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Military Lending Act – Update

The CFPB, DOD, and DOJ have recently weighed in on the MLA debate regarding the Military Lending Act exemption for vehicle purchase money loans. Through amicus briefs filed with the 4th Circuit Court of Appeals, these federal agencies that are generally responsible for interpreting and enforcing the MLA took the position that the financing of GAP insurance along with the financing of a vehicle was essentially two loans rolled into one – a loan for GAP insurance, which is not exempt, and a loan for the purchase of the vehicle, which is exempt. The agencies argue in their brief that lenders should not be able to evade the responsibilities of the MLA by combining these two loans into a "hybrid" loan. This brief comes as somewhat of a surprise, given the DOD's prior withdrawal of the portion of its interpretive rule addressing this specific issue. We will monitor this case to see how the court interprets the MLA's vehicle purchase money exemption in light of this new analysis from the CFPB, DOD, and DOJ.

California Brings Back COVID-19 Supplemental Paid Sick Leave

On February 9, 2022, Governor Newsom signed SB114, requiring employers with 26 or more employees to provide up to 80 hours of COVID-19 supplemental paid sick leave ("2022 SPSL"). The law went into effect on February 19, 2022, but applies retroactively to January 1, 2022, and expires on September 30, 2022. Covered employees are entitled to 2022 SPSL that is **in addition to** leave previously provided under state and federal law.

The 2022 SPSL law provides two separate banks of leave, each of up to 40 hours. The first bank of 2022 SPSL provides up to 40 hours to a covered employee who cannot work or telework due to any of the specified reasons, including caring for themselves, caring for a family member, or vaccine related. The second bank of 2022 SPSL, up to 40 hours, is available only if an employee or a family member for whom they are providing care tested positive for COVID-19. For leave under the second bank, SB 114 authorizes employers to require proof of a positive test before granting the leave.

Unlike the 2021 law, which required employers to pay the leave taken at the highest rate of the listed calculations, the 2022 SPSL law revises the rate of pay requirement to align with regular paid sick leave and requires employees to be compensated based on their "regular rate of pay." Employers are not required to pay more than $511 per day and $5,110 in the aggregate to a covered employee for 2022 SPSL (but the covered employee may utilize other paid leave available to receive what they would normally earn if the cap were reached).

The 2022 SPSL law requires employers to provide employees with a notice detailing the amount of 2022 SPSL that the employee has used during the applicable pay period on their itemized wage statements. Of note, the 2022 SPSL law differs from the 2021 law in that the paystub must list what has been used instead of what is available to use.

Lastly, under California law, employers are required to display the required poster issued by the Labor Commissioner about 2022 SPSL in a place at the worksite where employees can easily read it.

WCAG 2.0 or 2.1?

Recall that in 2017 we saw an influx of website accessibility cases, many of which were brought against financial institutions, and it appears there has been a recent surge in demand letters and the filing of such lawsuits relating to website accessibility. Notably, in a recent settlement between the DOJ and Rite Aid Corporation concerning its online COVID-19 portal, which was allegedly not accessible to some people with disabilities (i.e., the portal did not show screen reader users any available vaccine appointment times, and people who use the tab key instead of a mouse could not make a choice on a consent form that they needed to fill out before scheduling their appointment), the DOJ required that Rite Aid modify the portal (including the forms for scheduling an appointment to get the vaccine) to conform to, at minimum, the Web Content Accessibility Guidelines (WCAG) 2.1, Level AA. Under the settlement, Rite Aid also must regularly test the pages of its website about vaccine scheduling and information and quickly fix any problems that keep people with disabilities from being able to use these pages. While earlier cases brought awareness for companies about website accessibility, many took steps to update their digital platforms to bring them up to compliance with the then-current WCAG 2.0. However, companies will likely be expected to adhere to WCAG 2.1, Level AA as the new benchmark standard. That said, financial institutions are advised to be wary and monitor digital platforms to ensure compliance as the website accessibility guidelines continue to evolve. Financial institutions should also have their IT team explore the feasibility of blocking IP addresses from online tools used by plaintiff firms to detect WCAG noncompliance.

