

## Client Alert

---

December 31, 2014

# CFPB Weighs in on Department of Defense Military Lending Act Proposed Rule

By Leonard Chanin, Obrea Poindexter and Ryan Rogers

On December 29, 2014, the Consumer Financial Protection Bureau (CFPB) released a report, entitled “The Extension of High-Cost Credit to Servicemembers and Their Families” (“Report”). According to the CFPB, the Report provides a “snapshot” of the market for “high-cost credit products” that are not currently covered by the Military Lending Act (MLA).<sup>1</sup> The CFPB released the Report together with its comment letter to the Department of Defense (DoD) on the DoD’s recent proposal to amend the regulation that implements the MLA. The following is a high-level overview of the CFPB Report and comment letter.

### CFPB REPORT PURPORTS TO PROVIDE SUPPORT FOR EXPANDING THE MLA

The CFPB said in a press release announcing the Report that it identifies how “gaps [in the MLA] have allowed companies to offer high-cost loans to military families.” However, the Report is based primarily on data derived from the CFPB’s 2013 white paper on deposit advance products and does not provide a statistical analysis or compelling reasons supporting a broad expansion of MLA coverage. For example, the CFPB says in the Report that its analysis of 2013 deposit advance product data indicates that “some depository institutions extended millions of dollars in deposit advances to servicemembers with APRs that typically exceeded 300 percent.” Notwithstanding the CFPB’s assertion on this point, there is little data presented in the Report that provides a basis for how the CFPB reaches its findings.

A significant portion of the Report is based on five “examples” in the form of anecdotes that are apparently drawn from “contracts [that the CFPB has] received from servicemembers.” According to the CFPB, the examples in the Report “underscore the assessment that there are a number of ways that consumer credit products can be structured to fall outside of the scope of the [MLA], as it is currently implemented.” Notably, the Report does not mention credit card products being used to circumvent MLA limitations and requirements and points only to circumvention based on lenders modifying loan amounts and duration. The Report does not provide the kind of detailed statistical analysis that is sometimes contained in CFPB studies and reports.

### CFPB COMMENT LETTER SUPPORTS DOD PROPOSED RULE BUT IS SHORT IN SUBSTANCE

Comments on the DoD proposal to amend its MLA regulation were due on December 26, 2014. The DoD proposal would significantly expand the scope of the DoD’s current regulation by applying the MLA to new types

---

<sup>1</sup> Generally, the MLA establishes three key “layers” of protections to ensure that covered borrowers are not subjected to “predatory” lending practices. First, the MLA establishes a maximum “military” annual percentage rate of 36 percent that may be charged on “consumer credit” transactions. Second, it prohibits the use of arbitration or “other onerous legal notice provisions” with covered borrowers when disputes arise, and provides that any credit agreement that is prohibited under the MLA is void from inception. Third, the MLA requires that certain disclosures be given orally and in writing “before the issuance of credit,” and that creditors comply with any applicable disclosure requirements of Regulation Z.

# Client Alert

---

of creditors and credit products, including open-end credit, with special rules for credit cards. In its comment letter, the CFPB expressed support for the DoD's proposed expansion of the regulation. Specifically, the CFPB stated in the comment letter that it supported the DoD's proposed definition of "consumer credit" and general approach of drawing on the regulatory framework established under Regulation Z.

With respect to proposed rules for credit card accounts, the CFPB said that covering credit cards is "essential" and that the "strength of the [DoD's] proposal rests on its comprehensive coverage of consumer credit products, regardless of how and from whom the credit is extended." The CFPB stated that its rationale for supporting the DoD's proposed approach for credit card accounts was based on a number of recent public enforcement actions against card issuers to date related to credit cards and so-called "add-on" products. Even though the CFPB acknowledges in its comment letter that none of those enforcement actions related to the credit card lending to servicemembers, the CFPB draws on the approach in the Report and gives an example of a consumer complaint from a servicemember regarding an add-on product. Relying on the information in the consumer complaint, the CFPB stated in the letter that "stories like [the example], taken with the [CFPB's] findings in the course of its supervision and enforcement activity, underscore the need to include credit card accounts within the scope of the MLA protections."

## TEA LEAVES ARE STILL UNCLEAR

When the DoD released its proposed rule, the CFPB issued a press statement in which the agency said it "strongly supports" the DoD's proposed rule. Regardless of what behind-the-scenes role the CFPB may have had in shaping the DoD's proposal, the CFPB Report and comment letter now make clear that the CFPB fully supports the DoD's amendments.

It remains unclear what effect the CFPB's public statements of support will have as the DoD seeks to address the many problems that the proposal presents, especially for credit cards. However, the detailed and compelling arguments outlined in many of the comment letters submitted by representatives of the industry about the challenges associated with the DoD proposal stand in stark contrast to the comment letter submitted by the CFPB, which ignores the fact that credit cards are not a "predatory" financial product, a key consideration that historically has guided MLA coverage of financial products.

### Contact:

**Leonard Chanin**  
(202) 887-8790  
[lchanin@mofo.com](mailto:lchanin@mofo.com)

**Obrea Poindexter**  
(202) 887-8741  
[opoindexter@mofo.com](mailto:opoindexter@mofo.com)

**Ryan Rogers**  
(202) 887-1507  
[rrogers@mofo.com](mailto:rrogers@mofo.com)

# Client Alert

---

## **About Morrison & Foerster:**

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 11 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*