



Department of Justice

STATEMENT

OF

**THOMAS E. PEREZ
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE**

**BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE**

**ENTITLED
"ECONOMIC OPPORTUNITY AND TRANSITION LEGISLATION"**

JUNE 13, 2012

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Madame Chairman Murray, Ranking Member Burr, and Members of the Committee, thank you for the opportunity to present the views of the Department of Justice on S. 2299, the proposed, "Servicemembers Rights Enforcement Improvement Act." The Department welcomes the introduction of this legislation, which incorporates a number of the Department's proposals to amend and to strengthen enforcement of two important statutes that protect the rights of servicemembers and their families – the Servicemembers Civil Relief Act (SCRA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

S. 2299 would amend the SCRA's affidavit requirement, which provides that a party seeking foreclosure or other default judgment against a servicemember must first file with the court an affidavit stating whether or not the servicemember is in military service. Section 2 would amend that provision to clarify that such requirement includes the obligation to take reasonable steps to determine the servicemember's military status, including but not limited to searching available Department of Defense records. The amendment would simply codify what several courts have already held. The Department of Justice supports this provision because it would make clear that the party seeking a default judgment has an affirmative obligation to determine the servicemember's military status.

The bill would also amend the SCRA to clarify that the private right of action, added to the SCRA by the Veterans Benefits Act of 2010, applies retroactively to violations occurring before the date of enactment of that Act. The Department supports this provision because it would strengthen the ability of servicemembers to

vindicate their rights under the SCRA. The Department has proposed a similar amendment to clarify that the Attorney General's authority to enforce the SCRA, which was made explicit by the 2010 Act, also applies retroactively. Both proposals are consistent with the Department's litigating position and with recent decisions of the Fourth Circuit Court of Appeals. Accordingly, the Department strongly urges the Committee to revise Section 3 to make clear that both the private right of action and the Attorney General's authority apply to violations occurring before enactment of the Veterans Benefits Act of 2010. By including only the private right of action in Section 3, Congress could signal, incorrectly, that it did not intend that the Attorney General's authority also apply retroactively.

Further, S. 2299 would amend USERRA to allow the Attorney General, acting on behalf of the United States, to serve as a plaintiff in all USERRA suits, rather than only in suits filed against State employers. The amendment would preserve the right of the aggrieved servicemember to intervene in such suits or to bring his or her own suit where the Attorney General has declined to file suit. The amendment would require that the Attorney General keep the aggrieved servicemember informed of the status of the Attorney General's decision and to provide written notice of such decision within a specified time period. Importantly, Section 4 also would grant independent authority to the Attorney General to investigate and file suit to challenge employment policies or practices that establish a pattern or practice of violating USERRA. The Department strongly supports these changes, which would make USERRA operate more like the SCRA and other civil rights laws by allowing the United States to always serve as the plaintiff to vindicate the public interest in ensuring the statute is enforced. The changes also would strengthen significantly the Department's ability to enforce USERRA to address a systemic violation (such as a policy prohibiting extended absences, including absences for military service) that could adversely affect the employment rights of multiple servicemembers.

Section 6 would amend both the SCRA and USERRA to provide the Attorney General with civil investigative demand authority (CID) to compel the production of existing documents and unsworn answers to written questions from the custodian of such documents. The Department strongly supports this amendment. The

Department of Labor has subpoena power in its investigations under USERRA. The Department of Justice, however, has no pre-suit investigative authority under USERRA or the SCRA, and therefore must rely on the voluntary cooperation of respondents when assessing matters for litigation. If a respondent is not cooperative, the Department must undertake a costly effort to try to obtain the necessary evidence through alternate routes or forego litigation. Providing the Department with CID authority to complement the USERRA pattern-or-practice authority proposed in Section 4 is critical because pattern-or-practice authority includes the authority to initiate an investigation. The Department has existing authority to initiate investigations under the SCRA but has no CID authority. Section 6, therefore, would strengthen the Department's ability to enforce both statutes. The Department notes that the proposed CID authority is narrow in scope. In addition, the authority would be subject to the same limitations that apply to the Department's authority under the False Claims Act. For example, it would require high-level approval and would not include the power to compel documents protected from disclosure under the Federal Rules of Civil Procedure. Section 6 therefore strikes the proper balance between the Department's need for greater authority to enforce laws that protect the rights of servicemembers on the one hand, and the respect for civil liberties concerns on the other.

Finally, the Department urges the Committee to include in this bill a provision that would double the amount of civil penalties available under the SCRA. When Congress amended the SCRA with the Veterans Benefits Act of 2010 to provide for civil penalties, it used the same amounts authorized under the Fair Housing Amendments Act (\$55,000 for the first violation and \$110,000 for any subsequent violation). Those amounts, however, have not been adjusted for inflation or for any other reason – not even in response to recent abuses in the lending market – since 1999. Civil penalties can serve as an important tool for deterring violations and for remedying violations that do not result in large damages awards for victims. Accordingly, the Department, in its legislative proposals transmitted to Congress on September 20, 2011, proposed amendments to double the amount of civil penalties available in litigation under both statutes. Another bill before this Committee, S. 486, the

proposed “Protecting Servicemembers from Mortgages Abuses Act,” also would increase the amount of civil penalties under the SCRA. The Department strongly urges the Committee to act on this proposal.

The Department appreciates the opportunity to submit its views on S. 2299, and stands ready to work with the Committee in moving forward this important legislation to strengthen enforcement of laws that protect the rights of servicemembers.