The Board's meeting was widely publicized throughout the California walnut industry. All interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the September 11, 2020, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons were invited to submit comments on this rule, including the regulatory and information collection impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581–0178 Vegetable and Specialty Crops. No changes in those requirements will be necessary as a result of this rule. Should any changes become necessary, they would be submitted to OMB for approval.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large California walnut handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

A proposed rule concerning this action was published in the **Federal Register** on March 5, 2021 (86 FR 12837). The Board notified all California walnut handlers of the proposed assessment rate decrease. The proposed rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending April 5, 2021, was provided for interested persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Board and other information available, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 984

Marketing agreements, Reporting and recordkeeping requirements, and Walnuts.

For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

■ 1. The authority citation for part 984 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 984.347 is revised to read as follows:

§ 984.347 Assessment rate.

On and after September 1, 2020, an assessment rate of $0.0250 per kernelweight pound is established for California merchantable walnuts.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2021–13039 Filed 6–22–21; 8:45 am]

BILLING CODE P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Examinations for Risks to Active-Duty Servicemembers and Their Covered Dependents

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interpretive rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) has statutory authority to conduct examinations, at those institutions that it supervises, regarding the risks to active-duty servicemembers and their covered dependents that are presented by conduct that violates the Military Lending Act. This interpretive rule explains the basis for that authority.

DATES: This interpretive rule is effective on June 23, 2021.

FOR FURTHER INFORMATION CONTACT: Christopher Shelton, Senior Counsel, Legal Division, (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Consumer Financial Protection Act of 2010 (CFPA) authorizes the Bureau to conduct examinations of supervised nonbanks for the purposes of assessing and detecting ''risks to consumers.'' As explained below, the risks to active-duty servicemembers and their dependents from conduct that violates the Military Lending Act (MLA) fall squarely within that category. The CFPA also authorizes the Bureau to conduct examinations of very large banks and credit unions for purposes of detecting and assessing those ''risks to consumers'' that are ''associated'' with ''activities subject to'' Federal consumer financial laws, such as the Truth in Lending Act (TILA) or the CFPA.[1] Because conduct that violates the MLA is associated with activities that are subject to TILA and the CFPA, that standard is also satisfied here. The Bureau's interpretation is also entirely consistent with the enforcement scheme of the MLA, which by incorporating TILA's enforcement scheme authorizes the Bureau to use formal administrative adjudications, civil enforcement actions, and other authorities to enforce the MLA. That enforcement scheme is complemented by the Bureau's use of the examination process to detect and assess risks to consumers arising from violations of the MLA. This reading also avoids an unworkable gap in Bureau examinations that can otherwise only be potentially filled by the formal enforcement process; based on the Bureau's experience, that gap leads to wasteful inefficiencies for both the Bureau and supervised institutions. Additionally, the Bureau is no longer persuaded by counterarguments that it does not have the relevant authority, for reasons that will also be discussed below.

This part I is followed by part II, which provides some general background about the CFPA, the MLA, TILA, and the history of Bureau examinations regarding the MLA. Part III sets out the Bureau's analysis of its authority with respect to supervised nonbanks, including the statutory text; the statutory scheme; and counterarguments that the Bureau no

[1] This interpretive rule uses the terms ''supervised nonbank'' and ''very large bank or credit union'' for convenience. The more precise definitions of the persons that are subject to the Bureau's supervisory authority under sections 1024 and 1025 of the CFPA are set out in the statute. 12 U.S.C. 5514(a), 5515(a). The Bureau also has certain additional supervisory authority regarding service providers to these persons, and the reasoning of this interpretive rule also extends to those service providers. 12 U.S.C. 5514(e), 5515(d).

longer finds persuasive. Part IV addresses the parallel issue in the context of very large banks and credit unions. Part V concludes with some regulatory matters.

