Center for Regulatory Effectiveness

February 1, 2007

MEMORANDUM OF LAW

SUBJECT: Applicability to all forms of consumer credit, including credit cards and installment loans, of the new legislative limitations on consumer credit extended to members of the armed forces or their dependents

The issue to be addressed is whether this new statute[1] clearly covers "consumer credit" extended via all means, including credit cards and installment loans, other than those means expressly excluded, or whether, because the statute is ambiguous on what is covered, the Secretary of Defense has discretion to interpret, through the implementing regulations authorized by the statute, the term "consumer credit" to exclude certain types of credit mechanisms, including consumer credit extended through credit cards and installment loans, and related interest and fees.

The Plain Language of the Statute

General Principles

We start, as always, with the plain language of the statute. The full text is in Attachment I. If the statute is clear as to what is covered, there is no resort to legislative history or any other extrinsic aids to statutory interpretation. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121 S.Ct.1302, 1311 (2001); *Ratzlaf v. United States*, 510 U.S. 135, 147, 114 S.Ct. 655, 662 (1994); *CBS, Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001).

A related principle was established in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778 (1984). *Chevron* set up a two-part process for statutory interpretation in cases in which agency discretion to interpret the statute is at issue. The first step is to examine the express statutory language. If Congress "has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. Under step one, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id*. at 843 n. 9. If the court determines that the statute is ambiguous, and Congress has explicitly or impliedly left it to the agency to fill the "gap" and clarify the ambiguity, step two is to ask whether the agency interpretation is a permissible construction -- *i.e*., a reasonable construction even if not the one the court or someone else would determine to be the most reasonable construction. *Id*. at 843. A court does not address step two unless it finds an ambiguity or gap under step one. *State of New York v. U.S. Envtl. Prot. Agency*, 443 F.3d 880, 884 (D.C. Cir. 2006).

[1] Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, Oct. 17, 2006 (adding a new section 987 to title 10, chapter 49, of the United States Code).

At this time, although there is no agency interpretation yet at issue, it is appropriate to examine the statutory language, including the overall statutory context, to determine whether the Secretary of Defense has discretion to adopt an interpretation that excludes from coverage of the statute credit cards, installment loans, or other consumer credit instruments -- in other words, whether it is possible to even move from step one of *Chevron* to step two in view of the plain language of the statute.

Key Language and Provisions

The legislation (hereafter referred to as "section 670" or "the statute") covers terms of "consumer credit" extended to the military or dependents by a "creditor". Subsection (c), on mandatory disclosures, states that it applies to "**any** extension of consumer credit (including **any** consumer credit originated or extended through the internet)" (emphasis added). Subsection (e) makes it unlawful for "**any** creditor" (emphasis added) to impose certain terms. Subsection (h), directing the Secretary of Defense to prescribe implementing regulations, requires that the regulations establish the disclosures required of "**any** creditor" (emphasis added) "consistent with the provisions of this section." Subsection (i)(5) provides a definition of "creditor" (as one "in the business" of providing consumer credit), and allows the Secretary to establish additional criteria for the definition of "creditor" in the regulations authorized by subsection (h).

Subsection (i)(6) provides a definition of "consumer credit" that specifies two exceptions -- a residential mortgage and a loan used to procure a car or other personal property, with the loan secured by the property -- and otherwise provides that the term will have the meaning provided in the regulations issued by the Secretary. Other than in these two exceptions, and the reference to consumer credit originated or extended through the internet, there is no mention of any specific forms of "consumer credit", such as credit cards, installment loans, or payday advances.

Under subsection (h), the Secretary is directed to define "creditor" and "consumer credit", and to provide "[s]uch other criteria or limitations as . . . [he] determines appropriate"; however, those definitions and criteria or limitations must be "consistent with the provisions of this section [*i.e.*, section 670]."

The use of the term "any" with regard to "consumer credit" and "creditor", and the specification of two exceptions to the meaning of "consumer credit", together with the absence of any other reference to particular forms of credit, are of particular significance under federal caselaw finding that statutory language had a plain meaning. There is considerable and consistent caselaw addressing whether Congress' use of the term "any" means any and all, without exception. There is also considerable caselaw on the statutory construction maxim of "*inclusio unius est exclusio alterius*" (to include one is to exclude the other) that is consistent with regard to specified exceptions that must be considered in light of the two specified exceptions to the definition of "consumer credit".

The Importance of the Term "Any"

The federal courts, including the Supreme Court, have held that use of the term "any" clearly indicates an unambiguous Congressional intent to be all-inclusive, absent specific

limitations elsewhere in the statute or unless such a reading would result in absurd, farfetched, or anomalous outcomes or violate commonsense presumptions. Congress is presumed to be aware of this body of caselaw when it drafts legislation.

