AMERICAN USURY LAW AND THE MILITARY LENDING ACT

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I. INTRODUCTION

On February 6, 2019, the Consumer Financial Protection Bureau ("CFPB" or "the Bureau") took the first major step toward eliminating the federal government's primary consumer protection for payday loan borrowers.[1] During the Obama Administration, the CFPB deliberated for over five years and received over a million public comments, before adopting a complex 1690 page final rule governing payday loans, vehicle title loans, and similar forms of credit.[2] The centerpiece of the regulation was a requirement that payday lenders determine whether loan applicants have the ability to repay the debt without defaulting on their other pre-existing obligations.[3] However, payday lenders were not required to comply with the regulation until August of 2019, giving them ample opportunity to prepare compliance programs—or lobby the Trump Administration to eliminate the rules.[4] Responding to the latter approach, the Bureau, led by the first confirmed nominee of the Trump Administration, published a proposal that would rescind the lynchpin ability-to-repay provisions of the original, Obama-era rule.[5] The move was cheered by payday lenders and derided by consumer advocates.[6] Supporters of the ability-to-repay provision saw it as a critical

[1] Kate Berry, *CFPB Takes Big Step Toward Unwinding Payday Lending Rule*, AM. BANKER (Feb. 6, 2019), https://www.americanbanker.com/news/cfpb-takes-big-step-toward-unwinding-payday-lending-rule?.

[2] Press Release, Consumer Financial Protection Bureau, CFPB Finalizes Rule To Stop Payday Debt Traps: Lenders Must Determine If Consumers Have the Ability to Repay Loans That Require All or Most of the Debt to be Paid Back at Once (Oct. 17, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/.

[3] 12 C.F.R. § 1041.5(b)(1) (2019) ("[A] lender must not make a covered short-term loan or covered longer-term balloon-payment loan or increase the credit available under a covered short-term loan or covered longer-term balloon-payment loan, unless the lender first makes a reasonable determination that the consumer will have the ability to repay the loan according to its terms.")

[4] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472-01 (Nov. 17, 2017), "Effective Date: This regulation is effective January 16, 2018. Compliance Date: Sections 1041.2 through 1041.10, 1041.12, and 1041.13 have a compliance date of August 19, 2019."

[5] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252 (Proposed Feb. 14, 2019).

[6] Berry, *supra* note 1.

minimum protection against spiraling consumer debt-traps. Indeed, most consumer advocates, civil rights leaders, and faith groups believed that the Obama-era rule did not go far enough in protecting consumers.[7] Without question, the Bureau's planned repeal will likely be a major victory for payday lenders for whom the ability-to-repay requirement is a significant threat.[8]

The Bureau's plans, announced shortly before this article went to press, serve as another sobering and all-too-real reminder of the current vulnerability of the consumer protection laws of the United States. It is a reflection of the reality that consumer protection law is very much imperiled, and it should serve as a loud alarm to consumer advocates and the public. This latest setback, in a series of setbacks, indicates that consumers will be forced to rely upon other authorities—either adopted by Congress or perhaps more likely at the state level—for protection in the financial marketplace. This Article recognizes this current dynamic and makes the very specific recommendation that an existing piece of legislation—the Military Lending Act—and the federal regulation implementing it, provide a workable and appropriate template for the regulation of financial products and services for not only military service members, but for all Americans.

The Military Lending Act ("MLA")[9], enacted by Congress in 2006 and implemented through Department of Defense ("DoD") regulations, protects active duty members of the military, their spouses, and their dependents from certain financial products, services, and lending practices. The core provision of the MLA is a usury law capping interest rates at 36 percent per annum.[10] Subsequent to passage of the MLA, the DoD has issued two regulations implementing the MLA: the first adopted in October of 2007;[11] and second, revised regulations adopted in September of

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[7] Consumer Financial Protection Bureau, Ex Parte Communications Memorandum, Roundtable Meeting with consumer advocates, civil rights, and faith groups to discuss the Notice of Proposed Rulemaking on Payday, Vehicle, Title, and Certain High-Cost Installment Loans, Docket No. CFPB-2016-0025 RIN: 3170–AA40 (Aug. 24, 2016), https://www.regulations.gov/document?D=CFPB-2016-0025-144173.

[8] *Id.*

[9] 10 U.S.C. § 987.

[10] 10 U.S.C. § 987(b).

[11] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule, 72 Fed. Reg. 50579 (Oct. 1, 2007) (codified at 32 C.F.R. Part 232).

2015.[12] Both the initial 2007 rule and the revised 2015 rule implemented the MLA's usury limit and further defined how other protections in the MLA apply to active duty service members and their dependents, referred to as "covered borrowers."[13]

In contrast to the precarious future of the CFPB's payday lending rule, the Military Lending Act rests, for now, upon a relatively firm political and legal foundation. The MLA is significant in that it is the nation's first modern national usury law that is applicable to all types of creditors and was adopted after the evolution of our national credit card market. The statute and its 2015 implementing regulation benefited from a political climate supportive of military servicemembers and leadership at the Pentagon with the political will to engage in decisive, bold intervention in consumer finance markets. Despite considerable predictions of doom by some in the financial services industry prior to both the adoption of the statute and the revised 2015 implementing regulations, the MLA has not generated significant litigation and has not dried up access to credit for military service members. Indeed, the military community including the Department of Defense, military service member support organizations, and the veterans' rights groups overwhelmingly support the law and have aggressively opposed any efforts to weaken it.[14]

This Article explains how the MLA evolved and queries why the statute has succeeded when so many other consumer protection laws are corroding. Amid the hand-wringing and

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[12] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule, 80 Fed. Reg. 43560 (July 22, 2015) (codified as amended at 32 C.F.R. Part 232).

[13] 32 C.F.R. § 232.5.

[14] *See, e.g.*, *Don't Abandon Military Families*, https://keepmilitaryprotections.org/ (last visited April 26, 2019) (coalition letter supporting robust enforcement of the military lending act signed by: the Air Force Sergeants Association, Air Force Women Officers Associated, AMVETS, Armed Forces Retirees Association, Association of the United States Navy, Blue Star Families, the Chief Petty Officers Association, the Fleet Reserve Association, High Ground Veterans Advocacy, the Military Officers Association of America, the Military Order of the Purple Heart, the National Association of Veterans' Program Administrators, the National Military Family Association, the Non Commissioned Officers Association, Service Women's Action Network, the Retired Enlisted Association, the Tragedy Assistance Program for Survivors, the United States Army Warrant Officers Association, Veterans for Education Success, Veterans of Foreign Wars, and the Vietnam Veterans of America).

widespread concern regarding the apparent demise of consumer protection law in the current regulatory environment, the successful implementation of the MLA, in our view, provides an opportunity to expand protection of vulnerable consumers. This Article, then, has two goals. First it provides a contemporary record of the history of Military Lending Act in hope of assisting future policy makers, scholars, students, and businesses to understand the statute and its implementing regulations. Second, we argue that the MLA and the Pentagon's implementing regulations provide a politically defensible, market-tested, low-compliance cost template on how to establish a national usury limit, or failing that, new state usury laws.

This article begins with a brief review of the origin and history of the MLA as well as the statute's primary provisions and underlying policy goals. Next, we explain the Department of Defense's evolving regulatory implementation of the Act with a particular focus on the Department's revised 2015 regulations. Then, this article assesses the importance the MLA as a component of consumer protection law in the United States, specifically arguing that the MLA provides a proven template capable of adoption by Congress or individual state legislatures to establishing interest rate limitations on financial services in including especially small-dollar, high-cost payday loans. Finally, this article includes an appendix with a discussion draft of a legislation that Congress could consider adopting to expand the MLA to veterans and all consumers.

II. USURY AND THE AMERICAN MILITARY IN HISTORICAL CONTEXT

The history of American consumer protection law, at least as it relates to usury law and small-dollar, high-cost loans, seems to defy the modern convention that things should improve over time, especially as societies and legal systems progress. Throughout American history, for example, with very few exceptions, state usury laws prohibited lenders from charging triple-digit interest rates. All 13 original colonies prescribed interest rate limits between 5 and 12 percent.[15] Early in the 20^{th} Century, however, states began relaxing these usury laws, allowing now-licensed and

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[15] Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand; Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1117-18 (2008).

regulated lenders to develop new financial products and services.[16] Despite this, through the 1960s, every state in the United States maintained usury limits on small consumer loans prohibiting charging of triple-digit interest rates.[17] The most common interest limit cap on small loans in the second half of the 20th Century was 36%.[18]

The close of the 20th century brought a reversal of fortune for American consumers. Whether due to inflation, higher interest rates eating into the profitability of consumer lending, or perhaps due to more nefarious reasons such as a burgeoning lack of concern for consumers, many states relaxed or eliminated their interest rate caps. The United States Supreme Court helped spark this trend when, in 1978, it held that national banks could export interest rates from the banks' home states to consumers living in states with lower interest rate limits.[19] Thus, a combination of unfavorable laws pre-empting traditional usury limits, inflation cutting into lenders' profits, the abolition of traditional interest rate limitations, and the advent of a new genre of small-dollar, high-cost loans precipitated a race to the bottom, thereby subjecting the most vulnerable consumers to economic peril.[20]

All of these trends were manifested in the form of "deferred presentment" loans, which have come to be known as "payday loans."[21] These loans were, and are, characterized by a creditor agreeing to hold a borrower's post-dated check as collateral for the loan of a relatively small sum over a relatively short period of

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[16] DAVID J. GALLERT ET AL., SMALL LOAN LEGISLATION: A HISTORY OF THE REGULATION OF LENDING SMALL SUMS 89 (1932).

[17] *See* BARBARA CURRAN, TRENDS IN CONSUMER CREDIT REGULATION 158-166 (1965).

[18] Peterson, *supra* note 15, at 1119-21.

[19] *See* Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299, 303-13 (1978) (interpreting National Bank Act, ch. 106, 13 Stat. 99, 108 (1864) (codified as amended at 12 U.S.C. § 85 (2019)).

[20] Peterson, *supra* note 15, at 1121; James J. White, *The Usury Trompe l'Oleil*, 51 S.C. L. REV. 445, 447–48, 464–65 (2000); Robert C. Eager & C.F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21, 66–67 (2004); Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 619–20 (2004).

[21] *See, e.g.*, Turner v. E-Z Check Cashing of Cookeville, TN, Inc., 35 F. Supp. 2d 1042, 1048 (M.D. Tenn. 1999) ("Courts that have addressed the issue have held, without exception, that deferred presentment transactions are extensions of 'credit'. . . . .")

time—usually a couple of weeks.[22] Given the relatively small amount of such loans and their short duration, these loans could be viewed as innocuous. In reality, however, they are anything but, as a strong body of evidence suggests that these loans are seldom one-time loans paid back within the prescribed initial periods, and the majority are "rolled over" again and again.[23] Studies by industry-sponsored think tanks,[24] federal regulators,[25] state

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[22] *See How Payday Loans Work*, CONSUMER FED'N OF AM. (2018), https://paydayloaninfo.org/facts; DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 5:6 (2019).

[23] *See* PETER SKILLERN, CMTY. REINVESTMENT ASS'N OF N.C., SMALL LOANS, BIG BUCK$: AN ANALYSIS OF THE PAYDAY LENDING INDUSTRY IN NORTH CAROLINA 4 (2002) (finding that 85% of payday lender revenue comes from borrowers with over five loans per year).

[24] Gregory Elliehausen & Edward C. Lawrence, Georgetown University McDonough School of Business Credit Research Center, *Payday Advance Credit in America: An Analysis of Demand,* 39 (2001) (about 40 percent of borrowers rolled over more than five times in preceding year, about 20 percent of borrowers who renewed existing loans nine times or more, 10 percent renewed 14 times or more).

