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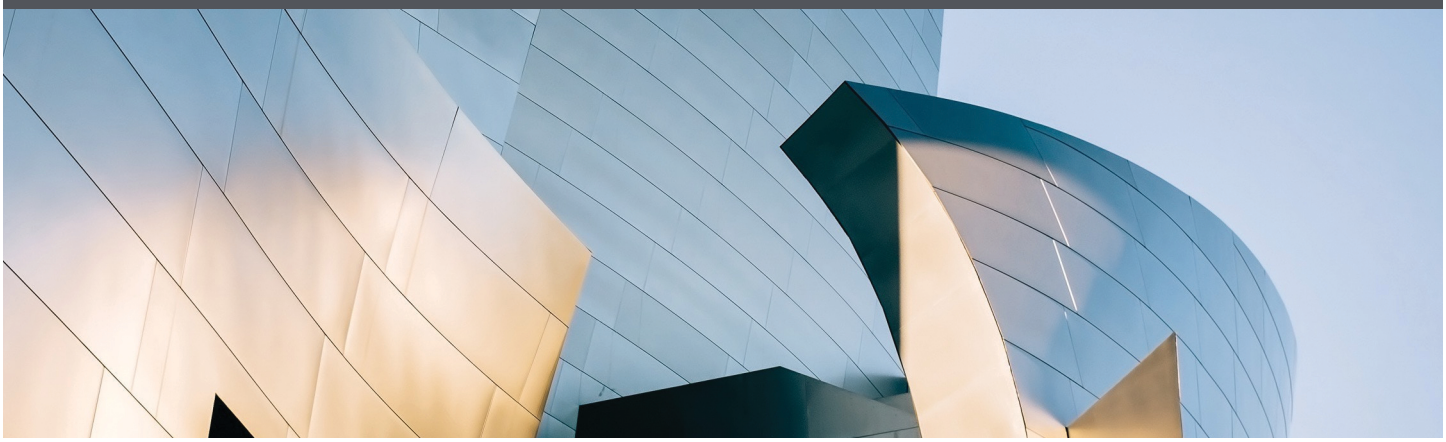

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CFPB Affirms Application of ECOA to Borrowers of Credit in Addition to Applicants

The Consumer Financial Protection Bureau ("CFPB") issued an Advisory Opinion on Monday affirming that the Equal Credit Opportunity Act ("ECOA") and Regulation B protect not only credit "applicants," but also those who ultimately qualify for and receive credit. Advisory Opinions are issued by the Bureau to provide guidance to the consumer finance industry on the application and interpretation of relevant federal laws and regulations. Creditors should review their fair lending policies to ensure that discrimination prohibited by ECOA and other fair lending laws is avoided in *all* stages of a credit transaction.

Congress enacted ECOA in 1974 to address "widespread discrimination…in the granting of credit to women." Accordingly, the statute originally prohibited discrimination against applicants for credit on the basis of "sex or marital status with respect to any aspect of a credit transaction," but was subsequently amended to also prohibit discrimination on the bases of race, color, religion, national origin, age, and the receipt of public-assistance income. The statute's implementing regulations (Regulation B) made clear that ECOA was intended to prohibit discrimination not only against applicants but also against recipients of credit by including "any person to whom credit is or has been extended" in the definition of "applicant."

In its Advisory Opinion, the CFPB notes that, despite the long-standing interpretation of ECOA to apply to recipients of credit, some creditors fail to apply ECOA and Regulation B to circumstances that occur after credit has been granted. They also fail to issue ECOA's required "adverse action" notices in connection with certain circumstances that can arise after credit has been granted. "Adverse action" notices must contain a statement of reasons for a decision made by a creditor. The requirement is intended to both educate and protect consumers, as creditors are effectively discouraged from engaging in discriminatory practices if they must explain the reasons for their decisions.

The CFPB emphasizes that the language in ECOA prohibiting discrimination "with respect to *any aspect* of a credit transaction" implies that the law applies to all stages of a credit transaction. The statute defines an "adverse action" as including "revocation of credit" as well as a "change of the terms of an existing credit arrangement," which clearly relate to circumstances following a debtor's receipt of credit. Also, the CFPB notes that ECOA's private right of action, which allows aggrieved "applicants" to bring suit against creditors who violate ECOA or Regulation B, cannot be construed to apply to applicants only, as a violation is most likely to occur after a decision has been made on an application.

The CFPB also notes that the legislative history of ECOA and Regulation B support this interpretation of the meaning of "applicant," as Congress was aware that Regulation B defined "applicant" to include "any person to whom credit is or has been extended" when it was issued in 1975, yet it took no action to change this definition when it modified and expanded ECOA the following year. The Advisory Opinion also suggests that, without this interpretation of ECOA, creditors would have "obvious paths to evasion" of the statute, such as through purposely granting and subsequently revoking credit to a borrower on a prohibited basis. Finally, the CFPB noted that federal courts that have decided this issue have also favored this interpretation of the statute.

Creditors and other lenders should expect to see a continued expansion of the CFPB's supervisory and enforcement activity in its ongoing efforts to ensure fair access to credit for all consumers.

For further information, please contact Jonathan K. Moore or Louise Bowes Marencik, or a member of Blank Rome's Financial Institutions Litigation and Regulatory Compliance ("FILARC") group.

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