

Despite Uncertainty, Protections for Military Borrowers Remain a Priority

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The Bureau of Consumer Financial Protection (Bureau, formerly CFPB) has created uncertainty about whether legal protections for military borrowers will be actively supervised. Nevertheless, other federal and state agencies and the Bureau itself will continue to enforce compliance with the Military Lending Act (MLA) while the supervisory uncertainty lingers. And as a result of the midterm elections, Congress may also take a renewed interest in this area. Given the level of attention that military lending continues to attract, financial institutions should continue to ensure that they are providing the protections required by the MLA for their military customers.

MLA Protections

The MLA says that active-duty service members and covered dependents cannot be charged a Military Annual Percentage Rate (MAPR) higher than 36 percent on most types of consumer loans. Because the MAPR includes certain costs that are not included when a conventional Annual Percentage Rate (APR) is calculated, more loans reach the 36 percent MAPR limit than would reach a conventional 36 percent APR.

In addition, military borrowers cannot be required to submit to mandatory arbitration, give up rights provided by state or federal laws like the Servicemembers Civil Relief Act, become subject to an automatic paycheck deduction/allotment plan to repay a loan, or pay a prepayment penalty if they repay a loan early.

Compliance Oversight

Enforcement of the MLA is divided among the federal banking agencies, the Bureau, and other agencies based on the types of institutions that they regulate. But the Bureau's enabling legislation—the Dodd-Frank Act—does not treat the MLA as “consumer financial law” that explicitly triggers Bureau supervision. News reports suggest that this ambiguity has prompted the Bureau to suspend supervisory examinations of lenders for violations of the MLA.¹

This is a precarious outcome for the industry. Without recourse to its confidential examination process, the Bureau will have no choice but to open an investigation and consider public enforcement action if it becomes aware of serious MLA violations through complaints or other sources. And because a bipartisan coalition of over 30 state attorneys general (AGs)—and multiple veterans groups—have urged the Bureau to reconsider its position,² all of these eyes will be scouting for military lending practices that warrant an enforcement referral. Notably, the AGs have offered to conduct joint enforcement investigations with the Bureau.

For its part, the Bureau has asserted that it is “100 percent committed” to protecting service members and has asked for legislation to confirm its supervisory authority.³ Consistent with the expectation that it will eventually resume supervising for MLA compliance, the Bureau has not removed MLA examination procedures from the manual published on its website.⁴

INDUSTRY INSIGHTS (CONTINUED)

In the meantime, the other federal banking agencies could also move forward with their own MLA examinations. These agencies have specific authority to enforce the MLA⁵ against the institutions under their jurisdiction and have generally viewed supervision as the first step on an oversight continuum that includes enforcement. For example, the Office of the Comptroller of the Currency's (OCC's) MLA examination handbook dated May 2018 treats the enforcement authority provided by the MLA as the basis for its supervisory activity.⁶ Like other federal banking agencies, the OCC already examines banks with less than \$10 billion in assets⁷ for compliance with the MLA. These agencies could expand their existing supervisory approach to cover larger banks while the Bureau defers its examinations. Any violations they discover could be quickly referred to the Bureau for enforcement.

Last, but certainly not least, the leadership of the House of Representatives has changed as a result of the recent midterm elections. This means that Rep. Maxine Waters (D-Calif.) is expected to chair the House Financial Services Committee. Rep. Waters has said that she plans to "look carefully" at efforts to weaken the Bureau's enforcement activities.⁸ Such oversight may spur both MLA investigations and examinations.

Implications for Lenders

With all of this in mind, lenders should remain focused adhering to the requirements of the MLA and its implementing rules. Beyond adopting clear policies, procedures, and training for client-facing staff, they should ensure that their internal monitoring and testing programs encompass the MLA. Business lines, compliance departments, and internal auditors should consider the operational, strategic, compliance, and reputational risk associated with offering lending products covered by the MLA.

Any suspension of Bureau MLA examinations is likely to be offset by attention from state AGs and other federal banking agencies, as well as pressure on the Bureau itself to take assertive enforcement action where serious MLA violations emerge. ☒

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INDUSTRY INSIGHTS (CONTINUED)

¹ <https://www.nytimes.com/2018/08/10/us/politics/mulvaney-military-lending.html>

² See https://coag.gov/sites/default/files/filefield_paths/mla_letter_to_cfpb_-_final.pdf (October 23, 2018, letter from AGs to Bureau) and <https://www.law360.com/articles/1096725/ags-join-call-for-cfpb-to-keep-probing-military-lenders> (Law 360 article concluding with list of veterans groups that have called on both the Bureau and the Defense Department to vigilantly enforce the MLA)

³ <https://www.nytimes.com/2018/08/10/us/politics/mulvaney-military-lending.html>

⁴ https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092016_cfpb_MLAExamManualUpdate.pdf

⁵ 10 U.S. Code Section 987(f)(6)

⁶ OCC MLA Examination Handbook, page 1 at note 1: <https://occ.gov/publications/publications-by-type/comptrollers-handbook/military-lending-act/pub-ch-mla.pdf>

⁷ 12 U.S. Code Section 5515

⁸ <https://www.nytimes.com/2018/11/09/business/wall-street-democrats-republicans-midterm-elections.html>