[25] CONSUMER FIN. PROT. BUREAU, CFPB DATA POINT: PAYDAY LENDING 4 (2014), https://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf (finding that half of all payday loans "are in a sequence at least 10 loans long" and that most payday borrowing "involves multiple renewals following an initial loan, rather than multiple distinct borrowing episodes separated by more than 14 days."); U.S. OFFICE OF THE COMPTROLLER OF THE CURRENCY, FACT SHEET: EAGLE NATIONAL BANK CONSENT ORDER at 2 (Jan. 3, 2002) (discovering payday loan employee compensation incentives for promoting repeat borrowing); Mark Flannery & Katherine Samolyk, *Payday Lending: Do the Costs Justify the Price?* 16–17 (FDIC Center for Financial Research, Working Paper No. 2005–09, 2005) (high frequency borrowers are more profitable because they generate lower loss ratios and lower operating costs).

regulators,[26] consumer advocacy organizations,[27] and academics[28] all found that borrowers of single-payment, triple-digit interest rate loans tended to fall into reoccurring debt patterns. "Over 80% of payday loans are rolled over or followed by another loan within 14 days,"[29] and many consumers are forced to turn to family or friends to escape from the triple-digit interest rate loan.[30] "Ninety-

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[26] Report of the Uniform Consumer Credit Code Rev. Comm. And Action of the Colorado Commission on Consumer Credit 16 (Nov. 4, 1999) (reporting instances of as many as thirteen or more refinances); Paul Chessin, *Borrowing from Peter to Pay Paul: A Statistical Analysis of Colorado's Deferred Deposit Loan Act*, 83 DENVER U. L. REV. 387 (2005) (discussing official Colorado statistics); Ill. Dept. of Fin. Inst., Short Term Lending: Final Report 30 (1999) (average payday loan customer borrows thirteen times per year and remains indebted for at least six months); Indiana Department of Financial Institutions, *Summary of Payday Lender Examination,* 1–2 (77% of payday loans are extensions of previously existing contracts); Survey Iowa Division of Banking (2000) (finding an average of 12.5 loans per customer per year); North Carolina Office of the Commissioner of Banks, Report to the General Assembly on Payday Lending, (87% of borrowers roll over payday loans more than once with each individual lender); Washington State Department of Financial Institution, Payday Lending Report 3 (2003) (over thirty percent of borrowers borrow more than ten times per year, almost ten percent borrow twenty times or more per year).

[27] JEAN ANN FOX & ED MIERZWINSKI, CONSUMER FEDERATION OF AMERICA & U.S. PUBLIC INTEREST RESEARCH GROUP, SHOW ME THE MONEY: A SURVEY OF PAYDAY LENDERS AND REVIEW OF PAYDAY LENDER LOBBYING IN STATE LEGISLATURES 8 (2000), https://consumerfed.org/wp-content/uploads/2016/12/Show-Me-the-Money_Report.pdf; Oregon State Public Interest Research Group, Preying on Portlanders: Payday Lending in the City of Portland (2005) (three out of four payday loan borrowers are unable to pay their loan when it comes due).

[28] *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending*, 87 MINN. L. REV. 1, 55–76 (2002); *see also* Michael A. Stegman & Robert Faris, *Payday Lending a Business Model that Encourages Chronic Borrowing*, 17 ECON. DEV. Q. 8 (2003).

[29] CONSUMER FIN. PROT. BUREAU, CFPB DATA POINT: PAYDAY LENDING, *supra* note 25, at 4.

[30] *Payday Lending in America: Report 2—How Borrowers Choose and Repay Payday Loans* 7, PEW CHARITABLE TRUSTS (February 2013), https://www.pewtrusts.org/-/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf ("Forty-one percent of borrowers have needed a cash infusion to pay off a payday loan. Many of these borrowers ultimately turn to the same options they could have used instead of payday loans to finally pay off the loans, including getting help from friends or family, selling or pawning personal possessions, or taking out another type of loan.").

seven percent of loans go to people using three or more loans per year, and 60 percent go to those using at least 12 loans per year."[31] If the modern American experiment with legally permissible triple-digit interest rate credit proves anything it is that this form of credit inexorably risks trapping borrowers in a cycle of debt that is difficult, and sometimes impossible, to escape.

As many states around the country weakened or eliminated their usury limits, the ability of consumers to effectively vindicate their consumer protection rights also declined. Since 1925 the Federal Arbitration Act ("FAA") has required parties to a contract to submit disputes to an arbitrator where their contract so specifies.[32] But, for another fifty years courts often refused to order arbitration of claims created by 'public interest' statutes in order to preserve legislative public policy goals.[33] Moreover, prior to 1995, many courts held that FAA only applied to those contracts where the parties "contemplated" a connection to "interstate commerce."[34] But a steady stream of Supreme Court decisions has since strengthened judicial enforcement of forced arbitration clauses eventually concluding that courts must enforce arbitration agreements, including class action waivers within those agreements in almost all circumstances.[35] Most consumer advocates objected to forced arbitration clauses because they "allow companies to select the arbitrators, set the arbitration in a location convenient for the company but not for consumers, exclude certain recoveries such as punitive damages, shorten the statute of limitations, deny discovery and other procedural protections, and eliminate virtually any right to appeal."[36] For their part, 98.5% of storefront payday lenders now include arbitration clauses in their agreements.[37] And, 88.7% of payday loan

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[31] *Id.* at 17.

[32] 9 U.S.C. § 2.

[33] Stephen J. Ware, *Arbitration and Unconscionability after Doctor's Associates, Inc. v. Casarotto,* 31 WAKE FOR. L. REV. 1001, 1004-05 (1996).

[34] JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 3 (2003). The Supreme Court overturned this line of cases in *Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 277 (1995). that the "involving commerce" language of the FAA should be interpreted to broadly.

[35] Andrea Cann Chandrasekher & David Horton, *Arbitration Nation, Data from Four Providers*, 107 CALIF. L. REV. 1, 1 (2019).

[36] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996).

[37] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND

arbitration clauses expressly do not allow arbitration to proceed on a class-wide basis.[38]

The corrosion of traditional American usury limits and declining access to the judiciary had a profound effect on the lives of military families. Service members face a variety of demographic, social, and administrative circumstances that leave them relatively vulnerable to high-cost debts.[39] Servicemembers are relatively young and disproportionately come from financially challenged backgrounds.[40] Military life requires frequent moves, leaving servicemembers geographically dislocated from civilian and familial support networks.[41] And, servicemembers are required by law and regulation to keep their finances in order.[42] Failure to do so may result in prosecution under the Uniform Code of Military Justice ("UCMJ") or involuntary, administration elimination from the Armed Forces.[43] Similarly, failure to manage their finances may result in the suspension or revocation of a Servicemember's security clearance, which may render a Servicemember incapable of performing duties within their Military Occupational Specialty ("MOS"), render them non-deployable, or necessitate administrative separation. All of the foregoing, of course, affect not only the individual Servicemember's ability to serve and their ability to support their family, but have concomitant effects on his or her unit's ability to perform its mission.

The growth of payday lending coincided with an exponential increase in the number of servicemembers forced to turn to charitable institutions for assistance repaying their payday loans. For example, in 2001, the Navy-Marine Corps Relief Society—one of several Service-related non-profit organizations

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CONSUMER PROTECTION ACT § 1028(a), at § 2, p. 7 (March 2015) [*hereinafter* CFPB ARBITRATION REPORT].

[38] *Id.* at § 2, p. 44.

[39] G. L. A. Harris, *Charlatans on the Move: How Predatory Lenders Fleece Military Personnel*, 13 PUBLIC INTEGRITY 353, 355-57 (2011).

[40] Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OH. S. L.J. 653, 675-78 (2005).

[41] *Id.* at 681-85.

[42] *See, e.g.*, U.S. DEP'T OF ARMY, Reg. 600-15, INDEBTEDNESS OF MILITARY PERSONNEL, at § 1-5a (1986), http://asktop.net/wp/download/3/r600_15.pdf ("Soldiers are required to manage their personal affairs satisfactorily and pay their debts promptly. Failure to do so damages their credit reputation and affects the Army's public image.").

[43] *Id.* at § 1-5g.

that provide emergency financial relief to military families – provided emergency loans totaling $5,000 to only nine servicemembers who fell victim to predatory lenders.[44] But by 2006 the Navy-Marine Corps Relief Society provided more than $1.37 million to military members and their families who fell victim to such lenders.[45]

Interest in protecting Servicemembers from high-cost lending practices, payday lending products, and predatory products and actions aimed at military members began in earnest in the late 1990s. The effort reached a critical point in 1999 when then-Senator Joseph Lieberman (D-CT), Ranking Member of the Senate Committee on Banking, Housing and Urban Affairs held a hearing on payday lending. Among the witnesses and organizations testifying were representatives of the Consumer Federation of America ("CFA"), who offered insightful and persuasive testimony as to the practices of the payday lending industry and its harmful effects upon military members.

Fortuitously, DoD representatives attended the hearing and subsequently requested the assistance of Congress and others in protecting members of the force from predatory lending products and practices. Something of a grass-roots effort followed, with the National Consumer Law Center and others organizing to express their concerns.[46] And, in 2005 a detailed academic study mapped the location of nearly 15,000 storefront payday lenders in twenty states. The research showed how payday lenders were clustering around military bases creating "an environment where Servicemembers are literally surrounded by lenders clamoring to charge annual interest rates averaging 450 percent."[47] The research conclusively proved that payday lenders were targeting military families.

Nevertheless, no one with military experience was or would have been surprised at the study's results. Indeed, if there was one

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[44] *Danger of Payday Loans*, NAVAL SUPPORT ACTIVITY ANNAPOLIS, https://www.cnic.navy.mil/regions/ndw/installations/nsa_annapolis/ffr/support_services/counseling_and_assistance/personal_finance_management/danger_of_payday_loans.html.

[45] *Id.*

[46] *See, e.g*, Steve Tripoli & Amy Mix, *In Harm's Way—At Home: Consumer Scams and the Direct Targeting of America's Military and Veterans,* NAT'L CONSUMER LAW CENTER, (May 2003), http://www.nclc.org/images/pdf/special_projects/military/report-scams-facing-military.pdf (identifying predatory loans near military bases in southeastern Georgia and northeastern Florida).

[47] Graves & Peterson, *supra* note 40, at 153.

axiom of military service or one aspect common to military installations nation-wide, it was the ubiquitous presence of payday lending businesses outside of the gates of virtually every military installation. Holly Petraeus, former Assistance Director of the CFPB and a then-head of the Bureau's Office of Servicemember Affairs ("OSA") observed that that "at least 21 payday lenders were clustered outside of the gates at Fort Campbell, Kentucky" during her family's military assignment there.[48]

The academic study and a related flurry of activity got the attention of the Pentagon's senior leadership and Congress. In May of 2006, then-Admiral and Chief of Naval Operations Mike Mullen authored a memorandum to Navy personnel. In it he noted: "A sailor's financial readiness directly impacts unit readiness and the Navy's ability to accomplish its mission."[49] Admiral Mullen went on to say: "I am concerned with the number of sailors who are taken advantage of by predatory lending practices, the most common of which is the payday loan."[50]

Apparently alarmed, several members of Congress began to push for legislative reform. After a failed attempt to insert protective language into previous defense authorization bills, then-Senator Elizabeth Dole (R-NC) was able to include language in the National Defense Authorization Act for 2006 requiring the Department of Defense to perform a study on the impacts of predatory lending practices on Servicemembers and their families.[51] The subsequent report proved a watershed event. *Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*,[52] was issued in 2006 and concluded that:

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[48] Holly Patraeus, *Testimony of Hollister K. Petraeus Assistant Director, Consumer Financial Protection Bureau, Office of Servicemember Affairs Before the U.S. Senate Committee on Commerce, Science & Transportation*, CONSUMER FIN. PROT. BUREAU, NOV. 20, 2013, https://www.consumerfinance.gov/about-us/newsroom/hollister-k-petraeus-before-the-u-s-senate-committee-on-commerce-science-transportation/ (quoting Navy League, SEA POWER MAGAZINE, June 2006).

[49] *Id.*

[50] *Id.*

[51] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, 119 Stat. 3276 (requiring the Secretary of Defense to submit "a report on predatory lending practices directed at members of the Armed Forces and their families.").

[52] U.S. DEP'T OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS, 51 (2006), www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf.

> [P]redatory lending undermines military readiness, harms the morale of troops and their families, and adds to the cost of fielding an all-volunteer fighting force. Education, counseling, assistance from Aid Societies, and sound alternatives are necessary but not sufficient to protect Servicemembers from predatory lending practices or products that are aggressively marketed to consumers in general and to military personnel directly.[53]

In response to the report, Senator Richard Shelby of Alabama, then chair of the Senate Banking Committee, convened a hearing to discuss the report. In his opening statement Senator Shelby acknowledged that the Department of Defense had characterized payday loans as "predatory practices" and "debt traps" that "feature high rates and fees."[54] In contrast, Senator Johnson of South Dakota warned of unintended consequences and emphasized the need for greater financial literacy.[55] Senator Dole observed: "Predatory lenders are blatantly targeting our military personnel, undermining their financial stability and tarnishing their service records. This practice not only creates financial problems for individual soldiers and their families, but also weakens our military readiness."[56] Senator Jack Reed of Rhode Island explained:

> I used to command a parachute company in Fayetteville, North Carolina at Fort Bragg in the 504th Parachute Infantry Regiment, and I have seen young soldiers at payday lenders who are financially strapped and willing to sign anything to get a few dollars, and I think this behavior, if it is targeted to exploit soldiers is absolutely reprehensible. We owe them a lot more than that. . . . [A] 36 percent cap, I think is more than reasonable. Some of these loans have average annual percent rates of 470 percent. One of the advantages I had back in the 1970's commanding a company is most States had usury laws

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[53] *Id.*

[54] *A Review of the Department of Defense's Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, Wash, at 1, 109th Cong. 2 (2005), (statement of Senator Shelby) https://www.govinfo.gov/content/pkg/CHRG-109shrg50303/pdf/CHRG-109shrg50303.pdf.

