



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Bureau of Economics

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**Via Electronic Delivery to the Federal eRulemaking Portal at
<http://www.regulations.gov>**

Federal Docket Management System Office
4800 Mark Center Drive
2nd Floor, East Tower, Suite 02G09
Alexander, VA 22350-3100

Re: In the Matter of Request for Comment on Proposed Revised Regulation Regarding
Limitations on Terms of Consumer Credit Extended to Service Members and
Dependents; Docket No. DOD-2013-OS-0133

Dear Sir or Madam:

Staff of the Federal Trade Commission's Bureau of Consumer Protection and Bureau of Economics¹ thanks the Department of Defense ("DoD") for this opportunity to comment on proposed amendments to its regulation implementing the Military Lending Act ("MLA") set forth in its September 2014 Notice of Proposed Rulemaking ("NPRM").² Since 2007, the MLA has provided important protections to service members and their families in credit transactions – protections that go beyond those provided to other individuals under the consumer credit laws.

Although all consumers are potential targets for unfair and deceptive lending practices, service

¹ This letter expresses the views of the Federal Trade Commission's Bureau of Consumer Protection and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments, with Commissioner Wright dissenting.

² John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, as amended by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, codified in 10 U.S.C. § 987. The existing DoD regulation is at 32 C.F.R. Part 232 (hereinafter "existing regulation"); the proposed amendments are at 79 Fed. Reg. 58602 (Sept. 29, 2014) (to be codified at 32 C.F.R. Part 232) (hereinafter "proposed regulation").

members and their families have some distinctive characteristics that can make them more likely to be targeted by less scrupulous lenders. For example, as noted in the NPRM, many service members are young and married with children or other dependents;³ military families also may relocate frequently; many are earning a steady salary and faced with significant financial responsibilities for the first time; and a large percentage of enlisted personnel have reported in a DoD survey that they have used one or more sources of small dollar loans in the past year.⁴ Moreover, unscrupulous lenders may take advantage of concerns unique to service members, such as threat of disciplinary action or risk to their security clearance if they are unable to pay a financial obligation, which can affect their ability to continue to serve in the military.⁵ Financial instability understandably places great stress on service members and their families, likely adversely affecting job performance, military readiness, mission focus, and family relationships, as well as requiring attention from commanding officers and senior non-commissioned officers to resolve outstanding debts and other credit issues.⁶

The Federal Trade Commission (“FTC” or “Commission”) has wide-ranging responsibilities concerning nearly all segments of the economy, including jurisdiction over most non-bank entities. The Commission enforces Section 5 of the FTC Act, which prohibits deceptive or unfair practices, often referred to as the Commission’s “UDAP” authority. The Commission’s UDAP authority

³ The NPRM notes that, based on U.S. Census data comparing marriage rates of service members and individuals of comparable age who are not in the military, young “service members tend to take on relatively more household responsibilities than their civilian counterparts.” 79 Fed. Reg. at 58604, n.23.

⁴ See generally 79 Fed. Reg. at 58604-05.

⁵ See 79 Fed. Reg. at 58605, n.29, 58630-31; see also Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. § 147.8 (Guideline F – Financial considerations) (“An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. [...] Conditions that could raise a security concern and may be disqualifying include: [...] A history of not meeting financial obligations; [...or ...] Inability or unwillingness to satisfy debts”); Uniform Code of Military Justice, 10 U.S.C. §§ 801-940.

⁶ See 79 Fed. Reg. at 58605.

plays an important role in protecting consumers: put simply, it requires companies to market their products truthfully and to refrain from engaging in harmful business practices. The Commission's UDAP authority also levels the playing field, and thus promotes competition, by requiring all companies to make truthful claims. In addition to the FTC Act, the Commission enforces numerous financial services laws, including the MLA and the Truth in Lending Act ("TILA"). The Commission engages in robust law enforcement to combat unlawful practices, including in areas that affect service members, veterans, and their families, primarily through commencing legal actions in federal court and administratively.⁷ The FTC further fulfills its core consumer protection mission through consumer and business education, competition and consumer protection advocacy, and public policy research. A number of these efforts are specially designed to protect service members and their families. For example, the FTC maintains the Consumer Sentinel Complaint Network, a secure online database available to law enforcement, which now integrates complaints directly from all the armed services through portals at DoD.⁸ In addition, this year, the Commission, with its partners, held its second annual Military Consumer Protection Day, to empower service members, veterans, and their families on financial issues.⁹ The Commission also maintains a *Military Families* page on its consumer education website;¹⁰ its resource materials focus

⁷ See, e.g., *United States v. Mortgage Investors Corp. of Ohio, Inc.*, No. 8:13-cv-01647-SDM-TGW (M.D. Fla. June 25, 2013) (alleging that one of the nation's leading refinancers of veterans' home loans misrepresented the costs and potential savings of refinancing services to current and former military consumers), available at <http://www.ftc.gov/enforcement/cases-proceedings/122-3084/mortgage-investors-corporation-ohio-inc>.

