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### **Servicemembers Civil Relief Act**

A series of proposed legislative changes would codify many of the positions that the DOJ has taken in recent Servicemembers Civil Relief Act settlements. Even if Congress declines to implement the Justice Department's proposed changes, however, this legislative package offers a window into what the DOJ expects from financial institutions—and may itself impose through enforcement.

### **BNA INSIGHTS: Expanding the SCRA, If the DOJ Has Its Way**



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The last few weeks of 2015 saw two important legislative developments relating to the Servicemembers Civil Relief Act (SCRA). First, in November, the Department of Justice (DOJ) submitted a legislative package to Congress with proposed revisions to several existing laws that protect service members, including several significant changes to the SCRA.<sup>1</sup> If accepted by

<sup>1</sup> Dep't of Justice, Servicemembers Legislative Package, 114th Congress, <http://www.justice.gov/crt-military/file/792636/download> [hereinafter DOJ SCRA Legislative Package].

Congress, these changes would codify many of the positions that the DOJ has taken in recent SCRA settlements. Even if Congress declines to implement the DOJ's proposed changes, however, this legislative package offers a window into what the DOJ expects from financial institutions—and may itself impose through enforcement. Of particular note, the DOJ's legislative package would revise the following sections of the statute:

- the default judgment provisions of the SCRA, including the affidavit requirement and expectations for attorneys appointed to represent service members;
- the definition of military orders under the SCRA;
- the notice requirement for borrowers seeking the SCRA's interest rate benefit;
- expanded protections under installment sales contracts and residential and motor vehicle leases;
- enforceability of arbitration requirements;
- DOJ's investigatory and enforcement authority.

Second, effective Dec. 1, the House of Representatives Office of the Law Revision Counsel (OLRC) eliminated the entire appendix to Title 50 of the U.S. Code and recodified the SCRA into a different section of the U.S. Code.<sup>2</sup> The statute itself was not amended, and the recodification results in no substantive changes. Changes to the citations, however, impose burdens related to the updating of policies, procedures, and other documentation.

## DOJ Proposed SCRA Legislative Revisions

In 2011, in the midst of the National Mortgage Settlement, the DOJ submitted its first set of proposed amendments to the SCRA.<sup>3</sup> Focused at that time on home mortgage servicing, the DOJ requested that Congress: (1) increase the civil penalties for violations, (2) require a party seeking a default judgment against a service member to check the Department of Defense's (DOD) Defense Manpower Data Center (DMDC database) database to ascertain the service member's active-duty status, (3) clarify the retroactivity of provisions of the SCRA establishing a private right of action and the Attorney General's authority to enforce the SCRA, and (4) grant the Attorney General authority to issue civil investigative demands (CIDs) to compel production of documents in SCRA investigations.

In its 2015 proposed revisions, the DOJ revived a number of its 2011 requests and proposed additional amendments arising out its recent SCRA interest rate and motor vehicle repossession settlements. In addition, echoing a provision in the new Military Lending Act rules, the DOJ's proposed revisions seek to invalidate mandatory arbitration clauses for service members.

<sup>2</sup> Office of the Law Revision Counsel United States Code, United States House of Representatives, Editorial Reclassification: Elimination of Title 50, Appendix, United States Code (2015) <http://uscode.house.gov/editorialreclassification/t50a-elim/index.html> [hereinafter OLRC Reclassification].

<sup>3</sup> Letter from Ronald Weich, Assistant Attorney General, United States Department of Justice, to the Honorable Joseph R. Biden, Jr., President, United States Senate (Sept. 20, 2011), <http://www.justice.gov/sites/default/files/crt/legacy/2011/09/21/letterslegprop.pdf>.