[55] *Id.* at 3 (statement of Senator Johnson).

[56] *Id.* at 4 (statement of Senator Dole).

> capping interest rates at 21 percent or so. That is a thing of the past now. We didn't have to worry, at least, in licensed agencies like this having soldiers pay a 470 percent interest rate.[57]

The Under-Secretary of Defense for Personnel and Readiness also elaborated on why the Department of Defense supported an interest rate cap of 36 percent. Undersecretary Chu explained,

> The department has recommended establishing an interest rate cap of 36 percent for service members and their families. The department believes service members who acquire loans with interest rates above 36 percent should seek assistance and not consider further debt load. The 36 percent limit creates a barrier for installment lenders to refrain from packing fees and premiums—and others have alluded to this this morning—onto the base interest rate that is charged for a loan.

The Pentagon advocated for 36 percent cap in particular because "it mirrors the limitations found in several States" and "is an amount that has been proven reasonable for consumers and the industries that serve them."[58] Interestingly foreshadowing today's debate over the CFPB's payday lending ability-to-repay standard, Under-Secretary Chu pointed out that a 36 percent usury cap also serves to "limit[] . . . the credit opportunities that do not consider service members' *ability to repay* their debt."[59]

Although in certain respects the key debate over the Military Lending Act occurred in the Senate Banking committee, the actual legislation proceeded through the Senate and House Armed Services Committees that retain primary jurisdiction over the National Defense Authorization Act each year. Senator Bill Nelson, a democrat from Florida and Senator Jim Talent, a Republican from Ohio cosponsored the bill as an amendment to John Warner National Defense Authorization Act for the Fiscal Year 2007.[60] The combined persuasion of bipartisan senators from two large swing states and the pressure of must-pass military support legislation during war time was sufficient to build

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[57] *Id.* at 6 (statement of Senator Jack Reed).

[58] *Id.* at 10 (statement of Under-Secretary David Chu).

[59] *Id.* at 10 (emphasis added).

[60] Pub. Law 109–364, 120 STAT. 2083, § 670 (Oct. 17, 2006), *codified at* 10 U.S.C. § 987.

bipartisan majorities in both the Senate and the House of Representatives.[61] In support of the Amendment bearing his name, Senator Talent said of the Law: "The fact is, predatory lenders are targeting American troops and are trying to make a buck off of their service to our country. We rely on the military to protect us, and we have just taken a significant step to protect them from predatory lenders."[62] President George W. Bush signed the National Defense Authorization Act including the Talent-Nelson Amendment—now generally referred to as *the Military Lending Act*—into law on October 17, 2006.[63]

III. THE MILITARY LENDING ACT AND ITS IMPLEMENTING REGULATIONS

A. The Military Lending Act

The Military Lending Act did at least three crucial things for military consumers. First, it established a nation-wide usury limit where creditors "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."[64] The statute left the definition of consumer credit to the Department of Defense to define by regulations, except that the statute excluded residential mortgages and loans extended for the purpose of purchasing a car or other personal property.[65] The term "annual percentage rate" refers to the concept of APR which originally appeared in the Truth in Lending Act ("TILA") in 1968.[66] Under TILA, APR is term of art that attempts to create a uniform benchmark for the cost of credit. It is an annualized expression of a "finance charge" imposed in connection with the loan's principal balance, or "amount financed."[67] Under TILA costs included in the finance charge are generally defined as costs "incident to the

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[61] The legislation passed the U.S. House of Representatives 398 to 23. *National Defense Authorization Act for Fiscal Year 2007: Roll Vote No. 510* Cong. Record 398:23 (Sept 29, 2006), http://clerk.house.gov/evs/2006/roll510.xml.

[62] 152 CONG. REC. S6406. (daily ed. June 22, 2006) (statement of Sen. Talent).

[63] WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 42 (2006): Oct. 17, Presidential statement.

[64] 10 U.S.C. § 987(b).

[65] *Id.* at § 987(i)(6).

[66] 15 U.S.C. § 1606.

[67] *Id.* at § 1605, 1606.

extension of credit" including both periodic interest as well as non-periodic fees.[68] But, TILA and its implementing rules, called Regulation Z, carve out a variety of exceptions that allow creditors to exclude some charges, premiums and fees from the finance charge and thereby the APR.[69]

The MLA defined "annual percentage rate" as having "the same meaning as in . . . the Truth in Lending Act."[70] But divergently, the MLA also proceeded to include a variety of fees, credit insurance premiums, and charges for ancillary products within the definition of APR "for purposes of this section."[71] Moreover, the MLA defines "interest" very broadly as including:

> all the cost elements associated with the extension of credit, including fees, service charges, renewal charges, credit insurance premiums, any ancillary product sold with an extension of credit . . . as applicable, and any other charge or premium with respect to the extension of consumer credit.[72]

Under TILA many of fees, premiums, and charges for ancillary products are not included within the finance charge (and thereby the APR) under a range of circumstances.[73] The practical result is that "APR" under the MLA is different than under TILA. To avoid confusion between the two legally distinct concepts, some commentators and eventually the Department of Defense itself began referring to APR as it is defined in the MLA as an "MAPR" or Military-APR.[74] The distinction was significant because the complexity therein set the stage for regulatory implementation battles that followed adoption of the MLA and also because the MAPR's "all-in" posture likely does a better job of capturing—and limiting—the borrower's true cost of credit.

Second, in addition to the usury limit, the MLA adopted serval additional protections for service members. The most important among these provisions declared it "unlawful for any creditor to extend consumer credit to a covered member or a dependent of a covered member" where "the creditor requires the

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[68] *Id.* at § 1605(a).
[69] 12 C.F.R. § 1026.4.
[70] 10 U.S.C. § 987(h)(4).
[71] *Id.*
[72] *Id.* at 987(i)(3).
[73] 12 C.F.R. § 1026.4.
[74] 32 C.F.R. § 232.3(h).

borrower to submit to arbitration."[75] Civilian consumers of high-cost credit are overwhelmingly forced to resolve disputes with individual, secret arbitrations after limited discovery and subject to virtually no right of appeal.[76] After the MLA, service members were entitled to resolve any dispute relating to consumer credit in court before a judge,[77] with standard discovery,[78] the right to join other similarly affected service members in class actions,[79] and a right to appellate review.[80] Servicemembers are still free to choose arbitration after a dispute arises if they prefer. They simply cannot be forced into arbitration before a dispute arises with an (ordinarily unread) term buried within the contractual provisions of their loan agreements.

Along with the prohibition of forced arbitration, the MLA includes a raft of other limitations including declaring it unlawful for creditors to: "roll over" credit; require borrowers to waive their rights under otherwise applicable provisions of law; or, impose a prepayment penalty.[81] And, the MLA also establishes several "mandatory loan disclosures" including requiring creditors to disclose both in writing and orally "a statement of the annual percentage rate," any disclosures required under TILA, and a "clear description of the payment obligations."[82] Much of the difficulty for the Department of Defense in implementing the MLA (and for creditors seeking to comply with the statute) has arisen from these additional limitations and disclosures, rather than the usury limit or prohibition of forced arbitration. For example, creditors have justifiably wondered how to disclose both the "annual percentage rate" and the disclosures already required under TILA when the MLA and TILA define APR differently. Moreover, verbally providing "a clear description" of the payment obligation seems especially difficult when there is the potential for two different "APRs" associated with the same obligation.

Fortunately, to resolve this type of problem and also to implement the statute generally, the MLA includes a third key component: establishing an administrative framework for issuing implementing regulations and engaging in enforcement. The law

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75 10 U.S.C. 987(e)(3).

76 *See* CFPB ARBITRATION REPORT, *supra* note 37, at § 2, p. 44

77 10 U.S.C. § 987(f)(5).

78 Fed. R. Civ. P. 26-37.

79 Fed. R. Civ. P. 23.

80 Fed. R. App. P. 3.

81 *Id.* at § 987(e).

82 *Id.* at § 987(c).

conferred upon the DoD near plenary authority to draft regulations implementing the statue. Specifically, the MLA grants the DoD various authorities to prescribe regulations to carry out the law and broad latitude to determine the scope, terms, and conditions of the regulations. Congress empowered the DoD to define the scope of the regulations through, first, a broad grant of authority to define "consumer credit" and the type(s)of creditor subject to the MLA and, second, the authority to prescribe "such other criteria of limitations as the department deems appropriate, consistent with the provisions of 10 U.S.C. 987.[83] Within those general grants of authority, the law further grants the Department powers to prescribe terms and conditions relating to "the method for calculating the applicable annual percentage rate of interest on consumer credit, in accordance with the limit established under 10 U.S.C. 987 and maximum allowable amounts of all fees, and the types of fees, associated with any such extension of credit.[84] Credit extended in violation of the statute is void *ab initio* and constitutes a misdemeanor subject to prosecution by the Department of Justice.[85]

However, in prescribing regulations, Congress also required the Secretary of Defense to consult six other federal agencies responsible for the nation's financial and banking policy including the Federal Trade Commission ("FTC"), the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA"), and the Department of the Treasury ("Treasury Department").[86] Requiring rulemaking to occur through a large interagency process created a complex framework for the DoD, but also ensured that the Pentagon would be legally entitled to draw upon an unusually deep bench of federal regulatory experience and policy perspective.

B. The Department of Defense's 2007 Implementing Regulations and Subsequent Amendments to the Military Lending Act

The Pentagon faced several difficult challenges in implementing the Military Lending Act. While the agency had tremendous depth of experience in dealing with the wellbeing of

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[83] 10 U.S.C § 987(i)(2).
[84] 10 U.S.C. § 987(h)(2).
[85] *Id.* at § 987(f)(3), (f)(1).
[86] *Id.* at § 987(h)(3).

military families, the Department had never issued a financial or banking regulation before. It did not have a seasoned staff financial services counsel. Moreover, although the DoD had extensive experience dealing with private sector military contractors, it had never engaged with the nation's banks, credit unions, and other financial services businesses as a regulator. Soon after Congress adopted the MLA, the Department came under stiff pressure from the formidable banking industry lobby to craft regulations that would minimize any compliance burden or inconvenience for mainstream financial institutions.

Pressure on the Department to narrowly tailor its MLA regulations was reinforced by several legal puzzles bequeathed to the Department in the statute. For example, to issue a broad regulation, the Department would need to provide direction to many different types of creditors extending loans through a host of different distribution channels. Lenders would need to know how to reconcile the new MLA disclosure requirements with those already included in TILA. How should lenders extending credit over the internet or by mail "verbally" provide any disclosures required under TILA when many TILA disclosures are lengthy and must be delivered "in writing?"[87] Moreover, some of the restrictions in the MLA had the potential to interfere with uncontroversial, beneficial transactions. For example, in addition to declaring it unlawful for a creditor "roll over" consumer credit, one reading of Section 987(e)(1) seemed to prohibit refinancing loans generally. While refinancing a debt in order to pack in unnecessary or costly origination fees can be harmful, depending on the circumstances, refinancing can also obviously help borrowers when it meaningfully reduces their interest rate without imposing other charges, fees, or limitations. And, in order to provide the correct disclosures and refrain from any prohibited acts, creditors needed some way to identify whether loan applicants were covered military service members.

But, arguably, the thorniest implementation problem for the Department was how to apply the MLA's usury limit to the nation's credit card market. All credit cards are currently issued by banks or credit unions.[88] Although state interest rate limits do

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[87] *Compare, e.g.,* 10 U.S.C. § 987(c)(1) (requiring verbal disclosures) *with* 12 C.F.R. § 1026.5(a)(1)(ii) (the latter requiring "the creditor shall make the disclosures required by this subpart in writing, in a form that the consumer may keep . . . .").

[88] *See generally, Credit Card Agreement Database*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/credit-cards/agreements/. The

not apply to credit cards, historically the vast majority of credit cards have not imposed periodic interest rates above 36 percent and currently no cards exceed this rate.[89] Federal credit unions are also already subject to a federal usury limit currently set at 18 percent.[90] Nevertheless, virtually all cards include a variety of fees including annual fees, foreign exchange fees, cash advance fees, balance transfer fees, late fees, and many others. Depending on how a usury limit is calculated, the combination of fees and interest on credit cards could exceed 36 percent in any given month. And yet, credit card issuers also provide additional services beyond advancing credit in connection with many of the fees in typical credit card plans. A generally applicable "all-in" usury limit would require the Department to address how the cap applies to each of these charges.

