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SERVICEMEMBERS' CIVIL RELIEF ACT

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The Servicemembers' Civil Relief Act (SCRA) restates and expands existing coverage of the Soldiers' and Sailors' Civil Relief Act, providing new authority for servicemembers and their dependents to break rental housing leases and stay eviction actions, among other protections.

- SCRA includes general provisions that expand the definition of servicemembers covered by SCRA, permit waiver of SCRA rights, and limit applicable interest that "creditors" may charge.
- Industry-specific provisions in SCRA require evictions or distress actions by court order, expand courts' authority to stay eviction actions, and provide for new lease termination rights for residents and their families.

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Based in Washington, DC, **NMHC** represents the interests of the nation's largest and most prominent firms in the apartment industry. NMHC members are engaged in all aspects of the developing and operating apartments, including ownership, construction, management, and financing. The Council was established in 1978 as a national association to advocate for rental housing and to provide a source of vital information for the leadership of the multifamily industry. Since then, NMHC has evolved into the industry's leading national voice. The association concentrates on public policies that are of strategic importance to participants in multifamily housing, including finance, tax, property management, environmental and building codes. NMHC benefits from a focused agenda and a membership that includes the principal officers of the most distinguished real estate organizations in the United States. For more information on joining NMHC, contact the Council at 202/974-2300 or www.nmhc.org.

NAA, based in Alexandria, VA, is a federation of 155 state and local affiliated associations representing more than 28,000 members responsible for more than 4.4 million apartment homes nationwide. It is the largest broad-based organization dedicated solely to rental housing. NAA members include apartment owners, management executives, developers, builders, investors, property managers, leasing consultants, maintenance personnel, suppliers and related business professionals throughout the United States and Canada. NAA strives to provide a wealth of information through advocacy, research, technology, education and strategic partnerships. For more information, call 703/518-6141, e-mail information@naahq.org or visit www.naahq.org.

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The information discussed in this guidance is general in nature and is not intended to be legal advice. It is intended to assist owners and managers in understanding this issue area, but it may not apply to the specific fact circumstances or business situations of all owners and managers. For specific legal advice, consult your attorney.

Servicemembers' Civil Relief Act

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The Servicemembers' Civil Relief Act (SCRA), which Congress has passed and sent to the President for his signature, affects rental housing providers that do business with a wide range of military personnel (including reservists), their families, and their guarantors. SCRA restates and renames the old Soldiers' and Sailors' Civil Relief Act (SSCRA), expanding SSCRA's established protections for military servicemembers from rental housing providers and a wide range of creditors.¹

This analysis addresses two categories of SCRA provisions that significantly impact apartment operations – provisions of general applicability and industry-specific provisions. Of special interest are general provisions that expand the definition of servicemembers covered by SCRA, permit waiver of SCRA rights, and limit applicable interest “creditors” may charge, as well as industry-specific provisions that require evictions or distress actions by court order, expand courts' authority to stay eviction actions, provide for new lease termination rights for residents and their families, and provide for criminal misdemeanors for certain violations of these industry-specific provisions (including collecting a security deposit on a validly terminated lease).

Note that additional state laws may provide added protections for servicemembers. Particularly in light of the new criminal provisions provided for in Title III, firms are advised to consult with counsel on appropriate modifications to leasing and collections procedures involving SCRA.

General Provisions

Covered “servicemembers,” “courts” - The definition of “servicemembers” covered by SCRA is expanded to include National Guard members who are called to active service for more than a month at a time. They join Army, Navy, Air Force, Marine, and Coast Guard servicemembers on active duty, as well as commissioned officers from the Public Health Service or National Oceanic and Atmospheric Administration, under the act's protections.² SCRA also specifies that servicemembers' legal representatives (their attorneys or individuals with power of attorney for the servicemember) have all the rights of servicemembers under the act.

