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EDITOR'S NOTE: COMPELLING INTEREST

Steven A. Meyerowitz

**A NEW BALANCING ACT: THE DOJ PROVIDES NEW DIRECTION REGARDING
THE SCRA'S INTEREST RATE BENEFIT**

Kirk D. Jensen, Jeffrey P. Naimon, and Sasha Leonhardt

AN EVER CLOSER BANKING UNION IN THE EU?

Edite Ligere

FUNDAMENTALS OF MIDDLE-MARKET ACQUISITION FINANCING

Gregory A. Klamrzynski and Cari A. Grieb

BANKING BRIEFS

Terence G. Banich



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A New Balancing Act: The DOJ Provides New Direction Regarding the SCRA's Interest Rate Benefit

*Kirk D. Jensen, Jeffrey P. Naimon, and Sasha Leonhardt**

The authors review new developments under the Servicemembers' Civil Relief Act that are of particular interest to creditors.

When Congress reenacted the Servicemembers' Civil Relief Act ("SCRA") in 2003, Congress designed the SCRA to balance the interests of active duty servicemembers and their creditors, as it had done under the SCRA's predecessor legislation. One of the benefits provided by the SCRA is a six-percent cap on interest for credit obligations a servicemember incurs prior to entering active duty military service. Drawing upon decades of real-world experience, and consistent with the intended balancing of interests, Congress placed the burden on servicemembers to provide documentation showing eligibility for the interest rate benefit. Specifically, Congress crafted the SCRA to require a servicemember to submit "written notice and a copy of the military orders calling the servicemember to military service."¹

Since the SCRA became law in 2003, the prevailing interpretation of this requirement was that a servicemember was required (1) to request the SCRA's interest rate benefit in writing; and (2) to provide a copy of the orders calling the servicemember to active duty (*i.e.*, calling the servicemember from civilian life to military service). A recent settlement between the Department of Justice ("DOJ") and Sallie Mae now signals that the DOJ interprets the SCRA's requirements differently.² Instead of a written request, mere written notice of military service appears sufficient. And instead of the military orders calling the borrower to active duty, the DOJ has taken the position that any document from a military or Department of Defense source that indicates active duty status is sufficient. The DOJ also appears to expect creditors to take greater

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¹ 50 U.S.C. app. § 527(b)(1).

² *United States v. Sallie Mae, Inc.*, no. 1:99-mc-09999 (D. Del. Sept. 29, 2014) [hereinafter "*Sallie Mae Consent Order*"]. The consent order was announced by DOJ and filed on May 13, 2014.

steps to elicit qualifying documentation from servicemembers who have indicated military service in some way but have not provided qualifying documents. This is a substantial departure from the prevailing interpretation in the financial services industry and elsewhere. Creditors and servicers should read the Sallie Mae Complaint and Consent Order with caution.

BALANCING THE RIGHTS OF CREDITORS AND SERVICEMEMBERS ALIKE

To understand Congress's intent in passing and later reenacting the SCRA's interest rate benefit, it is necessary to understand the balancing of servicemember and creditor interests central to the structure of the SCRA itself. In passing the SCRA, Congress was clear in its goal of establishing parity between servicemembers disadvantaged by military service and their creditors—Congress never intended to create a windfall for servicemembers. There can be no doubt that the SCRA confers significant benefits upon servicemembers;³ however, these benefits are one part of a statutory framework that balances servicemember and creditor interests alike. Just as the SCRA protects servicemembers, the law was “also designed to protect rights of individuals having causes of action *against* persons in the military service.”⁴

Balancing the interests of servicemembers and creditors was forefront in Congress's mind when it enacted the Soldier's and Sailor's Civil Relief Act (“SSCRA”) and subsequently. In 1917, Congressman Edwin Webb, Chair of the House Committee on the Judiciary, explained that the SSCRA was intended to effect “even-handed justice between the creditor and the soldier,”⁵ by giving servicemembers meaningful benefits, while also offering reasonable protection to creditors that servicemembers would continue to honor their financial obligations.⁶ Recognizing that the moratory⁷ legislation that had

³ See, e.g., James P. Pottorff, *Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act*, 132 MIL. L. REV. 115, 116 (1991) (“The premise underlying the SSCRA is that service members should not be disadvantaged either legally or financially when called to active service.”); 50 U.S.C. app. § 502(1) (stating that the SCRA exists to enable servicemembers “to devote their entire energy to the defense needs of the Nation”).

⁴ THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, SERVICEMEMBERS CIVIL RELIEF ACT GUIDE, § 1-2, at 1-3 (2006) [hereinafter “JAG SCRA GUIDE”] (emphasis in original) (citing *Ray v. Porter*, 464 F.2d 452 (6th Cir. 1972)).

⁵ 55 CONG. REC. 7787, 7787 (statement of Rep. Webb) (Oct. 4, 1917).

⁶ Robert H. Skilton, *The Soldiers' and Sailors' Civil Relief Act of 1940 and the Amendments of 1942*, 91 U. PA. L. REV. 177, 179–80 (1942).

protected servicemembers in earlier conflicts was “arbitrary, inelastic, inflexible”—and failed to address adequately the needs of both servicemembers and creditors⁸—the Committee instead granted courts significant discretion to resolve servicemember-creditor conflicts with a goal of preserving the pre-service status quo.⁹ The SSCRA was enacted in 1918, but expired after the end of World War I.¹⁰

The balancing of interests on which the original SSCRA was premised has been maintained through every subsequent iteration of the Act. As World War II loomed, the SSCRA was reenacted in 1940 in the same form—and containing the same balancing of interests that was central to the 1918 Act.¹¹ The Act was amended significantly in 1942 to address social, military, and economic changes that had occurred since 1942, but the amendments were expressly designed to maintain the balancing of interests on which the 1918 and 1940 Acts were based.¹²

Following the September 11, 2001 terrorist attacks and subsequent war on terror, and after careful deliberation and decades of experience under the SSCRA, Congress reenacted the statute as the Servicemembers’ Civil Relief Act

⁷ Unlike the SSCRA’s and SCRA’s careful balancing, statutes that had protected members of the military during earlier conflicts exclusively posed a moratorium on any actions that may disadvantage a servicemember. See H.R. REP. NO. 108-81, at 32 (2003).

⁸ 55 CONG. REC. 7787, 7787 (statement of Rep. Webb) (Oct. 4, 1917).

⁹ *Id.* at 180 (“The solution was to throw the entire matter upon the courts, by giving them discretion to decide upon the grant of moratoria in individual cases, subject to certain guides defined in the statute. . . . It had both the advantages and disadvantages of elasticity.”); see also Mansfield Ferry, Samuel Rosenbaum, & John H. Wigmore, *The History of the Soldiers’ and Sailors’ Civil Relief Act (With Explanatory Notes to the Different Sections and a Discussion of its Constitutionality)*, 3 MASS. L.Q. 204, 207–08 (1918).

¹⁰ Soldiers’ and Sailors’ Civil Relief Act, ch. 20, 40 Stat. 440 (1918).