After taking public comment on these and other issues, the Department published the first set of regulations implementing the MLA on August 31, 2007.[91] Required to act quickly, and in a case of first impression, the DoD opted to define consumer credit covered by the Act narrowly, concentrating on the most egregious products the Department believed were most harmful to military readiness. The 2007 regulations limited the scope of the MLA's protections by defining "consumer credit" to include only three specific types of loans: (1) Payday loans defined as "closed-end credit with a term of 91 or fewer days in which the amount financed does not exceed $2,000 False"; (2) Vehicle title loans

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CARD Act's amendments to TILA, require creditors to post agreements for open-end consumer credit cards on the creditors' Web sites and to submit those agreements to the CFPB which in turn maintains a database of agreements for public inspection. *See* 15 U.S.C. § 1632(d); 12 CFR § 1026.58. Every agreement included in the database is issued by a bank or credit union.

[89] Jane Parker, *What is the Highest Credit Card Interest Rate?*, WALLETHUB, (Jan. 1, 2018) https://wallethub.com/answers/cc/highest-credit-card-interest-rate-2140660307/.

[90] The Federal Credit Union Act generally limits federal credit unions to a 15 percent interest rate ceiling on loans. However, the NCUA may establish a higher rate for up to 18 months after considering certain statutory criteria. 12 U.S.C. §1757(5)(A)(vi)(I). Currently NCUA has extended the permissible interest rate ceiling to 18 percent. *Board Extends 18 Percent Interest Rate Cap*, Boar Action Bulletin, NAT'L CREDIT UNION ADMIN., Boar Action Bulletin (Feb. 23, 2017) https://www.ncua.gov/newsroom/news/2017/board-extends-18-percent-interest-rate-cap.

[91] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule, 72 Fed. Reg. 50580 (August 31, 2007) *codified at* 32 C.F.R. Part 232.

defined as "closed-end credit with a term of 181 days or fewer that is secured by the title to a motor vehicle . . . ."; and (3) "Tax refund anticipation loans."[92]

The Department's 2007 regulation allowed lenders to identify covered borrowers by soliciting from loan applicants a signed, sworn borrower identification statement.[93] Lenders could immunize themselves from MLA liability by obtaining from the loan applicant signed a form swearing not to be an active duty servicemember or dependent.[94] In effect, only payday, vehicle title, and tax refund anticipation lenders had to solicit these forms because only their loans were considered "consumer credit" within the scope of the implementing regulation. This approach allowed the Department to punt many of the thorny statutory construction and practical implementation challenges regarding disclosure and other limitations within the statute. Since virtually all payday loans, vehicle title loans, tax refund anticipation loans had interest rates far in excess of the 36 percent usury limit, any loan requiring disclosure under the MLA was already effectively prohibited. Under the Department's 2007 rule, no businesses had to figure out how to simultaneously comply with the MLA's interest rate limit and its other limitations and disclosures. For their part, banks or credit unions that did not offer payday loans, vehicle title loans, or tax refund loans could conveniently ignore the statute. And, the federal banking regulatory agencies that consulted with the Department in drafting the regulations faced only modest revisions to their existing prudential examination procedures.

Initially this approach had some positive results. In a report back on the first five years of the MLA, the Consumer Federation of America concluded: "to the extent products meet these definitions, the law has been largely effective in curbing predatory payday, car title, and tax refund lending to covered borrowers."[95] However, problems arose with respect to products that did not meet these narrowly drawn definitions. With increasing frequency unscrupulous lenders modified the duration or size of their loans

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[92] *Id.*

[93] *Id.*

[94] 12 C.F.R. § 232.5(a), *amended by* Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule, 80 Fed. Reg. 43560, 43609-610 (July 22, 2015).

[95] Jean Ann Fox, *The Military Lending Act Five Years Later: Impact on Servicemembers, the High-Cost Small Dollar Loan Market, and the Campaign against Predatory Lending* at 9, CONSUMER FEDERATION OF AMERICA, (May 29, 2012), https://consumerfed.org/pdfs/Studies.MilitaryLendingAct.5.29.12.pdf.

to evade MLA coverage.[96] Under this approach, for example, payday loans offered to military consumers were modified to cover periods longer than 92 days or were offered in amounts of $2,001 dollars or more. And any loan structured as an open-end line of credit was excluded from the scope of the regulation even if the credit carried a triple digit interest rate. And some service members or their spouses were tempted to misrepresent their status as covered borrowers in loan applications. This allowed lenders to continue making high cost loans to some military families and it exposed those families to potential military discipline for incorrectly misidentifying themselves on covered borrower self-identification forms.

Human nature being what it is, evasion became common. Surveys conducted by the Pew Charitable Trusts uncovered evidence that many military households were still taking on payday loans and similar forms of usurious credit. By 2013, Pew's researchers estimated that: "5.9% of payday and auto title loan borrowers live in a household that includes current members of the Armed Services. Comparatively, 2.5% of U.S households overall are active duty, in the National Guard, or in training."[97]

At this point in time, Congress was in no mood to tolerate predatory lending to the Military. Since the original act passed in 2006, the nation's banking industry collapsed creating a national home mortgage foreclosure crisis and ushering in the Great Recession.[98] In 2010 Congress adopted the most comprehensive financial reform in nearly a century. Among many other provisions, the Dodd-Frank Wall Street Reform and Consumer Protection Act established the CFPB and transferred to it the regulatory implementation responsibility for most of the country's consumer financial services laws, including the Truth in Lending Act.[99] It was, perhaps, no surprise that Congress also responded to the troubling reports of evasion of the MLA requirements by

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[96] *Id.* at 10 ("Lenders have exploited loopholes in the definitions of covered credit, such as styling a payday or car title loan as open-end credit or setting a loan term slightly longer than the definitions cover, to make high-cost loans to servicemembers.")

[97] Letter from Nick Bourke, Project Director, the Pew Charitable Trusts, February 26, 2013.

[98] *See generally* U.S. FIN. CRISIS INQUIRY COMM'N, FIN. CRISIS INQUIRY REPORT (2011).

[99] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 22, 31, and 42 U.S.C. (2012)).

updating the MLA in 2013.[100]

The 2013 Congressional amendments to the MLA included three primary changes. First, Congress explicitly added a private cause of action for servicemembers. The statute allows covered borrowers to sue in federal court to obtain actual damages, a statutory penalty of not less than $500, "appropriate punitive damages," as well as costs and reasonable attorney fees.[101] Second, the amended statute also added a subsection on administrative enforcement ordering that the MLA "shall be enforced by the agencies specified in section 108 of the Truth in Lending Act (15 U.S.C. 1607) in the manner set forth in that section or under any other applicable authorities available to such agencies."[102] In effect this gave the FTC enforcement authority for nondepository lenders within its jurisdiction it more clearly articulated examination and enforcement authority for NCUA with respect to credit unions, OCC with respect to national banks, and FDIC with respect to state banks. And third, the amendments added the recently created CFPB to the list of agencies the Department is required to consult with respect to issuing implementing regulations.[103]

For its part, the new CFPB quickly recognized some of the strengths and weaknesses of the MLA. For instance, Holly Petraeus, Assistant Director of the CFPB's Office of Service Member Affairs, testified on loopholes in the 2007 regulations before the Senate Banking Committee:

> I hear from financial counselors on the installations about the prevalence of payday-like products that are specifically marketed to military families—often with patriotic-sounding names and the American flags on the website to match, but with a sky-high interest rate for the Servicemember who takes out the loan. And the internet is full of 'military loans,' some outright scams and others with very high interest rates. Although the MLA put an interest rate cap on the annual percentage rate of certain types of loans to the active duty military, some lenders have found ways to get outside the definitions in the DoD

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[100] Pub. L. 112-239, Div. A, Title VI, §§ 661(a), (b), 662(a), (b), 663, Jan. 2, 2013, 126 Stat. 1785.

[101] *Id. codified at* 10 U.S.C. § 987(f)(5).

[102] *Id. codified at* 10 U.S.C. § 987(f)(6).

[103] *Id. codified at* 10 U.S.C. § 987(h)(3)(E).

rule implementing the MLA.[104]

And, the Bureau conducted a study to identify whether banks were also making loans to service members at prices in excess of the MLA's 36 percent cap.[105] Drawing on a large sample of data gathered directly from banks with over $10 billion assets, CFPB researchers identified over 55,000 military service members that had access to deposit advance products from a handful of banks.[106] Deposit advance products are open-end lines of credit connected to checking accounts that impose a non-periodic fee on overdrawn accounts that is typically repaid the next time an account holder's salary is deposited into the account.[107] Consumer advocates have bitterly criticized these deposit advance products as harmful products and generally refer to them as "bank payday loans."[108] The CFPB's research estimated that bank payday loans made to these military service members had average effective

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[104] *See supra* note 48.

[105] CONSUMER FIN. PROT. BUREAU, THE EXTENSION OF HIGH-COST CREDIT TO SERVICEMEMBERS AND THEIR FAMILIES (December 2014) [hereinafter CFPB, EXTENSION OF HIGH-COST CREDIT TO SERVICEMEMBERS] *published as an appendix to* Petraeus, Assistant Director for the Office of Servicemember Affairs, Consumer Financial Protection Bureau, Comment Letter on Limitations on Terms of Consumer Credit Extended to Service Members and their Dependents, 32 C.F.R Part 232, RIN 0790-AJ10, December 26, 2014, available at: https://www.regulations.gov/document?D=DOD-2013-OS-0133-0193.

[106] *Id.*

[107] Following regulatory guidance from the OCC and FDIC issued in 2013, most banks that offered bank payday loans at the time the CFPBs study terminated these products. *See*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, Docket ID OCC-2013-0005, GUIDANCE ON SUPERVISORY CONCERNS AND EXPECTATIONS REGARDING DEPOSIT ADVANCE PRODUCTS, (Nov. 2013), available at http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-182a.pdf; FED. DEPOSIT INS. CORP., GUIDANCE ON SUPERVISORY CONCERNS AND EXPECTATIONS REGARDING DEPOSIT ADVANCE PRODUCTS (Nov. 2013), available at http://www.fdic.gov/news/news/press/2013/pr13105a.pdf. CFPB's study reflected the market at the time predated the prudential regulators' guidance. However, consumer advocates have expressed concern that under the Trump Administration, bank payday loans or similar products may be reintroduced. Mike Calhoun, *Payday Lending, Bank Deposit Advances are Payday Loans in Disguise,* AM. BANKER (Mar. 8, 2019), https://www.americanbanker.com/opinion/bank-deposit-advances-are-payday-loans-in-disguise.

[108] *See, e.g.*, Calhoun, *supra* note 107.

annual percentage rate of about 304 percent—almost ten times the MLA's usury limit.[109] The study also identified over $50 million in bank payday loans that had been extended to active duty military service members and found that military service members were using bank payday loans more frequently than civilians.[110] Nevertheless, large banks could legally make loans with an APR of over 300% to military consumers because the banks had structured their products as open-end lines of credit—taking advantage of the Department of Defense's narrow, three product definition of "consumer credit" in the 2007 regulations.[111] Although the CFPB's research did not identify the banks making bank payday loans to the military, it was widely known in the industry that only six banks were willing to engaged in this controversial business.[112] One of them was Wells Fargo.[113] The CFPB's research proved that it was not merely peripheral, small non-depository lenders who were evading the MLA's usury limit.

C. The Department of Defense's 2015 Implementing Regulations

Following an Advanced Notice of Proposed Rulemaking,[114] the Department published a proposal to substantially amend the MLA, implementing regulations in September of 2014.[115] The Department's Notice of Proposed Rulemaking included three fundamental changes. First, the Department proposed extending the protections of 10 U.S.C. § 987 to a much broader range of closed-end and open-end credit products. In describing the

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[109] CFPB, EXTENSION OF HIGH-COST CREDIT TO SERVICEMEMBERS, *supra* note 105, at 6.

[110] *Id.* at 7.

[111] *Id.* at 8 ("The findings indicate that some depository institutions extended millions of dollars in deposit advances to servicemembers with APRs that typically exceeded 300 percent. However, deposit advances structured as open-end lines of credit are not subject to the Military Lending Act's limitations under the current regulations.").

[112] *See, e.g.*, Calhoun, *supra* note 107.

[113] *Mainstream Banks Making Payday Loans: Regulators Must Put Swift End to New Trend* at 2-3, CENTER FOR RESPONSIBLE LENDING, (Feb. 2010), https://www.responsiblelending.org/payday-lending/policy-legislation/regulators/mainstream-banks-making-payday-loans.pdf.

[114] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Advanced Notice of Proposed Rulemaking, 78 Fed. Reg. 36134 (June 17, 2013).

[115] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Notice of Proposed Rule, 79 Fed. Reg. 58602 (September 29, 2013).