Administrative agencies are added to the SCRA's definition of “court.” Thus, it appears that rental housing providers could pursue actions (subject to the limitations below) – and also see SCRA defenses invoked in – administrative agency proceedings as well as in the courts.³

¹ 50 U.S.C. 501 *et seq.*

² SCRA Sec. 101 (2)

³ SCRA Sec. 101 (5)

Protection for sureties, reservists upon receiving orders - The act now specifies that the stays, modifications, and protections (such as those outlined below) extend to guarantors and sureties, such as those on a residential lease or rental agreement.¹ The act also specifies that the protections outlined below apply to a military reservist from the time the reservist receives an order to report for service until the reservist reports.²

Waiver - A servicemember (including a reservist ordered to report) may waive any of the rights and provisions provided by this Act, but must waive modifications to a lease in writing.³

Retaliation prohibition - SCRA prohibits a “creditor” (which courts could read broadly to include a rental housing provider) from denying credit, changing terms of an existing credit arrangement, refusing to grant credit, or annotating a servicemember’s record to identify the servicemember as a member of the National Guard or reserve, on the basis of a servicemember’s exercise of rights under the act.⁴

Protections against default judgments - SCRA provides that, in cases of default judgments, the court shall require a plaintiff (such as a rental housing provider) to file an affidavit, according to specified procedures, stating whether or not the defendant is in military service or if that cannot be determined. Provisions for protections for servicemembers against default judgments are set out. The section also establishes authority for courts to vacate a prior default judgment.⁵

Stay of proceedings where servicemember has notice - SCRA sets out certain general procedures for a servicemember to request a stay in matters covered under this section (such as, apparently, a rental housing provider’s court motion to treat a resident’s termination as breach under Section 302). This provision does not apply to the stays of evictions and distress under Section 301.⁶

Other court authority - SCRA authorizes courts to reduce or waive fines or penalties accruing under contracts (such as rental agreements),⁷ stay or vacate a prior judgment or attachment upon motion by a servicemember whose service has “materially affected” him or her from complying,⁸ and stay an action under the SCRA for up to 90 days after the end of the servicemember’s military service.⁹ If the servicemember is a co-defendant with others who are not in military service and not entitled to SCRA protections (e.g., non-military roommates who co-signed a lease), the plaintiff may proceed against those other defendants with the approval of the court.¹⁰

Limited rate of interest - Where the servicemember provides notice and a copy of his or her order to a “creditor” no later than 180 days after leaving military service, the servicemember may be entitled to the following “forgiveness” on “interest” owed, subject to a court granting creditor relief:

¹ SCRA Sec. 103

² SCRA Sec. 106

³ SCRA Sec. 107

⁴ SCRA Sec. 108

⁵ SCRA Sec. 201

⁶ SCRA Sec. 202

⁷ SCRA Sec. 203

⁸ SCRA Sec. 204

⁹ SCRA Sec. 205

¹⁰ SCRA Sec. 205 (b)

“(1) LIMITATION TO 6 PERCENT.— An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember’s spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent per year during the period of military service.

(2) FORGIVENESS OF INTEREST IN EXCESS OF 6 PERCENT.— Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven.

(3) PREVENTION OF ACCELERATION OF PRINCIPAL.—The amount of any periodic payment due from a servicemember under the terms of the instrument that created an obligation or liability covered by this section shall be reduced by the amount of the interest forgiven under paragraph (2) that is allocable to the period for which such payment is made.”¹¹

“Interest” is defined broadly to include “service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability.”¹² The court may grant the creditor relief if it determines that the servicemember’s ability to pay interest in excess of 6 percent is not materially affected by military service.¹³

Operations Note: “Interest” as defined here is arguably broad enough to include “fees” such as move-in, reservation, and/or termination fees. Thus it appears a servicemember (or the servicemember’s creative counsel) may seek to argue for forgiveness of a debt owing to a rental housing provider where all applicable fees owed during the period of military service amount to more than 6 percent of the principal.

Effective date – SCRA takes effect upon enactment and applies to any case that is not final before the date of enactment of the act.¹⁴ Thus, the act applies to leases and rental agreements already in effect and to litigation on those leases that is not yet “final.”