A leading case is *United States v. Gonzales*, 520 U.S. 1, 117 S.Ct. 1032 (1997), in which the Supreme Court held that the term "any" in "any other term of imprisonment" (in a criminal sentencing statutory provision) had an "expansive" meaning in covering both State as well as federal prison sentences. The Court concluded that because Congress did not add any language limiting the term "any", it must read "any" as "all". *Accord, United States v. Monsanto*, 491 U.S. 600, 606-09, 109 S.Ct. 2657, 2661-63 (1989) (statutory language providing for forfeiture of "any property" was plainly all-inclusive, especially when read with other statutory language); *State of New York v. U.S. Envtl. Prot. Agency*, 443 F3d. 880, 884-90, and cases cited therein (D.C. Cir. 2006) (in the absence of Congressional intent to the contrary, "any" physical change pertaining to Clean Air Act new source review must be read as all-inclusive, and to avoid a literal interpretation at *Chevron* step one, it must be shown that as a matter of historical fact, logic, or statutory structure, Congress did not mean what it said when it used the term "any"); *CBS, Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1222-26 (11th Cir. 2001) (the term "any" means "all" and is not ambiguous, and in the absence of limiting language no resort to legislative history is justified); *United States v. Wildes*, 120 F.3d 468, 469-71 (4th Cir. 1997) (the term "any" is expansive and unambiguous unless a literal reading would produce a result demonstrably at odds with the intent of the drafters or would produce absurd or futile results). *And see Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 31-32, 125 S.Ct. 385, 397 (2004) (interpretation of "any" in maritime contract clause under federal law as all-inclusive).

An expansive reading of "any" does not apply if other provisions of the statute, or its overall context, show clearly that the expansive meaning was not intended. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357-58, 114 S.Ct. 1599, 1603-04 (1994) (statutory provision applying to delay in federal arraignment of a person in the custody of "any" law enforcement officer or agency did not include time in the custody of non-federal officers or agencies when the rest of the statute was considered because there could be no "duty" to arraign federally until there was an arrest for a federal offense); *Small v. Unites States*, 544 U.S. 385, 388-89, 125 S.Ct. 1752, 1754-55 (2005) (although "any" usually demands a broad interpretation, such an interpretation is not appropriate when it would violate commonsense presumptions, and "convicted in any court" did not mean convicted in a court outside the U.S. because it is presumed that when Congress legislates it legislates with domestic concerns in mind and not with extraterritorial application); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132-41, 124 S.Ct. 1555, 1561-66 (2004) (reading a prohibition applying to telecommunications service provided by "any entity" to preempt state law would be "farfetched" in view of the Constitutional sensitivity of the issue in the absence of some unmistakably clear indication that Congress intended such a result).

In other words, use of the term "any" indicates Congressional intent for an all-inclusive and unambiguous coverage under *Chevron* step one unless there is some very clear indication of Congressional intent to the contrary that is apparent from the statute itself or logic or precedent.

Not only is there no indication in all of section 670 or logic or precedent that the term "any" modifying "extension of consumer credit" or "creditor" should not be given its ordinary

expansive meaning, thereby keeping the analysis within step one of Chevron (plain meaning), but other portions of the statute reinforce the expansive reading.

The Importance of the Specified Exceptions to "Consumer Credit"

The statutory definition of "consumer credit" in subsection (i)(6) states that it specifically does not include, and regulations otherwise defining it cannot include, "(A) a residential mortgage, or (B) a loan procured in the course of purchasing a car or other personal property, when that loan is offered for the express purpose of financing the purchase and is secured by the car or personal property procured." These specific exclusions clearly bring into play the long-standing statutory construction maxim (or canon) of "*inclusio unius est exclusio alterius*." The literal translation of this Latin is "to include one is to exclude the other." In other words, if Congress has specifically included one thing in a statute, it is inferred that it decided to exclude (or not to include) another (related) thing.