¹¹ Soldiers’ and Sailors’ Civil Relief Act, ch. 888, 54 Stat. 1178 (1940); see also H.R. REP. NO. 108-81, at 33 (2003) (noting that in 1940 “Congress re-enacted the [1918] SSCRA almost verbatim”); Amy J. McDonough, Gregory M. Huckabee, & Christopher C. Gentile, *Crisis of the Soldiers’ and Sailors’ Civil Relief Act: A Call for the Ghost of Major (Professor) John Wigmore*, 43 MERCER L. REV. 667, 670 (1992) (same).

¹² H.R. REP. NO. 108-81, at 34 (quoting *Soldiers’ and Sailors’ Civil Relief Act: Hearings on H.R. 7029 Before the House Committee on Military Affairs*, 77th Cong., 11 (1942) (Maj. William Pertlow)); see also M.R. Neifeld, *Consumer Credit and the Soldiers’ and Sailors’ Civil Relief Act*, 227 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 43, 43 (1943) (observing that the Act did not create an opportunity for servicemembers to avoid legitimate obligations, but rather provided courts with discretion to provide temporary relief when military service materially affected a debtor’s ability to comply with obligations).

of 2003.¹³ Shortly before the SCRA was reenacted in 2003 (and over 80 years after the original SSCRA was passed), then-Acting Assistant Secretary of Defense Craig W. Duehring told a subcommittee of the Senate Committee on Veterans' Affairs that "Congress addressed these problems [faced by servicemembers] adequately and equitably through the Act's *skillfully crafted balance* among the needs of our nation for a strong national defense, the needs of Servicemembers—and their families—for security in their personal affairs, and the needs of those who have dealt with and depend upon Servicemembers for fulfillment of their obligations."¹⁴

Congress's focus on balance is evident in several provisions of the final statutory text. The interest rate provision, like many sections of the Act, provides that the benefit may be avoided by creditors if the servicemember's military service does not materially affect the servicemember's ability to repay the obligation.¹⁵ The SCRA also tolls statutes of limitations for any cause of action "by *or against* the servicemember."¹⁶ And in the statutory language outlining the overall purpose of the SCRA, Congress indicated that its goal was the "temporary [not permanent] suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."¹⁷

Courts interpreting the SCRA have similarly sought to balance the rights of servicemembers and their creditors. In *Boone v. Lightner*,¹⁸ the U.S. Supreme Court mandated that the SCRA "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens

¹³ Servicemembers Civil Relief Act of 2003, Pub. L. No. 108-189, 117 Stat. 2835 (subsequently amended).

¹⁴ H.R. REP. NO. 108-81, at 51 (2003) (quoting Statement of Craig W. Duehring, Acting Assistant Secretary of Defense, Reserve Affairs, Department of Defense, *H.R. 5111, The Servicemembers' Civil Relief Act and H.R. 4017, the Soldiers' and Sailors' Civil Relief Equity Act, Hearings Before the Subcommittee on Benefits of the Committee on Veterans Affairs, House of Representatives*, 107th Cong., 2d Sess. (July 24-25, 2002) (Serial No. 107-38), at 3-4 (emphasis added).

¹⁵ 50 U.S.C. app. § 527(c). Several other sections of the SCRA use this "material effects" language to moderate the impact of the SCRA upon non-servicemembers. *See, e.g., id.* §§ 521(g)(1)(A) (default judgment), 522(b)(2)(A) (stay of proceedings), 523(b)(2) (fines and penalties under contracts), 524(a) (stay or vacation of judgments, attachments, and garnishments), 531(b)(1) (eviction), 533(b) (foreclosure), 536(c) (life insurance policy), 537(b) (storage liens), 538 (protection for dependents).

¹⁶ *Id.* § 526(a) (emphasis added).

¹⁷ *Id.* § 502(2).

¹⁸ 319 U.S. 561 (1943).

of the nation.”¹⁹ However, in that very same paragraph, the Court tempered its broad interpretive mandate—and ultimately ruled against the servicemember—by holding that “discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.”²⁰

Following the Supreme Court’s lead in *Boone*, several lower courts have also held that the SCRA is fundamentally a balancing statute. In *Ricard v. Birch*,²¹ the Sixth Circuit held that, in addition to protecting servicemembers, the SCRA has a “parallel purpose . . . to protect the rights of individuals having causes of action against members of the armed forces.”²² Similarly, in *Engstrom v. First National Bank of Eagle Lake*,²³ the court held, “Although the act is to be liberally construed it is not to be used as a sword against persons with legitimate claims.”²⁴ In *Walters v. Nadell*,²⁵ the court stated, “Congress enacted the SCRA as a shield to protect servicemembers from having to respond to litigation while in active service Here, plaintiff is seeking to transform the SCRA into a sword to preserve his lawsuit without having timely invoked its provisions.”²⁶ In *George P. v. Superior Court*,²⁷ another court noted that “[T]he SCRA is a shield, not a sword. The goal of preventing a servicemember from being disadvantaged by his or her service to the country is not furthered by giving servicemembers an unwarranted advantage over civilian litigants.”²⁸ And in *Keefe v. Spangenberg*,²⁹ the court weighed the inconvenience to a servicemember of proceeding with trial while on active duty against “the needs and interests of all parties,” including the non-servicemember plaintiff, and declined to postpone trial until the end of the defendant’s military service.³⁰

Even the military itself acknowledges Congress’s intent to create balance,

¹⁹ *Id.* at 575.

²⁰ *Id.*

²¹ 529 F.2d 214 (4th Cir. 1975).

²² *Id.* at 216 (citing *Ray v. Porter*, 464 F.2d 452, 455 (6th Cir. 1972)).

²³ 47 F.3d 1459 (5th Cir. 1995).

²⁴ *Id.* at 1462 (citing *Slove v. Strohm*, 236 N.E.2d 326, 328 (Ill. App. Ct. 1968)).

²⁵ 481 Mich. 377, 385 (2008).

²⁶ *Id.* at 386.

²⁷ 127 Cal. App. 4th 216 (Cal. Ct. App. 2005).

²⁸ *Id.* at 225; see also *Lutes v. Alexander*, 421 S.E.2d 857, 864 (Va. Ct. App. 1992) (“The SSCRA is meant to act as a shield, not a sword, for servicemen.”).

²⁹ 533 F. Supp. 49 (W.D. Okla. 1981) (emphasis added).

³⁰ *Id.* at 50; see also *Diamond v. United States*, 344 F.2d 703, 706 (Ct. Cl. 1965) (declining to expand the SSCRA’s protections to include a period of “constructive military service” due to the military’s alleged unlawful rejection of his application for reenlistment).

rather than a windfall, for servicemembers. In the official Army Judge Advocate General's School Guide to the SCRA, the authors note that the SCRA "does not excuse a servicemember from his/her obligations, but it will level the playing field so that military personnel are not disadvantaged because of their commitment to our nation."³¹ The JAG Guide goes on to say, "The Act is not a panacea, however, for every legal problem of a civil nature a servicemember might face."³² And later, the JAG Guide notes, "[T]he Act 'may not be employed to enable one who had flouted his obligations in civilian life to obtain indefinite delay.'"³³ In other words, Congress designed the SCRA not only to protect servicemembers and their interests, but also to protect creditors to whom servicemembers owe obligations.³⁴

THE SCRA'S INTEREST RATE BENEFIT: THE HISTORICAL VIEW

To understand the new standard signaled by the Sallie Mae Complaint and Consent Order, it is necessary to understand how the financial services industry and others, including other federal government agencies and other authorities, have previously understood the requirements of the SCRA's interest rate benefit.

