creating a strong “presumption of validity” and upholding the validity of Regulation Z, with *Pfenning v. Household Credit Servs., Inc.*, 295 F.3d 522 (6th Cir. 2002), perhaps finding more clarity than exists in the statute, but stating that where a statute and a regulation conflict, courts must defer to the statute). But given the sanctions for many violations, persons subject to the legislation demanded even more; they sought as much certainty as possible. The reaction of the Board at first was to issue interpretations itself from time to time and allow its staff to issue specific opinion letters. Over time the volume and the difficulty of applying these multiple sources of proliferating law became immense, and the Board instead issued general—yet still detailed—“Commentary” under the regulations. The Commentary was similar in concept to the Official Comments to the Uniform Commercial Code. In other cases, so-called “guidelines” serving the same purpose were issued.

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Complexity was reduced but hardly eliminated, and practice in this area rapidly became the province of specialists, and still remains so.

B. TRUTH IN LENDING

1. PURPOSE AND SCOPE

At the time TILA became law, state laws often mandated some disclosures about some transactions so the consumer could better understand the terms of the prospective transaction and avoid unwise contracts. But the disclosure of charges, particularly finance charges, was not uniform. The finance charge might be called “interest” or “time price differential,” and what constituted interest varied. The rate might be expressed as a simple rate, or an add-on or discount rate that was almost double the simple rate. As a consequence, it was difficult for consumers to comparison shop or to determine the best terms. TILA was aimed at this problem.

TILA covers consumer credit transactions, defined as a credit transaction, primarily for a personal, family, or household purpose, that bears a finance charge, or such a transaction payable in more than four installments without a finance charge (designed to exclude sales with a down payment and thirty/sixty/ninety days “same as cash,” but to include longer-term credit with a finance charge built into the price). Extensions of credit primarily for a business, commercial, or agricultural purpose, or to a government or an organization, are not covered, nor are non-real-estate transactions in excess of \$25,000, or credit subject to other regulation such as in the case of securities and commodities, public utilities, and certain student loans. *See* 15 U.S.C. §§ 1602(f), 1603. There are issues of scope; for example, is a debt due in thirty days, with a late charge if payment is not made, covered? The answer is yes if the creditor continues to extend further credit as if no default exists, as the late charge then in essence becomes a charge for a longer time to pay, which is the classic definition of a finance charge. *See id.* § 1605. For the most part, however, scope issues were settled long ago.

Both consumer credit sales and consumer loans are covered. There are a few, but significant, differences in the rules applicable to each. More important is the distinction between a so-called “closed-end” transaction, like a retail installment sale or loan to purchase a car, and a so-called “open-end” transaction, such as a retail revolving charge account, credit card, or home equity line. See 15 U.S.C. § 1602i. Here there are significant disclosure and other differences. In 2001, the Seventh Circuit, in deciding *Rendler v. Corus Bank, N.A.*, 272 F.3d 992 (7th Cir. 2001), provided a good example of the difference between closed and open-end transactions. In *Rendler*, the Court found a home mortgage to be a closed-ended transaction while a separate but simultaneous home equity line of credit was found to be an open-end transaction.

2. DISCLOSURE

For most closed-end transactions, disclosure is due before or at the closing. See Regulation Z, 12 C.F.R. § 226.17. This, of course, is not much advance notice, and so the restrictions on false and misleading credit advertising (*id.* §§ 226.24(a)-(d)) are particularly important. Earlier disclosures than required are allowed and even encouraged (*see id.* § 226.17(f)), but for the most part are not used. Early disclosures in some cases are mandated, however, such as in residential mortgage transactions subject to the Real Estate Settlement Procedures Act, in variable-rate mortgage transactions secured by the home with a term over one year, and in so-called high-rate mortgages and reverse-mortgage transactions. See, e.g., *id.* § 226.19. If the information required to be disclosed is not known this early, estimates may be used. See *id.* § 226.17(c).

There are certain form requirements for the mandated disclosures. For example, the terms “finance charge” and “annual percentage rate” must be particularly conspicuous. The disclosures generally must be segregated from other material, in what is sometimes known as “the federal box,” as this requirement often is accomplished by putting the disclosures in a black-outlined box in the contract. See Regulation Z, 12 C.F.R. § 226.17.