This maxim has been invoked and addressed in thousands of federal cases, sometimes being found applicable and sometimes not. However, that it has sometimes been found inapplicable does not mean that it has lost validity, and the courts have often taken pains to clarify its correct application. In particular, the U.S. Supreme Court has clarified the maxim in recent cases. Those cases caution that the maxim usually only has correct application when Congress has specified more than one in a series of related things, thereby giving rise to the commonsense inference and conclusion that Congress gave careful consideration to what should be included and excluded, and then set out the specific inclusions or exclusions. The most recent Supreme Court explanation of the maxim and its previous cases was in *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 168-69, 123 S.Ct. 748, 760 (2003):

> We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it. . . . As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence. [Citations omitted]

The stated exceptions to the statutory definition of "consumer credit" in subsection (i) clearly come within this Supreme Court guidance. Residential mortgages and loans secured by the purchased personal property are stated as explicit exceptions to "consumer credit", so Congress clearly considered what to exclude, and did not exclude anything else, such as unsecured installment loans or credit card transactions. And the two specified exceptions are clearly members of an "associated group or series", justifying an inference that Congress deliberately chose what to exclude. Moreover, the specific inclusion of "any consumer credit originated or extended through the internet" as a type of credit within "any extension of consumer credit" in subsection (c) strengthens the inference that Congress gave careful thought

to what to include or exclude and deliberately chose to exclude only those two types of "consumer credit" specified in subsection (i).[2]

Moreover, the recent case of *State of New York v. U.S. Envtl. Prot. Agency* in the D.C. Circuit, 443 F.3d 880, 887 (2006), illustrates how a statute that uses the term "any" and then provides an express exclusion, adds force to an inference that everything not excluded was intended to be included. In that case, as a result of application of the expansive interpretation of "any" combined with application of the maxim, the court determined that the Congressional intent was clear from the language of the statute and there was no justification for proceeding to step two of a *Chevron* analysis. *Id*. at 889-90.

The Statutory Context and Related Provisions

As noted, the usual presumption that attaches to use of the term "any", and the accepted application of the maxim *inclusio unius est exclusio alterius,* will give way to strong evidence of Congressional intent to the contrary that is evident from the statute. This means that consideration must be given to other provisions of the statute, its structure, and its obvious intent. In other words, are there other aspect of the statute that indicate clearly that Congress intended to exclude from its coverage certain types of consumer credit, such as credit card transactions and installment loans for consumer goods and not secured by the goods, other than those specified exclusions in subsection (i)?

One might argue that because section 670 requires that creditors shall provide certain disclosures orally as well as in writing under subsection (c), the statute must contemplate face-to-face transactions and such a scenario is not compatible with credit cards because cards are obtained and payments are ordinarily made by mail or electronically. Such an argument will not stand up to the language of the statute or common sense, however. Subsection (c) specifically provides that it covers "consumer credit originated or extended through the internet." Such transactions are subject to the same argument, yet they are covered. It is common knowledge that a multitude of consumer products may be purchased with a credit card through the internet, and major credit cards are offered and can be obtained through online application.[3] Credit cards

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[2] See also *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160 (1993) (specification of two types of cases in which more particularized pleading would be required under the Federal Rules of Civil Procedure, along with the encompassing statement that generally all that would be required is a "short and plain statement", gave rise to application of the maxim). And see 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (6th ed. 2000) ("The maxim . . . has force only when the items expressed are members of an associated group of series, justifying the inference that the items not mentioned were excluded by deliberate choice. . . . The maxim . . . can be overcome by a strong indication of contrary legislative intent or policy. . . . The enumeration of exclusions . . . indicates that the statute should apply to all cases not specifically excluded." [Footnotes omitted]).

[3] See, *e.g.*,
http://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/card_acquisitions/unsolicited/page/PFSCreditChooseCategory&cat=military (Chase);
http://www.citicards.com/cards/wv/filter1Search.do?constituent=CONSUMER&x=22&y=10 (Citibank),
http://www.discovercard.com/apply/student/ (Discover);
https://www124.americanexpress.com/cards/cda/dynamic.jsp?name=CCSGMultiCardLandingPage2&typ

are marketed online to the military specifically, and in competition with other types of credit.[4] Moreover, credit card providers already give oral disclosures in several contexts. New or reissued cards come with an adhesive strip notifying the customer to call a toll-free number for activation. Depending on the provider, some offer recorded messages on terms, etc. Some have customers speak with a live operator. In other circumstances, if a customer purchases an add-on feature such as credit protection, the customer calls a toll free number and a service representative reads the terms and conditions, and the communication is recorded. The specific inclusion of consumer credit originated or extended through the internet indicates that the law does not contemplate face-to-face transactions despite the requirement for oral disclosure of terms in the same subsection (c). The requirement for oral communication of terms for providers of consumer credit in other than face-to-face situations might pose logistical issues, but they are clearly surmountable through the use of telephone communications (including recorded messages).

