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116TH CONGRESS
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HOUSE OF REPRESENTATIVES
REPORT
116–638

NON-JUDICIAL FORECLOSURE DEBT COLLECTION CLARIFICATION ACT

DECEMBER 10, 2020.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. WATERS, from the Committee on Financial Services, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5001]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 5001) to amend the Fair Debt Collection Practices Act to clarify that the definition of a debt collector includes, in all cases, a person in a business the principal purpose of which is the enforcement of security interests, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Non-Judicial Foreclosure Debt Collection Clarification Act".

SEC. 2. ENFORCEMENT OF SECURITY INTERESTS.

Section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) is amended by striking "For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.".

PURPOSE AND SUMMARY

On November 8, 2019, Congressman William Lacy Clay introduced H.R. 5001, the "Non-Judicial Foreclosure Debt Collection Clarification Act," which would reverse the recent Supreme Court decision in *Obduskey* v. *McCarthy and Holthus LLP* [1] by amending the Fair Debt Collection Practices Act ("FDCPA") to clarify that entities in non-judicial foreclosure proceedings are covered by the law.

BACKGROUND AND NEED FOR LEGISLATION

In March 2019, the Supreme Court held in *Obduskey* v. *McCarthy & Holthus LLP* that businesses engaged in non-judicial foreclosure do not qualify as debt collectors under the FDCPA. In that case, a homeowner in Colorado, which is a non-judicial foreclosure state, went through foreclosure proceedings, but the mortgage servicer's law firm refused to follow the FDCPA as it disputed that it was covered as a "debt collector" under the FDCPA. In its decision, although the Supreme Court acknowledged that non-judicial foreclosure would otherwise fit within the law's primary definition of "debt collector," it held that the secondary definition of "debt collector," which applies to the collection of a security interest, suggested that Congress intended for non-judicial foreclosure to be excluded from the broader definition.[2]

However, in a concurrence, Justice Sotomayor noted that it was "too close a case for [her] to feel certain that Congress recognized that this complex statute would be interpreted the way that the Court does today" and that Congress could clarify the statute if the Court got it wrong. Justice Sotomayor also highlighted the majority's acknowledgement that nothing in the Court's opinion "suggest[s] that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not grant an actor blanket immunity from the Act."

This legislation would clarify the FDCPA to clearly state that parties bringing proceedings against consumers in non-judicial foreclosure are covered by FDCPA as debt collectors. This legislation is supported by over twenty consumer, civil rights, labor, and community organizations, including Americans for Financial Reform, Consumer Federation of America, NAACP, National Associa-

[1] *Obduskey* v. *McCarthy & Holthus LLP*, 586 U.S.____, (2019).
[2] *Obduskey* v. *McCarthy & Holthus LLP*, 586 U.S.____, (2019).

tion of Consumer Advocates, National Consumer Law Center, and Public Citizen.[3]

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides that H.R. 5001 may be cited as the "Non-Judicial Foreclosure Debt Collection Clarification Act."

Section 2. Enforcers of security interests

This section amends Section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) by clarifying the definition of "debt collector" to not include "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests."

HEARINGS

For the purposes of section 103(i) of H. Res. 6 for the 116th Congress on September 26, 2019, the Committee on Financial Services held a hearing entitled, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices" to consider a discussion draft of H.R. 5001. Testifying before the Committee were the Honorable Rohit Chopra, Commissioner, Federal Trade Commission, Rev. Dr. Cassandra Gould, Pastor, Quinn Chapel A.M.E. Church (Jefferson City, MO) and Executive Director, Missouri Faith Voices, Ms. Bhairavi Desai, Executive Director, New York Taxi Workers Alliance, Ms. April Kuehnhoff, Staff Attorney, National Consumer Law Center, Professor Dalié Jiménez, Professor of Law, University of California, Irvine School of Law, Ms. Sarah Auchterlonie, Shareholder, Brownstein Hyatt Farber Schreck, and Mr. John H. Bedard, Jr., Owner, Bedard Law Group, P.C.

COMMITTEE VOTES AND ROLL CALL VOTES

The Committee on Financial Services met in open session on November 13, 2019, and ordered H.R. 5001 to be reported favorably to the House as amended in the nature of a substitute by a recorded vote of 31 yeas and 23 nays, a quorum being present.