Proposed Rule, the Department explained in relevant part that "the narrowly defined parameters of the products regulated as 'consumer credit' under the then-existing rule do not effectively provide the protections intended to be afforded to Service members and their families under the MLA."[116] Instead of covering merely covering three narrowly defined loan types, the proposed rule defined consumer credit to essentially follow the long-standing and broad definition of "consumer credit" in the Truth in Lending Act as implemented by Regulation Z. This meant that a broad array of credit products, notably including credit cards, would have to comply with the MLA's usury limit, forced arbitration ban, and other disclosure requirements and limitations. This also meant that the proposed revisions to the Department's implementing regulations had significant implications for broader group of banks, credit unions, finance companies, service providers, as well as their many lobbyists, trade associations, and friends on Capitol Hill.

The second fundamental change proposed by the Department was a substantial revision to the requirements for verifying loan applicants' status as covered borrowers. Instead of relying on the loan applicants to self-identify as covered borrowers, the proposal allowed creditors to select any method of identifying covered borrowers.[117] But, the Department provided an optional safe-harbor only to creditors that verified loan applicants status as a covered borrower through a free online database maintained by the Pentagon's Defense Manpower Data Center.[118] This meant that creditors who were concerned about potentially violating the MLA would need to significantly revise their software, origination procedures, employee training, and loan servicing practices.

The Department, and the Inter-Agency Working Group with whom the Department was required to consult including the Federal Reserve Board, the CFPB, the Treasury Department, the FDIC, the FTC, the NCUA, and the OCC received, reviewed, and analyzed several hundred comments from a wide range of persons—including thousands of individuals. In total, over 21,000 individuals expressed views on the Proposed Rule, and the vast majority of individuals supported the proposal to extend the protections of the MLA to a wider-range of closed-end and open-end credit products.[119]

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[116] 79 Fed. Reg. at 58610.

[117] *Id.* at 58639.

[118] *Id.*

[119] Limitations on Terms of Consumer Credit Extended to Service

Nearly two hundred consumer or civil rights organizations submitted comments, most expressing support for the reforms in the Proposed Rule. Some organizations expressed the view that the Regulation should go further in application to cover, for example, checking account overdraft fees and rent-to-own products.[120] Forty U.S. Senators expressed support for the Proposed Rule, particularly to close what they found to be "loopholes" in the previous rule that precluded Servicemembers and their families from effectively receiving the protections of the MLA.[121] Similarly, the Attorneys General of twenty-two states supported the Proposed Rule and urged the Department to adopt even more aggressive provisions to regulate some financial products under the MLA.[122]

Conversely, over 350 groups, trade associations, and businesses submitted comments expressing concerns with—as well as outright opposition to—the Proposed Rule.[123] Most financial institutions urged the Department to offer exemptions for certain types of creditors or credit products. Insured depository institutions and insured credit unions, for example, urged exemptions of their products from the MLA. And some lobbyists warned that the regulation would lead to widespread confusion and expose creditors to costly lawsuits.

Many businesses also expressed serious and credible concerns with the logistics integrating their loan origination platforms with the Department's Military Lending Act Database in order to avail themselves of the optional safe-harbor for covered borrower identification.[124] Businesses were concerned that checking the MLA database would be a costly burden, would slow down origination of millions of credit applications each month, and would grind the nation's consumer finance markets to a halt if the Department's website were to temporarily shut down. Predicting doom, one trade association for finance companies claimed that the covered borrower database safe harbor had the potential to "seriously disrupt consumer credit through the country."[125]

Members and Dependents; Final Rule, 80 Fed. Reg. 43560, 43561 (July 22, 2015).

[120] *Id.*

[121] *Id.*; *see also* Sen. Jack Reed, et al., Nov. 25, 2014.

[122] *Id.*; *see also* Attorneys General, Dec 22, 2014.

[123] *Id.*

[124] *Id.*

[125] American Financial Services Association, Comment Letter on Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Notice of Proposed Rule (December 22, 2014),

Finance companies and payday lenders expressed the view that the Rule would reduce access to a wide range of installment loans, which these commenters asserted, were valuable resources for Service members and their families. They asserted also that the Service Relief Societies, non-profit entities which provide financial assistance in the form of no-interest loans to Servicemembers and their families in emergent circumstances, would not have sufficient resources to handle the range and volume of loans needed by Servicemembers and their families. Lastly, Pawnbrokers and their representatives argued that pawn transactions are different in kind from other types of credit transactions, principally because pawn transactions are non-recourse loans and should therefore be exempt from the MLA.[126]

In addition, behind the scenes, the financial services industry engaged in a lobbying campaign to stop the Department from more broadly implementing the MLA. Although the leadership of the Department of Defense, but for the President, is unelected, senior Pentagon leaders are political appointees subject to advice and consent of their appointments and are accountable to individual Members of Congress who sit on many of the committees and sub-committees before which pentagon leaders must appear to appeal for advancement and support of the initiatives or programs Pentagon leaders need to train and equip their troops. Calls and letters to the Pentagon from Members of Congress, lobbyists, principals of large financial institutions, and constituents were numerous. Department officials and others were summoned frequently to Capitol Hill for frank discussions as to the potential effects of the Proposed Rule in Congressional districts throughout the country. The Department's rulemaking overcame a critical hurdle in a dramatic midnight 32-30 House Armed Services Committee vote to strike language that would have indefinitely delayed the Department's rule from the annual Defense Authorization Act.[127] For their part, Defense leaders refused to bend to significant political pressure and risk, and focused on the needs of servicemembers and their families.

The Department of Defense finalized its proposal by

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https://www.regulations.gov/document?D=DOD-2013-OS-0133-0316.

[126] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 80 Fed. Reg. at 43,562.

[127] Ashlee Kieler, *House Panel Strikes Provision that Would Delay Added Military Lending Act Protections*, CONSUMERIST (Apr. 30, 2015) https://consumerist.com/2015/04/30/house-panel-strikes-provision-that-would-delay-added-military-lending-act-protections/.

publishing a revised final rule on July 22 2015.[128] No combatants in the battle over the proposal won every skirmish. The Department rejected consumer advocates' comments urging that the rule cover checking account overdraft fees and rent-to-own transactions. And the Department also rejected various industry trade associations' requests for special exemptions from the law. Nevertheless, the core changes in the proposal remained intact in the final rule. Specifically,

> [T]he Department amend[ed] its regulation primarily for the purpose of extending the protection of the MLA to a broader range of closed-end and open-end credit products rather than the limited credit products that had been defined as 'consumer credit.' After reviewing comments submitted on the Proposed Rule and in light of its experience administering the existing regulation for over seven years, the Department amend[ed] its regulation so that, in general, consumer credit would be defined consistently with credit that for decades has been subject to the disclosure requirements of the truth in Lending Act, codified in Regulation Z, namely: Credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is (i) subject to a finance charge or (ii) payable by a written agreement in more than four installments."[129]

Moreover, the Department retained its database-driven covered borrower identification policy, albeit with considerable accommodations to address industry concerns. In the final rule, the Department modified its proposal to allow alternative methods for creditors to check the status of loan applicants. In addition to submitting a free inquiry directly to the Department's online MLA database, under the 2015 final rule creditors can also obtain a safe harbor by checking the status of a loan applicant on a consumer report obtained through a nationwide consumer reporting agency as that term is defined in the Fair Credit Reporting Act.[130] In

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[128] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule, 80 Fed. Reg. 43560 (July 22, 2015).

[129] *Id.* at 43560.

[130] 32 C.F.R. § 232.5(b)(2)(ii). Currently there are three nationwide consumer reporting agencies: Equifax, Experian, and TransUnion. *How can I contact the nationwide credit reporting companies with general inquiries?* , CONSUMER FIN. PROT. BUREAU (last updated Sept. 22, 2016), https://www.consumerfinance.gov/ask-cfpb/how-can-i-contact-the-

implementing the optional database safe-harbor, the Department sponsored a government-industry working group to iron out technological challenges and facilitate compliance with the regulation and has developed procedures to regularly update covered borrower status with the nationwide credit reporting agencies.

The 2015 rule also used a variety of creative provisions to facilitate loan origination and temper industry compliance costs while preserving the core consumer protections in the statute. For instance, the rule allows lenders to comply with statutory requirement of providing "verbal" disclosures by listing a toll-free telephone number service in the written agreement that covered borrowers can call to hear a recorded disclosure message.[131] The Department resolved the tension between TILA's disclosure requirement and the MLA's disclosure requirements by allowing lenders to comply with the MLA by providing standard TILA disclosures and a non-numeric, standardized, model "statement of the MAPR" in their boilerplate agreements.[132] And, the Department allowed lenders to minimize compliance costs by providing written disclosures for both civilians and service members within the same standard document.[133]

The Department also resolved the difficulty of applying a modern usury limit to credit cards. The 2015 MLA regulations

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nationwide-credit-reporting-companies-with-general-inquiries-en-1225/.

[131] 32 C.F.R. § 232.6(d)(2)(ii)(B), (iii).

[132] *Id.* at § 232.6(a), (c). The "model" statement reads:

> Federal law provides important protections to members of the Armed Forces and their dependents relating to extensions of consumer credit. In general, the cost of consumer credit to a member of the Armed Forces and his or her dependent may not exceed an annual percentage rate of 36 percent. This rate must include, as applicable to the credit transaction or account: The costs associated with credit insurance premiums; fees for ancillary products sold in connection with the credit transaction; any application fee charged (other than certain application fees for specified credit transactions or accounts); and any participation fee charged (other than certain participation fees for a credit card account).

Id.

[133] 80 Fed. Reg. at 43587 n. 238*; see also* Military Lending Act Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Interpretive Rule, 81 Fed. Reg. 58840, 58844 (Aug. 26, 2016) (response to question 15 further explaining the right of creditors to comply with MLA limitations through the use of "savings clauses" within standard written agreements provided to covered borrowers and civilians alike).

compromised by applying the 36 percent interest rate limit to periodic rates, but allowing non-periodic credit card fees to be excluded from the cap when those fees are imposed for a bona fide transactional purpose and are reasonable for that type of fee.[134] The Department provided considerable flexibility to card issuers in determining whether their transactional fees are reasonable, allowing issuers to consider a variety of factors in setting their fees.[135] And the Department established a mathematical safe harbor for issuers on the average fees imposed by other major card lenders.[136]

And finally, the Department imposed a staggered compliance period for the 2015 rule to provide ample time for the industry to adjust to the regulation. The 2015 regulations went into effect October 1, 2015.[137] But the effective regulations did not require general compliance for newly originated credit for another year until October 3rd of 2016.[138] And, the regulations required compliance for new credit cards accounts on October 3rd of 2017 but authorized the Department of Defense to issue an additional one year extension on credit card compliance until October 3rd of 2018.[139]

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[134] 32 C.F.R. § 232.4(b)(1) ("For consumer credit extended in a credit card account under an open-end (not home-secured) consumer credit plan, a bona fide fee, other than a periodic rate, is not a charge required to be included in the MAPR pursuant to paragraph (c)(1) of this section. The exclusion provided for any bona fide fee under this paragraph (d) applies only to the extent that the charge by the creditor is a bona fide fee, and must be reasonable for that type of fee.").

[135] *See, e.g.*, *id.* at § 232.4(d)(3)(iv) (providing that "An amount of a bona fide fee for participation in a credit card account may be reasonable under paragraph (d)(1) of this section if that amount reasonably corresponds to the credit limit in effect or credit made available when the fee is imposed, to the services offered under the credit card account, or to other factors relating to the credit card account.").

[136] *Id.* at § 232.4(d)(3)(iv). Under the regulation a bona fide fee is reasonable per se if:

> the amount of the fee is less than or equal to an average amount of a fee for the same or a substantially similar product or service charged by 5 or more creditors each of whose U.S. credit cards in force is at least $3 billion in an outstanding balance . . . at any time during the 3-year period preceding the time such average is computed.

[137] 32 C.F.R. § 232.12(a).

[138] *Id.* at § 232.13(a).

[139] *Id.* at § 232.13(c).

IV. THE MILITARY LENDING ACT IN PERSPECTIVE: A TEMPLATE FOR FUTURE AMERICAN USURY LAWS

A. Groundbreaking Success in Implementation

Throughout the rulemaking process, financial services businesses and their advocates advanced many doomsday scenarios. In retrospect, very few, if any, of these concerns proved meritorious. Perhaps the most common argument was that broadly applying the MLA's interest rate limitation would restrict or cut-off access to credit. That argument did not resonate with Department officials. The Department, justifiably, argued that the interest rate limitation restricted access not to credit, but rather, to access to debt and the cycle of debt that harmful financial products caused. The Department did, of course, need to ensure that covered borrowers in need of funds and who might have been disposed to get them from payday lenders would still have access to finance appropriate to their credit risk and ability to repay. As is noted at length in the Supplementary Information accompanying the 2015 final rule, the Department coordinated with the military Service Relief Agencies prior to adoption of the Rule with a view toward ensuring that sufficient relief assets would be available. Surprisingly, service members' demand for free emergency loans actually *declined* once the MLA cut off access to payday loans, vehicle title loans, and similar forms of high-cost credit: "In 2006 about 1,500 active personnel struggling with payday loans sought financial aid from the Navy-Marine Corps Relief Society, which paid over $1.3 million in assistance. That fell to *three requests for aid* and $4,000 granted in 2018. . . ."[140] Despite much hand-wringing and prognostication that an expansion of the scope of the MLA's usury limit would both cripple the financial industry and restrict greatly access to credit for covered borrowers, neither proved to be true and many of the problems predicted for service members never came to fruition.