Of the many revisions in 2003, Congress made several important changes to the interest rate protection that was first added to the statute in 1942. Under the SCRA's interest rate benefit, a servicemember may limit the amount of interest charged on any pre-service debt to six percent.³⁵

However, this is not—and never was—an automatic benefit for servicemembers. In World War II, there was no way for a creditor to determine if an individual borrower was in military service if the borrower did not notify the creditor. In 2003, Congress specifically codified the longstanding, practical requirement since 1942 that a borrower must provide both a copy of the orders calling the servicemember to active duty and a written request to receive the interest rate benefit. Specifically, Section 527(b)(1) states:

In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall

³¹ JAG SCRA GUIDE, *supra* note 4, § 1-2 at 1-3.

³² *Id.*

³³ *Id.* (quoting *Franklin Soc. For Home-Building & Sav. v. Flavin*, 40 N.Y.S.2d 582, 583, *aff'd*, 50 N.E.2d 653 (1943)).

³⁴ *See, e.g., id.* ("[T]he Act is also designed to protect rights of individuals having causes of action *against* persons in the military service." (emphasis in original) (citing *Ray v. Porter*, 464 F.2d 452 (6th Cir. 1972); *Ricard v. Birch*, 529 F.2d 214 (4th Cir. 1975)).

³⁵ *Id.* § 527(a).

provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service.³⁶

The statutory text specifically requires a servicemember to provide a creditor with two distinct documents to be eligible for the SCRA interest rate benefit: (1) written notice of SCRA eligibility (*i.e.*, a written request for SCRA benefits), and (2) a set of military orders that call the servicemember to active duty. As enacted, the language seems clear that the written notice must be a separate document from the military orders.

Once a servicemember provides the written request and active duty orders, the creditor must implement the interest rate benefit. The servicemember receives the benefit not just from the date that the servicemember provides documents, but for the servicemember's entire period of military service.³⁷ Reservists can enjoy the interest rate benefit beginning when they receive orders calling them to military service.³⁸ All interest that would have been charged under the original contract but for the interest rate benefit is forgiven, not deferred, during military service.³⁹ The SCRA also prohibits creditors from accelerating the repayment of principal to maintain the same monthly payment rate.⁴⁰

Written Notice

Of all of the areas where Congress created balance in the SCRA, the interest rate provision is one of the most contested—and most important—to servicemembers and government agencies. The interest rate provision of the SCRA requires a servicemember to provide military orders calling the servicemember to military service as well as “written notice.”⁴¹ Written notice, however, has historically been understood to have two distinct parts: it must be a written request for SCRA eligibility, and it must be a separate document provided in addition to the military orders.

Written Notice as a Request for SCRA Eligibility

Historically, and under the statutory language, the SCRA's “written notice”

³⁶ *Id.* § 527(b)(1).

³⁷ *Id.* § 527(b)(2).

³⁸ *Id.* § 516(a).

³⁹ *Id.* § 527(a)(2).

⁴⁰ *Id.* § 527(a)(3).

⁴¹ *Id.* § 527(b)(1).

provision has been understood to require a servicemember to provide a creditor with written notice *of eligibility* for the SCRA's interest rate benefit, and not merely written notice that the servicemember is on active duty.

When compared to the other SCRA protections, the interest rate benefit is perhaps the most challenging to apply.⁴² Creditors must:

- (1) determine when a servicemember entered military service;
- (2) determine whether the debt existed before or after military service;⁴³
- (3) limit all interest—including “service charges, renewal charges, fees, or any other charges (except bona fide insurance)” —relating to the debt to six percent;⁴⁴
- (4) apply the benefit retroactively to when the servicemember entered military service;⁴⁵ and
- (5) apply the benefit proactively until the servicemember's orders expire.⁴⁶

Not only is this a difficult benefit for creditors to apply, but to add to the confusion servicemembers provide military orders to creditors for a number of different reasons. For example, a servicemember may provide military orders as evidence of employment, evidence of income, to obtain a deferment, to refinance debt, to prove that real property is owner-occupied in a mortgage setting, or to obtain a new loan. Therefore, a creditor needs to receive a servicemember's request for SCRA benefits to know exactly why a servicemember is providing military orders.

Congress appreciated the challenges imposed upon creditors in applying the interest rate benefit. Rather than start from scratch in establishing a way for servicemembers to obtain the interest rate benefit, Congress sought to preserve the lessons learned during the first Gulf War:

⁴² *E.g.* H.R. 4763, *Servicemembers' Civil Relief Act: Hearing before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs*, 102nd Cong. 182 (1992) (written testimony of Principal Deputy Assistant Secretary of Defense (Reserve Affairs) Dr. George G. Kundahl). (“It is also true that this [the interest rate protection under the SSCRA] was not easy to administer. Many procedural issues arose, and generally accepted practiced developed.”).

⁴³ 50 U.S.C. app. § 527(a)(1).

⁴⁴ *Id.* § 527(d)(1).

⁴⁵ *Id.* § 527(b)(2).

⁴⁶ *Id.* § 527(a)(1)(A). For a mortgage, deed of trust, or other security in the nature of a mortgage, the creditor must take an additional step and apply the interest rate benefit for one year after the end of military service. *Id.* § 527(a)(1)(B).

The original section [of the SSCRA] provided no guidance on how the servicemember should initiate an interest rate reduction. The Committee believes the burden should be on the servicemember to inform the creditor of the order for military service within a specific time. *Section 207 would codify the practices established during the Persian Gulf War. The servicemember would be required to submit to the creditor written notice and a copy of military orders.*⁴⁷

Congressional testimony obtained during and after the first Gulf War shows that servicemembers were required to provide a written request for the SCRA's interest rate benefit. In a 1992 hearing on the interest rate benefit, Principal Deputy Assistant Secretary of Defense (Reserve Affairs) Dr. George G. Kundahl noted that "generally accepted practices developed" to implement the interest rate benefit, including practices that "require[d] the Servicemember to *request the relief in writing* and to include proof of entering active military service."⁴⁸ Donald W. Grigley, speaking on behalf of the American Bankers Association and the Consumer Bankers Association, testified, "For banks, a major consideration in responding to the *requests for interest reduction* is the inherent limitations of their operating systems."⁴⁹ The President of Navy Federal Credit Union stated that his company required "a statement in writing, in no particular format, from our members advising us that they are being called to active duty and *requesting relief* under the Act."⁵⁰ In 2002, Lt. Col. Patrick Lindemann, Deputy Director for Legal Policy in the Office of the Undersecretary for Personnel and Readiness, stated that "the interest rate reduction doesn't occur automatically—service members *must request it*."⁵¹ Lindemann also noted that a creditor need only act "[o]nce a servicemember *requests the*

⁴⁷ H.R. REP. NO. 108-81 at 39 (2003) (emphasis added).

