

Legislative Update

BY STACEY SALTERS

Debt-Collection Reforms Draw Congressional Focus Post-COVID

While government stabilization programs and lender forbearance assisted many U.S. households, “debt collection” continues to be one of the leading issues that prompts consumers to register a complaint with the Consumer Financial Protection Bureau (CFPB).¹ At the same time, aggregate household debt balances increased by \$85 billion in the first quarter of 2021, a 0.6 percent rise from Q4 2020, and now stand at \$14.64 trillion, according to the New York Federal Reserve.²

Amid the U.S. transition to a post-pandemic economy, some of the factors that held collections in check, such as stimulus funds, enhanced unemployment benefits and payment accommodations, are set to expire or are easing. As debt levels continue to increase and complaints about debt-collectors and their practices remain elevated, Democratic lawmakers continue to scrutinize the industry and push legislative proposals for reforms despite challenges to passage. This article examines a package of proposed reforms that recently passed the House of Representatives, takes a closer look at a few of the key provisions related to nonjudicial foreclosure, student loan and servicemember debt-collection practices, and considers its prospects for passage in the Senate.

Comprehensive Debt Collection Improvement Act Introduced, Passes the House

House Financial Services Committee Chair Maxine Waters (D-Calif.) introduced H.R. 2547, the “Comprehensive Debt Collection Improvement Act,” on April 15. The bill is a legislative package of debt-collection reform proposals from previous sessions of Congress that aims to bring “new accountability to the debt-collection industry and stronger protections for consumers from harassment and abuse,” according to Rep. Waters.³ The legislation incorporates text similar to the following bills introduced in the 117th Congress:

- The Small Business Lending Fairness Act, a bill by Rep. Nydia Velazquez (D-N.Y.) that would amend the Truth in Lending Act (TILA) to restrict the use of confessions of judgment for small business owners, extending the protections that currently exist in consumer lending.
- The Fair Debt Collection Practices for Servicemembers Act, a bill introduced by Rep. Madeleine Dean (D-Pa.) to amend the Fair Debt Collection Practices Act (FDCPA) to prohibit debt-collectors from threatening a servicemember with reducing their rank, having their security clearance revoked, prosecuting them under the Uniform Code of Military Justice, or otherwise communicating with the commanding officer or any other senior officer in the chain of command above a servicemember regarding an outstanding debt.
- The Private Loan Disability Discharge Act, a bill introduced by Rep. Dean that would amend TILA to require the discharge of private student loans in the case of permanent disability of the borrower, providing rights that already exist for federal student loan borrowers.
- The Consumer Protections for Medical Debt Collections Act, a bill introduced by Rep. Rashida Tlaib (D-Mich.) that would bar entities from collecting medical debt or reporting it to a consumer reporting agency without giving the consumer notice about their rights under the FDCPA and Fair Credit Reporting Act (FCRA) related to that debt, including a minimum one-year delay before adverse information is reported to a consumer reporting agency. It would also bar the reporting of adverse information relating to medical debt arising from medically necessary procedures.
- The Ending Debt Collection Harassment Act, a bill introduced by Rep. Ayanna Pressley (D-Mass.) that would amend the FDCPA to prohibit a debt-collector from contacting a consumer by email or text message without a consumer’s consent to be contacted electronically.
- The Stop Debt Collection Abuse Act, a bill introduced by Rep. Emanuel Cleaver (D-Mo.) that would extend FDCPA protections as they relate to debt owed to a federal agency, and limit the fees debt-collectors can charge. In addition, the bill requires the Government Accountability Office (GAO) to conduct a study into the use of third-party debt-collectors by government agencies.



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1 Fair Debt Collection Practices Act, CFPB Annual Report 2021, Consumer Fin. Prot. Bureau, March 2021, available at files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2021.pdf (unless otherwise specified, all links in this article were last visited on June 16, 2021).

2 “Quarterly Report on Household Debt and Credit,” Center for Microeconomic Data, New York Federal Reserve, May 2021, available at newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2021q1.pdf.

3 “Waters Floor Statement on Her Comprehensive Debt Collection Reform Bill,” House Fin. Servs. Comm. Press Release, May 13, 2021, available at financialservices.house.gov/news/documentsingle.aspx?DocumentID=407836.

• The Debt Collection Practices Harmonization Act, a bill introduced by Rep. Gregory Meeks (D-N.Y.) that would expand the definition of “debt” covered under the FDCPA to include money owed to a state or local government, clarifying that private debt-collectors who pursue debts such as municipal utility bills, tolls, traffic tickets and court debts are subject to the FDCPA. It also updates monetary penalties for inflation and clarifies that courts can award injunctive relief, as well as adds protections to consumers affected by national disasters.