This is not to say the industry has faced no compliance challenges. At the request of financial institutions, the Department issued an interpretive rule providing further guidance on industry compliance concerns in August of 2016.[141] Again drawing on an

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[140] Katy O'Donnell, *Military Personnel Caught in Crossfire,* POLITICO (Apr. 9, 2019), https://www.politico.com/story/2019/04/09/military-personnel-caught-in-crossfire-over-lending-law-1290791.

[141] Military Lending Act Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Interpretive Rule, 81 Fed. Reg.

interagency working group for expertise and assistance, the Department's guidance answered nineteen frequently asked questions.[142] Despite this, at least two policy disputes continue to simmer. First, auto dealers are lobbying the White House, the Department of Defense, and Congress to expand the MLA's exemption on auto purchase finance.[143] The original MLA did not apply "to a loan procured in the course of purchasing a car . . . when that loan is offered for the express purpose of financing the purchase and is secured by the car. . . ."[144] But, what if a loan procured to finance the purchase a car is also financing some sort of add-on, low-value credit insurance or debt suspension product? The Department has taken the sensible position that such a loan is intended to purchase a car *and* a financial product—thereby taking the loan out of the vehicle purchase exemption and requiring the lender to comply with the 36 percent MAPR usury limit as well as the prohibition of forced arbitration.[145]

And a second still-simmering dispute concerns the CFPB's role in enforcing the MLA. Since the inception of the agency, the CFPB routinely included MLA compliance within its supervisory exams. But, under the Trump Administration, the CFPB reversed itself and took the curious position that the CFPB cannot include MLA compliance within its supervisory exams of payday lenders, banks with more than $10 billion in assets, or other consumer finance businesses subject to CFPB's consumer protection

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58840 (Aug. 26, 2016). The Department also amended its guidance in December of 2017. *See* Military Lending Act Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Interpretive Rule, Amendment, 82 Fed. Reg. 58739 (Dec. 14, 2017).

[142] 81 Fed. Reg. at 58840.

[143] *Fix the GAP Hole in the Military Lending Act*, AUTOMOTIVE NEWS (Mar. 18, 2019), https://www.autonews.com/editorial/fix-gap-hole-military-lending-act ("The National Automobile Dealers Association, the American Financial Services Association, and other industry groups and state dealer associations are ramping up their efforts. . . .").

[144] 10 U.S.C. § 987(i)(6).

[145] *See* Military Lending Act Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Interpretive Rule, Amendment, 82 Fed. Reg. 58739 (Dec. 14, 2017) ("[A] credit transaction that also finances a credit-related product or service rather than a product or service expressly related to the motor vehicle or personal property is not eligible for the exceptions under § 232.3(f)(2)(ii) and (iii). For example, a credit transaction that includes financing for Guaranteed Auto Protection insurance or a credit insurance premium would not qualify for the exception under § 232.3(f)(2)(ii) or (iii).")

supervisory responsibilities.[146] There is a peppercorn of coherence in the Bureau's reversal because Title X of the Dodd-Frank Act does not list the MLA as an enumerated federal consumer law like other statutes typically included within CFPB's supervisory exams. But there are at least a dozen other statutory hooks that provide the Bureau with an ample basis include MLA compliance in its exams.[147] And, forty-seven senators recently wrote to the CFPB insisting that the agency has statutory authority to include MLA compliance in its exams and requesting that the agency resume including MLA compliance within its exams and to do so.[148] But for the time being, the CFPB has announced the view that "supervision is the heart of [the] agency" and the Bureau's leadership is "focused on ensuring we use this tool as effectively and efficiently as possible to prevent consumer harm"—but not to prevent creditors from making usurious loans to military families.[149]

Notwithstanding these remaining policy issues, the critics of the Department's 2015 rule that predicted it would spawn widespread litigation and severe liability for the nation's financial institutions appear to have been mistaken. Financial institution's fear of compliance litigation can be reasonable in some circumstances. For example, in the decade following adoption of

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[146] *See* O'Donnell, *supra* note 140 ("CFPB Director Kathy Kraninger . . . says the bureau lacks the power to monitor violations of the statute — even though the CFPB did just that during the Obama administration . . . .").

[147] Christopher L. Peterson, *Missing in Action? Consumer Financial Protection Bureau Supervision and the Military Lending Act* at 31, CONSUMER FEDERATION OF AMERICA (Nov. 1, 2018), https://consumerfed.org/wp-content/uploads/2018/11/missing-in-action-cfpb-supervision-and-the-military-lending-act.pdf.

[148] Letter from Jack Reed, United States Senator (RI), et al., to Kathleen Kraninger, Director, Consumer Financial Protection Bureau (Mar. 5, 2019), https://www.reed.senate.gov/imo/media/doc/2019-03-05%20Ltr%20to%20CFPB%20re%20MLA.pdf; *see also* Letter from Maxine Waters, Chair, Financial Services Committee, United States House of Representatives, et al., to Kathleen Kraninger, Director, Consumer Financial Protection Bureau (Dec. 14, 2018), https://financialservices.house.gov/uploadedfiles/12.14.2018_cfpb_mla_letter.pdf (letter from 21 Congressional Representatives requesting that the CFPB resume including MLA compliance within supervisory exams).

[149] Director Kathleen L. Kraninger, Consumer Financial Protection Bureau, Speech at the Bipartisan Policy Center (Apr. 17, 2019), https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/.

the Truth in Lending Act in 1968, the financial services industry faced a tsunami of over 14,000 lawsuits for noncompliance.[150] This figure likely significantly understates the actual amount of litigation because it excludes state court cases and all cases where consumers raised TILA claims as an affirmative defense.[151] Furthermore, the banking industry endured statutory amendments to correct TILA's technical problems in 1970, 1974, twice in 1976, 1978, and a major overhaul of the statute in 1980.[152]

By way of comparison, MLA litigation has been surpassingly infrequent. In the most notable MLA lawsuit, the National Pawnbrokers Association ("NPA") sued the Department of Defense seeking a permanent injunction against implementation of the Department's 2015 rule.[153] In comments submitted during the comment period the NPA asserted hardship for its constituents in utilizing the MLA Database to determine a borrower's status as a covered borrower.[154] In its lawsuit, the NPA asserted also that pawn transactions should not be covered by the MLA because they are non-recourse loans.[155] The Department argued otherwise and quickly won a denial of the pawnbroker's motion for a preliminary injunction.[156] But beyond this case, as this article goes to press, Westlaw reports only sixteen federal or state court decisions citing 10 U.S.C. § 987 in the entire history of the MLA and only eight of those cases post-date the 2015 amendments—about 0.114% of the federal cases spawned in a shorter time period by TILA. In terms of public enforcement, the CFPB has announced one consent order enforcing the statute[157] and the FTC has not announced any.[158]

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[150] David S. Willenzik & Mark Leymaster, *Recent Trends in Truth-in-Lending Litigation*, 35 BUS. LAW. 1197 n. 4 (1980).

[151] *Id.* at 1197, n. 5.

[152] Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 808, 888-89 (2003).

[153] Huntco Pawn Holdings. LLC. v. U.S. Dept. of Defense, 240 F.Supp.3d 206, 210 (D. D.C. 2016).

[154] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 80 Fed. Reg. at 43,598.

[155] 240 F.Supp.3d at 215.

[156] 240 F.Supp.3d at 238; *see also* California Pawnbrokers Ass'n v. Carter, 2016 WL 6599819, at *12 (E.D. Cal., 2016) (similarly denying pawnbroker trade association's motion for preliminary injunction).

[157] In re Cash Am. Int'l, Inc., CFPB No. 2013-CFPB-0008 (Nov. 20, 2013), http://files.consumerfinance.gov/f/2013-cfpb_0008_consent-order.pdf.

[158] *See* Federal Trade Commission, Staff Comment Letter to Paul Sanford, Assistant Director of Supervision Examinations, Consumer Financial

While further litigation is from time-to-time inevitable, the financial services industry appears to be fully capable of complying with the MLA.

B. The MLA as a Template for Future American Usury Laws

Despite the success of the MLA for military service members, the statute cannot provide protection for millions of low- and moderate- income American that also struggle with triple-digit interest rate debt traps. The fact remains that this type of lending still exists and continues to pose significant risk to civilian consumers, especially the most vulnerable. Tennessee, for example, has the sad distinction of having the most payday lending and check-cashing establishments within its borders.[159] Shelby County, home of the City of Memphis is home to 232 locations, and Madison County, Tennessee had the highest concentration of predatory lenders with 29.53 locations per 100,000 residents.[160] The State of Tennessee has over *three times* more payday lender storefront locations—all making triple-digit interest rate predatory loans—than it has McDonald's franchises.[161] Every year, about 12 million Americans put their financial well-being at risk with payday, vehicle title, and similar forms of high-cost credit. Of these people, 52 percent of are women; 12 percent are African Americans; and 13 percent are struggling through marital are separation or divorce.[162] Millions of these consumers have young children.

For these vulnerable Americans, payday, vehicle title, and similar loans continues to impose an estimated $8 billion in fees annually.[163] Nationally, according to the CFPB data, 75% of all

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Protection Bureau, 2018 WL 2460188, at *4-*5 (May 17, 2018).

[159] Joda Thongnopnua, *Fighting Predatory Lending in Tennessee: A Simple Strategy for Cities and Counties at* 11, METRO IDEAS PROJECT (Jan. 2018), https://www.scribd.com/document/368207795/Fighting-Predatory-Lending-in-Tennessee-Metro-Ideas-Project.

[160] *Id.* at 10.

[161] *Id.*

[162] PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY, PEW CHARITABLE TRUSTS (July 2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

[163] DIANE STANDAERT AND DELVIN DAVIS, CENTER FOR RESPONSIBLE LENDING, PAYDAY AND CAR TITLE LENDERS DRAIN $8 BILLION IN FEES EVERY YEAR, 1 (2016), https://www.responsiblelending.org/sites/default/files/nodes/files/research-

payday loan fees are due to borrowers stuck in more than ten loans a year.[164] The average payday loan borrower is indebted 196 days per year.[165] According to CFPB research, these forms of credit erode the ability of struggling households to meet basic living expenses like rent, groceries, electricity, and health care as a result of using covered products that were offered without any determination of their ability to repay them.[166] Collection activity associated with high-cost loans disrupts consumers ability to form useful, traditional banking and credit union relationships exposing borrowers to an increased risk of involuntary checking account closure.[167] And, high interest rates drastically understate the true cost of payday loans because interest rates do not include the increased risk of insufficient funds and overdraft penalties associated with these forms of credit. On this point, another CFPB study found that in an 18-month period half of online payday loan borrowers were charged an average of $185 in bank penalties for overdrafts or insufficient funds.[168] Because the majority of borrowers cannot afford to repay their loans without defaulting on their other obligations, payday lenders compete through collections exposing the industry to repeated allegations of illegal collection practices such as illegal calls, harassment at borrowers' residences or places of work, and false threats of legal action, and

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publication/crl_statebystate_fee_drain_may2016_0.pdf.

[164] CONSUMER FIN. PROT. BUREAU, PAYDAY LOANS AND DEPOSIT ADVANCE PRODUCTS A WHITE PAPER OF INITIAL DATA FINDINGS 22 (Apr. 24, 2013), https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[165] *Id.* at 23.

[166] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54591 (Nov. 17, 2017) ("borrowers . . . experience injury when covered short-term loans are made without making a reasonable assessment of their ability to repay and they are unable to cover the loan payment on top of major financial obligations and basic living expenses. These injuries include those associated with default, delinquency, and re-borrowing, as well as the negative collateral consequences of being forced to forgo major financial obligations or basic living expenses to cover the unaffordable loan payment.").