⁸ See generally *FTC Consumer Sentinel Network Data Book for January – December 2013* (February 2014), available at <http://www.ftc.gov/reports/consumer-sentinel-network-data-book-january-december-2013>.

⁹ See FTC, Partners To Recognize Second Annual Military Consumer Protection Day July 16, available at <http://www.ftc.gov/news-events/press-releases/2014/07/ftc-partners-recognize-second-annual-military-consumer-protection>. The FTC and its partners originally launched Military Consumer Protection Day in 2013, as a means of highlighting the consumer resources available to service members, veterans, and their families.

¹⁰ See FTC Consumer Information, Military Families, available at <http://www.consumer.ftc.gov/features/feature-0009-military-families>. The material is also available on the FTC's website in Spanish. See *Familias militares*, available at <http://www.consumidor.ftc.gov/destacado/destacado-s0009-familias-militares>.

on the unique challenges faced by military families and emphasize the rights that military families have when dealing with certain consumer protection issues.¹¹

FTC staff supports DOD's efforts to implement strong consumer protections for service members, and submits for consideration several comments on the proposed amendments. First, the NPRM proposes a new framework for creditors to ensure that consumers entitled to the MLA's protections are accurately identified.¹² Under the existing regulation, creditors are granted a safe harbor if a consumer signs a "covered borrower identification statement" indicating that he or she is not a covered borrower and the creditor has not otherwise determined that the consumer is a covered borrower.¹³ Under the proposed amendments, creditors can determine if the consumer is a covered borrower. A safe harbor is provided if creditors check an online DoD-maintained database to determine whether a consumer applying for credit is covered under the MLA.¹⁴ Staff supports these proposed changes. This streamlined approach will reduce the paperwork burden on consumers, aid in accurate identification of consumers who are entitled to the MLA's protections, and provide a more efficient, cost-effective mechanism for creditors to comply with the MLA.

Second, staff believes that, in assessing expansion of the existing regulation to cover additional credit products, careful consideration should be given to preserving the regulation's protections. For example, under the existing regulation, anyone engaged in the business of

¹¹ See, e.g., FTC Consumer Information, Active Duty Alerts, available at <http://www.consumer.ftc.gov/articles/0273-active-duty-alerts>; FTC Consumer Information, Identity Theft: Military Personnel & Families, available at <http://www.consumer.ftc.gov/articles/pdf-0016-military-identity-theft.pdf>. Many other resources are available for service members at the FTC website, in English and Spanish; see generally www.ftc.gov.

¹² Under the proposed regulation, covered borrowers would include all active-duty service members and their dependents who are eligible for military medical care. See proposed 32 C.F.R. § 232.3(g); 79 Fed. Reg. at 58617.

¹³ See 32 C.F.R. § 232.5.

¹⁴ See proposed 32 C.F.R. § 232.5. This safe harbor would not apply if the creditor has actual knowledge that the consumer is a covered borrower notwithstanding the consumer's status in the MLA database. See 79 Fed. Reg. at 58619-20.

extending covered consumer credit is a “creditor” subject to the requirements of the MLA. In the current rulemaking, the NPRM seeks comment on whether there should be a limited or complete exemption for insured depository institutions or insured credit unions.¹⁵ It also seeks comment on a proposed amendment that would exclude such institutions from a ban on rolling over, renewing, or refinancing payday loans.¹⁶ As in its 2007 comment on DoD’s then-proposed regulation, FTC staff is concerned about exempting banks, credit unions, or savings associations entirely.¹⁷ The MLA reflects a Congressional determination that certain lending practices can harm military consumers. Exempting some entities could have unintended consequences, including limiting the protections afforded to service members under the MLA, and placing covered entities that comply with the MLA at a competitive disadvantage. Further, a resulting reduction in competition among creditors could lead to higher interest rates or fees and reduced service for consumers. As for a limited exemption based on the type of product offered, if it can be beneficial to offer certain forms of such credit, it would be helpful to consider permitting these beneficial refinancing transactions regardless of the type of creditor involved.

Third, the NPRM proposes amending the existing regulation to cover a broader range of closed-end and open-end credit products.¹⁸ In formulating the existing regulation, DoD tailored the scope of coverage to well-documented instances of problematic lending practices and expressed concerns about the potential for unintended consequences “that could adversely affect credit

¹⁵ 79 Fed. Reg. at 58610.

¹⁶ 79 Fed. Reg. at 58622-23.