• The Non-Judicial Foreclosure Debt Collection Clarification Act, a bill introduced by Rep. Jake Auchincloss (D-Mass.) that would reverse the recent U.S. Supreme Court decision in *Obduskey v. McCarthy & Holthus LLP* by amending the FDCPA to clarify that entities in nonjudicial foreclosure proceedings are covered by the statute.

On April 30, the legislative package was reported out of the House of Representatives. Republicans opposed to H.R. 2547 said in the committee report that, if enacted, “this bill will fundamentally restructure the consumer credit market as well as how businesses, most of whom are small businesses, are paid for their services. As a result, credit will be more expensive for all borrowers and may exclude the lowest income borrowers entirely.”⁴

The legislative package advanced to the House floor, and on a party-line vote, Democrats on May 13 passed (215-207) H.R. 2547. The proposed reforms were received in the Senate on May 17 and were referred to the Senate Banking, Housing and Urban Affairs Committee.

The debt-collection industry and some financial services agencies, including the Community Bankers Association (CBA)⁵ and Credit Union National Association (CUNA),⁶ have lobbied against the legislation. “The Comprehensive Debt Collection Improvement Act will have unintended or negative impacts on individuals and the banking services they pursue, including student loans,” the CBA wrote in a May 12 letter to House leadership. Previously, the CUNA said in an April 20 letter to House leadership that “restrictions on the reporting or consideration of certain debt prevents lenders from seeing borrowers’ complete debt circumstances and clouds lenders’ ability to fairly assess borrowers’ creditworthiness.”

Conversely, 88 public-interest, legal services, consumer, labor and civil rights organizations sent a letter of support⁷ on May 13 for the swift passage of H.R. 2547. “Debt in collection can wreak havoc on consumers, subjecting them to harassing debt collection calls and potential lawsuits. Despite the enactment of the federal [FDCPA] in 1977, debt collection remains a frequent source of complaints to the [CFPB], Federal Trade Commission, and other state and federal agencies,” they wrote.

Examination of Reforms

While future publications by ABI’s Legislation Committee will delve into additional provisions of H.R. 2547, this article spotlights the reforms proposed for debt-collection practices related to nonjudicial foreclosures, student loans and servicemembers.

Nonjudicial Foreclosures⁸

The legislation seeks to amend the definition of “debt collector” under the FDCPA to include entities that conduct nonjudicial foreclosures. This proposed change was prompted by the Supreme Court’s 2019 ruling in *Obduskey v. McCarthy & Holthus LLP*,⁹ in which it held that those engaged in nonjudicial foreclosures are not “debt collector[s]” within the FDCPA’s meaning, except for the limited purpose of enforcing security interests pursuant to 15 U.S.C. § 1692f(6).

Obduskey involved a law firm, McCarthy & Holthus LLP, that was hired to pursue nonjudicial foreclosure proceedings against a homeowner, Dennis Obduskey. The law firm sent correspondence to the homeowner, evidencing its intent to pursue nonjudicial foreclosure.¹⁰ The homeowner responded with correspondence challenging the underlying debt,¹¹ but the law firm proceeded to nonjudicial foreclosure without any further notice to the homeowner.¹² The homeowner filed suit against the law firm in connection with the debt, arguing that the law firm failed to follow the notice requirement under the FDCPA once he challenged the debt.¹³

Reviewing the statute’s plain language, the Supreme Court unanimously held that the lack of notice complained of by the homeowner did not extend to the actions of those seeking to enforce a security interest such as is the case in nonjudicial foreclosures. The Court also compared prior versions of the bill, which led it to reason that the exclusion of nonjudicial foreclosures from the general definition of “debt collector” was the result of a compromise.¹⁴ In *dicta*, the Court commented that Congress should amend the definition if its holding led to unintended results,¹⁵ and the amendment proposes to do just that.

Student Loans¹⁶

H.R. 2547 also proposes an amendment to 15 U.S.C. § 1650(g) that would slightly expand private student loan protections to mandate the holder of a private student loan to discharge the liability of the student borrower in situations where a student is “totally and permanently disabled.” The proposed amendment would prohibit the holders of a private education loan from making further attempts to collect on the outstanding student loan debt and prohibit them from

8 This applies certain consumer protections regarding debt collection to debt owed to federal agencies, states, debt buyers and businesses engaged in nonjudicial foreclosures.

9 139 S. Ct. 1029 (March 20, 2019).

10 *Id.* at 1035.

11 Obduskey responded with a letter invoking § 1692g(b) of the FDCPA, which provides that if a consumer disputes the amount of a debt, a “debt collector” must “cease collection” until it “obtains verification of the debt” and mails a copy to the debtor. *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 1038.

15 *See id.* at 1040.

16 This expands certain protections currently applicable to federally backed student loans to private student loans, including requiring the discharge of a private student loan in the event of the borrower’s death or total and permanent disability.

4 “House Report 117-23: Comprehensive Debt Collection Improvement Act,” House Fin. Servs. Comm., April 30, 2021, available at congress.gov/117/crpt/hrpt23/CRPT-117hrpt23.pdf.