[167] Dennis Campbell, et. al., *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures* 32 (June 6, 2008), *available at*: http://ssrn.com/abstract=1335873 or http://dx.doi.org/10.2139/ssrn.1335873 (finding a "positive relationship between the existence of payday lending and involuntary account closures.");

[168] CONSUMER FIN. PROT. BUREAU, ONLINE PAYDAY LOAN PAYMENTS 3 (Apr. 2016), https://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf.

misuse of the criminal justice system.[169] And, recent public health research increasingly demonstrates a troubling link between unaffordable payday and vehicle-title loans and negative health outcomes. Medical and public health research shows growing evidence that payday loan use is risk factor associated with a variety of poor health outcomes including higher blood pressure, weight gain, inflammation, and anxiety.[170] One recent study found "a sharp increase in attempted suicides after gaining access to payday loans" that "appear[ed] to be related to mental health deterioration from financial distress."[171]

Perhaps, then, it should come as no surprise that Americans overwhelmingly support a traditional usury limit like the Military Lending Act. In virtually every poll conducted on the subject, a super-majority of Americans—nearly 3 in 4—support traditional usury limits of no more than 36 percent.[172] And in every public

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[169] *Id.*; *see* Melanie Hicken, *In Texas, payday lenders are getting borrowers arrested,* CNN MONEY (Jan. 8, 2015), https://money.cnn.com/2015/01/08/pf/payday-lenders-texas/ ("[Texas] Appleseed analyzed more than 1,500 criminal complaints filed by more than a dozen payday lenders between 2012 and mid-2014. Yet it says these are 'just the tip of the iceberg' since it only examined public records from eight of the state's 254 counties."); In addition, a recent report by the ACLU found that collection litigation related to payday and vehicle-title loans have led to borrowers' arrest and imprisonment. *A Pound of Flesh: The Criminalization of Private Debt* 33, AM. C.L. UNION (2018), https://www.aclu.org/sites/default/files/field_document/022118-debtreport.pdf. This "debt-to-jail pipeline" can result in long-term lost income, psychological trauma, and other harmful effects on consumers and their families. *Id.* at 19. In one case identified by the ACLU, a Missouri borrower was jailed for three days after failing to appear at a collection hearing on a $425 payday loan. *Id.* at 55.

[170] *See* Elizabeth Sweet, et al., *Short-term lending: Payday loans as risk factors for anxiety, inflammation and poor health*, 5 POPULATION HEALTH 114, 114 (2018) ("[W]ithin the broader context of financial debt and health, short-term loans should be considered a specific risk to population health"); Jerzy Eisenberg-Guyot, et al., *From Payday Loans to Pawnshops: Fringe Banking, the Unbanked, and Health*, 37 HEALTH AFFAIRS 429, 433 (2018) ("[P]ast-year fringe loan use was associated with 38 percent higher prevalence of poor or fair health. . . .").

[171] Jaeyoon Lee, *Credit Access and Household Well-being: Evidence from Payday Lending* (Jan. 1, 2019), https://ssrn.com/abstract=2915197.

[172] *See Congress Should Cap Interest Rates: Survey Confirms Public Support for Cracking Down on High-Cost Lending,* CENTER FOR RESPONSIBLE LENDING (Mar. 2009), *available at* http://www.responsiblelending.org/payday-lending/policy-legislation/congress/interest-rate-survey.pdf ("Three out of four Americans who expressed an opinion think that Congress should cap interest

rates at some level. 72% think that the annual interest rate cap should be no higher than 36% annually."). "Only one quarter of those who expressed an opinion think Congress should not cap interest rates at all." *Id.* The telephone survey reached 1,004 adults in the continental United States. *Id.* CRL weighted the sample by age, sex, geographic region, and race to suggest a 95% chance that the survey results are accurate within 2%. *Id.*; *see also* Holly Beaumont, *Capping Interest at 36% is Ethical, Just*, ALBUQUERQUE J., (Feb. 22, 2015) ("A poll conducted by the Center for Responsible Lending Public Policy Poling in January shows that 86 percent of New Mexicans support interest caps of 36 percent or less."); Rudolph Bush, *Statewide Survey Shows Broad Support for Payday Lending Reform*, DALLAS NEWS CITY HALL BLOG (June 21, 2012), http://cityhallblog.dallasnews.com/2012 /06/statewide-survey-shows-broad-support-for-payday-lending-reform.html/ (reporting that 79% of Texans polled favored capping interest rates on payday and auto title loans at 36% APR or less); *Poll on Payday Lending Legislation*, CENTER FOR POLICY ENTREPRENEURSHIP (Feb. 15, 2008), *available at* http://www.c-pe.org/download/PaydayLendingReform/PollPaydayLending.pdf (stating that a weighted sample of 500 Colorado voters found "74% of respondents are in favor of proposed legislation that will set a cap of 36% on the interest and fees that a company can charge for payday loans"); Tim Evans, *Lawmakers Face Familiar Question: How Much is Too Much to Charge for Small, Short-term Loan?*, INDY STAR (Jan. 14, 2018), https://www.indystar.com/story/news/2018/01/14/lawmakers-face-familiar-question-how-much-too-much-chart-smalfate-high-interest-short-term-loans-bac/1020203001/ (poll of 600 registered Indiana voters conducted by Bellwether Research and Consulting of Alexandria, Virginia finding "68 percent 'strongly favor' and another 20 percent 'somewhat favor' the 36 percent cap."); Timothy E. Goldsmith & Nathalie Martin, *Interest Rate Caps, State Legislation, and Public Opinion: Does the Law Reflect the Public's Desires?,* 89 CHICAGO-KENT L. REV. 115, 127 (2014) (survey of New Mexicans finding "over 72% of participants felt that the closest approximation of the rate at which these loans should be capped was 25% or less."); *Iowans for Payday Loan Reform: Iowa Poll Reveals Strong Bi-partisan Support for Payday Lending Reform*, IOWAPOLITICS.COM (Jan. 26, 2011), http://www.iowapolitics.com/index.iml ?Article=224730 (reporting about 7 in 10 Iowans support capping payday loan interest rates); *Kentucky Voters Support a 36 Percent Rate on Payday Loans, Despite Database and Job Loss Threats,* KENTUCKY COALITION FOR RESPONSIBLE LENDING (2010), *available at* http://kyresponsiblelending.files.wordpress.com/2010/01/kcrl_polling_data_fact_sheet_2-7-11.pdf (stating that a survey of "[n]early 400 voters from 179 cities and towns across the Commonwealth" found "73% of voters across the Commonwealth support a 36% APR cap on payday loans"); Pascale Mondesir, *AARP New Poll Shows Support for Payday Loan Cap*, KSFY NEWS (Oct. 28, 2015) (South Dakota poll commissioned by AARP "showed that 77% of the participants agree that there needs to be a cap on payday loans, with a 64% percent strongly agreeing."); *Alabama Public Opinion Survey* at 19-20, PUBLIC ballot referendum ever conducted on the issue, Americans have overwhelmingly voted in favor of traditional usury limits on the interest rates of consumer loans.[173] Large majorities of both

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AFFAIRS RESEARCH COUNCIL OF ALABAMA (Summer 2018), http://parcalabama.org/wp-content/uploads/2018/09/PARCA-2018-Public-Opinion-Survey.pdf (finding 73.6 percent of Alabamians agree or strongly agree with the statement "[t]he Alabama legislature should pass legislation capping the maximum rates on payday loans at 36%."); Jennifer H. Sauer, *Summary of AARP Poll of Texans Ag 45+: Opinions on Payday loan Rates and Legislation*, AARP (Jan. 2013), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2013/Summary-of-AARP-Poll-of-Texans-Age-45-Plus-Opinions-on-Payday-Loan-Rates-and-Legislation-AARP.pdf (finding 79% of Texans aged 45 years-old or believed the highest annual percentage rates payday and auto-title loan businesses should be able to charge is 36% APR or less); R.I. Office of the Gen. Treasurer, Press Release, Coalition, Raimondo, Taveras Raise Awareness on Payday Lending Pitfalls (Apr. 17, 2012), http://www.ri.gov/press/view/16334 (reporting that 76% of Rhode Islanders polled support capping payday loan interest rates).

[173] Ballot measures on usury limits have occurred in Arizona, Montana, Ohio, South Dakota, and Colorado. The public voted overwhelmingly in favor of usury limits in all of these states. *See* Tom Jacobson, Op-ed., *I-64 Passed, But There Are Still Debt Traps Out There*, GREAT FALLS TRIB. Jan. 6, 2011, at 4A ("Ballot Initiative 164, which took effect Jan. 1, capped the annual interest rates on payday and car title loans at 36 percent . . . . The measure passed with 72 percent of the vote statewide. It won in every county and House district . . . ."); Marian McClure & Debbie McCune Davis, Op-ed., *Let's Make Sure the Sun Sets on Arizona Payday Loans*, ARIZONA REPUBLIC, Nov. 21, 2009, at B5 ("60 percent of Arizona voters soundly rejected 400 percent annual interest rates on payday loans, when 1.2 million Arizonans rejected the payday lenders' Proposition 200. The lenders spent more than $14 million trying to fool the people. The voters saw through their scam."); Editorial, *Ohio Voters Prove that a Good Idea Can Beat $22 Million*, AKRON BEACON J. Nov. 6, 2008, at A10 ("Voters handed the industry a deservedly humiliating defeat, rejecting one of the slickest and most misleading campaigns in the state this election season by a ratio of roughly 2-to-1. The defeat of the lenders is particularly gratifying, as their efforts carefully concealed the industry's goal to regain the license to charge excessive interest rates to borrowers desperate for quick loans."); *South Dakota Payday Lending Initiative, Initiated Measure 21,* BALLOTPEDIA (2016), https://ballotpedia.org/South_Dakota_Payday_Lending_Initiative,_Initiated_Measure_21_(2016) (reporting 75.58% voting "in favor of placing an interest rate cap of 36 percent on short-term loans."); Ballotpedia, *Colorado Proposition 111, Limits on Payday loan Charges Initiative (2018)*, https://ballotpedia.org/Colorado_Proposition_111,_Limits_on_Payday_Loan_Charges_Initiative_(2018) (reporting 77.25% voting in favor of reducing "the loan costs on a payday loan to a maximum APR of 36 percent . . . . regardless of

Republicans and Democrats support traditional usury law.[174] The public supports traditional usury law in red states, blue states, and swing states.[175] Congressional representatives and state legislators could earn the respect and admiration of many voters by restoring the simple, effective usury limits that Americans previously enjoyed throughout most of the twentieth century.

To this end, the Military Lending Act and its 2015 implementing regulation provide a template for how to successfully restore a traditional usury limit in a modern economy. Congress, or failing that, state legislatures that do not already have effective usury laws, should consider adopting legislation to expand the MLA's usury limit to all consumers. The MLA has at least four distinct advantages over other restrictions on payday, vehicle title, and similar loans. First, a key component of the MLA's success was its focus on limiting the application of price cap to those markets most clearly falling within the national supermajority opposing usury. The MLA does not apply to home mortgage loans—avoiding the ire of real estate agents and mortgage lenders. It does not, ordinarily, apply to purchase money car loans—mostly avoiding the ire of car dealerships and automobile manufacturers. And, although the MLA does apply to banks and credit unions, the 2015 final rule is crafted in a way that these institutions can live with. The MLA currently permits nearly all credit card periodic interest rates and restricts only unreasonable nonperiodic credit fees—effectively deferring to the CARD Act as the primary of source consumer protection in the card market. And the 2015 MLA rule follows the lead of Regulation Z in treating nonperiodic courtesy overdraft fees as a separate issue. The result is a usury limit that, appropriately, cuts primarily into the product offerings of payday lenders, vehicle title lenders, and finance companies that rely on collections as a business model instead of authentic ability-to-repay underwriting. But, the MLA does so in a way that is difficult to evade because relevant forms of credit are included within the scope of the rule even though the usury limit does not impede them. The result is a

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whether payday lenders have a physical location in the state, they may not offer higher cost loans via electronic or U.S. mail, the internet, or telemarketing.").

[174] Eliza Relman and Walt Hickey, *The vast majority of Republicans support Alexandria Ocasio-Cortez and Bernie Sanders' plan to cap credit-card interest rates at 15%*, BUSINESS INSIDER (May 14, 2019), https://www.businessinsider.com/republicans-love-alexandria-ocasio-cortez-plan-cap-interest-rates-2019-5.

[175] *Id.*

consumer protection law that isstrategically targeted toward the most objectionable products and draws upon a wide base of political support.

Second, the MLA's price cap is currently the nation's most vetted usury limit. Although the statute is only about 13 years old, and the 2015 implementing regulation is much younger still, the law is now the only usury law in America for which all creditors lending within its scope must comply. Many states have older usury laws, but none of them currently bind prices within the credit card market and none of them have been subject to multiple national policy-making cycles in bitter Washington, D.C. politics. And, although the NCUA's federal usury limit on federal credit union loans is older than the MLA, it has never bathed in the acid bath of payday lender evasion tactics.[176] Moreover, the interagency consultation process that Congress imposed on the Department of Defense created a deep reservoir of expertise across every federal administrative agency with a substantial responsibility in consumer finance and banking policy. Unlike any other American usury law the Department's 2015 final rule is was forged as composite from the collective insights of these agencies—not the least of which was the DoD itself. Although the Pentagon had the least experience in financial regulatory policy, it—by far—has more experience than any public or private American institution objectively attending to the well-being of young, vulnerable consumers and their families. It was precisely this experience as well as perhaps the clarity of purpose derived from Department's tradition of leadership, that gave the agency the political spine necessary to insist on a bright line, rigorously enforced, prohibition of usurious predation. The result is that most of the interpretive and technical issues with the MLA's price limit have already been resolved.