CFPB Compliance Bulletin – EFT Compulsory Use Prohibition and Government Benefit Accounts

A February 2022 CFPB compliance bulletin provides important reminders of the EFTA's prohibitions on compulsory use. The EFTA and Regulation E provide that no person may require a consumer to establish an account for receipt of an electronic fund transfer with a particular financial institution as a condition of receipt of a government benefit. A similar prohibition extends to receipt of salary from an employer.

The compulsory use prohibition does apply to a "government benefit account"—an account established by a government agency for distributing benefits to a consumer electronically. Having said that, please note that a government benefit account does not include an account for distributing needs-tested benefits in a program established under State or local law or administered by a State or local agency. Nonetheless, all accounts used to distribute benefits for federally administered programs (including Federal needs-tested programs), for example, accounts used to distribute Social Security and Social Security Disability Insurance, as well as non-needs tested State and local government benefit programs, for example, accounts used to distribute unemployment insurance and child support, remain covered by Regulation E.

In sum, the compulsory use prohibition ensures that consumers receiving the government benefits described herein have a choice with respect to how they receive their funds. Importantly, the EFTA and Regulation E appear to be a point of emphasis for the CFPB, and as such, financial institutions are well advised to review procedures and practices in these areas.

Special Purpose Credit Programs

The NCUA, in conjunction with other regulatory agencies including HUD, the Federal Housing Finance Agency, and the DOJ, recently issued an interagency statement. The interagency statement explains the permissibility under ECOA and Regulation B for financial institutions to establish special purpose credit programs (SPCPs) to extend credit services to specified classes of people. For credit unions, SPCPs may be established pursuant to any credit assistance program offered by a not-for-profit organization to benefit its members or an economically disadvantaged class of persons. It appears the intent was primarily to encourage financial institutions to explore opportunities to develop SPCPs. Financial institutions considering implementing an SPCP should carefully review the interagency statement and work with counsel for compliance with ECOA and Regulation B. The statement also indicates that institutions may contact the NCUA or state regulator for guidance.

Cares Act Expanded Eligibility for Subchapter V Cases May End in March 2022

The CARES Act expanded the ability of small businesses to take advantage of expedited relief under the Bankruptcy Code by more than doubling the debt limit for eligibility under Subchapter V of Chapter 11 of the Bankruptcy Code (Subchapter V). Subchapter V was added to the Bankruptcy Code in September of 2019 with the passage of the Small Business Reorganization Act of 2019 (SBRA). The SBRA was intended to make Chapter 11 bankruptcy more accessible and less expensive by establishing an elective process for small business debtors under Chapter 11 similar to the bankruptcy process under Chapters 12 and 13 (for family farmers and fishermen, and for individuals, respectively). As originally passed, the SBRA limited the availability of its relief to those debtors having noncontingent liquidated debt of approximately $2.7 million. The CARES Act raised that limit to $7.5 million; however, the increase was originally scheduled to sunset one (1) year after the enactment of the CARES Act, with the debt limit then reverting to the pre-CARES Act amount, but the provision was extended. Its current expiration date is **March 28, 2022**, at which time the Subchapter V debt limit will revert from $7,500,000 back to the original amount of $2,725,625. It is uncertain whether Congress will extend this provision before it expires.

Field of Membership "Police"?

The saying goes: "There aren't any FOM police… until there are." In recent examinations, we have observed the California DFPI carefully examining FOM and memberization practices for California state-chartered credit unions. This includes:

- examining processes for memberization under associational common bonds (is the member really a member of the association before loan funding?);
- examining SEG lists under streamlined processes for proper notice to the DFPI and inclusion in appendices to Bylaws; and
- taking hard-line approaches on interpretations of FOM language.

While we have more recently seen some FOM flexibility from the NCUA's CURE office for federal credit unions, significant variability still exists among regions in the examination process.

Credit unions are well advised to "garden" their FOMs—review particularly important and prominent groups to ensure that they have not changed names or merged. Keep in mind that in any name change request, the DFPI may ask for proof that the change of a FOM group's name is not an "expansion" requiring a new FOM application.

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