II. Background

A. Consumer Financial Protection Act of 2010

The CFPA establishes the Bureau as an independent bureau in the Federal Reserve System and assigns the Bureau a range of rulemaking, enforcement, supervision, and other authorities.[2] Many of these authorities relate to the body of ''Federal consumer financial law,'' which the CFPA defines to include the CFPA itself, TILA, and a number of other statutes, rules, and orders, but it does not include the MLA.[3] For example, one of the Bureau's authorities is to ''prescribe rules . . . as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.''[4] A notable substantive provision of the CFPA is its prohibition on unfair, deceptive, or abusive acts or practices.[5] The CFPA also requires the Director of the Bureau to establish several offices, including an Office of Service Member Affairs.[6]

The key CFPA provisions that are relevant to this interpretive rule are sections 1024 and 1025. Section 1024 addresses Bureau supervision of specified categories of nonbanks—for example, any covered person who ''offers or provides to a consumer a payday loan''—while section 1025 addresses Bureau supervision of ''very large'' depository institutions and credit unions, which are generally those with more than $10 billion in total assets and their affiliates.[7]

Section 1024(b)(1) provides that the Bureau ''shall require reports and conduct examinations on a periodic basis of'' a supervised nonbank for purposes of: ''(A) assessing compliance with the requirements of Federal consumer financial law; (B) obtaining information about the activities and compliance systems or procedures of such person; and (C) detecting and assessing risks to consumers and to markets for consumer financial products and services.''[8]

Section 1025(b)(1) contains parallel but slightly different language. It provides that the Bureau ''shall have exclusive authority to require reports and conduct examinations on a periodic basis of'' very large banks and credit unions for purposes of: ''(A) assessing compliance with the requirements of Federal consumer financial laws; (B) obtaining information about the activities *subject to such laws* and *the associated* compliance systems or procedures of such persons; and (C) detecting and assessing *associated* risks to consumers and to markets for consumer financial products and services.''[9]

These differences in wording between section 1024(b)(1) and section 1025(b)(1) are explained by the structure of the statute. Very large banks and credit unions have long been subject to supervisory examinations by the prudential regulators, who continue to examine these institutions for a broad range of purposes.[10] By contrast, the supervised nonbanks that are covered by section 1024(b)(1) were generally not subject to examination by the Federal government before the creation of the Bureau.[11] The purposes of Bureau examinations under sections 1024(b)(1) and 1025(b)(1) are both broad. But it was natural, to ensure thorough Federal examination of supervised nonbanks, for Bureau examinations of those nonbanks to cover an even broader range of subject matters than the Bureau's examinations of very large banks and credit unions. (For example, the Bureau can obtain information about all of a supervised nonbank's compliance systems or procedures, not only those that are ''associated'' with activities subject to Federal consumer financial laws.)

Accordingly, with respect to supervised nonbanks that are covered by section 1024(b)(1), the relevant question here is whether there are ''risks to consumers'' arising from conduct that violates the MLA that the Bureau may detect and assess. In the case of very large banks and credit unions that are covered by section 1025(b)(1), there is the additional question of whether such ''risks to consumers'' are ''associated'' with ''activities subject to'' Federal consumer financial laws, such as TILA or the CFPA.[12]

B. Military Lending Act

The MLA, also known as the Talent Amendment, was bipartisan legislation first enacted in 2006.[13] As Senator Talent explained during the passage of the MLA: ''The fact is, predatory payday lenders are targeting American troops and are trying to make a buck off of their service to our country. . . . This is a national problem. Predatory payday lenders set up shop near our military bases throughout the country and prey on our servicemembers. . . . Our troops deserve uniform, national protection against abusive financial practices that target them.''[14]

The MLA establishes safeguards when creditors extend consumer credit to certain active-duty members of the armed forces or their covered dependents. The statute is implemented through regulations issued by the Department of Defense, in consultation with other specified agencies including the Bureau.[15] The Department of

[2] CFPA section 1011(a), 12 U.S.C. 5491(a); *see generally* Public Law 111–203, tit. X, 124 Stat. 1376, 1955–2113 (2010).

[3] CFPA section 1002(14), 12 U.S.C. 5481(14).

[4] CFPA section 1022(b)(1), 12 U.S.C. 5512(b)(1).

[5] CFPA sections 1031, 1035, 12 U.S.C. 5531, 5535.

[6] CFPA section 1013(e), 12 U.S.C. 5493(e).

[7] 12 U.S.C. 5514, 5515. As explained in note 1, this interpretive rule uses the terms ''supervised nonbank'' and ''very large bank or credit union'' for convenience.

[8] 12 U.S.C. 5514(b)(1).

[9] 12 U.S.C. 5515(b)(1) (emphasis added).