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Generally, what is disclosed is determined by the contract and state law, which establish the legal obligation. However, there are some tolerances for irregular transactions. Generally, disclosure must be of the legal obligation at the time the disclosure is due. Thus, subsequent events do not require redisclosure as a rule, but there are exceptions for refinancing and assumptions of mortgages. See Regulation Z, 12 C.F.R. §§ 226.17, 226.20. There are modified rules for special transactions, like mail or telephone orders and interim student credit extensions. See *id.* § 226.17.

The information to be disclosed in most closed-end transactions is listed in Regulation Z, 12 C.F.R. § 226.18, and includes the following: the identity of the creditor; the amount financed; an itemization of the amount financed or notice that there is a right to that disclosure upon request; the amount of the finance charge; the annual percentage rate of the finance charge; information about any variable rate; the payment schedule; the total of payments; any demand feature; in a sale, the total sale price; information, not in too much detail, about any prepayment penalty or rebate of the finance charge; late payment charges; information, again not in great detail, about any security interest; and information about insurance, fees such as filing fees, assumption policy, required deposit balances, and looking to the contract for further information. See *id.* § 226.18. A Sixth Circuit case that deals with closed-end transactions is *Inge v. Rock Fin. Corp.*, 281 F.3d 613 (6th Cir. 2002), where a lender's failure to disclose various fees were considered to give rise to a cause of action under TILA. Additional disclosures may be due in certain residential mortgage and variable-rate transactions, and in so-called high-rate mortgages and reverse mortgages. See *id.* §§ 226.19, 226.32, 226.33.

The "annual percentage rate" (APR) is the cost of credit as a yearly rate; it essentially is a simple interest rate as opposed to an add-on, discount, or some other method of rate computation. The concept of "finance charge" is somewhat different from that of "interest," and is more inclusive because its focus is on the cost to the borrower. Thus, the disclosed APR may well exceed the rate of interest as computed for other purposes, such as a state usury law. See Regulation Z, 12 C.F.R. § 226.4.

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Open-end disclosure generally is due before the first transaction under the open-end credit plan. Because disclosure is due before the plan is used, initial open-end disclosure is not specific, and consists more of the plan terms than disclosure about transactions. To illustrate, Regulation Z, 12 C.F.R. § 226.6, does not require disclosure of the finance charge, but of the circumstances under which a finance charge will be imposed and how it will be determined. Also required are disclosures about when the finance charge begins to accrue, the periodic rate and the balances to which it is applicable, the corresponding APR, information about other charges and any security interest, and a statement of billing-error rights. Format rules, such as requiring the terms “finance charge” and “annual percentage rate” to be more conspicuous, are similar to those for closed-end credit, and it is the legal obligation that must be disclosed. Estimates may be used, and subsequent events generally are not included. *See id.* § 226.5. Again, there are also special rules regarding timing, format, and substance for credit and charge card applications and solicitations, and home equity plans. *See id.* §§ 226.5(a), 226.5(b).

Open-end disclosure, however, involves more than disclosures made at the time the open-end plan is established. The creditor must supply the consumer with periodic statements at the end of each billing cycle when there is account activity, excluding bad debts or delinquent accounts. In this context, disclosure is more transaction oriented; for example, the amount of any finance charge debited or added during the cycle—itemized to show the amounts attributable to a periodic rate and to any other type of finance charge—must be disclosed. In addition, disclosure must be made of the previous balance of the account, identification of credit transactions, credits to the account, the periodic rate(s) used, the amount of the balance on which the finance charge was computed and how it was determined, the APR, other charges, the cycle closing date and new balance of the account, any “free ride” period, and, unless a separate billing rights statement is used, an address for notice of billing errors. *See* Regulation Z, 12 C.F.R. §§ 226.7, 226.8.

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An open-end creditor may have to make disclosures in other instances as well, including those involving addition of a supplemental credit device or other features, changes in the terms of the account agreement or insurance, and renewal of a credit or charge card. *See* Regulation Z, 12 C.F.R. § 226.9. Generally, the merchant accepting a credit card need make no disclosure, but exceptions exist. *See id.* § 226.2(a)(17).

Advertising in open-end credit also is regulated to prevent false or misleading ads. *See* Regulation Z, 12 C.F.R. § 226.16 and *Roberts v. Fleet Bank*, 342 F.3d 260 (3d Cir. 2003), where a credit card solicitation was found to mislead a consumer.