¹⁷ See FED. TRADE COMM’N, Staff Comments, *In the Matter of Request for Comment on Proposed Regulation Implementing Limitations on Terms of Consumer Credit Extended to Service Members and Dependents*, Docket No. DOD-2006-OS-0216, at 5-6 (June 11, 2007), available at http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-department-defense-concerning-proposed-regulation-implementing-limitations-terms/070614dodcomm.pdf.

¹⁸ See proposed 32 C.F.R. § 232.3(f); 79 Fed. Reg. at 58602.

availability if it were to adopt a broadly applicable regulation.”¹⁹ In support of the proposed amendments, the NPRM states that some creditors are restructuring products to avoid the MLA requirements – for example, restructuring closed-end credit products into open-end credit products or restructuring the amount or term of a loan.²⁰

FTC staff supports efforts to stop creditors that evade MLA coverage while offering a substantially similar product to those products currently covered by the existing rule. For products that are not already covered by the existing regulation, FTC staff also supports DoD’s efforts to obtain and analyze additional data regarding the nature, scope, and prevalence of credit products offered or extended to service members and their families.²¹ FTC staff also supports efforts to obtain data regarding consumer impact, the effect that proposed changes could have on the availability of credit, and the forms of alternative credit that may emerge.²² For example, studies have documented consumer cognitive biases that negatively impact their financial decision making.²³ Other studies have focused on the impact of rate caps on specific credit products.²⁴

¹⁹ 72 Fed. Reg. at 50580, 50584.

²⁰ *See generally* 79 Fed. Reg. at 58607-09 (discussion of comments raising concerns that lenders purposefully structure loan transactions to avoid the strictures of the MLA).

²¹ *See* 79 Fed. Reg. at 58606.

²² Staff is especially concerned that more risky forms of credit could emerge – including that offered by unregulated offshore or international entities – which could have negative consequences for service members. Borrowing from offshore or international entities could compromise a security clearance and leave a service member indebted to less mainstream sources of credit, with fewer protections from unfair or deceptive practices. *See generally* 79 Fed. Reg. at 58631; *see also* Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. § 147.4 (Guideline B – Foreign influence) (“Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.”).

²³ *See, e.g.*, Bertrand & Morse (2011) “Information Disclosure, Cognitive Biases and Payday Borrowing,” *Journal of Finance* 66-6 (showing that changing psychology-guided information disclosure can induce borrowers to lower their use of high-cost debt); Agarwal et al. (2009) “Payday Loans and Credit Cards: New Liquidity and Credit Scoring Puzzles? Puzzles?,” *American Economic Review* 99-2 (showing that some consumers choose higher cost credit even when lower cost credit is available); Agarwal & Mazunder (2013) “Cognitive Abilities and Household Financial Decision Making,” *American Economic Journal: Applied Economics* 5-1 (showing that some consumers make suboptimal decisions, measured by the use and cost of available credit products).

Broad coverage has not been studied as extensively, and may create additional challenges that could adversely affect military consumers.

Furthermore, to accommodate the proposed expansion of covered credit products, the proposed regulation would remove the requirement to disclose the military annual percentage rate (“MAPR”) and its total dollar amount – items creditors have been required to provide to covered borrowers since 2007 – while retaining the requirement to disclose the more customary annual percentage rate (“APR”).²⁵ The proposed regulation still requires creditors to calculate the MAPR because they are subject to a 36% rate cap under the MLA and proposed regulation.²⁶ But under the proposal, they need not disclose the MAPR in addition to the APR to covered borrowers and, with respect to the MAPR must, instead, provide a statement that the law mandates a 36% cap.

Staff recognizes that, to the extent companies are restructuring products to evade MLA coverage, military consumers currently may not be receiving the MAPR disclosure for the most problematic products.²⁷ By requiring the disclosure of the APR, pursuant to TILA, but not the MAPR, however, the proposed rule would not require covered entities to provide military

²⁴ See, e.g., Diane Ellis (1998) “The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate,” FDIC Bank Trends 98-05 (showing that the deregulation of credit card usury ceilings after 1978 produced a substantial increase in credit card availability); Daniel Villegas (1989) “The Impact of Usury Ceilings on Consumer Credit,” Southern Economic Journal 56 (1), 126-41 (finding that the quantity of consumer revolving and non-mortgage closed-end credit was significantly lower in states with usury ceilings during the year 1983); John Wolken & Frank Navratil (1981) “The Economic Impact of the Federal Credit Union Usury Ceiling,” Journal of Finance 36 (5), 1157-68 (finding that loan growth in federally chartered credit unions was constrained by the imposition of usury ceilings during the late 1970s). See also, Oren Rigbi (2013) “The Effects of Usury Laws: Evidence from the Online Loan Market,” Review of Economics and Statistics 95 (4), 1238-48 (finding that an increase in the usury ceiling covering unsecured consumer installment loans between 2007 and 2008 expanded this type of credit, especially among risky borrowers).