## Amendments to Default Judgment Provisions

Section 3931<sup>4</sup> of the SCRA states that “the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit” indicating whether the defendant is in military service or stating that the plaintiff is unable to determine whether the defendant is in military service. In drafting the current version of Section 3931, Congress put the onus on the court to require the affidavit rather than on the plaintiff to file it. In recent SCRA settlements, however, the DOJ has taken the position that the burden is on a plaintiff to file a Section 3931 affidavit, and has also required plaintiffs to review both the DMDC database<sup>5</sup> and any other information in the plaintiff's possession when executing the affidavit.<sup>6</sup>

The DOJ's proposed statutory changes reflect this burden-shifting with respect to default judgments. The DOJ proposes to require the plaintiff to file a military status affidavit as a predicate to seeking a default judgment.<sup>7</sup> Further, the DOJ's suggested revision would mandate that plaintiffs conduct a “diligent and reasonable investigation” regarding the defendant's military status, including a search of “available Department of Defense records and any other information available to the plaintiff.”<sup>8</sup> It is important to note that Section 3931 applies to all plaintiffs in all lawsuits, including child custody cases and other lower-level civil disputes.<sup>9</sup> Imposing this obligation on individual plaintiffs in such cases raises serious policy questions well beyond the scope of what Congress contemplated in enacting the statute.

Section 3931 also requires the court to appoint an attorney to represent a defendant if it appears that the defendant is in military service (often referred to as an attorney ad litem).<sup>10</sup> The DOJ proposes to amend the statute to specify the expectations of such court-appointed counsel, including that they contact the defendant (and report to the court regarding these efforts), assert the defendant's right to obtain a stay, and request that the court adjust an obligation unless directed otherwise by the defendant.<sup>11</sup>

## Definition of Military Orders

Certain provisions of the SCRA—most notably Section 3937 regarding the interest rate cap and Section

<sup>4</sup> Here and throughout, we use the statutory numbers under the OLRC's recent recodification of the SCRA. For a quick-reference chart matching the prior section numbers from the Appendix to Title 50 to the new numbers, please see [http://www.buckleysandler.com/uploads/1082/doc/SCRA\\_Recodification\\_Chart\\_BuckleySandler.pdf](http://www.buckleysandler.com/uploads/1082/doc/SCRA_Recodification_Chart_BuckleySandler.pdf).

<sup>5</sup> The DMDC database is available at [https://www.dmdc.osd.mil/appj/scra/single\\_record.xhtml](https://www.dmdc.osd.mil/appj/scra/single_record.xhtml).

<sup>6</sup> Consent Order ¶ 36(a), *United States v. Sallie Mae, Inc.*, No 1:14-cv-00600-UNA (D. Del. May 13, 2014), ECF No. 1-1 (“... Defendants or their agents shall search the DMDC and review all information in their possession, custody, or control for military orders to determine if the borrower is in military service.”) [hereinafter Sallie Mae Consent Order].

<sup>7</sup> DOJ SCRA Legislative Package, *supra* note 2, at 9.

<sup>8</sup> *Id.*

<sup>9</sup> 50 U.S.C. § 3931(a) (“This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.”).

<sup>10</sup> DOJ SCRA Legislative Package, *supra* note 2, at 10.

<sup>11</sup> *Id.*

3955 regarding the termination of residential or motor vehicle leases—reference “orders,” a term that is currently undefined in the statute. The DOJ proposes to add “military orders” to Section 3911 and to define this term to include any “official military orders, *or any notification, certification, or verification from the Secretary or the servicemember’s commanding officer*, with respect to the servicemember’s current or future military status.”<sup>12</sup> This language appears to be modeled on a recent SCRA consent order expanding the definition of military orders to include “any letter on official letterhead from a servicemember’s commanding officer that includes contact information” and the name, date of birth/Social Security number, and period of military service for the servicemember.<sup>13</sup>

If Congress accepts it, the DOJ’s proposed language is likely to create confusion for servicers. Financial institutions already face challenges in assessing documents provided by customers to demonstrate military status. The DOJ’s proposed changes would expand vastly the universe of documents eligible for that purpose. Although the DoD has created the online DMDC database to determine active-duty status and assist in verifying the authenticity of military orders, the DMDC admits that its database has a “small error rate.” Servicers presented with documents that may be ambiguous as to the period of active duty or potentially inauthentic, and a response from the DMDC database that does not support them, will be under enormous pressure to err on the side of extending protections as broadly as possible—especially given the DOJ’s approach to treating the SCRA as a strict liability statute and imposing significant penalties for errors.

### Sufficiency of Oral Notice to Invoke Interest Rate Benefit

Section 3937, which caps a service member’s interest rate for debts entered into prior to active-duty military service at 6 percent, requires that a borrower requesting the benefit submit: (1) a written request for the interest rate reduction and (2) a copy of orders calling him or her to active duty service.<sup>14</sup> As discussed above, the DOJ proposes to relax the latter by allowing for documents other than orders to satisfy the requirement. The DOJ also proposes to remove the written notice requirement altogether, and require servicers to track and honor oral requests for the interest rate benefit.<sup>15</sup> Providing for oral requests has the potential to create significant challenges in determining what constitutes a request and whether the service member has requested the interest rate benefit.