[10] Under the CFPA, the ''prudential regulators'' are the Board of Governors of the Federal Reserve System (Federal Reserve), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA). *See* CFPA section 1002(24), 12 U.S.C. 5481(24). For convenience, this interpretive rule also uses that term anachronistically to refer to the Federal Home Loan Bank Board, which existed until 1989, and the Office of Thrift Supervision, which existed from 1989 until 2011.

[11] As the legislative history of the CFPA explains, the Bureau's new authority with respect to these nonbanks remedied the previous situation, where the ''lack of any effective supervision on nondepositories led to a 'race to the bottom' in which the institutions with the least effective consumer regulation and enforcement attracted more business . . . .'' S. Rept. 111–176, at 10 (2010). At the same time, the Bureau's authorities are not limited to addressing the specific problems that existed prior to the CFPA. *See id.* at 11 (''The CFPB will have enough flexibility to address future problems as they arise. Creating an agency that only had the authority to address the problems of the past, such as mortgages, would be too short-sighted. Experience has shown that consumer protections must adapt to new practices and new industries.'').

[12] Note that the term ''associated'' in section 1025(b)(1)(C) is best read as meaning ''associated'' with ''the activities subject to such laws'' in section 1025(b)(1)(B), where ''such laws'' refers back to ''Federal consumer financial laws'' in section 1025(b)(1)(A). This reading flows naturally from the order in which the provisions appear. However, as discussed below, this interpretive rule would reach the same conclusion if ''associated'' in section 1025(b)(1)(C) were read to mean ''associated'' with violations of Federal consumer financial laws. MLA violations are both associated with activities subject to Federal consumer financial law and associated with violations of Federal consumer financial law. Also note that, since the Bureau concludes that the above standards are satisfied, this interpretive rule does not need to consider whether there are also other statutory bases for the Bureau's authority to conduct examinations of supervised nonbanks and very large banks and credit unions related to the MLA.

[13] 10 U.S.C. 987.

[14] 152 Cong. Rec. S6406 (June 22, 2006) (statement of Sen. Talent).

[15] 10 U.S.C. 987(h). Congress added the Bureau to the list of agencies that the Department of Defense consults in 2013.

Defense has explained that under its implementing regulations, as revised in 2015, consumer credit for purposes of the MLA is, in general, ''defined consistently with credit that for decades has been subject to the disclosure requirements of the Truth in Lending Act (TILA), codified in [the Bureau's] Regulation Z.'' [16] However, there are some instances where the definition of consumer credit under the MLA and its implementing regulations is narrower than under TILA.[17]

One of the MLA's safeguards is a prohibition on imposing interest at a military annual percentage rate (MAPR) of greater than 36 percent, where MAPR is calculated by reference to TILA's annual percentage rate (APR), with some specified differences.[18] The MLA also establishes a number of other limitations on the terms of credit transactions, such as a prohibition on rolling over credit under certain circumstances; a prohibition on requiring, as a condition for the extension of credit that, the borrower establish an allotment to repay an obligation; and a prohibition on prepayment penalties or fees.[19] The MLA requires disclosures that are based on TILA disclosures with additional supplementary information, such as a statement regarding the MAPR in addition to the disclosure of the TILA APR.[20]

Conduct that violates the MLA may also violate TILA's disclosure requirements, or occur concurrently with violations of TILA's disclosure requirements, since the MLA's disclosure requirements incorporate and supplement TILA's. Conduct that violates the MLA may also overlap with violations of the CFPA's prohibition on deceptive acts or practices or other violations of Federal consumer financial law.

Congress provided that any contract prohibited by the MLA ''is void from the inception of such contract.'' [21] As the MLA's implementing regulations further explain, any contract with a covered borrower that fails to comply with the MLA or which contains one or more provisions prohibited under the MLA is void from the inception of the contract.[22] The MLA also provides criminal penalties for creditors that knowingly violate the statute.[23] However, as originally enacted in 2006, the MLA did not address administrative enforcement.

In 2013, Congress amended the MLA to provide that it ''shall be enforced by the agencies specified'' in section 108 of TILA, ''in the manner set forth in that section or under any other applicable authorities available to such agencies by law.'' [24] As the conference report explained, ''for the purposes of the enforcement authority under this section, a violation of the Military Lending Act would be treated as though it were a violation of the Truth in Lending Act.'' [25] Thus, the authorities in section 108 of TILA, which are discussed below, are applicable to the MLA.