⁴⁸ *E.g. H.R. 4763, Servicemembers' Civil Relief Act: Hearing before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs*, 102nd Cong. 182 (1992) (written testimony of Principal Deputy Assistant Secretary of Defense (Reserve Affairs) Dr. George G. Kundahl) (emphasis added).

⁴⁹ *Soldiers' and Sailors' Civil Relief Act and Veterans' Reemployment Rights: Joint Hearing before the H. and S. Comms. on Veterans' Affairs*, 101st Cong. 53 (1990) (statement of Donald W. Grigley, Senior Vice President, Connecticut National Bank, representing the American Bankers Association and the Consumer Bankers Association) (emphasis added).

⁵⁰ *Id.* at 186 (statement of Thomas J. Hughes, President and CEO, Navy Federal Credit Union and Treasurer, National Association of Federal Credit Unions) (emphasis added).

⁵¹ AMERICAN FORCES INFORMATION SERVICE, *SOLDIERS' AND SAILORS' CIVIL RELIEF ACT PROVIDES UMBRELLA OF PROTECTION 2* (2002), in *H.R. 5111, The Servicemembers' Civil Relief Act and H.R. 4017, the Soldiers' and Sailors' Civil Relief Act: Hearings before the Subcomm. On Benefits of the H. Comm. on Veterans' Affairs*, 107th Cong. 130 (2002) (emphasis added).

rate reduction.”⁵² Finally, “Lindemann advised that *servicemembers notify lenders of their intent to invoke the 6 percent cap in writing*, along with proof of mobilization/activation to active duty and evidence of the difference in the member’s military and civilian pay.”⁵³

Based on congressional guidance regarding the intent of the SCRA, and longstanding practice in applying the interest rate benefit, the financial services industry has long interpreted the “written notice” requirement in the statute as requiring written notice of eligibility for the interest rate benefit, not mere written notice of military service. This interpretation has also been adopted by multiple federal authorities:

- The Department of Education (“ED”) promulgated regulations in 2009 stating that any servicer of loans issued under the Department’s Federal Family Education Loan Program could only implement the SCRA’s interest rate benefit “upon the loan holder’s receipt of the borrower’s *written request*”⁵⁴
- The Army JAG Corps has made public the letter that it provides to its legal assistance attorneys to fulfill the written notice requirement under the SCRA. This letter is a “Sample Letter to Creditor *Requesting Reduction to 6% Interest*.”⁵⁵
- The Consumer Financial Protection Bureau advises servicemembers that, to “obtain an interest rate reduction under the Servicemembers Civil Relief Act . . . [y]ou will need to send a *written request* to your servicer”⁵⁶
- The Office of the Comptroller of the Currency’s current handbook directs creditors to limit a borrower’s interest rate to six percent “[u]pon

⁵² *Id.* (emphasis added).

⁵³ *Id.* (emphasis added).

⁵⁴ 34 C.F.R. § 682.202(a)(8) (emphasis added).

⁵⁵ JAG SCRA GUIDE, *supra* note 4, app. B at B-1. In addition, a former JAG attorney who now represents servicemembers in SCRA claims also interprets the written notice provision to require a written request: “The servicemember must make a written request to the creditor for reduction of the interest rate and must provide to the creditor a copy of the military orders calling the servicemember to military service and any orders further extending the period of military service.” Col. John S. Odom, Jr., USAF JAGC, Ret’d., A Judge’s Benchbook for the Servicemembers Civil Relief Act, 39 (2011).

⁵⁶ Consumer Financial Protection Bureau, *How can I reduce my student loan interest rate under the Servicemembers Civil Relief Act (SCRA)?*, Ask CFPB (June 17, 2013), <http://www.consumerfinance.gov/askcfpb/1501/how-can-i-reduce-my-student-loan-interest-rate-under-servicemembers-civil-relief-act-scra.html>.

receiving a *written request for relief*. . . .”⁵⁷

Even the DOJ has recently taken the position that “written notice” means a written request for benefits. In a 2012 consent order arising out of allegations that a creditor did not properly apply the SCRA’s interest rate benefit, the DOJ equated written notice to a creditor’s receipt of a written “request” for SCRA benefits.⁵⁸

The position that “written notice” means a written request (*i.e.*, notice of SCRA eligibility) has perhaps been most thoroughly explored in the context of student lending. Federal student loans are owned or guaranteed by ED, which has an “ongoing fiduciary responsibility to protect American taxpayer resources.”⁵⁹ Being more generous than permitted by the statutory text is not an idle concern for ED—it could lead to giving away federal tax dollars to borrowers without Congressional approval. To fulfill its fiduciary duty to taxpayers, ED issues regulations regarding loans that it owns or guarantees. Sallie Mae and other federal student loan servicers are required to follow ED’s regulations. And as noted, ED’s regulations are consistent with the historical understanding of the meaning of “written notice.”⁶⁰

Recognizing that some borrowers were in military service but had not provided a written request for the interest rate reduction, in 2011 Sallie Mae

⁵⁷ OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S HANDBOOK: SERVICEMEMBERS CIVIL RELIEF ACT OF 2003 2 (2011) (emphasis added).

⁵⁸ Consent Order ¶¶ 15(a); 15(c), *United States v. Capital One, N.A.*, No. 1-12cv828 JCC/IDD (E.D. Va. July 26, 2012). Additionally, in *Moll v. Ford Consumer Finance Company*, the district court noted, “Once activated to service, Moll notified Ford of his military status, *requested* that the interest rate on his note be reduced to six percent [under the SSCRA], and provided all of the documentation Ford requested.” This is further evidence that servicemembers were informing their creditors of active-duty status proactively, and courts approved of this notification practice.

⁵⁹ Memorandum from Jacob J. Lew, Director, Office of Management and Budget to Heads of Executive Departments and Agencies (Nov. 15, 2011) (on files with authors); *accord* United States Environmental Protection Agency Office of Acquisition Management, *An Acquisition Guide for Executives* (2010) (“[T]he Federal Government has a fiduciary responsibility to ensure that taxpayer funds are spent prudently”); *Farm and Ranch Lands Protection Program*, 77 Fed. Reg. 6941-01 (2012) (“However, NRCS [Natural Resources Conservation Service] has a fiduciary responsibility to the Nation’s taxpayers to ensure the program is carried out as authorized and that funds expended meet the program’s purpose”); *accord Chester County Aviation Holdings, Inc. v. Chester County Aviation Auth.*, 967 F. Supp. 2d 1098, 1111 (E.D. Pa. 2013) (“It was rational for the Aviation Authority, as a municipal organization with a fiduciary responsibility to the County’s taxpayers, to choose to require a personal guarantee to protect against default by an assignee.”).

⁶⁰ 34 C.F.R. § 682.202(a)(8).

and other student loan servicers sought permission from ED to be more generous than the statute requires and provide SCRA benefits upon receipt of a borrower's orders and nothing more.⁶¹ The student loan servicers wrote:

We believe there is opportunity to enhance customer service and ensure that servicemembers fully benefit from the provisions of the SCRA by authorizing lenders and servicers to adopt any or all of the following discretionary processing recommendations:

. . .