Rental Housing Provisions

Court-ordered rental and distress eviction requirement expanded (Sec. 301) - SCRA expands the old SSCRA’s protections against eviction to a broader range of rental housing. Following SCRA, unless it first obtains a court order, a rental housing provider¹⁵ may not evict or proceed with an action in distress against a servicemember or the servicemember’s

¹¹ SCRA Sec. 207 (a)

¹² SCRA Sec. 207 (d)

¹³ SCRA Sec. 207 (c)

¹⁴ SCRA Sec. 3

¹⁵ The House Report accompanying SCRA notes that Section 301 is meant to extend to protect residents in actions brought by persons holding superior title to the property, as well as residents living in a property under a valid landlord-tenant relationship. The report notes that the section is meant to “eliminate the conflict between courts regarding the relationship required to invoke the eviction protections of this section. *See Clinton Cotton Mills v. United States*, 164 F.2d 173 (4th Cir. 1947) (holding that if a person merely has superior title and attempts to evict a servicemember, the Act’s protections apply); *but see Arkless v. Kilstein et al.*, 61 F. Supp. 886 (E.D. Pa. 1944) (holding that there must be an actual landlord-tenant relationship). H. Rep. 108-81, 40

dependents from “premises that are occupied or intended to be occupied primarily as a residence”¹⁶ where the monthly rent is \$2,400 or less.¹⁷ This rent amount will be adjusted annually for inflation.¹⁸

Courts’ expanded stay powers (Sec. 301) - Further, on a showing by a servicemember or the servicemember’s representative (e.g., attorney) that the servicemember’s ability to pay rent is “materially affected by military service,” the court must stay an eviction or distress action for a period of time at the court’s discretion (90 days is specified) or modify the lease obligations of the parties. SCRA specifically provides that, where a stay is granted under this provision, the court may grant to the rental housing provider such relief “as equity may require.”¹⁹ Under SCRA, courts may now also require a “rent allotment” from the pay of the servicemember to satisfy the terms of a court order, subject to limitations determined by the appropriate Secretary.²⁰ The additional stay provisions found in Sec. 202 (see “Stay of proceedings where servicemember has notice” above) do not apply to these Section 301 actions.

Court-ordered breach or rescission of pre-service contracts required (Sec. 302) - SCRA requires a court order for rescission or termination for breach of contract (or repossession for such breach) during a period of military service for the purchase or lease of real or personal property (e.g., apartment lease or rental agreement, lease or purchase of furnishings) that was entered into prior to such service, where a deposit or installment was paid before the servicemember entered the service.²¹ Courts are also given broad discretion to order repayment, enter a stay of proceedings, or “make other disposition as is equitable to preserve the interests of all parties.”²²

Rental housing providers in military service (Sec. 303) - SCRA authorizes a court to stay proceedings or adjust the obligation in the case of claims filed to enforce mortgage or trust deed payments for up to 90 days after a servicemember’s period of military service when the servicemember’s ability to comply with the obligation has been materially affected by military service. This provision would only apply to obligations on real or personal property owned by a servicemember that originated before the period of the servicemember’s military service and for which the servicemember is still obligated when the property is secured by a mortgage, trust, deed, or other security in the nature of a mortgage. Foreclosure sale rights are also limited for properties covered under this section.²³

Operations Note: Section 303 could be claimed by some rental housing providers – smaller housing providers, in all likelihood – who are able to show that their military service “materially affected” their ability to make payments on their mortgage or trust deed. Interestingly, because the hardship a mortgagor can claim for relief under this provision does not appear to be limited to the mortgagor’s own military service, conceivably a small rental property owner whose

¹⁶ The House Report accompanying SCRA notes that the words “intended to be occupied” are “intended to eliminate any question” that Section 301’s protections cover “a servicemember [who] has signed a contract or deposited money for premises, but is unable to initiate or complete occupancy due to military service.” H. Rep. 108-81, 40

¹⁷ The rent caps were last adjusted, from \$150 a month to \$1,200 a month, in 1991. H. Rep. 108-81, 35

¹⁸ SCRA Sec. 301 (a)

¹⁹ SCRA Sec. 301 (b)

²⁰ SCRA Sec. 301 (d)

²¹ SCRA Sec. 302 (a)

²² SCRA Sec. 302 (b), (c)

²³ SCRA Sec. 303

occupancy has been severely impacted by units vacated by the military call-up of its residents could try to claim relief from mortgage obligations under this provision.