It might also be argued that since the ordinary interest rates on credit cards are typically under 36 percent, the statute was not aimed at them. However, the statute does not cover just interest rates in the usual sense; rather, it defines "interest" in subsection (i)(3) to include "fees, service charges . . . and any other charge or premium." Such charges can easily take credit cards payments over the 36 percent maximum and into APRs over 400 percent.[5] Attachment II illustrates high APRs that can result from credit cards as well as some other types of consumer loans.[6]

Section 670 was clearly designed to protect military servicemembers and their dependents from **any** credit charges above 36%, and it would be anomalous, absent some clear indication of Congressional intent to the contrary, to construe the statute to exclude types of credit with charges above 36% that are of a type not specifically excluded from the definition of "consumer credit".

Other provisions of section 670 also have application to credit cards as well as other forms of consumer credit. Subsection (e) also makes it unlawful for a creditor to use a "method of access to a deposit, savings, or other financial account maintained by the borrower", and credit card providers (and other lenders) routinely provide for automatic withdrawal methods to

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e=intBenefitDetail (American Express); https://www.paypal.com/us/cgi-bin/webscr?cmd=xpt/cps/general/PPPlusCC-outside (PayPal); http://www.creditcards.com/ (multiple) (all accessed January 2007).

[4] See, *e.g.*, http://www.armedforces.net/Detailed/1984.html (accessed January 2007).

[5] It should also be kept in mind that currently we are in a low-to-moderate interest rate environment, and even in this environment some sub-prime or "penalty" credit card rates (imposed due to late payment or "universal default") can approach or even exceed the 36 percent statutory maximum.

[6] And see http://deseretnews.com/dn/view/0,1249,650224882,00.html ("Do banks overcharge?: Some 'deposit advances' resemble high-interest payday-type loans", Deseret Morning News, Jan. 22, 2007) (accessed January 2007).

obtain payments due.[7] Subsection (e) prohibits creditors from requiring borrowers to waive their rights to legal recourse and submit to arbitration, and credit card agreements often require just that unless the cardmember reads the fine print and rejects the arbitration agreement in writing within 30 days.[8] Subsection (e) also prohibits consolidation of credit with the same creditor, a transaction that could often apply to credit cards and installment loans.

On the other hand, there are no provisions of section 670 that do not make sense for credit cards or some other forms of consumer credit while making sense for some others. The overall language and structure of the statute is consistent with an interpretation that when Congress said "any extension of consumer" credit and "any creditor", with only those exceptions that are stated, it meant what it said.

Since this is the case, one might then ask what is the purpose of giving the Secretary regulatory authority to define "consumer credit" and "creditor". Are there areas remaining in which the Secretary can exercise discretion in those definitions? The answer to this is yes. The term "consumer" does not have a self-evident definition. While everyone might be considered a "consumer", credit for "consumer" purposes would likely exclude credit extended for business, investment, gambling, or other purposes. The Federal Reserve found it necessary to adopt a definition of "consumer credit" for purpose of its Truth in Lending regulations that covers credit extended "to a consumer primarily for personal, family, or household purposes."[9] The Secretary's definition of "creditor" would have to address the issue of how to define whether an entity is "in the business" of extending consumer credit, as has the Federal Reserve effectively in its Truth in Lending regulations.[10]

Legislative History

Although the above analysis appears to establish indisputably that section 670 covers all forms of consumer credit other than those types specifically excepted, and therefore it is unnecessary to resort to the legislative history -- and the legislative history cannot override the

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[7] See, *e.g.*, http://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/card_servicing/account_access/page/epay_landing1 (accessed January 2007). It might be argued that that the prohibition against automatic electronic withdrawals from a borrower's bank account in subsection (e)(5) does not make sense when applied to credit cards because it is a convenience to military borrower's rather than something they need to be protected from. However, such an argument could apply equally to other forms of consumer credit and would appear to amount simply to simply an argument that Congress was unwise to insert such a provision, which is a policy/political argument, not a legal argument.

[8] See, *e.g.*, https://discovercardapplication.com/terms.aspx?type=gas&source=&tid= (accessed January 2007).

[9] 12 CFR § 226(12).

[10] 12 CFR § 226(17).

plain language of the statute -- courts nevertheless sometimes look to the legislative history to confirm that what appears evident from the plain language is indeed what Congress intended.[11]

The only Congressional report explaining section 670 is the conference report.[12] The short explanation in the report, just like the statute, does not refer to any particular forms of credit, it refers only to "consumer credit loans", "credit", and "creditors who extend credit".