C. Truth in Lending Act

Section 108 addresses administrative enforcement of TILA. It provides that TILA ''shall be enforced'' by a list of enforcing agencies, including the applicable prudential regulators and, since 2010, the Bureau.[26] In the case of the prudential regulators, section 108 specifies that they shall enforce TILA under statutory provisions that authorize, among other things, administrative adjudications for cease-and-desist orders and civil money penalties.[27] In the case of the Bureau, section 108 provides that TILA shall be enforced under subtitle E of the CFPA. Subtitle E authorizes the Bureau to, among other things, conduct administrative adjudications, initiate civil enforcement actions, and send civil investigative demands.[28] Section 108 further provides that each of the enforcing agencies ''may exercise, for the purpose of enforcing compliance'' with TILA, ''any other authority conferred on it by law.'' [29]

As general background, since TILA's enactment in 1968, the prudential regulators have relied heavily on bank examinations in order to implement TILA. As noted above, each of the prudential regulators has longstanding statutory authority to ''examine'' or conduct ''examinations'' of banks or credit unions.[30] As the Federal Reserve reported to Congress in 1972, in its capacity as the agency that wrote regulations to implement TILA: ''For the most part, compliance [with TILA] is determined by [the prudential regulators] during the regular periodic examinations of the creditors under their jurisdiction.'' [31] The Federal Reserve similarly reported to Congress in 1983 that the five prudential regulators ''enforce compliance with [TILA and three other consumer finance statutes] mainly through periodic examinations.'' [32] Along the same lines, the Comptroller of the Currency testified to Congress in 2007 that the ''primary method that federal banking agencies use to implement consumer protection standards is direct supervision—not formal enforcement actions—of the banks we supervise.'' [33]

D. History of Bureau Examinations Regarding the MLA

In September 2013, the Bureau amended its short-term, small-dollar lending examination procedures to advise examiners that they ''should review for MLA violations, which evidence risks to consumers and may require supervisory or enforcement action.'' [34] This was about two years into the history of the Bureau's examination program and about nine months after the MLA was amended to provide the Bureau with authority to enforce the MLA in the same manner as it is authorized to enforce TILA. As far as the Bureau is aware, no supervised entity ever disputed the propriety of this aspect of the Bureau's examinations by

[16] 80 FR 43559, 43560 (July 22, 2015).

[17] *See, e.g.,* 32 CFR 232.3(f)(2) (exceptions from definition of ''consumer credit'' for purposes of the MLA).

[18] 10 U.S.C. 987(b); 32 CFR 232.4(c).

[19] 10 U.S.C. 987(e); 32 CFR 232.8.

[20] 10 U.S.C. 987(c); 32 CFR 232.6.

[21] 10 U.S.C. 987(f)(3).

[22] 32 CFR 232.9(c).

[23] 10 U.S.C. 987(f)(1).

[24] Public Law 112–239, sec. 662(b), 126 Stat. 1631, 1786 (Jan. 2, 2013) (adding 10 U.S.C. 987(f)(6)). The provision of the MLA concerning criminal penalties is excepted from this authority; that provision is outside the scope of this interpretive rule. *Id.* (cross-referencing 10 U.S.C. 987(f)(1)).

[25] H.R. Conf. Rep. No. 112–705, at 775 (2012).

[26] 15 U.S.C. 1607(a), (c), as amended by Public Law 111–203, title X, § 1100A, 124 Stat. 1376, 2107–09 (2010). The agencies' authority to enforce TILA under section 108 is ''subject to'' subtitle B of the CFPA. *Id.* Subtitle B, among other things, allocates supervisory and enforcement authority between the Bureau and the prudential regulators. *See* 12 U.S.C. 5514–16.

[27] 15 U.S.C. 1607(a)(1), (a)(2) (citing section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818, and the Federal Credit Union Act, 12 U.S.C. 1751 *et seq.*).

[28] *E.g.,* CFPA sections 1052–54, 12 U.S.C. 5562–64.

[29] 15 U.S.C. 1607(b).

[30] *E.g.,* 12 U.S.C. 248, 325, 481, 1464(a), (d)(1)(B)(ii), (d)(1)(B)(v), 1756, 1784(a), 1819(a)(Eighth), 1820(b), (c), (d)(1).

