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32 CFR Part 232
Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 232

[DOD–2013–OS–0133]

RIN 0790–AJ10

Limitations on Terms of Consumer Credit Extended to Service Members and Dependents

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense (''Department'') amends its regulation that implements the Military Lending Act, herein referred to as the ''MLA.'' Among other protections for Service members and their families, the MLA limits the amount of interest that a creditor may charge on ''consumer credit'' to a maximum annual percentage rate of 36 percent. The Department amends its regulation primarily for the purpose of extending the protections of the MLA to a broader range of closed-end and open-end credit products. Among other amendments, the Department modifies the provisions relating to the optional mechanism a creditor could use when assessing whether a consumer is a ''covered borrower,'' modifies the disclosures that a creditor must provide to a covered borrower, and implements the enforcement provisions of the MLA.

DATES: *Effective Date:* October 1, 2015. Compliance required by October 3, 2016.

FOR FURTHER INFORMATION CONTACT: Marcus Beauregard, 571–372–5357.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Regulatory Action

In September 2014, the Department published a proposal to amend its regulation implementing the MLA [1] primarily for the purpose of extending the protections of 10 U.S.C. 987 to a broader range of closed-end and open-end credit products (''Proposed Rule''),[2] rather than the limited credit products that had been defined as ''consumer credit.'' [3] After reviewing comments submitted on the Proposed Rule and in light of its experience administering the existing regulation for over seven years, the Department amends its regulation so that, in general, consumer credit covered under the MLA [4] would be defined consistently with credit that for decades has been subject to the disclosure requirements of the Truth in Lending Act (TILA), 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.[5]

The Department believes that this final rule is appropriate in order to address a wider range of credit products that currently fall outside the scope of the Department's existing regulation that, until now, had implemented the MLA (''existing rule''). In addition, the final rule streamlines the information that a creditor must provide to a covered borrower when consummating a transaction involving consumer credit and provides a more straightforward mechanism for a creditor to conclusively determine—via a safe harbor—whether a consumer-applicant is a covered borrower. In this regard, the Department is aware of misuses of the covered borrower identification statement whereby a Service member (or covered dependent) falsely declares that he or she is not a covered borrower. The Department believes that, if a creditor elects to (but is not required to) unilaterally conduct a covered-borrower check by obtaining information from the Department's online database (''MLA Database''),[6] a Service member or his or her dependent would be relieved from making any statement regarding his or her status as a covered borrower.

The Department is provided authority in 10 U.S.C. 987(h) to establish regulations to implement the MLA. As described in 10 U.S.C. 987(h)(3) the Department, at a minimum, must consult with other Federal agencies ''not less often than once every two years'' with a view towards revising the regulation implementing the MLA. In developing this final rule the Department has consulted with the Board of Governors of the Federal Reserve System (''Board''), the Consumer Financial Protection Bureau (''Bureau''), the Department of the Treasury, the Federal Deposit Insurance Corporation (''FDIC''), the Federal Trade Commission (''FTC''), the National Credit Union Administration (''NCUA''), and the Office of the Comptroller of the Currency (collectively, ''Federal Agencies''). The Department will continue to consult with the Federal Agencies, as appropriate, as the Department continues to assess the measures implementing the protections of the MLA.

B. Summary of the Major Provisions of the Department's Final Rule; Modifications to the Department's Proposed Rule

The MLA, as implemented by the Department's regulation, provides two broad classes of requirements applicable to a creditor: First, the creditor may not impose a Military Annual Percentage Rate (''MAPR'') greater than 36 percent in connection with an extension of consumer credit to a covered borrower (''interest-rate limit''); second, when extending consumer credit, the creditor must satisfy certain other terms and conditions, such as providing certain information (*e.g.,* a statement of the MAPR), both orally and in a form the borrower can keep, before or at the time the borrower becomes obligated on the transaction or establishes the account, refraining from requiring the borrower to submit to arbitration in the case of a dispute involving the consumer credit, and refraining from charging a penalty fee if the borrower prepays all or part of the consumer credit (collectively, ''other MLA conditions'').

Key elements of the Department's rule, particularly relative to the Proposed Rule, include:

- Providing a temporary exemption for credit extended in a credit card account under an open-end (not home-secured) consumer credit plan. The exemption for a credit card account expires, at minimum, in October 2017, and the rule permits that exemption to be extended for up to one year;
- Providing a qualified exclusion from the requirements relating to the computation of the MAPR for a credit card account for a ''bona fide'' fee, but eliminating the proposed condition that the bona fide fee be ''customary.'' Under the final rule, an application fee, participation fee, transaction-based fee, or similar fee (other than a periodic rate) for a charge may be excluded from the MAPR to the extent that the fee is (i) a bona fide fee and (ii) reasonable for that type of fee; and

[1] 32 CFR part 232.

[2] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents (Proposed Rule), 79 FR 58602 (Sept. 29, 2014). The Department extended the period for submitting comments on the Proposed Rule, to December 26, 2014. 79 FR 70137 (Nov. 25, 2014).

[3] 32 CFR 232.3(b) (2008).

[4] The forms of ''consumer credit'' that may be covered by the MLA are subject to certain exceptions, notably for a residential mortgage or auto-secured purchase loan. 10 U.S.C. 987(i)(6)(A) and 987(i)(6)(B).

[5] *See* 12 CFR 1026.1(c)(1)(iii) (2015) (limiting the coverage of the regulation, in relevant part, to credit that is subject to a finance charge or is payable by a written agreement in more than four installments).

[6] The MLA Database is available at *https://www.dmdc.osd.mil/mla/welcome.xhtml.*

• Permitting a creditor, until October 3, 2016, to continue to use the method described in the existing rule for conducting a covered-borrower check, which involves the use of a covered borrower identification statement, as a safe harbor for compliance. After October 3, 2016, a creditor seeking a safe harbor for compliance with the rule may elect to use either of the new methods for conducting a covered-borrower check (and keep a record accordingly) set forth in § 232.5(b).

C. Timetable for Implementing the Department's Final Rule

1. Twelve-month Period for Compliance

Many comments on the Proposed Rule state that, if the Department were to adopt a final rule along the lines of the Proposed Rule, creditors would need a substantial period of time to modify their operations in order to comply with the rule. For example, in a joint letter, the American Bankers Association, the Association of Military Banks of America, the Consumer Bankers Association, the Independent Community Bankers of America, and the National Association of Federal Credit Unions (the ''Associations'') state: ''Given the breadth, complexity, and broad reach of the proposal, the necessary legal analysis operations, systems changes, staff training, [and] the draconian consequences for violations, . . . the Department should allow [creditors] at least 18 months to comply'' with a final rule.[7] Similarly, another comment states that ''[the Department] should allow as long an implementation period as reasonable to provide adequate time for credit unions and others to implement necessary changes.'' [8]

Because the protections of the MLA will apply to a wider range of credit products—and thus the requirements of the final rule will apply to broader classes of creditors—the Department believes that a creditor should be afforded a reasonable period of time to adjust its operations and, if necessary, the terms and conditions of its loan product(s) offered to covered borrowers in order to comply with the final rule. Accordingly, under § 232.13(a), a creditor must comply with the requirements of the rule with respect to a consumer credit transaction or account for consumer credit consummated or established on or after October 3, 2016.[9]

2. Creditor May Use Existing Safe Harbor for Covered-Borrower Determination Prior to Compliance Date

Consistent with the Department's determination that a creditor should be afforded a 12-month period to adjust its operations and loan product(s) to comply with the rule, a creditor also is permitted to use the existing safe harbor when assessing whether a consumer-applicant is a covered borrower. If a creditor uses the safe harbor set forth in § 232.5(a) of the Department's existing rule, the creditor would be subject to the existing interpretation regarding the treatment of a covered borrower which is designed to prevent the creditor from using the borrower's declaration to allow the borrower to waive his or her rights to the protections provided under the MLA.[10]

Upon the compliance date, the rule permits—and does not require—a creditor to use information obtained from the MLA Database or information contained in a consumer report obtained from a nationwide consumer reporting agency in order to conclusively determine whether a consumer-applicant is a covered borrower. A creditor who uses one (or both) of the methods set forth in, and complies with the recordkeeping requirements of, § 232.5(b) when conducting a covered-borrower check will be afforded the new safe harbor.

3. Two-Year Exemption for Credit Card Accounts

The Department concludes that consumer credit should not include credit extended in a credit card account under an open-end (not home-secured) consumer credit plan until October 3, 2017. Section 232.13(c)(2) allows the Secretary (or an official of the Department duly authorized by the Secretary) to extend, up to an additional year, the expiration of the exemption for a credit card account. Thus, until October 3, 2017 (or potentially a longer period of time), the requirements relating to the computation of the MAPR for a credit card account, as set forth in § 232.4, would not apply. When the exemption expires, the conditional exemption for any ''bona fide'' fee charged to a credit card account, as set forth in § 232.4(d) would apply.

D. Overview of Comments on the Proposed Rule

Several hundred comments from a wide range of persons—including thousands of individuals—have submitted comments on the Proposed Rule. Including comments on form letters and petitions, over 21,000 individuals express views on the Proposed Rule,[11] and the vast majority of individuals support the proposal to extend the protections of the MLA to a wider range of closed-end and open-end credit products.

Nearly two hundred consumer or civil rights organizations have submitted comments, and most express support for the reforms in the Proposed Rule. In addition, some organizations representing consumers believe that the Department should adopt a regulation that extends the protections of the MLA to credit extended in overdraft services, as well as to rent-to-own products.

Forty U.S. Senators express support for the Department to adopt the proposed definition of ''consumer credit,'' particularly in order to close what they find to be ''loopholes'' in the existing rule that preclude Service members and their families from effectively receiving the protections of the MLA.[12] Likewise, the Attorneys General of 22 states (''Attorneys General'') support the Proposed Rule, and urge the Department to adopt more aggressive provisions to regulate some financial products under the MLA.[13] Several other state officials have submitted comments generally supporting the Proposed Rule,[14] and, in particular, applauding the proposed expansion of the definition of ''consumer credit.'' [15]

Over 350 groups, trade associations, and businesses have submitted comments, and many of these businesses and their representatives express concerns with—as well as outright opposition to—the Proposed Rule.

Most financial institutions, through approximately 50 comments, urge the Department to adopt in the final rule an exemption for certain types of creditors or, more narrowly, one or more exemptions for certain types of credit products. In particular, insured depository institutions and insured credit unions believe that, if the Department extends the scope of ''consumer credit,'' then the Department also should craft that definition so that an extension of credit from an insured depository institution or insured credit

[7] Associations, Dec. 18, 2014, at 58.

[8] Missouri Credit Union Assoc., Nov. 25, 2014, at 3.

[9] The Department has determined that the final rule shall be effective on October 1, 2015.

[10] *See* 72 FR 50588.

[11] In this regard, the comment from U.S. PIRG includes thousands of letters from consumers who support the Proposed Rule (U.S. PIRG, Dec. 23, 2014), and Public Citizen provides the names of 12,000 consumers supporting the Proposed Rule. Public Citizen, Dec. 24, 2014.

[12] Sen. Jack Reed, et al., Nov. 25, 2014.

[13] Attorneys General, Dec. 22, 2014.

[14] *See, e.g.,* Hon. Kate Marshall, State Treasurer, State of Nevada, Dec. 23, 2014.

[15] Hon. Benjamin M. Lawsky, Superintendent, N.Y. Dep't of Financial Services, Dec. 24, 2014.

union should be exempt from the requirements of the MLA. In addition, banks and credit unions, as well as others, raise concerns that Service members and their families should continue to have access to voluntary credit insurance products, unrestricted from the interest-rate limit of the MLA. Financial institutions request that the Department, at a minimum, delay the date(s) on which a creditor must comply with the final rule, seeking time periods ranging from 90 days to three years after the effective date of the rule.[16]

Apart from banks and credit unions, several finance companies and their representatives express the view that the Proposed Rule, if adopted, would reduce access to a wide range of installment loans, which these commenters contend are valuable resources for Service members and their families. Some of these comments state that the four relief societies for the military services (Army Emergency Relief, Navy-Marine Corps Relief Society, Air Force Aid Society and Coast Guard Mutual Assistance) (collectively, the ''Relief Societies'') currently have limited scope of service and resources, insufficient to handle the range and volume of loans needed by Service members and their families; extending the Department's rule to cover a wider range of installment loans, these comments contend, would restrict access to these products for covered borrowers.[17] Installment lenders, including payday loan companies, also raise concerns about the potential burdens of using the MLA Database to conduct covered-borrower checks. Nonetheless, the Community Financial Services Association of America, which represents certain payday loan companies operating in more than 30 states, stated that it ''believes that extending MLA protections to a broader range of consumer credit products will provide more consistent consumer protections.'' [18]

Pawnbrokers and their representatives explain that traditional pawn transactions are different in kind from other types of credit transactions, principally because a pawn transaction typically is a non-recourse loan,[19] and should be exempt from the scope of ''consumer credit'' regulated under the MLA.[20]

E. Costs and Benefits

In its proposal, the Department posed a series of questions in order to facilitate comments and, in particular, encourage interested persons to provide detailed information about the potential effects if the Department were to adopt the Proposed Rule. Some commenters offer certain data regarding the potential costs and benefits that might emerge if the Proposed Rule were to be implemented; in assessing the potential effects of the final rule, the Department has incorporated that data, as appropriate.

The Department has quantified three effects of the regulation. With respect to costs, the Department anticipates that, absent any relief under § 232.13(c), its regulation might impose costs of approximately $106 million during the first year, as creditors adapt their systems to comply with the requirements of the MLA and the Department's regulation. When the relief afforded to creditors for the general exemption for credit card accounts is included, then the anticipated approximate costs would be significantly lower during the first year. After the first year and on an ongoing basis, in a sensitivity analysis, the annual benefits to the Department may be between approximately $14 to $133 million. The Department estimates the potential savings that could result if the rule reduces the involuntary separations of Service members where financial distress is a contributing factor in sensitivity analyses; at some points in the range of estimates the Department has used to assess the proposal, these savings are estimated to exceed the compliance costs that would be borne by creditors. The Department also has developed a transfer payment analysis that estimates between $100 and $119 in transfer payments per year from creditors to service members and their dependents. In addition to these quantified effects, the Department examined some effects qualitatively including those effects listed in figure 2 within section V.A.

FIGURE 1—SUMMARY OF ESTIMATED EFFECTS OF FINAL RULE

[2015 dollars in millions]

		First Year, set-up costs (Oct. 1, 2015–Sept. 30, 2016)	Annual, ongoing (October 1, 2016 and thereafter)	PV 10-year, 7% discount rate	PV 10-year, 3% discount rate
Sensitivity Analysis: Benefits to the Department	Low	$0	$14	$96	$129
	High	$0	$133	$940	$1,263
Primary Analysis: Costs to Creditors of Compliance.		($106)	($30)	($185)	($259)
Sensitivity Analysis: Transfer Payments	Low	n/a	$100	$616	$856
	High	n/a	$119	$740	$1,022

II. Background

A. Overview of the Final Rule

The Department is amending its regulation that implements 10 U.S.C. 987, which was enacted in section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (''2006 Act''),[21] and amended by sections 661–663 of the National Defense Authorization Act for Fiscal Year 2013 (''2013 Act'').[22]

The 2013 Act amended several provisions of 10 U.S.C. 987. In particular, the 2013 Act added provisions that would permit a covered borrower to recover damages from a creditor who violates a requirement of

[16] *See, e.g.,* Nat'l Pawnbrokers Assoc., Nov. 24, 2014, at 21 (urging the Department to delay the date for compliance with the final rule for at least 90 days); GECU-Greater El Paso's Credit Union, Dec. 12, 2014, at 1 (recommending that, for credit unions, the compliance date should be delayed for a minimum of three years).

[17] *See, e.g.,* Nat'l Installment Lenders Assoc., Dec. 9, 2014.

[18] Community Financial Services Assoc. of America, Dec. 24, 2014, at 2.

[19] *See, e.g.,* Nat'l Pawnbrokers Assoc., Nov. 24, 2014, at 3.

[20] *See, e.g.,* American-Gold Mine, Inc., Nov. 25, 2014.

[21] Public Law 109–364, 120 Stat. 2266.

[22] Public Law 112–239, 126 Stat. 1785.

the MLA,[23] and authorizes the agencies ''specified in section 108 of the Truth in Lending Act'' [''TILA''] to enforce the requirements of the MLA ''in the manner set forth in that section [of TILA] or under any other applicable authorities available to such agencies by law.'' [24] Section 663 of the 2013 Act modified the definition of ''dependent'' in order to make the meaning of that term consistent with parts of the definition that applies in the context of eligibility of a Service member's dependent for military medical care.[25] In addition, section 661 of the 2013 Act amended the MLA to require the Department to consult—''not less often than once every two years''—with the Federal Agencies with a view towards revising the regulation implementing the MLA.

In August 2007, the Department published its regulation to implement the MLA.[26] At that time, the Department elected to define the scope of ''consumer credit'' as a narrow band of products within three categories of credit; for example, the existing rule had defined a ''payday loan,'' in relevant part, as ''[c]losed-end credit with a term of 91 days or fewer in which the amount financed does not exceed $2,000.'' [27]

In September 2014, the Department published a proposal to amend the existing rule primarily for the purpose of extending the protections of 10 U.S.C. 987 to a broader range of closed-end and open-end credit products. In describing the Proposed Rule, the Department explained, in relevant part, that ''the narrowly defined parameters of the credit 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.'' [28]

Many persons and entities believe that the Department should not amend its regulation as proposed because the expansion of the definition of ''consumer credit'' and the attendant requirements under the MLA would impair the ability of many types of creditors, particularly insured depository institutions and insured credit unions, to provide short-term credit to Service members and their families. However, some commenters argue that the Department should amend its regulation to apply to a broader range of credit products, including open-end credit, provided that the regulation also includes an exemption for insured depository institutions and insured credit unions.[29] Still other commenters urge the Department to amend its regulation to apply to a broader range of credit products, including open-end credit, without any exemptions or conditions.[30]

In the process of adopting this final rule, the Department has reviewed the comments on the Proposed Rule and consulted with the Federal Agencies on a wide range of issues implicated by the Proposed Rule. In light of its assessment of the comments, its experience observing the effects of its existing regulation, and the scope and purposes of the provisions of 10 U.S.C. 987, the Department has determined that a wider range of credit products offered or extended to covered borrowers should be subject to the protections of the MLA. As proposed, the Department is amending its regulation so that, in general, consumer credit covered under the MLA [31] would be defined consistently with credit that for decades has been subject to TILA, 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.[32] In general, any charge that is a ''finance charge'' under Regulation Z,[33] adopted by the Bureau, as well as certain other charges that would be covered as ''interest'' under 10 U.S.C. 987(i)(3), must be included in the calculation of the MAPR, as applicable to the transaction for consumer credit.

The Department has considered whether unqualified exclusions from the MAPR for certain types of fees, such as an application fee or participation fee, should be adopted for credit card accounts in order to preserve current levels of access to those products for Service members and their dependents; however, the Department believes that unqualified exclusions from the MAPR for certain fees, or all non-periodic fees, could be exploited by a creditor who would be allowed to preserve a high-cost, open-end credit product by offering a relatively lower periodic rate coupled with an application fee, participation fee, or other fee (as described in the exclusion), subject to the restrictions under the amendments to TILA enacted in the Credit Card Accountability Responsibility and Disclosure Act of 2009 (''CARD Act'').

However, the Department also adopts the provisions in the Proposed Rule, with certain modifications, that provide a broad exclusion to allow a creditor who offers consumer credit through a credit card account to exclude from the MAPR any ''bona fide'' fee (other than a periodic rate). Under the final rule, that creditor would need to confirm that its fees are bona fide and reasonable, and if so, the Department believes that the creditor should be able to continue to offer the same credit card product(s) to covered borrowers by making certain adjustments to the terms and conditions for the product(s) by, for example, including the ''statement of the MAPR'' (which would be permitted simply to be added to its credit card agreement(s), and which is not required to be provided in any advertisement),[34] and modifying any provision (if any) that requires a covered borrower to ''submit to arbitration.'' [35]

The Department has considered whether to provide a complete exemption from the definition of consumer credit for certain types of loans, such as a ''payday alternative loan'' (''PAL'') offered by a federal credit union and regulated under the NCUA's regulation [36] or similar credit product; likewise, the Department has considered whether to provide an exclusion from the requirements for computing the MAPR for an application fee or participation fee imposed on certain types of credit transactions or credit accounts. The Department has determined that an application fee or participation fee is an element generally required to be included when computing the MAPR (subject to a limited exception for a qualifying closed-end loan and the conditional exclusion for a bona fide fee charged to a credit card account).

As discussed in section III.D., the Department declines to provide a complete exemption for a PAL and,

[23] *Id. See* section 662(a) of the 2013 Act.

[24] 126 Stat. 1786. *See* section 662(b) of the 2013 Act.

[25] 126 Stat. 1786 (defining ''dependent'' to be a person described in subparagraph (A), (D), (E), or (I) of 10 U.S.C. 1072(2)).

[26] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 FR 50580 (Aug. 31, 2007).

[27] 32 CFR 232.3(b)(1)(i) (definition of ''consumer credit'').

[28] 79 FR 58610.

[29] *See, e.g.,* Associations, Dec. 18, 2014, at 8.

[30] *See, e.g.,* Attorneys General, Dec. 22, 2014, at 3 (urging the Department to adopt ''a more inclusive calculation of the MAPR,'' without the conditional exclusion for ''bona fide'' fees charged for a credit card account).

[31] The forms of ''consumer credit'' that may be covered by the MLA are subject to certain exceptions, notably for a residential mortgage. 10 U.S.C. 987(i)(6)(A) and 987(i)(6)(B).

[32] *See* 12 CFR 1026.1(c)(1)(iii) (limiting the coverage of the regulation, in relevant part, to credit that is subject to a finance charge or is payable by a written agreement in more than four installments).

[33] 12 CFR part 1026 (2013).

[34] *See* § 232.6.

[35] *See* § 232.8(c).

[36] 12 CFR 701.21(c)(7)(iii) (2015).

instead, has determined that an application fee may be excluded from the computation of the MAPR for a short-term, small amount loan, subject to certain conditions.

The Department adopts in the final rule provisions designed to provide a creditor with a more straightforward mechanism to assist in assessing the status of a consumer as a covered borrower so that the creditor may have ''some degree of certainty in determining that the loans [the creditor makes] are in compliance with [the MLA] as implemented by Part 232.'' [37] The Department continues to believe that a covered-borrower check could be conducted unilaterally by a creditor who uses information obtained from the MLA Database and without relying on the borrower (as currently required), akin to the process a creditor currently uses to obtain a consumer report when assessing the creditworthiness of a consumer. Accordingly, the Department amends the existing rule to allow a creditor to use information obtained from the MLA Database or information contained in a consumer report from a nationwide consumer reporting agency to assess the status of a consumer-applicant for consumer credit and thereby providing a clearer mechanism for a creditor to obtain the protection of a safe harbor when determining whether a consumer is a covered borrower.

B. Financial Stability and Readiness

As the Department stated when issuing the Proposed Rule, the Department makes a significant investment in recruiting, training and retaining highly qualified Service members. The Department expects these Service members to maintain personal readiness standards, including paying their debts and maintaining their ability to attend to the financial needs of their families.[38] Losing qualified Service members due to personal issues, such as financial instability, causes loss of mission capability and drives significant replacement costs. The Department estimates that each separation costs the Department $58,250.[39] Losing an experienced mid-grade noncommissioned officer (NCO), who may be in a leadership position or key technical position, may be considerably more expensive in terms of replacement costs and in terms of the degradation of mission effectiveness resulting from a loss of personal reliability for deployment and availability for duty. A study of the potential impact of the access to payday loans on enlisted members in the Air Force found ''[a]irmen job performance and retention declines with payday loan access, and severely poor readiness increases.'' [40] Additionally, financial concerns detract from mission focus and often require attention from commanding officers and senior NCOs to resolve outstanding debts and other credit issues.

C. Financial Readiness Program

As young people with steady pay checks and personal responsibilities which emerge earlier than their contemporaries, junior enlisted Service members need to have a commensurate level of financial acumen and maturity to succeed. Junior enlisted Service members are generally high school graduates who may have started college.[41] Prior to entering the military they may have had limited exposure to financial literacy programs within high school, but they are generally unprepared for their financial responsibilities.[42] The Department has established the Financial Readiness Program to assist Service members in dealing with financial concerns, by providing messaging, education, and assistance. Throughout each year, the Department provides key messages on personal finance to the military community as part of a strategic communications plan that includes press releases, news articles, interviews, Web sites and social media. The Department has the assistance of nonprofit organizations in delivering messages and programs to promote savings and sound money management. The Department annually promotes the ''Military Saves Campaign,'' which occurs at the end of February each year as part of ''America Saves,'' sponsored by the Consumer Federation of America. The campaign asks Service members and their families to pledge towards their own savings goals, and the campaigns are supported by banks and credit unions on military installations. Initiated in 2007, the campaign has signed up 31,527 savers through 2013.[43] Additionally, the Financial Institutions National Regulatory Authority (FINRA) Foundation sponsors the ''Save and Invest Program'' that has provided forums at military installations (33,000 participants), fellowships for 1,200 military spouses to earn a financial counselor credential and give back to the community through 355,000 practicum hours, assistance to wounded warriors (17,000 guides distributed), 800,000 booklets on managing money during military moves and deployments, and access to no cost on-line tools to assist 150,000 military families with managing credit.[44]

The Department has established policy requiring Service members to receive financial education throughout their military careers, commencing with an initial course provided within 3 months of having arrived at their first duty station. As Service members assume supervision of others, they are also provided information on policies and practices designed to protect junior military members.[45] Each of the military services manages its own educational program to fulfill this requirement, based on regulations from the Military Departments. For Fiscal Year 2012, the military services reported providing 34,867 briefings to 872,187 participants.[46] In addition, the National Guard and Reserve Commands conducted 8,912 sessions, hosted at unit

[37] 72 FR 50588.

[38] U.S. Dep't of Defense, Instruction 1344.09, Indebtedness of Military Personnel (2008) (''Members of the Military Services are expected to pay their just financial obligations in a proper and timely manner [to include alimony and child support]. A Service member's failure to pay a just financial obligation may result in disciplinary action under the Uniform Code of Military Justice [10 U.S.C. 801–940] or a claim pursuant to [Article 139 of Uniform Code of Military Justice (10 U.S.C. 939)].'').

[39] U.S. Gov't Accountability Office, GAO–11–170, *Military Personnel: Personnel and Cost Data Associated with Implementing DOD's Homosexual Conduct Policy* (January 20, 2011) (estimating that each separation costs the Department $52,800 in 2009 dollars). The cost of $58,250 is calculated in 2015 dollars (through December 2014), using the DOL, Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers (CPI–U), available at *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.*

[40] Scott Carrell and Jonathan Zinman, ''In Harm's Way? Payday Lending and Military Personnel Performance,'' August 2014, Abstract, available at *http://www.econ.ucdavis.edu/faculty/scarrell/payday.pdf.*

[41] Defense Manpower Data Center (DMDC) QuickCompass of Financial Issues, (2013), question 20: 39% of E1–E4s have a high school diploma, 22% have less than one year of college, 24% have one or more years of college, but no degree.

[42] *See* Lewis Mandell, *The Financial Literacy of Young American Adults,* (2008), at 8, available at *www.jumpstart.org/assets/files/2008SurveyBook.pdf* (reporting that average score for high school seniors was 48.3% and 62.2% for college students on a financial literacy test measuring: (1) Income; (2) money management; (3) saving and investing; and (4) spending and credit).

[43] Consumer Federation of America, Military Saves Week 2013 Report, at 2, available at *http://www.militarysaves.org/in-the-newsroom/military-saves-week-reports.*

[44] ''*Military Financial Readiness Program—Accomplishments To Date,''* SaveandInvest.org, About the Program, available at *http://www.saveandinvest.org/MilitaryCenter/About/P124822.*

[45] *See* DoD Instruction 1342.22, Family Readiness Program, July 3, 2012, at 12, available at *http://www.dtic.mil/whs/directives/corres/pdf/134222p.pdf.*

[46] Fiscal Year 2012 Annual Report on Family Readiness Programs (internal Department report), which reflects activities of installation-based Military and Family Support Centers/Reserve Family Program Sites.

events lasting one-to-three days, attended by 13,480 participants.[47]

Department policy also requires the military services to provide one-on-one counseling to help a Service member determine appropriate short- and long-term actions to alleviate debt and achieve financial goals. The military services employ at least one certified financial counselor (civil service or contractor) at each military installation and have developed Military Service-specific programs to extend counseling into the military units through designated approved financial educators. For example, the Department of the Navy directs Navy and Marine Corps units to designate and train a Command Financial Specialist (E6 or above) who delivers financial education, conducts basic counseling and makes referrals to certified counselors. The military services reported 1,828,299 brief counseling contacts and 161,992 extended counseling contacts for Fiscal Year 2012.[48] To supplement the counseling services provided by the military services, the Department employs contract counselors through Military One Source to conduct over-the-phone counseling (available 24 hours a day and 7 days each week) and 12 in-person sessions for each military client (in a 12 month period). These counselors provided 32,000 in-person sessions for 35,000 Service members and spouses in Fiscal Year 2012.[49]

To provide monetary support to Service members and their families with financial hardships, the military services have partnered with nonprofit charitable organizations chartered to provide relief services to Service members and their families. The four Relief Societies provide no-interest loans, grants, and scholarships, and fund other support programs for active-duty military communities. Each of these Relief Societies traditionally has provided no-interest loans and grants for shortfalls in household expenses (*e.g.,* rent, mortgage, or utilities) and for unforeseen emergencies (*e.g.,* auto repair, funeral, or family emergency). Since 2007, each of the Relief Societies also has offered small-dollar loans, which can be drawn without counseling.[50] In total for 2012, the Relief Societies provided $142.2 million in no-interest loans and grants to 159,745 clients.[51]

D. Regulation in Support of Financial Readiness

The Department continues to believe that, consistent with the MLA, there may be a need to limit access to high-cost borrowing, even with the Department's emphasis on delivering messages to save and control debt, education to support managing finances wisely, counseling resources to aid Service members, and financial resources to help Service members cover unforeseen shortfalls and emergencies. Additionally, as messaging and education programs make clear, the Department expects Service members to seek out assistance rather than continue attempting by themselves to manage high-cost debt.

The majority of Service members have access to reasonably priced (as well as low-cost) credit, and, as long as they wisely use those resources, they are likely not to need high-cost loans to fulfill their credit needs. In particular, the military services have partnered with nonprofit charitable organizations chartered to provide relief services to Service members and their families so that Service members and their families can obtain monetary support for their financial hardships. The Relief Societies provide no-interest loans and grants for shortfalls in household expenses (*e.g.,* rent, mortgage, or utilities) and for unforeseen emergencies (*e.g.,* auto repair, funeral, or family emergency), as well as scholarships; the Relief Societies also fund other support programs for active-duty military communities. In the event that a Service member overwhelms his or her credit, or has not established credit for an emergency, the Department and the Relief Societies are prepared to assist that person in order that he or she might resolve the immediate difficulties and continue to manage his or her income and expenses to a point where he or she can develop a sound financial basis. In circumstances where Service members have taken high-cost loans because no other alternatives appeared to be available, Department counselors and the Relief Societies have found that the existing high-cost debt makes intervention more difficult; these service providers would rather have had the opportunity to have helped resolve issues sooner.

Section 661 of the 2013 Act amended the MLA to require the Department to consult—''not less often than once every two years''—with the Federal Agencies. Consistent with this provision of the MLA and with Executive Order 13563 (''EO 13563''),[52] the Department intends to conduct periodic reviews of this rule and may, as appropriate, modify certain provisions of the rule after notice and comment. The Department is mindful that the changes to credit made pursuant to this rule warrant continued evaluation of access to and the impact on credit extended to service members and their families, and that there may be relevant distinctions between military and civilian populations. During the periodic review and the required consultations, the Department will review its need to collect data as well as information provided by the Federal Agencies. The Department intends to synthesize and review available data on new and historical information to evaluate the effectiveness of this rule, including incorporation of fees in calculating MAPR, affected open-ended credit products, and availability of credit to covered borrowers with an eye toward striking an appropriate ongoing balance between covered borrower protection and industry compliance burden. These results of this data gathering will form the basis for ongoing reviews of the rule and assessments of various aspects of the rule. Any modifications, including those based on the results of studies currently ongoing and underway, would be subject to further analysis. This rule, as well as any proposed revisions to this rule, are part of the Department's retrospective review plan under EO 13563 completed in August 2011. The Department's full plan and retrospective review reports is available at: *http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036.*

III. Key Aspects of the Final Rule

A. Scope of ''Consumer Credit''

1. In General

As proposed, the Department has determined to revise the scope of the definition of ''consumer credit'' to be generally consistent with the credit

[47] Military OneSource internal report for Fiscal Year 2012.

[48] Fiscal Year 2012 Annual Report on Family Readiness Programs (internal Department report), which reflects activities of installation-based Military and Family Support Centers/Reserve Family Program Sites.

[49] Military OneSource internal report for Fiscal Year 2012.

[50] *See* Army Emergency Relief, Soldiers Helping Soldiers: Army Emergency Relief 2012 Annual Report, at 13 (2013) (in 2012, Army Emergency Relief provided $19.1 million in ''Commander Referral Loans''); Air Force Aid Soc'y, Air Force Aid Society 2012 Annual Report, at 6 (2013) (in 2012, the Air Force Aid Society provided half of its $10.1 million in emergency assistance ''Falcon Loans''); Coast Guard Mut. Assistance, 2012 Annual Report, at 2 (2013) (in 2012, Coast Guard Mutual Assistance provided $212,000 in quick loans).

[51] *See* Army Emergency Relief, Soldiers Helping Soldiers: Army Emergency Relief 2012 Annual Report, at 13 (2013); Navy-Marine Corps Relief Society, 2012 Annual Report, at 11 (2013); Air Force Aid Soc'y, Air Force Aid Society 2012 Annual Report, at 6 (2013); Coast Guard Mut. Assistance, 2012 Annual Report, at 2 (2013).

[52] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011).

products that for decades have been subject to the requirements of the Bureau's Regulation Z. Accordingly, the Department has revised § 232.3(e) so that, in general, consumer credit is defined consistently with certain credit that long has been subject to TILA, 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.[53]

The Department believes that the narrow parameters of the credit products defined as ''consumer credit'' under the existing rule do not effectively provide the protections intended to be afforded to Service members and their families under the MLA. As forty U.S. Senators observe, extending the scope of ''consumer credit'' to track the credit regulated under Regulation Z closes ''existing MLA loopholes'' and ''[t]his comprehensive approach is essential to preventing future evasions'' of the requirements of the MLA.[54] Subject to certain exceptions, under the final rule when extending consumer credit to a covered borrower, a creditor should be permitted to rely on the provisions and jurisprudence of the Bureau's Regulation Z because that regulation substantially regulates the central components of the framework of the MLA, particularly the types of charges that should be included as ''interest'' [55] and the methods for calculating the annual percentage rate of interest for consumer credit.[56] In general, in §§ 232.3(n) and 232.4(c), any charge that is a ''finance charge'' under Regulation Z, as well as certain other charges that would be covered as ''interest'' under 10 U.S.C. 987(i)(3), must be included in the calculation of the MAPR (as applicable to the transaction), and would be subject to the interest-rate limit.

Commenters urge the Department to modify certain aspects of the Proposed Rule in light of certain provisions relating to the scope of consumer credit and the charges included in the MAPR that do not track the terms and conditions of Regulation Z. As discussed in section IV., the Department declines to adopt provisions that would allow any fee for a voluntarily agreed to credit insurance product, debt cancellation contract, or debt suspension agreement to be excluded from the MAPR.

2. Need to Address Risks Posed by High-Cost Consumer Credit

Many persons and entities urge the Department not to revise the scope of ''consumer credit'' as described in the Proposed Rule. For example, one commenter that generally ''applaud[s] the proposal and support[s] the expansion of the definitions of the credit products that fall under the [Proposed Rule]'' nonetheless cautions that ''the proposed changes [to the regulation] would mean that the cost of providing small dollar loans will be more than can be recovered in fees and interest.'' [57] The Associations likewise appear to argue that the Department should not adopt the definition of consumer credit set forth in the Proposed Rule: ''we recommend a more focused approach and urge the Department to address particular problems of the current regulation by modifying coverage in a targeted fashion, consistent with its previous approach.'' [58] However, the Associations also specifically recommend that the Department ''*broaden coverage of the regulation by eliminating the current parameters in the definition of covered consumer credit related to loan terms and amount, expand coverage to open-end credit, and exempt insured depository institutions.*'' [59]

Other persons and entities similarly urge the Department not to adopt the approach of the Proposed Rule because, they contend, 10 U.S.C. 987 is intended solely to address so-called ''predatory'' loan products. For example, a comment on behalf of certain credit card issuers asserts that the ''regulatory framework [under the MLA] . . . was developed by the [Department] for application only to specific types of closed-end products,'' and the comment contends that, in adopting the rule in 2007, the Department had established or endorsed certain ''criteria for evaluating whether credit products pose risks to [Service] members.'' [60] These credit card issuers argue that the Department should not abandon a product-based approach to a regulation that implements the protections of the MLA,[61] and further argue that certain aspects of the Proposed Rule ''clearly demonstrate the significant problems that would arise by abandoning a more targeted and tailored approach to coverage under the MLA.'' [62]

Even though the Department's initial proposal, issued in April 2007,[63] referred to various studies and reports (including reports and other initiatives by the Department) that describe ''predatory'' lending ''practices,'' the Department broadly described its overarching aim, namely, to promote readiness by taking steps to reduce the risk that a Service member or his or her family could get caught in a ''debt trap.'' [64] In the context of describing its own report to Congress in 2006, for example, the Department observed that ''some forms of credit'' could pose risks for Service members and their families: ''The combination of little to no regard for the borrower's ability to repay the loan, unrealistic payment schedule, high fees and interest and the opportunity to rollover the loan instead of repaying it can create a cycle of debt for financially overburdened Service

[53] *See* 12 CFR 1026.1(c)(1)(iii) (limiting the coverage of the regulation, in relevant part, to credit that is subject to a finance charge or is payable by a written agreement in more than four installments).

[54] Sen. Jack Reed, et al., Nov. 25, 2014.

[55] *See* 10 U.S.C. 987(i)(3) (broadly defining ''interest'').

[56] *See* 10 U.S.C. 987(h)(2) (granting discretion to the Department to prescribe rules regarding ''[t]he method for calculating the applicable annual percentage rate of interest on [consumer credit] obligations'').

[57] Nat'l Military Family Assoc., Dec. 18, 2014, at 1. However, the National Military Family Association declines to explain how the changes to the regulation could be a source for increasing the costs of providing small-dollar loans and does not provide data to support its assertion that ''the proposed changes to the [regulation], if implemented as drafted, could eliminate an important category of products proven to be beneficial to [Service] members and their families.'' *Id.*

[58] Associations, Dec. 18, 2014, at 8. In this regard, the Associations argue that the MLA is intended ''to target *specific* loans considered under the legislation to be ''predatory:'' Payday loans, vehicle title loans, rent-to-own programs, refund anticipation loans, and military installment loans.'' *Id.* at 2 (emphasis in original). *But see* Associations at 11 (explaining that Congress rejected an ''original payday lending amendment'' offered in the Senate, which was ''narrower than the legislation ultimately [enacted]'').