3. SUBSTANTIVE RULES

TILA today requires more than disclosures; in a number of instances it imposes a substantive rule that may preempt state law. The oldest substantive rule is the right—in both open-end and closed-end credit—to rescind within three business days when the extension of credit is secured by the home, unless the credit is obtained to acquire the home (if open-end), is pursuant to a plan that is subject to rescission, or is merely a refinancing of credit originally subject to the right. *See* Regulation Z, 12 C.F.R. §§ 226.15, 226.23.

When first enacted, the right of rescission caused much litigation. Notice of it had to be given, and often creditors used the wrong form. The three-day period did not begin until proper TILA disclosures were given, so any error meant the right continued. In those cases, when the work was done but the right was not extinguished and later was exercised, a question arose about whether the creditor should forfeit the value of work that could not be returned. Presently, most—but not all—of the issues have been answered through either amendment of the law or case law. Some states, however, have similar provisions, and in those states the right may have been more favorably interpreted for consumers and thus not preempted; therefore, creditors in those states need to consider both levels of law.

Other substantive provisions now appear in TILA. For example, there are limitations on what may be agreed upon in a home equity plan (that is, a variable rate must be tied to an index that is available publicly and not under the creditor's control); use of the "Rule of 78" is proscribed in various cases as a method for determining rebates of finance charges; unsolicited credit cards are not allowed and a limit on liability for unauthorized use is created; in transactions secured by a dwelling and in which the rate may increase, a contractual provision setting the maximum rate must appear; and there are limitations on contracts and practices in certain so-called high-rate mortgages. See Regulation Z, 12 C.F.R. §§ 226.5(b), 226.12, 226.30, 226.32; 15 U.S.C. § 1615.

4. ENFORCEMENT

TILA illustrates an enforcement scheme that is common to most acts under the CCPA and to modern consumer protection legislation generally. First, there is potential criminal liability for willful and knowing violations of a number of the more significant provisions. 15 U.S.C. § 1611. Second, there is administrative enforcement by the agency that normally has jurisdiction over the creditor for other purposes, through whatever enforcement powers that agency has, plus the ability to require "restitution" for certain disclosure violations. *Id.* § 1607. Perhaps most important, § 1640 of TILA gives an aggrieved consumer a right of action for a violation, allowing recovery of actual damages and, in certain cases involving more significant provisions, statutory damages as well; a successful action also allows for recovery of attorneys' fees and costs. Class actions are possible under the normal rules governing such actions, though they do not allow recovery of statutory damages and are limited by a cap on liability. Certain defenses are provided, as well as a relatively short statute of limitations (but a violation may be used in recoupment in many cases, even if the statute has run on an affirmative claim). There is also limited assignee liability for violations committed by the assignor. *Id.* § 1641.

Overall, this enforcement structure has been quite effective.

C. FAIR CREDIT BILLING

Open-end credit and charge card plans present problems that normally do not appear in closed-end credit because of its more structured nature. The Fair Credit Billing Act addresses some of these problems.

Perhaps the central provision is the one setting forth a statutory procedure for handling asserted billing errors. See Regulation Z, 12 C.F.R. § 226.13. Billing errors include charges for property or services not delivered or not accepted, unauthorized extensions of credit, and computation or similar errors. If a consumer follows the required steps for asserting an error, the creditor must investigate the error, and, as is appropriate, either correct the error or notify the consumer why it believes no error occurred. See *Moynihan v. Providian Fin. Corp.*, 2003 U.S. Dist. LEXIS 13732 (2003), where a credit card holder did not make a proper allegation of a billing error, and the issuing bank was granted summary judgment.

Billing errors often stem from recurring and common circumstances, and the act addresses those more specifically. It requires the prompt crediting of payments (Regulation Z, 12 C.F.R. § 226.10), and prompt notification of returns and the crediting of refunds (*id.* § 226.12). The act also provides a right to a credit balance refund (*id.* § 226.11), and disallows both offsets against amounts owed the consumer for deposits to collect credit card debt, and prohibitions against merchants offering discounts for payment by cash or the like rather than with credit (an earlier prohibition against a surcharge for using a credit card is gone, although surcharges may be still prohibited by state law and may pose disclosure obligations on the merchant) (*see id.* § 226.12).

The holder in due course doctrine, allowing the assignee or the holder of a consumer obligation to refuse to recognize defenses to payment that would be recognized were the seller the creditor, has been changed on the federal level by both a provision of the act dealing with credit cards where the issuer and the person who honors the card are not the same (Regulation Z, 12 C.F.R. § 226.12), and by a Federal Trade Commission rule, as discussed in Chapter 5.