2) Consider the receipt of a servicemember's military orders as sufficient information that the servicemember intends to request the 6% interest rate cap.

3) In lieu of or in addition to military orders, utilize information that contains DOD commanding officer certifications such as affidavits, federal deferment forms, and other types of correspondence signed by an applicable military officer or authority as well as military status report information secured from the U.S. Government Computer System (www.dmdc.osd.mil/appj/scra/scraHome.do) provided the information contains the applicable active duty information that is contained in military orders.⁶²

ED, conscious of its fiduciary obligation to protect federal funds, insisted that servicemembers provide both a written request for SCRA benefits and military orders.⁶³ ED explained:

[I]t appears clear that the SCRA requires submission of something more from the servicemember than just a copy of the servicemember's military orders.

. . .

[T]his suggestion [that servicers accept military orders as written notice] is not consistent with the SCRA. It also is not consistent with the Department [of Education]'s regulations in this area because it eliminates the servicemember's request. Although lenders may opt to require less documentation than is required by the SCRA when dealing with their commercial loan portfolios, any decision by the Department

⁶¹ Letter from Consumer Bankers Ass'n *et al* to Pamela Moran, U.S. Dep't of Education (June 9, 2011) (on file with authors).

⁶² *Id.*

⁶³ Letter from Pamela Moran, U.S. Dep't of Education, to Consumer Bankers Ass'n *et al*, (June 27, 2011) (on file with authors).

to accept less documentation for federal student loans would require consultation with DOD, a determination that such a change is consistent with the RA [regulatory authority] and a corresponding regulatory change.⁶⁴

Accordingly, ED declined the request by Sallie Mae and other student loan servicers to adopt a standard for applying SCRA benefits that is more generous and flexible than the historical understanding of the statutory requirements.

Written Notice as a Separate Document

Additionally, the “written notice” requirement has historically been understood to require that a servicemember submit a written request *in addition to* a copy of the orders calling the servicemember to active duty. In enacting the SCRA, Congress stated that a servicemember must provide “written notice *and* a copy of the military orders calling the servicemember to military service.”⁶⁵

The rule for interpreting statutes with the word “and” is clear: “When terms are connected by a conjunctive term in a statute—such as the term ‘and’—courts normally interpret the statute as requiring satisfaction of both of the conjunctive terms to trigger application of the statutory provision.”⁶⁶ And a leading treatise on statutory construction agrees: “Where two or more requirements are provided in a section and it is the legislative intent that all of the requirements must be fulfilled to comply with the statute, the conjunctive ‘and’ should be used. Statutory phrases separated by the word ‘and’ are usually interpreted in the conjunctive.”⁶⁷

The rules against superfluous language and absurd interpretations of a statute similarly require that a borrower submit a written request that is distinct and separate than military orders alone. One of the “most basic interpretive canons” states that “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”⁶⁸ Finally, if one were to read the statute disjunctively, then servicemembers would not be required to submit their orders at all; it would be enough for the servicemember to submit a written request alone. This result

⁶⁴ *Id.*

⁶⁵ 50 U.S.C. app. § 527(b)(1) (emphasis added).

⁶⁶ *United States v. Ganadonegro*, 854 F. Supp. 2d 1068, 1081 (D.N.M. 2012).

⁶⁷ 1A *Sutherland Statutory Construction* § 21:14 (7th ed. 2012 supp.).

⁶⁸ *Corley v. United States*, 556 U.S. 303, 304 (2009) (internal quotations omitted) (citation omitted); *see also Setser v. United States*, 132 S. Ct. 1463, 1470 (2012) (holding that a court “must ‘give effect . . . to every clause and word’ of [an] Act” (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))).

would be absurd and an invalid interpretation of the statute, as it would wholly eliminate the orders requirement at the core of Congress's intent.⁶⁹

Congress—and every court decision addressing this issue—has also treated the notice and orders clauses as separate requirements. In passing Section 527, legislative history shows that Congress anticipated that servicemembers would submit two documents: “written notice and a copy of military orders.”⁷⁰ And case law also indicates that a servicemember must provide a separate notice for the interest rate benefit in addition to providing military orders. For example, in *Frazier v. HSBC Mortgage Services, Inc.*⁷¹ the 11th Circuit held that a servicemember is entitled to the interest cap “[o]nce a creditor receives such [written] notice and a copy of the orders.”⁷²

Finally, just as the four federal authorities cited above interpret “written notice” as a written request, they also indicate that servicemembers must submit a written request separate from the military orders.

- ED’s regulations require that servicers of FFELP loans provide the interest rate benefit only upon the servicer’s receipt of “the borrower’s written request *and* a copy of the borrower’s military orders.”⁷³
- By drafting a cover letter—a separate document that servicemembers can use to submit their orders—the Army JAG Corps indicates that written notice must be more than just submitting military orders to a creditor.⁷⁴
- The Consumer Financial Protection Bureau instructs servicemembers “to send a written request to your servicer, *and you will also need* to provide your servicer with a copy of your orders calling you on to active

⁶⁹ *E.g. In re Butcher*, 125 F.3d 238, 242 (4th Cir. 1997) (holding that a legislative body “is presumed not to have enacted futile laws or laws which generate such absurd results”); *Consumers Union of U.S., Inc. v. Sawhill*, 512 F.2d 1112, 1118 *on reh’g sub nom. Consumers Union of U. S., Inc. v. Sawhill*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975) (“ . . . Congress will not be presumed to have done a useless, ineffective, or absurd thing” (citations omitted)).

⁷⁰ H.R. REP. NO. 108-81, at 39 (2003).

⁷¹ 401 F. App’x 436 (11th Cir. 2010).

⁷² *Id.* at 441 (emphasis added); *see also Santana-Archivald v. Banco Popular De Puerto Rico*, No. 11-1627 JAG (D.P.R. June 19, 2012) (same); *cf. Linscott v. Vector Aerospace*, No. CV05-682-HU (D. Or. July 27, 2007) (finding that the requirement to send orders was a separate, unfulfilled requirement from merely advising a lender of military status).

⁷³ 34 C.F.R. § 682.202(a)(8) (emphasis added).

⁷⁴ JAG SCRA GUIDE, *supra* note 4, app. B at B-1.

duty.”⁷⁵

- Finally, the Office of the Comptroller of the Currency’s handbook mandates that a servicemember provide “a written request for relief *and* a copy of the service member’s military orders.”⁷⁶

Copy of the Military Orders Calling the Servicemember to Military Service

In addition to requiring the servicemember to submit a written request to a creditor to qualify for the interest rate benefit, the SCRA requires that the servicemember provide the creditor with “a copy of the military orders calling the servicemember to military service and any orders further extending military service.”⁷⁷ The orders requirement, like the written notice requirement, has historically been understood to contain two distinct parts: the servicemember must submit a copy of active duty orders to qualify, and then must submit subsequent orders extending military service to remain qualified.