[59] Associations, Dec. 18, 2014, at 8 (emphasis in original).

[60] L. Chanin, Dec. 23, 2014, at 7.

[61] *Id.*

[62] L. Chanin, Dec. 23, 2014, at 7–8. Nevertheless, these credit card issuers do not provide any proposal to improve the ''product-based approach.'' In this regard, the Department specifically sought comment on ways to ''refin[e] the Department's current rule for payday loans, vehicle title loans, and refund anticipation loans—and the associated benefits and costs.'' 79 FR 58604. These credit card issuers decline to take up the Department's invitation; their silence regarding one or more ways to establish a ''more targeted and tailored approach to coverage under the MLA'' evinces support solely for the very narrowly defined scope of consumer credit adopted in 2007.

Compare New York Credit Union Assoc., Dec. 26, 2014, at 3 (arguing that the Department should amend 32 CFR 232.3(b)(1) by adding a new subparagraph (iv) that would clarify that consumer credit includes '' 'similarly structured loans' in which a lender has engaged in a pattern of offering loans in which a paycheck, vehicle's title, or an anticipated tax refund is used as collateral for the [underlying] loan'').

[63] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 FR 18157 (Apr. 11, 2007).

[64] 72 FR 18159.

members and their families.'' [65] When implementing the regulation in 2007, the Department acted in light of the short timetable for the effective date of 10 U.S.C. 987 [66] and the instruction to act swiftly, as evidenced in authority to prescribe interim regulations without regard to the notice-and-comment requirements of the Administrative Procedure Act.[67] Still, the Department elected to act judiciously by initially regulating only certain credit products that, at that time, the Department believed posed the most severe risks to Service members and their families.[68] Moreover, in proposing and adopting the regulation in 2007, the Department eschewed any reliance on certain criteria as a predicate to define the scope of consumer credit.[69]

In explaining the bases and rationale for redefining consumer credit in the Proposed Rule, the Department observed that ''certain payday loans, vehicle title loans, and refund anticipation loans present the *most severe* risks to Service members and their families'' [70]—not the only risks. Some comments [71] have seized on the Department's characterization of the risks posed by those three narrowly defined products in the context of that aspect of the Proposed Rule to conclude that the status quo must be maintained because either: (i) The Department's countervailing consideration—to guard against unintended adverse consequences [72]—is a relatively more important objective; or (ii) expanding the scope of consumer credit to track the scope of credit that is subject to Regulation Z would eliminate access to credit products that are benign or beneficial to Service members and their families.[73] The Department finds that the conclusion many comments support—avoid expanding the scope of consumer credit—is based on false absolutes, say, between preserving access to ''much needed, good, small-dollar credit'' [74] and affording the protections of the MLA to Service members and their families when they choose to obtain a wider range of loan products. As the Department explained when issuing the Proposed Rule, ''a broader range of closed-end and open-end credit products carry high costs, many of which far exceed the interest rate limit established in 10 U.S.C. 987(b), and thereby [pose risks] to Service members and their families. . . .'' [75] The Department believes, and comments amply support the view,[76] that the scope of consumer credit reasonably could apply to credit products that are subject to the requirements of Regulation Z in order to reduce the risks to covered borrowers posed by high-cost loans, and still preserve access to a wide range of products, including ''much needed, good, small-dollar credit options,'' [77] for those borrowers.[78]

B. Department's Authorities To Establish Key Terms, Conditions, and Criteria

The MLA grants the Department various authorities to prescribe regulations to carry out the law and broad latitude to determine the scope, terms, and conditions of the regulations. The Department is empowered to define the scope of the regulations through, first, a broad grant of authority to define ''consumer credit'' and the type(s) of ''creditor'' [79] that is subject to the requirements of the MLA, and, second, authority to prescribe ''[s]uch other criteria or limitations as the [Department] determines appropriate, consistent with the provisions of [10 U.S.C. 987].'' Within those general grants of authority, the law further grants the Department powers to prescribe terms and conditions relating to ''[t]he method for calculating the applicable annual percentage rate of interest on [consumer credit], in accordance with the limit established

[65] *Id.*

[66] The 2006 Act, enacted on October 17, 2006, was scheduled to take effect in less than one year, and under 10 U.S.C. 987(c)(3) the Department was authorized to establish an earlier effective date. 10 U.S.C. 987 note.

[67] 10 U.S.C. 987(d).

[68] 72 FR 50584 (observing the need to act ''judiciously'' when initially defining the scope of ''creditor'' and ''consumer credit''). *See also* 72 FR 18162 (''the statute allows the Department to focus [the limitation imposed under the MLA] on areas that create the most concern'') and 72 FR 50585 (''the final rule focuses on three problematic credit products that the Department identified in its August 2006 [report to Congress]'').

[69] In this regard, comments urging the Department to ''continue'' to define the scope of the regulation to address only credit products with ''predatory characteristics'' miss the mark. *See, e.g.,* L. Chanin, Dec. 23, 2014, at 2; Assoc. of Military Banks of America, Dec. 18, 2014, at 2; Independent Bank, Dec. 24, 2014, at 1.

[70] 79 FR 58607 (emphasis added). Likewise, the Department finds no occasion to concur with the view expressed by many comments asserting that the (primary or sole) purpose of the MLA is to ''curb predatory lending practices.'' *See* Attorneys General, Dec. 22, 2014, at 2.

[71] *See, e.g.,* American Financial Services Assoc. (''AFSA''), Dec. 22, 2014, at 8–9 (In particular, AFSA states:

''[T]he Department recognizes that there is a need for small-dollar credit, while at the same time being concerned that the current regulation implementing the MLA does not protect covered borrowers from high-cost credit products.

''AFSA agrees with the Department that Service members and their families should have access to safe and responsible credit. We understand the Department's concern that high-cost loans can pose risks to Service members and their families.

''The Department's proposed approach, though, does not meet these two goals. It seems that the Department is willing to prevent covered borrowers from accessing much needed, good, small-dollar credit options by rewriting the rules with a broad brush stroke that assumes that all products are undesirable.'').

[72] Avoidance of unintended adverse consequences is one of the Department's longstanding objectives, and the one of the principal bases for the Department's election to incrementally implement the protections of the MLA. *See* 72 FR 50584–50585 (explaining that a ''narrow definition'' of consumer credit in the existing regulation ''will prevent unintended consequences'').

[73] *See* 79 FR 58610 (explaining the Department's view that the MLA should be interpreted to provide ''important protections to Service members and their families . . . without unduly impeding the availability of credit that is benign or beneficial to [them]'').

[74] AFSA, Dec. 22, 2014, at 9.

[75] 79 FR 58607.

[76] *See, e.g.,* Navy Federal Credit Union, Dec. 15, 2014, at 1–2 (stating that ''Navy Federal supports the Department's proposal to expand the scope of the rule to include additional credit products'' and not raising any objection to the cost elements, other than ''*voluntary* debt cancellation fees,'' that must be included in the MAPR) (emphasis in original); Consumer Finance team at the Pew Charitable Trusts (''Pew''), Dec. 23, 2014, at 1–3 (stating that ''comprehensive definitions that include all small-dollar loans will give lenders clear guidance to foster innovation,'' and that ''[t]horough assessment of income and expenses is the best way to ensure that loans are affordable for borrowers''); Consumer Federation of America *et al.,* Aug. 1, 2013, at 12–14 (describing dozens of financial institutions that offer to consumers credit products that would satisfy the interest-rate limit imposed by the MLA).

[77] AFSA, Dec. 22, 2014, at 9.

[78] Moreover, the Department continues to believe that the extremely narrow definition of ''consumer credit'' in the existing rule permits a creditor to structure its credit products in order to reduce or avoid altogether the obligations of the MLA. For example, if a creditor wishes to market a ''payday loan'' to a covered borrower without regard to the 36-percent interest-rate limit under the MLA, the creditor simply needs to adjust the terms or conditions so that the loan is (i) not closed-end credit, (ii) for a term longer than 91 days, *or* (iii) for an amount of more than $2,000. Making any of these elementary adjustments to a credit product marketed as a ''payday loan'' is not illegal, however, the effect is clear: a covered borrower would obtain the credit without the protections afforded under the MLA. Many persons and entities commenting on the Proposed Rule share the view that ''consumer credit'' in the existing rule is unduly narrow and permits a creditor to avoid the obligations of the MLA. *See, e.g.,* Texas Appleseed, Dec. 2, 2014 (describing products offered by various lenders and observing that ''the [Proposed Rule] will help close the loopholes Texas' payday and auto title businesses have been able to exploit''); *see also* U.S. PIRG, Dec. 23, 2014, at 2; Americans for Financial Reform et al., Dec. 26, 2014, at 1–2.

[79] 10 U.S.C. 987(h)(2)(D). *See also* 10 U.S.C. 987(i)(5) (in relation to the term ''creditor,'' permitting the Department to prescribe ''such additional criteria as are specified for such purpose in regulations prescribed under [10 U.S.C. 987]'' and 987(i)(6) (providing that ''[t]he term 'consumer credit' has the meaning provided for such term in regulations prescribed [by the Department],'' subject to the exceptions for a residential loan or a loan procured in the course of purchasing a car or personal property).

under [10 U.S.C. 987]'' [80] and ''[a] maximum allowable amount of all fees, and the types of fees, associated with any such extension of credit. . . .'' [81] Moreover, several parts of these core provisions relating to the charges to be accounted for in order to implement the interest-rate limit of 10 U.S.C. 987(b) are ambiguous,[82] and the law contemplates that the Department prescribe regulations to carry out the law through a process that involves the Department exercising its discretion to establish other appropriate ''criteria or limitations'' that are consistent with the law.[83]

C. Consideration of Exemptions for Certain Classes of Creditors

In light of the scope of the Proposed Rule, the Department asked whether consideration should be given for a limited or complete exemption for an insured depository institution or insured credit union.[84] Many comments argue in favor of providing a complete exemption for a supervised financial institution.[85] Indeed, the Associations appear to tie their support for broadening the scope of the definition of consumer credit with an exemption for insured depository institutions.[86] One association representing credit unions cautions against the ''unintended consequences [of the Proposed Rule] for credit unions,'' which that association contends ''could jeopardize extension of some consumer credit to [Service] members and their families.'' [87] This association urges the Department to provide a blanket exemption for ''credit unions and other depository institutions.'' [88] Likewise, other associations representing credit unions argue that credit unions should be exempt from the regulation because (i) ''credit unions are not predatory lenders,'' (ii) ''already have very high compliance burdens'' under other laws and regulations (implemented and enforceable by other agencies), and (iii) of ''the highly regulated and relatively limited nature of their operations.'' [89]

One credit union argues:

> Simply stated, there is a critical and growing need for short-term credit among our military and the working class families that make up the majority of [the credit union's] constituents. . . . [T]he reality is that over 40% of [the credit union's] military members survive on less than $30,000 per year. They have financial emergencies. An unexpected illness, an emergency vehicle repair, or a loss of income in the family often strikes at the worst possible time. Yet, most have no ability to qualify for a traditional loan or credit card due to poor and insufficient credit history. In order to make ends meet, short term credit is the only option. And when there is demand the market will provide an outlet to satisfy that demand. The question for the [Department] then is what market is most appropriate to address this demand. Payday lenders that have shown time and again the ability to circumvent any regulatory attempt to control their lending practices and cap excessive finance charges? Or highly regulated not-for-profit cooperatives that are controlled by the very same members we serve? The [Proposed Rule] makes no distinction between the various players in the market and therefore must not be enacted.[90]

This credit union argues that if the Proposed Rule were to be implemented, covered borrowers who ''require short term credit . . . will lose access to the one sector of the financial industry that places consumer fairness at the core of its mission: credit unions.'' [91] Another credit union states that ''[b]ecause we strongly believe our military members should have continued access to the same types of fair credit we offer to all of our members, we respectfully encourage the [Department] to reconsider its [Proposed Rule] in several important ways,'' and urges the Department to provide an exemption for ''credit unions and other insured depository institutions.'' [92]

The Department rejects the view that in considering whether to extend the scope of consumer credit to generally track the credit that is subject to Regulation Z the Department must choose between allowing Service members and their families to obtain credit products and services from insured depository institutions and insured credit unions or shutting them out from access to those institutions. The Department is confident that an insured depository institution or insured credit union that places the fair treatment of its consumers at the core of its mission still could find appropriate methods to provide to covered borrowers credit products that comply with the interest-rate limit and other requirements of 10 U.S.C. 987.

Other comments support providing an exemption for an insured depository institution or insured credit union based on the current framework of regulating these entities. A comment on behalf of certain credit card issuers, for example, contends that ''the existing robust regulatory and supervisory framework that applies to federally-supervised depository institutions provides a strong basis for exempting such institutions from the scope of the MLA regulations.'' [93] Commerce Bancshares, Inc. similarly states that the Department should ''craft a specific exclusion for insured depository institutions, such as Commerce, because they are highly regulated by their prudential regulators, and already prohibited from engaging in abusive practices.'' [94]

The Department recognizes that the regulation and supervision of an insured depository institution or insured credit union could be among the criteria that the Department, in its discretion, may apply in defining a ''creditor'' [95] that would be subject to the MLA. Various provisions of 10 U.S.C. 987 would permit the Department to determine that a partial or complete exemption is justified because, for example, supervision of an bank, thrift, or credit union could effectively limit or prohibit one or more of the activities that are the object of the restrictions under the MLA.

[80] 10 U.S.C. 987(h)(2)(B).

[81] 10 U.S.C. 987(h)(2)(C). The grant of authority under this subparagraph also relates to the disclosures that a creditor must provide to a covered borrower, which is addressed in subsection 2 of the relevant part of section IV (Section 232.6 Mandatory loan disclosures).

[82] For example, 10 U.S.C. 987(i)(4) first provides that the term ''annual percentage rate'' has the same meaning as implemented in Regulation Z, but, second, provides that the term ''includes all fees and charges,'' including specified charges, even though Regulation Z for years has excluded from the disclosures of APR many types of fees and charges, particularly some of the fees specified in 987(i)(4).

[83] In addition, as discussed in section II.A., the Department is directed to periodically consult with the Federal Agencies.

[84] 79 FR 58610 (QUESTION 4).

[85] *See, e.g.,* Iowa Credit Union League, Nov. 28, 2014, at 1; L. Chanin, Dec. 23, 2014, at 2 (supporting an exemption for ''federally-supervised depository institutions''); Bellco Credit Union, Dec. 19, 2014, at 2–3 (supporting an exemption for ''federally-insured credit unions''). However, other comments argue that the regulation should not distinguish between types of creditors; instead, the regulation should distinguish between types of loans or between certain features of loan products. *See, e.g.,* Nat'l Installment Lenders Assoc., Dec. 9, 2014, at 6.

[86] Associations, Dec. 18, 2014, at 8.

[87] Missouri Credit Union Assoc., Nov. 25, 2014, at 1.

[88] Missouri Credit Union Assoc., Nov. 25, 2014, at 2–3. *See also* The Wisconsin Credit Union League, Dec. 4, 2014, at 1–2.

[89] African-American Credit Union Coalition, Credit Union National Assoc., Defense Credit Union Council, Nat'l Assoc. of Federal Credit Unions, and the Nat'l Assoc. of State Credit Union Supervisors (the ''Credit Union Associations''), Dec. 22, 2014, at 1–3.

[90] Wright-Patt Credit Union, Inc., Dec. 23, 2014, at 1.

[91] Wright-Patt Credit Union, Inc., Dec. 23, 2014, at 3. Similarly, Bellco Credit Union asserts that, unlike for-profit financial institutions, ''[a]s not-for-profit, cooperatives, credit unions have no incentive to extort money from Service members, or any members.'' Bellco Credit Union, Dec. 19, 2014, at 3.

[92] Randolph-Brooks Federal Credit Union, Dec. 23, 2014, at 1.

[93] L. Chanin, Dec. 23, 2014, at 9.

[94] Commerce Bancshares, Inc., Dec. 24, 2014, at 2.

[95] 10 U.S.C. 987(i)(5)(A)(ii).

The Department had recognized, both in 2007 and when issuing the Proposed Rule, that in the course of implementing the protections of the MLA the Department should strive towards comity with other federal laws, including considering whether a partial or complete exemption for one or more types of federally regulated financial institutions should be established in deference to the federal laws that may provide protections that are consonant with those of the MLA.[96] Alternatively, an exemption based on the regulation and supervision of an insured depository institution or insured credit union might reasonably be based, at least in part, on the interest in avoiding unduly duplicative regulatory requirements.

The 2013 Act amended 10 U.S.C. 987 to grant enforcement authority to certain agencies (as specified in section 108 of TILA),[97] indicating that an insured depository institution and insured credit union should be subject to the requirements of the MLA, enforceable by the appropriate supervisory agency. Moreover, as staff of the FTC observe, ''[e]xempting some [types of] entities could have unintended consequences, including limiting the protections afforded to [covered borrowers] under the MLA, and placing covered entities that comply with the MLA at a competitive disadvantage.'' [98]

Supervision to assess whether a financial institution complies with safety-and-soundness principles or mandates, or even with consumer protection requirements, is designed largely for other purposes, and not directly aimed to lower the costs of credit to covered borrowers in the manner that 10 U.S.C. 987 is expressly designed to do. In light of the terms and structure of 10 U.S.C. 987, as well as the Department's review of the comments submitted on the Proposed Rule, the Department finds, at this time, that there is no adequately strong connection between the supervision of an insured depository institution or insured credit union and restrictions on costs of consumer credit to warrant an exemption from the definition of ''creditor'' for either type of institution.[99]

Nevertheless, supervision to assess compliance by an insured depository institution or insured credit union with safety-and-soundness principles or requirements (or other applicable laws) could provide meaningful benefits to borrowers that are the object of the protections of the MLA.[100] And supervision by the Bureau of covered persons who extend credit for compliance with requirements of applicable federal consumer financial laws is conducted with a view towards providing meaningful benefits to borrowers. Accordingly, as discussed in section III.D.2., the Department concludes that supervision of an insured depository institution or insured credit union under applicable federal law is an important element in support of a targeted exclusion from the requirements for computing the MAPR to allow a charge by that type of entity for an application fee for a qualifying closed-end loan.

D. Application or Participation Fees

1. In General

Many commenters urge the Department to modify the definition of consumer credit set forth in the Proposed Rule to accommodate schemes that many financial institutions use involving a fixed fee, commonly an 'application' or 'processing' fee, plus an interest-rate charge. As one commenter explains:

> The ability to offer small-dollar loans, open or closed-end, most often requires assessing a fixed fee in conjunction with higher interest rates to recover costs. As an example, an application fee is charged to offset underwriting requirements, which include accessing credit bureaus, decision processing (automated or manual), and regulatory notifications, for an approved or denied loan. . . . This balance between fixed fee and reduced interest earnings allows a banking institution to recover its costs and continue its small-dollar lending. It must be noted that the above example is illustrative of how banking institutions recover costs, not generate significant income, from small-dollar lending.[101]

The Department has no occasion to dispute this account of how financial institutions could structure credit products, particularly small-dollar loans, to borrowers. Similarly to the way that a saver uses separate envelopes to allocate cash for different purposes (*e.g.,* groceries, fuel), a bank or credit union could split its revenue between fixed fees, periodic interest, and other charges, nominally associated with different phases of a credit transaction or account (*e.g.,* origination, servicing, regulatory compliance). But from the perspective of the covered borrower who is the focus of protection under 10 U.S.C. 987, the financial institution's own apportioning of revenue among the various 'fees' and 'interest' does not change the key fact that it is all part of an aggregate bundle of costs ''associated with the extension of credit.'' [102]

The Department remains concerned that if an application fee or participation fee were to be excluded from the elements that must be included in the calculation of the MAPR (under § 232.4(c))—the principal basis of the NCUA's argument to provide an exclusion for a PAL made in accordance with its regulation [103]—a creditor would have a strong incentive to evade the interest-rate limit by shifting the costs of a credit product by offering an interest rate below that limit and imposing (or increasing) one or more of those fees. Moreover, the Department believes that a creditor could attempt to impose an application or processing fee—regardless of whether formally tied to or nominally associated with the costs of processing the application—in order to obtain revenue that replaces (or pre-funds) periodic interest revenue, particularly for a covered borrower whose creditworthiness is low (and who thus has a higher risk of defaulting on periodic interest).[104] One credit union, for example, explains that its own small-dollar credit product includes an ''annual fee'' that ''replaces traditional underwriting and is used to offset the historical default rate of nearly 10%, thereby making the product financially sustainable''—for the credit union.[105]

[96] As discussed in section III.B., the Department is authorized to establish one or more appropriate exemptions for specific types of creditors under several provisions of 10 U.S.C. 987, such as 987(h) or 987(i).

[97] 126 Stat. 1786. *See* section 662(b) of the 2013 Act.

[98] Staff of the FTC, Dec. 22, 2014, at 5.

[99] In the course of periodically consulting with the Federal Agencies and, as the Department may find to be appropriate, periodically reviewing the scope and effects its regulation, the Department could revisit the factors that could justify a limited or complete exemption in favor of a supervised or federally regulated financial institution.

[100] Similarly, supervision of financial-institution licensees by one or more state regulatory agencies for compliance with state laws, including safety-and-soundness requirements and consumer protection laws, could provide benefits to borrowers.

[101] Assoc. of Military Banks of America, Dec. 18, 2014, at 2.

[102] 10 U.S.C. 987(i)(3) (defining the term ''interest,'' in relevant part, to ''include[ ] all cost elements associated with the extension of credit'').

[103] NCUA, Dec. 16, 2014, at 6.

[104] The Department does not mean to imply that, when providing a PAL, a credit union would not conform to its underwriting standards. *See* 12 CFR 701.21(c)(2)–(3) (requiring a Federal credit union to establish written policies for making loans or establishing lines of credit and to keep a credit application on file for each borrower supporting the credit union's decision to make the loan or establish the line of credit); 701.21(c)(8) (requiring a Federal credit union to implement appropriate underwriting guidelines for minimizing risk, including when making PALs, by, for example, ''requiring a borrower to verify employment by producing at least two recent pay stubs'').

[105] Wright-Patt Credit Union, Inc., Dec. 23, 2014, at 2. *See also* Assoc. of Military Banks of America,

Continued

The Department observes that 10 U.S.C. 987(b) and the provisions that define ''annual percentage rate'' and ''interest'' which are integral to that interest-rate limit, taken together, are designed to thwart high cost lending to Service members and their families—not solely loan products that carry the very highest costs. Accordingly, and consistent with its authorities to prescribe ''consumer credit'' and the method for computing the MAPR of ''interest,'' the Department concludes that, in general, an application fee charged to a covered borrower must be accounted for when computing the MAPR.

2. Exclusion for Application Fee Charged by a Federal Credit Union or Insured Depository Institution When Making a Qualifying Closed-End Loan

The NCUA states (and many credit unions share the NCUA's view) that a PAL structured in accordance with the NCUA's regulation [106] for that product likely could not be provided by a credit union to a covered-borrower member in many cases in which such loans would otherwise be made, because, given the short duration of such loans, the total charge for the PAL, which is a function of the periodic interest charged plus the application fee, would exceed the interest-rate limit of the MLA.[107] The NCUA notes that, under its regulation, a credit union may charge an application fee that ''reflects the actual costs associated with processing the application, not to exceed $20,'' [108] and that the NCUA interprets the relevant provision of the Federal Credit Union Act (''FCU Act'') so that the term ''finance charge'' does not include an application fee, consistent with the interpretation of finance charge under Regulation Z.[109] Because of the treatment of an application fee under the Proposed Rule, which is at variance with the treatment of that fee under the NCUA's regulation for a PAL, the NCUA urges the Department to adopt a final rule that contains an exemption for a PAL. Similarly, an association representing credit unions argues that credit unions are different from other types of financial institutions, in part, because the FCU Act imposes a statutory limit on the interest rate that a credit union may charge for a loan,[110] and (if adopted) the Proposed Rule ''could provide a challenge for credit unions to provide small-dollar loans because of the change in definition of finance charge and how it relates to how the MAPR is calculated.'' [111] The NCUA ''respectfully submits that a PAL with a military APR exceeding 36 percent is still a responsible credit product and that PALs should not be subject to the [interest-rate limit of the MLA].'' [112]

Even though the Department has determined that an application fee fits within the (ambiguous, but broad) definitions of ''interest'' and ''annual percentage rate'' in the MLA, the Department also recognizes that the FCU Act establishes an express restriction on the amount of interest that a federal credit union may charge to a member-consumer,[113] which is comparable to the interest-rate limit of the MLA. The Department concludes that this federal law warrants a measure of respect or comity. More broadly, there is an appropriate federal interest in implementing the requirements of the MLA, to the extent practicable, in a manner designed to promote due comity with, as well as to avoid direct conflict with, other federal laws or federal regulations which are expressly intended to regulate the cost of credit extended to consumers.[114] The Department concludes that in the case of a short-duration loan, which squarely presents arithmetic obstacles for any creditor who must simultaneously comply with the MLA and an annual interest-rate limit set by another federal law or a comparable federal regulation addressing the cost of credit, the express restriction on the amount of interest that may be charged to a borrower under that other federal law or federal regulation should not be disregarded in the course of the Department's implementation of the MLA.

After review of comments on the Proposed Rule—including those contending that PALs are necessary forms of short-term, small-dollar loans (complete with the charge of an application fee) for covered borrowers [115]—the Department expresses no view on the potential benefits for a covered borrower from a short-term loan provided by a federal credit union or insured depository institution. Still, the Department is mindful that the charge of an application fee, though permissible under other law, poses a cost to a covered borrower, and when combined with the interest rate the overall cost to the borrower from a loan extended by a federally supervised bank or credit union still could exceed the interest-rate limit of the MLA. Nonetheless, the Department elects to exercise its discretion under 10 U.S.C. 987(h) and 987(i)(6) to implement the requirements of the MLA in a manner that affords comity with other federal laws that expressly limit the costs of credit products that may be provided to covered borrowers. Accordingly, the Department determines to modify § 232.4(c)(1) to contain an exception that allows a ''Federal credit union'' or an ''insured depository institution''—as those terms are defined in § 232.3—to exclude from the computation of the MAPR an application fee charged when making a ''short-term, small amount loan,'' which is defined in § 232.3(t).

Consistent with the Department's policy to implement the requirements of the MLA in a manner that affords comity with other federal laws that expressly limit the interest rate of credit products that may be provided to covered borrowers, the Department adopts the exclusion in § 232.4(c)(1)(iii)(B) to apply to the FCU Act and to other similar federal laws that apply to insured depository institutions. In particular, the exclusion would apply to a closed-end loan that is ''[s]ubject to and made in accordance with a Federal law (other than the [MLA]) that expressly limits the interest rate or cost that a Federal credit union or an insured depository institution may charge on an extension of credit.'' [116] In defining that closed-end loan, the Department has established the further condition that the limitation ''in that law is comparable to a limitation of an annual percentage rate of interest of 36 percent.'' [117] The language in

Dec. 18, 2014, at 2 (stating that the ''fixed cost [relating to origination] may be much higher on a small-dollar loan amount'' and that small-dollar loans have ''higher delinquency rates'').

[106] 12 CFR 701.21(c)(7)(iii).

[107] NCUA, Dec. 16, 2014, at 6.

[108] NCUA, Dec. 16, 2014, at 4.

[109] NCUA, Dec. 16, 2014, at 6.

[110] Nat'l Assoc. of Federal Credit Unions, Dec. 23, 2014, at 2.

[111] Nat'l Assoc. of Federal Credit Unions, Dec. 23, 2014, at 3.

[112] NCUA, Dec. 16, 2014, at 6.

[113] 12 U.S.C. 1757(5)(A)(vi).

[114] Under Executive Order 12866, the Department must, to the extent permitted by law and where applicable, take care to avoid prescribing a rule that is ''inconsistent, incompatible, or duplicative with its other regulations or those of other Federal Agencies.'' Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993), § 1(b)(10).

[115] *See, e.g.,* Nat'l Assoc. of Federal Credit Unions, Dec. 23, 2014, at 3 (''Many of these types of loans are loss-leaders in credit unions and are offered strictly for the benefit of their members who are in need of short-term [,] small-dollar alternatives to payday lenders. . . . Also, these types of loans give credit unions another opportunity to work with members to get them back into the traditional banking system and away from unregulated or under-regulated predatory actors.'').

[116] 12 CFR 232.3(t)(1) (prescribing a new definition for a ''[s]hort-term, small amount loan'').

[117] *Id.*

§ 232.4(c)(1)(iii)(B)—''other than an application fee charged by a Federal credit union or an insured depository institution when making a short-term, small amount loan''—is not limited to an extension of credit by a federal credit union that is subject to the FCU Act. This provision, therefore, provides comity to not only the FCU Act, but also to federal laws applicable to other insured depository institutions if the laws were to be enacted to include a cost limitation comparable to the MLA on loans made to the general public.

At this time, the Department has crafted the exclusion in § 232.4(c)(1)(iii)(B) only with respect to a closed-end loan subject to a ''Federal law (other than 10 U.S.C. 987) that expressly limits the rate of interest'' [118] that a qualifying creditor may charge for the loan. The Department recognizes that, over time, the landscape of federal requirements designed to limit finance charges or other costs of credit to consumers could be altered, particularly by the adoption of new regulations applicable to creditors, notably federal credit unions and insured depository institutions. If new regulations that sanction types of short-term or small-dollar loans involving application fees (or similar charges) are implemented by one or more federal agencies, the Department could reevaluate the contours of the exclusion for an application fee for a short-term, small amount loan.

The exclusion from the elements required to be included when computing the MAPR applies to an application fee charged when making a ''short-term, small amount loan,'' defined in § 232.3(t). As a matter of deference to FCU Act and the NCUA's authorities under that Act, this new term is designed to contain certain elements of the short-duration, closed-end loan product prescribed by the NCUA's regulation [119] that the Department finds are integral for protecting a covered borrower and, at the same time, may be stated generally so that insured depository institutions also could be eligible for the exclusion.

First, § 232.3(t)(2)(i) provides that the relevant law or rule must contain ''[a] fixed numerical limit on the maximum maturity term, which term shall not exceed 9 months.'' The short duration of the loan is the key arithmetic predicate for the exclusion for the application fee, and the Department has arrived at the upper boundary by selecting a maximum term which is fifty percent greater than the maximum term permitted under the NCUA's regulation.[120] This subparagraph sets the maximum term of the closed-end loan to the lesser of (i) the fixed numerical limit established by the federal law or rule that the creditor must comply with or (ii) 9 months.

Second, the condition in § 232.3(t)(2)(ii), namely, that the ''law or rule contains a fixed numerical limit on any application fee that may be charged to a consumer who applies for such closed-end loan,'' is consistent with one of the key conditions in the NCUA's regulation.[121] The limitation on the amount of the application fee that a federal credit union may charge to a covered borrower flows from the NCUA's considered judgment regarding how to implement the provisions of the FCU Act. The Department's determination to accommodate, to this extent, the structure of a PAL, and similar federal laws that may be adopted, does not require a broader scope of exception from the general MAPR approach.[122]

In addition to defining the ''short-term, small amount loan'' so that the creditor making the qualifying closed-end loan product must adhere to certain conditions integral for protecting a covered borrower, the Department has established a restriction on the number of times that a creditor may impose an application fee without being required to include that fee when computing the MAPR. Under § 232.4(c)(1)(iii)(B), a creditor who is a federal credit union or insured depository institution is not required to include in the MAPR an application fee charged for the qualifying closed-end loan product if the creditor charges the fee only once ''in any rolling 12-month period.'' [123] The fee is, after all, an ''application fee,'' and if a covered borrower seeks to obtain a second or third of these short-duration loans during one year, the creditor already knows who the borrower is and reasonably could be expected to have on file information bearing on the covered borrower's creditworthiness. In the Department's judgement, there is no adequate basis—consistent with the interest-rate limit of 10 U.S.C. 987(b) and the other terms of the MLA relating to that limit—for allowing a creditor to repeatedly exclude an application fee from the computation of the MAPR for multiple closed-end loans, each of which is structured to be repaid within a matter of months. If a creditor charges a second application fee to a covered borrower who applies for a second short-term, small amount loan within that same 12-month period, then that second fee (and any subsequent application fee charged during that period) is not eligible for the exclusion and must be included when computing the MAPR for that loan.

The upshot is that even though at this time the Department declines to adopt a general exemption for a federal credit union or an insured depository institution, the Department adopts new terms (notably, in §§ 232.3(t) and 232.4(c)(1)(iii)(B)) that allow either type of entity to exclude an application fee from the computation of the MAPR for a qualifying closed-end loan. By crafting this targeted exclusion, the Department affords comity to the FCU Act and similar federal laws, and nonetheless adopts a final rule that requires a federal credit union (or insured depository institution, as the case may be) to comply with the other MLA conditions when making a short-term, small amount loan.

The Department has considered other approaches that would afford comity with the FCU Act or other similar federal laws. For example, the Department has considered whether, as the NCUA and other comments argue, a PAL should be wholly excluded from the scope of ''consumer credit,'' and the Department concludes that that would be a step too far. In the Department's judgment, the Department may exercise

[118] 32 CFR 232.3(t)(1).

[119] 12 CFR 701.21(c)(7)(iii).

[120] 12 CFR 701.21(c)(7)(iii)(2).

[121] 12 CFR 701.21(c)(7)(iii)(7).

[122] In the process of assessing whether to provide an exclusion from the elements that must be included when computing the MAPR for an application fee, the Department has considered whether to establish (*e.g.,* in § 232.3(t)) a fixed numerical limit or a percentage-based limitation (*e.g.,* a limit based on a percentage of the credit to be extended or the amount of available credit for an open-end credit account) for that fee. The Department believes that there are benefits associated with directly establishing a fixed limit on the amount of the application fee that a creditor could charge, and the Department retains the discretion to adjust this aspect (as well as related aspects) of the rule, as may be appropriate. However, at this time, the Department concludes that the language in § 232.3(t) stating that the ''law or rule [must contain] a fixed numerical limit on any application fee that may be charged'' accomplishes the central purpose of the desired limit and, equally importantly, is designed so that these particular requirements under the MLA afford comity with that other federal law or rule which imposes the same type of limit.

[123] The Department has considered whether to establish (*e.g.,* in § 232.3(t) or in § 232.4(c)(1)(iii)(B)) a more restrictive limit on the number of times a creditor may charge an ''application fee.'' For example, the Department has considered whether to adopt a condition on the exclusion that would restrict a creditor from charging an application fee not more than once in any two calendar years or not more than once for any covered borrower. The Department believes that there could be benefits associated with a more restrictive limit on the exclusion from this required element of the MAPR, and the Department retains the discretion to adjust this aspect (as well as related aspects) of the rule, as may be appropriate.

its discretion, out of comity toward other federal programs, to make some accommodation toward the provisions of those programs—but such comity does not require accommodating every aspect of such other programs, without any reciprocal accommodation of requirements under such other programs in the direction of MLA standards.

E. Conditional Exclusion for Credit Card Accounts

1. In General

Even though the Department believes that the consumer credit regulated under the MLA generally should track the scope of credit regulated under Regulation Z, the Department recognizes that imposing the interest-rate limit of 10 U.S.C. 987(b) on credit card products likely would result in dramatic changes to the terms, conditions, and availability of those products to Service members and their families. Many commenters echo the Department's own recognition and underscore that a typical creditor that issues a credit card would be required to revamp the fee, terms, and other conditions for that credit product when offering it to a covered borrower or, more drastically, disqualify a covered borrower from opening that credit card account. One commenter, for example, offers the view that the Proposed Rule would, if adopted, ''have a material and substantial impact on thousands of credit card issuers who must redesign technology, sales processes, and business strategies while incurring significant legal risk to comply with a proposal that affords Service members no increased protections.'' [124]

As the Department explained when issuing the Proposed Rule, unlike the vast majority of credit products that are amenable to straightforward pricing mechanisms relating to the cost of the funds borrowed (such as solely on the basis of a fixed or variable interest rate applied for a term or on a periodic basis or, as discussed above, a combination of an 'application' fee and a periodic rate), credit provided through a credit card account can be provided subject to pricing mechanisms that, in part, account for the value of products or services delivered through the cardholder's use of the card itself. In this regard, many creditors offer credit card products that, from a consumer's perspective, generally are subject to periodic interest-rate charges (*i.e.,* the cost of the funds borrowed), plus participation fees and transaction-based fees that may vary, depending on the consumer's use of the card.

Comments on the Proposed Rule do not dispute that the cost of the funds borrowed in a credit card account can be segregated from the fees that a creditor expressly ties to specific products or services for using the credit card itself. For example, a foreign transaction fee that applies when the cardholder tenders the card for a purchase made outside of the United States can be segregated from the interest charge that the creditor may impose for the funds loaned to make that purchase. Even though some of these fees might appear to be relatively high under certain circumstances, the Department believes that the costs of bona fide fees expressly tied to specific products or services which may be imposed upon the covered borrower's own choices regarding the use of the card can meaningfully be distinguished from the cost of borrowing itself. Flatly applying the interest-rate limit of 10 U.S.C. 987(b) to credit card products could result in unusually adverse consequences to both creditors and covered borrowers, especially because creditors likely would be required to significantly re-structure their current products, services, and pricing mechanisms when providing credit cards to Service members and their families—without a corresponding benefit to those covered borrowers.[125]

The Department also continues to believe that credit card products warrant special consideration under the MLA because comparable protections for consumers who use these products separately apply under the CARD Act. For example, the CARD Act, as implemented by the Bureau's Regulation Z, generally prohibits a card issuer from opening a credit card account or increasing the credit limit on an existing account without considering the consumer's ability to repay the amount borrowed on the account.[126] The CARD Act limits penalty fees on credit cards, including late-payment and over-the-limit fees, to those fees that are ''reasonable and proportional'' to the omission or violation that triggered the fee.[127] Regulation Z provides safe harbor fee ranges designed to facilitate compliance with these requirements of the CARD Act. The CARD Act also limits the total amount of fees that may be charged on an account in its first year: in general, a creditor may not impose fees for a credit card account during the first year that exceed 25 percent of the available line of credit in effect when the account is opened.[128]

Several comments state that the CARD Act provides substantial protections to consumer-cardholders and that the protections under that law are sufficient to justify a wholesale exclusion from the definition of consumer credit for credit card accounts. One commenter, for example, explains that the prohibition against opening a credit card account or increasing the credit limit on an existing account without considering the consumer's ability to repay ''helps prevent [covered borrowers] from obtaining credit that they may find difficult to repay.[129] A comment on behalf of certain credit card issuers concludes that ''[b]alancing these costs against the benefits should lead to the conclusion that imposition of special rules for credit card lending to active duty service members is not justified or appropriate in light of the significant consumer protections already in place as a result of the CARD Act.'' [130] The Associations even go so far to state:

[124] Schwartz & Ballen LLP, Dec. 24, 2014, at 4. *See also* Associations, Dec. 18, 2014, at 56–57 (describing some examples of types of costs that could be incurred when a creditor provides a credit card account to a covered borrower, and stating that ''[w]hile we do not have exact costs, implementing, running and maintaining a shadow control process for MAPR compliance''—including for credit card accounts whose transaction fees could be subject to an exemption under § 232.4(d)—''will be in the millions of dollars for the larger banks and a comparably expensive redundancy for community banks'').