D. CONSUMER LEASING

Because a lease payment is contemporaneous with use, credit is not involved. Yet a long-term lease, such as an automobile lease, is an alternative to purchasing on credit and a consumer could benefit from appropriate disclosure for a lease transaction just as much as it does for a credit transaction, if not more so. The Consumer Leasing Act was enacted as part of the CCPA for that purpose.

A consumer lease is a “true” lease—a transaction that, at lease-end, leaves a meaningful residual for the lessor. If at lease-end the consumer has, under the contract, paid for what amounts to the full value of the leased goods, the transaction legally is a secured sale and falls under TILA as such. See Regulation Z, 12 C.F.R. § 226.2(a)(16); Regulation M, 12 C.F.R. § 213.2(e). The lease must (1) be from a lessor that regularly leases or facilitates such leases, (2) be entered by an individual primarily for personal, family, or household purposes, (3) be for a term exceeding four months, and (4) involve a contractual obligation not exceeding \$25,000. Only leases of personal property are covered. Regulation M, 12 C.F.R. § 213.2(e).

The act and its implementing regulation, Regulation M, 12 C.F.R. § 213, require that certain lease terms be disclosed clearly and conspicuously, in writing and in a form the consumer can keep. In 2001, the Federal Reserve Board passed rules allowing electronic communication for disclosure under Regulation M (Regulation M, 12 C.F.R. § 213.6), as well as under Regulations B, E, Z, and DD. Many of the disclosures must be segregated from other material. The disclosures must be made before a lease is signed. Estimates may be used in a proper case, subsequent events generally are ignored unless they constitute a renegotiation or extension, and some tolerance is allowed for irregular transactions. See *id.* §§ 213.3, 213.5.

The required disclosures under Regulation M, 12 C.F.R. § 213.4, include the following: a description of the leased property; any amount due at lease signing, itemized by type and amount; the payment schedule; the amount of other charges not included in periodic payments, itemized by type and amount; the total of payments plus a warning when the lessee may have liability at lease-end if actual value is less than residual value

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(so-called “open-end lease”); in a motor vehicle lease, the gross capitalized cost, which is the amount due for use of the leased property and for any service contracts, insurance, or the like, and a statement providing the agreed-upon value of the leased property and that an itemization of the gross capitalized cost may be obtained; the capitalized cost reduction due to any trade-in or initial payment; the resulting adjusted capitalized cost; the residual value; the depreciation and any amortized amounts; any rent charge (an amount in addition to depreciation and any amortized amounts); the total of depreciation, amortized amounts, and rent charge; the lease term; the amount of the base periodic payments; other itemized charges that are part of a periodic payment; and the total periodic payment.

In addition, the lessor must disclose the following: any provisions for early termination; maintenance responsibilities and the amount of wear and use allowed; a statement referencing the lease for more detail on these matters; information concerning any purchase option, express warranties, insurance, default charges, and security interests; and a statement concerning liability in an open-end lease at the end of the lease. *See Hildabrand v. Difeo Partnership*, 89 F.Supp.2d 202 (2000), holding that disclosures comply with Regulation M even if they are complex so long as they are not intentionally misleading. In this regard, the act imposes substantive rules relating to an appraisal right, and creates a rebuttable presumption that the residual value (which if different from actual value establishes the liability) is unreasonable if it exceeds the realized value by more than three times the base periodic payment. On this last point, some state laws invalidate any liability when there is a balloon payment at lease termination and, as such, would not be preempted by the federal law.

The act also contains provisions regulating false or deceptive lease advertising. *See* Regulation M, 12 C.F.R. § 213.7.

E. FAIR CREDIT REPORTING

The CCPA contains two acts that impose many substantive provisions beyond disclosure (as the Fair Credit Billing Act does), and that relate to the process of obtaining credit. One of these is

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the Fair Credit Reporting Act, which has no implementing regulation, but has commentary by the Federal Trade Commission staff. The general goal of the Fair Credit Reporting Act is to protect the reputation of the consumer. See *Ackerley v. Credit Bureau of Sheridan, Inc.*, 385 F. Supp. 658 (DC Wyo. 1974). The Act attempts to accomplish this goal by identifying three policy considerations. The first is to assure confidentiality of information that consumer reporting agencies collect about consumers by limiting access to such information to those who have a legitimate reason to obtain it, as specified in 15 U.S.C. § 1681b. These uses include responses to court orders; consumer applications for credit, insurance, or employment; and responses to agencies that need information to establish appropriate child support levels. The act also allows—with certain safeguards—the use of pre-screened lists of limited information, not based on specific prospective transactions or requests from consumers, but in connection with offers of credit or insurance to those on the list unless the consumer elects otherwise.