Lease Termination Rights Expanded (Sec. 305) - As the House Report accompanying SCRA notes, in expanding the old SSCRA's lease termination privileges this section specifically intends to overturn certain current lease practices (such as not recognizing a permanent change of station or certain deployment orders as adequate grounds for breaking a lease without penalty) and criminalize other practices (such as the practice of accruing rent after a servicemember validly terminates a lease). The section

“creates a new protection for a servicemember while in military service, executes a lease and thereafter receives military orders for a permanent change of station (PCS) or deployment with a military unit for at least 90 days. The need for this protection is demonstrated by the situation of unmarried servicemembers who are forced to pay rent for an entire term on premises that can go unoccupied for many months due to rapid and unexpected deployments around the world. Leases that include a military clause do not generally protect a servicemember ordered to deploy (not a PCS) with a unit. In addition, this section would add the words “security deposit” to the penalty section to deter landlords from wrongfully keeping security deposits when servicemembers are required to break a lease due to military requirements.” (emphasis added)²⁴

Specifically, Section 305 allows the termination of residential leases of premises occupied or intended to be occupied by a servicemember or servicemember's dependents, if the lease is executed by a person who thereafter and during the term of the lease enters military service. The servicemember may also terminate where he or she executes a lease while in military service and thereafter receives orders for a permanent change of station or to deploy for not less than 90 days. The servicemember has the option to terminate at any time after entry into military service or receipt of orders for permanent change of station or deployment.

The provision specifies requirements for the renter to provide written notice of termination to the housing provider or its agent and provide the effective date of termination for leases with monthly rent and for all other leases. Written notice must be provided to the landlord along with a copy of the servicemember's orders. Generally, a monthly lease will terminate 30 days after the first date on which the next payment is owed, after notice is delivered (i.e. notice given 10 August, next payment due 1 September, lease terminated 1 October – 30 days after 1 September). All other leases terminate on the last day of the month following the month in which notice is given.

Expanding the penalty provision in current law,²⁵ Section 305 (h) (1) makes it a misdemeanor to knowingly seize, hold, or detain the “personal effects, *security deposit*, or other property” of a servicemember or dependent “who lawfully terminates a lease under this section...for the purpose of subjecting or attempting to subject any of such property to a claim for rent accruing subsequent to the date of termination of such lease.” (emphasis added)²⁶

²⁴ H. Rep. 108-81, 40-41, citing *Patrikes et al. v. J.C.H. Service Stations Inc.*, 180 Misc. 917, 41 N.Y.S. 2d 158 (N.Y. City Ct.), *aff'd*, 180 Misc. 927, 46 N.Y.S. 2d 233 (N.Y. Sup. Ct. 1943) (court held “the lessor should not be permitted to retain a security for the faithful performance of that which has become impossible through the command of the sovereign.”)

²⁵ see 50 U.S.C. Sec. 534 (3)

²⁶ SCRA Sec. 305 (h) (1)

The provision also requires that arrearages in rent be paid on a prorated basis and requires that rents paid in advance be refunded. It also would authorize a court to grant certain relief to housing providers “as justice and equity require.”

Operations Note: Firms should examine lease and rental agreement language. Firms should also review their lease termination and collection procedures with counsel to ensure (in particular) that rent is not accruing where servicemembers or their dependents have properly terminated their leases.

Although the penalty provision in Section 305 (h) (1) has been expanded to name “security deposits,” nothing in this section limits the ability of rental housing providers under other applicable law to deduct from the security deposit for damages and the like. For example, as the Navy Judge Advocate General’s guidance on this provision in the prior law SSCRA notes:

“The service member is entitled to the return of any security deposit to which he or she is entitled and a prorated refund of any advance rent. NOTE - this does not mean that you automatically get the whole security deposit back. If any damage is done to the apartment, the landlord may be entitled to withhold a portion, or the whole, of the security deposit to cover the costs of repairs.”²⁷

New criminal misdemeanors for violation of these sections - SCRA makes knowing violations or attempted violations of the above sections (301, 302, 303, 305) a criminal misdemeanor. The act also provides that remedies otherwise available under law are not precluded by these sections.

Protections extend to servicemembers’ families (Sec. 308) - Upon application to the court, a dependent of a servicemember is entitled to the above protections if the dependent’s ability to comply with a lease, contract, or other obligation “is materially affected by reason of the servicemember’s military service.”²⁸

²⁷ www.jag.navy.mil/documents/SSCRA.htm#LeaseEviction

²⁸ SCRA Sec. 308