COMMITTEE VOTES AND ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 5001:

[3] November 13, 2020 letter of support available with House Financial Services Committee majority staff.

Present	Representatives	Ayes	Nays
	Ms. Waters, *Chairwoman*	X	
	Mrs. Maloney	X	
	Ms. Velázquez	X	
	Mr. Sherman	X	
	Mr. Meeks	X	
	Mr. Clay	X	
	Mr. Scott	X	
	Mr. Green	X	
	Mr. Cleaver	X	
	Mr. Perlmutter	X	
	Mr. Himes	X	
	Mr. Foster	X	
	Mrs. Beatty	X	
	Mr. Heck	X	
	Mr. Vargas	X	
	Mr. Gottheimer	X	
	Mr. Gonzalez (TX)	X	
	Mr. Lawson	X	
	Mr. San Nicolas		
	Ms. Tlaib	X	
	Ms. Porter	X	
	Ms. Axne	X	
	Mr. Casten	X	
	Ms. Pressley	X	
	Mr. McAdams	X	
	Ms. Ocasio-Cortez		
	Ms. Wexton	X	
	Mr. Lynch	X	
	Ms. Gabbard		
	Ms. Adams	X	
	Ms. Dean	X	
	Mr. Garcia (IL)	X	
	Ms. Garcia (TX)	X	
	Mr. Phillips	X	
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	Mr. McHenry, *Ranking Member*		X
	Mrs. Wagner		X
	Mr. King		
	Mr. Lucas		
	Mr. Posey		X
	Mr. Luetkemeyer		X
	Mr. Huizenga		X
	Mr. Stivers		X
	Mr. Barr		X
	Mr. Tipton		X
	Mr. Williams		X
	Mr. Hill		X
	Mr. Emmer		X
	Mr. Zeldin		X
	Mr. Loudermilk		X
	Mr. Mooney		X
	Mr. Davidson		X
	Mr. Budd		X
	Mr. Kustoff		X
	Mr. Hollingsworth		X
	Mr. Gonzalez (OH)		X
	Mr. Rose		X
	Mr. Steil		X
	Mr. Gooden		X
	Mr. Riggleman		X
	Mr. Timmons		
26			

Committee on Financial Services
Full Committee
116th Congress (1st Session)

Date:____ 11/13/2019

Measure __ H.R.5001

Amendment No._____

Offered by:_____ Mr. Clay, as amended

Agreed To	Yes	No	Prsnt	Wdrn
Voice Vote	Ayes		Nays	

Record Vote	FC
	31 Ayes- 23 Nays

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c) of rule XIII of the Rules of the House of Representatives, the goals of H.R. 5001 are to ensure that government employees, contractors, and other consumers affected by a Federal government shutdown.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget Act of 1974*, the Committee has received the following estimate for H.R. 5001 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 22, 2020.

Hon. MAXINE WATERS,
Chairwoman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5001, the Non-Judicial Foreclosure Debt Collection Clarification Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is David Hughes.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

H.R. 5001, Non-Judicial Foreclosure Debt Collection Clarification Act
As ordered reported by the House Committee on Financial Services on November 14, 2019

By Fiscal Year, Millions of Dollars	2020	2020-2025	2020-2030
Direct Spending (Outlays)	*	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	*	*	*
Spending Subject to Appropriation (Outlays)	*	*	not estimated

Statutory pay-as-you-go procedures apply?	Yes	**Mandate Effects**	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	No	Contains intergovernmental mandate?	Yes, Under Threshold
		Contains private-sector mandate?	Yes, Cannot Determine Costs

* = between zero and $500,000.

H.R. 5001 would classify some businesses engaged in nonjudicial foreclosure proceedings as debt collectors under the Fair Debt Collection Practices Act (FDCPA). (Nonjudicial proceedings allow foreclosures on delinquent mortgages to occur without court supervision.) By classifying such businesses as debt collectors, H.R. 5001 would require them to comply with all applicable provisions of the FDCPA.

The Federal Trade Commission (FTC) is primarily responsible for enforcing violations of the FDCPA. Using information from the FTC, CBO estimates that the agency would spend less than $500,000 over the 2020–2025 period to enforce additional violations under the amended statute; such spending would be subject to the availability of appropriated funds.