Although remarks by individual Members of Congress carry little or no legal weight as legislative history, in this case they do show that a number of Members considered credit card companies to be engaging in "predatory" practices when they commented on other pending consumer credit legislation at the same time they were considering legislation pertaining to restrictions on lending to the military .[13] The same is true for installment loans extended to the military.[14]

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[11] See, *e.g.*, *CBS, Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1229 n.9 (11th Cir. 2001) ("'Notwithstanding that well-recognized and bedrock principle [of not advancing to legislative history when statutory text is clear], sometimes judges who find that legislative history supports and complements the plain meaning of statutory language cannot resist the temptation to set out that history. We have given in to that temptation more than once.'" [Citation omitted]).

[12] H.R. Rep. No. 109-702, at 750, Sept. 29, 2006 (Conf. Rep.).

[13] 151 Cong.Rec. H2064, April 14, 2005 (Rep. Sensenbrenner commenting on bankruptcy legislation: "[I]f anyone is "gaming' our bankruptcy system, it is the credit card companies, who have long been advocating for this bill at the same time they prey on unsuspecting customers . . . [and] there is virtually nothing in this bill that would require creditors to curb their outrageous predatory lending practices that mislead even the most educated consumers into debt."); 151 Cong.Rec. S1836, Mar. 1, 2005 (Senator E. Kennedy commenting on the Credit Card Minimum Payment Warning Act: "[T]his bill does everything the mind of the purveyors of predatory plastic could think up to make cardholders pay in full, and prevent them from getting the 'fresh start' that bankruptcy offers them."); 151 Cong.Rec. S1838, Mar. 1, 2005 ("Predatory credit card companies are doing all they can to urge unsuspecting citizens to pile up huge debts on their credit cards."); 151 Cong.Rec. S2201, Mar. 8, 2005 (Sen. E. Kennedy commenting on the Bankruptcy Abuse Protection Act and Consumer Protection Act of 2005, S. 256: "We have seen the credit card companies use a self-help remedy for the problem they create by their own indiscriminate and predatory marketing practices."); 151 Cong.Rec. H1975, Mar. 14, 2005 (Rep. Stark commenting on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256: "[W]ith all the perks they've awarded to the big credit card companies, Republicans have done nothing to ensure that they are held accountable for their role in this consumer crisis. There is nothing in this bill that stops the abusive, predatory lending that lands too many Americans in bankruptcy in the first place."); 151 Cong.Rec. H1976, Mar. 14, 2005 (Mr. Hastings commenting on the same bills as Mr. Stark, *supra*: "This legislation, masquerading as protection against bankruptcy abuse, is really a protection for credit card companies and their predatory lending practices."); 151 Cong.Rec. H2064, April 12, 2005 (Rep. McDermott: "Credit card companies are an equal-opportunity scourge. . . . The marketing is not aggressive. It is predatory. . . . Does this so-called consumer protection action [sic] do anything to address predatory credit card marketing? Nothing, nada, zippo."). Senator Dodd, during hearings on credit card practices in 2005 commented: "Credit card issuers have now become the victims of their own success and are turning credit cards into nothing less than wallet-sized predatory loans. In a time when access to credit is the easiest and cheapest, credit card companies are making more money than ever. Credit card issuers are charging usurious rates and fees and engaging, in my view, in a very serious amount of abusive and deceptive practices, which I believe will have drastic long-term consequences on our country." Hearing

Although non-Congressional statements are entitled to even less (if any) legal weight, numerous consumer organizations supported the legislation that became section 670, and commented: "[T]his important amendment would protect service members who obtain loans after they have enlisted or been mobilized, closing a major loophole in the Service Members Civil Relief Act. It also treats all lenders equally, no matter what type of loan they offer."[15]

Moreover, after the statute was enacted, various organizations with credit card provider membership also expressed the view that it covered credit cards.[16]

Before the Senate Committee on Banking, Housing and Urban Affairs, May 17, 2005, S. Hrg. No. 109-543, at 15, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:29643.pdf (all accessed January 2007).

[14] Those Congressional remarks mainly referred to Pioneer Financial Services, an installment loan provider that concentrates on the military, often using a variety of names, websites, and affiliates. 151 Cong. Rec. E1405-06, June 30, 2005 (Rep. Westmoreland: "Pioneer Financial has realized that it can prey on military customers by charging unjustifiable rates, high fees and selling them expensive and often unnecessary credit insurance, and then refinancing the loan within a year to generate more fees."); 151 Cong.Rec. E1487, July 14, 2005 (Rep. Jones: "[T]he New York Times pointed out abusive lending practices by companies like Pioneer Financial . . . . According to that paper, Pioneer charges high rates and hidden fees and has the policy of refinancing their existing loans with the first year for the express purpose of generating more fees. Unfortunately, it's not just one company like Pioneer that requires servicemembers to prey on our Armed Forces personnel."); 151 Cong.Rec. E1466-67, July 12, 2005 (Rep. Meek: "unethical lenders like Pioneer Financial that target vulnerable service members and charge unreasonably high rates and fees and sell them grossly overpriced credit insurance and who then refinance these predatory loans with the first 12 months if possible to generate more unjustifiable fees"); 151 Cong.Rec. E1450, July 11, 2005 (Rep. Davis: "I know about companies like Pioneer Financial that engage in predatory lending with high rates and hidden fees and frequently refiance [sic] loans to generate more fees for the lender while providing little or no benefit to the service member.") (all accessed January 2007).