[31] Federal Reserve, Truth in Lending for the Year 1971, *reprinted in* 118 Cong. Rec. 816, 817 (Jan. 24, 1972).

[32] Federal Reserve, Annual Report to Congress for 1982 (Apr. 1983).

[33] Statement by John C. Dugan, Comptroller of the Currency, Before the H. Comm. on Fin. Servcs. (June 13, 2007).

[34] CFPB Examination Procedures, Short Term, Small Dollar Lending, at Procedures 11 (Sept. 2013), *https://files.consumerfinance.gov/f/201309_cfpb_payday_manual_revisions.pdf.* These particular procedures are no longer applicable, among other reasons because they do not reflect subsequent revisions to the Department of Defense's regulations implementing the MLA.

appealing a supervisory determination regarding the MLA.

In 2018, the Bureau discontinued examination activity regarding the MLA. This was because the Bureau changed its position, taking the view that it lacked the authority to engage in MLA-related examination activity, for reasons that will be discussed below.[35] In 2019, the Bureau wrote to Congress to suggest legislation to ''clarify the [Bureau's] authority to supervise for compliance with the [MLA].'' [36]

The Bureau is now returning to the original position that it took from 2013 until 2018. The Bureau believes that it does have the requisite authority, and that the view that it originally took in 2013 was the correct one, for the reasons discussed below.

III. Analysis of Section 1024(b)(1)(C) (Supervised Nonbanks)

A. Statutory Text

Section 1024(b)(1)(C) of the CFPA, in relevant part, straightforwardly authorizes the Bureau to conduct examinations of supervised nonbanks for purposes of detecting and assessing ''risks to consumers.'' [37] As the Supreme Court has explained in another context: ''Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.'' [38]

''Risks to consumers'' that arise from conduct that violates the MLA fall well within that capacious phrase. Such conduct risks having adverse financial consequences for active-duty service members and their covered dependents. One reason why these consequences can be particularly significant for military families is that financial status can affect servicemembers' ability to maintain their security clearances and therefore maintain their military careers. Congress considered the risk of harm from contracts made in violation of the MLA so severe that it made such contracts entirely void.

B. Statutory Scheme

A statute should be interpreted ''as a symmetrical and coherent regulatory scheme.'' [39] Here, the statutory scheme provides additional confirmation that ''risks to consumers'' include conduct that violates the MLA, for three main reasons.

First, the Bureau believes that risks of harm to consumers that the Bureau can address through its enforcement authority, when that proves necessary, are logically within the core of ''risks to consumers'' that the Bureau can detect and assess. There can be many types of risks to consumers, and the Bureau's ability to use its range of authorities to remedy those risks can vary in effectiveness. But if ''risks to consumers'' did not include, at the very least, those risks that are so severe and so central to the Bureau's consumer-protection mission that they can lead to a Bureau enforcement action for civil money penalties, restitution, disgorgement, and other relief,[40] it is unclear what remaining meaning the category would have. It would be anomalous to read out of the category of ''risks to consumers'' a type of risk that the Bureau can—out of all the potential risks to consumers—forcefully remedy through enforcement action if that becomes necessary. Thus, not only does conduct that violates the MLA fall within the plain language of ''risks to consumers,'' in the Bureau's view it is not a borderline case, but sits within the core of the provision.

Second, the Bureau's textual interpretation is the most effective way of carrying out the statutory scheme of the CFPA and MLA. When the Bureau is already examining a supervised nonbank or very large bank or credit union for potential violations of TILA that are intertwined with potential violations of the MLA, it is especially inefficient for both the Bureau and the supervised institution if the Bureau relies exclusively on enforcement tools under Subtitle E of the CFPA to identify and address MLA violations, closing off any use of the Bureau's supervisory process to detect and assess these risks to consumers. As one example, under the contrary interpretation, verifying TILA disclosures may be the work of a Bureau examiner, but scrutinizing the related MLA disclosures in the very same document would be reserved to a Bureau enforcement attorney, who would normally obtain copies of those disclosures by sending a civil investigative demand. The Bureau believes that the capacious reference to ''risks to consumers'' in section 1024(b)(1)(C)—when read according to its plain terms—avoids this incongruous result by allowing examiners to consider the potentially overlapping MLA and TILA issues together in one review.

