SQUIRE
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Is CFPB Curtailing its Own Supervisory Authority?

On August 10, 2018, the *New York Times* reported that the Consumer Financial Protection Bureau (the "Bureau") plans to stop conducting supervisory examinations for violations of the Military Lending Act[1] ("MLA").

As significant as that decision is in its own right, it has much broader implications. Companies subject to Bureau supervision now have the opportunity to push back on a wide range of supervisory activity, on the basis of the legal theory that must be the basis of the Bureau's decision.

According to the Times, Acting Director Mick Mulvaney has concluded that the Bureau does not have the authority MLA examinations, because "such proactive oversight is not explicitly laid out in" the Dodd-Frank Act[2]. Later reports noted that the Bureau will continue enforcing the MLA.

Enforcement, as people on both sides of the debate recognize, is not supervision. An agency begins an enforcement investigation only after developing some suspicion that a violation has occurred. Under the Dodd-Frank Act, whenever the Bureau demands information during an investigation, it must state what conduct constitutes the potential violatio[3]n. The information requested has to be "reasonably relevant" to the issues identified. [4]By contrast, a supervisory agency conducts an "examination" on an occasional basis, without necessarily having any expectations about what it might find. Examiners review files and activities in general, subject to certain limitations on scope. Sometimes an examination will uncover possible violations that will lead to enforcement activity, and the supervisory process can be an effective way for the Bureau to find out about violations. However, quite often an examination results in only a report, informing the company and the agency about what examiners found, and possibly recommendations for improvements. The Bureau has long used this mechanism to push companies toward the Bureau's preferred standards of conduct without having to go through enforcement.

This distinction has become relevant for the MLA because of a quirk in how the law is implemented. The MLA limits interest rates and imposes other restrictions on loans to servicemembers[5], and a 2013 amendment authorized the Bureau to enforce it against companies under the Bureau's purview[6]. However, the Bureau's broader authorities—including supervision—are focused on "federal consumer financial law."

The Dodd-Frank Act defines this concept to include various listed statutes like the Truth in Lending Act, as well as various other particular authorities noted in the definition.[7] Despite the 2013 amendment, the MLA is not part of "federal consumer financial law."

Despite that fact, the Bureau used to check on MLA compliance during ordinary supervisory examinations. It claimed authority to do that from a sort of catchall provision in the Dodd-Frank Act. The law tells the Bureau to examine covered companies to "assess[] compliance with the requirements of Federal consumer financial law"; to "obtain[] information about the[ir] activities and compliance systems or procedures"; and to "detect[] and assess[] risks to consumers and to markets for consumer financial products and services[8]." When Acting Director Mulvaney says supervision for MLA compliance is not "explicitly laid out," that is a reference to the first clause. Because the MLA is not federal consumer financial law, "assessing compliance" does not encompass an MLA review. However, "detecting and assessing risks" might. The loans subject to the MLA are certainly consumer financial products, and the Bureau previously seems to have thought a violation of the MLA would be a "risk[] to consumers."

If the Bureau has changed its position about examining for MLA compliance, the Bureau must no longer think this catchall provision is adequate authority. I have not seen the internal document that laid out the new theory. However, the reasoning must be that MLA violations are not the sort of "risk to consumers" for which the Bureau is allowed to monitor. In other words, then, Mr. Mulvaney believes the Bureau is only authorized to monitor for the risks that come from violations of federal consumer financial law.

As significant as this is for MLA oversight, its broader consequences are even more important. The Bureau relies on the "detecting and assessing risks" authority in almost every regular examination. A survey of the Bureau's Supervisory and Examination Manual, in its "product-based procedures," reveals that at the end of every module there is a section entitled "other risks to consumers." Some of these involve other laws that the Bureau might have a policy interest in. For example, in debt collection examinations, the Bureau looks at calling practices, especially the use of autodiale[9]rs. This portion of the examination is surely meant to uncover violations of the Telephone Consumer Protection Act. In mortgage servicing, examiners check transactions for compliance with the Servicemembers Civil Relief [10]Act. Neither of these laws is part of federal consumer financial law, and the Bureau does not even enforce them[11]. The Bureau evidently expects to refer any violations it finds to the appropriate regulators. Whether this use of the Bureau's supervision authority is good policy is debatable.

In any case, to do these examinations the Bureau is using the same "detecting and assessing risks" authority that it apparently now thinks does not cover MLA examinations.