Orders Calling the Servicemember to Military Service as Orders Calling the Servicemember to Active Duty

The financial services industry has historically understood the requirement for a servicemember to provide a “copy of the military orders calling the servicemember to military service”⁷⁸ as requiring the servicemember to provide a copy of the orders calling the servicemember to active duty. “Military service” is a defined term under the SCRA, and for members of the armed forces means “active duty.”⁷⁹ Thus, the requirement that a servicemember provide orders calling a servicemember “to military service” has historically been understood as referring only to those orders calling the servicemember to “active duty” (*i.e.*, ordering the servicemember to leave a non-active duty status and enter active duty).⁸⁰

⁷⁵ Consumer Financial Protection Bureau, *How can I reduce my student loan interest rate under the Servicemembers Civil Relief Act (SCRA)?*, ASK CFPB (June 17, 2013), <http://www.consumerfinance.gov/askcfpb/1501/how-can-i-reduce-my-student-loan-interest-rate-under-servicemembers-civil-relief-act-scra.html> (emphasis added).

⁷⁶ OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S HANDBOOK: SERVICEMEMBERS CIVIL RELIEF ACT OF 2003 2 (2011) (emphasis added).

⁷⁷ 50 U.S.C. app. § 527(b)(1).

⁷⁸ *Id.*

⁷⁹ *Id.* § 511(2)(A)(i) (defining “military service” as “active duty” as that term is defined in 10 U.S.C. § 101(d)(1)).

⁸⁰ *See, e.g.*, Consumer Financial Protection Bureau, *How can I reduce my student loan interest rate under the Servicemembers Civil Relief Act (SCRA)?*, ASK CFPB (June 17, 2013), <http://www.consumerfinance.gov/askcfpb/1501/how-can-i-reduce-my-student-loan-interest-rate-under-servicemembers-civil-relief-act-scra.html>.

This view is supported by the SCRA's legislative history. As noted above, the SCRA provides that servicemembers can request the SCRA benefit not just for future periods, but also retroactively back to the date the servicemember entered military service.⁸¹ Until very recently, a creditor could only document when a servicemember began military service in one of two ways: (1) by the servicemember submitting a copy of the orders calling the servicemember to active duty; or (2) by the creditor requesting a "certificate" from the servicemember's military branch indicating when the servicemember began active duty.⁸² By requiring that the servicemember submit orders, Congress made clear its intent that "the burden should be on the servicemember to inform the creditor of the order for military service within a specific time."⁸³ And Congress further explained that the orders calling the servicemember to active duty are required because "[t]hese orders indicate the period of time for which the servicemember is called to duty."⁸⁴ Only the orders calling the servicemember to active duty would serve this purpose.

This interpretation is also consistent with guidance from federal authorities.⁸⁵ As with the written request provision, the student loan servicing industry went to ED for permission to be more generous to servicemembers, and was again rebuffed. The student loan servicers recommended that:

In lieu of or in addition to military orders, [servicers] utilize information that contains DOD commanding officer certifications such as affidavits, federal deferment forms, and other types of correspondence signed by an applicable military officer or authority as well as military status report information secured from the U.S. Government Com-

consumerfinance.gov/askcfpb/1501/how-can-i-reduce-my-student-loan-interest-rate-under-servicemembers-civil-relief-act-scra.html ("You will need to send a written request to your servicer, and will also need to provide your servicer with a copy of your orders calling you on to active duty.").

⁸¹ 50 U.S.C. app. § 527(b)(2).

⁸² *Id.* § 582. In April 2012, nearly a decade after Congress reenacted the SCRA, the Department of Defense's Defense Manpower Data Center ("DMDC") Web site for the first time began providing the date on which a servicemember started active duty military service. Prior to that date, the DMDC Web site provided only information about the first time the individual ever entered military service. For example, if an individual served from 1991-1992, and again from 2003-2005, the DMDC prior to April 2012 would only indicate that the individual first entered active duty in 1991.

⁸³ H.R. REP. NO. 108-81, at 39 (2003).

⁸⁴ *Id.*

⁸⁵ Letter from Consumer Bankers Ass'n *et al* to Pamela Moran, U.S. Dep't of Education, (June 9, 2011) (on file with authors).

puter System (www.dmdc.osd.mil/appj/scra/scraHome.do) provided the information contains the applicable active duty information that is contained in military orders.⁸⁶

As with the student loan servicers' request to set aside the SCRA's written request requirement, ED focused on its obligation to protect taxpayer dollars and declined the request:

Accepting other documentation "in lieu" of a copy of the servicemember's military orders would effectively eliminate the requirement for a copy of the orders and is inconsistent with both the SCRA and the applicable program regulations. These alternate forms of documentation do not serve as the servicemember's request for the relief.⁸⁷

As recently as 2014, when asked for recommendations of how to simplify the SCRA's interest rate benefit for servicemembers, the Chief Operating Officer of ED's Federal Student Aid Office wrote to a member of Congress to explain that the SCRA requires servicemembers to provide creditors with a copy of military orders to qualify for the interest rate benefit, although ED was contemplating adopting a broader approach administratively:

As you noted in your letter, under the SCRA qualified servicemembers may request that the interest rate on loans taken out before they began active duty service be reduced to six percent. Under the SCRA, however, the borrower must submit a copy of his or her military orders and a written request for the lower interest rate.

. . .

[W]e are working with the Civil Rights Division of the Department of Justice, the Department of Defense and the Consumer Financial Protection Bureau to identify administrative changes that would make it easier for servicemembers to provide the required documentation for SCRA benefits. We are working with those agencies to develop procedures that will provide an electronic process for borrowers, loan servicers, and lenders to use to confirm that borrowers are eligible for the SCRA interest rate benefit. We believe these administrative changes will effectively address the issues identified in your letter without the need for legislative changes.⁸⁸

The view that servicemembers must submit their active duty orders was also

⁸⁶ *Id.*

⁸⁷ Letter from Pamela Moran, U.S. Dep't of Education, to Consumer Bankers Ass'n *et al* (June 27, 2011) (on file with authors).

⁸⁸ Letter from James W. Runcie, Federal Student Aid Office of the United States Dep't of

consistent with historical practice. Like the written notice requirement, the requirement that servicemembers provide the orders calling them to military service was intended to codify practices established during the Persian Gulf War in the 1990s.⁸⁹ For example, then-Major James P. Pottorff, an Instructor in the Administrative and Civil Law Division of the JAG School, wrote: “As a general rule, these organizations [Fannie Mae, Freddie Mac, and Ginnie Mae] require that mortgage issuers obtain a copy of a Reserve component service member’s *orders to active duty* before granting the reduction in interest.”⁹⁰ Similarly, the CEO of Navy Federal Credit Union testified before Congress in 1991 that the credit union required documented confirmation of military service, and that “[a] copy of the *call-up orders* is sufficient confirmation.”⁹¹ When Congress a decade later added the requirement for servicemembers to provide a copy of orders calling the servicemember to military service as a requirement for interest rate benefit eligibility, the financial services industry understood that this longstanding practice was being codified.

