

WFG Underwriting Bulletin



To: All Policy Issuing Agents of WFG National Title Insurance Company
From: Underwriting Department
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Subject: Servicemembers' Civil Relief Act (SCRA) following Foreclosure of Mortgage/Deed of Trust

Update Notes: In 2008, in response to the foreclosure crisis, the SCRA was amended to restrict foreclosures for first 9 months, then 1 year following the end of military service. This was a change from the original 90 days after leaving the military. Thinking things would revert to a more normal state, Congress included a "sunset" provision that caused it to automatically revert back to 90 days after a period of years. Congress has periodically pushed out the sunset date (sometimes after it has reverted) and a bill is currently pending to do so again.

As an underwriting matter, WFG will continue to require compliance with the SCRA for 1 year following the end of military service, even during those periods when the sunset provision has caused an automatic reversion to 90 days.

When examining title following a judicial or non-judicial foreclosure of a mortgage on the property, the agent shall confirm that (i) the docket or court file of a judicial foreclosure proceeding, (ii) the affidavits/certifications, Trustee's certificates or statement in the trustees deed in a non-judicial foreclosure, or (iii) other documents recorded in the land records, confirm that each of the property owners and any other individual defendants whose interest was foreclosed was not in the Military Service of the United States during the One Year preceding the final date of the foreclosure, forfeiture or sale.¹

As corporations and other "entities" cannot serve in the U.S. Military, no affidavits or proofs are required for corporations or other "entities."

If the above records do not confirm that every one of the foreclosed individual defendants were not in the Military Service, any search or commitment shall include the following exception:

¹ The time period was increased from 90 days to 9 months effective July 30, 2008, and to 1 year effective Feb. 2, 2013. It reverted back to 90 days on January 15, 2015. P.L. 112-154, Title VII, §710(d), This was changed back to 1 year through December 31, 2017 P.L. 114-142 (retroactive to January 1, 2016). It reverted back to 90 days effective January 1, 2018, but is expected to be changed back to 1 year. See HR 2810, s 557.

- #. Any claim based upon the Servicemembers Civil Relief Act, 50 U.S.C.A. § 3901 et seq., which restricts foreclosure, forfeiture and other legal proceedings based upon Military Service of the United States.

NOTE: This exception may be removed only upon providing evidence satisfactory to the Company that the foreclosure [described as] was conducted in accord with the requirements of or an exemption from the Servicemembers Civil Relief Act, 50 U.S.C.A. § 3901 as set forth in National Bulletin #2014-6.

The exception may be removed under the following circumstances:

1. Insuring a Subsequent Sale.

WFG will insure the second sale to a bona fide purchaser (BFP) following foreclosure or a refinance by the second BFP without taking an SCRA exception. Any post foreclosure transaction involving a lender, servicer or lender affiliate or a BFP who acquired at the foreclosure sale, should require proof of compliance with applicable provisions of the SCRA.

2. Evidence in Non-Judicial Foreclosure.

In some jurisdictions, the practice is for the foreclosing trustee to provide a separate Trustee's certificate or affidavit as to non-military status. WFG agents are authorized to rely on such certificates whether or not recorded or in recordable form to remove the SCRA exception.

3. Non-Military Evidence as to All Foreclosed Individual Owners.

Non-Military affidavits are provided to the title agent/escrow officer for recording in the land records certifying that each of the property owners whose interest was foreclosed was not in the Military Service of the United States at any time during the 1 year¹ preceding the final date of the foreclosure, forfeiture or sale. Evidence of current military status is not sufficient to satisfy the requirement.

The Defense Manpower Data Center has an online portal to verify Military Service at <https://scra.dmdc.osd.mil/scra/#/home>. The foreclosing lender should be able to confirm their compliance with the SCRA using data available in the loan file and the online certificate generated at the above site.

Because of the impossibility of generating proof of non-military status for an unknown spouse, heir or tenant who may or may not be in the military, WFG will insure a default judgment of foreclosure notwithstanding the absence of a non-military affidavit as to unknown parties.

4. Mortgage or deed of trust executed during Military Service:

The SCRA exception may be removed with appropriate evidence that the foreclosed mortgage or deed of trust was executed during each servicemember's period of Military Service AND if the foreclosure was judicial, that there was no default judgment. Note that under §3953, a non-judicial foreclosure of mortgage or deed of trust during the servicemembers period of Military Service may proceed.

5. Appearance in a judicial mortgage foreclosure:

When insuring title to real property acquired out of a judicial mortgage foreclosure, you may remove the SCRA exception with regard to a court ordered foreclosure in which each individual defendant, for whom non-military evidence is not of record, made an appearance (filed an answer or motion) in the action (except if such appearance is solely to apply for a stay pursuant to 50 U.S.C.A. § 3932 or to deny jurisdiction or adequacy of service).