A third reason why examinations regarding the MLA complement the Bureau's enforcement authority under Subtitle E is that such examinations can play a role in preventing violations of the MLA before they occur. In a Bureau examination to detect and assess the risk that consumers will be harmed by violations of the MLA, the Bureau is able to detect and assess not only fully completed violations of the MLA, but also practices by the supervised institution that present a danger of violations of the MLA and therefore risk harm to consumers. For example, one important practical step that creditors generally need to take, in order to avoid violations of the MLA, is to correctly identify which of their borrowers are active-duty servicemembers or covered dependents and therefore protected by the MLA.[41] If examiners observe an error or deficiency in the processes that a supervised institution uses to identify borrowers that are covered by the MLA, they can alert the institution of their assessment in their examination report or supervisory letter, and this may occur before the danger manifests in an actual violation of the MLA that in turn harms consumers. When Bureau examiners work cooperatively with supervised institutions to identify and address risks to consumers before they harm consumers, both the Bureau and supervised institutions can often avoid an after-the-fact enforcement action under Subtitle E of the CFPA. The Bureau believes that this is a prime example of a proper exercise of its authority under section 1024(b)(1)(C) to conduct examinations for the purpose of detecting and assessing risks to consumers.

C. Discussion of Counterarguments

During the period when it ceased MLA-related examination activity, the Bureau was persuaded by arguments that it lacked this authority. But for the following reasons, the Bureau no longer finds these arguments persuasive.

First, the Bureau's interpretation during this period was informed by the fact that the MLA is not a Federal consumer financial law, which is the focus of the examination authority in the separate section 1024(b)(1)(A) of the

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[35] *See* Letter from Kathleen L. Kraninger, Director of the Bureau, to Senator Sherrod Brown (Feb. 1, 2019).

[36] Letter from Kathleen L. Kraninger, Director of the Bureau, to the Hon. Nancy Pelosi, Speaker, House of Representatives (Jan. 17, 2019), *https://files.consumerfinance.gov/f/documents/cfpb_MLA-legislative-proposal-to-Pelosi.pdf.* No legal conclusion can be drawn from the fact that this particular proposal has not as yet been enacted.

[37] The statute also includes the authority to ''require reports.'' CFPA sections 1024(b)(1), 1025(b)(1), 12 U.S.C. 5514, 5515. This analysis focuses on the authority to conduct examinations for simplicity, but the same analysis would be applicable to requiring reports, because the same operative statutory language is also applicable to requiring reports.

[38] *City of Arlington, Tex.* v. *FCC,* 569 U.S. 290, 296 (2013) (Scalia, J.).

[39] *Roberts* v. *Sea-Land Servs., Inc.,* 566 U.S. 93, 103 (2012) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (quoting *Gustafson* v. *Alloyd Co.,* 513 U.S. 561, 569 (1995))).

[40] *See* CFPA section 1055, 12 U.S.C. 5565.

[41] *See* 32 CFR 232.5.

CFPA. The Bureau asserted that Congress confined the Bureau's authority to assess compliance to Federal consumer financial law and not compliance with other laws; that Congress intended not to confer examination authority with respect to the MLA, since it did not add the MLA to the definition of Federal consumer financial law; and that the Bureau would be circumventing Congress's intentions by conducting examinations related to the MLA.

The Bureau no longer accepts this argument, because the argument relies on assumptions about Congress's intentions that are not expressed anywhere in the statutory text or any legislative history. There is nothing in the statute to suggest that ''risks to consumers'' can never include violations of law. (Indeed, in the case of the MLA, Congress enacted it precisely because there were risks to active-duty servicemembers and their families.) Moreover, to the extent it is appropriate to speculate about Congress' choice to not amend the definition of Federal consumer financial law, it is understandable why Congress would not have added the MLA to that definition. As noted above, the Bureau has general *rulemaking* authority with respect to Federal consumer financial law, but Congress gave the Department of Defense, not the Bureau, general rulemaking authority for the MLA. Adding the MLA to the definition of Federal consumer financial law would have led to potential confusion about which agency, or both, has this significant rulemaking authority. Lastly, to assert that the Bureau is circumventing Congress's intentions is conclusory. Again, had Congress wished to more closely ''circumscribe . . . agency discretion,'' it would not have used the ''capacious terms'' that it did.[42]