Furthermore, the drafters of the SCRA appear to have understood that there is a difference between orders “calling the servicemember to military service,” and other types of orders. For example, the SCRA’s lease protection specifically references permanent change of station orders (“PCS orders”),⁹² which are orders requiring a servicemember who is already in military service to report to a new duty location. It is a longstanding rule of statutory interpretation that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

Education, to Rep. John Kline, Chairman, House Committee on Education and the Workforce (Jan. 30, 2014) (on file with authors).

⁸⁹ *Id.*

⁹⁰ James P. Pottorff, *Contemporary Applications of the Soldiers’ and Sailors’ Civil Relief Act*, 132 MIL. L. REV. 115, 130 (1991) (emphasis added); *see also id.* at 133 (“As a practical matter, however, service members can best take advantage of the SSCRA by putting creditors on notice of their desire to benefit from this provision. Service members should consider providing *copies of orders to active duty* and outlining differences between civilian and military pay.” (emphasis added)); Donald B. Steele & Tye G. Darland, *Mobilization for the Gulf War: Reservists Rights*, 47 J. MO. B. 258, 261 (1991) (“Most creditors will reduce the applicable rate to six percent when a *copy of the active duty orders* is furnished to the creditor” (emphasis added)).

⁹¹ *Soldiers’ and Sailors’ Civil Relief Act and Veterans’ Reemployment Rights: Joint Hearing before the H. and S. Comms. on Veterans’ Affairs*, 101st Cong. 186 (1991) (statement of Thomas J. Hughes, President and CEO, Navy Federal Credit Union and Treasurer, National Association of Federal Credit Unions) (emphasis added).

⁹² 50 U.S.C. app. § 535.

exclusion.”⁹³ It follows that the drafters’ omission of PCS orders or other types of orders in Section 527 should be seen as intentional—and that orders “calling the servicemember to military service” did not include other types of orders a servicemember receives after entering active duty. In several other instances, servicemembers must provide specific military documentation to receive government benefits, and the requirement to provide active duty orders does not impose any greater burden on a servicemember.⁹⁴

Orders Further Extending Military Service as Separate Orders Requirement

In addition to the requirement that servicemembers submit to creditors a copy of the orders calling the servicemember to military service to qualify for the interest rate benefit, the SCRA requires that a servicemember submit “any orders further extending military service.”⁹⁵ The legislative history explains that “[i]f there is an extension of the military duty obligation, the servicemember receives amended orders and would be required to provide the amended orders to the creditor in order to extend further the 6 percent protection.”⁹⁶

Consistent with the statutory text and legislative history, the financial services industry has long understood this provision to require that a servicemember whose military service is extended must submit the orders extending the military service in order to get the interest rate benefit for that extended period. It has not historically been the interpretation that a creditor must have affirmative confirmation that a borrower has left military service before discontinuing the interest rate benefit.

THE SALLIE MAE SETTLEMENT: NEW INTERPRETATIONS OF OLD LAW

The DOJ’s settlement with Sallie Mae shows that the DOJ has taken a more expansive view of the SCRA’s interest rate benefit. The Sallie Mae Consent Order is a clear signal that the DOJ may expect more from creditors, and is applying its far-reaching view of the statute both prospectively and retroactively against creditors. This new standard is a marked departure from the historical view of the balancing of servicemember and creditor interests. And creditors who have to date relied on the past interpretations of the SCRA would do well

⁹³ *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotations and citations omitted).

⁹⁴ See, e.g., U.S. DEP’T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS (2013).

⁹⁵ 50 U.S.C. app. § 527(b)(1).

⁹⁶ H.R. REP. NO. 108-81, at 39 (2003).

to revisit that reliance in light of the DOJ's current position.

Written Notice as Notice of Military Service

The Sallie Mae Consent Order departs from the long held view that written notice must be a request for, or notice of the intent to invoke, SCRA benefits. Under the Consent Order, written *notice only means notice that the servicemember is in military service*. And under the Consent Order, once a creditor receives notice that a borrower is in the military, this is considered sufficient notice to invoke the interest rate benefit.

Further, the Consent Order requires that, once a servicemember submits orders, the written orders put the creditor on notice that the servicemember is in military service. In effect, under the Consent Order, a military document satisfies both the requirement to provide “written notice *and* a copy of the military orders calling the servicemember to military service.”⁹⁷ Thus, separate written notice no longer appears to be required for interest rate eligibility. Going forward, the Consent Order requires Sallie Mae to “accept servicemembers’ military orders as written notice of eligibility for reduced interest rates pursuant to the SCRA via facsimile, mail, or overnight delivery.”⁹⁸ The Consent Order also applies this standard retroactively: under the settlement, nearly one-half of the \$60 million settlement fund was attributable to loans where a borrower never provided any written request at all.⁹⁹

The Consent Order acknowledges the conflict between the Consent Order's requirements and ED's regulations discussed above.¹⁰⁰ To ensure that Sallie Mae can comply with the Consent Order without running afoul of ED's regulations, the Consent Order includes a letter from ED expressly providing that Sallie Mae's compliance with the Consent Order's requirements constitutes full compliance with ED's regulations and guidance.¹⁰¹ While third party student loan servicers that service on behalf of one of the defendants in the Consent Order would similarly be permitted to comply with the Consent Order notwithstanding ED's regulations, it is less clear whether other student loan servicers may do so.

“Written Notice” and a Copy of the Military Orders “Calling the Servicemember to Military Service”

Not only must creditors be aware of the expanded interpretation of “written

⁹⁷ 50 U.S.C. app. § 527(b)(1) (emphasis added).

⁹⁸ *Sallie Mae Consent Order* ¶ 35(a).

⁹⁹ *Id.* ¶ 15.

¹⁰⁰ See discussion at notes 61–64 and 85–88, *supra*.

¹⁰¹ *Sallie Mae Consent Order* App. C.

notice” in the Sallie Mae Consent Order, but the Consent Order also extends the meaning of “orders calling the servicemember to military service” beyond previously held interpretations.

As discussed above, the financial services industry had previously understood the requirement for servicemember to provide orders “calling the servicemember to military service” to mean the orders calling the servicemember to active duty from an inactive status. In its Complaint, the DOJ states that a creditor must accept “qualifying active duty military *documents*,” not active duty *orders* as required by the statute.¹⁰² Consistent with the DOJ’s expanded view, the Consent Order requires Sallie Mae to extend benefits upon receipt of “any document prepared exclusively by a branch of the military, the Department of Defense, or a borrower’s commanding officer that indicates that the borrower is on active duty.”¹⁰³ Documents that now must be considered qualifying military orders under the Consent Order include:

- *Permanent or Temporary Change of Station Orders*: While these are orders, they do not call a servicemember to military service. Rather, these orders require a servicemember who is already on military service to move from one location to another.
- *DD Form 214*: These are backwards-looking documents that catalogue a servicemember’s completed military service. They are not orders because they do not instruct anyone to do anything. In fact, DD Form 214 is only given to a servicemember when leaving active duty and returning to civilian life.
- *Letter from a Commanding Officer*: These letters are generally addressed to the creditor, rather than to the servicemember. Accordingly, they are not orders because they do not order a servicemember to take any action. Instead, they provide information to a creditor.