²⁵ See 79 Fed. Reg. at 58620.

²⁶ The proposal would require open-end creditors to calculate an “effective rate” as a proxy for the MAPR. The proposal would exclude certain “bona fide fees” from the MAPR for credit cards; to qualify, each fee would have to be compared to those typically imposed by other creditors, for the same or substantially similar product or service. See proposed 32 C.F.R. § 232.4(d). This would require complex consideration, and for smaller businesses, could result in limiting non-predatory alternative fee structures.

²⁷ See *supra* note 20 and accompanying text.

consumers with key information about the amount of additional fees, premiums, and other charges that are a real and often significant portion of their cost of credit. Accordingly, it would be helpful to see more research on whether removing the disclosure requirement for products covered by the regulation could harm consumers by eliminating material information that would allow service members to compare offers with different MAPRs,²⁸ or whether eliminating a requirement that covered entities disclose the MAPR and its total dollar cost of credit would, on balance, alleviate consumer confusion stemming from disparate disclosures of two different annual percentage rates.²⁹ In the absence of such research, we simply do not know whether the approach proposed in the NPRM strikes the right balance.

It would also be helpful to assess whether requiring disclosure of the MAPR and total dollar charges would aid enforcement by private parties and administrative agencies, both of which have been given rights of action under the amended MLA,³⁰ by providing an additional method to identify violations and hold creditors accountable.

Separately, in an effort to “simplify the information that a creditor must provide to a covered borrower when issuing consumer credit,”³¹ the NPRM proposes eliminating the requirement that information be disclosed “clearly and conspicuously;” the NPRM instead would require the creditor to provide “a description of ‘the charges the creditor may impose [...] to calculate the MAPR’” and no longer require a creditor to “describe the MAPR as a numerical value or to describe the total

²⁸ The purpose of an APR is to provide a single comprehensive measure of the cost of credit to the borrower, which he or she can use to compare loans of different types and features, and loans offered by different providers. *See, e.g.*, Federal Reserve Bank Consumer Compliance Handbook, “Regulation Z/Truth in Lending Act,” available at <http://www.federalreserve.gov/boarddocs/supmanual/cch/til.pdf>.

²⁹ *See* 79 Fed. Reg. at 58621.

³⁰ *See* 10 U.S.C. § 987(f)(5), (6).

³¹ *See* 79 Fed. Reg. at 58620.

dollar amount of all charges that apply to the extension of consumer credit.”³² The Commission has long emphasized that if a disclosure is required, it should be made clearly and conspicuously.³³ By proposing to not require the description of charges the creditor may impose be disclosed “clearly and conspicuously”, the statement could be buried in fine print, separated via multiple clicks online, or hidden among voluminous terms and conditions that contain unrelated information, which would allow the covered entity to enjoy the protections of a safe harbor while depriving consumers of meaningful information about the actual cost of credit. The risk that consumers may not look for some of the MLA required disclosures is increased by the fact that generally TILA disclosures will still have to be displayed clearly and conspicuously.³⁴ Yet, we believe these disclosures – such as the statement of the MAPR and the statement of Federal law protections provided to service members and dependents³⁵ - contain important information for these consumers.

In conclusion, FTC staff continues to support DoD’s efforts to provide the most effective protections to service members. As discussed above, it is important to assess the ways in which the proposed regulation would further such protections, and also to weigh the benefits and costs of each proposed change on service members. We appreciate your consideration of FTC staff views regarding certain key aspects of DoD’s proposed regulation. If you have questions or seek additional information about this matter, please contact Carole Reynolds, Senior Attorney, Division

³² 79 Fed. Reg. at 58621.

³³ See FTC Policy Statement on Deception, 103 F.T.C. at 180-81 (accurate information in a footnote or in the text likely will not remedy a false headline because reasonable consumers may glance only at the headline); *Removatron v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *.Com Disclosures: How To Make Effective Disclosures in Digital Advertising* (2013), available at <http://www.ftc.gov/news-events/press-releases/2013/03/ftc-staff-revises-online-advertising-disclosure-guidelines>. Although the MLA regulation’s requirements regarding disclosures do not apply to advertisements, the guidance in the “Dot Com” document addresses issues that can interfere with consumer comprehension of information in many contexts, and generally provides useful guidance about the need for clear and conspicuous disclosure of key consumer information.

³⁴ TILA sets its own clear and conspicuous requirements. See, e.g., proposed 32 C.F.R. § 232.6(a)(2) & (3).

³⁵ See 10 U.S.C. §987(c)(1); 32 C.F.R. § 232.6(a)(1) & (4).

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