[15] Letter dated July 26, 2006 to Senators Warner, Hunter, Leven, and Skelton from 38 representatives of military, consumer, and legal entities. Available at http://www.responsiblelending.org/pdfs/S2766-Talent_Floor_Group_Letter.pdf (accessed January 2007). The Service Members Civil Relief Act covers credit cards. See, *e.g.*, http://www.uscg.mil/legal/la/topics/sscra/about_the_sscra.htm (accessed January 2007)

[16] See the American Bankers Association analysis of section 670, available at http://www.aba.com/aba/documents/winnews/DoD_PayDayWhitePaper_101206.pdf ("The following are just a few examples of the types of traditional products that are thrown into jeopardy by this provision: (1) cash advances on credit cards; (2) checking account overdraft protection services; (3) direct debit for payment of some loans; (4) new products developed as lower-cost substitutes for payday lending; and (5) some debt consolidation loans, including the refinancing of prior debt with the same lender at a lower rate.") (accessed January 2007); the news report of the Independent Community Bankers Ass'n on section 670, available at http://www.icba.org/publications/NewsletterDetailNWT.cfm?ItemNumber=25905#n163833 ("**Congress Caps Military Payday Lending:** . . . Late fees on credit cards are considered interest charges under the law. . . . It also requires new disclosures and limitations and covers all forms of consumer credit.")

Summary and Conclusions

The plain language of section 670, together with firmly established principles of statutory construction, and further confirmed by legislative history, establishes that section 670 covers all forms of consumer credit, including installment loans and credit cards, with the exception of those forms of credit specifically excepted (residential mortgages and personal property loans secured by the property). The authority of the Secretary to define "consumer credit" and "creditor" in regulations does not extend to allowing him to exclude certain forms of credit other than those specifically excluded by the legislation.

(accessed January 2007); and see also this statement from the American Financial Services Association, available at http://www.spotlightonfinance.org/2006/November/legislative-story3.htm ("The cap [in section 670] applies to unsecured consumer loans such as credit cards and payday advance loans, but not to mortgages or auto loans.") (accessed January 2007).

ATTACHMENT I of Memorandum of Law

John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, Oct. 17, 2006

SEC. 670. LIMITATIONS ON TERMS OF CONSUMER CREDIT EXTENDED TO SERVICEMEMBERS AND DEPENDENTS.

(a) TERMS OF CONSUMER CREDIT.—Chapter 49 of title 10, United States Code, is amended by adding at the end the following new section:

''§ 987. Terms of consumer credit extended to members and dependents: limitations

''(a) INTEREST.—A creditor who extends consumer credit to a covered member of the armed forces or a dependent of such a member shall not require the member or dependent to pay interest with respect to the extension of such credit, except as—

''(1) agreed to under the terms of the credit agreement or promissory note;

''(2) authorized by applicable State or Federal law; and

''(3) not specifically prohibited by this section.

''(b) ANNUAL PERCENTAGE RATE.—A creditor described in subsection (a) may not impose an annual percentage rate of interest greater than 36 percent with respect to the consumer credit extended to a covered member or a dependent of a covered member.

''(c) MANDATORY LOAN DISCLOSURES.—

''(1) INFORMATION REQUIRED.—With respect to any extension of consumer credit (including any consumer credit originated or extended through the internet) to a covered member or a dependent of a covered member, a creditor shall provide to the member or dependent the following information orally and in writing before the issuance of the credit:

''(A) A statement of the annual percentage rate of interest applicable to the extension of credit.

''(B) Any disclosures required under the Truth in Lending Act (15 U.S.C. 1601 et seq.).

''(C) A clear description of the payment obligations of the member or dependent, as applicable.

''(2) TERMS.—Such disclosures shall be presented in accordance with terms prescribed by the regulations issued by the Board of Governors of the Federal Reserve System to implement the Truth in Lending Act (15 U.S.C. 1601 et seq.).