In this regard, when issuing the Proposed Rule the Department requested that interested parties ''provide specific data relating to the benefits and costs of amending the regulation, including costs to implement measures to adjust computer systems and to train personnel. . . . Please provide information on the type of costs and the magnitude of costs by providing relevant data and studies.'' 79 FR 58626. The Department does not dispute the views (as expressed in these two, as well as in other, comments) that creditors will encounter certain costs to adjust their business operations in order to comply with the interest-rate limit and other requirements of the MLA. Nonetheless, the comment from Schwartz & Ballen LLP offers no data in support of its view, and the Associations offer scant data.

[125] *See, e.g.,* Associations, Dec. 18, 2014, at 37 (In the context of addressing the application of the Proposed Rule to open-end credit, particularly credit cards, the Associations state: ''Given the challenges, complexities, and costs of creating a system to segregate a small minority of customers, calculate the MAPR, and waive fees, especially when coupled with all of the other provisions in the [Proposed Rule] and the accompanying risk, a rational choice for individual lenders or the market as a whole might be simply not to make those products available to covered borrowers or not offer covered consumer credit to anyone.'').

[126] 15 U.S.C. 1665e; 12 CFR 1026.51(a) (effectively requiring a card issuer to consider whether a consumer can ''make the required minimum periodic payments under the terms of the account based on the consumer's current income or assets and the consumer's current obligations'').

[127] 15 U.S.C. 1665d; 12 CFR 1026.52.

[128] 15 U.S.C. 1637(n)(1); 12 CFR 1026.52(a).

[129] Schwartz & Ballen LLP, Dec. 24, 2014, at 3.

[130] L. Chanin, Dec. 23, 2014, at 12.

''Though Congress created these broad consumer protections when it passed the CARD Act in 2009, what it did not do was expand application of MLA to credit cards, even though they were exempt from the MLA at that time.[131] If Congress had felt it necessary to apply MLA to credit cards, it could and would have done so in 2009.'' [132]

Even though the CARD Act provides certain protections for all consumers that are not inconsistent with overarching objectives evident under the MLA, the Department has determined, at this time, that the interest-rate limit and other requirements of the MLA should not be completely set aside in reliance on the CARD Act for covered borrowers. The Department continues to believe that certain creditors could take advantage of an opportunity to exploit a complete exemption for credit cards by transforming high-cost, open-end credit products (which otherwise would be covered as ''consumer credit'') into credit card products.[133] In this regard, forty U.S. Senators support the Department's ''comprehensive approach'' because, they believe, this approach ''is essential to preventing future evasions.'' [134] Nevertheless, the Department recognizes the benefits of implementing the protections of the MLA in a manner that balances the interests of limiting credit practices that have an adverse impact on covered borrowers without unduly impeding the availability of credit that is benign or beneficial to those borrowers. Accordingly, the Department is adopting a final rule that: (1) Contains a qualified exclusion from the requirements relating to the computation of the MAPR for a credit card account for a fee that is both ''bona fide'' and ''reasonable'' for that type of fee; and (2) temporarily provides a complete exemption from the definition of ''consumer credit'' for credit extended to a covered borrower under a credit card account.

Even though the Department's general policy is to avoid, when possible, creating regulatory gaps in the framework for 10 U.S.C. 987, the Department believes that, for a definite period of time as set forth in the rule, consumer credit under the MLA should not include credit extended to a covered borrower under a credit card account under an open-end (not home-secured) consumer credit plan. However, when the exemption for a credit card account expires, this form of consumer credit would be subject to a qualified exclusion for bona fide application fees, participation fees, transaction-based fees, and similar fees connected to the use of the credit card under § 232.4(d).[135]

2. Standards for Exclusion for Bona Fide Fees

Section 232.4(d) of the final rule allows a creditor to exclude from the MAPR a bona fide fee—other than a periodic rate—only to the extent that the charge by the creditor is (i) a bona fide fee and (ii) reasonable for that type of fee.

Among other comments on the proposed exclusion for a bona fide fee, many focus on the provision that would have required the fee to be ''customary'' in order to be excluded from the MAPR. In criticizing this aspect of the Proposed Rule, commenters believe that this condition could thwart innovation because a creditor would not be able to show that a fee for a newly-designed product or service for a credit card is ''customary.'' [136] Even though the Department believes that this type of criticism is misplaced,[137] the Department has determined to omit this condition from the final rule.

The Department believes that the conditions for excluding a bona fide fee from the MAPR—namely, that the fee must be bona fide and ''reasonable''—fairly allows Service members and their families to continue to have access to credit card products *and* limit the opportunity for a creditor to exploit the exclusion for those products. A conditional exclusion is designed to bar a creditor from transforming high-cost, open-end credit products into credit card accounts by offering a relatively lower periodic rate coupled with a high application fee, participation fee, or other fee. Under the final rule, a creditor who imposes a fee that is not bona fide or unreasonable in a credit card account for a covered borrower must include the total amount of the fees—including any fee(s) that otherwise may be eligible for the exclusion—in the MAPR. The ''reasonable '' condition for a bona fide fee should be applied flexibly so that, in general, creditors may continue to offer a wide range of credit card products that carry reasonable costs expressly tied to bona fide, specific products or services and which vary depending upon the Service member's own choices regarding the use of the card.

Sections 232.4(d)(3) provides standards to guide determinations regarding whether a bona fide fee—other than a periodic rate—for a credit card account may be excluded from the calculation of the MAPR as ''reasonable.''

3. Like-Kind Fees

Section 232.4(d)(3)(i) provides that the bona fide fee must be compared to ''fees typically imposed by other creditors for the same or a substantially similar product or service.'' The Department believes that this elementary like-kind standard is appropriate because a creditor should not be permitted to assess the

[131] Associations, Dec. 18, 2014, at 19. On this claim, the Associations do not cite the provision of 10 U.S.C. 987 (or other law) that had provided an ''exempt[ion]'' for credit card accounts.

[132] Associations, Dec. 18, 2014, at 19. The Association's argument is curious because the contrary inference appears to be more compelling. When Congress enacted the CARD Act (and again when Congress enacted the 2013 Act), Congress declined to amend 10 U.S.C. 987 in order to provide a partial or complete exemption from the scope of ''consumer credit'' for a credit card account that is subject to the CARD Act; thus, a reasonable interpretation of 10 U.S.C. 987 in light of the enactment of the CARD Act is that a credit card account appropriately should be regulated as ''consumer credit,'' subject to the Department's authorities to prescribe regulations that may include conditions or criteria applicable to a credit card account. *See, e.g.,* 10 U.S.C. 987(h)(2)(D)–(E).

[133] In this regard, the New York State Department of Financial Services (NY Dep't Financial Services) argues that the Proposed Rule ''falls short'' of providing appropriate consumer protections intended by the MLA, in part, because ''undefined 'bona fide' fess [would not be] included in the calculation of the [MAPR], which could allow lenders to charge exorbitant interest rates under the guise of permissible fees.'' NY Dep't Financial Services, Dec. 24, 2014, at 3.

[134] Sen. Jack Reed et al., Nov. 25, 2014, at 1.

[135] The Department maintains that 10 U.S.C. 987(i)(6) grants broad latitude to the Department to ''define which types of consumer credit transactions shall be covered by the law, provided that they do not include the two listed exemptions.'' 72 FR 50585. Furthermore, 10 U.S.C. 987(h) grants to the Department discretion to ''prescribe regulations to carry out [the MLA],'' and, in particular, to prescribe rules relating to ''[t]he method for calculating the applicable annual percentage rate of interest'' and the ''types of fees'' that are subject to the restrictions of the MLA. 10 U.S.C. 987(h)(2)(B) and (h)(2)(C).

[136] *See, e.g.,* Associations Dec. 18, 2014, at 38 (''First, a fee that few or no other creditors charge is tautologically 'not customary' and consequently will be deemed ineligible for the exception.'').

[137] The Associations, for example, fail to recognize that the Department's rule does not affect the extent to which a creditor could charge fees on consumers who are not covered borrowers. Under the Proposed Rule, if creditors would have succeeded in the huge marketplace of non-covered borrower cardholders in making a fee for a novel or innovative service ''customary'' (or in making the fee itself ''customary'')—that is, commonly used or encountered—then a creditor would have been permitted to claim that that type of fee would qualify as ''customary'' in a credit card account for a covered borrower. This dimension of the conditional exemption remains relevant because, under § 232.4(d)(3)(ii)–(iv), a creditor is permitted to rely on practices and amounts used by other creditors in the huge marketplace of non-covered borrower cardholders when assessing whether a fee charged by that creditor to a covered borrower is ''reasonable.''

reasonableness of a fee for, say, a balance-transfer service based on the fees that other creditors charge for cash-advance services.

A comment on behalf of certain credit card issuers contends that the like-kind standard is ''not workable in practice because it disregards the fact that there can be significant differences between issuers' credit cards and fails to provide a clear basis for determining what constitutes a comparable product or service.'' [138] On this point, the comment for these credit card issuers presents two principal arguments.[139] First, the comment raises a series of rhetorical questions relating to potentially different features of ''rewards programs,'' and asks ''[h]ow will a [creditor] determine whether a fee imposed in connection with its rewards program is substantially similar to, or the same as, another issuer's rewards program?'' The like-kind standard does not require a creditor to compare its rewards program to other *rewards programs,* per se; rather, the like-kind standard requires a creditor to assess the reasonableness of the *fee* charged for its rewards program to the fees charged by other creditors for their rewards programs, respectively. In this way, the like-kind standard does not allow a creditor to compare a ''rewards program fee'' (an amount other than zero) to the ''foreign transaction fee'' charged by another creditor (which could be, say, three percent of the amount of the purchase) in order to assess whether its reward program fee is reasonable under § 232.4(d)(1). Moreover, in the case of a creditor that imposes a fee for participation in a credit card account that includes a ''rewards program,'' the creditor is permitted under § 232.4(d)(3)(iv) to assess the reasonableness of the participation fee by taking into account the potential value of any 'rewards points' that may be awarded to a covered borrower.

Second, the comment on behalf of these credit card issuers observes that creditors ''treat specific types of transactions differently and the imposition of a fee for a particular type of transaction is not the same across all [creditors].'' The like-kind standard does not contain a presumption that a creditor's assessment of a fee for a product or service must be relative to the product or service that is identical across all creditors; rather, the like-kind standard is designed to guard against the possibility that a creditor could improperly assess its (high) fee for one service (or type of transaction) relative to the (lower) fees charged by other creditors for a service (or type of transaction) that is different in kind. By describing the comparison to be made as between ''the same *or substantially similar* product[s] or service[s]'' (emphasis added), the Department expects creditors in the marketplace of credit card accounts to charge certain fees tied to products or services that, despite variances, can be classified in a manner that would allow a creditor to fairly assess the reasonableness of its bona fide fees. In order to illustrate their apparent confusion regarding the application of the like-kind standard under § 232.4(d)(3)(i), the comment on behalf of these credit card issuers offers this example:

> Different [creditors] treat different types of transactions as a 'cash advance' transaction. For example, some [creditors] treat transactions involving traveler's checks, money orders or gift cards as a cash advance transaction because those [creditors] consider those transactions to be 'cash equivalents' while other [creditors] do not. Under the [Proposed Rule], if [Creditor A] assesses a cash advance fee for four types of transactions, and [Creditor B] assesses a cash advance fee for only two of the four types of transactions, it is not clear whether [Creditor A] or [Creditor B] could deem their fees to be 'like-kind' fees.

Of course they could. More precisely, § 232.4(d)(3)(i) would allow Creditor A to assess the reasonableness of the 'cash advance' fee that applies to all four types of transactions by comparing its fee to the fee charged by another group of creditors who cover fewer than those transactions within their own structures of fees. Sections 232.4(d)(1) and 232.4(d)(3)(i) do not require a strict correlation among comparators. Even though each transaction that Creditor A classifies in its cardholder agreement as subject to a 'cash advance' fee has distinctive features bearing on a payment (*e.g.,* a traveler's check provides for a countersignature by the consumer-purchaser of the check when he or she negotiates the check), all of the transactions fit within the same class because each allows the cardholder to tender an item or instrument as if it were cash (and instead of the credit card itself). In this way, Creditor A would be permitted to assess the fee it charges for selling a traveler's check as a bona fide 'cash advance' fee and compare the amount of that fee to the amount that Creditor B charges for the sale of a gift card—even if Creditor B does not use the same label of 'cash advance' fee for that transaction.

To provide additional clarity on the application of the like-kind standard, the Department has modified § 232.4(d)(3)(i) by adding the statement: ''Conversely, when assessing a foreign transaction fee, that fee may not be compared to a cash advance fee because the foreign transaction fee involves the service of exchanging the consumer's currency (*e.g.,* a reserve currency) for the local currency demanded by a merchant for a good or service, and does not involve the provision of cash to the consumer.''

4. Safe Harbor

Section 232.4(d)(3)(ii) provides a firm, yet flexibly adaptable standard for a ''reasonable'' amount of a bona fide fee. Under this provision, a creditor may compare the amount of the bona fide fee to ''an average amount for a substantially similar fee charged by 5 or more creditors each of whose U.S. credit cards in force is at least $3 billion in an outstanding balance (or at least $3 billion in loans on U.S. credit card accounts initially extended by the creditor) at any time during the 3-year period preceding the time such average is computed.'' In this regard, the Department has modified § 232.4(d)(3)(ii) to clarify that a creditor may meet the $3-billion threshold even if the creditor has sold the credit card loans to a special-purpose vehicle or entered into another arrangement so that securities backed by the loans may be issued. The standard for a ''reasonable'' amount of a bona fide fee should be sufficiently flexible to allow for changing conditions in the marketplace for products and services provided through credit card accounts, and thus, as proposed, the Department has adopted language in the provision (''an average'' of an amount charged by ''5 or more creditors'') that allows a creditor to select any group of 5 or more credit card issuers who each have the qualifying amount of credit card loans in order to make a determination. The Department believes that using a pool of 5 or more of these qualifying creditors is reasonable because these creditors, taken together, would represent a

[138] L. Chanin, Dec. 23, 2014, at 16.

[139] L. Chanin, Dec. 23, 2014, at 16–17. The comment also raises a question regarding whether a creditor (say, Bank A) that issues its credit card on one payment network (*e.g.,* MasterCard) is ''the same as'' a card that another creditor (Bank B) issues on another payment network (*e.g.,* American Express). However, the comment fails to describe (or is at least incomplete as to) whether either creditor charges a fee to the cardholder that is connected to the bona fide service of processing payments over a given network. Nevertheless, assuming that the comment's example is pertinent, if Bank A charges a ''payment network fee'' to a covered borrower for the use of the MasterCard network to process payments on that card, then Bank A must compare the amount of that fee to the ''payment network fees'' charged by other creditors in order to assess whether that fee is reasonable under § 232.4(d)(1).

significant portion of the market for credit card products.[140]

In order for a creditor to use the fee(s) charged by a credit card issuer when computing an average, the credit card issuer must have met the $3-billion threshold at any time during the 3-year period preceding the date when the creditor computes the average. If the amount of the creditor's own bona fide fee is less than or equal to the average of the amount charged by those 5 or more credit card issuers who each meets the $3-billion threshold, then the creditor's bona fide fee is reasonable for the purposes of the exclusion.

Section 232.4(d)(3)(ii) sets a threshold of $3 billion in outstanding credit card loans on U.S. credit card accounts held by a credit card issuer (or at least $3 billion in loans on U.S. credit card accounts initially extended by the creditor) in order for that issuer's fees to be eligible for inclusion in an average calculated for the purposes of compliance with the ''reasonable'' condition of § 232.4(d)(1). The Department has adopted the use of a minimum of 5 credit card issuers, each of whom meet the $3-billion threshold, in order to facilitate a creditor's ability to compute an average under the safe-harbor provision in light of a very manageable, yet fairly representative, sample of fees in the marketplace for credit card products. The Department has concluded that a $3 billion threshold of credit card loans is reasonable because that threshold would include a significant number of credit card issuers, whose credit card products make up the majority of the products in the current credit card market. Moreover, the credit card issuers who hold more than $3 billion in outstanding credit card loans (or had initially had originated more than $3 billion of credit card loans) on U.S. credit card accounts offer credit card products that are typical in that marketplace. The Department is aware that many credit card issuers who do not meet the $3-billion threshold may offer credit card products with lower or similar fees (relative to issuers who hold more than $3 billion in outstanding credit card loans); these issuers would benefit in a straightforward manner from the proposed method of computing an average for the purposes of the safe-harbor proposed in § 232.4(d)(3)(ii). The Department believes that establishing this threshold would prevent a niche issuer charging unreasonable credit card fees from benefiting from the safe harbor, in a manner that evades the intent of the rule, by comparing its fees only to the fees of other niche issuers, rather than a representative sample of the marketplace.

The Department also has adopted, as proposed, a rolling 3-year look-back period to facilitate a creditor's ability to establish that a credit card issuer meets the asset-size standard. This 3-year period is designed to facilitate the process for calculating, and relying on, an average amount for one or more relevant fees because, for example, when a creditor uses information from the past year to establish that a credit card issuer meets the asset-size threshold, the creditor could rely on the fee information relating to that credit card issuer's credit card products for the next two years. At the same time, the 3-year period is expected to provide stability to the safe-harbor determination, particularly if credit card loan holdings of credit card issuers shift significantly in response to market conditions or otherwise. Furthermore, a 3-year period is expected to provide adequate time for the Department to amend the threshold or safe harbor, as may be necessary.[141]

The Department believes that all creditors who offer credit card products to Service members and their dependents could readily calculate whether each type of fee associated with those products may fit within the safe harbor because data relating to the fees imposed by other credit card issuers, as well as the amount of credit card loans outstanding, is widely available. With regard to credit card fees, most credit card issuers, particularly all of the largest issuers, make complete contract terms on their current offerings freely available on their Web sites as part of solicitations and applications for their products.[142] Indeed, subject to certain conditions, TILA, as amended by the CARD Act, requires a creditor to maintain an internet site on which the creditor must post its written agreement with a cardholder, and must provide that agreement to the Bureau to be made publicly available on the Bureau's site.[143]

With regard to the amount of outstanding credit card loans held by a credit card issuer, issuers provide this information in both filings to the Securities and Exchange Commission (SEC filings) and Consolidated Reports of Condition and Income (Call Reports). Both SEC filings[144] and Call Reports[145] are available online without charge. In addition, the Department recognizes that data collected from these and other information sources is compiled in commercially available databases regularly used by financial institutions to track the marketplace for credit card products and services, and the Department believes that creditors should be permitted to reasonably rely upon those industry-specific databases when computing an average fee under § 232.4(d)(3)(ii).

For example, a creditor seeking to determine whether another credit card issuer could qualify as one of the 5 creditors for determining the average fee under § 232.4(d)(3)(ii) could download a recent Call Report for an issuer and review Schedule RC–C Part I line 6(a) that provides credit card ''[l]oans to individuals for household, family, and other personal expenditures'' held by the institution. If that credit card issuer indicated that it held more than $3 billion in outstanding credit card loans, then the creditor could include any fee charged by that credit card issuer in the creditor's safe-harbor calculation under § 232.4(d)(3)(ii). The creditor could find the amounts of the relevant fees for that credit card issuer disclosed on the issuer's current offerings, as available through a variety of sources, such as the issuer's Web site.

5. Reasonable Fee

Section 232.4(d)(3)(iii) provides that a bona fide fee still may be ''reasonable'' for the purposes of the exclusion even if that fee is higher than an average amount as calculated under proposed § 232.4(d)(3)(ii). In particular, the Department recognizes that, due to

[140] The Department is aware of at least 16 creditors who hold loans above the proposed asset threshold. *See* The Nilson Report, Issue 1,025 (Sept. 2013) at 10 (listing 14 MasterCard and Visa issuers with above $3 billion in outstanding loans mid-year 2013); Discover Bank, Consolidated Reports on Condition and Income for A Bank with Domestic Offices Only— FFEIC 041 (July 30, 2013) at 17 (indicating that Discover held more than $49 billion in such loans); and American Express Company, Consolidated Statements of Income (July 17, 2013) at 13 (indicating that American Express held $54.6 billion in cardmember loans. These 16 creditors (who are not the only creditors above the $3 billion threshold) hold over $582 billion in credit card loans or greater than 87 percent of the market in 2013.

[141] In this regard, 10 U.S.C. 987(h)(3) requires the Department, at a minimum, to consult with other Federal agencies ''not less often than once every two years'' with a view towards revising the regulation implementing the MLA.

[142] *See, e.g.,* the solicitations available at *https://creditcards.chase.com.*

[143] 15 U.S.C. 1632(d).

[144] The SEC makes public filings available through its Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. Information on this system is available at *http://www.sec.gov/edgar/aboutedgar.htm.*

[145] Call Reports for institutions insured by the FDIC can be found on the Federal Financial Institutions Examination Council's Web site, available at *https://cdr.ffiec.gov/public/.* Call Reports for credit unions are available online through the NCUA's Web site, available at *http://researchcu.ncua.gov/Views/FindCreditUnions.aspx.*

several factors in the marketplace for credit cards, the prices of certain fees could drop from current levels, including to zero, and yet the Department believes that a creditor who charges a reasonable fee still should be permitted to avail itself of the exclusion in paragraph (d)(1) of this section. Accordingly, the Department has adopted a provision that expressly states that ''[a] bona fide fee charged by a creditor is not unreasonable solely because other creditors do not charge a fee for the same or a substantially similar product or service.''

6. Reasonableness for a Participation Fee

Consistent with the Department's policy that the ''reasonable'' amount of a bona fide fee is a standard designed to be applied flexibly, § 232.4(d)(3)(v) provides a standard in the particular case of a participation fee. The Department recognizes that creditors who issue credit cards provide a range of benefits and services to Service members and their dependents who are cardholders, and some cards may charge a participation fee in lieu of (or in light of lower) transaction-based fees. For example, a creditor may offer a credit card that carries a relatively higher participation fee, yet does not charge a foreign transaction fee. Accordingly, § 232.4(d)(3)(v) provides a standard stating that ''[a]n amount of a bona fide fee for participation in a credit card account may be reasonable . . . 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.''

F. Assessment of a Covered Borrower

1. In General

Many comments on the Proposed Rule focus on the transition in the method that a creditor could use to determine whether an applicant is a covered borrower. The Department continues to be keenly aware of the practical implications of offering a safe harbor relating to a creditor's assessment of an applicant to determine whether a credit transaction or account is subject to the Department's rule implementing the protections of the MLA. Nonetheless, nothing in 10 U.S.C. 987 mandates the provision of any safe harbor for a ''covered-borrower check;'' the Department elects to maintain the existence of a safe harbor in § 232.5 in the exercise of the authorities granted to it in the law.

In their comment on § 232.5 of the Proposed Rule, the Associations incorrectly state that there would be a ''requirement for lenders to query the Department's [MLA Database]. . . .'' [146] Many other commenters similarly err: [147] Neither the Department's existing rule nor the Proposed Rule would have required a creditor to take any action to assess whether any consumer-applicant is a covered borrower. And nothing in the Department's final rule requires a creditor to conduct a covered-borrower check. Moreover (if the creditor elects to conduct that check), the final rule does not prescribe any method for a covered-borrower check.

To underscore the Department's consistent policy regarding a covered-borrower check, the Department has modified § 232.5 to state, at the outset: ''A creditor is permitted to apply its own method to assess whether a consumer is a covered borrower.'' [148] Under the Department's final rule, as under the existing rule and the Proposed Rule, a creditor who seeks to ascertain whether consumer-applicants are covered borrowers may use a ''simple check box on credit applications,'' as one commenter suggests,[149] or any other method that suits its business operations.

Nevertheless, the Department still believes that a creditor should be afforded a degree of certainty regarding whether an extension of consumer credit is being made to a covered borrower, and to accomplish that purpose adopts new safe-harbor consistent with the provision contained in the Proposed Rule. The Department continues to believe that the dynamic between creditors and borrowers in actual transactions has led to widespread misuses of the individual's self-certification statement,[150] which also have resulted in adverse effects on Service members or their dependents who make false statements. Accordingly, the Department has adopted a safe-harbor provision designed to relieve a Service member or his or her dependent from making any statement regarding his or her status as a covered borrower [151] in the course of a transaction involving consumer credit. Only if a creditor chooses to have a legally conclusive—but not the only factually conclusive—mechanism to determine whether a consumer seeking to obtain consumer credit is a covered borrower would the creditor need to use one or both of the methods set forth in § 232.5(b)(2), and maintain a record of the information so obtained, as set forth in § 232.5(b)(3).[152]

The Department also recognizes the reasonable concerns, raised in many comments on the Proposed Rule, regarding the various interests of creditors in using the MLA Database and the potential costs associated with changing systems for processing consumer credit applications to do so. For example, one commenter expresses the view that a small entity might not have the ''financial resources'' to use the MLA Database and thus ''recommend[s] that small entities be allowed to continue to operate under a safe harbor that requires military members and their dependents to self-identify.'' [153] Consistent with the general provision that affords a creditor one year to comply with the requirements of the final rule, § 232.13(b) provides that a creditor may continue to operate under the existing safe harbor for identifying a

[146] Associations, Dec. 18, 2014, at 27. The thrust of the Associations' criticism in this sentence is that the use of the MLA Database would ''overtax an already unreliable system and inconvenience all consumer credit applicants.'' The Department addresses this criticism by allowing a creditor to use the existing safe harbor for up to one year after the effective date of the final rule. *See* 12 CFR 232.13(b).

[147] *See, e.g.,* Penn State Federal Credit Union, Dec. 12, 2014, at 1 (''The method of identifying servicemembers and dependents to comply with the rule should be changed. Instead of forcing lenders to check the [MLA Database] for every extension of consumer credit to any individual, servicemembers and dependents could self-identify.''); Small Business Administration (''SBA'') Office of Advocacy, Dec. 18, 2014, at 4 (''Requiring small entities to check every customer to determine if he or she is a military member or a military dependent could become burdensome. The business may need to train its staff on how to use the [MLA Database]. If the [MLA Database] is not operating, the small entity may lose a non-military customer while it is trying to ascertain whether the customer is a covered borrower.'')

[148] 32 CFR 232.5(a).

[149] Penn State Federal Credit Union, Dec. 12, 2014, at 1.

[150] As the Department observed when issuing the Proposed Rule, some spouses of active duty Service members may not understand that they are ''dependents'' covered under the MLA and might unwittingly incorrectly complete the covered borrower identification statement. 79 FR 58614.

[151] In this regard, the Department notes that even under the elective verification method, an activated member of the National Guard or Reserves is required to provide a copy of the military orders calling the covered member to military service, upon request of the creditor. 32 CFR 232.5(b).

[152] In this regard, a creditor would not need to use the MLA Database when processing a consumer's application for a loan that is not consumer credit, such as a residential mortgage loan.

[153] SBA Office of Advocacy, Dec. 18, 2014, at 4. Similarly, the Associations contend (though without offering any data that could support their views) that § 232.5 of the Proposed Rule ''will impose significant costs on all depository institutions, especially small institutions, related to the necessary changes to operating systems, security, procedures, and staff training, and the continuing costs associated with compliance monitoring and examination.'' Associations, Dec. 18, 2014, at 27.

covered borrower (as set forth in § 232.5(a) of the regulation established by the Department and effective on October 1, 2007) for up to one year after the effective date of the regulation.

2. Use of MLA Database or Consumer Report Obtained From a Nationwide Consumer Reporting Agency Permitted

The Department adopts a new safe harbor in § 232.5(b) that permits a creditor to legally conclusively determine whether a consumer is a covered borrower by using information obtained either: (i) Directly or indirectly from the MLA Database or (ii) in a consumer report from a nationwide consumer reporting agency or a reseller who provides such a consumer report. If the creditor uses one of these two methods (or both, as the creditor may elect), the creditor's determination would be conclusive with respect to that transaction or account involving consumer credit, so long as the creditor maintains a record of the information so obtained.

As the Department stated when issuing the Proposed Rule, commercial information-services providers reasonably might be anticipated to supply information products to financial institutions that would include covered-borrower checks as part of the products used to process loan applications. Nothing in § 232.5(b)(2)(i) prohibits or restricts a creditor from using a commercially-provided product containing information obtained from the MLA Database to conduct a covered-borrower check.[154] To make this aspect of the rule more clear, the Department adopts § 232.5(b)(2)(i) to state that ''a creditor may verify the status of a consumer by accessing information relating to that consumer, if any, *obtained directly or indirectly* from the database maintained by the Department'' (emphasis added).[155]

Nevertheless, several commenters encourage the Department to provide greater flexibility to creditors that may wish to use commercially provided information with underlying data supported by the Department's database. For example, the American Financial Services Association suggests that ''[i]f the Department proceeds with the proposed safe harbor, the Department should clarify that a creditor may take advantage of the safe harbor by conducting a covered borrower check using a commercially provided information product whose underlying data is derived from the MLA Database.'' [156] In addition to permitting the use of information obtained from the MLA Database, the Department should provide a second method for verifying the status of covered borrowers. In § 232.5(b)(2)(ii), the Department allows a creditor to use information relating to a consumer contained in a consumer report obtained from a nationwide consumer reporting agency, or a reseller of such a consumer report (*i.e.,* a reseller who obtains the underlying report from a nationwide consumer reporting agency). The Department believes that information contained in a consumer report should be permitted to be used for the purposes of the safe harbor in § 232.5(b) because the Fair Credit Reporting Act (''FCRA'') [157] imposes stringent requirements on the assembly of information for, disclosure of, and use of a consumer report; the Department believes that, taken together, these requirements should be sufficient to provide the degree of accuracy necessary for a creditor to make a legally conclusive determination regarding the status of a consumer for purposes of compliance with the MLA. In particular, the Department believes that a covered borrower would not face a material risk of being mis-identified as not having that status by a creditor's use of a consumer report because, under the FCRA, a consumer reporting agency must ''follow reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the report relates.'' [158] The Department has crafted § 232.5(b)(2)(ii) broadly to allow a creditor to ''[use] information relating to that consumer, if any, contained in a consumer report.'' Although the MLA Database may be one source of information nationwide credit reporting agencies might draw upon, nothing in this subparagraph requires the information contained in the consumer report bearing on the covered-borrower check to be derived solely from the MLA Database.[159] A creditor may use information contained in a consumer report obtained from a nationwide consumer reporting agency, or from a reseller who obtains the underlying consumer report from a nationwide consumer reporting agency, even if the nationwide consumer reporting agency has developed data from sources other than the MLA Database that bears on the status of the consumer vis-à-vis a covered borrower.

Nevertheless, at this time the Department is concerned that, despite the requirements of (and enforcement mechanisms that apply under) the FCRA, all consumer reporting agencies might not have sufficiently robust systems in place that would provide the degree of accuracy for covered-borrower checks that would warrant granting a safe harbor to their client-creditors. The Department observes that certain supervisory and regulatory mechanisms currently apply primarily (or exclusively) to nationwide consumer reporting agencies that reasonably can be expected to lead those entities to maintain sufficiently robust systems that would provide the degree of accuracy for covered-borrower checks. Consistent with the Department's approach to incrementally adopt and, as appropriate, amend its regulation to implement the protections of the MLA, the Department at this time is restricting the source of the consumer report that is eligible for the safe harbor in § 232.5(b)(2)(ii) to a nationwide consumer reporting agency or a reseller who obtains such a report (from a nationwide consumer reporting agency). As the Department gains more experience observing the effects of its regulation and continues to consult with the Federal Agencies, the Department may, as appropriate, review and consider whether to amend this provision of the regulation.

3. Modification To Use Information Solely at the Time of Processing an Application

Several entities contend that under the safe-harbor provisions proposed in § 232.5, in conjunction with the definition of ''covered borrower,'' in § 232.3(g), a creditor would have needed to conduct ''at least two checks of the

[154] However, even if the Department's rule implementing the MLA does not restrict a creditor from using a commercially provided information product to conduct a covered-borrower check, a commercial entity seeking to use the MLA Database and to re-sell data obtained from the MLA Database must comply with the terms and conditions for use of the database.

[155] Moreover, nothing in § 232.5(b)(2)(i) restricts a consumer reporting agency (including a nationwide consumer reporting agency) from providing information obtained exclusively from the MLA Database.

[156] American Financial Services Association (''AFSA''), Comment, Dec. 22, 2014, at 16–17. See also, Equifax, Dec. 26, 2014, at 4 (''Companies like Equifax have decades of experience running and maintaining data bases, and would be a superior choice to having the Department attempt to expand, run and maintain a database . . . .''); Nat'l Assoc. of Consumer Credit Administrators, Dec. 12, 2014 at 5 (''Our Association supports the creation of a safe harbor for creditors which conduct covered-borrower checks using a product supported by the MLA Database.'')

[157] 15 U.S.C. 1681–1681x.

[158] 15 U.S.C. 1681e(b).

[159] In this regard, the Department notes that a nationwide consumer reporting agency that provides to its client-creditors consumer reports containing covered-borrower data derived solely from the MLA Database may enable those creditors to use either of the two methods for the safe harbor in § 232.5(b).

[MLA Database] per applicant, one upon receiving the application, and the other at the point the applicant 'becomes obligated' on a transaction or establishes an account.'' [160] In § 232.3(g) of the Proposed Rule, the Department proposed to define the term ''covered borrower,'' in part, as a consumer who, *at the time the consumer becomes obligated on a consumer credit transaction or establishes an account for consumer credit,* [meets other criteria]'' (emphasis added); and in proposed § 232.5(b)(2) of the Proposed Rule, the Department described the process of obtaining information from the MLA Database ''when a creditor enters into a transaction or establishes an account for consumer credit.'' The likelihood that a creditor seeking to use the safe harbor under § 232.5(b) would need to check the MLA Database or use a consumer report more than once—that is, at the time of processing the application for consumer credit and at least once thereafter—is heightened for credit card accounts because, as the Associations observe, ''[c]onsumers typically do not become 'obligated' on credit cards . . . until the first transaction or a certain period after delivery of the card, as recognized under [Regulation Z].'' [161]

As the Department stated when issuing the Proposed Rule, the safe-harbor provisions of § 232.5(b) were designed to allow a creditor to be ''free from liability under the MLA at the outset of establishing an account for credit—and throughout the lifespan of that particular account—relating to that consumer.'' [162] In the context of explaining how the safe-harbor provisions would apply in the case of a consumer who opens multiple accounts for consumer credit, the Department stated that ''[i]n order to benefit from the safe-harbor provision under proposed § 232.5(b), a creditor must check the MLA Database whenever a consumer applies for a new consumer credit product or establishes a new account consumer credit.'' [163] The Department recognizes the potential ambiguity that could arise, particularly for consumer credit that is established—that is, when the consumer ''becomes obligated'' for the loan, as described in the definition of ''covered borrower'' (§ 232.3(g))—at a time weeks or months after the consumer applies for the loan—that is, when the Department contemplates that a creditor likely would use information from the MLA Database or information contained in a consumer report.

The Department concludes that the final rule should be clarified to allow a creditor to have a legally conclusive mechanism to determine whether a consumer is a covered borrower at the time that the consumer is *seeking to obtain* consumer credit or when the creditor develops or processes a firm offer of credit, subject to a 60-day expiration period (in the event the consumer delays responding to that offer). Consistent with the Department's authorities to prescribe a rule to implement 10 U.S.C. 987, the Department clarifies this aspect of the potential application of § 232.5(b), first by modifying the scope of the definition of ''consumer credit'' in § 232.3(f)(2)(v), and second by modifying the timing provisions of § 232.5(b)(3).

4. Actual-Knowledge Clawback From Safe-Harbor in Proposed § 232.5(c)

Apart from the reliance on information from the MLA Database as a safe harbor, several entities raised concerns about the Department's proposal to provide an exception (in proposed § 232.5(c)) from that safe-harbor provision based on the creditor's actual knowledge that the consumer is a covered borrower. One credit union, for example, states: ''Reviewing multiple record systems to comply with the 'actual knowledge' requirement is impractical; it would likely entail manual review by credit union staff to ensure records are thoroughly and accurately searched. This would cause significant delays to the loan application and underwriting processes, and increased costs for financial products and services—both undesirable consequences for consumers.'' [164] Similarly, the Associations believe that the presence of the exception for a creditor's actual knowledge would lead ''all credit unions and banks . . . to create an independent internal system to capture and centralize any documentation that might suggest that the customer is in the service or the spouse or dependent of a servicemember.'' [165]

After considering the potential benefits of affording protections under the MLA to a covered borrower who is mis-identified through the creditor's use of the MLA Database or through some other method, the Department concludes that a creditor who conducts a covered-borrower check in reliance on information obtained from the MLA Database or from a consumer report obtained from a nationwide consumer reporting agency, and determines at the outset that a consumer-applicant is not a covered borrower should be provided a safe harbor from liability under the MLA—even if, in fact, that consumer is a covered borrower. If a creditor were to use either or both of the methods in § 232.5(b)(2) to ascertain the status of a consumer who applies for consumer credit, that creditor would demonstrate its best efforts under the circumstances to comply with the MLA, as implemented by the Department's regulation, and should receive, therefore, protection from liability if the database contains incorrect information about that consumer. Accordingly, the Department has determined that § 232.5(c) of the Proposed Rule should not be retained in the final rule.

Under § 232.5 of the final rule, no inference may be drawn concerning the validity of a creditor's own method—that is, a method other than one of the methods in § 232.5(b)(2)—to assess whether a consumer is a covered borrower. If a dispute regarding the requirements of the MLA were to arise in a case when the creditor had used its own method to assess the status of a consumer, then the issue of whether the consumer is or had been a covered borrower is a question of fact, and the parties would be subject to the rules of evidence, including the burdens of production, that apply to that case. More specifically, the absence of the actual-knowledge exception to the safe-harbor provision (as had been proposed § 232.5(c)) in light of the absence of any requirement to use any method to identify a consumer as a covered borrower (*see* § 232.5(a) of the final rule) shall not be construed to create any presumption in favor of a creditor that elects to use its own method to ascertain whether a consumer is a covered borrower.

A comment on behalf of certain credit card issuers seeks clarification regarding the potential effects of certain ''customer management actions, such as credit line increases.'' [166] The Department believes that an action by a creditor within an existing account, such as to increase the available credit that a consumer may draw upon in an account, does not alter the status of the

[160] Schwartz & Ballen LLP, Dec. 23, 2014, at 5. *See also, e.g.,* Associations, Dec. 18, 2014, at 28 (''[A] depository institution will have to query the database multiple times with regard to open-end credit, such as credit cards.'')

[161] Associations, Dec. 18, 2014, at 28.

[162] 79 FR 58615.

[163] 79 FR 58615.

[164] Navy Federal Credit Union, Dec. 15, 2014, at 2. *See also* Michigan Credit Union League & Affiliates, Dec. 26, 2014, at 3 (''Depending on the complexity of the institution, the credit union may have to review multiple record systems to comply with the 'actual knowledge' requirement and will likely entail manual reviews by credit union staff to ensure records are thoroughly and accurately searched.'').