The second goal of the law is to better assure that consumer reports contain only relevant information. Section 1681c of the act thus precludes, in a consumer report, use of information that is older than the standards set in the statute, such as bankruptcies over ten years old and delinquent accounts over seven years old.

The last policy goal of the act is to better assure that consumer reports are accurate. Section 1681e of the act requires not only that consumer reporting agencies maintain reasonable procedures designed to avoid violations of the previous provisions on confidentiality and relevance, but also that the agencies assure maximum possible accuracy of the information supplied. In that regard, an agency must instruct the persons who supply it with information about the requirements of the law. However, an error-free consumer report is not required to avoid liability. If a consumer reporting agency accurately processes information received that appears to be credible, it is not liable if the information is, in fact, inaccurate. But if the agency learns or should be aware of errors that are not isolated, it must review applicable systems to better assure accuracy and, in some circumstances, the systems related to sources of its information. Moreover, procedures to

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monitor the status of past-due accounts must be implemented to keep such information current.

These goals are facilitated further by (1) restrictive rules in §§ 1681d and 1681l concerning “investigative consumer reports,” a particularly sensitive type of report with information on a consumer’s character, reputation, personal characteristics, and mode of living, derived from interviews with neighbors or associates of the report subject, and (2) special rules regarding reports for employment purposes and credit or insurance transactions not initiated by the consumer. *See* 15 U.S.C. § 1681b.

Another provision to facilitate these goals is the right of a consumer, in § 1681g, to generally obtain the information in his or her file as well as its sources and users. If the consumer disputes the completeness or accuracy of any of that information, the agency must reinvestigate and make any necessary correction with notice to the consumer. If after investigation the dispute is not resolved, the consumer may file a brief statement describing the dispute for the record. The consumer reporting agency then must note the dispute in subsequent reports. The statute contains limitations on charges in this process and otherwise. *See* 15 U.S.C. §§ 1681, 1681j.

Most of the duties under the act are placed on consumer reporting agencies (*see, e.g.*, 15 U.S.C. §§ 1681b, 1681c, 1681e), but some duties are placed on users of reports (under § 1681m), and on sources of information used in the report (under § 1681s-2).

The act provides for administrative enforcement by the agency that otherwise normally regulates persons subject to the act, with basic jurisdiction posited in the Federal Trade Commission. *See* 15 U.S.C. § 1681s. The Federal Trade Commission, in addition to its other powers, may bring an action for a civil penalty if the violation was a knowing one of an injunction or order directed to the violator; the act also provides for actions by state officials.

The act creates a consumer’s private right of action for actual and statutory damages and recovery of attorneys’ fees, based on a willful violation of the act by any person subject to it. *See Hawthorne v. Citicorp Data Sys.*, 216 F.Supp.2d 45 (E.D.N.Y. 2002),

where a plaintiff was allowed to bring a private cause of action against a bank that refused to investigate the consumer's claim of discrepancy in account statements, thereby willfully failing to comply with its duties under 15 U.S.C. § 1681 and 15 U.S.C. § 1681(n). There also is civil liability for actual damages and recovery of attorneys' fees if noncompliance was negligent. *Id.* § 1681(o). Finally, some violations, such as obtaining information under false pretenses, may carry criminal liability. *Id.* § 1681(q).

State laws dealing with credit reports exist, but are not preempted unless inconsistent with the federal act. 15 U.S.C. § 1681(t). The Maine law is comprehensive and similar to the federal law. An interesting case under the Maine law, *Equifax Services, Inc. v. Cohen*, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981), raised constitutional questions concerning the statute's undue limitations on freedom of speech, and, though not litigated to date under the federal act, the issues would likely exist there as well. However, the Fair and Accurate Credit Transactions Act discussed *infra* is considerably more preemptive of state law.