Third, following in the wake of the MLA's usury limit is likely to induce relatively less industry opposition because it has formidable advantage of sunken compliance costs. The MLA protects only a relatively small (but important) proportion of our population. But it applies to *all* creditors that extend loans within its scope. Like muscle memory of a person trained to a repetitive act, the financial services industry now knows how to comply with the MLA. Financial institutions have already revised their policies and procedures, redesigned their origination and servicing software, and trained their compliance staff on how to conduct

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[176] *See, e.g.*, Christopher L. Peterson, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH COST CREDIT MARKET 86-87 (2004).

business under the MLA. As time goes on, financial institutions will have an even better sense of how making MLA-compliant loans affects their business model, tactics, and bottom line. For consumer advocates seeking to expand consumer protection law in America, this developed expertise in the industry represents a probable path of relatively lesser resistance. Expanding the MLA is a consumer protection benefit to compliance cost ratio bargain.

And fourth, as a political matter, proposing legislation to expand the military's usury law to cover non-military consumers can draw upon the credibility and reputation of the Defense Department. According to the long-running national Gallup poll of public confidence in American institutions, more Americans trust the U.S. Military than any other major public or private institution. In 2018, *74 percent* of Americans had "a great deal/quite a lot" of confidence in the U.S. Military.[177] More people have great confidence in the military than church or organized religion (38%), the Supreme Court (37%), Congress (11%), the presidency (37%), police (54%), the criminal justice system (22%), public schools (29%), newspapers (23%), television news (20%), the medical system (36%), organized labor (26%), big business (25%), small business (67%), or banks (30%).[178] Ironically, the military is about as popular as traditional usury law.[179]

Given these political and legal advantages, the Appendix following this Article sets out draft legislation Congress should consider adopting to extend the MLA's protections to all Americans including our military veterans and their families. The concept bill, meant to spark discussion, would amend the Truth in Lending Act to apply the 36% usury limit in 10 U.S.C. § 987(b) of the MLA to creditors lending to consumers "to the same extent as such section applies to a creditor who extends consumer credit to a covered member of the armed forces . . . ."[180] Building directly on the DOD's success in its 2015 implementing regulations, the concept bill would task the CFPB with adopting implementing regulations that would "not provide lesser protection to consumers than those provided within the rules issued by the Secretary of Defense on July 22, 2015, to carry out section 987 of title 10, United

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[177] *Confidence in Institutions*, GALLUP (2018), https://news.gallup.com/poll/1597/confidence-institutions.aspx.

[178] *Id.*

[179] *See infra* note 174 (collecting public polling on support for usury limits of 36 percent or less).

[180] *See infra*, Appendix at Sec. 3(a) § 140B(a)(1).

States Code."[181] While the concept bill was written with Congress in mind, it also provides a template that could be adapted by state legislatures seeking to build upon the MLA in their own state.

V. Conclusion

This Article has provided a contemporary history of the origins and evolution of the Military Lending Act. In enacting the MLA, Congress recognized what military leaders have known for decades. Military servicemembers have long been targeted by unscrupulous lenders, have been the victims of fraud and deception, and have been the subject of affinity marketing intended to capitalize on their patriotism and diligence. Worse yet, once hooked, these predatory lenders and debt collectors have relied upon the knowledge that servicemembers were obligated to make good on their bad transactions, lest they sacrifice their careers, failing to provide for their families and compromising their unit's ability to perform the all-important mission of defending American freedom.

And yet, in protecting servicemembers from predatory lenders, the U.S. Military can serve to remind Americans about what freedom means. Borrowers that are suffering in a high-interest, financial debt trap are not free—they are trapped. Just as every signatory to the Declaration of Independence and every delegate to the original Constitutional Convention returned home to states with usury limits, legislators today can return to the traditional policy of limiting exploitative credit pricing by following the U.S. Military's strategically targeted, thoroughly vetted, previously implemented, and overwhelmingly popular template.

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[181] *See infra*, Appendix at Sec. 3(a) § 140B(h)(2)(b).

APPENDIX

Discussion Draft Bill[182]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Military Veteran and Vulnerable Consumer Usury Protection Act of 2019".

SEC. 2. FINDINGS.

Congress finds that—

(1) all thirteen original states prohibited usurious interest rates in America in colonial times, and the overwhelming majority of states and citizens have supported usury limits throughout American history;

(2) at the Federal level, in 2006, Congress enacted a Federal 36-percent annualized usury cap to protect servicemembers and their families from predatory, high-cost lending;

(3) after initially limiting the scope of protections, resulting in evasions, in 2015 the Department of Defense successfully implemented this usury limit curbing predatory payday loans, car title loans, and other forms of high-cost lending around military bases

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[182] This draft, concept bill is adapted from the Protecting Consumers from Unreasonable Credit Rates Act of 2019, S.1230, 116th Cong. (2019) (sponsored by Sen. Richard Durbin-IL). It was prepared in constructive dialogue with the majority professional staff of the U.S. House Committee on Financial Services. The authors gratefully acknowledge input, suggestions, feedback and/or constructive criticism from Yana Miles, Lauren Saunders, and Chi Chi Wu.

while preserving access to mainstream credit products;

(4) notwithstanding such attempts to curb predatory lending, high-cost lending to civilian consumers persists in all 50 States due to loopholes in State laws, safe harbor laws for specific forms of credit, and the exportation by banks of unregulated interest rates through preemption and parity laws;

(5) current law does not protect military veterans who have served their country with honor and deserve protection from predatory high cost loans;

(6) current law does not protect the families of military veterans who have also sacrificed for their country, too often go unrecognized for their service, and also deserve protection from predatory high cost loans;

(7) due to the lack of a comprehensive Federal usury cap, consumers and military veterans annually pay as much as approximately $8,000,000,000 on storefront and online short-term payday loans, $3,800,000,000 on car title loans, and additional amounts in unreported revenues on high-cost installment loans and lines of credit;

(8) cash-strapped consumers pay on average approximately 400-percent annual interest for short-term payday loans, 300-percent annual interest for car title loans, and up to 100 percent or more annual interest for installment loans and lines of credit;

(9) a national maximum interest rate that includes all forms of fees and manipulative add-on products, closes all loopholes, and provides sufficient deterrence and enforcement to discourage evasion is necessary to eliminate such predatory lending; and

(10) high-cost creditors use revenue from high interest rates to crowd out safer and less expensive alternatives to predatory lending that would otherwise be offered to military veterans and vulnerable consumers;

SEC. 3. LIMITATIONS ON CONSUMER CREDIT AND MAXIMUM RATES OF INTEREST.

(a) IN GENERAL.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by adding at the end the following:

"§ 140B. Limitations on consumer credit and maximum rates of interest

"(a) APPLICATION OF THE MILITARY LENDING ACT.—

"(1) Except as provided in paragraph (2), Section 987(b) of title 10, United States Code (commonly referred to as the 'Military Lending Act') shall apply to a creditor who extends consumer credit to a consumer to the same extent as such section applies to a creditor who extends consumer credit to a covered member of the armed forces or a dependent of a covered member of the armed forces (as such terms are defined, respectively, under such section 987).

"(2) Paragraph (a)(1) of this section, shall not apply to:

"(A) a residential mortgage,

"(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; or,

"(C) a loan made by a federal credit union subject to the cost limitations provided within 12

U.S.C. 1757(5)(A)(vi) as implemented by the National Credit Union Administration Board.

"(b) DEFINITIONS.—As used in this section:

"(1) CONSUMER CREDIT.—Except as provided in paragraph (a)(2), the term 'consumer' has the meaning provided for such term in section 103 (15 U.S.C. 1602).

"(2) CREDIT. — Except as provided in paragraph (a)(2), the term "credit" has the meaning provided for such term in section 103 (15 U.S.C. 1602).

"(3) CREDITOR.—Except as provided in paragraph (a)(2), the term 'creditor' has the same meaning as in section 103 (15 U.S.C. 1602).

"(c) NO EXEMPTIONS PERMITTED.—The exemption authority of the Bureau under section 105 shall not apply to the cost limitations established under this section

"(d) CALCULATION OF THE ANNUAL PERCENTAGE RATE FOR OPEN-END CREDIT.—

"(1) IN GENERAL.—The annual percentage rate for open-end credit for purposes of this section shall be calculated pursuant to the mathematical formula set forth in Section 107(a)(2) [15 U.S.C. 1606(a)(2)], subject to adjustments to the amount considered a finance charge as provided in the rules issued by the Secretary of Defense on July 22, 2015, to carry out section 987 of title 10, United States Code.

"(2) EXCEPTION.—Notwithstanding paragraph (d)(1) of this section, for consumer credit extended in a credit card account under an open-end (not home-secured) consumer credit plan, a bona fide fee other than a period rate is not a charge required to be included within the finance charge for purposes of this section provided that the fee is assessed in compliance with Section 127(n) [15 U.S.C. 1637(n)], except this exclusion shall not apply to—

"(A) Any credit insurance premium or fee, including any charge for single premium credit insurance, any fee for a debt cancellation contract, or any fee for a debt suspension agreement; or

"(B) Any fee for a credit-related ancillary product sold in connection with the credit card account under an open-end (not home-secured) consumer credit plan.

"(e) RELATION TO STATE LAW.—Nothing in this section may be construed to preempt any provision of State law that provides greater protection to consumers than is provided in this section.

"(f) PENALTIES AND REMEDIES.— The provisions of Section 987(f) of title 10, United States Code shall apply to any extension of consumer credit to a consumer in violation of this section to the same extent as such penalties and remedies apply to an extension of consumer credit to a covered member of the armed forces or a dependent of a covered member of the armed forces (as such terms are defined, respectively, under such section 987 of title 10).

"(g) PRESERVATION OF STATE ENFORCEMENT.— Notwithstanding Section 130(e) (15 U.S.C. 1640(e)), the following state administrative enforcement provisions shall apply for purposes of this section:

"(1) IN GENERAL.—

"(A) STATE ATTORNEYS GENERAL.—Within 3 years from the date of the violation the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this section or regulations issued pursuant to this section, and to secure remedies under provisions of this section or remedies otherwise provided under other law.

"(B) STATE REGULATORS.—Within 3 years from the date of the violation, a State regulator may bring a civil action or other appropriate proceeding to enforce the provisions of this section or regulations issued pursuant this section with respect to any entity that is or is required to be State-chartered, incorporated, licensed, or otherwise authorized to do business under State law, and to secure remedies under provisions of this section or remedies otherwise provided under other provisions of law with respect to such an entity.—.

"(2) RULE OF CONSTRUCTION.—No provision of this title shall be construed as modifying, limiting, or superseding the operation of any provision of an this title nor of section 5552 of title 12 that relates to the authority of a State attorney general or State regulator to enforce Federal law.

"(3) CONSULTATION REQUIRED.—Before initiating any action in a court or other administrative or regulatory proceeding connection with an extension of credit as authorized under this section, the State attorney general or State regulator shall consult and provide notice in accordance with and subject to the restrictions in subsections (b), (c), and (d) of section 5552 of title 12.

"(h) REGULATIONS.—

"(1) IN GENERAL.—The Bureau shall prescribe regulations carrying out this section.

"(2) CONSISTENCY.—

"(A) The Bureau's rules implementing this section shall be consistent with rules issued by the Secretary of Defense.

"(B) Notwithstanding paragraph (h)(2)(A), except as provided in paragraph (d)(2) of this section, the Bureau's rules implementing this section shall not provide lesser protection to consumers than those provided within the rules issued by the Secretary of Defense on July 22, 2015, to carry out section 987 of title 10, United States Code.

"(3) CONSULTATION.—In issuing rules implementing this section, the Bureau shall consult with the Secretary of Defense.

(b) RULEMAKING. —

(1) RULEMAKING DEADLINE.—Not later than the end of the 12-month period beginning on the date of enactment of this Act, the Bureau of Consumer Financial Protection shall issue rules to carry out the amendments made by this Act.

(2) RULEMAKING COMPLIANCE DEADLINE.—If the Bureau fails to adopt rules requiring compliance with this section prior to the expiration of the 18 month period beginning on the date of enactment of this Act, this section shall be self-implementing and require compliance at that time.

(c) CLERICAL AMENDMENT.—The table of contents for chapter 2 of the Truth in Lending Act is amended by adding at the end the following:

"140B. Limitations on consumer credit and maximum rates of interest".