6. Written Agreement:

WITH THE EXPRESS APPROVAL OF A WFG UNDERWRITER, you may rely upon a written agreement by the servicemember defendant waiving rights under the SCRA and acquiescing in any proceeding (foreclosure, sale, etc.), whether or not an appearance is made, if the agreement is executed during or after the servicemember's period of Military Service. The written agreement must specify the legal instrument or proceeding to which it applies, and it must be in recordable form.

OR

7. Express Approval by WFG Underwriting

Additional information is available in the Background on the Servicemembers' Civil Relief Act, attached below.

NOTE: This Bulletin is for the sole purpose of establishing underwriting positions and policies reflecting WFG National Title Insurance Company's best business judgment. The information contained in this Bulletin is intended solely for the use of employees of WFG National Title Insurance Company, its title insurance agents and approved attorneys. Disclosure to any other person is expressly prohibited unless approved in writing by the WFG National Title Insurance Company's Underwriting Department.

The Agent may be held responsible for any loss sustained as a result of the failure to follow the standards set forth above.

Background on the Servicemembers' Civil Relief Act

National Bulletin 2014-6 provides guidance on properly implementing the Servicemembers Civil Relief Act. 50 U.S.C.A. 3901 et seq. ("the Act" or "SCRA"), which was formerly known as the "Soldiers and Sailors' Civil Relief Act". This article is intended to provide a broader perspective and deeper understanding about this lengthy piece of legislation that addresses a variety of issues important to military personnel.

Who Does the Act Protect?

The Act protects active duty members in the Army, Navy, Air Force, Marine Corps and Coast Guard, and members of the National Guard called to active service for 30 days or more. The term "Military Service" as defined in the Act, also applies to members of the commissioned corps of the National Oceanic and Atmospheric Administration; and the commissioned corps of the Public Health Service. § 3911.

Under certain circumstances, (e.g., eviction actions), dependents of military members (e.g., a spouse, child, and someone who is supported by the servicemember) are also covered by the Act. §§ 3911, 3951. Dependents may also be entitled to protections with respect to other obligations if they can demonstrate that their ability to comply with an obligation is materially affected by the servicemember's Military Service. § 3959. Persons secondarily liable, like sureties, guarantors, endorsers, accommodation makers, and co-makers, may also be protected. § 3913.

What Does the Act Protect?

The Act provides a wide range of protections for individuals entering, called to active duty in the military, or deployed servicemembers. It postpones or suspends certain civil obligations to allow servicemembers to devote their full attention to duty and relieve stress on their families. The Act impacts a broad range of things, including:

- Outstanding credit card debt
- Mortgage payments
- Foreclosures
- Pending trials
- Taxes and Tax foreclosures
- Life insurance
- Protecting dependents against eviction
- Allowing the servicemember to terminate a lease following change of station orders.
- Caps interest rates on credit obligations (including credit cards)

This article focuses on only those sections of the Act that directly affect foreclosure procedures and the insurability of foreclosed property. However, note that these provisions also apply to other court actions like quiet title actions and domestic relations actions that can affect title. It does not purport to be a review of the entire Act.

How Does the Act affect Real Property Title?

WFG and its agents are rarely going to be in the role of creditors to a service-member or in any of the other directly affected relationships. However, we do provide title and other services to creditors who have duties under the Act. In that role, we may be called upon to assist them with their own compliance with the Act.

When we insure title after a foreclosure, we also must assure that any affected servicemembers received the full protections to which they are entitled under the Act, and that it is properly documented in the land or court records for the benefit of the next examiner. While as title examiners, we are not subject to the criminal enforcement provisions of the Act, a completed judicial or non-judicial foreclosure may be set aside based on non-compliance with the Act – thus turning it into a title claim. It is also the right thing to do for the brave men and women serving our country.

So first, we'll examine the provisions of the Act which affect Real Property Title. National Bulletin 2014-6 spells out the practices and standards to be followed to document proper compliance.

The SCRA affects real property title in five different ways:

1. Judicial Foreclosure of Pre-Service Mortgage:

Section 3953 of the Act protects military personnel from legal proceedings to enforce a secured debt in the nature of a mortgage created prior to the date on which Military Service commenced.

Under subsection 3953(b), a court must stay any proceedings to enforce a secured debt unless the court finds that the ability of the debtor to comply with the terms of the debt was not materially affected by Military Service.

From a title standpoint, it is important to note §3953(c) which provides any foreclosure made during the period of Military Service or for one year² thereafter is invalid unless agreed to by the mortgagor or specifically approved by the court.