In late 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act of 2003. The act, a corollary of the Fair Credit Reporting Act, has a number of significant provisions. Among them:

- New provisions allowing consumers to alert consumer reporting agencies about fraud and identity theft make identity theft less likely to be missed by nationwide credit reporting agencies, and increase protection for consumers who fear identity theft. Military consumers also may provide an active duty alert. The alerts prevent new extensions of credit, increasing a credit limit and the issuance of an additional card on an account. Users also have greater duties, as do debt collectors. *See* Pub.L.No. 108-159 (2003).
- New provisions require credit reporting agencies not to use information resulting from identity theft. Once proof that information has been due to identity theft, agencies have time limits for removing that information from a consumer's file, along with restrictions on other uses of that information.

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- Also of significance, the new Act provides a much greater level of consumer protection with regard to the accuracy requirements of a consumer's credit report. The law allows consumers to dispute information directly with the furnisher, and requires furnishers of information and credit reporting agencies to do considerably more work in ensuring the accuracy of information and the latter to conduct a reasonable investigation when information is disputed by the consumer. The law also requires the credit reporting agencies to make the furnisher aware of the results of the investigation of the accuracy of disputed information.

F. EQUAL CREDIT OPPORTUNITY

The other primarily substantive federal law dealing with the process of obtaining credit (although the act also applies to any aspect of a credit transaction, including during the period of the credit or its collection) is the Equal Credit Opportunity Act (ECOA), implemented by Regulation B, 12 C.F.R. § 202.

Most of the CCPA applies only to consumer transactions. The ECOA is a major exception, as it applies not only to consumer credit, but also to credit transactions involving a business or government, and to incidental credit not subject to a finance charge or payable by agreement in more than four installments. These types of credit are excluded from TILA, for example. However, although they are covered under ECOA, there may be special rules or exceptions for such credit. See Regulation B, 12 C.F.R. § 202.3. A case from the Ninth Circuit, *Brothers v. First Leasing*, 724 F.2d 789 (9th Cir.), *cert. denied*, 469 U.S. 832 (1984), also applied the act to a true lease, which is not credit under TILA. For that reason, the decision is questionable, but it never has been overturned.

The basic rule of the act is articulated in Regulation B, 12 C.F.R. § 202.4, stating that a creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.

Regulation B, 12 C.F.R. § 202.2, defines critical terms. Among those definitions, a "creditor" is a person who in the ordi-

nary course of business regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates, and persons who refer prospects or select creditors. The term does not include a merchant honoring a credit card.

"Applicant" means any person who requests or who has received an extension of credit from a creditor, and includes a guarantor.

The "prohibited bases" covered by the act are race, color, religion, national origin, sex, marital status and age (if over the age of majority), receipt of public assistance, and exercise of rights under the Act.

"Discriminate" means to treat an applicant less favorably than other applicants (who are similarly situated). *See, e.g., Williams v. First Federal Savings and Loan Ass'n*, 554 F. Supp. 447 (N.D.N.Y. 1981) (fact that another creditor granted credit to applicant does not alone establish violation), *aff'd*, 697 F.2d 302 (2d Cir.1982); *Markham v. Colonial Mortgage Service Co.*, 605 F.2d 566 (D.C. Cir. 1979) (violation of act to aggregate income of married couples but not of unmarried partners, under circumstances of case). Self-testing to detect any discrimination is protected as confidential. Regulation B, 12 C.F.R. § 202.15.

Under the law, discrimination can be overt, such as refusing to lend to persons over seventy, or indirect, such as taking action that is neutral on its face but that has disproportionate impact on a protected class and cannot be justified in relation to other action, equally effective, that has a lesser discriminatory impact. *See* Regulation B, 12 C.F.R. § 202.6(a) n.2. A good example of this "effects test" is § 202.6(b)(4) of Regulation B, which prohibits taking into account whether the applicant has a telephone in the applicant's name (many married women do not), but allows consideration of whether there is a telephone in the applicant's residence (equally predictive of creditworthiness with a lesser impact on married women). Properly constructed credit scoring systems also are allowed even though their use constitutes a diversion from a purpose of the act, which is to focus on the particular applicant. *See id.* §§ 202.2(p), 202.6. An exception to the basic rule exists for special purpose credit programs that

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benefit some types of economically or otherwise disadvantaged applicants, but not other types of applicants. *Id.* § 202.8.