The Consumer Financial Protection Bureau (CFPB) is authorized to implement the FDCPA through regulation. Using information from the CFPB, CBO estimates that it would cost the bureau less than $500,000 to update FDCPA regulations. The CFPB has permanent authority, not subject to annual appropriation, to spend amounts transferred from the Federal Reserve.

The bill would impose private-sector and intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). CBO cannot determine whether the cost of the private-sector mandates would exceed the threshold established in UMRA ($168 million in 2020, adjusted annually for inflation). CBO estimates the cost to comply with the intergovernmental mandates would not exceed the threshold established in UMRA ($84 million in 2020, adjusted annually for inflation).

Under the FDCPA, a debt collector is prohibited from communicating with third parties about a debt without the consumer's approval and cannot communicate with a consumer who has requested not to be contacted. In addition, under the FDCPA, a debt collector cannot act to collect a debt that is in dispute without providing the consumer with verification of that debt. Applying those restrictions to nonjudicial foreclosures could slow the foreclosure process while the debt collector provides information requested by the consumer.

The restrictions would impose costs on the new debt collectors, including expenses to comply with the new disclosure requirements and revenues lost from the delay in the nonjudicial foreclosure process. Little data is available to estimate the number of newly classified debt collectors or the number of consumers who would make claims that would slow the nonjudicial foreclosure process; therefore, CBO cannot estimate the cost of the mandate. However, given the number of loans that might be affected, CBO expects the costs could be substantial.

Because the FDCPA preempts state laws that conflict with its provisions, any amendments that would broaden the scope of FDCPA also would preempt state law. Thus the reclassification would preempt laws in roughly 30 states and the District of Columbia that govern businesses involved in nonjudicial foreclosures. Although the preemption would limit the application of those laws, it would impose no duty on states that would result in additional spending or a loss of revenue.

The CBO staff contacts for this estimate are David Hughes (for federal costs) and Rachel Austin (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 5001. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget Act*, which is attached.

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the *Congressional Budget and Impoundment Control Act* (as amended The Committee adopts as its own the estimate of federal mandates regarding H.R. 5001, as amended, prepared by the Director of the Congressional Budget Office.

ADVISORY COMMITTEE

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the *Congressional Accountability Act*, Pub. L. No. 104–1 H.R. 5001, as amended, does not apply to terms and conditions of employment or to access to public services or accommodations within the legislative branch.

EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5001 does not contain any congressional

earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 5001 establishes or reauthorizes a program of the Federal Government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

CHANGES TO EXISTING LAW

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 5001, as reported, are shown as follows:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets and existing law in which no change is proposed is shown in roman):

FAIR DEBT COLLECTION PRACTICES ACT

TITLE VIII—DEBT COLLECTION PRACTICES

* * * * * * *

§ 803. Definitions

As used in this title—

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. [For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.] The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affilated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors;

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

* * * * * * *

MINORITY VIEWS

Committee Republicans believe that consumers should have certainty and transparency with respect to mortgage foreclosures. However, H.R. 5001 will disrupt existing state laws implementing nonjudicial foreclosures. The bill would amend the *Fair Debt Collection Practices Act* (FDCPA) to include businesses that enforce a security interest as a primary debt collector.

Earlier this year, the Supreme Court in *Obduskey* v. *McCarthy & Holthus LLP* held in a 9–0 decision that businesses following a state's foreclosure proceedings statute are not "debt collectors" under the FDCPA, except for limited purposes articulated in the statute. In upholding Congress' intent with respect to a primary debt collector, the Supreme Court observed that the exclusion of enforcing a security interest from the definition was intentional, understanding that states are better positioned to implement nonjudicial foreclosures.

Thirty-one states and the District of Columbia have enacted nonjudicial foreclosure statutes. These statutes serve the purpose of protecting consumers while also reducing unnecessary litigation, thereby decreasing overall mortgage costs. Additionally, the Court recognized extending the FDCPA to cover nonjudicial foreclosures would result in foreclosure sale advertisements being prohibited. This has the potential to depress bidding for a distressed property and harm debtors if the sale does not cover the full amount of the debt.

Committee Republicans recognize the need to protect consumers from harmful debt collection practices but continue to oppose this bill. Specifically, committee Republicans are concerned by the lack of available data demonstrating the need for this legislation. The FDCPA and in particular the definition of a debt collector has been in place for more than 40 years. States continue to be well-positioned to protect consumers with respect to mortgages and non-judicial foreclosure process.

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