[165] Associations, Dec. 18, 2014, at 28.

[166] L. Chanin, Dec. 23, 2014, at 20.

creditor's prior determination for that account. The Department has adopted a new provision, in § 232.5(b)(3), to clarify this aspect of the operation of the safe harbor. However, the Department maintains that, in order to benefit from the safe-harbor provision under § 232.5(b), a creditor must use a method in § 232.5(b)(2) whenever extending a new consumer credit product or newly establishing an account for consumer credit, including a new line of consumer credit that might be associated with a pre-existing transactional account held by the borrower. For example, if a consumer initially opens a checking account with a bank, and then, later, applies for an overdraft line of credit associated with that checking account and which carries a cost in excess of the interest-rate limit, in order to receive the benefit of the safe harbor for purposes of that new line of consumer credit, the bank must, for example, use information obtained from the MLA Database when processing the consumer's application for (or at the time of establishing) the overdraft line of credit, even if the bank previously had used information from the MLA Database at the time the consumer established the checking account and did not find the consumer in the database.

IV. Section-by-Section Description of the Regulation

Section 232.1 Authority, purpose, and coverage

The Department adopts this section as proposed.

Section 232.2 Applicability

The Department adopts this section as proposed, with a few amendments, including an example, to clarify that the protections of 10 U.S.C. 987 apply only when the consumer continues to hold the status as a covered borrower.

The Department proposed to add new subsection (a), stating: ''Nothing in this part applies to a credit transaction or account relating to a consumer who is not a covered borrower at the time he or she becomes obligated on a credit transaction or establishes an account for credit.'' The Department continues to believe that defining the scope of the regulation to apply only to a covered borrower when he or she enters into a transaction or establishes an account for consumer credit is consistent with the language and structure of 10 U.S.C. 987.[167] Interpreting 10 U.S.C. 987 as applying only to a covered borrower who holds that status when he or she agrees to obtain the consumer credit is fair to the creditor who, at the outset of the transaction, should be in a position to know the status of its counterparty to the agreement.[168] Correspondingly, 10 U.S.C. 987 should apply only when the consumer (who is a covered borrower at the outset of the transaction, or when establishing an account, for consumer credit) continues to be a covered borrower. A comment on behalf of certain credit card issuers observes that the Proposed Rule ''does not address account 'roll-off'—*i.e.,* whether the MLA protections continue to apply once the service member is no longer on active duty or exits the military.''[169] The Department has modified § 232.2(a)—as well as the definition of ''covered borrower'' in § 232.3(g), as discussed below—to clarify that the regulation does not apply to a transaction or account for credit relating to a consumer (which otherwise would be consumer credit) when the consumer no longer is a covered borrower.

The Department adopts corresponding revisions to certain other provisions of the regulation, notably §§ 232.3(f) and 232.5(b)(2), for the sake of clarity and consistency with this policy.

The Department adopts § 232.2(b) as proposed.

Section 232.3 Definitions

(a) Affiliate. The Department adopts the term ''affiliate'' as proposed. As previously explained, this definition is designed to prevent evasion of the rule, specifically with respect to an entity that would not, when considered alone, qualify as a creditor, but, when considered together with its affiliates, would be engaged in extending credit, as described in § 232.3(i)(3).

(b) Billing cycle. The Department adopts the term ''billing cycle'' as proposed.

(c) Bureau. The Department adopts the term ''Bureau'' as proposed.

(d) Closed-end credit. The Department adopts the term ''closed-end credit'' as proposed.

(e) Consumer. The Department adopts the term ''consumer'' as proposed.

(f) Consumer credit. As discussed above, the Department defines ''consumer credit'' consistent with the relevant provisions of the Bureau's Regulation Z.

Sections 232.3(f)(2)(i)–(iii) provide exceptions to ''consumer credit'' that track the exceptions to that term in the MLA.

The Department's existing rule, as well as the Proposed Rule, interpreted 10 U.S.C. 987(i)(6)(A) to exclude from consumer credit ''any credit transaction secured by an interest in the *covered borrower's* dwelling,''[170] whereas the statutory provision flatly excludes ''a residential mortgage.'' A few comments ask the Department to modify § 232.3(f)(2)(i) in order that other types of transactions secured by property, such as the dwelling of another person, would be eligible for the exclusion.[171] The Department concludes that subparagraph (f)(2)(i) should reflect the language and the scope of the exclusion in the MLA—''a residential mortgage''—and amends that provision accordingly.

Certain credit products may, or may not, be covered under the Department's definition of ''consumer credit,'' depending, for example, on whether the particular credit product is subject to a ''finance charge,'' which the Department likewise defines consistent with the meaning of that term in Regulation Z. Most, if not all, ''deposit advance'' products would (when offered to a covered borrower) be covered as consumer credit because this type of product typically involves credit extended by a creditor primarily for personal, family, or household purposes for which the borrower pays any fee or charge that is, or is expected to be, repaid from funds available in the borrower's asset account held by that creditor. Likewise, consistent with Regulation Z,[172] an overdraft line of credit with a finance charge would (when offered to a covered borrower) be covered as consumer credit to the extent

[167] *See, e.g.,* 10 U.S.C. 987(a) (imposing conditions on ''[a] creditor who *extends* consumer credit''); 10 U.S.C. 987(c) (requiring certain information to be provided to a covered borrower ''before the issuance of credit''); 10 U.S.C. 987(e) (declaring that ''[i]t shall be unlawful for any creditor *to extend* consumer credit to a [covered borrower]'' that involves certain restrictions or conduct) (emphases added).

[168] In this regard, the Department explained that its longstanding policy regarding this aspect of the scope of 10 U.S.C. 987 is consistent with the provision set forth in § 987(f)(3). (''Any credit agreement, promissory note, or other contract prohibited under this section is void from the inception of such contract.''). In proposing § 232.2(a), the Department explained that ''10 U.S.C. 987 should not be interpreted so as to impose restrictions on an existing agreement between a creditor and a consumer involving a credit transaction primarily for personal, family, or household purposes that spring to life when the consumer becomes a covered borrower when he or she begins active duty service in the military.'' 79 FR 58616.

[169] L. Chanin, Dec. 23, 2014, at 20.

[170] *See* proposed 12 CFR 232.3(f)(2)(i), 79 FR 58637 (emphasis added).

[171] *See, e.g.,* Wolters Kluwer Financial Services, Dec. 23, at 1 (asking the Department to ''consider whether these transactions pose the type of 'debt trap' to [covered borrowers], and if not, amend the restriction ''in order to limit unnecessary regulatory burden'').

[172] *See* 12 CFR 1026.4(c)(3) (imposing certain conditions on a charge for overdraft services that, if not satisfied, would make that charge a ''finance charge'').

that product consists of credit extended by a creditor primarily for personal, family, or household purposes to pay an item that overdraws an asset account and for which the borrower pays any fee or charge, but only if (A) the extension of credit for such an item and (B) the imposition of the fee or charge were previously agreed upon in writing. On the other hand, an overdraft service typically would not be covered as consumer credit because Regulation Z excludes from ''finance charge'' any charge imposed by a creditor for credit extended to pay an item that overdraws an asset account and for which the borrower pays any fee or charge, unless the payment of such an item and the imposition of the fee or charge were previously agreed upon in writing.[173]

Consistent with the Department's existing rule, § 232.3(f)(2)(iv) excludes from the scope of ''consumer credit'' any credit transaction that is an exempt transaction for the purposes of Regulation Z (other than a transaction exempt under 12 CFR 1026.29) [174] or otherwise is not subject to disclosure requirements under Regulation Z. The Department continues to believe that the exclusions in § 232.3(f)(2)(iv) are appropriate because these types of exempted credit do not pose risks to Service members and their dependents, and a creditor who already complies with Regulation Z should not be required to independently assess whether certain types of credit exempt under that rule could be subject to the requirements of the MLA.

As discussed when issuing the Proposed Rule,[175] the Department has removed the provision in the existing rule that had provided an exclusion for ''credit secured by a qualified retirement account as defined in the Internal Revenue Code.'' [176]

As discussed in section III.D., the Department adopts § 232.5(b) in order to afford a creditor a degree of certainty regarding whether an extension of consumer credit is being made to a covered borrower. Accordingly, and pursuant to the Department's authorities to prescribe regulations defining the scope of ''consumer credit,'' [177] the Department adopts an exclusion in § 232.3(f)(2)(v) that gives effect to a creditor's election to use the method of conducting a covered-borrower check, and by complying with the recordkeeping requirement, under § 232.5(b).

(g) Covered borrower. In general, the Department has adopted the definition of ''covered borrower'' as proposed. The Department proposed to revise the definition of ''dependent'' to reflect the language of 10 U.S.C. 987(i), as amended by § 663 of the 2013 Act and, with respect to this provision, one commenter states that the definition of ''dependent'' should include surviving spouses, as described in subparagraphs (B) and (C) of 10 U.S.C. 1072(2).[178] The Department has no discretion to expand the scope of the term ''dependent'' to include surviving spouses, and believes that the definition of ''dependent'' hereby adopted in the final rule appropriately carries out the intent to simplify the process for determining which family members are covered under 10 U.S.C. 987.

For the reasons discussed in connection with the modification to § 232.2(a), the Department has modified the definition of ''covered borrower,'' by adding a new subparagraph (4), to clarify that a consumer who had been a covered borrower ceases to hold that status when the consumer no longer is a covered member or a dependent of a covered member.

(h) Credit. The Department adopts the term ''credit'' as proposed.

(i) Creditor. The Department adopts the term ''creditor'' as proposed. As stated in the Proposed Rule, the Department interprets the statutory provision of ''engaged in the business of extending consumer credit'' [179] consistent with the corresponding provision of the Department's existing rule, which refers to the definition of ''creditor'' in Regulation Z.[180]

(j) Department. The Department adopts the definition for the Department of Defense as proposed.

(k) Dwelling. The definition of ''dwelling'' is not changed from the Department's existing rule.[181]

(l) Electronic fund transfer. The Department adopts the term ''electronic fund transfer'' as proposed.

(m) Federal credit union. The Department adopts the term ''Federal credit union'' to have the same meaning as in the FCU Act. As discussed in section III.D., this term is part of the exclusion from the MAPR for an application fee charged by a Federal credit union (or insured depository institution).

(n) Finance charge. The Department adopts the term ''finance charge'' as proposed.

(o) Insured depository institution. The Department adopts the term ''insured depository institution'' to have same meaning as in the Federal Deposit Insurance Act. As discussed in section III.D., this term is part of the exclusion from the MAPR for an application fee charged by an insured depository institution (or Federal credit union).

(p) Military annual percentage rate (MAPR). The Department adopts the definition of the term ''MAPR'' as proposed, which requires the cost of credit to be expressed as an annual rate and requires the MAPR to be calculated in accordance with § 232.4(c).

(q) Open-end credit. The Department adopts the term ''open-end-credit'' as proposed.

(r) Person. The Department adopts the term ''person'' as proposed.

(s) Regulation Z. The Department adopts the term ''Regulation Z'' as proposed.

(t) Short-term, small amount loan. For the reasons described in section III.D., the Department adopts a new term, ''short-term, small amount loan,'' to define the qualifying closed-end loan for the exclusion from the MAPR for an application fee charged by a Federal credit union or insured depository institution.

Section 232.4 Terms of Consumer Credit Extended to Covered Borrowers

1. Sections 232.4(a)–(c): In General

As proposed, the Department adopts § 232.4(a), which tracks the restrictions under 10 U.S.C. 987(a).

Section 232.4(a)(2) tracks the restriction under 10 U.S.C. 987(a)(2), which provides that a creditor who extends consumer credit to a covered borrower shall not require the borrower to ''pay interest with respect to the extension of such credit, except as . . . authorized by applicable State or Federal law.'' As stated in the Proposed Rule,[182] the Department understands that this condition on an extension of consumer credit possibly could be interpreted to restrict a financial institution, such as a national bank, based in one state from charging interest to covered borrowers residing in another state, which imposes a limit on the interest rate that may be charged, ''except as . . . authorized by [that

[173] *See* 12 CFR 1026.4(c)(3).

[174] *See* 12 CFR 1026.29, regarding state application for Bureau exemption of a class of transactions within the state.

[175] *See* 79 FR 58616–58617.

[176] 32 CFR 232.3(b)(2)(iv) (2014).

[177] 10 U.S.C. 987(h)(2)(D)–(E); 987(i)(6).

[178] Nat'l Military Family Assoc., Dec. 18, 2014, at 2. 10 U.S.C. 1072(2)(B)–(C) (defining ''dependent'' to mean ''the unremarried widow'' of a member or the ''unremarried widower'' of a member, respectively).

[179] 10 U.S.C. 987(i)(5)(A)(i).

[180] 32 CFR 232.3(e) (''*Creditor* means a person who . . . and who otherwise meets the definition of 'creditor' for purposes of Regulation Z.'').

[181] 32 CFR 232.3(f).

[182] 79 FR 58617.

other] State.'' The Department believes that, other than the limit imposed in § 232.4(b), nothing in 10 U.S.C. 987 or this regulation should be construed so as to affect the federal law governing the interest rate a financial institution may charge.[183]

Section 232.4(b) tracks the interest-rate limit of 10 U.S.C. 987(b).

Section 232.4(c) provides the framework for calculating the MAPR by: First, in § 232.4(c)(1), describing each of the charges that must be included in the MAPR; and second, in § 232.4(c)(2), prescribing the rules for computing the MAPR based on those charges.

Relative to the corresponding provisions of the Department's existing rule,[184] the Department amends the language of § 232.4(b) and § 232.4(c)(1)(ii), to reflect the broader scope of consumer credit subject to the regulation, such as by referring to the sale of credit-related ancillary products in connection with ''the credit transaction *for closed-end credit* or an *account for open-end credit*'' (emphasis added).

As stated in the Proposed Rule,[185] the Department has crafted § 232.4(c)(1)(i)–(ii) to generally reflect the charges that must be included as ''interest'' under 10 U.S.C. 987(i)(3), and subject to the conditional exclusion for bona fide fees, as explained further below. Several comments raised concerns regarding the Department's proposal to modify the treatment of fees for credit insurance products, debt cancellation contracts, or debt suspension agreements that are voluntarily entered into by covered borrowers.[186] The Debt Cancellation Coalition, for example, acknowledges that 10 U.S.C. 987(h) and 987(i) grants discretion to the Department to prescribe regulations regarding the elements of, and method of computing the ''annual percentage rate'' of ''interest'' that is subject to the interest-rate limit in 10 U.S.C. 987(b), and urges the Department to exclude fees for voluntary debt cancellation contracts or debt suspension agreements from the ''calculation of MAPR as long as the requirements under TILA and Regulation Z are satisfied.'' [187] Alternatively, the Debt Cancellation Coalition argues that the Department should, ''[a]t the very least,'' modify the rule to clarify that any fee for a debt cancellation contract or debt suspension agreement must be included in the MAPR only when that product is ''sold at or before consummation of the credit transaction for closed-end credit or upon account opening for open-end credit.'' [188] The Debt Cancellation Coalition explains that, unless a charge for debt cancellation or debt suspension agreement that must be included in the MAPR is limited to an initial charge, a creditor would face a ''near impossible'' condition when attempting to compute the MAPR because the fee(s) for those products would vary from month to month.[189]

Aon Integramark similarly argues that under the Department's existing rule a fee for a debt cancellation contract is not included in the MAPR unless one of three conditions is met, consistent with the treatment of that type of fee under Regulation Z. In this regard, Aon Integramark observes that in § 232.3(h)(1) of the existing rule,[190] the cost elements set forth in subparagraphs (i)–(iii) must be included in the MAPR only ''if they are financed, deducted from the proceeds of the consumer credit, or otherwise required to be paid as a condition of the credit.'' [191] This commenter explains that the existing rule ''strikes the proper balance by allowing members of the military to purchase debt cancellation on a voluntary basis without including the cost in the MAPR.'' [192] Aon Integramark urges the Department to align the treatment of debt cancellation contracts in the final rule with the treatment of those products in the existing rule by amending § 232.4(c)(1)(i)—but not § 232.4(c)(1)(ii) (which relates to credit-related ancillary products)—by adding at the end of that subparagraph (i) the words '' 'if they are financed, deducted from the proceeds of the consumer credit, or otherwise required as a condition of the credit.' ''[193] If this amendment were to be adopted, a fee for a credit insurance product, debt cancellation contract, or debt suspension agreement would be excluded from the computation of the MAPR if the covered borrower voluntarily agrees to obtain that product, contract, or agreement.[194]

The Department recognizes that, by eliminating the condition that certain charges be included in the computation of the MAPR ''if [those charges] are financed, deducted from the proceeds of the consumer credit, or otherwise required as a condition of the credit,'' [195] the Department is expanding the scope of the elements that must be included in the MAPR. The Department believes that eliminating this condition in § 232.4(c)(1)—thereby requiring voluntary credit insurance products to be included—reasonably interprets the definition of ''interest'' in the MLA, which generally (and subject to the Department's rulemaking authorities) must include ''*all* cost elements associated with the extension of credit, *including* fees, service charges, renewal charges, credit insurance premiums, any ancillary product sold with any of extension of credit. . . .[196] Correspondingly, the MLA defines the ''annual percentage rate'' of interest—another term integral to the law's interest-rate limit—as ''*all* fees and charges, *including* charges for single premium credit insurance and other ancillary products sold in connection with the credit transaction. . . .[197] The Department recognizes, and commenters acknowledge, that the MLA grants discretion to the Department to prescribe regulations regarding the method for calculating the applicable MAPR, including the ''maximum allowable amount of all fees, and the types of fees, associated with any such extension of credit,'' [198] as well as ''other criteria or limitations as the Secretary of Defense determines appropriate, consistent with the provisions of [the MLA.] [199] Upon review of the comments submitted on the Proposed Rule and in light of its experience administering the existing rule, the Department has elected to exercise its discretion by generally requiring any fees for credit insurance

[183] In the case of a national bank, for example, *see* 12 U.S.C. 85; 12 CFR 7.4001 (2015).

[184] 32 CFR 232.3(h)(1)(ii)–(iii) (2013).

[185] 79 FR 58617.

[186] *See, e.g.,* Aon Integramark, Nov. 11, 2014; Debt Cancellation Coalition, Dec. 15, 2014; Navy Federal Credit Union, Dec. 15, 2014.

[187] Debt Cancellation Coalition, Dec. 15, 2014, at 5. The Debt Cancellation Coalition explains that Regulation Z requires a creditor to meet certain requirements in order for a charge or premium for one of these products to satisfy the relevant exclusion from the finance charge, and these requirements generally aim to allow the consumer to voluntarily purchase the product.

[188] Debt Cancellation Coalition, Dec. 15, 2014, at 6.

[189] Debt Cancellation Coalition, Dec. 15, 2014, at 6.

[190] 32 CFR 232.3(h)(1) (2013).

[191] Aon Integramark, Nov. 11, 2014, at 2. *See also* Debt Cancellation Coalition, Dec. 15, 2014, at 3 (''The MAPR includes fees for [debt cancellation contracts], but only 'if they are financed, deducted from the proceeds of the consumer credit, or otherwise required to be paid as a condition of credit.'')

[192] Aon Integramark, Nov. 11, 2014, at 3.

[193] Aon Integramark, Nov. 11, 2014, at 3.

[194] The Department observes that there is a near-absence of support in the comments for an exclusion from the elements that must be included in the MAPR for voluntarily agreed to credit-related ancillary products.

[195] 32 CFR 232.3(h)(1) (2013).

[196] 10 U.S.C. 987(i)(3) (emphasis added).

[197] 10 U.S.C. 987(i)(4) (emphasis added).

[198] 10 U.S.C. 987(h)(2)(B)–(C).

[199] 10 U.S.C. 987(h)(2)(E).

products or for credit-related ancillary products to be included in the MAPR.

As stated when issuing the existing rule, the Department remains concerned that covered borrowers are sold credit insurance products ''without having these credit insurance products placed in the context of the Service member's employment status or his or her current level of insurance coverage.'' [200] By eliminating the condition in § 232.3(h)(1) of the existing rule (''if [those charges] are financed, deducted from the proceeds of the consumer credit, or otherwise required as a condition of the credit''), as set forth in § 232.4(c)(1) of the Proposed Rule, the Department is more fully carrying out its existing policy.

Insofar as some commenters urge the Department to align its treatment of credit insurance, debt cancellation, or debt suspension products vis-à-vis the computation of the MAPR with the treatment of those products under Regulation Z, that regulation provides for exclusions from the scope of the finance charges that must be disclosed for voluntarily agreed to ''credit life, accident, health, or loss-of-income insurance,'' [201] as well for ''debt cancellation or debt suspension coverage in the event of the loss of life, health, or income or in the case of accident'' [202]—all conditions that a covered borrower already is substantially insured for, or otherwise substantially provided benefits for, by the military services. The Department believes that most, if not all, of the credit insurance products, debt cancellation contracts, or debt suspension agreements customarily offered to consumers are not suitable for a covered borrower because the military services already provide insurance or other benefits to a Service member that would adequately provide financial resources even if an event of coverage (*e.g.,* disability) were to occur to the borrower. For example, a Service member currently holds health insurance as part of his or her benefits in the Service and, if that Service member were to become ill, the Service member still would be employed, thereby allowing him or her (or the relevant dependent who relies on the Service member's income) to continue to make payments on the debts incurred without triggering a condition of the credit insurance. Accordingly, the Department adopts § 232.4(c)(1)(i) to require all fees for credit insurance products, debt cancellation contracts, or debt suspension agreements to be included in the MAPR, consistent with the scope of 10 U.S.C. 987(i)(3)–(4).[203]

The Department has determined to modify § 232.4(c)(1)(ii), relative to that provision of the Proposed Rule and § 232.3(h)(1)(iii) of the existing rule, to require a creditor to include in the MAPR ''fees for credit-related ancillary products sold in connection with and either at or before consummation of the [consumer credit].'' As the Department explained when issuing the Proposed Rule, when § 232.3(h)(1)(iii) was adopted in 2007, including in the MAPR only the ''credit-related ancillary products'' sold ''either at or before consummation of the credit transaction'' [204] was designed to be consistent with the scope of consumer credit, which covers only a narrow band of closed-end credit products. However, nothing in the MLA necessarily limits the inclusion in the MAPR of these charges only to those that are sold at the outset of the credit transaction. Particularly insofar as consumer credit now encompasses open-end credit products, the Department has concluded that the MLA should be interpreted to require a creditor to include in the MAPR the fee for any ancillary product ''sold with any extension of credit to a [covered borrower]'' so long as that ancillary product is ''associated with the extension of credit'' [205]—which could arise at any time in an ongoing, open-end account for consumer credit. Accordingly, the Department has determined to amend § 232.4(c)(1)(ii) so as to require the inclusion in the MAPR of any fee for a credit-related ancillary product sold in connection with the credit transaction for closed-end credit or (at any time in connection with) an account for open-end credit, so long as the consumer was a covered borrower at the time the account was established.[206]

Section 232.4(c)(1)(iii) describes the charges that must be included in the MAPR in light of the definition of consumer credit, which would chiefly consist of ''[f]inance charges,'' consistent with Regulation Z. In general, a charge that is excluded as a ''finance charge'' under Regulation Z also would be excluded from the charges that must be included when calculating the MAPR. As a result, whereas the Department's existing rule had provided exclusions from the MAPR for late payment fees [207] and taxes required to be paid,[208] § 232.4(c) omits these provisions because these charges (as well as other charges) are not finance charges under Regulation Z.[209]

However, the Department recognizes that, under Regulation Z, a wide range of charges that a creditor may impose in connection with a credit product are excluded as ''finance charges,'' particularly an application fee and a participation fee.[210] If these exclusions from the definition of finance charge were to be maintained in the context of consumer credit covered under the MLA, a creditor would have a strong incentive to evade the interest-rate limit of 10 U.S.C. 987(b) by shifting the costs of a credit product by lowering the interest rate and imposing (or increasing) one or more of these excluded fees. To guard against this obvious result, the Department specifically has included any application fee and any participation fee as charges that generally must be included in the MAPR.[211] The exception for a bona fide fee (other than a periodic rate) charged to a credit card account apply to the charges set forth in § 232.4(c)(1)(iii).

Section 232.4(c)(1)(iv) clarifies that, even if a charge set forth in paragraphs (c)(1)(i)–(iii) of this section would be excluded from the finance charge under Regulation Z, that charge nevertheless must be included in the calculation of the MAPR.

2. Elements of the MAPR and Treatment of Items Under the Conditional Exclusion for Bona Fide Fees

One commenter observes, for example, that ''if a voluntary debt cancellation fee is charged to a credit

[200] 72 FR 50587.

[201] *See* 12 CFR 1026.4(d)(1).

[202] *See* 12 CFR 1026.4(d)(3).

[203] Moreover, the Department is permitted to establish the elements that must be included in the MAPR under 10 U.S.C. 987(h)(2)(E), which directs the Department to establish ''[s]uch other criteria or limitations as the Secretary of Defense determines appropriate, consistent with the provisions of this section.''

[204] 32 CFR 232.3(h)(1)(iii) (2013).

[205] 10 U.S.C. 987(i)(3) (defining '' 'interest' '' generally as including ''all cost elements associated with the extension of credit'').

[206] Moreover, amending the scope of § 232.4(c)(1)(ii) by eliminating the timing condition is consistent with the scope of § 232.4(c)(1)(i) (which tracks § 232.3(h)(1)(ii) of the existing regulation), which does not impose a condition based on the timing of a sale or charge for a credit insurance premium.

[207] 32 CFR 232.3(h)(2)(i) (excluding from the MAPR ''[f]ees or charges imposed for actual unanticipated late payment, default, delinquency, or similar occurrence'').

[208] 32 CFR 232.3(h)(2)(ii) (excluding from the MAPR ''[t]axes or fees prescribed by law that actually are or will be paid to public officials for determining the existence of, or for perfecting, releasing, or satisfying a security interest'').

[209] *See* 12 CFR 1026.4(c).

[210] *See* 12 CFR 1026.4(c)(1) and (c)(4).

[211] *See also* 72 FR 50587 (explaining the need to define the MAPR so that covered credit products ''cannot evade the 36 percent [interest-rate] limit by including low interest rates with high fees associated with origination, membership, administration, or other cost that may not be captured in the TILA definition of APR'').

card account one month, other bona fide fees such as a reasonable annual fee or an ATM fee must also be included in the MAPR calculation.'' [212]

The Department now recognizes that the Proposed Rule left ambiguous the treatment of the charges set forth in § 232.4(c)(1)(i)–(ii) under the exclusion for bona fide fees. The Department intends for the charges set forth in § 232.4(c)(1)(i)–(ii) to be included in the MAPR irrespective of whether any other fee may be a bona fide fee eligible for the exclusion in § 232.4(d). Thus, the charges set forth in § 232.4(c)(1)(i)–(ii) must be treated separately from any fees excluded under § 232.4(d). Correspondingly, even if a creditor imposes one or more charges described in § 232.4(c)(1)(i)–(ii)—which always must be included in the MAPR—the creditor still would be able to exclude other, bona fide fees that meet the conditions in § 232.4(d). The Department has included, in § 232.4(d)(iii), examples to illustrate the interaction between certain charges that always must be included in the MAPR (*e.g.,* a fee for a credit insurance premium) and the availability of the conditional exclusion for bona fide fees.

3. Computing the MAPR

The final rule contains two provisions for computing the MAPR,[213] both of which track the methods already established in Regulation Z.

First, for closed-end credit, the rule requires a creditor to follow ''the rules for calculating and disclosing the 'Annual Percentage Rate (APR)' for credit transactions under Regulation Z,'' based on the charges required for the MAPR, as set forth in § 232.4(c)(1). In general, the requirements for calculating the APR for closed-end credit under Regulation Z are found in § 1026.22(a)(1), and include the explanations and instructions for computing the APR set forth in appendix J to part 1026.

For example, the MAPR for single advance, single payment transactions, such as some types of deposit advance loans, must be computed in accordance with the rules in Regulation Z, such as by following the instructions described in paragraph (c)(5) of appendix J. Based on the formula provided in paragraph (c)(5) of appendix J, in the case of a single advance, single payment transaction loan extended to a covered borrower for a period of 45 days, and for which the advance is $500 and the single payment required consists of the principal amount plus a finance charge of $28.44, for a total payment of $528.44, the MAPR would be 46.14 percent. In this example, the resultant MAPR would exceed the interest-rate limit imposed by 10 U.S.C. 987(b), as set forth in § 232.4(b) of the regulation.

Second, for open-end credit, a creditor generally must calculate the MAPR using the methods prescribed in § 1026.14(c)-(d) of Regulation Z, which relates to the ''effective annual percentage rate'' (''effective APR'').[214] Section 1026.14(c) of Regulation Z provides for the methods of computing the annual percentage rate under three scenarios: (1) When the finance charge is determined solely by applying one or more periodic rates; (2) when the finance charge includes a fixed charge that is not due to application of a periodic rate, other than a charge with respect to a specific transaction; and (3) when the finance charge includes a charge relating to a specific transaction during the billing cycle.

For example, suppose a creditor offers a line of credit to a covered borrower primarily for personal, family, or household purposes (commonly referred to as a ''personal line of credit''), and permits the borrower to repay on a monthly basis. Upon establishing the personal line of credit, the covered borrower borrows $500. The creditor charges a periodic rate of 0.006875 (which corresponds to an annual rate of 8.25 percent), plus a fee of $25, charged when the account is established and annually thereafter. Under these circumstances, pursuant to § 1026.14(c)(2) of Regulation Z the creditor would calculate the MAPR as follows: ''dividing the total amount of the finance charge for the billing cycle''—which is $3.44 (corresponding to (0.006875) × ($500)), plus $25—''by the amount of the balance to which it is applicable''—$500—and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year''—12 (since the creditor allows the borrower to repay monthly), which is 68.26 percent. In this example, even though the periodic rate (0.006875) would comply with the interest-rate limit under § 232.4(b), the resultant MAPR would be in excess of that limit because the amount borrowed is low at the time the annual fee is imposed. If the covered borrower instead borrows a higher amount, then the creditor still could impose the $25 annual fee and comply with § 232.4(b); for example, if the amount initially borrowed is $1,400, then the resultant MAPR would be 24.73, well below the 36 percent limit.

In the case of open-end credit extended through a credit card account, a creditor likewise would be required to calculate the MAPR using the methods prescribed in § 1026.14(c)–(d) of Regulation Z. For example, if a creditor extends credit to a covered borrower through a credit card account and the borrower incurs a finance charge relating to a specific transaction, such as a cash advance transaction, during the billing cycle, then the creditor would calculate the MAPR under the instructions set forth in § 1026.14(c)(3) of Regulation Z. However, in the case of a credit card account the creditor may exclude, pursuant to § 232.4(c)(1)(iii) and § 232.4(d), any bona fide fee from the finance charges that otherwise must be accounted for; thus, if a charge for the cash advance transaction fits within the exclusion for a bona fide fee under § 232.4(d), then that charge would not be included when computing the MAPR for that billing cycle.

In general, a creditor reasonably could be expected to estimate at the outset of a billing cycle whether charges to a covered borrower can produce an MAPR in excess of the limit in § 232.4(b), particularly because the creditor already would know the periodic rate and whether the non-periodic fees are covered by the exclusion for a bona fide fee under § 232.4(d). Nevertheless, under certain circumstances, a creditor might not know at the outset of a billing cycle whether the borrower's use of an open-end line of credit will lead to a finance charge that—through a combination of rates and fees—exceeds the interest-rate limit of the MLA. However, at the end of a billing cycle the creditor would be able to calculate the total charges included in the MAPR and waive an amount necessary to comply with the 36-percent limit of § 232.4(b).

Several comments contend that the requirement in § 232.4(c)(2)(ii) of the Proposed Rule, to apply the standards prescribed in § 1026.14(c)–(d) of Regulation Z, as the method to compute the MAPR for open-end credit is

[212] Navy Federal Credit Union, Dec. 15, 2014, at 2–3.

[213] 10 U.S.C. 987(h)(1) (authorizing the Department to prescribe regulations to carry out the MLA); 10 U.S.C. 987(h)(2)(B) (authorizing the Department to establish ''[t]he method for calculating the applicable annual percentage rate of interest on such obligations, in accordance with the limit established under [the MLA]'').

[214] A creditor subject to § 1026.40 of Regulation Z is not required to comply with § 1026.14(c) (''[that type of] creditor may, at its option, disclose an effective annual percentage rate pursuant to § 1026.7(a)(7) and compute the effective annual percentage [in accordance with the subparagraphs of § 1026.14(c)]''). However, for the purposes of complying with the Department's rule when computing a MAPR for open-end credit, any creditor subject to the Department's regulation must comply with that § 1026.14(c), subject to § 232.4(c)(2)(ii)(B) (in the event that there is no balance during a billing cycle).

inappropriate. A comment on behalf of certain credit card issuers, for example, argues that ''[u]se of the historical, or effective, APR was originally intended as a disclosure tool to enhance consumer understanding of the cost of credit,'' not as a method to calculate fees on open-end credit transactions.[215] These credit card issuers state:

After years of study, the [Board] published a final rule in 2009 that eliminated the requirement in Regulation Z for card issuers to calculate and disclose the APR for each billing cycle. The [Board's] decision to eliminate the historical APR was based on several factors, including extensive consumer testing which found that the effective APR is not helpful to consumers because it does not enable consumers to meaningfully compare costs from month to month or for different products. [216]

These credit card issuers further state that ''[t]he fact that the MAPR rate cap would be reached in some [billing] cycles and not in others depending, in part, on when a service member engages in a transaction would create a rule that bans the identical fee in one cycle and permits it in another cycle.'' [217] ''This approach would,'' these credit card issuers allege, ''be very confusing to service members who clearly would not understand when a fee is or is not assessed for a service such as a cash advance.'' [218]

The Associations likewise assert:

The proposed MAPR [calculation] simply does not work for the same reasons that the 'effective APR' did not work and was discarded by the Federal Reserve. The MAPR will have the same distortions, creating a flawed measurement of the cost of credit. . . . To illustrate, assume a $4 transaction fee and a $100 draw made at the beginning of the month on an overdraft line of credit. This would translate to a minimum 48 percent MAPR—before interest is included. The MAPR could be much higher, depending on when the line was used and when the balance paid.[219]

When in 2009 the Board amended Regulation Z to create an exemption from the requirement in TILA, thereby relieving a creditor from disclosing the effective APR, the Board interpreted TILA as follows: ''The statutory requirement of [disclosing] an effective APR is intended to provide the consumer with an annual rate that reflects the total finance charge, including both the finance charge due to application of a periodic rate (interest) and finance charges that take the form of fees. This rate, like other APRs required by TILA,'' the Board explained, ''presumably was intended to provide consumers information about the costs of credit that would help consumers compare credit costs and make informed credit decisions and, more broadly, strengthen competition in the market for consumer credit.'' [220] The Board found, in part, that ''[d]isclosure of the effective APR on periodic statements does not significantly assist consumers in credit shopping, because the effective APR disclosed on a statement on one credit card account cannot be compared to the nominal APR disclosed on a solicitation or application for another credit card account.'' [221] The Board also stated—again from the perspective of assessing whether a *disclosure* required to be provided under Regulation Z could assist a consumer in comparing the costs of credit card programs or compare the costs of an existing credit card account across billing cycles—that ''the effective APR for a given cycle is unlikely to accurately indicate the cost of credit in a future cycle, because if any of several factors (such as the timing of transactions and payments and the amount carried over from the prior cycle) is different in the future cycle, the effective APR will be different even if the amounts of the transaction and the fee are the same in both cycles.'' [222] Significantly, the Board did not create an exemption from the requirement in TILA that a creditor disclose the effective APR because the creditor could not compute that figure from one billing cycle to the next or because the prescribed method of computation had been demonstrated to be susceptible to error. Rather, the Board's action fundamentally rested on its assessment of the balance of costs and benefits associated with requiring the use of the effective APR to communicate the costs of open-end credit to consumers so that they could, for example, ''meaningfully compare costs from month to month or for different products.'' [223]

That the standards for computing the effective APR still stand in Regulation Z (albeit as an optional, not required, form of disclosure to a consumer) is a testament to their value for computing the cost of open-end credit during a given billing cycle on an annualized basis. The Department's reliance, in § 232.4(c)(2)(ii), on the standards set forth in Regulation Z [224] is solely for the purpose of calculating the MAPR for open-end credit so that the costs of credit can be determined vis-à-vis the interest-rate limit of the MLA—not for communicating that figure to a covered borrower. None of the comments disparaging the Department's reliance on these standards in Regulation Z dispute the accuracy of those standards. Instead, these comments take issue with the implications of applying those standards, together with the constituent elements (*e.g.,* the definition of ''interest'' in 10 U.S.C. 987(i)(3) and the charges that must be included in the MAPR under § 232.4(c)(1)), to certain open-end credit products that some creditors currently provide: ''a small foreign transaction fee,'' for example, ''depending on the existing balance and repayment date, could easily cause the MAPR on a credit card to exceed 36 percent;'' [225] or ''a card issuer may not be able to assess [a cash advance fee] in the case of [a given] billing cycle.'' [226] Those implications flow from the hard truth of the mathematics under the interest-rate limit established by 10 U.S.C. 987(b).

Section 232.4(c)(2)(ii)(B) generally would prohibit a creditor from imposing a charge in an open-end credit plan for any billing cycle during which there is no balance. However, this provision includes an exception for a participation fee (which otherwise would be required to be included under § 232.4(c)(1)(iii)(B)) because the Department concludes that there might be circumstances in which a creditor should be allowed to charge a bona fide fee for maintaining an open-end line of credit for a covered borrower. Still, recognizing that a creditor could structure a high-cost, open-end line of credit to fit within this exception by substantially increasing the participation fee, the Department has adopted a provision that limits that fee to $100 per annum, regardless of the billing cycle in which the participation fee is imposed. The Department believes that $100 is the highest reasonable amount that a creditor could charge as a bona fide participation fee, during a billing cycle in which there is no balance, for the purposes of keeping the line of credit open to the covered borrower. Furthermore, § 232.4(c)(2)(ii)(B) contains a provision to clarify that the $100-per annum limitation on the amount of the participation fee does not apply to a

[215] L. Chanin, Dec. 23, 2014, at 18.

[216] L. Chanin, Dec. 23, 2014, at 18.

[217] L. Chanin, Dec. 23, 2014, at 19.

[218] L. Chanin, Dec. 23, 2014, at 19.

[219] Associations, Dec. 18, 2014, at 34–35. *See also* Schwartz & Ballen LLP, Dec. 24, 2014, at 6 and Attachment.

[220] Truth in Lending, 74 FR 5,244, 5,316–17 (Jan. 29, 2009).

[221] 74 FR at 5319.

[222] 74 FR at 5319.

[223] 74 FR at 5319.

[224] 12 CFR 1026.14(c)–(d).

[225] Associations, Dec. 18, 2014, at 35. *But see* § 232.4(d), which provides a conditional exclusion that is designed to apply to the ''small foreign transaction fee'' the Associations describe in this scenario.