Second, the Bureau's prior interpretation was informed by the fact that Congress conferred authority on the Bureau to enforce the MLA through subtitle E of the CFPA, by incorporating TILA's enforcement scheme, without *specifically* addressing the Bureau's supervisory authority under section 1024. According to this line of argument, this specific conferral of certain enforcement authorities implies an unstated exclusion of supervisory authority. But the Supreme Court has rejected just such an argument. The Court has recognized that where financial regulators have formal enforcement powers regarding a specific subject but also ''broad statutory authority to supervise financial institutions,'' there is nothing that prevents ''the regulators from invoking less formal means of supervision of financial institutions,'' given that there is ''no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation.''[43] This is particularly true here, where Congress has expressly authorized the Bureau to rely upon ''any other applicable authorities available to'' the Bureau to enforce the MLA, and where TILA's enforcement regime likewise authorizes the Bureau to exercise ''any other authority conferred on it by law'' to aid in its enforcement of that statute.[44] Thus, there is no reason to infer that Congress's conferral of certain specific enforcement authorities foreclosed the use of other authorities to ensure conformity with the MLA and securing its protections for servicemembers and their families. Moreover, when Congress incorporated TILA's enforcement scheme into the MLA in 2013, there had been forty years of consistent history of regulators taking this kind of approach in the TILA context—using their generally-framed authorities to examine supervised institutions in order to supplement the formal enforcement measures that section 108 of TILA specifically references.

Third, the Bureau's prior interpretation was influenced by a concern that reading the phrase ''risks to consumers'' in sections 1024(b)(1)(C) to include those risks to consumers that arise from conduct that violates the MLA might lead to a similar reading with respect to other statutes that, like the MLA, are not covered by sections 1024(b)(1)(A). But, as already explained, there is nothing in the statutory text to suggest that ''risks to consumers'' are somehow limited to conduct that is lawful and that ''risks to consumers'' can *never* include conduct that violates the law. It is also appropriate to step back and recognize that this is a ''slippery slope'' argument. ''Like all slippery-slope arguments, the . . . point can be inverted with equal logical force.''[45] *Not* exercising the Bureau's authority to identify these important risks to active-duty servicemembers and their families would be a slippery slope towards making the authority that Congress expressly conferred on the Bureau, to seek out ''risks to consumers,'' a dead letter. As discussed above, the Bureau believes that the very harmful conduct that Congress sought to prevent in the MLA, which the Bureau has the authority to remedy through its other authorities (specifically enforcement action), sits within the core of this authority. There could doubtless be debate about the outer limits of the authority, but that is simply because Congress chose to frame it in such flexible terms, and that is not a reason for the Bureau to boycott this core application of the authority.

The Bureau would note, in conclusion, that a common feature of the above arguments against the Bureau's authority is that they do not dispute the plain fact that conduct that violates the MLA presents risks to consumers. Instead, the arguments all implicitly rely on variations of a mistaken premise: that Congress could not have meant what it said when it used the words ''risks to consumers'' to confer examination authority on a consumer protection agency in the aftermath of a financial crisis. But it is ''a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts. This principle applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text.''[46]

IV. Analysis of Section 1025(b)(1)(C) (Very Large Banks and Credit Unions)

Section 1025(b)(1)(C) of the CFPA authorizes the Bureau, in relevant part, to conduct examinations of very large banks and credit unions for purposes of detecting and assessing ''risks to consumers'' that are ''associated'' with ''activities subject to'' Federal consumer financial laws. This requirement that there be an association with activities subject to Federal consumer financial laws is present in section 1025(b)(1)(C) but not section 1024(b)(1)(C), which narrows section 1025(b)(1)(C) in comparison to section 1024(b)(1)(C). The Bureau previously assumed that MLA-related issues could not be ''associated'' risks to consumers under section 1025(b)(1)(C). But as explained above, the activity of extending ''consumer credit'' under the MLA is a subset of the activity of extending ''consumer credit'' under TILA. Indeed, violations of the MLA can overlap with violations of TILA's disclosure requirements, as well as the CFPA's prohibition on deceptive acts or practices or other violations of Federal

[42] *City of Arlington,* 569 U.S. at 296.

[43] *United States* v. *Gaubert,* 499 U.S. 315, 319–20, 329–30 (1991).

[44] 10 U.S.C. 987(f)(6); 15 U.S.C. 1607(b).