''(d) PREEMPTION.—

''(1) INCONSISTENT LAWS.—Except as provided in subsection (f)(2), this section preempts any State or Federal law, rule, or regulation, including any State usury law, to the extent that such law, rule, or regulation is inconsistent with this section, except that this section shall not preempt any such law, rule, or regulation that provides protection to a covered member or a dependent of such a member in addition to the

protection provided by this section.

''(2) DIFFERENT TREATMENT UNDER STATE LAW OF MEMBERS AND DEPENDENTS PROHIBITED.—States shall not—

''(A) authorize creditors to charge covered members and their dependents annual percentage rates of interest for loans higher than the legal limit for residents of the State; or

''(B) permit violation or waiver of any State consumer lending protections for the benefit of residents of the State on the basis of nonresident or military status of a covered member or dependent of such a member, regardless of the member's or dependent's domicile or permanent home of record.

''(e) LIMITATIONS.—It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which—

''(1) the creditor rolls over, renews, repays, refinances, or consolidates any consumer credit extended to the borrower by the same creditor with the proceeds of other credit extended to the same covered member or a dependent;

''(2) the borrower is required to waive the borrower's right to legal recourse under any otherwise applicable provision of State or Federal law, including any provision of the Servicemembers Civil Relief Act;

''(3) the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute;

''(4) the creditor demands unreasonable notice from the borrower as a condition for legal action;

''(5) the creditor uses a check or other method of access to a deposit, savings, or other financial account maintained by the borrower, or the title of a vehicle as security for the obligation;

''(6) the creditor requires as a condition for the extension of credit that the borrower establish an allotment to repay an obligation; or

''(7) the borrower is prohibited from prepaying the loan or is charged a penalty or fee for prepaying all or part of the loan.

''(f) PENALTIES AND REMEDIES.—

''(1) MISDEMEANOR.—A creditor who knowingly violates this section shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

''(2) PRESERVATION OF OTHER REMEDIES.—The remedies and rights provided under this section are in addition to and do not preclude any remedy otherwise available under law to the person claiming relief under this section, including any award for consequential and punitive damages.

''(3) CONTRACT VOID.—Any credit agreement, promissory note, or other contract prohibited under this section is void from the inception of such contract.

''(4) ARBITRATION.—Notwithstanding section 2 of title 9, or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered

member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.

''(g) SERVICEMEMBERS CIVIL RELIEF ACT PROTECTIONS UNAFFECTED.—Nothing in this section may be construed to limit or otherwise affect the applicability of section 207 of the Servicemembers Civil Relief Act (50 U.S.C. App. 527).

''(h) REGULATIONS.—(1) The Secretary of Defense shall prescribe regulations to carry out this section.

''(2) Such regulations shall establish the following:

''(A) Disclosures required of any creditor that extends consumer credit to a covered member or dependent of such a member.

''(B) The method for calculating the applicable annual percentage rate of interest on such obligations, in accordance with the limit established under this section.

''(C) A maximum allowable amount of all fees, and the types of fees, associated with any such extension of credit, to be expressed and disclosed to the borrower as a total amount and as a percentage of the principal amount of the obligation, at the time at which the transaction is entered into.

''(D) Definitions of 'creditor' under paragraph (5) and 'consumer credit' under paragraph (6) of subsection (i), consistent with the provisions of this section.

''(E) Such other criteria or limitations as the Secretary of Defense determines appropriate, consistent with the provisions of this section.

''(3) In prescribing regulations under this subsection, the Secretary of Defense shall consult with the following:

''(A) The Federal Trade Commission.

''(B) The Board of Governors of the Federal Reserve System.

''(C) The Office of the Comptroller of the Currency.

''(D) The Federal Deposit Insurance Corporation.

''(E) The Office of Thrift Supervision.

''(F) The National Credit Union Administration.

''(G) The Treasury Department.

''(i) DEFINITIONS.—In this section:

''(1) COVERED MEMBER.—The term 'covered member' means a member of the armed forces who is—

''(A) on active duty under a call or order that does not specify a period of 30 days or less; or

''(B) on active Guard and Reserve Duty.

''(2) DEPENDENT.—The term 'dependent', with respect to a covered member, means—

''(A) the member's spouse;

''(B) the member's child (as defined in section 101(4) of title 38); or

''(C) an individual for whom the member provided more than one-half of the individual's support for 180 days immediately preceding an extension of consumer credit covered by this section.

''(3) INTEREST.—The term 'interest' includes all cost elements associated with the extension of credit, including fees, service charges, renewal charges, credit insurance premiums,

any ancillary product sold with any extension of credit to a servicemember or the servicemember's dependent, as applicable, and any other charge or premium with respect to the extension of consumer credit.