[226] L. Chanin, Dec. 23, 2014, at 19.

bona fide participation fee charged to a credit card account that would be eligible for the exclusion under § 232.4(d).

4. Conditional Exclusion From the MAPR for Bona Fide Fees Charged to a Credit Card Account

The Department believes that credit card products warrant special consideration under the MLA. As discussed above, § 232.4(d) provides the conditional exclusion, including standards relating to the conditions, that allows a creditor to exclude bona fide fees charged to a credit card account from the MAPR. The Department believes that the condition for excluding a bona fide fee from the MAPR—namely, that the fee must be ''reasonable''—would fairly allow Service members and their dependents to continue to have access to credit card products *and* limit the opportunity for a creditor to exploit the exclusion for those products.

However, as set forth in § 232.4(d)(4)(ii) (and apart from the fees described in § 232.4(c)(1)(i)–(ii), as discussed in part (2) (''Elements of the MAPR and Treatment of Items Under the Conditional Exclusion for Bona Fide Fees'')), a creditor who imposes any fee that is not a bona fide fee or that fails to meet the condition of being reasonable must include the total amount of those fees, including any bona fide fees, in the MAPR. Thus, if a creditor charges one unreasonable fee in a credit card account for a covered borrower, the creditor must include the total amount of the fees—including any fee(s) that otherwise may be eligible for the exclusion—in the MAPR. As discussed above, the ''reasonable'' condition for a bona fide fee, as proposed, is intended to be applied flexibly so that, in general, creditors may continue to offer a wide range of credit card products that carry reasonable costs expressly tied to specific products or services and which vary depending upon the covered borrower's own choices regarding the use of the card.

One comment states that the Department should further restrict the scope of the bona fide fees that may be excluded under § 232.4(d)(1) in order to exclude ''transaction fees for cash advances.'' [227] This comment explains that a cash advance fee should be identified as an ineligible bona fide fee (in § 232.4(d)(2)) because cash advance services ''provide no benefit other than accessing a credit line'' and, thus, ''do not meet the rationale that the [Department] has laid out for exempting certain credit card fees from the general rule (*i.e.,* that certain credit card costs are related to benefits of the use of the card that are not related to the use of the credit).'' [228] The Department recognizes that when a covered borrower obtains a cash advance drawn against a credit card account, the borrower appears to be solely borrowing funds; however, on closer inspection, when a bona fide cash advance fee is imposed, the transaction crucially involves the use of the card for the delivery of cash, and in many cases the cardholder-covered borrower conducts that transaction at a location not operated by the creditor (*e.g.,* a so-called ''foreign ATM''). Accordingly, at this time,[229] the Department concludes that a bona fide cash advance fee is eligible for the conditional exclusion under § 232.4(d).

Section 232.5 Identification of Covered Borrowers

The Department has modified § 232.5(a) to more clearly provide that a creditor is permitted to apply its own method, as the creditor may elect, to assess whether a consumer is a covered borrower.

As discussed above, § 232.5 provides two mechanisms for a creditor to unilaterally assess the status of a consumer who applies for consumer credit in order to make a legally conclusive determination that a consumer is not a covered borrower: The creditor may use information from the MLA Database or from a consumer report obtained from a nationwide consumer reporting agency. For either mechanism, the creditor may make a determination regarding a consumer-applicant's status generally when the creditor enters into a transaction or establishes an account that is (or could be) consumer credit. Under either mechanism, a creditor must timely create and thereafter maintain a record of the information so obtained. Due to this timing constraint in § 232.5(b), a creditor who is an assignee has no occasion to avail itself of the safe harbor afforded in this section by separately assessing the status of an existing borrower for the purpose of determining that the borrower is not a covered borrower.

The Department realizes that several purposes would be served by preserving the use of the MLA Database for bona fide inquiries regarding the status of a consumer as a covered borrower in respect of an upcoming or pending application for credit—that is for the purposes of complying, *ex ante,* with this rule. In particular, the Department has an interest in appropriately conserving the Department's resources for the MLA Database, which would facilitate access for many different creditors, as the circumstances for upcoming or pending applications dictate. Accordingly, the Department adopts a prohibition in § 232.5(b)(2)(i)(A) against using any database maintained by the Department to ascertain the status of a consumer as a covered borrower with respect to a pre-existing transaction or account involving an extension of credit, and that prohibition applies to any creditor, including an assignee.

Section 232.5(b)(3) clarifies that a creditor is permitted to conduct a covered-borrower check by using one or both of the methods set forth in § 232.5(b)(2), and, if so, must timely create and keep the record of that information obtained. The creditor needs to undertake this covered-borrower check only once—namely, only at the time that (i) a consumer initiates the transaction, (ii) a consumer applies to establish the account, or (iii) the creditor develops or processes, with respect to a consumer, a firm offer of credit that (among the specific criteria used by the creditor for the offer) includes the status of the consumer as a covered borrower. In order to facilitate a creditor's process for responding to a consumer's inquiry about a loan—which could occur days or a few weeks before the consumer's application for that loan—as well as to reduce the traffic on the MLA Database, § 232.5(b)(3)(i)–(ii) permit the creditor to make a determination and keep a record of the information so obtained 30 days prior to the date of the transaction or the date the consumer applies to establish an account. Many commenters observe that a creditor who, for example, issues a credit card could conduct a covered-borrower check at the time that the consumer applies for the card, but that under the Proposed Rule a creditor would need to conduct another covered-borrower check at or around the time that the consumer becomes obligated on the credit (by using the card), which typically occurs later.

The Department has designed § 232.5(b)(3) in order to enable a

[227] Pew, Dec. 23, 2014, at 7.

[228] *Id.*

[229] As the Department states in section III, in the course of periodically consulting with the Federal Agencies and in light of other factors the Department may find, as appropriate, the Department may review the scope and effects of its regulation; when undertaking that process, the Department may revisit the factors that could warrant specifically restricting (or otherwise specifically including) certain types of fees that would be eligible for the conditional exclusion provided in § 232.4(d).

creditor to conduct only one covered-borrower check within the permitted safe harbor at an early stage of the transaction or the relationship with the consumer, including at the time that the creditor develops a firm offer of credit to be provided to the consumer. However, in the scenario which describes what is commonly referred to as a ''prescreened'' offer of credit (set forth in § 232.5(b)(3)(iii)), the Department has placed a limitation on the amount of time that may lapse between the creditor's delivery of the prescreened offer and the creditor's reliance on its covered-borrower check that formed part of the basis of the offer. The Department believes that there will be many cases when a consumer who is not a covered borrower at the time that a creditor delivers its prescreened offer (which offer is predicated, in part, on that criterion) later responds to that offer, including after becoming a covered borrower. The Department has crafted a limitation in § 232.5(b)(3)(iii) in the interests of balancing the need to provide reasonable certainty to a creditor in using the safe harbor in § 232.5(b) and providing a bright-line standard to that effect,[230] and affording the protections of the MLA to the consumer who (still prior to the onset of the transaction or account but much later than that creditor's offer) becomes a covered borrower. Accordingly, § 232.5(b)(3)(iii) provides that creditor may rely on its initial covered-borrower check so long as the consumer responds to that offer not later than 60 days after the date that the creditor had provided that offer to the consumer. If the consumer responds to the creditor's offer later than 60 days after the date that the creditor had provided that offer to the consumer, then the creditor may not rely upon its initial determination in developing that offer; instead, the creditor may (but still is not required to) act on the consumer's response as if the consumer is initiating the transaction or applying to establish the account (as described in subparagraph (i) or (ii) of § 232.5(b)(3)).

Section 232.6 Mandatory Loan Disclosures

The Department amends § 232.6 of the regulation to simplify the information that a creditor must provide to a covered borrower when issuing consumer credit and to facilitate a creditor's oral delivery of the required disclosures, consistent with the requirements of 10 U.S.C. 987(c). In particular, the Department has determined: first, to eliminate the requirement in the existing rule for information to be provided ''clearly and conspicuously;'' second, to require a creditor to provide a ''statement'' of the MAPR that describes the charges the creditor may impose, instead of the periodic rate of the MAPR itself ''and the total dollar amount of all charges included in the MAPR,'' as the existing rule requires; third, to modify the Proposed Rule so that, for any transaction or account involving consumer credit, a creditor may elect to orally provide the required disclosures to the covered borrower either in person or by providing a toll-free telephone number that the borrower can use for that purpose; and, fourth, to eliminate the requirement in the existing rule that a creditor provide a specific statement regarding protections available to covered borrowers under federal law.

Section 232.6(a) requires a creditor to provide three categories of information to a covered borrower ''at the time the borrower becomes obligated on the transaction or establishes an account for the consumer credit,'' namely:

- A statement of the MAPR applicable to the extension of consumer credit;
- Any disclosure required by Regulation Z, which shall be provided only in accordance with the requirements of Regulation Z that apply to that disclosure; and
- A clear description of the payment obligation of the covered borrower, as applicable. A payment schedule (in the case of closed-end credit) or account-opening disclosure (in the case of open-end credit) provided pursuant to paragraph (a)(2) of this section satisfies this requirement.''

Section 232.6(d) requires a creditor to provide to a covered borrower the disclosures required under § 232.6(a)(1) and (a)(3) (which correspond to the items numbered above) both (i) in writing and in a form the borrower can keep and (ii) orally. When orally providing the required disclosures, a creditor may elect to provide the disclosures in person, as the circumstances surrounding the establishment of the transaction or account involving consumer credit may permit, or to provide a toll-free telephone number that the borrower can use for that purpose.

1. Clear and Conspicuous Requirement

The Department's existing rule requires each of these categories of information to be provided ''clearly and conspicuously'' to a covered borrower.[231] When issuing the Proposed Rule, the Department stated that, even though the MLA does not require any information to be provided ''clearly and conspicuously,'' there might be some benefits to covered borrowers by requiring certain information to be provided in a manner that, relative to other terms and conditions relating to the extension of or account for consumer credit, makes that information clear and conspicuous.[232] In light of the scope of the Proposed Rule, the Department proposed that a creditor should be relieved from the obligation to present the categories of information required under 10 U.S.C. 987(c)(1)(A) and 987(c)(1)(C) in a manner that is clear and conspicuous. Staff of the FTC urge the Department to retain the requirement that information be delivered to a covered borrower in a manner that is clear and conspicuous.[233] According to the staff of the FTC, if the existing clear-and-conspicuous requirement is eliminated, information required by the MLA to be provided to a covered borrower could be buried in fine print or hidden in one or more documents, among unrelated terms and conditions.[234]

The Department realizes that by eliminating the requirement to provide certain information in a manner that is clear and conspicuous there is a risk that a creditor might minimize the prominence of the statement of the MAPR or the clear description of the covered borrower's payment obligations amidst other disclosures, contract documents, statements, or marketing materials; in that circumstance, an ordinary covered borrower might not appreciate those items that, under the MLA, are intended to assist the borrower. Nonetheless, the Department has determined that, under the final rule, the interests of an ordinary covered borrower still would be served because: (i) Insofar as § 232.6(a)(3) permits a creditor to provide the relevant disclosure pursuant to Regulation Z as a mechanism for providing the ''clear description of the payment obligation of the borrower,'' the disclosure could be delivered in a manner which is clear and conspicuous; and (ii) even if the borrower is provided a description of

[230] *See, e.g.,* L. Chanin, Dec. 23, 2014, at 19 (urging the Department to establish a ''bright-line'' standard for the timing dimensions relevant to the use of the safe harbor).

[231] 32 CFR 232.6(a).

[232] When adopting its rule in 2007, the Department addressed the disclosure requirements of Regulation Z, *see, e.g.,* 72 FR 50588, but did not address the purposes of imposing a clear-and-conspicuous requirement under 10 U.S.C. 987(c).

[233] Staff of the FTC, Dec. 22, 2014, at 8–9. *But see* Bellco Credit Union, Dec. 19, 2014, at 6 (''removing the clear and conspicuous requirement for the disclosure would not affect the presentation of the disclosure'').

[234] Staff of the FTC, Dec. 22, 2014, at 9.

the charges that the creditor may impose to calculate the MAPR that is not clear and conspicuous, the creditor separately must adhere to the requirements of the rule when computing the MAPR. In this regard, a covered borrower could overlook the statement of the MAPR, yet remain protected by the substantive requirements that limit the costs associated with the borrower's transaction or account involving consumer credit.

2. Statement of the MAPR

Section 232.6(a)(1) requires a creditor to provide a ''statement'' of the MAPR, instead of ''[t]he MAPR applicable to the extension of consumer credit, and the total dollar amount of all charges included in the MAPR,'' as required under § 232.6(a)(1) of the existing rule. When adopting this requirement in 2007, the Department recognized that the disclosure of the figures relating to the MAPR would apply only to the discrete forms of closed-end credit defined as ''consumer credit,'' and therefore interpreted the language of 10 U.S.C. 987(c)(1)(A) to require an annual percentage rate of interest. Nonetheless, the Department then recognized ''the potential confusion inherent in mandating the disclosure of two differing annual percentage rates (the MAPR required by [its] regulation and the APR required by TILA).'' [235] As stated in the Proposed Rule, the Department now believes that this same ''potential confusion'' would be significantly magnified in the context of a wider range of closed-end and open-end credit products that, under this final rule, would be covered under the MLA.

Section 987(c)(1)(A) of the MLA does not require the disclosure of a particular annual percentage rate or the ''amount of all charges'' applicable to the extension of consumer credit. Rather, 10 U.S.C. 987(c)(1)(A) requires a ''*statement* of the annual percent rate of interest applicable to the extension of credit'' (emphasis added), and 10 U.S.C. 987(c)(2) independently requires ''[s]uch disclosures [to] be presented in accordance with terms prescribed by the regulations . . . to implement the [TILA].'' [236] Taken singly and in conjunction with each other, these provisions of section 987(c) reasonably should be interpreted as requiring a ''statement'' regarding the MAPR and, separately, disclosures regarding the particular costs of credit relating to a transaction of or account established for consumer credit that are ''in accordance with the terms'' of Regulation Z.

In addition, section 987(i)(4) of the MLA provides that the term '''annual percentage rate' has the same meaning as in section 107 of [TILA], as implemented by regulations of the [Bureau].'' That term also includes ''all fees and charges,'' including certain charges that may be exempt from the term ''finance charge'' under Regulation Z.[237] The Department believes that, in light of section 987(i)(4) ('' 'annual percentage rate' has the same meaning as in section 107 of [TILA], as implemented by the [Bureau]''), section 987(c)(1)(A) of the MLA (''A statement of the annual percentage rate of interest'') should be interpreted so as not to require a creditor to calculate and disclose to a covered borrower a definitive figure for the ''annual percentage rate'' of interest applicable to the consumer credit that could include additional charges that must be counted as ''interest,'' and thereby would be materially different from the figure the creditor is required (under section 987(c)(1)(B) of the MLA) to compute and disclose under TILA. Instead, the Department believes that the appropriate approach to interpret the tension between sections 987(i)(4), 987(c)(1)(A), and 987(c)(1)(B) is to subject a creditor to one set of requirements for calculating and disclosing the costs of the extension of credit, namely, the requirements under TILA. One clear and beneficial consequence of interpreting these ambiguous provisions of the MLA under this approach is that a creditor is not required to provide to a covered borrower two different numerical disclosures, which inevitably would lead to confusion.[238]

In light of the scope of the definition of consumer credit, which encompasses open-end credit products, the Department exercises its discretion under the MLA [239] to interpret 10 U.S.C. 987(c)(1)(A) more straightforwardly to require, in § 232.6(a)(1), a creditor to provide ''statement of the MAPR'' which may be satisfied (under § 232.6(c)) by a description of ''the charges the creditor may impose, in accordance with this part and subject to the terms and conditions of the agreement, relating to the consumer credit to calculate the MAPR.'' Section 232.6(c)(1) also clarifies that a creditor is *not* required to ''describe the MAPR as a numerical value or to describe the total dollar amount of all charges in the MAPR that apply to the extension of consumer credit.'' The Department concludes that the disclosure of the items relating to the costs of consumer credit (*e.g.,* a periodic rate and other finance charges) that apply to a particular transaction or account, including the format of those items, should be governed under Regulation Z, consistent with the provisions of 10 U.S.C. 987(c)(1)(B) and 987(c)(2). Accordingly, under the final rule, a creditor should be able to streamline its compliance with these requirements under 10 U.S.C. 987(c) by providing to a covered borrower the same disclosures the creditor must (in any event) provide to a consumer under Regulation Z, plus a statement of the MAPR. In order to facilitate compliance with that latter requirement, § 232.6(c)(3) provides a model statement that a creditor could use.

Section 232.6(c)(2) provides that a creditor may include a statement of the MAPR in its agreement with the covered borrower for the transaction of or account established for consumer credit. Consistent with the Department's interpretation of its existing regulation,[240] § 232.6(c)(2) expressly provides that the statement of the MAPR is not required in any advertisement relating to consumer credit.

3. One-Time Delivery of Information

Section 232.6(b) establishes rules relating to transactions involving a creditor and assignee or multiple creditors. More specifically, § 232.6(b)(1) provides that the information required under the MLA is ''not required to be provided to a

[235] 72 FR 50589.

[236] 10 U.S.C. 987(c)(2). As enacted, the MLA refers in this section to regulations ''issued by the Board of Governors of the Federal Reserve System'' (Board) to implement TILA. Subject to certain exceptions, notably under section 1029(c) of the Consumer Financial Protection Act of 2010, 12 U.S.C. 5519(c), the Board's authorities to prescribe rules implementing the federal consumer financial laws have been transferred to the Bureau. 12 U.S.C. 5581. Accordingly, the Department now generally looks to the rules prescribed by the Bureau implementing TILA, except with respect to certain creditors. *See* proposed § 232.3(p) (describing the application of the Board's Regulation Z, 12 CFR part 226, to certain creditors).

[237] *See* 12 U.S.C. 1026(c).

[238] In this regard, the Department also recognizes that many creditors likely would adopt disclosures and contract documents that would be designed to be provided to both consumers who are not entitled to the protections under the MLA and to covered borrowers. The Department's proposed interpretation of sections 987(i)(4), 987(c)(1)(A), and 987(c)(1)(B) of the MLA, which would require a creditor to provide the cost disclosures only required by TILA, would reduce the general confusion to *non*-covered borrowers assessing the costs of credit products that are not covered by the MLA.

[239] 10 U.S.C. 987(h)(1) (authorizing the Department to prescribe regulations to carry out the MLA); 10 U.S.C. 987(h)(2)(A) (authorizing the Department to prescribe regulations establishing ''[d]isclosures required of any creditor that extends consumer credit to a [covered borrower]'').

[240] 72 at 50589.

covered borrower more than once for the transaction or the account established for consumer credit with respect to that borrower.'' Accordingly—and particularly in light of the general timing requirement for providing disclosures when the transaction occurs or the account originally is established [241]—a creditor who is an assignee is not required to provide the information described in paragraphs (a)(1) and (a)(3) of § 232.6. (However, the disclosures required by Regulation Z, described in proposed § 232.6(a)(2), would remain subject to Regulation Z, and not the one-time delivery provision in proposed § 232.6(b)(1).) Relative to the Proposed Rule, § 232.6(b)(2) has been modified to clarify that only one of two or more creditors involved in a transaction for consumer credit must provide the disclosures, and the multiple creditors are permitted to agree among themselves as to which creditor may provide the information required under the MLA.

4. Methods of Delivery

Section 232.6(d) establishes rules relating to the methods of delivery, which are substantively similar to the provisions of the existing rule and, yet, allow for greater flexibility. Under § 232.6(d)(1), a creditor must provide the information required under the MLA ''in writing in a form the covered borrower can keep.'' And under § 232.6(d)(2), consistent with the structure of the existing rule,[242] a creditor must orally provide the information required by paragraphs (a)(1) and (a)(3) of § 232.6(a). However, in order to satisfy the requirement to orally provide certain disclosures, a creditor may provide the information in person or provide a toll-free telephone number that a covered borrower can use to obtain the information. Thus, whereas the Proposed Rule would have permitted the provision of a toll-free telephone number only in the context of a mail transaction, an internet transaction, or a credit transaction conducted at the point-of-sale in connection with the sale of a nonfinancial product or service, the final rule allows a creditor to use that method for any transaction or account involving consumer credit.

Under 10 U.S.C. 987(c)(1), a creditor must provide to a covered borrower certain information ''orally and in writing,'' but 10 U.S.C. 987(c)(2) provides that ''[s]uch disclosures shall be presented in accordance with terms prescribed [in Regulation Z].'' By requiring the disclosures to be ''presented in accordance with'' Regulation Z, the MLA is ambiguous as to the nature of the requirement to ''orally'' provide the disclosures because, in general, Regulation Z requires the disclosures required by TILA only to be presented to a consumer ''in writing, in a form that the consumer may keep.'' [243] Regulation Z contains certain provisions that allow for disclosures to be made orally, but only in the context of ''an oral response to a consumer's inquiry.'' [244] More generally, even though the MLA provides that a creditor must ''orally'' provide certain information ''before the issuance of the credit,'' the law applies that requirement to ''any extension of consumer credit (including any consumer credit originated or extended through the internet).'' Thus, the law is conspicuously vague as to precisely when (or even whether) the creditor must orally deliver the information to a covered borrower (say, in person or over the telephone), since the technological constraints of conducting a credit transaction ''through the internet'' make oral delivery of disclosures an impossibility.

In light of the ambiguities in 10 U.S.C. 987(c), and particularly in the context of conducting transactions involving consumer credit ''through the internet,'' the Proposed Rule had tracked the existing rule by allowing a creditor who is conducting a mail or internet transaction to provide to a covered borrower a toll-free telephone number that the borrower could use to obtain the oral disclosures.[245] The Department recognized that when a creditor is not present to interact orally with a covered borrower—including when obtaining consumer credit at the point-of-sale for a nonfinancial product or service—the creditor should be permitted to provide a toll-free telephone number on or with the written disclosures so that the borrower may obtain the oral disclosures.

Several comments raise general concerns about the requirement to orally provide the disclosures required by the MLA. The Associations, for example, state that in many transactions, creditors will face difficulties ''persuad[ing] covered borrowers to listen to the oral disclosures at the time an account is opened, especially if they are not in a private setting. In addition, providing oral disclosures will require specialized training to ensure that the depository institution employee, at the right time, first identifies the customer as a covered borrower, and then, second, provides the oral disclosures.'' [246] The Associations urge the Department to modify the requirement so that the use of the toll-free telephone to provide the required disclosures is permitted in any ''bank [or] credit union branch setting.'' [247] Another commenter similarly argues that, if possible, the term ''consumer credit'' should be defined ''so that oral disclosures are not required, unless requested by the Service member prior to the Service member becoming obligated on the transaction or [establishing] an account for the consumer credit.'' [248] Still another comment states that ''at the very least, the Department should allow a toll-free number to be provided in all transactions, not just mail transactions, internet transactions, and transaction conducted at the point of sale in connection with the sale of a nonfinancial product or service.'' [249]

The Department concludes that the requirement in 10 U.S.C. 987(c) to deliver certain disclosures ''orally . . . before the issuance of the credit'' should be interpreted in a manner that provides a creditor straightforward mechanisms to do so at that time. Moreover, the Department has determined that a creditor should be afforded the latitude to develop the same (or consistent) systems to orally provide the required disclosures—regardless of the particular context of the transaction or account involving consumer credit (*e.g.,* an in-person, mail, or internet transaction)—in order to promote reliability and economy of those systems so that covered borrowers can actually receive the disclosures. Accordingly, the Department adopts § 232.6(d)(2) so that the essential mandate of 10 U.S.C. 987(c)(1)—orally provide the disclosures—remains intact, yet allows a creditor to fulfill that mandate either by (i) providing the information directly, ''in person'' or (ii) including a toll-free telephone number that a covered borrower can use to obtain the oral disclosures. Section 232.6(d)(2)(iii) clarifies that if a creditor elects to provide the toll-free number, then the creditor must include that number on either (i) the application form that the creditor has directed the consumer to use for that transaction or account

[241] 12 CFR 232.6(a) (''before or at the time the borrower becomes obligated on the transaction or establishes an account for the consumer credit'').

[242] *See* 10 U.S.C. 987(c)(1) (requiring information to be provided ''orally'').

[243] 12 CFR 1026.5(a)(1)(i) (open-end credit); *see also* 12 CFR 1026.17(a)(1) (closed-end credit).

[244] 12 CFR 1026.

[245] *See* 79 FR 58639 (§ 232.6(d)(2)).

[246] Associations, Dec. 18, 2014, at 53.

[247] Associations, Dec. 18, 2014, at 53.

[248] Bellco, Dec. 19, 2014, at 6–7.

[249] AFSA, Dec. 22, 2014, at 15.

involving consumer credit or (ii) a written disclosure that the creditor provides in order to meet the requirement in § 232.6(d)(1).

5. Refinancing a Covered Loan

Section 232.6(e) keeps intact the current provision, currently found in § 232.6(c) of the existing rule, that requires ''a new statement''—to correspond with the statement of the MAPR under proposed § 232.6(a)(1)—and ''disclosures under this section only when the transaction for that credit would be considered a new transaction that requires disclosures under Regulation Z.''

6. Elimination of Disclosure Under § 232.6(a)(4)

Under the Proposed Rule, § 232.6(a)(4) would have required a creditor to provide to a covered borrower a specific statement regarding protections for Service members and their dependents under federal law and resources that may be available to assist them with financial matters (''Statement of Federal Protections''). Consistent with the Department's stance when proposing its initial regulation in 2007,[250] the Department intends to develop this regulation so that its provisions are true to the intent of the MLA without creating a system that is so burdensome that the creditor cannot comply. The Department recognizes that, whereas a ''statement'' of the MAPR is required by 10 U.S.C. 987(c)(1)(A), the Statement of Federal Protections under § 232.6(a)(4) is solely a function of the Department's discretion to require a creditor to provide certain disclosures.[251] In light of other aspects of the Department's rule, the Department concludes that these two, potentially duplicative disclosure requirements could create a system that would be relatively burdensome for a creditor to comply with. The Department recognizes the need to consider balancing the interests of covered borrowers in receiving useful information with the interests of creditors in reducing compliance burdens; thus, the Department has taken certain steps to reduce the overall amount of and to simplify the information relating to extensions of consumer credit. Accordingly, the Department has determined to eliminate § 232.6(a)(4) of the Proposed Rule, which would have required a creditor to provide the Statement of Federal Protections.

Section 232.7 Preemption

Section 232.7 revises the corresponding section of the Department's existing regulation to reflect amendments to 10 U.S.C. 987(d)(2) enacted in section 661(a)(1) of the 2013 Act. In particular, § 232.7(b)(1) is amended to reflect the prohibition against a state to authorize creditors to charge covered borrowers rates of interest for ''*any consumer credit or* loans'' that are higher than the legal limit for residents of the state (emphasis added). To mirror the language in 10 U.S.C. 987(d)(2), § 232.7(b)(1) also revises the term ''rates of interest'' to ''annual percentage rates of interest.'' Additionally, the Department amends § 232.7(b)(2) to clarify that the prohibition against a state to permit a violation or waiver of any state law protections on the basis of a covered borrower's nonresident or military status to protections ''covering consumer credit,'' consistent with the amendment in section 661(a)(2) of the 2013 Act.

Section 232.8 Limitations

1. Rollover Restriction

When the Department adopted its initial regulation in 2007, § 232.8(a) provided an exception from the prohibition, set forth in 10 U.S.C. 987(e)(1), that applies to a creditor who rolls over, renews, or refinances consumer credit that had been extended to a covered borrower by the same creditor. The exception in the existing rule allows the same creditor to renew or refinance consumer credit to the covered borrower if ''the new transaction results in more favorable terms to the covered borrower, such as a lower MAPR.''[252] Comments on the Department's initial proposal had expressed concerns that the more-favorable-terms standard was ''too subjective and would create uncertainty about what terms are 'more beneficial,' '' and ''suggested that financial institutions might err on the side of caution and forego entering transactions that could benefit the borrower in order to avoid any potential liability.''[253] Whereas the exception adopted in the existing rule was made in the context of a narrow band of products within the three categories defined as consumer credit, this final rule extends the scope of consumer credit and thereby increases the potential risks associated with any perceived ambiguity in the more-favorable-terms standard.

Section 232.8(a) tracks the language of the rollover restriction of 10 U.S.C. 987(e)(1),[254] and, consistent with this provision in the Proposed Rule, limits the application of that restriction to a relatively narrow group of creditors. More specifically, the Department is exercising its discretion to define a creditor for the purposes of 10 U.S.C. 987[255] by defining the term ''creditor'' for the purposes of § 232.8(a) to mean ''a person engaged in the business of extending consumer credit subject to applicable law to engage in deferred presentment transactions or similar payday loan transactions (as described in the relevant law), *provided however,* that the term does not include a person that is chartered or licensed under Federal or State law as a bank, savings association, or credit union.'' Restricting the application of the rollover restriction to creditors who are engaged in the business of ''deferred presentment transactions or similar payday loan transactions (as described in the relevant law)'' is consistent with the structure, language, and intent of the restriction, which is designed to apply to a creditor who rolls over, renews, repays, refinances, or consolidates consumer credit that the creditor itself already extended to a covered borrower, thereby ensnaring the borrower in the debt trap that the Department described in its 2006 Report.[256] The Department believes that payday lenders commonly engage in these rollover transactions. Moreover, the Department believes that restricting the application of the rollover restriction to that specified class of creditors would permit most creditors,

[250] When proposing its initial regulation in April 2007, the Department addressed the disclosure requirements under § 232.6(a) and stated: ''As with other aspects of the statute, the Department's intention has been to develop a regulation that is true to the intent of the statute without creating a system that is so burdensome that the creditor cannot comply.'' 72 FR 18165.

[251] 10 U.S.C. 987(h)(2)(A).

[252] 32 CFR 232.8(a)(1).

[253] 72 FR 50589.

[254] In addition, the Department proposes to substantially preserve the provision which currently states: ''This part shall not apply to a transaction permitted by this paragraph when the same creditor extends consumer credit to a covered borrower to refinance or renew an extension of credit that was not covered by this part because the consumer was not a covered borrower at the time of the original transaction.''

[255] 10 U.S.C. 987(h)(1) (authorizing the Department to prescribe regulations to carry out the MLA); 10 U.S.C. 987(i)(5)(A)(ii) (authorizing the Department to establish ''additional criteria [for the definition of creditor] as are specified for such purpose in regulations prescribed under [the MLA]'').

[256] *See* 2006 Report, at 14. *See also* Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products* 24–25 (April 2013), available at *http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf* (discussing the sustained use of payday loans, and stating that for consumers who conducted at least seven payday loan transactions in a year, the majority of those transactions ''were taken on a nearly continuous basis.'').

including a wide range of banks, thrifts, and credit unions, to extend other forms of consumer credit, such as workout loans and other refinancing transactions, to their covered-borrower customers, particularly when lower interest rates are available to those customers.

2. Vehicle Title Restriction

In the course of reviewing various comments regarding the scope of the limitations in 10 U.S.C. 987(e),[257] as would be implemented in the rule, the Department recognizes that neither the existing rule nor the Proposed Rule gives effect to the provision of the MLA that restricts a creditor from ''[using] . . . the title of a vehicle as security for the obligation.'' [258] New § 232.8(f) gives effect to that restriction of the MLA, but lifts the application of that limitation for certain classes of creditors. Upon review of the broad scope of the restriction in 10 U.S.C. 987(e)(5), the Department has determined that if the restriction against using the title of a vehicle as security for consumer credit were to apply to any creditor, without limitation, then many covered borrowers undoubtedly would be denied opportunities to favorably re-finance existing auto loans, particularly to take advantage of falling interest rates. The Department finds that a comprehensive restriction against using the title of a vehicle as security for consumer credit would operate too severely against covered borrowers and, accordingly, exercises its authorities under the MLA to establish a reasonable limitation on this provision.[259] More specifically, the Department has determined that certain classes of lenders should remain available to conduct refinancing transactions for consumer credit that involve the use of the title of a vehicle as security, and that the appropriate classes of lenders for this purpose are banks, thrifts, and credit unions supervised by federal or state regulators.[260] Accordingly, the Department retains the core element of the statutory restriction and exercises its discretion to define a ''creditor'' for the purposes of 10 U.S.C. 987 [261] by defining the creditor in § 232.8(f) to not include ''a person that is chartered or licensed under Federal or State law as a bank, savings association, or credit union.''

3. Other Restrictions of 10 U.S.C. 987(e)

The Department adopts § 232.8(e) as proposed.

The Department adopts § 232.8(f) as proposed (now re-designated as paragraph (g) in light of the new § 232.8(f)), and notes that while this provision tracks the language of the prohibition of 10 U.S.C. 987(e)(6), the provision also contains an exemption for a unique class of creditors. More specifically, the Department has concluded to exercise its discretion to define a creditor for the purposes of 10 U.S.C. 987 [262] by excluding—only for the purposes of § 232.8(f)—from the term ''creditor'' military welfare societies and the relief societies, as described in 10 U.S.C. 1033(b)(2) and 37 U.S.C. 1007(h)(4) and: Army Emergency Relief, the Air Force Aid Society, the Navy-Marine Corps Relief Society, and the Coast Guard Mutual Assistance. Federal law provides that a loan to a Service member from one of these specified Relief Societies may be repaid through deductions from the pay of the borrowing Service member.[263]

As the Department explained when issuing the Proposed Rule, the specified Relief Societies provide essential emergency financial assistance to Service members. The specified Relief Societies make low- and no-cost loans, as well as grants, to Service members repayable through an allotment of military pay.[264] Recognizing the unique and important role of the specified Relief Societies, and the long history of the specified Relief Societies in supporting the welfare of Service members and their families, the Department encourages Service members facing financial need to utilize the services provided by the specified Relief Societies.

In light of the specialized operations of each of the specified Relief Societies, which currently depend crucially on the use of an allotment from a Service-member borrower's pay, and consistent with the Department's regulations on deductions from pay under 37 U.S.C. 1007, the Department has determined to exclude the Relief Societies specified in 10 U.S.C. 1033(b)(2) and 37 U.S.C. 1007(h)(4) from the definition of ''creditor'' only for the purposes of the prohibition in § 232.8(f).

In all other respects, § 232.8 substantially preserves the language of the existing provisions of § 232.8. However, the Department amends the structure of § 232.8 by eliminating subsection § 232.8(b) (and making other conforming amendments) because the definition of ''creditor,'' in § 232.3(i)(2), includes an assignee of a covered creditor.

Section 232.9 Penalties and Remedies

The Department adopts § 232.9 as proposed.

Section 232.10 Administrative Enforcement

The Department adopts § 232.10 as proposed.

Section 232.11 Servicemembers Civil Relief Act Provisions Unaffected

The Department adopts § 232.11 as proposed.

Section 232.12 Effective Dates

In general, the Department adopts § 232.12 as proposed, particularly to reflect the effective dates of amendments to the MLA enacted in the 2013 Act. The Department has modified the dates set forth in this section in order to clarify the relationships between the effective dates (including the effective date of this final rule) and

[257] *See, e.g.,* Associations, Dec. 18, at 44–51.

[258] 10 U.S.C. 987(e)(5).

[259] *See* 10 U.S.C. 987(h)(2)(E) (expressly authorizing the Department to prescribe regulations that include ''[s]uch other criteria or limitations as the Secretary of Defense determines appropriate, consistent with the provisions of this section'') and 10 U.S.C. 987(i)(5)(ii) (expressly authorizing the Department to establish ''such additional criteria'' to define a ''creditor'' for ''such purpose in [the Department's] regulations'').

[260] In this regard, the final rule contains a distinction between (i) a ''Federal credit union'' or insured depository institution'' that is eligible to apply the exclusion in § 232.4(c)(1) with respect to an application fee charged for a short-term, small amount loan and (ii) a bank, savings association, or credit union described in §§ 232.8(a) and 232.8(f). The Department has concluded that the purposes of §§ 232.8(a) and 232.8(f) are different from scope and purpose of the exclusion in § 232.4(c)(1), and correspondingly there should be a broader range of banks, thrifts, and credit unions designated in §§ 232.8(a) and 232.8(f).

[261] 10 U.S.C. 987(h)(1) (authorizing the Department to prescribe regulations to carry out the MLA); 10 U.S.C. 987(i)(5)(A)(ii) (authorizing the Department to establish ''additional criteria [for the definition of creditor] as are specified for such purpose in regulations prescribed under [the MLA]'').

[262] 10 U.S.C. 987(h)(1) (authorizing the Department to prescribe regulations to carry out the MLA); 10 U.S.C. 987(i)(5)(A)(ii) (authorizing the Department to establish ''additional criteria [for the definition of creditor] as are specified for such purpose in regulations prescribed under [the MLA]'').

[263] 37 U.S.C. 1007(h).

[264] *See* Army Emergency Relief: *http://www.aerhq.org/dnn563/Portals/0/AERAnnualReport2012.pdf*, ''[i]n 2012, AER provided more than $68.6 million in no-interest loans and grants to 55,342 Soldiers and Families and their Families;'' Air Force Aid Society: *http://www.afas.org/file/documents/2012-Annual-Report.pdf*, ''2012 direct assistance totaled nearly $18 million, and includes more than 40,000 assists to Airmen and their families;'' Navy-Marine Corps Relief Society *http://b.3cdn.net/nmcrs/45f955f5204f8ca1df_mlbruu7ib.pdf*, ''FY12 63,392 Clients received financial assistance, $41.8 million;'' Coast Guard Mutual Aid: *http://www.cgmahq.org/Financial/AnnualReports/2012.pdf*, ''[o]verall in 2012, CGMA distributed more than $4.27 million in direct financial assistance to over 5,900 Coast Guard individuals and their families.''

the compliance dates set forth in new § 232.13.

Section 232.12(a) amends the language of § 232.11 of the existing rule to reflect the amendments adopted in the final rule.

Section 232.12(b) provides a general rule that the definitions, conditions, and requirements of the existing rule apply to transactions involving consumer credit that are consummated or established prior to the compliance date. Relative to the Proposed Rule, the language in § 232.12(b) has been revised to clarify that the ''definitions, conditions, and requirements'' of the existing rule apply. The Department believes that this provision is equitable, particularly to avoid the potential injustice and operational difficulties that could arise if new requirements under the final rule were to apply to pre-existing transactions or accounts involving consumer credit to covered borrowers. Section 232.12(c) provides exceptions to allow certain provisions of § 232.7(b) and § 232.9(e), as discussed below, to become effective prior to the effective date of the final rule.

Section 232.12(d) provides that ''the amendments to 10 U.S.C. 987(d)(2) enacted in section 661(a) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239, 126 Stat. 1785), as reflected in § 232.7(b) of this part, shall take effect on January 2, 2014.'' Section 661(c)(2)(A) of the 2013 Act provides, in relevant part, that the amendments enacted in section 661(a) of that Act shall take effect on ''the date that is one year after the date of enactment of this Act.'' [265] As a result, only the amendments made in § 232.7(b)(1)—adding the phrase ''any consumer credit'' before ''loans''—and § 232.7(b)(2)—adding the phrase ''covering consumer credit'' after ''State consumer lending protections''—are effective as of January 2, 2014.