[45] *B.H. ex rel. Hawk* v. *Easton Area Sch. Dist.,* 725 F.3d 293, 317 (3d Cir. 2013).

[46] *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2381 (2020) (Thomas, J.) (internal citations, brackets, and quotation marks omitted).

consumer financial law. The analysis under section 1025(b)(1)(C) of the CFPA is otherwise similar to that under section 1024(b)(1)(C) of the CFPA, and so there is no need to repeat it here.[47]

The Bureau recognizes the role of the prudential regulators in conducting MLA supervision, including examinations, at very large banks and credit unions. Applicable statutes grant the prudential regulators broad supervisory and examination powers, which they use for various purposes, including assuring the safety and soundness of supervised institutions, assuring compliance with laws and regulations at those institutions, and other purposes. By contrast, the Bureau's authority under section 1025(b)(1)(C) concerns a targeted purpose: Detecting and assessing those ''risks to consumers'' that are ''associated'' with ''activities subject to'' Federal consumer financial laws, such as TILA. Conducting examinations for that particular purpose is distinct from the prudential regulators' authority to conduct examinations for the purpose of assessing compliance with the MLA (or for safety and soundness or other purposes) —including the fact that the prudential regulators' purposes are not based on the association with Federal consumer financial law discussed above. Even though some of the activities in Bureau examinations may be similar to activities in prudential regulators' examinations, they are for a different purpose. Nothing in the CFPA or in this interpretive rule limits in any way, or should be deemed to limit in any way, the prudential regulators' consumer compliance examinations of very large banks or credit unions, or their subsidiaries, for the purpose of assessing compliance with the MLA.

Section 1025 has a number of provisions that promote coordination and efficiency among the Bureau and the prudential regulators. The agencies work with each other to minimize regulatory burden that may result from their complementary authorities, while ensuring the efficient and effective protection of covered borrowers.

V. Regulatory Matters

This is an interpretive rule issued under the Bureau's authority to interpret the CFPA, including under section 1022(b)(1) of CFPA, which authorizes guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws, such as the CFPA.[48]

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[49] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[50] The Bureau has also determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[51]

Pursuant to the Congressional Review Act,[52] the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Dated: June 16, 2021.

David Uejio,

Acting Director, Bureau of Consumer Financial Protection.

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[47] The Bureau's previous concerns that it lacked authority under section 1024(b)(1)(C) were also applicable to section 1025(b)(1)(C). But for the reasons already discussed in the context of section 1024(b)(1)(C), the Bureau no longer finds those arguments persuasive.

[48] 12 U.S.C. 5512(b)(1).

[49] 5 U.S.C. 553(b).

[50] 5 U.S.C. 603(a), 604(a).

[51] 44 U.S.C. 3501–3521.

[52] 5 U.S.C. 801 *et seq.*

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

RIN 3064–ZA19

Statement of Policy Regarding Minority Depository Institutions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final statement of policy.

SUMMARY: The FDIC is issuing its Statement of Policy Regarding Minority Depository Institutions. Section 308 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 established several goals related to encouraging, assisting, and preserving minority depository institutions. The FDIC has long recognized the unique role and importance of minority depository institutions and historically has taken steps to preserve and encourage minority-owned and minority-led financial institutions. The Statement of Policy updates, strengthens, and clarifies the agency's policies and procedures related to minority depository institutions.

DATES: The Statement of Policy is effective August 23, 2021.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

Section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[1] established several goals related to minority depository institutions (MDIs): (1) Preserving the number of MDIs; (2) preserving the minority character in cases of merger or acquisition; (3) providing technical assistance to prevent insolvency of institutions not now insolvent; (4) promoting and encouraging creation of new MDIs; and (5) providing for training, technical assistance, and education programs.

On April 3, 1990, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC Board and FDIC, respectively) adopted the Policy Statement on Encouragement and Preservation of Minority Ownership of Financial Institutions (1990 Policy Statement). The framework for the 1990 Policy Statement resulted from key provisions contained in Section 308 of FIRREA. The 1990 Policy Statement provided information to the public and minority banking industry regarding the

[1] Public Law 101–73, title III, § 308, Aug. 9, 1989, 103 Stat. 353, as amended by Public Law 111–203, title III, § 367(4), July 21, 2010, 124 Stat. 1556, *codified at* 12 U.S.C. 1463 note.