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New York Department of Financial Services Extends Student Loan Relief to Private Student Loans

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New York has been the American epicenter for the exploding coronavirus pandemic. Informed by recent systemic challenges to the financial services sector, New York's regulators have responded.

Among the responses is an Industry Guidance Letter issued on April 7, 2020, (the "Industry Letter") by the Department of Financial Services ("DFS") to its regulated student loan servicers. New York is among a growing number of states that require the licensure of parties who service student loans. The intent of the guidance is to level the playing field with the provisions of the federal Coronavirus Aid, Relief, and Economic Security ("CARES") Act. Although the CARES Act provides certain relief to borrowers with federal student loans, it does not extend these benefits to borrowers with private education loans - and there are some key differences between the benefits offered under the CARES Act and the Industry Letter.

Let's start with the similarities. The Industry Letter requires regulated student loan servicers to not only implement the protections required by the CARES Act, but to undertake a number of additional actions, several of which mimic the protections of the CARES Act. Specifically, the Industry Letter provides:

- Payment forbearance (or other similar accommodations) of at least 90 days for any borrower who has been impacted by the pandemic;
- Reporting missed payments that are subject to a forbearance or other payment accommodation as current to consumer reporting agencies for a period of at least 90 days; and
- A "time out" period of at least 90 days for sending any defaulted student loan accounts to third party debt collectors while also refraining from filing any new or proceeding with any existing collection actions.

Although the CARES Act calls for an interest-free period for federal student loans, the Industry Letter does not go that far. Rather, it requires the waiver of late fees for any student loan account with suspended payments.

In supplement to these repayment option benefits, the Industry Letter also calls for regulated student loan servicers to reduce the administrative overhead associated with options currently available for income-driven repayment, deferment, forbearance, rehabilitation, loan consolidation or other similar relief. For borrowers already enrolled in an income-driven repayment plan or other hardship status, the Industry Letter calls on regulated servicers to relax recertification requirements and/or automatically grant extensions to borrowers despite their failure to recertify or provide required paperwork by certain deadlines.

Both the CARES Act and the Industry Letter require servicers to inform federal student loan borrowers of the payment accommodations. Student loan servicers are tasked with a wide range of customer outreach requirements so that the potential benefits are clearly communicated to borrowers. This outreach includes:

- Alerting borrowers via email or other means of communication agreed to by the borrower to inform him/her that relief is available if s/he has been impacted by the pandemic, and that the borrower should contact the servicer to discuss these options;
- Prominently displaying on the servicers website a clear description of the repayment options available related to the pandemic; and
- Proactive outreach by the servicer to borrowers who recently missed payments to determine the borrowers status and to discuss the options available to such borrowers, and also automatically implementing any relief where it is available or required by the Department of Education (for federal student loans) or private lenders (for private student loans).

To ensure that the servicers can accommodate an influx of requests from borrowers for payment relief, the Industry Letter calls for servicers to have sufficient staffing in place or to permit student loan borrowers to request such relief through alternative delivery channels, such as through telephone prompts or online. Servicers must appropriately train customer service representatives to inform borrowers impacted by the pandemic of their repayment options, along with any other repayment plans, hardship programs or other relief opportunities offered by the federal government. Once a borrower calls to express a financial hardship caused by the pandemic, the customer service representative should discuss the available repayment options with the borrower. If such customer service representatives work remotely, the servicer must provide safe and secure access to borrower information.

The final aspect of the Industry Letter is most aptly described as making sure that the servicer practices good "servicing hygiene." Servicers must post, process, and credit payments in a timely manner. If there is a delay in such processing or crediting the student loan, the borrower must be held harmless from that delay. Similarly, borrowers should not suffer the consequences of any delay or disruption in required paper processing, particularly so that borrowers without internet or telephone access are appropriately served. Finally, servicers should monitor their inbound student loan borrowers to identify changes in the number and/or frequency of such calls, as well as call abandonment and application submission and review rates - all so that staffing plans can be appropriately adjusted.

All of the recommendations and requirements of the Industry Letter make sense in a time when it seems like the country - and the economy - is careening out of control. However, there is a key difference between the benefits offered under the CARES Act and those offered by the Industry Letter. Specifically, the repayment benefits and accommodations of the CARES Act arise automatically and without borrower request. They simply came into being with the passage of the law. That is not the case under the Industry Letter. Rather, under the Industry Letter, it is incumbent on private student loan borrowers to proactively reach out to their servicer(s) to determine what options are available and what documentation might be required to prove to the servicer (and ultimately the student loan lender) that the borrower has suffered a financial hardship due to the pandemic.

This difference highlights one of the key challenges for complying with the Industry Letter. The CARES Act mandates requirements for federal loans, but the DFS may not have a direct jurisdictional line to private student loan lenders. Presumably, it is the lender who will have the ultimate authority and discretion to apply repayment accommodations and other benefits in a manner that it deems appropriate. The DFS solution is to regulate the servicer of such loans; but how successful will this be?

The Industry Letter appears to put the servicer at the point of the sword in effectuating its requirements. It notes that if a servicer is hamstrung in dispatching its responsibilities under the Industry Letter due to either contractual or investor restrictions, the servicer "should proactively work with the loan holders or the U.S. Department of Education whenever possible to relax those restrictions and obligations." But what if the creditor is unwilling or unable to accommodate the recommendations of the Industry Letter? Will the servicer be held accountable?

That is unclear. The Industry Letter provides that "(t)he Department will exercise its examination and reporting authority…as necessary to ensure that regulated student loan servicers meet essential servicing standards and demonstrate the institutional fitness required to further the public interest." It seems unreasonable to hold a servicer's feet to the fire if a lender flatly refuses to offer borrowers the accommodations of the Industry Letter, but one can envision a scenario where the DFS might conclude that a servicer did not make sufficient efforts to encourage lender compliance or was otherwise derelict in its responsibilities to act in the public interest by making the accommodations of the Industry Letter available to New York student loan borrowers.

Much like the pandemic itself, how all of this plays out in the long term is simply an unknown. However, in the short term, servicers should take heed of the requirements of the Industry Letter, and undertake all reasonable efforts to have their lender clients do the same.

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

hudsoncook.com