Section 232.12(e) provides that civil-liability provisions adopted in § 232.9(e) ''shall apply with respect to consumer credit extended on or after January 2, 2013.'' This subsection reflects the effective date, established in section 662(c) of the 2013 Act, of the civil-liability provisions enacted in section 662(a) of that Act. The term ''consumer credit'' for purposes of this § 232.12(e) applies to the definition of consumer credit in force as of the date that the consumer and the creditor enter into the transaction or establish the account for that credit.

[265] 10 U.S.C. 987 note.

Section 232.13 Compliance Dates

As discussed in section I.C., many comments on the Proposed Rule state that, if the Department were to adopt a final rule along the lines of the Proposed Rule, creditors would need a substantial period of time to modify their operations in order to comply with the rule. For example, the Associations state that creditors generally would need 18 months to comply with the rule, if adopted as proposed,[266] and another comment states that ''[the Department] should allow as long an implementation period as reasonable to provide adequate time for credit unions and others to implement necessary changes.'' [267]

The Department concludes that, particularly because the protections of the MLA will apply to a wider range of credit products, a creditor should be afforded a reasonable period of time to adjust its operations and, if necessary, the terms and conditions of its loan product(s) offered to covered borrowers in order to comply with the regulation. Accordingly, under § 232.13(a), a creditor must comply with the requirements of the rule with respect to a consumer credit transaction or account for consumer credit consummated or established on or after October 3, 2016.[268]

Consistent with the Department's determination regarding the 12-month period that allows a creditor to adjust its operations and loan product(s) to comply with the rule, a creditor also is permitted to use the existing safe harbor when assessing whether a consumer-applicant is a covered borrower.

Upon the compliance date, the rule permits—and does not require—a creditor to use information obtained from the MLA Database or information contained in a consumer report obtained from a nationwide consumer reporting agency in order to conclusively determine whether a consumer-applicant is a covered borrower. A creditor who uses one (or both) of the methods set forth in, and complies with the recordkeeping requirements of, § 232.5(b) when conducting a covered-borrower check will be afforded the new safe harbor.

The Department concludes that consumer credit should not include credit extended in a credit card account under an open-end (not home-secured) consumer credit plan until October 3, 2017. Section 232.13(c)(2) allows the Secretary (or an official of the Department duly authorized by the Secretary) to extend, up to an additional year, the expiration of the exemption for a credit card account. Thus, until October 3, 2017 (or potentially a longer period of time), the requirements relating to the computation of the MAPR for a credit card account, as set forth in § 232.4, would not apply. When the exemption expires, the conditional exemption for any ''bona fide'' fee charged to a credit card account, as set forth in § 232.4(d) would apply.

[266] Associations, Dec. 18, 2014, at 58.

[267] Missouri Credit Union Assoc., Nov. 25, 2014, at 3.

[268] The Department has determined that the final rule shall be effective on October 1, 2015.

V. Regulatory Analyses

A. Analysis Under Executive Orders 12866 and 13563

In accordance with the requirements of Executive Orders 12866 [269] and 13563 [270] (''E.O. 12866'' and ''E.O. 13563''), the Department has assessed the expected costs associated with the amendments to its existing rule. This final rule extends the protections of 10 U.S.C. 987 to a broader range of closed-end and open-end credit products offered or extended to covered borrowers. In addition, the Department provides a sensitivity analysis that examines potential benefits of the final rule.

1. Executive Summary

E.O. 12866 and E.O. 13563 direct executive agencies, including the Department, to assess the anticipated present and future benefits and costs of available regulatory alternatives—including both quantitative measures and qualitative measures—using the best available techniques. A determination has been made that this rule is a significant regulatory action, as defined in E.O. 12866 and as supplemented by E.O. 13563, in that this final rule might have an annual effect on the economy of $100 million or more. Accordingly, this regulation has been reviewed by the Office of Management and Budget (''OMB''). This rule, as well as any proposed revisions to this rule, are part of the Department's retrospective review plan under E.O. 13563 completed in August 2011. The Department's full plan and retrospective review reports is available at: *http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036.* The regulatory impact assessment prepared by the Department for this regulation is provided below.

The Department anticipates that the final rule might impose costs of

[269] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[270] Improving Regulation and Regulatory Review, 76 FR 3,821 (Jan. 21, 2011).

approximately $106 million during the first year—that is, during the first year after the rule is effective and prior to the general date on which a creditor must comply with the rule (pursuant to § 232.13(a)). The Department expects that, during this first-year, phase-in period, creditors will take steps to adapt their systems to comply with the requirements of the MLA and the Department's final rule. After that first-year, phase-in period—that is, when a creditor generally must comply with the rule—and on an ongoing basis, the Department estimates the annual compliance cost would be approximately $30 million. The Department provides a sensitivity analysis examining scenarios in which the rule is expected to reduce the incidence of involuntary separation of Service members where financial distress is a contributing factor; the benefits under these scenarios range from $14 million to $133 million annually.

The MLA, as implemented by the Department's existing rule as well as under this final rule, provides two broad classes of requirements applicable to a creditor: First, the creditor may not impose an MAPR greater than 36 percent in connection with an extension of consumer credit to a covered borrower (''interest-rate limit''); second, when extending consumer credit, the creditor must satisfy certain other terms and conditions, such as providing certain information (*e.g.,* a statement of the MAPR), both orally and in a form the borrower can keep, before or at the time the borrower becomes obligated on the transaction or establishes the account, by refraining from requiring the borrower to submit to arbitration in the case of a dispute involving the consumer credit, and by refraining from charging a penalty fee if the borrower prepays all or part of the consumer credit (collectively, ''other MLA conditions'').

The interest-rate limit results in a transfer payment because the amount of interest revenue to be foregone by a creditor—that is, the amount of interest revenue that a creditor otherwise could receive by imposing an MAPR of greater than 36 percent—necessarily corresponds to the amount saved by the covered borrower.

The Department recognizes that the voluntary mechanisms a creditor may use for identifying covered borrowers, as well as the requirements to provide certain disclosures, lead to various types of compliance costs for creditors, and the estimated cumulative amount of those quantified costs on an ongoing, annual basis is approximately $30 million. These conditions are anticipated to impose direct financial costs on a creditor that are not reasonably expected to be offset by any quantifiable, financial benefit to a covered borrower. For example, the Department believes that, for the purposes of conducting this assessment under E.O. 12866 and E.O. 13563, the estimated costs on creditors associated with the requirement to provide to covered borrowers a statement of the MAPR is not offset by any financial benefit to the borrowers, even though borrowers generally do obtain some non-quantifiable benefits from receiving the statement. Similarly, the Department expects that creditors will face compliance costs when assessing whether consumer-applicants are covered borrowers and maintaining records of that information, as provided in § 232.5(b), and consumers reasonably can be assumed to be indifferent to the functions associated with conducting covered-borrower checks and not receive any readily quantifiable, financial benefits thereof. The Department believes, as discussed in section III.F., there are benefits to a system for conducting a covered-borrower check that minimizes, or eliminates, the opportunity for a covered borrower to make a false statement regarding his or her status when applying for consumer credit. Likewise, the Department recognizes that the final rule could impose certain types of costs on covered borrowers, including a potential reduction in access to available credit. Nevertheless, as discussed in sections II.C. and II.D., the majority of Service members have access to reasonably priced (as well as low-cost) credit, and, as long as they wisely use those resources, they are likely not to need high-cost loans to fulfill their credit needs.

The annual ongoing estimates of the costs relate to each year following the first-year, phase-in period. This figure includes compliance costs for creditors that, with respect to credit card accounts under open-end (not home secured) credit plans would not be required to comply with the rule for an additional period of time, pursuant to § 232.13(c). The Department elects to conservatively estimate the activities of all creditors because the costs associated with credit card accounts eventually would be accounted for in the annual costs of the final rule.

Furthermore, the Department expects that creditors could adjust their systems on an incremental basis and makes no judgment about when creditors will undertake various activities and when the costs associated with this adjustment could accrue. The assessment provided here is designed solely for the purposes of evaluating the Department's action under E.O. 12866 and E.O. 13563, and is intended only to serve as an exposition of the regulatory costs of the amendments adopted in the final rule.

The scenario analysis that examines the anticipated benefit of the Department's regulation are the savings attributable to lower recruiting and training expenses associated with the reduction in involuntary separation of Service members where financial distress is a contributing factor. Each separation of a Service member is estimated to cost the Department $58,250, and the Department estimates that each year approximately 4,640 to 7,580 Service members are involuntarily separated where financial distress is a contributing factor. If the Department's proposed regulation could reduce the annual number of involuntary separations where financial distress is a contributing factor from between 5 to 30 percent, the savings to the Department could be in the range of approximately $13.51 million to $132.52 million each year.

Figure 1 (which also appears in the Executive Summary, in section I.E.) provides a summary of the anticipated benefits and (costs) of the Department's amendments to the MLA regulation,[271] and the estimates are provided for the first year, on an annual (ongoing basis), and for a ten-year period, applying discount rates of both 7 percent and 3 percent, consistent with guidance issued by OMB.[272] The Department also has assessed non-quantified effects of this regulation, and those effects are listed in Figure 2.

[271] For the sake of brevity and clarity, the estimated savings to creditors, as discussed below, are not included in the computations represented in Figure 1.

[272] *See* OMB Circular A–4 (Regulatory Planning and Review), at 31–34 (recommending, for regulatory analysis, providing estimates of net benefits using discount rates of both 3 percent and 7 percent), available at *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf.*

FIGURE 1—SUMMARY OF ESTIMATED EFFECTS OF FINAL RULE

[2015 dollars in millions]

		First year, set-up costs (Oct. 1, 2015–Sept. 30, 2016)	Annual, ongoing (October 1, 2016 and thereafter)	PV 10-year, 7% discount rate	PV 10-year, 3% discount rate
Sensitivity Analysis: Benefits to the Department.	Low	$0	$14	$96	$129
	High	0	133	940	1,263
Primary Analysis: Costs to Creditors of Compliance.		(106)	(30)	(185)	(259)
Sensitivity Analysis: Transfer Payments	Low	n/a	100	616	856
	High	n/a	119	740	1,022

FIGURE 2—NON-QUANTIFIED EFFECTS OF THE FINAL RULE

- Potential costs of increased telephone call volume for creditors that elect to provide oral disclosures by making a toll-free telephone number available to covered borrowers;
- Potential savings for creditors covered under the existing rule from reduction in transaction time for checking covered borrower status through batch processing instead of individual self-identification;
- Costs of creditors that elect to acquire new or to update existing technological capacity;
- Costs of implementing the prohibition against requiring waiver of otherwise applicable provisions of the MLA;
- Legal costs associated with defending alleged violations of the MLA;
- Marginal costs associated with adding MLA coverage to existing supervisory examinations;
- Marginal costs associated with modifying existing open-end credit existing open-end credit insurance, debt suspension plans, and credit related ancillary products to comply with the interest-rate limit;
- Costs associated with reviewing, adjusting, and implementing systems and control processes to calculate the MAPR and, if necessary, waive fees when the costs of the credit during a given billing cycle exceed the interest-rate limit for open-end credit products, other than credit card accounts;
- Costs associated with reviewing, adjusting, and implementing systems and control processes to calculate the MAPR and waive fees for credit card issuers that impose unreasonable or non-bona-fide non-periodic fees;
- Costs associated with a reduction in the availability of credit with MAPRs in excess of the interest-rate limit;
- Costs associated with complying with the prohibition against compelled arbitration; and
- Costs associated with the fact that financial institutions are, in general, subject to an array of state and federal laws, including the MLA.

2. Need for the Regulation and Consideration of Alternatives

The Department amends its existing rule primarily for the purpose of extending the protections of 10 U.S.C. 987 to a broader range of closed-end and open-end credit products. More specifically, as discussed above, the Department amends its rule so that, in general, consumer credit covered under the MLA [273] is defined consistently with credit that for decades has been subject to the protections under TILA, 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.[274]

In developing this final rule, the Department has consulted with the Federal Agencies (pursuant to 10 U.S.C. 987(h)(3)), and in the course of that process has considered a range of alternatives to the provisions contained in this regulation. For example, in developing the provisions for the conditional exclusion for credit card accounts, the Department has considered a complete exemption from the definition of ‘‘consumer credit’’ for credit extended to a covered borrower under a credit card account. The Department similarly has considered whether exclusions from the MAPR for all non-periodic fees should be permitted for credit card accounts in order to preserve current levels of access to those products for covered borrowers.

Similarly, in developing the provisions relating to a creditor's assessment of a covered borrower, the Department considered alternatives to the creditor's use of information obtained directly or indirectly from the MLA Database in order to obtain the benefit of a safe harbor under § 232.5(b). In this regard, the Department considered alternative provisions relating to a creditor's use of information obtained from the MLA Database, and adopts an additional mechanism that a creditor may use to avail itself of the safe harbor in § 232.5(b). The Department also considered whether to retain a safe harbor for a creditor's use of the covered borrower identification statement, but declines to retain that mechanism after the general compliance date.

The Department believes that this final rule is appropriate in order to address a wider range of credit products that currently fall outside the scope of the existing rule, streamline the information that a creditor must provide to a covered borrower when consummating a transaction involving consumer credit, and provide a more straightforward mechanism for a creditor to conclusively determine—via a safe harbor—whether a consumer-applicant is a covered borrower. In this regard, as discussed in section III.F., the Department is aware of misuses of the covered borrower identification statement whereby a Service member (or covered dependent) falsely declares that he or she is not a covered borrower. The Department believes that, if a creditor elects to conduct a covered-borrower check by using information obtained from the MLA Database or information in a consumer report obtained from a nationwide consumer reporting agency, a Service member or his or her dependent would be relieved from making any statement regarding his or her status as a covered borrower.

[273] The forms of ‘‘consumer credit’’ that may be covered by the MLA are subject to certain exceptions, notably for a residential mortgage. 10 U.S.C. 987(i)(6)(A) and 987(i)(6)(B).

[274] *See* 12 CFR 1026.1(c)(1)(iii) (limiting the coverage of the regulation, in relevant part, to credit that is subject to a finance charge or is payable by a written agreement in more than four installments).

3. Affected Entities and Baseline Conditions

The Department estimates that approximately 37,500 creditors will fall within the parameters of this regulation.[275] The Department arrives at this estimate through a combination of statistics compiled by the U.S. Department of Labor (''DOL''), the FDIC, and the NCUA. DOL estimates an annual average number of consumer lending establishments at 14,882.[276] DOL also estimates annual average number of all other nondepository credit intermediation establishments at 9,609.[277] The FDIC reports there are 6,444 insured depository institutions.[278] The NCUA reports there are 6,554 credit unions.[279] The Department does not have data on the number of creditors with financial products that fall within the parameters of the existing rule because available sources of information do not differentiate between lenders that offer loan products that fall within the three narrowly defined product categories and lenders that do not. Nevertheless, the Department's estimate of the number of affected entitles represents a significant increase in comparison to the likely baseline condition of entities affected under the existing rule.

4. Estimate of Anticipated Costs Associated With Identification of Covered Borrowers and Provision of Mandatory Disclosures

The Department believes that creditors who offer consumer credit products that are subject to the modified regulation will face several types of compliance costs. For the purposes of this regulatory impact assessment, the Department has focused its quantitative assessment of costs on two areas that, based on the Department's experience, are reasonably likely to impose costs: First, the disclosures required by the MLA to be provided by a creditor to a covered borrower (under § 232.6); and, second, employing one of the methods available for conducting covered-borrower checks—through the use of information obtain from the MLA Database or the use of information in a consumer report obtained from a nationwide consumer reporting agency—and the retention of related records, as provided in § 232.5(b).

The Department recognizes that this assessment does not capture all possible compliance costs associated with the final rule. Indeed, the Department anticipates that a creditor who chooses to extend credit with a cost that may exceed the interest-rate limit or implicate the limitations in § 232.8 would need to adjust its computer and software systems to calculate the MAPR, develop new policies and procedures, or train staff on new procedures for identifying covered borrowers. Further, creditors likely would select different techniques for meeting compliance obligations under the final rule. The costs to each creditor could vary depending on the business decisions made by that creditor.

Acknowledging the limits of the assessment and pursuant to the directive of E.O. 12866 and E.O. 13563, the Department has sought to quantify the important potential costs of the final rule and to identify important non-quantified potential costs and benefits.[280] In considering whether to amend its existing rule, the Department sought comment on all aspects of the Proposed Rule and on the estimates made in this assessment. In particular, the Department sought specific data relating to the benefits and costs of amending the regulation, as proposed. The Department requested that commenters provide information on the type of costs and the magnitude of costs that might be borne by creditors by providing relevant data and studies.

Fewer than two dozen of the comments on the Proposed Rule contain estimates of potential costs or benefits with the proposal to modify the existing rule. Comments focus on the cost to creditors of updating their systems to comply with the interest-rate limit and set-up and ongoing costs associated with the optional safe harbor proposed for conducting a covered-borrower check,[281] and potential costs associated with a potential decline in the availability of credit to covered borrowers.[282] In addition, some comments provide examples of high-cost credit currently marketed to Service members and their families,[283] and other comments describe the benefits to Service members and to the Department in reducing financial distress among the military force,[284] underscoring the need to modify the existing rule.

Disclosures. Under the existing rule, a creditor who extends to a covered borrower one or more of the three consumer credit products covered by the regulation must ''clearly and conspicuously'' disclose: (i) A numerical value for the MAPR applicable to the extension of credit, including the total dollar amount of all charges included in the MAPR; (ii) any disclosures required by Regulation Z; (iii) a clear description of the payment obligation (which may be satisfied by a payment schedule provided pursuant to Regulation Z); and (iv) a Statement of Federal Protections. A creditor must provide the information orally and in writing prior to consummation of the credit transactions. The creditor may provide, with the written disclosures, a toll-free telephone number that the borrower may use to obtain the oral disclosures.

Section 232.6 of the final rule amends the provisions relating to the information required by the MLA, first, to simplify the information that a creditor must provide to a covered borrower when extending consumer credit, and, second, to streamline the methods of orally providing the required disclosures. More specifically, the final rule: Relieves a creditor of the obligation to disclose ''clearly and conspicuously'' the information required by the MLA; relieves a creditor

[275] At the time that the Department assessed the Proposed Rule, the Department estimated that approximately 40,000 creditors that would fall within the parameters of the proposal. The revised estimate of 37,500 reflects changes in the overall number of establishments within the same categories from the Bureau of Labor Statistics, the FDIC, and the NCUA.

[276] *See* DOL, Bureau of Labor and Statistics, Quarterly Census of Employment and Wages, NAICS 522291 Consumer Lending (Annual Average for 2013).

[277] DOL, Bureau of Labor and Statistics, Quarterly Census of Employment and Wages, NAICS 522291 Consumer Lending, NAICS 522298 All Other Nondepository Credit Intermediation (Annual Average for 2013).

[278] FDIC, DIC Institution Directory, available at *http://www2.fdic.gov/IDASP/* (reporting 6,444 insured institutions as of March 26, 2015).

[279] NCUA, 2013 Annual Report, available at *http://www.ncua.gov/Legal/Documents/Reports/AR2013.pdf.*

[280] In considering the costs associated with updating computer programs, the Department relies on analysis from the Government Accountability Office (GAO) examining the costs of implementing changes to minimum payment disclosures for credit card accounts. There, GAO found that credit card issuers were unable to provide precise estimates of, among others, the cost of computer programming to provide the revised disclosures. GAO found that estimates of the computer programming cost varied widely, from $5,000 to $1 million. For large issuers, GAO concluded that these one-time costs would be very small when compared with large issuers' net income. For smaller issuers, GAO concluded that work to implement changes would be done largely by third-party processors, accustomed to reprogramming required to managing cardholder data and processing billing statements. U.S. Gov't Accountability Office, GAO–06–434, *Credit Cards: Customized Minimum Payment Disclosures Would Provide More Information to Consumers, but Impact Could Vary* (April 2006).

[281] *See, e.g.,* Associations, Dec. 18, 2014; TSYS, Dec. 24, 2014.

[282] *See, e.g.,* AFSA, Dec. 22, 2014; Just Military Loans, Dec. 26, 2014.

[283] *See, e.g.,* Texas Appleseed, Dec. 2, 2014; North Carolina Justice Center, Dec. 26, 2014.

[284] *See, e.g.,* Military Officers Association of America, Dec. 17, 2014; The Military Coalition, Dec. 11, 2014.

of the obligation to provide the Statement of Federal Protections; no longer requires a creditor disclose a numerical value for the MAPR or ''the total dollar amount of all charges'' and, instead, requires a creditor to provide a description of the charges that the creditor may impose; and provides a generally applicable mechanism through which a creditor may orally provide the required disclosures by permitting a creditor to provide a toll-free number to orally deliver those disclosures. In order to facilitate compliance, the final rule provides a model statement that a creditor could use to fulfill the requirement to provide a statement of the MAPR. Consistent with the Department's interpretation of its existing rule, the final rule expressly provides that the statement of the MAPR would not be required in any advertisement relating to consumer credit.

The Department estimates that there are approximately 238 million transactions each year in which creditors would provide the required information,[285] generally included as part of their standard credit agreements. The Department assumes that all creditors, other than creditors who offer only residential mortgage loans or loans expressly to finance the purchase of personal property (neither of which loans is consumer credit), will provide these disclosures, and believes that, based on these assumptions, approximately 37,500 creditors would be subject to the regulation.[286]

(a) Statement of the MAPR

For creditors who currently provide disclosures to covered borrowers (under the existing rule), the final rule is expected to reduce some of their compliance costs by eliminating the requirement to disclose a numerical value for the MAPR. The Department largely maintains for the final rule the estimates generated in developing the Proposed Rule, and updates that estimate to reflect more recent wage and dollar value figures.[287] The Department estimates that eliminating the requirement under the existing rule to disclose a numerical value for the MAPR would reduce the compliance costs for creditors who currently offer forms of consumer credit by $73,065 per year. Over 10 years, the Department estimates that the total savings to this class of creditors would be between $0.51 million (at a 7 percent discount rate) and $0.62 million (at a 3 percent discount rate).

The requirement that creditors provide a statement of the MAPR, which may be satisfied through the use of a model statement, is anticipated to cost all creditors approximately $24.01 million during the first year, principally due to the costs of modifying the documents given to covered borrowers (such as a contract for consumer credit).[288] One commenter notes that some creditors may need to redesign their disclosure forms to make room for the statement of the MAPR.[289] The Department estimates that, on an ongoing basis, providing the statement of the MAPR would require one-quarter of a printed page when included in standard account disclosures.

The Department assumes that creditors will update standard account disclosures for all consumer credit accounts and that the printing and paper costs are five cents per page.[290] The Department estimates that the ongoing costs for additional printing would be approximately $2.98 million per year.[291] Over 10 years, the total costs to creditors of providing a printed statement of the MAPR would be between $18.12 million (at a 7 percent discount rate) and $25.38 million (at a 3 percent discount rate).

Under the framework of the Proposed Rule, the Department had estimated that the cost of providing the statement of the MAPR orally at the time of sale in face-to-face transactions would be $0.69 million per year. Several commenters urge the Department to modify § 232.6 to permit a creditor to satisfy its obligation to orally provide disclosures by providing a toll-free telephone number, as the Department has permitted for transactions conducted over the internet. In the final rule, the Department adopts § 232.6(d)(2) to allow a creditor to orally provide the required disclosures by providing to the covered borrower a toll-free telephone number, subject to certain conditions, and this option is permitted for all channels for conducting transactions or establishing accounts involving consumer credit. Solely for the purposes of its analyses under E.O. 12866 and E.O. 13563 and the other analyses in this section, the Department believes that the vast majority of creditors will avail themselves of this mechanism for orally providing the required disclosures.

While commenters urge the Department to permit creditors to provide oral disclosure through a toll-free number, these commenters do not provide any estimate of the costs or savings associated with this provision.

[285] The Department's methodology for estimating the number of accounts that will be affected each year is discussed in greater detail at the text accompanying note 280, infra. To estimate the number of consumer credit transactions each year, the Department relies on data from the Federal Reserve Bank of New York's Consumer Credit Panel. *See* Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (February 2015). For the six months prior to the first quarter of 2013, there were approximately 175 million credit inquiries. The Department assumes that 68 percent of these inquiries were for credit accounts that would be consumer credit under § 232.3(f). This estimate does not differentiate between credit applications and accounts established. If most creditors only supply the required information as part of account agreements which are provided at the time of account opening, then the overall number of transactions involving the provision of that information would be lower than this estimate.

[286] The Department bases this estimate on relevant numbers of establishments published by the DOL's Bureau of Labor and Statistics, the FDIC, and the NCUA. *See* DOL, Bureau of Labor and Statistics, Quarterly Census of Employment and Wages, NAICS 522291 Consumer Lending, NAICS 522298 All Other Nondepository Credit Intermediation (Annual Average for 2013) (the annual average number of establishments for consumer lending is 14,882; the annual average number of all other nondepository establishments for credit intermediation is 9,609); FDIC Institution Directory, available at *http://www2.fdic.gov/IDASP/* (reporting 6,444 insured institutions as of March 26, 2015); and NCUA 2013 Annual Report, available at *http://www.ncua.gov/Legal/Documents/Reports/AR2013.pdf* (reporting 6,554 credit unions).

At the time that the Department assessed the Proposed Rule, there were approximately 40,000 creditors that fell within these parameters; the updated estimate of the affected creditors reflects the change in the overall number of establishments within the same categories from the Bureau of Labor and Statistics, the FDIC, and the NCUA.

[287] The Department also has revised wage compensation estimates to include an adjustment for the non-wage component of employee compensation.

[288] The Department estimates that set-up for the statement of the MAPR will take 20 hours, and that staff time for the set-up of the disclosure will be 50 percent data entry and information processing workers, 40 percent supervisors of office and administrative support workers, and 10 percent legal counsel. DOL, Bureau of Labor and Statistics, Occupational Employment and Wages, Table 1 (May 2014) (mean hourly wage for data entry and information processing workers is $15.48; mean hourly wage for supervisors of office and administrative support workers is $26.15; mean hourly wage for legal counsel is $64.17), available at *http://www.bls.gov/oes/current/oes_nat.htm#23-0000*. The Department further estimates a non-wage component of compensation to be an additional 30 percent of estimated wages. The Department, therefore, calculates a total estimated wage cost of approximately $18.47 million by multiplying the mean hourly wage by the portion of time for each classification of worker expected to be involved in modifying the documents. The Department's total estimated cost reflects an additional 30 percent adjustment for non-wage compensation.

[289] Nat'l Pawnbrokers Assoc., Nov. 24, 2014, at 17.

[290] The Department relies on estimates of paper and printing costs recently published by the DOL. Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 FR 5632–5654 (Feb. 3, 2012).

[291] The Department reaches this estimate by computing the cost of the additional printing and paper for the disclosure, calculated by multiplying the number of transactions (238 million) by the cost per page ($.05) and the portion of the page used for the disclosure (0.25 page).

Nonetheless, the Department, for purposes of assessing the final rule under E.O. 12866 and E.O. 13563, provides qualitative analysis of the potential costs that creditors could incur as a result of this final rule. For those creditors who choose to orally provide disclosures via a toll-free telephone number, the costs associated with the final rule include establishing a toll-free number (in the event that a creditor does not already have a such a line available for consumers), updating the script used by staff, and training staff in connection with questions that consumers might raise about the disclosures. Additionally, creditors could experience some increase in call volume and costs associated with providing oral disclosures or other aspects of this rule. Due to the lack of available data, the Department has not quantified the potential costs of any increase in call volume due to the disclosures required by the MLA to be provided to covered borrowers in transactions or accounts involving consumer credit.

(b) Statement of Federal Protections

Under the Proposed Rule, like the existing rule, a creditor would have been required to provide to a covered borrower the Statement of Federal Protections. Because the Proposed Rule would have applied the protections of 10 U.S.C. 987 to a broader scope of credit transactions, an additional 20,000 creditors would have been required to provide the Statement of Federal Protections. In the final rule, the Department determines that, in balancing the interests of covered borrowers in receiving useful information with the interests of creditors vis-à-vis facilitating compliance and reducing the costs associated thereto, eliminating the requirement that creditors provide a Statement of Federal Protections best serves these purposes. This modification will relieve those creditors that offer consumer credit subject to the existing rule from the obligation to provide a Statement of Federal Protections when providing that credit to Service members and their dependents. Relieving creditors of the obligation to provide a Statement of Federal Protections will reduce some costs for those creditors that currently extend consumer credit subject to the existing rule. However, the Department believes that, due to the relatively low number of creditors who currently offer loans subject to the existing rule, the impact of this amendment generally will be relatively minor; therefore, the Department does not account for the estimated reduction in burden in this analysis of the final rule.

Figure 3a provides a summary of the anticipated benefits and (costs) associated with the disclosures under the Department's modified regulation.

FIGURE 3a—ESTIMATED BENEFITS AND COSTS OF DISCLOSURES UNDER THE FINAL RULE

[2015 dollars in millions]

	First year, set-up costs	Annual, ongoing	PV 10-year, 7% discount rate	PV 10-year, 3% discount rate
Cost savings of eliminating requirement to disclose numerical MAPR	$0	$0.07	$0.51	$0.62
Set up costs of Statement of the MAPR	(24)	n/a	n/a	n/a
Ongoing costs of Statement of the MAPR (oral and printed)	0	(3)	(18)	(25)
Total Net Costs	(24)	(3)	(18)	(25)

Identification of Covered Borrowers. The Department has modified the mechanisms through which a creditor may avail itself of a safe harbor for identifying covered borrowers. The final rule permits, though does not require, a creditor to unilaterally assess the status of a consumer-applicant, rather than relying on the applicant to complete a self-declaration form. The final rule permits a creditor to definitively conduct a covered-borrower check either by using information obtained from the MLA Database or by using information in a consumer report obtained from a nationwide consumer reporting agency, and (when finding that the consumer is not a covered borrower) timely creating and thereafter maintaining a record of the information so obtained.

Solely for the purposes of its assessment in this section V., the Department assumes that all creditors, other than creditors who offer only residential mortgage loans or loans expressly to finance the purchase of personal property (neither of which loans is consumer credit), will establish processes to use one of the mechanisms for conducting a covered-borrower check described in § 232.5(b). As described above, the Department believes that approximately 37,500 creditors would be subject to the final rule. The Department believes that setting up a process to use information obtained from the MLA Database or to use information in a consumer report obtained from a nationwide consumer reporting agency and to retain records of that information will take each creditor 70 hours of labor time. The actual cost for each creditor will depend on that entity's business decisions. For example, if one or more of the nationwide consumer reporting agencies incorporate information about covered borrower-status into consumer reports, a creditor that already obtains a consumer report from one of those nationwide consumer reporting agencies (or that report from a reseller) during the credit origination process might choose to use information provided as part of the report to avail itself of the safe harbor in § 232.5(b). Another creditor, particularly one that does not already have the agreements and technological connections in place to obtain consumer reports from a nationwide consumer reporting agency, may instead choose to use information from the MLA Database, as permitted in § 232.5(b). And a third creditor, particularly one that offers credit products that comply with the MLA and this final rule, may choose to forgo the use of a method described in § 232.5(b) when determining the status of a consumer-applicant.

Nonetheless, assuming that each of the approximately 37,500 creditors subject to the final rule establishes a process for availing itself of one of the safe harbors under § 232.5(b) and that each creditor will incur 70 hours of labor time in doing so, the Department estimates that the total costs relating to setting up the processes to use the methods set forth in § 232.5(b) would be $84.02 million.[292] Some creditors may

[292] The Department estimates that staff time to set up access to one of the safe harbor mechanism and the processes to record and retain information will

incur additional costs related to adjusting or updating their technological capacity or systems in order to avail themselves of one of the methods for conducting covered-borrower checks in § 232.5(b), including ''costs associated with integrating the MLA [D]atabase with the lenders' database that ensure the security and protection of both'' [293] and training staff on use of the MLA Database.[294] The Department believes that these additional costs depend on the business judgment and practices of each creditor, such as whether the loan application process is performed manually and whether multiple ''databases'' interact with each other, and therefore declines to estimate the overall costs of such potential additional costs associated with the voluntary mechanism for identifying covered borrowers. The Department also recognizes that certain costs may be particular to the type of creditor and practices in that market. For example, the National Pawnbrokers Associations shared the report of one member estimating that as many as 4,000 pawn stores across the country do not have computers and would, therefore, need to purchase such equipment in order to take advantage of the safe harbor in § 232.5(b).[295]

The Department contemplates that a creditor could use batch processing to conduct covered borrower checks of a portfolio of potential customers. For example, a depository institution or credit union that offers open-end lines of credit with an MAPR in excess of 36 percent might choose to use batch processing capacity in the MLA Database before offering or extending those types of loans, and thereby take advantage of the safe harbor in § 232.5(b), to identify potential covered borrowers within its account portfolio. As with making an individual inquiry of the MLA Database, making a batch inquiry of the MLA Database can be done by a creditor (or nationwide consumer reporting agency) free of charge. Nonetheless, the comments on the Proposed Rule do not provide any data as to the costs to creditors associated with identifying covered borrowers through batch processing on the MLA Database. In light of the absence of data relating to batch processing for covered-borrower checks, the Department does not estimate the costs of conducting those checks. The Department observes that a creditor who currently offers consumer credit products (as defined by the existing rule), typically requires all consumer-applicants to complete the self-declaration form, and for that type of creditor, replacing the self-declaration form with a process to use information obtained from the MLA Database or information in a consumer report from a nationwide consumer reporting agency is estimated to result in a savings from transaction time, printing and paper costs, as well as a reduction in legal risks. In assessing the Proposed Rule, the Department estimated that the elimination of the self-certification procedure would result in savings for creditors who currently offer consumer credit products covered by the existing rule. The Department maintains those estimates in assessing the final rule, and updates the figures for 2015 dollars. The Department estimates that the savings in printing and paper for those creditors who offer consumer credit products covered under the existing rule will be $0.29 million per year; over 10 years, the Department estimates a savings of between $1.77 million (at a 7 percent discount rate) and $2.48 million (at a 3 percent discount rate). As in the Proposed Rule, the Department has not quantified the expected savings for creditors with respect to the potential reduction in transaction time or legal risk.

For the purposes of its assessments in this section V., the Department expects that the final rule will prompt all creditors who offer consumer credit with an MAPR of more than 36 percent (which would include some creditors who offer credit products with credit insurance premiums or fees for credit-related ancillary products sold in connection with the consumer credit) to assess the status of consumer-applicants as potential covered borrowers. The Department estimates that of the estimated 238 million covered credit applications each year,[296] there will be approximately 100 million applications when creditors choose to query the MLA Database as a single-record check. In assessing the Proposed Rule, the Department had estimated, using then-current data, that there would be approximately 70 million applications each year in which creditors would conduct a single-record inquiry of the MLA Database. A comment on behalf of certain credit card issuers suggests, instead, that there would be 100 million such transactions each year.[297] The Associations assert that there would be between 450 million and 700 million inquiries made of the MLA Database in total each year.[298] In arriving at those figures, the Associations assume that ''the regulation may require multiple inquires'' for each account.[299] Mindful of the potential ambiguity in the Proposed Rule, the Department has clarified in the final rule that a creditor who uses one of the methods described in § 232.5(b) for conducting a covered-borrower check may do so solely by using the qualifying information at one time, relatively early in the process of conducting a transaction or establishing an account involving consumer credit. In light of this revision, the overall estimate from the Associations would be between 225 million and 350 million. Nonetheless, the Department is unable to determine from the estimates provided by the Associations how many of these inquiries would be conducted as a single-record check of the MLA Database or how many would be conducted through a batch-processing method. The Department believes that many creditors that impose periodic rates of 36 percent or less, impose only reasonable and bona fide non-periodic fees, and do not market credit-related ancillary products may choose to forego covered-borrow checks because their credit products may be extended to covered borrowers and civilians alike. Furthermore, many creditors that already request consumer reports on applicants from a nationwide credit reporting agency may choose to determine covered borrower status through the procedure set out in § 232.5(b)(2)(ii). In light of these factors and after review of the information provided in the comments, the Department believes that the estimate of 100 million transactions more accurately assesses the costs associated

be 50 percent data entry and information processing workers, 40 percent supervisors of office and administrative support workers, and 10 percent legal counsel. DOL, Bureau of Labor and Statistics, Occupational Employment and Wages Table 1 (March, 2015) (mean hourly wage for data entry and information processing workers is $15.48; mean hourly wage for supervisors of office and administrative support workers is $26.15; mean hourly wage for legal counsel is $64.17). The Department estimates total wages to be approximately $64.63 million. The Department arrives at an estimated total cost by including an additional non-wage component of compensation of 30 percent of estimated wages.

[293] Associations, Dec. 18, 2014, at 57.

[294] SBA Office of Advocacy, Dec. 18, 2014, at 4.

[295] Nat'l Pawnbrokers Assoc., Nov. 24, 2014, at 14.

[296] The Department estimates 238 million relying on data from the Federal Reserve Bank of New York's Consumer Credit Panel. *See,* Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (February 2015). For the six months prior to the first quarter of 2015, there were approximately 175 million credit inquiries. The Department assumes that 68 percent of these inquiries were for credit accounts that would be consumer credit under § 232.3(f).

[297] L. Chanin, Dec. 23, 2014, at 21.

[298] Associations, Dec. 18, 2014, at 32.

[299] Associations, Dec. 18, 2014, at 31.

with conducting a covered-borrower check under the final rule.[300]

For each of the uses of a record to conduct a covered-borrower check, the inquiry and record retention is expected to add approximately 60 seconds to each new consumer credit transaction.[301] The Department estimates that the total cost to creditors for using information obtained from the MLA Database or using information in consumer reports obtained from nationwide consumer reporting agencies and retaining records relating to consumer-applicants would be approximately $27.75 million per year; [302] over 10 years, the total cost of using the MLA Database would be between $169.01 million (at a 7 percent discount rate) and $236.76 million (at a 3 percent discount rate).

Because modern credit applications, whether conducted online or in person, involve highly automated systems for underwriting, the Department expects that many creditors—including creditors who issue credit cards—will choose to develop systems that would make the marginal increase in time for using information from the MLA

Database relatively low. The Department does not estimate the potential costs associated with computer programming or including a covered-borrower check in automated underwriting.[303]

Figure 3b provides a summary of the anticipated benefits and (costs) associated with the covered-borrower checks under the final rule.

FIGURE 3B—ESTIMATED BENEFITS AND COSTS OF COVERED-BORROWER CHECKS UNDER THE FINAL RULE

[2015 dollars in millions]*

	First year, set up costs	Annual, ongoing	PV 10-year, 7% discount rate	PV 10-year, 3% discount rate
Benefits of Eliminating Printing and Paper Costs for Self-Certification	$0	$0.29	$1.77	$2.48
Set-up Costs to Use MLA Database	(84)	n/a	n/a	n/a
Covered-Borrower Checks	0	(28)	(169)	(236)
Total	(84)	(28)	(167)	(234)

*Assumes 100 million credit checks per year.