More fundamentally, the Bureau's ability to screen for possible, but uncertain, violations of federal consumer financial law is also at risk. Examiners following the "other risks" procedures regularly ask questions about topics like underwriting practices, such as whether a lender makes loans with a high risk of default; crediting and posting processes; consumer complaint processes; and more. The Auto Lending chapter provides a typical explanation about these procedures: "[T]he examination process also will include assessing other risks to consumers that are not governed by specific statutory or regulatory provisions.These risks may include potentially unfair, deceptive, or abusive acts or practices."[12] In other words, examiners use the "detecting and assessing risks" authority to look for activities or practices that might rise to the level of unfair, deceptive, or abusive acts or practices ("UDAAP"), or might not. Determining whether something is a UDAAP is often complicated; it can depend on a subtle analysis of the full set of circumstances; and there are many, many boundary cases on which reasonable minds can disagree. Many of the activities that examiners scrutinize under the "other risks" procedures are not necessarily illegal on their own, but might be in some situations. If examiners are restricted to checking on "compliance with Federal consumer financial law," they may not be able to check for activities that are not, in any obvious way, non-compliant. Companies subject to supervision might now try to limit the scope of Bureau examinations, using arguments like this.

One possible answer would be that the broader "other risks" procedures probe conduct that may indeed violate federal consumer financial law (namely the Dodd-Frank Act's prohibition on UDAAPs), while MLA examinations target conduct that does not. But this distinction is not as clear as it seems. It is quite conceivable that conduct violating some other law—whether the MLA, the Servicemembers Civil Relief Act, or something else—could also, in some circumstances, be a UDAAP[13]. So, if examiners are looking for conduct that may or may not violate the UDAAP prohibition, checking on MLA compliance might not be unreasonable. At any rate, it seems about as reasonable as examining other activities that are not necessarily even unlawful. So an interpretation under which the Bureau cannot examine MLA compliance also casts doubt on whether the Bureau can do its general "other risks" examinations.

A further, broad consequence may involve the Bureau's policymaking. Historically, the Bureau has used large-volume data sets to conduct economic research, on which it relies heavily in its rulemaking and other policy activities. For example, in a rule barring certain practices among small-dollar lenders, the Bureau relied on a large set of account-level data on payday loans. That rule also relied on checking-account transaction data. The Bureau also has data sets on credit-card transactions and more[14]. The Bureau acquired much of this data using its "detecting and assessing risks" supervisory authority[15]. Yet if that part of the statute does not permit the Bureau to examine for MLA compliance, it seems even less likely to authorize a broad-scope collection of general account data. Perhaps institutions will continue for a while to comply with requests for data. In principle, though, a company that wants to stop could object to supervisory data requests, on the basis of the Bureau's theory about MLA examinations.

The Bureau does collect some data using a different authority, which it calls "market monitoring[16]." This authority, too, is insecure if the Bureau cannot examine for MLA compliance. The relevant provision directs the Bureau to "monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services[17]." The language is strikingly similar to the text of the supervisory authority that the Bureau apparently thinks does not encompass MLA violations.

The Bureau's new attitude about the MLA part of examinations might seem, on its face, limited to small-dollar loans to servicemembers. All told, its implications are much broader. The Bureau is exposing itself to extensive attacks on its ability to conduct supervision, and even to gather information more broadly. We may be about to see a large new front open up in the struggle over federal consumer protection regulation.

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Endnotes

1 https://www.nytimes.com/2018/08/10/us/politics/mulvaney-military-lending.html

2 https://www.nytimes.com/2018/08/10/us/politics/mulvaney-military-lending.html

3 12 USC 5562(c)(2).

4 CFPB v. The Source for Public Data, L.P.,, No. 17-10732 (5th Cir. Sept. 6, 2018), https://scholar.google.com/scholar_case?case=8789638669002971658&q=Consumer+Financial+Protection+Bureau+v.+The+Source+for+Public+Data,&hl=en&as_sdt=400003&as_ylo=2018.

5 10 U.S.C. 987

6 Pub. L. 112-239, div. A, tit. VI, 662(b) (codified at 10 USC 987(f)(6).

7 12 USC 5481(14).

8 12 USC 5514(b)(1); see also 5515(b)(1).

9 Supervision & Examination Manual, Debt Collection p.14.

10 Supervision & Examination Manual, Mortgage Servicing p.12.

11 50 USC 4041 (SCRA enforcement); 47 USC 227 (TCPA).

12 Supervision & Examination Manual, Auto Finance p.6.

13 See FTC Policy Stmt. on Unfairness, n.28, appended to Int'l Harvester Co., 104 FTC 949, 1070 (1984), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

14 See generally CFPB, "Sources and Uses of Data at the Bureau of Consumer Financial Protection," pp. 43-45 (Sept. 2018), at https://www.consumerfinance.gov/data-research/research-reports/sources-and-uses-data-bureau-consumer-financial-protection/.

15 GAO, Rep. No. GAO-14-758, pp. 17-19 (Sept. 2014).

16 GAO Rep. No. GAO-14-758, p.7.

17 12 USC 5512(c)(1).