Section 3953 does not apply to the foreclosure of Condominium, Homeowners Association Liens, or other non-tax liens, however, §3931 (protecting against default judgments); §3932 (providing for stay of proceedings) and §3934 (stay or vacation of execution) may provide important protections in those contexts.

2. Non-Judicial Foreclosure of Pre-Service Mortgage

The same section 3953(c) functionally makes a non-judicial foreclosure of a pre-service mortgage or deed of trust impractical as to an active duty servicemember or within one year after the conclusion of Military Service. There are two ways in which a non-judicial foreclosure may validly proceed. The first is to have an express court order authorizing the sale and a second approving the sale. (hardly a

² As noted in Footnote 1 to Bulletin 2014-6, the 1 year term of protection after ceasing military service “sunset” periodically and reverts to 90 days. It then gets renewed, sometimes retroactively.

non-judicial process). The second is to have the servicemember agree to the foreclosure. The waiver of rights under the Act requires meeting very specific requirements (§3918) and reliance on any such waiver is to be made only upon review and approval of a WFG underwriter. The responsibility for assuring compliance with these requirements falls to the foreclosing lender and the trustee. While practices differ around the country, compliance with the Act is not always documented in the land records.

3. Protections against Default Judgments

Congress recognized that it can be exceedingly difficult for a servicemember to respond to or appear before a domestic court. Accordingly, §3931 of the Act provides protections for the servicemember against the entry of default judgments.

In any action in which a defendant does not make an appearance, “the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit ... stating whether or not the defendant is in Military Service and showing necessary facts to support the affidavit.” Contrary to common belief, personal service on a person does not remove one from the requirements of the Act.

As the Act is phrased, this affidavit would seem to be a condition precedent to the entry of a judgment, such that a judgment entered in violation of this provision would be void. However, the case law holds that it is merely voidable at the instance of the servicemember. See e.g. *Davidson v. General Finance Corp.*, 295 F. Supp. 878, (N.D.Ga.1968); *Rentfrow v. Wilson*, 213 A.2d 295 (D.C.App.1965); *Krumme v. Krumme*, 636 P.2d 814, 6 Kan.App.2d 939 (Kan.App. 1981).

Where it appears from the affidavit that the defendant is in Military Service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case do not waive any defense of the servicemember or otherwise bind the servicemember. §3931(b)(2).

Providing a false affidavit is a criminal violation under §3931(c) of the Act, and subjects the parties to state law penalties for fraud on the court and perjury. Moving for a default judgment without providing the required affidavit may also constitute an ethical violation for foreclosing counsel.

From a title insurance standpoint the danger is that the court is statutorily obligated to reopen the judgment and allow the servicemember to defend the action (potentially unwinding the insured sale) if it appears that the servicemember was materially affected by reason of Military Service in defending the action and has a meritorious or legal defense to the action or some part of it. The motion to reopen the judgment may be filed up to 90 days after the end of Military Service. §3931(g)(2). Note this is in addition to the basic voidability of the foreclosure under §3953(c).

4. Tax Foreclosure/Tax Sale

Real property occupied for dwelling, professional, business, or agricultural purposes by a servicemember or the servicemember's dependents or employees may not be sold to enforce the collection of a tax or assessment (other than income taxes) except by court order and with the court's determination that Military Service does not materially affect the servicemember's ability to pay the unpaid tax or assessment.

The court may stay the collection action or sale during the period of Military Service and for a period not more than 180 days after the end of Military Service. When the property has been sold or forfeited in compliance with these requirements, the servicemember has the right to redeem (or commence an action to redeem) anytime during or within 180 days after termination of or release from Military Service. §3991

Please note that WFG generally does not insure titles based on non-judicial tax sales for reasons unrelated to SCRA. However, if WFG does agree to insure a tax title, an SCRA exception must be taken in any policy unless the matter has been cleared as set forth in National Bulletin 2014-6.

5. Interest Rates Capped, Payments Adjusted.

Interest rates on pre-service debts are capped at 6% per annum, with any excess interest forgiven and periodic installments payments recomputed to reflect the lower rate. §3937 This limitation on interest rates applies for the entire period of service as to all debts. As to mortgage debts, the interest rate cap continues for an additional one year after the end of Military Service. This limitation is also available to the dependents of a servicemember, if the dependent's ability to comply with the obligation is materially affected by reason of Military Service. §3959.

While this protection does not directly affect Real Property title, or affect the foreclosure process, it may retroactively affect the amount of the debt, or the existence of a default.

Underwriting requirements for the SCRA are set forth in National Bulletin 2014-6.

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