Orders No More: The DMDC Web Site

When Congress passed the SCRA in 2003, the only way to determine if an individual was in military service was for that individual to provide a creditor with military orders. To simplify the process, two years later the Department of Defense’s Defense Manpower Data Center (“DMDC”) introduced a Web site (the “DMDC Web site”) letting creditors determine if an individual is—or ever

¹⁰² Complaint, *United States v. Sallie Mae, Inc.*, no. 1:99-mc-09999 ¶ 16(a) (D. Del. May 13, 2014) (emphasis added) [hereinafter “*Sallie Mae Complaint*”].

¹⁰³ *Sallie Mae Consent Order* ¶ 35(c).

was—in military service.¹⁰⁴ To check the DMDC Web site for an individual borrower, a creditor needs a servicemember's last name and either the servicemember's Social Security number or date of birth.¹⁰⁵ The DMDC Web site is an imperfect tool to determine active duty status; the DMDC acknowledges that it experiences what it describes as a “small error rate,” and a creditor should always confirm its results against any other information in a creditor's possession.¹⁰⁶

No court, no regulation, and no guidance has ever before stated that a creditor was required to provide the SCRA's interest rate benefit based purely upon the results from the DMDC Web site—borrowers have always been required to provide their active duty orders. Indeed, in a prior consent order, the DOJ required a servicer to check the DMDC Web site to confirm eligibility, but the DOJ did not require the creditor to apply the interest rate until the servicemember provided qualifying military orders.¹⁰⁷ And as discussed above, student loan servicers explicitly asked for permission to provide benefits based upon the results of the DMDC Web site but were denied.¹⁰⁸

Under the Consent Order, however, Sallie Mae must check the DMDC Web site every time a borrower requests SCRA protection and provide the interest rate benefit if the DMDC Web site indicates that the borrower is on military service. The Consent Order also requires Sallie Mae to confirm with the DMDC Web site that a borrower has left active duty prior to discontinuing the interest rate benefit, even if the borrower has not provided a copy of orders extending military service.¹⁰⁹ And the Consent Order requires Sallie Mae to pay one million dollars to settle claims that it did not provide appropriate SCRA assistance to servicemembers who provided no military documents at all—just a request for the interest rate benefit.¹¹⁰

¹⁰⁴ As of the date of publication, this Web site may be found at: <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.

¹⁰⁵ *Id.*

¹⁰⁶ See DMDC, *Status Report Pursuant to the Servicemembers Civil Relief Act*, DEP'T OF DEFENSE (last visited Mar. 29, 2014).

¹⁰⁷ Consent Order ¶ 15(c), *United States v. Capital One*, N.A., No. 1-12cv828 JCC/IDD) (E.D. Va. July 26, 2012).

¹⁰⁸ See discussion at notes 85–88, *supra*.

¹⁰⁹ *Sallie Mae Consent Order* ¶ 35(h). This is not the first time that the DOJ has required DMDC Web site checks prior to removing the SCRA interest rate benefit, *e.g.* Consent Order ¶ 15(e), *United States v. Capital One*, N.A., No. 1-12cv828 JCC/IDD) (E.D. Va. July 26, 2012).

¹¹⁰ *Sallie Mae Consent Order* ¶ 15.

Creditors' "Obligation" to Educate Servicemembers

In addition to signaling an expansion of the interpretation of "written notice" and military orders "calling the servicemember to military service," the Sallie Mae Complaint and Consent Order suggest that the DOJ interprets the SCRA to require that creditors inform servicemembers that they may be eligible for SCRA benefits and to follow up with potentially-eligible servicemembers to obtain qualifying documentation from servicemembers who have previously failed to provide it.¹¹¹

Previously, the SCRA placed the obligation to educate servicemembers regarding SCRA benefits on the Department of Defense. Section 515 of the SCRA orders the Secretary of each branch of the military to "ensure that notice of the benefits accorded by this Act is provided in writing to persons in military service and to persons entering military service."¹¹² Consistent with this provision, creditors have previously assumed that the responsibility of educating servicemembers about SCRA benefits rested on the Department of Defense rather than on creditors. But the Sallie Mae Complaint and Consent Order indicate that the DOJ expects more from creditors; creditors may now be required to "notify servicemember that they might be eligible for SCRA benefits when they provide[] their military documents to [a creditor] for purposes other than seeking the 6% interest rate."¹¹³ And because more than half of the Sallie Mae settlement fund is allocated toward borrowers who did not provide a written request and copy of active duty orders,¹¹⁴ it appears that this interpretation will be enforced retroactively.

* * *

Since the Sallie Mae Consent Order was announced in May, ED issued a "Dear Colleague" letter that requires its servicers to implement several of the steps outlined in the Consent Order—even those steps that go beyond the SCRA.¹¹⁵ In its letter, ED reversed its prior direction that borrowers need to

¹¹¹ *Sallie Mae Consent Order* ¶ 32 ("Defendants . . . are hereby required to inform any servicemember who inquires about receiving a military deferment or military forbearance of the SCRA protections and benefits available under Section 527 of the SCRA, 50 U.S.C. app. § 527."); *Sallie Mae Complaint* ¶ 16(c) ("Defendants . . . engaged in a practice of . . . failing to notify servicemember that they might be eligible for SCRA benefits when they provided their military documents to Defendants for purposes other than seeking the 6% interest rate.")

¹¹² 50 U.S.C. app. § 515.

¹¹³ *Sallie Mae Complaint* ¶ 16(c).

¹¹⁴ *Sallie Mae Consent Order* ¶ 15.

¹¹⁵ Letter from Lynn B. Mahaffie, Acting Assistant Secretary, Office of Postsecondary

meet the statutory prerequisites of providing a written request and active duty orders. Instead, ED has now ordered its loan servicers to check the DMDC Web site and apply interest rate benefits to any active duty borrowers.¹¹⁶ Further, ED has directed its servicers “to use the DMDC’s SCRA Web site to identify borrowers who are eligible for the interest rate limitation under the SCRA and to grant that benefit”—even without a request from the borrower.¹¹⁷ ED is also “authorizing and encouraging FFEL lenders and lender-servicers” to follow this guidance and provide the SCRA’s interest rate benefit to borrowers through the DMDC Web site alone, without a borrower request.¹¹⁸

CONCLUSION

Over the past three years, the DOJ has entered into several landmark SCRA-related settlements. Never before, however, has one settlement provided such a clear picture of the heightened standards that the DOJ expects creditors to meet in applying the SCRA’s interest rate benefit. The Sallie Mae Consent Order demonstrates that the DOJ will not hesitate to enforce its own interpretation of the statute, even when its interpretation departs from long and widely held interpretations by the industry and other federal authorities. Although Congress carefully balanced the obligations of servicemembers and creditors in drafting the SCRA, the DOJ’s interpretation of the SCRA in the Sallie Mae Consent Order has shifted several burdens from servicemembers to creditors. With all of these changes, creditors should read the Sallie Mae Consent Order with a critical eye and revisit their own SCRA practices accordingly.

Education, United States Department of Education, to Student Loan Servicers, Improved Administration of the Servicemembers Civil Relief Act for Borrowers Under the William D. Ford Direct Loan and Federal Family Education Loan Programs (August 25, 2014).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*