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''(4) ANNUAL PERCENTAGE RATE.—The term 'annual percentage rate' has the same meaning as in section 107 of the Truth and Lending Act (15 U.S.C. 1606), as implemented by regulations of the Board of Governors of the Federal Reserve System. For purposes of this section, such term includes all fees and charges, including charges and fees for single premium credit insurance and other ancillary products sold in connection with the credit transaction, and such fees and charges shall be included in the calculation of the annual percentage rate.

''(5) CREDITOR.—The term 'creditor' means a person—

''(A) who—

''(i) is engaged in the business of extending consumer credit; and

''(ii) meets such additional criteria as are specified for such purpose in regulations prescribed under this section; or

''(B) who is an assignee of a person described in subparagraph (A) with respect to any consumer credit extended.

''(6) CONSUMER CREDIT.—The term 'consumer credit' has the meaning provided for such term in regulations prescribed under this section, except that such term does not include (A) a residential mortgage, or (B) a loan procured in the course of purchasing a car or other personal property, when that loan is offered for the express purpose of financing the purchase and is secured by the car or personal property procured.''.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such title is amended by adding at the end the following new item:

''987. Terms of consumer credit extended to members and dependents: limitations.''.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), section 987 of title 10, United States Code, as added by subsection (a), shall take effect on October 1, 2007, or on such earlier date as may be prescribed by the Secretary of Defense, and shall apply with respect to extensions of consumer credit on or after such effective date.

(2) AUTHORITY TO PRESCRIBE REGULATIONS.—Subsection (h) of such section shall take effect on the date of the enactment of this Act.

(3) PUBLICATION OF EARLIER EFFECTIVE DATE.—If the Secretary of Defense prescribes an effective date for section 987 of title 10, United States Code, as added by subsection (a), earlier than October 1, 2007, the Secretary shall publish that date in the Federal Register. Such publication shall be made not less than 90 days before that earlier effective date.

(d) INTERIM REGULATIONS.—The Secretary of Defense may prescribe interim regulations as necessary to carry out such section. For the purpose of prescribing such interim regulations, the Secretary

is excepted from compliance with the notice-and-comment requirements of section 553 of title 5, United States Code. All interim rules prescribed under the authority of this subsection that are not earlier superseded by final rules shall expire no later than 270 days after the effective date of section 987 of title 10, United States Code, as added by this section.

ATTACHMENT II of Memorandum of Law

APRs ASSOCIATED WITH:
PAYDAY LOANS AND OTHER ALTERNATIVE CONSUMER FINANCE MECHANISMS

Below are ballpark estimates of the effective APR associated with four specific alternative consumer finance options. All estimates are calculated based on a $100 base loan.

APRs for payday lenders are based on a bi-weekly loan as typical and cited in the literature. APRs for credit cards and overdraft checks are based on a monthly billing cycle. Please note that this results in very conservative estimates since payday loans, if they were renewed, would be subject to a second service fee. Thus, the APRs for non-payday alternative consumer loans are about half what is estimated in the literature.

- **APR on a loan from payday lender: 520%**[1]
- **APR on a credit card cash advance with late fee**: **456%**[2]*
- **APR on a credit card cash advance with over-the-limit fee: 406%**[3]*
- **APR on a credit card cash advance with late fee and over-the-limit fee: 826%**[4]*
- **APR on a checking account overdraft: 576%**[5]*

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[1] Source: J. P. Caskey, "The Economics of Payday Lending," April 2002. Caskey states that "lenders typically charge $15 to $25 for each $100 that they advance with a two-week maturity." The CRE analysis uses the mid-point of $20 and multiplied it by 26, the same methodology Caskey uses to estimate the APR for a $200 loan. See p. 5. The study "Credit Union Payday Alternatives" published in December 2005 by the National Association of Community Credit Unions (NACCU) uses the same methodology. See p. 6.

[2] Source: $35 average late fee reported by IndexCreditCards.com in June 2006 + a $3 cash advance fee based on the 2-4% cash advance fee reported by BankRate.com.

[3] Source: USA Today, "Credit card fees can suck you in" 12/15/06 citing an average over-the-limit fee is $30.81 reported by CardWeb.com. $3 cash advance fee included in calculations.

[4] Based on a $35 late fee, $30.81 over-the-limit fee and a $3 cash advance fee.

[5] Source: J. Jerving, "Credit Union Payday Loan Alternatives," NACCU, December 2005, p. 6.
Based on $48 combined bank fee and merchant fee for a bad check. Note, this may not be a consumer loan since the bounced check was not honored – triggering the merchant fee. Thus, the original debt remains in addition to the fees.

* **Note: The calculation *excludes* the customary 30% APR interest.**