In the same section, the DOJ also proposes to require creditors who receive requests for the interest rate benefit to search the DMDC database to confirm the borrower’s military service.<sup>16</sup> If the DMDC database confirms military service, the creditor would be required to apply the interest rate cap as of the date the DMDC da-

tabase indicates that the borrower was called to military service.<sup>17</sup>

### Provisions Relating to Installment Sales Contracts and Leases

The DOJ’s proposal would extend Section 3952’s protection against repossession for installment sales contracts for an additional year after a borrower leaves military service.<sup>18</sup> It would also broaden the eligibility requirements for the lease termination provision to include individuals ordered to move onto a military base and make the lease termination rights unwaivable by the servicemember.<sup>19</sup>

### Enforceability of Arbitration Requirements

The DOJ proposes to add certain limitations on the use of arbitration to settle disputes with service members. In particular, the DOJ’s suggested revisions would only permit the enforcement of a mandatory arbitration clause if the service member agreed to arbitration *after* the controversy arose.<sup>21</sup> Unlike other sections of the SCRA, such as the foreclosure, repossession, and interest rate provisions, limits on arbitration would apply to contracts entered into both before and after entering military service. While this language may be more pro-arbitration than the similar limitations in the recently enacted Military Lending Act rules, it nevertheless reflects another area where the government is working to limit the use of arbitration in service member-related disputes.

### Expansion of the DOJ’s Investigatory and Enforcement Authority

Finally, as it did in its 2011 proposed amendments, the DOJ proposes to amend the SCRA to grant the Attorney General authority to issue CIDs in connection with investigations under the SCRA.<sup>21</sup> The specific language proposed is similar to the language conferring such authority under the False Claims Act, although the proposed SCRA revisions would not grant the DOJ the authority to compel oral testimony or sworn answers to interrogatories. In addition, the DOJ again proposes to double the currently authorized amount of civil penalties for violations of the SCRA—from a maximum of \$55,000 for a first-time violation to \$110,000, and from a maximum of \$110,000 to \$220,000 for subsequent violations.<sup>22</sup>

### Recodification of the SCRA

In addition to the DOJ’s proposed legislative changes discussed above, the OLRC separately changed the location of the SCRA within the United States Code.<sup>23</sup> Since the 1940 edition of the Code, Title 50 has contained an appendix where emergency-related or tempo-

<sup>12</sup> *Id.* at 14 (emphasis added).

<sup>13</sup> Sallie Mae Consent Order, *supra* note 6, ¶ 35(b).

<sup>14</sup> 50 U.S.C. § 3937(b)(1).

<sup>15</sup> DOJ SCRA Legislative Package, *supra* note 1, at 15.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.* at 17-19.

<sup>21</sup> *Id.* at 20.

<sup>21</sup> *Id.* at 13.

<sup>22</sup> *Id.* at 12.

<sup>23</sup> OLRC Reclassification, *supra* note 6.

rary laws were codified.<sup>24</sup> However, a small number of these laws—including the SCRA—have endured since World War II. Recognizing after 75 years that the provisions of the SCRA are “permanent,” the OLRC moved them from the appendix to the body of Title 50, beginning at 50 U.S.C. § 3901.<sup>25</sup>

This recodification has no practical impact upon creditors or service members, as the actual text of the SCRA is unchanged. However, financial institutions may want to revisit their SCRA policies, procedures and other documents, as well as any active litigation, to ensure that they are making current and accurate references to the new Code sections.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

## Conclusion

While financial institutions have no immediate burdensome takeaways from these year-end developments, they would be well-advised to update their documentation to reflect the transfer of the SCRA from the appendix to Title 50 (now eliminated) to its subject-matter title within the Code. In the longer term, however, implementation of the DOJ’s proposed sweeping changes to the SCRA would significantly increase compliance and potential enforcement costs. In this regard, the placement of the SCRA in Title 50 accurately reflects the reality of its permanence, but its coincidence with the DOJ’s legislative packet portends its enduring impact and the reach of service member protections.