4. Anticipated Costs Associated With Other MLA Conditions

The Department recognizes that the preceding quantitative assessment does not capture all possible compliance costs associated with the final rule. The Department believes that some of the compliance costs due to the other MLA conditions are not material to the quantifiable aspects of this regulatory impact assessment because some costs are minimal (relative to the creditor's other compliance costs or the creditor's overall costs of operations when providing consumer credit) or not amenable to measurement.[304] By addressing such costs in a qualitative analysis rather than attempting to provide a quantitative assessment, the Department does not discount the potential costs that attempting to comply with the other MLA conditions might impose on creditors; rather, the Department recognizes the potential for costs in addition to those included within the quantitative analysis and had taken into account the impact on creditors of complying with all aspects of the modified rule.

In considering whether to amend its regulation, the Department sought comment on all aspects of the Proposed Rule and on the estimates made in its assessment. In particular, the Department sought specific data relating to the benefits and costs of amending the regulation, as proposed, including costs to implement measures to adjust computer systems and to train personnel. The Department requested that commenters provide information on the type of costs and the magnitude of costs that might be borne by creditors by providing relevant data and studies.

The Associations state that the analysis of the Proposed Rule ''grossly underestimates the intrinsic costs of the expansion in coverage of the proposed rule, as well as the cost of particular provisions.'' [305] This Department

[300] If creditors were to individually check covered-borrower status 225 million times per year, then the regulation in this respect would impose estimated annual costs of approximately $62.44 million per year. In this scenario, the 10-year cost associated with covered borrower checks would be approximately $532.7 million at a 3 percent discount rate and $380.28 million at a 7 percent discount rate. If creditors were to individually check covered borrower status 350 million times per year, then the regulation in this respect would impose estimated annual costs of approximately $97.13 million per year. In this scenario, the 10-year costs associated with covered borrower checks would be approximately $828.5 million at a 3 percent discount rate and $591.45 at a 7 percent discount rate.

[301] The National Pawnbrokers Association shared the report of one member who found that querying the MLA Database took ''less than 20 seconds from start to finish.'' (Nat'l Pawnbrokers Assoc., Nov. 24, 2014, at 15). In contrast, AFSA shares the report of a ''small business'' that had estimated that querying the MLA Database would take ''about five to 10 minutes per loan application.'' (AFSA, Dec. 22, 2014, at 7). And a comment submitted on behalf of certain credit card issuers suggests that checking the MLA Database could cause a ''delay'' for the transaction in question and for ''the transactions of any other consumer in line behind that consumer seeking to engage in a transaction, even if the consumer is not apply for credit.'' (L. Chanin, Dec. 23, 2014, at 22). In light of these divergent estimates and the lack of other data, the Department elects to maintain the estimate of the transaction time developed when the Proposed Rule was assessed.

[302] The Department calculates the estimated wage costs of 21.35 million per year by multiplying the expected number of transactions involving a single-record inquiry (100 million) by the mean hourly wage for financial tellers ($12.81) and the additional transaction time expected (1/60th of an hour) based on wage information in the DOL, Bureau of Labor and Statistics, Occupational Employment and Wages Table 1 (May, 2014). The Department arrives at a total cost estimate by including an additional non-wage component of compensation of 30% of estimated wages.

[303] In considering the costs associated with updating computer programs, the Department relies on analysis from GAO examining the costs of implementing changes to minimum payment disclosures for credit card accounts. There, GAO found that credit card issuers were unable to provide precise estimates of, among others, the cost of computer programming to provide the revised disclosures. GAO found that estimates of the computer programming cost varied widely, from $5,000 to $1 million. For large issuers, GAO concluded that these one-time costs would be very small when compared with large issuers' net income. For smaller issuers, GAO concluded that work to implement changes would be done largely by third-party processors, accustomed to reprogramming required to managing cardholder data and processing billing statements. U.S. Gov't Accountability Office, GAO–06–434, *Credit Cards: Customized Minimum Payment Disclosures Would Provide More Information to Consumers, but Impact Could Vary* (April 2006).

[304] For example, the Department believes that the costs associated with the prohibition against requiring a covered borrower to waive his or her rights under any otherwise applicable provision of law (as provided in § 232.8(b)) is not material to this regulatory impact assessment because the potential costs of this prohibition are negligible.

[305] Associations, Dec. 18, 2014, at 56.

appreciates that creditors represented by the Associations have a ''culture of compliance'' that ''demands an associated caution when implementing regulations.'' [306] Indeed, in analyzing the final rule—as throughout the rulemaking proceeding—the Department's estimates and judgments about how the final rule is likely to operate when implemented reflect the Department's expectation that creditors subject to the final rule will take steps to comply with each one of the other MLA conditions.

The Associations describe certain, specific costs other than those accounted for in the qualitative analysis that the Department should take into account in assessing the cost of complying with the final rule, namely, costs associated with: (a) Reviewing, revising, and replacing contracts for all credit contracts; (b) reviewing and revising contracts to comply with the prohibition on the waiver of legal rights; (c) reviewing, adjusting, and implementing systems to calculate the MAPR and waiving fees when the costs of the credit during a given billing cycle exceeds the interest-rate limit, as well as ''significant systems and operations changes'' to comply with the interest-rate limit for open-end credit products; (d) class actions that ''the regulation itself will attract;'' (e) being subject to supervisory examination; and (f) implementing and maintaining a ''shadow control process'' for MAPR compliance.[307] The Associations do not provide estimates for the magnitude of any of these costs.

The Department believes that many creditors will incur costs with implementing changes to their business operations and, on an ongoing basis, maintaining systems to comply with the other MLA conditions. The Department believes that many creditors will review and revise their credit contracts in order to comply with the MLA conditions going forward and that there will be costs associated with this process. For example, the Department expects that creditors will review and, as needed, revise contracts currently in use in order to comply with the prohibition on requiring a covered borrower to waive legal rights under the Servicemembers Civil Relief Act or other laws. The Associations report that one bank has six basic account agreements and ''approximately 180 ancillary original documents in its library;'' [308] the Department expects that banks and other creditors will incur costs in conducting this type of review. On an ongoing basis, the Department believes that creditors will revise contracts so that when new contracts are prepared, the MLA conditions already are included.

Credit card issuers who offer consumer credit at costs in excess of the interest-rate limit and who wish to avail themselves of the conditional exclusion for bona fide fees will need to update computer systems for these products in order to calculate the MAPR. Depending on the business practices of the creditor, these programs could be ''complex and sophisticated'' and could ''require ongoing transaction monitoring and crediting processes.'' [309]

In assessing the Proposed Rule, the Department considered, though did not quantify, the costs associated with the MLA's prohibition on requiring a Service member or his dependent to submit to arbitration in the case of a dispute related to an extension of consumer credit. Under the existing rule, the prohibition against requiring a covered borrower to submit to arbitration applies only to certain payday loans, vehicle title loans, and refund anticipation loans. Under the final rule, the prohibition against requiring arbitration applies to agreements for a significantly broader range of credit products, such as credit cards and deposit advance loans. In assessing the final rule, the Department continues to recognize that extending the application of the prohibition in § 232.8(c) likely will lead to costs, primarily as a result of the significantly broader range of creditors affected by that prohibition. The Associations suggest that the prohibition on requiring arbitration will itself attract class action lawsuits, though do not provide an estimate of those costs.[310] Nevertheless, commenters addressing the limitation do not provide specific information about the costs associated with complying with the prohibition against compelling arbitration, and the Department has not attempted to quantify the costs associated with those compliance measures.

The Department also recognizes that the fact of a regulation may cause a creditor to incur certain costs associated with the need to ''know and implement'' the laws applicable to certain activity in the market and the process of supervisory examination.[311] Indeed, the credit market is highly regulated today and many creditors are subject to supervision by state or federal regulators. The expanded scope of consumer credit under the final rule is expected to cause many creditors to be subject to the requirements of the MLA. Nonetheless, the presence of regulation or supervision itself is not due to any requirement imposed by this final rule. Even though the Department identifies and accounts for the most direct forms of compliance costs due to the amendments to the existing rule, the Department does not endeavor to quantify the costs associated with the fact that financial institutions are, in general, subject to an array of state and federal laws.

5. Sensitivity Analysis on Potential Benefits

Each year, thousands of well-trained Service members are compelled to leave military service where financial distress contributes to the revocation of their security clearances. The Department has direct experience with this process of involuntary separation, which generally involves a Service member becoming over-extended in debt—which occurs due to a wide range of factors—defaulting on one or more credit agreements (either by making late payments or by failing to make payments), and experiencing a deterioration in the credit score or credit history prepared by a consumer reporting agency for that individual. The individual's deteriorating creditworthiness presents an exposure to the Department that the individual poses a security risk, which ultimately warrants separation.

As discussed in sections II.B., II.C., and II.D., the Department makes a significant investment in recruiting, training, and progressing each qualified Service member. Losing a qualified soldier, sailor, airman, or Marine can cause a loss of mission capability, and there are substantial costs associated with replacing that Service member. Even though, for the purposes of this regulatory impact assessment under EO 12866 and EO 13563, the most direct effect of the interest-rate limit is a transfer payment, a secondary—yet no less direct—effect is the reduction in the overall amount of debt owed to creditors by covered borrowers. The Department believes applying the interest-rate limit to a broader range of credit products will reduce the overall amount of debt owed to creditors; as a result, regardless of the original occasions for incurring debts, Service members reasonably may be expected to have a lower incidence of financial distress, and a correspondingly lower incidence of involuntary separation where financial distress is a contributing factor. Thus,

[306] Associations, Dec. 18, 2014, at 56.

[307] Associations, Dec. 18, 2014, at 56–58.

[308] Associations, Dec. 18, 2014, at 58.

[309] L. Chanin, Dec. 23, 2014, at 18.

[310] Associations, Dec. 18, 2014, at 58.

[311] Associations, Dec. 18, 2014, at 56.

the Department believes that the savings of the Department's costs associated with replacing Service members who are involuntarily separated constitute benefits to the Department for the purposes of this regulatory impact assessment—entirely independently of the transfer payment flowing from the interest-rate limit. More generally, the anticipated improvements in military readiness and Service-member retention lie at the core of 10 U.S.C. 987.

Military Readiness and Service Member Retention. The most substantial—as well as meaningfully quantifiable—benefit of the Department's regulation will be the reduction in involuntary separations among Service members when financial distress is a contributing factor. The Department also anticipates that the regulation will entail non-quantifiable benefits, reducing stress for Service members or their families, which currently affects approximately 60 percent of military families who report experiencing stress related to their financial condition.[312]

The Department estimates that each separation costs the Department $58,250.[313] The Department estimates the potential impact of the regulation by using two alternative approximations of the current number of separations attributable to financial distress.

(1) Estimate One

For the years 2004 through 2013, there was an average of 54,293 involuntary separations per year. Of those involuntary separations that were due to legal or standard-of-conduct issues—an average of 18,961 per year—the Department estimates that approximately half are attributable to a loss of security clearance, and, of these, 80 percent are due to financial distress.[314] Based on this data and these assumptions, the Department estimates that, going forward, there would be approximately 7,580 separations each year where financial distress is a contributing factor.

(2) Estimate Two

In 2005, there were 1,999 revocations of security clearances as a result of financial problems in the Navy and Marine Corps,[315] and in those two branches, there was a total of 23,392 involuntary separations.[316] For the purposes of formulating an estimate of the potential impact of financial distress, the Department believes that the rate of involuntary separation due to financial distress across all of the services reasonably could be based on the 2005 data relating to the Navy and Marine Corps. Assuming that 8.5 percent of involuntary separations occur because of a security clearance revocation as a result of financial problems,[317] the Department estimates that, going forward, there would be approximately 4,640 separations each year where financial distress is a contributing factor.[318]

The Department estimates that the 10-year cost of involuntary separations due to financial distress is between $1.646 billion and $3.769 billion. However, the Department believes that these calculations significantly underestimate the impact of involuntary separations due to financial distress on Service-member retention and military readiness, primarily because the loss of security clearance is only one way that financial distress leads to separation from military service. Furthermore, involuntary separation is only one of the ways to detect the impact of financial distress on military readiness; excessive debt—which is less manageable at higher rates of interest—likewise can impair a Service member's eligibility to deploy or to reenlist.

The Department acknowledges that the final rule will not entirely eliminate financial distress among Service members. However, the Department expects that extending the protections of 10 U.S.C. 987 to a broader range of credit products will significantly reduce the incidence of derogatory items in the credit files of Service members (maintained by consumer reporting agencies), and thereby improve the Service members' respective capacities to manage and pay debts.

The Department estimates that the final rule will reduce the separations associated with financial distress. To assess the anticipated savings reasonably attributable to a reduction in involuntary separations, the Department has used three estimates of the possible reduction in involuntary separations: 5 percent,[319] 17.5 percent,[320] and 30 percent.[321] The Department believes that estimating between 5 percent and 30 percent reduction in the total number of these separations is reasonable in light of the conservative assumptions relating to the separations due to financial distress.

The Department estimates that the final rule will result in savings from involuntary separations due to financial distress of between $13.51 million and $132.52 million per year. Over 10 years, the rule will save the Department between $95.81 million and $1.263 billion. Figure 4 provides a summary of the anticipated savings that reasonably could be attributable to reduction in involuntary separations where financial distress is a contributing factor.

[312] Blue Star Families, *The 2014 Military Family Lifestyle Survey* 35 (May 2014).

[313] U.S. Gov't Accountability Office, GAO–11–170, *Military Personnel: Personnel and Cost Data Associated with Implementing DOD's Homosexual Conduct Policy* (January 20, 2011) (estimating that each separation costs the Department $52,800 in 2009 dollars). The cost of $58,250 is calculated in 2015 dollars, using the DOL, Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers (CPI–U), available at *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt*.

[314] U.S. Dep't of Defense, *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents* 39 (August 9, 2006), available at *http://www.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf.*

[315] Amy Klamper, ''Double Whammy,'' Seapower Magazine, Navy League of the United States (June 2006), available at *www.seapowermagazine.org/archives/june/2006/double-whammy.html*.

[316] Military OneSource, 2005 Demographic Report, at 35.

[317] Thus, in this estimate two, the overall rate of involuntary separations due to financial distress is computed as follows: (1,999)/(23,392) = 0.085.

[318] Thus, in this estimate two, the Department computes the total number of separations per year as follows: (54,293)/(.085) = 4,640.

[319] *See, generally,* Scott Carrell & Jonathan Zinman, *In Harm's Way? Payday Loan Access and Military Personnel Performance* (August 2014) (estimating a 5 percent increase in negative personnel outcomes for Service members with access to high-cost payday loans.) The Department uses this study to estimate a low-end of the possible reduction in separations. This estimate likely is less reliable than other estimates of separations included in this analysis because the study does not directly measure the impact of high-cost loans on borrower personnel outcomes.

[320] *See, generally,* Department of Navy, Personnel Security Appeals Board, CY 2011 Activity Report at 7 (in 2011, 47 percent of denied appeals of revoked security clearances were due to financial problems) available at *www.ncis.navy.mil/securitypolicy/PSAB/PSAB%20Activity%20Reports/CY11%20PSAB%20Activity%20Report.pdf*); Consumer Federation of America, et al, DOD–2013–OS–0133–0030, at 3 (noting that for the Department of Navy the portion of denied appeals of revoked security clearances due to financial distress declined from 57 percent in 2006 to 47 percent in 2011). The Department uses the percentage of the decline (17.5) as a midpoint estimate.

[321] *See, generally,* Jean Ann Fox, *The Military Lending Act Five Years Later,* Consumer Federation of America (2012) at 16–17 (for the Department of the Navy, overall denied appeals of revoked security clearances declined by 30 percent from 2006 to 2010).

FIGURE 4—SCENARIO ANALYSIS OF COSTS SAVINGS FROM REDUCTIONS IN SEPARATIONS

[2015 dollars in millions]

	Annual	10-year, 7% discount rate	10-year, 3% discount rate
Estimate One: 7,840 separations per year*			
Separations Reduced by 30%	$133	$940	$1,263
Separations Reduced by 17.5%	78	550	739
Separations Reduced by 5%	22	157	210
Estimate Two: 4,640 separations per year			
Separations Reduced by 30%	81	575	773
Separations Reduced by 17.5%	47	336	452
Separations Reduced by 5%	14	96	129

*7840 = 18961*0.5*0.8

In addition to reducing the quantifiable costs associated with separations where financial distress contributed, the Department believes that the regulation will reduce non-quantifiable costs associated with financial strains on Service members. High-cost debt can detract from mission focus, reduce productivity, and require the attention of supervisors and commanders. As one commenter observed the Service member's ''mission can easily be jeopardized if he or she is worried about financial burdens back home.'' [322] Additionally, the protections afforded to covered borrowers under the MLA might, over time, improve the Department's capabilities to retain Service members, offering further non-quantifiable benefits.[323] In this regard, one study found that access to extremely high-cost debt decreases military readiness by increasing the presence of unfavorable credit information in the files of consumer reporting agencies, and by producing a significant decline in job performance, reducing the overall eligibility of Service members for reenlistment.[324]

[322] *See, e.g.,* The Military Coalition, Dec. 11, 2014, at 1.

[323] *See, e.g.,* Military Officers Association of America, Dec. 17, 2014, at 2 (observing that ''retention of highly qualified and experiences service members and their families is beneficial to the morale, well-being and readiness of the force, which in turn redounds to maintaining a strong national defense.'').

[324] Scott Carrell & Jonathan Zinman, *In Harm's Way? Payday Loan Access and Military Personnel Performance* (August 2014) at § 6 (Conclusion), available at *http://www.econ.ucdavis.edu/faculty/scarrell/payday.pdf* (''Overall the results are consistent with DoD's assertion that payday borrowing has adverse effects on military readiness. We find that payday loan access produces a significant decline in overall job performance (as measured by a 3.9% increase in reenlistment ineligibility), and a concomitant decline in retention. We also find that a measure of severely poor readiness (the presence of an Unfavorable Information File) increases by 5.3%.'').

6. Estimate of Amount of Transfer Payments

The Department believes that the interest-rate limit and the corresponding provisions governing computation of the MAPR entails some costs to creditors, particularly creditors who might need to adjust their systems to compute the MAPR in accordance with the standards of the final rule. However, there are no reliable data that would allow the Department to develop a quantifiable estimate of the costs associated with compliance with the interest-rate limit and the provisions governing computation of the MAPR. In this regard, for example, the Associations assert that calculating the MAPR will be ''a significant challenge and costly,'' even in light of ''the sophisticated technology of today's world.'' [325] To this point, the Associations provide the reports of ''initial inquiries with depository institutions'' suggesting that developing or, as appropriate, modifying computer systems ''would be extremely complicated and disruptive of the information technology schedules.'' [326] Additionally, for ''[s]mall mid-sized depository institutions . . . [there are] few attractive options in the likely case that their third-party processor does not offer the capability'' to calculate the MAPR and waive fees, as necessary.[327] In contrast, one such third-party processor suggests that ''the calculation [of the MAPR] would still be performed during the statement billing cycle with remediation calculations made on those accounts exceeding the 36% MAPR.'' [328] Neither comment provides data or an estimate of the costs associated with making the adjustments to processing systems or the ongoing costs of calculating the MAPR or waiving fees, as may be necessary. Thus, for the purposes of this analysis under E.O. 12866 and E.O. 13563, the Department has assessed the effects of the interest-rate limit only in terms of the amount of the transfer payments relating to certain consumer credit products.

[325] Associations, Dec. 18, 2014, at 36.

[326] Associations, Dec. 18, 2014, at 36.

[327] Associations, Dec. 18, 2014, at 37.

[328] TSYS, Dec. 24, 2014, at 2.

Even though the interest-rate limit of 10 U.S.C. 987(b) results in transfer payments from various creditors to covered borrowers, and thus does not affect the benefits-cost analysis under E.O. 12866 and E.O. 13563, the Department has estimated the amounts involved in these payments.[329] For the purposes of assessing the amounts involved in the transfer payments, the Department has considered estimates of the current cost of credit and usage rates for four types of consumer credit, namely: (i) Credit card products, (ii) payday loans, (iii) auto title loans, and (iv) installment loans.[330]

[329] One commenter argues that the Department's estimate of the cost of modifying the existing rule should account for credit that would not be extended to covered borrowers because a creditor would choose to not extend credit in compliance with the interest-rate limit. This commenter states estimates that the annual ''cost'' to service members of this forgone credit availability would be $70 million each year, with a 10-year cost ''somewhere between $355.8 million (7% discount) and $520.9 million (3% discount).'' Just Military Loans, Dec. 26, 2014, at 9. The Department acknowledges that reduction of availability of credit is a cost, but is not able to quantify this cost at this time due to lack of data.

[330] By using estimates related to these four credit products, the Department does not assume that these types of credit are the *only* credit products on the market today and used by Service members. For example, a comment from the National Pawnbrokers Association describes pawn transactions that also would be covered by the final rule, suggesting that subjecting these transactions to the interest-rate limit would result in ''smaller-dollar returns against each dollar's worth of collateral value'' or for pawnbrokers purchase items outright, rather than loaning against them, in transactions with Service members (Nat'l Pawnbrokers Assoc., Nov. 24, 2014, at 10). Rather, the Department focuses on credit card products,

Continued

In the credit card market, the Department believes that most creditors should be able to comply with the limitation on the MAPR by continuing to offer credit card products with minimal or no alternations to their current pricing practices. In this regard, few, if any, creditors who offer credit card products charge periodic rates that exceed the interest-rate limit of 10 U.S.C. 987(b) and § 232.4(b). Taking into account the exclusion for bona fide fees under § 232.4(d), the Department expects that nearly all of the amount of the transfer payments in credit card products will be due to revenues that would be foregone from credit insurance, debt cancellation, and credit-related ancillary products sold to covered borrowers.

The Department estimates the amount of the transfer payments by taking the difference of the cost of credit for a typical credit card with a credit insurance or debt cancellation product and 36 percent MAPR, less the payout rate on a credit insurance or debt protection product. To calculate the range of possible transfer payments associated with credit card products, the Department estimates an amount per account, and then makes a high- and low-end estimate of the number of Service members with credit cards who also carry a credit insurance or debt cancellation product that would cause the MAPR to exceed the 36-percent threshold.

The Department is aware that there are other credit-related ancillary products that may be sold in connection with, and either at or before, the account opening. The Department has not estimated the amount of the transfer payments that might be associated with those credit-related ancillary products.

To estimate the amount of the transfer payment for each credit card account, the Department assumes that 78 percent of Service members have a credit card,[331] revolving an average balance of $5,000.[332] The Department further assumes that a typical debt-cancellation product costs $1.10 per $100 of balance and has a payout rate of 21 percent.[333] Assuming that a borrower makes only the minimum payment each month on this card while paying 28 percent APR, a creditor who offers a credit card with these terms could charge a fee for a credit insurance or debt cancellation product of no more than $0.67 per $100 of balance per month, a price of 8 percent interest per year. For a credit card with a credit insurance or debt cancellation product carrying standard prices, the amount transferred from a creditor to a covered borrower—that is, when the creditor complies with the 36-percent MAPR limit and foregoes revenue that the borrower thereby saves—would be $886 per card over 10 years.[334]

Second, from an examination of credit card offers, the Department estimates that between 44 and 100 percent of the 78 percent of Service members who have a credit card account have a card with an APR sufficiently high that if the creditor also sells a credit insurance or debt cancellation product, the cost of credit could exceed the limit in 10 U.S.C. 987(b). The Department assumes that 7 percent of these accounts actually use credit insurance or debt cancellation; therefore the estimates are based on the assumption that between 3 percent and 7 percent of the 78 percent of Service members holding credit cards have a credit insurance or debt cancellation product.[335]

At the high-end, assuming that 78 percent of Service members have a credit card that, given typical costs, might exceed the interest-rate limit if the borrower purchases credit insurance or debt cancellation and pays a penalty APR, and that 7 percent of these borrowers actually do purchase such a product, the amount that would be transferred is estimated to be $6.72 million per year.[336] Over 10 years, the discounted amount that would be transferred would be between $53.91 million (at a 7 percent discount rate) and $60.92 million (at a 3 percent discount rate).

At the low-end, assuming that 44 percent of Service members have a credit card that, given typical fees, might exceed the interest-rate limit if the borrower purchases credit insurance or debt cancellation and pays a penalty APR, and that 7 percent of these borrowers actually do purchase such a product, the amount that would be transferred is estimated to be $2.96 million per year.[337] Over 10 years, the discounted amount that would be transferred would be between $23.72 million (at a 7 percent discount rate) and $26.80 million (at a 3 percent discount rate).

For non-credit card credit products that are subject to the final rule, the Department estimates the amount that would be transferred due to the interest-rate limit by considering three segments of that market for consumer credit: Payday loans, auto title loans, and non-purchase money installment loans. The Department assumes that approximately 12 percent of Service members use non-credit card credit products that will be covered under the rule.[338] The prices associated with these credit products vary widely; for any given creditor, the amount that would be transferred as a result of compliance with the interest-rate limit depends on how much that creditor charges for credit extended under the rule.

In order to estimate the amount that will be transferred, the Department assumes that between 7 percent and 4.9 percent of Service members use payday loans with a median APR of 391 percent and a median 10 transactions per year, each borrowed for 14 days,[339] 0.3

payday loans, auto title loans, and installment loans because these products together represent much of the market for credit with a cost in excess of 36 percent MAPR and data on the cost of these products is readily available.

[331] Blue Star Families, *The 2013 Military Family Lifestyle Survey* 34 (May 2013).

[332] FINRA Investor Education Foundation, *Financial Capability in the United States, Military Survey* (October 2010).

[333] U.S. Gov't Accountability Office, GAO–11–311, *Credit Cards: Consumer Costs for Debt Protection Can be Substantial Relative to Benefits but Are Not a Focus of Regulatory Oversight* 9, 21 (March 2011).

[334] This calculation assumes a beginning balance of $5,000 and that the borrower pays only the minimum payment, calculated as 4 percent of the monthly balance. Under the existing rule, the APR is 28 percent and the debt cancellation is $1.10 per $1,000 of outstanding balance, and the sum of payments over ten years is $12,696. Under the final rule, the APR is 28 percent and the debt cancellation is $.67 per $1,000 of outstanding balance, and the sum of payments over ten years is $11,810.

[335] U.S. Gov't Accountability Office, GAO–11–311, *Credit Cards: Consumer Costs for Debt Protection Can be Substantial Relative to Benefits but Are Not a Focus of Regulatory Oversight* 7 (March 2011).

[336] The Department calculates the estimated transfer amount by multiplying the number of active duty service members (1.4 million) by the percentage with a credit card account (78 percent), the percentage of accounts with costs that might exceed the interest rate limit if the borrower purchases add-on products (100 percent), the percentage of accounts where the borrower actually purchases add-on products (7 percent), and the amount transferred per card ($886).

[337] The Department calculates the estimated transfer amount by multiplying the number of active duty service members (1.4 million) by the percentage with a credit card account (78 percent), the percentage of accounts with costs that might exceed the interest rate limit if the borrower purchases add-on products (44 percent), the percentage of accounts where the borrower actually purchases add-on products (7 percent), and the amount transferred per card ($886).

[338] *See* Department of Defense, *Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents* (August 9, 2006), available at *http://www.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf*; Jean Ann Fox, *The Military Lending Act Five Years Later,* Consumer Federation of America (2012); U.S. Gov't Accountability Office, GAO–05–349, *Military Personnel: DOD's Tools for Curbing the Use and Effects of Predatory Lending Not Fully Utilized* (April 2005); Pew, *Payday Lending in America: Who Borrowers, Where They Borrow, and Why* 4 (July 2012).

[339] *See* Department of Defense, *Report On Predatory Lending Practices Directed at Members of*

percent of Service members use auto title loans with a median APR of 300 percent,[340] and 7 percent of Service members use installment loans with a median APR of 80 percent.[341]

Given typical prices of payday loans and borrowing patterns, the Department estimates that the value that will be transferred is $534 per borrower per year for payday loans.[342] Assuming that 4.9 percent of Service members use payday loans each year, the Department estimates that the rule will result in transfer payments of $36.59 million per year relating to the domestic payday lending industry.[343] Over 10 years, the Department estimates that the amount of the transfer payments relating to the domestic payday lending industry will be between $222.80 million (at a 7 percent discount rate) and $312.10 million (at a 3 percent discount rate). Alternatively, assuming that 7 percent of Service members use payday loans each year, the Department estimates that the amount of transfer payments on the domestic payday lending industry will be $51.95 million per year.[344] Over 10 years, the Department estimates that the transfer payments under the regulation will be between $316.35 million (at a 7 percent discount rate) and $443.14 million (at a 3 percent discount rate).

Approximately 7 percent of volume in payday loans is done by online lenders based offshore.[345] The Department estimates that the transfer payments relating to these offshore creditors will be between $2.56 million and $3.64 million per year. Over 10 years, the Department estimates that the total amount of the transfer payments relating to these offshore creditors will be between $15.60 million (at a 7 percent discount rate, assuming 4.9 percent usage) and $31.02 million (at a 3 percent discount rate, assuming 7 percent usage).

Assuming that 0.3 percent of Service members use auto title loans each year and that the average auto title loan carries an APR of 300 percent, the Department estimates that the interest-rate limit will lead to transfer payments relating to the auto title lending industry of $0.86 million per year.[346] Over 10 years, the Department estimates that the total amount of the transfer payments relating to auto title lenders would be between $5.62 million (at a 7 percent discount rate) and $7.36 million (at a 3 percent discount rate).

Assuming that 7 percent of Service members use high-cost installment loans each year and that the average installment loan carries an APR of 80 percent, the Department estimates that the interest-rate limit will result in transfer payments relating to the domestic installment lending industry of $59.81 million per year.[347] Over 10 years, the Department estimates that the total amount of transfer payments from installment-loan creditors will be between $364.23 million (at a 7 percent discount rate) and $510.21 million (at a 3 percent discount rate).

Approximately 7 percent of volume in the high-cost installment lending market is done by online lenders based offshore.[348] The Department estimates the regulation will result in transfer payments relating to these offshore creditors of approximately $4.19 million per year. Over 10 years, the total amount of transfer payments from these offshore creditors is estimated to be between $25.50 million (at a 7 percent discount rate) and $35.71 million (at a 3 percent discount rate).

Overall, the Department estimates that the total amount of transfer payments relating to these four categories of consumer credit products will be between $100.22 million and $119.34 million per year; over 10 years, the overall amount of these transfer payments will be between $616.01 million (assuming lower usage rates and a 7 percent discount rate) and $1.022 billion (assuming higher usage rates and a 3 percent discount rate). Of these overall amounts, between $6.75 million and $7.83 million of the transfer payments relate to offshore creditors, and between $41.10 million and $66.73 million over 10 years. The transfer payments from domestic creditors will be between $93.47 million and $111.51 million per year; over 10 years, these transfer payments will be between $574.91 million (assuming lower usage rates and a 7 percent discount rate) and $954.90 billion (assuming higher usage rates and a 3 percent discount rate). Figure 5 provides a summary of all of these figures for the transfer payments.

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the Armed Forces and Their Dependents (August 9, 2006), available at *http://www.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf*; Jean Ann Fox, *The Military Lending Act Five Years Later,* Consumer Federation of America (2012); Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products* 8 (April 2013). The Department further assumes that borrowers take a median of 10 loans per year, those loans are for $392 and carry an average 14-day term. *See* Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products* (April 2013). Some, though not all, transactions involving these products are subject to the protections of 10 U.S.C. 987 under the existing rule.

[340] Consumer Federation of America and Center for Responsible Lending, *Driven to Disaster: Car-Title Lending and Its Impact on Consumers* 3 (2013); U.S. Gov't Accountability Office, GAO–05–349, *Military Personnel: DOD's Tools for Curbing the Use and Effects of Predatory Lending Not Fully Utilized* (April 2005); Jean Ann Fox, *The Military Lending Act Five Years Later,* Consumer Federation of America (2012).

[341] *See* Jean Ann Fox, *The Military Lending Act Five Years Later*, Consumer Federation of America (2012).

[342] The Department assumes that the average loan amount is $392, 10 loans of 14 days each are taken in a year, and the average APR is 391 percent. The Department calculates the transfer amount per borrower by finding the difference between the cost of a typical loan under the status quo, assuming that the loan falls outside the scope of the existing rule ($588), and the permissible cost of a loan complying with the 36 percent interest rate limitation ($54).

[343] The Department calculates the estimated transfer amount by multiplying the number of active duty service members (1.4 million) by the percentage with a payday loan (4.9 percent), and the amount transferred per account ($534).

[344] The Department calculates the estimated transfer amount by multiplying the number of active duty service members (1.4 million) by the percentage with a payday loan (7 percent), and the amount transferred per account ($534).

[345] *See* Stephens Inc., *Forging Ahead: Growth, Opportunity and the Direction of the Alternative Financial Services Sector,* presentation to the Community Financial Services Association of America, March 7, 2013 (estimating that one-third of lending volume is online and that 20 percent of the online market is offshore).

[346] The Department assumes that the average principal borrowed is $951, average APR is 300 percent, and the average loan term is 30 days. The Department calculates the transfer amount per borrower by finding the difference between the cost of a typical loan under the status quo, assuming that the loan falls outside the scope of the existing rule ($235), and the permissible cost of a loan complying with the 36 percent interest rate limitation ($28). *See* Susanna Montezemolo, *Car-Title Lending,* Center for Responsible Lending, July 2013, available at *http://www.responsiblelending.org/state-of-lending/reports/7-Car-Title-Loans.pdf. See* Consumer Federation of America, *Policy Brief: Gaps in the Military Lending Act Leave Many Service Members Vulnerable to Abusive Lending Practices,* July 2013, available at *http://www.consumerfed.org/pdfs/130725-policybrief-mla-cfa.pdf* (finding that a typical auto title loan has a 300 percent APR). The Department does not have data regarding auto-title creditors located offshore.

[347] The Department assumes that a typical loan is $1,000 and borrowed for two years. Under the existing rule with an APR of 80 percent, the monthly payment is $85 per month, for a sum of payments of $2,032. Under the final rule with an APR of 36 percent, the monthly payment is $59, for a sum of payments of $1,417, a difference of $615. For information on typical military installment loans, *see* Jean Ann Fox, *The Military Lending Act Five Years Later,* Consumer Federation of America, May 2012.

[348] *See* Stephens Inc., *Forging Ahead: Growth, Opportunity and the Direction of the Alternative Financial Services Sector,* presentation to the Community Financial Services Association of America, March 7, 2013 (estimating that one-third of lending volume is online and that 20 percent of the online market is offshore).

FIGURE 5—SENSITIVITY ANALYSIS: AMOUNT OF TRANSFER PAYMENTS RELATING TO THE INTEREST-RATE LIMIT

[2015 dollars in millions]

	Annual	PV 10-year, 7% discount rate	PV 10-year, 3% discount rate
Payday			
(1) At 4.9% usage	$37	$223	$312
(2) At 7% usage	52	316	443
Auto title	1	5	7
Installment	60	364	510
Credit Cards			
(1) At 3% of cards	3	24	27
(2) At 7% of cards	7	54	61
TOTAL			
Low (4.9% payday, 3% cards)	100	616	856
High (7% payday, 7% cards)	119	740	1,022

The Department does not expect that the interest rate limitation will have undesirable side-effects for Service members. The Department observes that numerous creditors currently supply credit to Service members in a manner that already should comply with the interest-rate limit.

Further, in the Department's experience, covered borrowers enjoy access to low- and no-cost credit. For example, to provide monetary support to Service members and their families with financial hardships, the Military Services have partnered with nonprofit charitable organizations chartered to provide relief services to Service members and their families. The four Relief Societies for the Military Services provide no-interest loans and grants for shortfalls in household expenses and unforeseen emergencies.[349]

B. Congressional Review Act

The Congressional Review Act establishes certain procedures for major rules, defined as those with similar major impacts. This final rule will have a major impact as that term is used under the Congressional Review Act.

C. Unfunded Mandates Reform Act (Title 10, U.S. Code, Chapter 25)

Section 202 of the Unfunded Mandates Reform Act of 1995 requires an agency to prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in the expenditure within any one year by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in 1995 dollars updated annually for inflation.[350] That threshold level is currently approximately $155 million.[351] The Department certifies that this final rule does not contain a federal mandate that may result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of $100 million or more in inflation adjusted 1995 dollars in any one year.[352]

D. Regulatory Flexibility Act (Title 5, U.S. Code, Chapter 6)

The Department certifies that this proposed regulation is not subject to the Regulatory Flexibility Act (''RFA'')[353] because the regulation, if adopted as proposed, would not have a significant economic impact on a substantial number of small entities.

The North American Industrial Classification (NAIC) codes for the affected businesses are the following:

(a) 522110—Commercial Banking
(b) 522130—Credit Unions
(c) 522210—Credit Card Issuing
(d) 522291—Consumer Lending

Pursuant to the Small Business Administration (SBA) Small Business Size Standards, a consumer lending business is a ''small business entity'' if it has less than $38.5 million in receipts. According to the 2007 Economic Census (the last year for which data is available), approximately 96 percent of firms in NAIC code 522291 are small business entities. For the other three potentially affected businesses, the SBA Small Business Size Standards considers any business with less than $550 million in assets to be a small business entity.

Approximately 81 percent of firms in NAIC code 522110 and 94 percent of firms in NAIC code 522130 are small business entities. Overwhelmingly, credit card products are issued by insured depository institutions and, therefore, small business entities issuing credit cards (included within NAIC code 522210) are covered by the previously described codes.

As detailed in Section V.A., the Department estimates the final rule might impose costs of approximately $106 million during the first year, as creditors adapt their systems to comply with the requirements of the rule. After the first year and on an ongoing basis, the annual cost to the economy is expected to be approximately $30 million. The first-year costs reflect the costs of revising disclosures to include the required statement of the MAPR and the costs of modifying lending systems (if needed) and procedures to take advantage of the optional methods to conduct covered-borrower checks that fit within the safe harbor afforded under § 232.5(b). On an ongoing basis, the costs reflect the costs to creditors of providing the required disclosure—generally, as part of standard form loan agreements—and the costs attributable to the use of the methods for conducting covered-borrower checks described in § 232.5(b).

In the Proposed Rule, the Department sought comment, particularly from potentially affected small businesses themselves, on the possible impact of the Proposed Rule on small businesses. The SBA Office of Advocacy observes that the Department ''underestimated the number of entities that might be

[349] *See, e.g.,* Air Force Aid Society, Nov. 14, 2014, at 1. In 2013, the Air Force Aid Society provided $9 million in interest-free loans and $668,000 in grant assistance.

[350] 2 U.S.C. 1532.

[351] DOL, Bureau of Labor and Statistics, Consumer Price Index Inflation Calculator, available at: *http://data.bls.gov/cgi-bin/cpicalc.pl.*

[352] *See* analysis in section V.A. for calculations. The Department expects expenditure by the private sector of approximately $106 million in the first-year, phase-in period for setting up the required disclosures and optional procedure(s) for conducting covered-borrower checks. On an ongoing basis, the Department expects expenditure by the private sector of approximately $30 million to comply with the provision of the required disclosures and optional covered-borrower checks.