In addition to the basic rule, Regulation B contains more specific provisions against discrimination in a number of cases. Thus, generally there are restrictions on the information that may be obtained based on the theory that if you don't know, you can't discriminate (*see* Regulation B, 12 C.F.R. § 202.5); on using statistics, assumptions, and credit history, and on discounting income (*see id.* § 202.6); and on denying credit if insurance is unavailable, denying individual accounts, requiring the use of a certain name and requiring reapplications or taking other action at the time an applicant reaches a certain age or retirement, or because of a change in the applicant's name or marital status, and requiring spouses to co-sign without regard to the applicant's creditworthiness (*see id.* § 202.7). There are exceptions to the "information bars" under § 202.5—a creditor can obtain otherwise prohibited information to self test and a creditor extending secured credit primarily for the purpose of purchasing or refinancing a home loan must collect data on the race or national origin, sex, marital status, and age of the applicant. There also are differences in how the prohibited bases are applied. For example, provisions against discrimination on the basis of sex or marital status are more inclusive than those involving age. *Compare* Regulation B, 12 C.F.R. § 202.6(b)(2) *with* 12 C.F.R. §§ 202.6(b)(3) *and* (6).

The ECOA imposes several affirmative actions upon creditors. A creditor must (1) provide a copy of an appraisal if the credit applied for will be secured by a dwelling (Regulation B, 12 C.F.R. § 202.14); (2) supply notice of action taken on an application and, if the action is adverse, such as a denial of credit, make the reasons for denial available to the applicant (*id.* § 202.9); and (3) furnish information on some credit transactions in a designated way (*id.* § 202.10).

G. FAIR DEBT COLLECTION PRACTICES

The CCPA also focuses specifically on the concluding end of the credit spectrum involving the collection of consumer debts by a third-party debt collector (including a lawyer), as opposed to the

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creditor itself, in the Fair Debt Collection Practices Act. The act covers collection practices; it generally does not cover legal process to collect a debt by way of judgment, execution, garnishment, and the like, which are left undisturbed to state law. 15 U.S.C. § 1692(n). Although the act does not cover creditors collecting their own debts owed by consumers (unless the creditor makes it appear another person is the collector, as by using a different name), the debt collection activities of actual creditors may be covered under the Federal Trade Commission Act, under state deceptive practices acts, and under particular parts of state credit codes (*see, e.g.*, 1974 Unif. Cons. Credit Code § 5.108). Common-law theories based on policies of privacy and against harassment may also apply. *See, e.g., Munley v. ISC Financial House, Inc.*, 584 P.2d 1336 (Okla. 1978). As used in the act, the term “debt” is very broad, and has even been held to include the obligation arising from a bounced check and a condominium fee.

The act contains a provision for administrative enforcement much like those elsewhere in the CCPA (*see* 15 U.S.C. § 1692(l)), but the real threat comes from a private right of action in § 1692(k) for actual damages, statutory damages, and recovery of attorneys’ fees. *See Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982), where the court found that statutory damages were available even without a showing of actual damage. There has been a huge amount of litigation under the act, even though its private-action provision is structured much like those in other acts under the CCPA that have resulted in less litigation. Probably this has occurred because a number of the statutory protections against excessive remedial action derived from experience in the context of TILA are not included in the act, and because, like TILA, the asserted violations need not be raised by a suit by the consumer, but rather can constitute one more “defense” when an action to collect the debt occurs by the creditor.

The main provisions of the act include limitations on communications with the debtor and with third parties (15 U.S.C. §§ 1692b, 1692c); a prohibition of harassment or abuse, such as the use or threat of use of violence (*id.* § 1692d) *but see Hulse v. Ocwen Fed. Bank., FSB*, 195 F.Supp.2d 1188 (D. Ore. 2002), where the court held that continuing to seek legal remedies against a

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debtor did not fall under the “cease communications rule” of the CCPA); prohibition of false, deceptive, or misleading means, such as false representations that the debt collector is vouched for, bonded, or affiliated with the United States or any state government (*id.* § 1692e); and the outlawing of unfair practices, such as the collection of any amount over what the consumer expressly authorized by agreement or that is allowed by law (*id.* § 1692f). There also are important provisions (1) requiring a debt collector to provide the consumer with initial information about the debt and rights under the act and to validate the debt if it is disputed (*id.* § 1692g); (2) sanctioning deceptive forms (*id.* § 1692j); and (3) restricting venue to places convenient to the consumer for actions to collect debts (*id.* § 1692i).