5 “CBA Comment Letter Regarding H.R. 2547 Comprehensive Debt Collection Improvement Act,” Consumer Bankers Ass’n, May 12, 2021, available at consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-re-hr-2547-comprehensive-debt-collection-improvement.

6 “CUNA Concerned with Bill’s Changes to Debt Collection,” Credit Union Nat’l Ass’n, April 20, 2021, available at news.cuna.org/articles/119341-cuna-concerned-w-bills-changes-to-debt-collection.

7 Letter Regarding H.R. 2547, the “Comprehensive Debt Collection Improvement Act,” Nat’l Consumer Law Center, May 13, 2021, available at nclc.org/images/pdf/legislation/HR_2547_Support_Letter.pdf.

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monitoring the disability status of the student borrower at any point after the date of discharge. The federal regulation cross-referenced within the legislation defines “totally and permanently disabled” to include the condition of an individual who:

- (1) Is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that —
 - (i) Can be expected to result in death;
 - (ii) Has lasted for a continuous period of not less than 60 months; or
 - (iii) Can be expected to last for a continuous period of not less than 60 months; or
- (2) Has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability.¹⁷

Although it seems clear that both the student borrower and any co-signers or guarantors of the private student loan would be discharged from the student loan obligation in the event of the death or total and permanent disability of the student borrower, it is unclear whether, or to what extent, the co-signer or guarantor would retain liability in the event of his/her death or total and permanent disability. Perhaps it would depend on the language of the applicable guaranty agreement. Notably, because most guaranties survive the death of the guarantor to live on as a liability under the guarantor’s estate,¹⁸ it seems that this proposed amendment would leave something to be desired with respect to protections for guarantors.

In essence, a private student loan dies with the student borrower and protects any guarantors still living from future liability. However, in the event of the death or total and permanent disability of the guarantor, the liability may still outlive the guarantors to pose a post-mortem threat to their estates in the event of a subsequent default by the student borrower. Nevertheless, the proposed expansion of protections to cover private student loans may lead to higher borrowing costs in the industry — a presumptively unintended consequence.

Servicemembers¹⁹

Finally, H.R. 2547 seeks to protect servicemembers from certain threats made by debt-collectors in connection with the collection of their consumer debts. Specifically, a debt-collector may not threaten to do any of the following: (1) have the covered member reduced in rank; (2) have the

covered member’s security clearance revoked; or (3) have the covered member prosecuted under the Uniform Code of Military Justice.

There seems, however, to be some sort of disconnect between the prohibited practices and the protected class. At least two provisions beg for further clarification: the definition of “covered member,” and the 365-day extension that proposes to protect the covered members during the 365-day period beginning on the date of discharge, separation or release from duty.

The phrase “covered member” extends to both servicemembers and their “dependents.” While it might be relatively simple to ascertain the status of a current servicemember or veteran, one may only speculate as to how a debt-collector can determine who may be a dependent and who falls under the definition of “covered member” because the phrase necessarily covered civilians. Ironically, the types of threats prohibited by the bill would be largely inapplicable to most civilians, as neither reduction in rank nor prosecution under the Uniform Code of Military Justice would constitute a viable threat.

It should be further noted that the proposed protections extend to cover servicemembers who were separated, discharged or released from duty during the 365-day period beginning on the date of that change in status. Dependents are defined to include the servicemember’s spouse, child, parent or parent-in-law who is dependent on the servicemember for more than one-half of their support and residing in the servicemember’s household, and unmarried persons who are placed in the legal custody of a servicemember for a period of least 12 consecutive months. How potential debt-collectors are to be made aware of who in fact falls into this protected class prior to any transgressions of the law remains to be seen.

We look forward to further clarification regarding the intent to encompass civilians within these proposed amendments as the bill is examined by the Senate.

Conclusion

As the legislation advanced in the House on a party-line vote, the Comprehensive Debt Collection Improvement Act faces stiff headwinds in the Senate. Without Republican support and Democrats maintaining a slender tie-breaking vote by Vice President Harris, prospects for passage remain uncertain.

However, as the government’s pandemic-stabilization efforts such as enhanced unemployment payments and eviction moratorium expire, and lender forbearance recedes in the post-pandemic economy, debt-collection activity will likely expand. As collection activity expands, so too will congressional consideration of reforms such as the Comprehensive Debt Collection Improvement Act. **abi**

¹⁷ 34 C.F.R. § 685.102(b).

¹⁸ Thomas C. Wolff, “Look Before You Sign: The Pitfalls of Personal Guaranties,” *Nat’l Law Rev.* (June 16, 2021), available at natlawreview.com/article/look-you-sign-pitfalls-personal-guaranties.

¹⁹ Prohibiting a debt-collector from representing to a servicemember that failure to cooperate with a debt-collector will result in a reduction of rank or similar action.

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