[353] 5 U.S.C. 601.

impacted.'' [354] The Department's estimates are based on the size standards established by the SBA and the 2007 Economic Census, published by the U.S. Census Bureau; the SBA Office of Advocacy does not provide alternate estimates in its comment. The Department believes that relying on standards from the SBA and Census Bureau to assess the number of entities that fit the description of a ''small business entity'' and may be affected by the rule is appropriate. However, the Department is not able to estimate the portion of businesses within these size categories that offer credit with an MAPR in excess of the interest-rate limit of the MLA or that otherwise conflict with the MLA conditions. For a small-entity creditor engaged in lending activity that would not violate MLA when extending consumer credit, the creditor might choose to forgo the use of a method for conducting a covered-borrower check described in § 232.5(b). In this instance, the cost that could be attributable to the final rule would be limited to (in the first year) updating disclosures and (on an ongoing basis) providing the statement of the MAPR, which may be included as part of a loan agreement.

The SBA Office of Advocacy also suggests that ''requiring small entities to check every customer to determine if he or she is a [covered borrower] could become burdensome.'' [355] Another commenter asserts that using the MLA Database ''would be a substantial cost burden on small businesses.'' [356] Neither comment provides data in support of its assertions.

The final rule—like the Proposed Rule—does not require any business to determine whether a customer is a covered borrower. A creditor may choose to make such a determination in order to obtain the protection of the safe harbor in § 232.5(b); the Department assumes that all creditors, other than creditors who offer only residential mortgage loans or loans expressly to finance the purchase of personal property (neither of which loans is consumer credit), will establish a procedure to determine whether a particular customer is a covered borrower.

The Department believes that setting up the process to use information obtained from the MLA Database or using information in a consumer report obtained from a nationwide consumer reporting agency, as well as to timely create and maintain a record of that information will take each creditor 70 hours of labor time. The actual cost for each creditor will depend on that entity's business decisions and operations. For example, if nationwide consumer reporting agencies incorporate covered-borrower indicators into consumer reports, a creditor that already obtains a consumer report during the credit origination process might choose to use that indicator to conduct a covered-borrower check, and keep a record of that indicator, pursuant to § 232.5(b). Another creditor, particularly one that does not already obtain consumer reports from a nationwide consumer reporting agency, may instead choose to use information obtained from the MLA Database, and keep a record of that indicator, pursuant to § 232.5(b). And a third creditor, particularly one that offers credit products that comply with the limitation under the MLA, may, as expressly permitted in § 232.5(a), choose to forgo the use of a covered-borrower check described in § 232.5(b).

Nonetheless, assuming that each of the approximately 37,500 creditors subject to the regulation establishes a process to conduct covered-borrower checks through a method provided in § 232.5(b), and that each creditor will incur 70 hours of labor time in doing so, the Department estimates that the total costs relating to setting up the processes for one of those methods would be $84.02 million.[357] The actual amount of time and the cost of the adjustment will depend on business decisions and operations. For example, a small creditor only originating loans in face-to-face transactions through a manual process may find that updating its procedures and training staff to query the MLA Database takes substantially less than 70 hours.

The Department also recognizes that certain costs may be particular to the type of creditor and practices in that market. For example, the National Pawnbrokers Associations shares the report of one member estimating that as many as 4,000 pawn stores across the country do not have computers and would, therefore, need to purchase such equipment in order to take advantage of the safe harbor in § 232.5.[358]

On an ongoing basis, the Department estimates that using information obtained from the MLA Database will add approximately 60 seconds to each new consumer credit transaction.[359] The Department estimates that the total cost to all creditors for using information obtained from the MLA Database or information in consumer reports obtained from a nationwide consumer reporting agency and retaining records relating to those covered-borrower checks would be approximately $27.75 million per year.[360] The actual cost for a small business of engaging in one of these optional methods to conduct a covered-borrower check depends on several factors, such as the number of customers that each business does business with or whether the small business regularly extends credit in a manner that could be inconsistent with the interest-rate limit or one or more of the other MLA conditions.

While a substantial portion of firms in each affected market are ''small business entities,'' Service members and their dependents make up only a small portion of the consumers for those businesses. Because only approximately 2.5 percent of households in the United States include an active duty Service member, the interest-rate limit and other MLA conditions of the final rule would affect a small percentage of the consumers served by entities that could be creditors covered by this final rule.

[354] SBA Office of Advocacy, Dec. 18, 2014, at 3.

[355] SBA Office of Advocacy, Dec. 18, 2014, at 4.

[356] AFSA, Dec. 22, 2014, at 25.

[357] The Department estimates that staff time to set up access to one of the safe harbor mechanism and the processes to record and retain information will be 50 percent data entry and information processing workers, 40 percent supervisors of office and administrative support workers, and 10 percent legal counsel. DOL, Bureau of Labor and Statistics, Occupational Employment and Wages Table 1 (May, 2014) (mean hourly wage for data entry and information processing workers is $15.48; mean hourly wage for supervisors of office and administrative support workers is $26.15; mean hourly wage for legal counsel is $64.17). The Department estimates total wages to be approximately $64.63 million. The Department arrives at an estimated total cost by including an additional non-wage component of compensation of 30 percent of estimated wages.

[358] Nat'l Pawnbrokers Assoc., Nov. 24, 2014, at 14.

[359] The National Pawnbrokers Association shared the report of one member who found that querying the MLA Database took ''less than 20 seconds from start to finish.'' (Nat'l Pawnbrokers Assoc., Nov. 24, 2014, at 15). In contrast, AFSA shared the report of a ''small business'' that estimated that querying the MLA Database would take ''about five to 10 minutes per loan application.'' (AFSA, Dec. 22, 2014, at 7). And a comment submitted on behalf of certain credit card issuers suggested that checking the MLA Database could cause a ''delay'' for the transaction in question and for ''the transactions of any other consumer in line behind that consumer seeking to engage in a transaction, even if the consumer is not apply for credit.'' (L. Chanin, Dec. 23, 2014, at 22). In light of these divergent estimates and the lack of other data, the Department elected to maintain its transaction time estimate from the Proposed Rule.

[360] The Department calculates an estimated wage cost of $21.35 million by multiplying the expected number of transactions involving a single-record inquiry (100 million) by the mean hourly wage for financial tellers ($12.81) and the additional transaction time expected (1/60th of an hour) based on wage information in the DOL, Bureau of Labor and Statistics, Occupational Employment and Wages Table 1 (May, 2014). The Department arrives at a total cost estimate by including an additional non-wage component of compensation of 30 percent of estimated wages.

Thus, the Department concludes that—even though there appears to be a large percentage of small business entities in each affected class of business—the final rule would not (for the purposes of the RFA) have a significant economic impact on a substantial number of small businesses because: (i) The cost for each business associated with updating disclosures is not substantial; (ii) the cost for each business of updating systems or procedures to use a method for conducting covered-borrower checks described in § 232.5(b) (if the business were to do so) is not substantial, and (iii) small businesses nonetheless have very few customers who are covered borrowers.

E. Paperwork Reduction Act (Title 45, U.S. Code, Chapter 35, Sub-Chapter 1)

The final rule contains information-collection requirements and has been submitted to OMB under the provisions of the Paperwork Reduction Act.[361] The paperwork costs associated with this final rule are accounted for in the assessment under E.O. 12866 and E.O. 13563.

Title: Mandatory Loan Disclosure and Covered-Borrower Check as Part of Limitations on Terms of Consumer Credit Extended to Service Members and Their Dependents.

Number of Respondents: 37,500.

Responses per Respondent: Varies by type of respondent.

Annual Responses: 238 million.

Average Burden per Response: Varies by type of response. On an ongoing basis, respondents likely will spend 1 minute (0.02 hours) for single-record borrower inquiry (100 million); and 0 minutes for printed disclosures included in all consumer credit contracts (191 million). In the first year, there is expected to be a one-time burden of 110 labor hours to set up the mandatory disclosures, as well as a process for conducting covered-borrower checks and retaining records.

Annual Burden Hours: 3,375,000 set-up burden hours in the first year; 2,000,000 ongoing burden hours each year.

Needs and Uses: With respect to any extension of consumer credit to a covered borrower, a creditor is required to provide to the borrower a statement of the MAPR. In approximately 238 million transactions, the required information would be included in standard account agreements. Additionally, a creditor may, at its discretion, identify the status of a consumer-applicant, as permitted under § 232.5(b) and, in the event that the information indicates that consumer-applicant is not a covered borrower, take advantage of a safe harbor from liability under 10 U.S.C. 987 by retaining a record of the information so obtained.

Affected Public: Creditors making loans that are subject to a finance charge or payable by a written agreement in more than four installments, except for loans that are mortgage loans and purchase-money financing for vehicles or other personal property.

Frequency: One disclosure for each transaction involving consumer credit; one covered-borrower check for each transaction involving consumer credit.

Respondents' Obligation: Mandatory loan disclosures; optional use of information from agency database or optional use of a consumer report obtained from a nationwide consumer reporting agency, and subsequent record retention.

F. Executive Order 13132 Federalism

Executive Order 13132 (''E.O. 13132'') requires Executive departments and agencies, including the Department, to identify regulatory actions that have significant federalism implications. A regulation has federalism implications if it has substantial direct effects on the States, on the relationship or distribution of power between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of government.

The provisions of this part, as required by 10 U.S.C. 987, override state statutes inconsistent with this part to the extent that these provisions provide different protections for covered borrowers than those provided to residents of that State. As discussed in the section-by-section description of the final rule, in sections III and IV, the rule revises the corresponding section of the Department's existing rule to reflect amendments to 10 U.S.C. 987(d)(2) enacted in section 661(a)(1) of the 2013 Act. This amendment clarifies the scope of state laws subject to preemption by 10 U.S.C. 987.

The final rule does not affect in any manner the powers and authorities that any State may have or affect the distribution of power and responsibilities between Federal and State levels of government. Therefore, the Department determines that the final rule does not have any federalism implications that warrant the preparation of a Federalism Assessment in accordance with E.O. 13132.

[361] 44 U.S.C. 3502, 3506–07.

List of Subjects in 32 CFR Part 232

Loan programs, Reporting and recordkeeping requirements, Service members.

For the reasons set forth in the preamble, chapter I of title 32, Code of Federal Regulations is amended by revising part 232 to read as follows:

PART 232—LIMITATIONS ON TERMS OF CONSUMER CREDIT EXTENDED TO SERVICE MEMBERS AND DEPENDENTS

Sec.

Authority: 10 U.S.C. 987.

§ 232.1 Authority, purpose, and coverage.

(a) *Authority.* This part is issued by the Department of Defense to implement 10 U.S.C. 987.

(b) *Purpose.* The purpose of this part is to impose limitations on the cost and terms of certain extensions of credit to Service members and their dependents, and to provide additional protections relating to such transactions in accordance with 10 U.S.C. 987.

(c) *Coverage.* This part defines the types of transactions involving ''consumer credit,'' a ''creditor,'' and a ''covered borrower'' that are subject to the regulation, consistent with the provisions of 10 U.S.C. 987. In addition, this part:

(1) Provides the maximum allowable amount of all charges, and the types of charges, that may be associated with a covered extension of consumer credit;

(2) Requires a creditor to provide to a covered borrower a statement of the Military Annual Percentage Rate, or MAPR, before or at the time the borrower becomes obligated on the transaction or establishes an account for the consumer credit. The statement required by § 232.6(a)(1) differs from and is in addition to the disclosures that must be provided to consumers under the Truth in Lending Act;

(3) Provides for the method a creditor must use in calculating the MAPR; and

(4) Contains such other criteria and limitations as the Secretary of Defense has determined appropriate, consistent with the provisions of 10 U.S.C. 987.

§ 232.2 Applicability; examples.

(a)(1) *Applicability.* This part applies to consumer credit extended by a creditor to a covered borrower, as those terms are defined in this part. Nothing in this part applies to a credit transaction or account relating to a consumer who is not a covered borrower at the time he or she becomes obligated on a credit transaction or establishes an account for credit. Nothing in this part applies to a credit transaction or account relating to a consumer (which otherwise would be consumer credit) when the consumer no longer is a covered borrower.

(2) *Examples*—(i) *Covered borrower.* Consumer A is a member of the armed forces but not serving on active duty, and holds an account for closed-end credit with a financial institution. After establishing the closed-end credit account, Consumer A is ordered to serve on active duty, thereby becoming a covered borrower, and soon thereafter separately establishes an open-end line of credit for personal purposes (which is not subject to any exception or temporary exemption) with the financial institution. This part applies to the open-end line of credit, but not to the closed-end credit account.

(ii) *Not a covered borrower.* Same facts as described in paragraph (a)(2)(i) of this section. One year after establishing the open-end line of credit, Consumer A ceases to serve on active duty. This part never did apply to the closed-end credit account, and because Consumer A no longer is a covered borrower, this part no longer applies to the open-end line of credit.

(b) *Examples.* The examples in this part are not exclusive. To the extent that an example in this part implicates a term or provision of Regulation Z (12 CFR part 1026), issued by the Consumer Financial Protection Bureau to implement the Truth in Lending Act, Regulation Z shall control the meaning of that term or provision.

§ 232.3 Definitions.

As used in this part:

(a) *Affiliate* means any person that controls, is controlled by, or is under common control with another person.

(b) *Billing cycle* has the same meaning as ''billing cycle'' in Regulation Z.

(c) *Bureau* means the Consumer Financial Protection Bureau.

(d) *Closed-end credit* means consumer credit (but for the conditions applicable to consumer credit under this part) other than consumer credit that is ''open-end credit'' as that term is defined in Regulation Z.

(e) *Consumer* means a natural person.

(f)(1) *Consumer credit* means 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.

(2) *Exceptions.* Notwithstanding paragraph (f)(1) of this section, consumer credit does not mean:

(i) A residential mortgage, which is any credit transaction secured by an interest in a dwelling, including a transaction to finance the purchase or initial construction of the dwelling, any refinance transaction, home equity loan or line of credit, or reverse mortgage;

(ii) Any credit transaction that is expressly intended to finance the purchase of a motor vehicle when the credit is secured by the vehicle being purchased;

(iii) Any credit transaction that is expressly intended to finance the purchase of personal property when the credit is secured by the property being purchased;

(iv) Any credit transaction that is an exempt transaction for the purposes of Regulation Z (other than a transaction exempt under 12 CFR 1026.29) or otherwise is not subject to disclosure requirements under Regulation Z; and

(v) Any credit transaction or account for credit for which a creditor determines that a consumer is not a covered borrower by using a method and by complying with the recordkeeping requirement set forth in § 232.5(b).

(g)(1) *Covered borrower* means a consumer who, at the time the consumer becomes obligated on a consumer credit transaction or establishes an account for consumer credit, is a covered member (as defined in paragraph (g)(2) of this section) or a dependent (as defined in paragraph (g)(3) of this section) of a covered member.

(2) The term ''covered member'' means a member of the armed forces who is serving on—

(i) Active duty pursuant to title 10, title 14, or title 32, United States Code, under a call or order that does not specify a period of 30 days or fewer; or

(ii) Active Guard and Reserve duty, as that term is defined in 10 U.S.C. 101(d)(6).

(3) The term ''dependent'' with respect to a covered member means a person described in subparagraph (A), (D), (E), or (I) of 10 U.S.C. 1072(2).

(4) Notwithstanding paragraph (g)(1) of this section, covered borrower does not mean a consumer who (though a covered borrower at the time he or she became obligated on a consumer credit transaction or established an account for consumer credit) no longer is a covered member (as defined in paragraph (g)(2) of this section) or a dependent (as defined in paragraph (g)(2) of this section) of a covered member.

(h) *Credit* means the right granted to a consumer by a creditor to defer payment of debt or to incur debt and defer its payment.

(i) *Creditor,* except as provided in § 232.8(a), (f), and (g), means a person who is:

(1) Engaged in the business of extending consumer credit; or

(2) An assignee of a person described in paragraph (i)(1) of this section with respect to any consumer credit extended.

(3) For the purposes of this definition, a creditor is engaged in the business of extending consumer credit if the creditor considered by itself and together with its affiliates meets the transaction standard for a ''creditor'' under Regulation Z with respect to extensions of consumer credit to covered borrowers.

(j) *Department* means the Department of Defense.

(k) *Dwelling* means a residential structure that contains one to four units, whether or not the structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and manufactured home.

(*l*) *Electronic fund transfer* has the same meaning as in the regulation issued by the Bureau to implement the Electronic Fund Transfer Act, as amended from time to time (12 CFR part 1005).

(m) *Federal credit union* has the same meaning as ''Federal credit union'' in the Federal Credit Union Act (12 U.S.C. 1752(1)).

(n) *Finance charge* has the same meaning as ''finance charge'' in Regulation Z.

(o) *Insured depository institution* has the same meaning as ''insured depository institution'' in the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(p) *Military annual percentage rate (MAPR).* The MAPR is the cost of the consumer credit expressed as an annual rate, and shall be calculated in accordance with § 232.4(c).

(q) *Open-end credit* means consumer credit that (but for the conditions applicable to consumer credit under this part) is ''open-end credit'' under Regulation Z.

(r) *Person* means a natural person or organization, including any corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.

(s) *Regulation Z* means any rules, or interpretations thereof, issued by the Bureau to implement the Truth in Lending Act, as amended from time to time, including any interpretation or approval issued by an official or employee duly authorized by the Bureau to issue such interpretations or approvals. However, for any provision of this part requiring a creditor to comply with Regulation Z, a creditor who is subject to Regulation Z (12 CFR part 226) issued by the Board of Governors of the Federal Reserve System must continue to comply with 12 CFR part 226. Words that are not defined in this part have the same meanings given to them in Regulation Z (12 CFR part 1026) issued by the Bureau, as amended from time to time, including any interpretation thereof by the Bureau or an official or employee of the Bureau duly authorized by the Bureau to issue such interpretations. Words that are not defined in this part or Regulation Z, or any interpretation thereof, have the meanings given to them by State or Federal law.

(t) *Short-term, small amount loan* means a closed-end loan that is—

(1) Subject to and made in accordance with a Federal law (other than 10 U.S.C. 987) that expressly limits the rate of interest that a Federal credit union or an insured depository institution may charge on an extension of credit, provided that the limitation set forth in that law is comparable to a limitation of an annual percentage rate of interest of 36 percent; and

(2) Made in accordance with the requirements, terms, and conditions of a rule, prescribed by the appropriate Federal regulatory agency (or jointly by such agencies), that implements the Federal law described in paragraph (t)(1) of this section, provided further that such law or rule contains—

(i) A fixed numerical limit on the maximum maturity term, which term shall not exceed 9 months; and

(ii) A fixed numerical limit on any application fee that may be charged to a consumer who applies for such closed-end loan.

§ 232.4 Terms of consumer credit extended to covered borrowers.

(a) *General conditions.* A creditor who extends consumer credit to a covered borrower may not require the covered borrower to pay an MAPR for the credit with respect to such extension of credit, except as:

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

(2) Authorized by applicable State or Federal law; and

(3) Not specifically prohibited by this part.

(b) *Limit on cost of consumer credit.* A creditor may not impose an MAPR greater than 36 percent in connection with an extension of consumer credit that is closed-end credit or in any billing cycle for open-end credit.

(c) *Calculation of the MAPR.*—(1) *Charges included in the MAPR.* The charges for the MAPR shall include, as applicable to the extension of consumer credit:

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

(ii) Any fee for a credit-related ancillary product sold in connection with the credit transaction for closed-end credit or an account for open-end credit; and

(iii) Except for a bona fide fee (other than a periodic rate) which may be excluded under paragraph (d) of this section:

(A) Finance charges associated with the consumer credit;

(B) Any application fee charged to a covered borrower who applies for consumer credit, other than an application fee charged by a Federal credit union or an insured depository institution when making a short-term, small amount loan, provided that the application fee is charged to the covered borrower not more than once in any rolling 12-month period; and

(C) Any fee imposed for participation in any plan or arrangement for consumer credit, subject to paragraph (c)(2)(ii)(B) of this section.

(iv) *Certain exclusions of Regulation Z inapplicable.* Any charge set forth in paragraphs (c)(1)(i) through (iii) of this section shall be included in the calculation of the MAPR even if that charge would be excluded from the finance charge under Regulation Z.

(2) *Computing the MAPR*—(i) *Closed-end credit.* For closed-end credit, the MAPR shall be calculated following the rules for calculating and disclosing the ''Annual Percentage Rate (APR)'' for credit transactions under Regulation Z based on the charges set forth in paragraph (c)(1) of this section.

(ii) *Open-end credit*—(A) *In general.* Except as provided in paragraph (c)(2)(ii)(B) of this section, for open-end credit, the MAPR shall be calculated following the rules for calculating the effective annual percentage rate for a billing cycle as set forth in § 1026.14(c) and (d) of Regulation Z (as if a creditor must comply with that section) based on the charges set forth in paragraph (c)(1) of this section. Notwithstanding § 1026.14(c) and (d) of Regulation Z, the amount of charges related to opening, renewing, or continuing an account must be included in the calculation of the MAPR to the extent those charges are set forth in paragraph (c)(1) of this section.

(B) *No balance during a billing cycle.* For open-end credit, if the MAPR cannot be calculated in a billing cycle because there is no balance in the billing cycle, a creditor may not impose any fee or charge during that billing cycle, except that the creditor may impose a fee for participation in any plan or arrangement for that open-end credit so long as the participation fee does not exceed $100 per annum, regardless of the billing cycle in which the participation fee is imposed; *provided, however,* that the $100-per annum limitation on the amount of the participation fee does not apply to a bona fide participation fee imposed in accordance with paragraph (d) of this section.

(d) *Bona fide fee charged to a credit card account*—(1) *In general.* 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.

(2) *Ineligible items.* The exclusion for bona fide fees in paragraph (d)(1) of this section does not apply to—

(i) 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

(ii) Any fee for a credit-related ancillary product sold in connection with the credit transaction for closed-end credit or an account for open-end credit.

(3) *Standards relating to bona fide fees* —(i) *Like-kind fees.* To assess whether a bona fide fee is reasonable under paragraph (d)(1) of this section, the fee must be compared to fees typically imposed by other creditors for the same or a substantially similar product or service. For example, when assessing a bona fide cash advance fee, that fee must be compared to fees charged by other creditors for transactions in which consumers receive extensions of credit in the form of cash or its equivalent. Conversely,

when assessing a foreign transaction fee, that fee may not be compared to a cash advance fee because the foreign transaction fee involves the service of exchanging the consumer's currency (*e.g.,* a reserve currency) for the local currency demanded by a merchant for a good or service, and does not involve the provision of cash to the consumer.

(ii) *Safe harbor.* A bona fide fee is reasonable under paragraph (d)(1) of this section 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 (or at least $3 billion in loans on U.S. credit card accounts initially extended by the creditor) at any time during the 3-year period preceding the time such average is computed.

(iii) *Reasonable fee.* A bona fide fee that is higher than an average amount, as calculated under paragraph (d)(3)(ii) of this section, also may be reasonable under paragraph (d)(1) of this section depending on other factors relating to the credit card account. A bona fide fee charged by a creditor is not unreasonable solely because other creditors do not charge a fee for the same or a substantially similar product or service.

(iv) *Indicia of reasonableness for a participation fee.* 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. For example, even if other creditors typically charge $100 per annum for participation in credit card accounts, a $400 fee nevertheless may be reasonable if (relative to other accounts carrying participation fees) the credit made available to the covered borrower is significantly higher or additional services or other benefits are offered under that account.

(4) *Effect of charging fees on bona fide fees*—(i) *Bona fide fees treated separately from charges for credit insurance products or credit-related ancillary products.* If a creditor imposes a fee described in paragraph (c)(1) of this section and imposes a finance charge to a covered borrower, the total amount of the fee(s) and finance charge(s) shall be included in the MAPR pursuant to paragraph (c) of this section, and the imposition of any fee or finance charge described in paragraph (c)(1) of this section shall not affect whether another type of fee may be excluded as a bona fide fee under this paragraph (d).

(ii) *Effect of charges for non-bona fide fees.* If a creditor imposes any fee (other than a periodic rate or a fee that must be included in the MAPR pursuant to paragraph (c)(1) of this section) that is not a bona fide fee and imposes a finance charge to a covered borrower, the total amount of those fees, including any bona fide fees, and other finance charges shall be included in the MAPR pursuant to paragraph (c) of this section.

(iii) *Examples.* (A) In a credit card account under an open-end (not home-secured) consumer credit plan during a given billing cycle, Creditor A imposes on a covered borrower a fee for a debt cancellation product (as described in paragraph (c)(1)(i) of this section), a finance charge (as described in paragraph (c)(1)(iii)(A)), and a bona fide foreign transaction fee that qualifies for the exclusion under this paragraph (d). Only the fee for the debt cancellation product and the finance charge must be included when calculating the MAPR.

(B) In a credit card account under an open-end (not home-secured) consumer credit plan during a given billing cycle, Creditor B imposes on a covered borrower a fee for a debt cancellation product (as described in paragraph (c)(1)(i) of this section), a finance charge (as described in paragraph (c)(1)(iii)(A)), a bona fide foreign transaction fee that qualifies for the exclusion under this paragraph (d), and a bona fide, but unreasonable cash advance fee. All of the fees—including the foreign transaction fee that otherwise would qualify for the exclusion under this paragraph (d)—and the finance charge must be included when calculating the MAPR.

(5) *Rule of construction.* Nothing in paragraph (d)(1) of this section authorizes the imposition of fees or charges otherwise prohibited by this part or by other applicable State or Federal law.

§ 232.5 Optional identification of covered borrower.

(a) *No restriction on method for covered-borrower check.* A creditor is permitted to apply its own method to assess whether a consumer is a covered borrower.

(b) *Safe harbor*—(1) *In general.* A creditor may conclusively determine whether credit is offered or extended to a covered borrower, and thus may be subject to 10 U.S.C. 987 and the requirements of this part, by assessing the status of a consumer in accordance with this paragraph (b).

(2) *Methods to check status of consumer*—(i) *Department database*—(A) *In general.* To determine whether a consumer is a covered borrower, a creditor may verify the status of a consumer by using information relating to that consumer, if any, obtained directly or indirectly from the database maintained by the Department, available at *https://www.dmdc.osd.mil/mla/welcome.xhtml.* A search of the Department's database requires the entry of the consumer's last name, date of birth, and Social Security number.

(B) *Historic lookback prohibited.* At any time after a consumer has entered into a transaction or established an account involving an extension of credit, a creditor (including an assignee) may not, directly or indirectly, obtain any information from any database maintained by the Department to ascertain whether a consumer had been a covered borrower as of the date of that transaction or as of the date that account was established.

(ii) *Consumer report from a nationwide consumer reporting agency.* To determine whether a consumer is a covered borrower, a creditor may verify the status of a consumer by using a statement, code, or similar indicator describing that status, if any, contained in a consumer report obtained from a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, or a reseller of such a consumer report (as each of those terms is defined in the Fair Credit Reporting Act (15 U.S.C. 1681a) and any implementing regulation (12 CFR part 1022)).

(3) *Determination and recordkeeping; one-time determination permitted.* A creditor who makes a determination regarding the status of a consumer by using one or both of the methods set forth in paragraph (b)(2) of this section shall be deemed to be conclusive with respect to that transaction or account involving consumer credit between the creditor and that consumer, so long as that creditor timely creates and thereafter maintains a record of the information so obtained. A creditor may make the determination described in this paragraph (b), and keep the record of that information obtained at that time, solely at the time—

(i) A consumer initiates the transaction or 30 days prior to that time;

(ii) A consumer applies to establish the account or 30 days prior to that time; or

(iii) The creditor develops or processes, with respect to a consumer, a firm offer of credit that (among the criteria used by the creditor for the offer) includes the status of the consumer as a covered borrower, so long as the consumer responds to that offer not later than 60 days after the time that the creditor had provided that offer to the consumer. If the consumer responds to the creditor's offer later than 60 days after the time that the creditor had provided that offer to the consumer, then the creditor may not rely upon its initial determination in developing or processing that offer, and, instead, may act on the consumer's response as if the consumer is initiating the transaction or applying to establish the account (as described in paragraph (b)(3)(i) or (ii) of this section).

§ 232.6 Mandatory loan disclosures.

(a) *Required information.* With respect to any extension of consumer credit (including any consumer credit originated or extended through the internet) to a covered borrower, a creditor shall provide to the covered borrower the following information before or at the time the borrower becomes obligated on the transaction or establishes an account for the consumer credit:

(1) A statement of the MAPR applicable to the extension of consumer credit;

(2) Any disclosure required by Regulation Z, which shall be provided only in accordance with the requirements of Regulation Z that apply to that disclosure; and

(3) A clear description of the payment obligation of the covered borrower, as applicable. A payment schedule (in the case of closed-end credit) or account-opening disclosure (in the case of open-end credit) provided pursuant to paragraph (a)(2) of this section satisfies this requirement.

(b) *One-time delivery; multiple creditors.* (1) The information described in paragraphs (a)(1) and (a)(3) of this section are not required to be provided to a covered borrower more than once for the transaction or the account established for consumer credit with respect to that borrower.

(2) *Multiple creditors.* If a transaction involves more than one creditor, then only one of those creditors must provide the disclosures in accordance with this section. The creditors may agree among themselves which creditor may provide the information described in paragraphs (a)(1) and (a)(3) of this section.

(c) *Statement of the MAPR*—(1) *In general.* A creditor may satisfy the requirement of paragraph (a)(1) of this section by describing the charges the creditor may impose, in accordance with this part and subject to the terms and conditions of the agreement, relating to the consumer credit to calculate the MAPR. Paragraph (a)(1) of this section shall not be construed as requiring a creditor to describe the MAPR as a numerical value or to describe the total dollar amount of all charges in the MAPR that apply to the extension of consumer credit.

(2) *Method of providing a statement regarding the MAPR.* A creditor may include a statement of the MAPR applicable to the consumer credit in the agreement with the covered borrower involving the consumer credit transaction. Paragraph (a)(1) of this section shall not be construed as requiring a creditor to include a statement of the MAPR applicable to an extension of consumer credit in any advertisement relating to the credit.

(3) *Model statement.* A statement substantially similar to the following statement may be used for the purpose of paragraph (a)(1) of this section: ''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).''

(d) *Methods of delivery*—(1) *Written disclosures.* The creditor shall provide the information required by paragraphs (a)(1) and (3) of this section in writing in a form the covered borrower can keep.

(2) *Oral disclosures.* (i) *In general.* The creditor also shall orally provide the information required by paragraphs (a)(1) and (3) of this section.

(ii) *Methods to provide oral disclosures.* A creditor may satisfy the requirement in paragraph (d)(2)(i) of this section if the creditor provides—

(A) The information to the covered borrower in person; or

(B) A toll-free telephone number in order to deliver the oral disclosures to a covered borrower when the covered borrower contacts the creditor for this purpose.

(iii) *Toll-free telephone number on application or disclosure.* If applicable, the toll-free telephone number must be included on—

(A) A form the creditor directs the consumer to use to apply for the transaction or account involving consumer credit; or

(B) A written disclosure the creditor provides to the covered borrower, pursuant to paragraph (d)(1) of this section.

(e) *When disclosures are required for refinancing or renewal of covered loan.* The refinancing or renewal of consumer credit requires new disclosures under this section only when the transaction for that credit would be considered a new transaction that requires disclosures under Regulation Z.

§ 232.7 Preemption.

(a) *Inconsistent laws.* 10 U.S.C. 987 as implemented by this part preempts any State or Federal law, rule or regulation, including any State usury law, to the extent such law, rule or regulation is inconsistent with this part, except that any such law, rule or regulation is not preempted by this part to the extent that it provides protection to a covered borrower greater than those protections provided by 10 U.S.C. 987 and this part.

(b) *Different treatment under State law of covered borrowers is prohibited.* A State may not:

(1) Authorize creditors to charge covered borrowers rates of interest for any consumer credit or loans that are higher than the legal limit for residents of the State, or

(2) Permit the violation or waiver of any State consumer lending protection covering consumer credit that is for the benefit of residents of the State on the basis of the covered borrower's nonresident or military status, regardless of the covered borrower's domicile or permanent home of record, provided that the protection would otherwise apply to the covered borrower.

§ 232.8 Limitations.

Title 10 U.S.C. 987 makes it unlawful for any creditor to extend consumer credit to a covered borrower with respect to which:

(a) The creditor rolls over, renews, repays, refinances, or consolidates any consumer credit extended to the covered borrower by the same creditor with the proceeds of other consumer credit extended by that creditor to the same covered borrower. This paragraph shall not apply to a transaction when the same creditor extends consumer credit to a covered borrower to refinance or renew an extension of credit that was not covered by this paragraph because the consumer was not a covered borrower at the time of the original transaction. For the purposes of this paragraph, the term ''creditor'' means a person engaged in the business of extending consumer credit subject to applicable law to engage in deferred presentment transactions or similar payday loan transactions (as described in the relevant law), *provided however,* that the term does not include a person that is chartered or licensed under Federal or State law as a bank, savings association, or credit union.

(b) The covered borrower is required to waive the covered borrower's right to legal recourse under any otherwise applicable provision of State or Federal law, including any provision of the Servicemembers Civil Relief Act (50 U.S.C. App. 501 *et seq.*).

(c) The creditor requires the covered borrower to submit to arbitration or imposes other onerous legal notice provisions in the case of a dispute.

(d) The creditor demands unreasonable notice from the covered borrower as a condition for legal action.

(e) The creditor uses a check or other method of access to a deposit, savings, or other financial account maintained by the covered borrower, except that, in connection with a consumer credit transaction with an MAPR consistent with § 232.4(b), the creditor may:

(1) Require an electronic fund transfer to repay a consumer credit transaction, unless otherwise prohibited by law;

(2) Require direct deposit of the consumer's salary as a condition of eligibility for consumer credit, unless otherwise prohibited by law; or

(3) If not otherwise prohibited by applicable law, take a security interest in funds deposited after the extension of credit in an account established in connection with the consumer credit transaction.

(f) The creditor uses the title of a vehicle as security for the obligation involving the consumer credit, *provided however,* that for the purposes of this paragraph, the term ''creditor'' does not include a person that is chartered or licensed under Federal or State law as a bank, savings association, or credit union.

(g) The creditor requires as a condition for the extension of consumer credit that the covered borrower establish an allotment to repay the obligation. For the purposes of this paragraph only, the term ''creditor'' shall not include a ''military welfare society,'' as defined in 10 U.S.C. 1033(b)(2), or a ''service relief society,'' as defined in 37 U.S.C. 1007(h)(4).

(h) The covered borrower is prohibited from prepaying the consumer credit or is charged a penalty fee for prepaying all or part of the consumer credit.

§ 232.9 Penalties and remedies.

(a) *Misdemeanor.* A creditor who knowingly violates 10 U.S.C. 987 as implemented by this part shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(b) *Preservation of other remedies.* The remedies and rights provided under 10 U.S.C. 987 as implemented by this part are in addition to and do not preclude any remedy otherwise available under State or Federal law or regulation to the person claiming relief under the statute, including any award for consequential damages and punitive damages.

(c) *Contract void.* Any credit agreement, promissory note, or other contract with a covered borrower that fails to comply with 10 U.S.C. 987 as implemented by this part or which contains one or more provisions prohibited under 10 U.S.C. 987 as implemented by this part is void from the inception of the contract.

(d) *Arbitration.* Notwithstanding 9 U.S.C. 2, or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit to a covered borrower pursuant to this part shall be enforceable against any covered borrower, or any person who was a covered borrower when the agreement was made.

(e) *Civil liability*—(1) *In general.* A person who violates 10 U.S.C. 987 as implemented by this part with respect to any person is civilly liable to such person for:

(i) Any actual damage sustained as a result, but not less than $500 for each violation;

(ii) Appropriate punitive damages;

(iii) Appropriate equitable or declaratory relief; and

(iv) Any other relief provided by law.

(2) *Costs of the action.* In any successful action to enforce the civil liability described in paragraph (e)(1) of this section, the person who violated 10 U.S.C. 987 as implemented by this part is also liable for the costs of the action, together with reasonable attorney fees as determined by the court.

(3) *Effect of finding of bad faith and harassment.* In any successful action by a defendant under this section, if the court finds the action was brought in bad faith and for the purpose of harassment, the plaintiff is liable for the attorney fees of the defendant as determined by the court to be reasonable in relation to the work expended and costs incurred.

(4) *Defenses.* A person may not be held liable for civil liability under paragraph (e) of this section if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under 10 U.S.C. 987 as implemented by this part is not a bona fide error.

(5) *Jurisdiction, venue, and statute of limitations.* An action for civil liability under paragraph (e) of this section may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of:

(i) Two years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(ii) Five years after the date on which the violation that is the basis for such liability occurs.

§ 232.10 Administrative enforcement.

The provisions of this part, other than § 232.9(a), 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 by law.

§ 232.11 Servicemembers Civil Relief Act protections unaffected.

Nothing in this part may be construed to limit or otherwise affect the applicability of section 207 and any other provisions of the Servicemembers Civil Relief Act (50 U.S.C. App. 527).

§ 232.12 Effective dates.

(a) *In general.* This regulation shall take effect October 1, 2015, except that, other than as provided in this section and in § 232.13(b)(1), nothing in this part shall apply to consumer credit that is extended to a covered borrower and consummated before October 3, 2016.

(b) *Prior extensions of consumer credit.* Consumer credit that is extended to a covered borrower and consummated any time between October 1, 2007, and October 3, 2016, is subject to the definitions, conditions, and requirements of this part as were established by the Department and effective on October 1, 2007.

(c) *New extensions of consumer credit.* Except as provided in paragraphs (d) and (e) of this section with respect to extensions of consumer credit under paragraph (b) of this section (and except as permitted by § 232.13(b)(1)), the requirements of this part that are effective as of October 1, 2015, shall apply only to a consumer credit transaction or account for consumer credit consummated or established on or after October 3, 2016.

(d) *Provisions of 10 U.S.C. 987(d)(2).* The amendments to 10 U.S.C. 987(d)(2) enacted in section 661(a) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239, 126 Stat. 1785), as reflected in § 232.7(b), took effect on January 2, 2014.

(e) *Civil liability remedies.* The provisions set forth in § 232.9(e) shall apply with respect to consumer credit extended on or after January 2, 2013.

§ 232.13 Compliance dates.

(a) *In general.* Except as provided in paragraph (c) of this section, a creditor must comply with the requirements of this part, as may be applicable, with respect to a consumer credit transaction or account for consumer credit consummated or established on or after October 3, 2016, not later than that date.

(b) *Safe harbors for identifying a covered borrower*—(1) *New safe harbors.* Section 232.5 shall apply October 3, 2016.

(2) *Prior safe harbor valid until general compliance date.* The provisions relating to the identification of a covered borrower set forth in § 232.5(a) of the regulation established by the Department and effective on October 1, 2007 (including the interpretation by the Department that provides an exception from the safe harbor for the creditor's knowledge that the applicant is a covered borrower) shall remain in effect until October 3, 2016.

(c) *Limited exemption for credit card account; reservation of authority*—(1) *In general.* Notwithstanding § 232.3(f)(1) and subject to paragraph (c)(2) of this section, until October 3, 2017, consumer credit does not mean credit extended in a credit card account under an open-end (not home-secured) consumer credit plan.

(2) *Authority to issue an order to extend exemption.* The Secretary, or an official of the Department duly authorized by the Secretary, may, by order, extend the expiration of the exemption set forth in paragraph (c)(1) of this section, until a date not later than October 3, 2018.

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Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

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