

New York Department of Financial Services Finalizes Student Loan Servicers Regs

December 20, 2019 | [Ryan S. Stinneford](#) and [Thomas P. Quinn, Jr.](#)

The New York Department of Financial Services ("DFS") has finalized the last piece of the Empire State's student loan servicer puzzle. On October 1st, the DFS issued a Student Loan Servicers Regulation (the "Regulation") that became effective with its Notice of Adoption appearing in the October 16th issue of the New York State Register. The Regulation, which is codified at Part 409 of the New York Banking Department Regulations, implements and in several cases augments the licensing and conduct-regulating requirements of the student loan servicer statute that we discussed in the June edition of *Insights*.

In this issue of *Insights* we will briefly discuss some of the ways in which the Regulation differs from the underlying requirements of the statute, both from a licensing and conduct-regulating perspective.

Student Loan Types Covered

As noted in the June 2019 edition of *Insights*, the underlying statute broadly defines the term "student loan" to mean any loan to fund postsecondary education or related expenses. Tracking the Reg Z definition of "private education loan," the Regulation modifies the statutory definition to carve out open-end credit, reverse mortgage transactions, and any other loans secured by real property.

Licensing

Generally - Clarification on What Constitutes "Servicing"

The June edition of *Insights* discusses in some detail the types of activities that would be considered "servicing" of a student loan covered by the statute. The Regulation generally tracks these requirements, with one key exception: under the Regulation any collection of (or attempting to collect on) loans in "default" (270 days past due for Direct Loans or FFELP loans, contractual default for Perkins Loans or private student loans) is not considered to be the "servicing" the loan. This exclusion is broader than the corresponding language in the draft regulation, which would have adopted the 270 days past due default standard regardless of loan type.

The exclusion of debt collection from the definition of what constitutes student loan

servicing is somewhat curious. While New York currently has several state statutes and regulations that impose conduct- requirements and restrictions on debt collection and debt collectors, the state does not have a licensing scheme applicable to such entities (several New York municipalities do, however).

Exemptions

The Regulation carries forward the general definition of "exempt organization" (generally banks and credit unions, along with postsecondary schools) found in the statute. The Regulation adds to this list the New York Higher Education Services Corporation, as well as entities licensed under the Empire State's licensed lender and sales finance company laws. The express addition of licensed lenders and sales finance companies will more clearly draw into the exemption non-depository institutions who might fund student loans (such as licensed fintech creditors).

Regulated Conduct

The Regulation provides additional interpretive gloss on several foundational servicing concepts established by the statute. While some of the additional requirements are logical and anticipated extensions of the statutory content, others are not. And while many of the requirements detailed below were found in the proposed version of the Regulation, the final version of this rule was issued within days of the close of the comment period for the proposed rule. This suggests that any industry feedback expressing concerns with the proposal was given little to no consideration.

Among the requirements found in the final version of the Regulation are:

- Nonconforming Payments: The statute established a general obligation on servicers to follow borrower directives for any payments that were either greater or less than the minimum amount due. The Regulation augments this by specifically requiring servicers to ask borrowers how to apply such nonconforming payments, and to provide borrowers with at least 10 business days to provide instructions. Any payment directives provided by borrowers are to be followed until revoked or changed. If a borrower has multiple student loans, and does not provide payment instructions, the Regulation requires overpayments be applied "in the best financial interests of the borrower." There is a safe harbor for servicers who apply overpayments to the highest interest-rate student loan. Similarly, in a multiple loan scenario partial payments are to be applied in the absence of borrower payment directives in a manner that minimizes late fees and negative credit reporting. If there are multiple loans in equal stages of delinquency, servicers satisfy this requirement by applying the partial payment to as many student loans as possible.
- Error Resolution Process for Borrower Complaints: While the Regulation retains statutory requirements applicable to complaints received from the DFS, it supplements these with additional error resolution requirements applicable to complaints received directly from a borrower or his/her authorized representative. Among other things, a servicer that receives such a complaint must:
 - Acknowledge receipt of the complaint (and request any additional required

information) within 10 days of receiving the complaint; and

- Either correct the alleged error or respond that the servicer has determined that no corrective action is required, in either case within 30 days of receiving the complaint.

- Transfer of Servicing: Like the complaint requirements, the Regulation generally tracks the statutory requirements for servicing transfers. However, the Regulation provides additional detail regarding the data that must be included in any servicing transfer. Among other things, the records to be transferred must include copies of the student loan promissory notes, any notes of communications between the servicer and the borrower regarding his/her account(s), data fields created by the servicer's systems regarding the loan account(s), copies of any information or documents provided to the servicer by the borrower, and information necessary to assess qualification for loan forgiveness and/or to create a payment history.

In addition to the above, the Regulation also includes some more prescriptive requirements regarding loan repayment and forgiveness options, and the provision of borrower information. Regarding the former, servicers must prominently display information regarding loan repayment options - including any deferment and income-based alternative repayment options (along with forgiveness and discharge benefits) - on their websites. This information must appear either on the servicer's home page, or be linked to from the homepage. These web postings must then be supplemented by an annual notice mailed to borrowers that includes a toll-free number that borrowers may call to discuss such options with a customer service representative. Servicers of private student loans must also provide clear and complete information on their websites regarding cosigner release availability and criteria.

As it regards specific account information, the Regulation requires that student loan servicers provide "clear and complete information and account records" for free through its website. This information must be accessible through a secure log-in system, meaning that an online account portal provided by the servicer presumably would suffice. However, this information must include a "consolidated report" and a loan history for each student loan account serviced.

The consolidated report must at a minimum include the borrower's name, his/her account(s) serviced along with their account number and type of loan (Direct Loan, FFELP, private student loan, etc.), the loan disbursements (amount and date) for each student loan, the interest rate and maturity date (or number of remaining) for each loan, the loan balance for each student loan as well as a cumulative balance for all loans, and whether the borrower has any applications pending for any alternative repayment or loan forgiveness options. The loan history information required must include disbursement and interest accrual information, any fees charges (including late fees), payments received, any payments toward loan forgiveness plans, and the borrower's repayment plan.

While much of the above is likely covered by current online account access portals, it

would be prudent for servicers to review these requirements (particularly the requirements regarding consolidated reports) against what is currently provided to ensure it is compliant.

In Conclusion

If they have not done so already, it is critical for parties servicing student loans (either federal or private) to review these requirements and take steps to ensure compliance as the Regulation is currently effective. Those subject to licensure under this regime will be subject to examination by the DFS, with noncompliance being subject to exam citation or worse.

Moreover, as we have detailed in prior issues of *Insights*, there are growing number of states with regulations of this nature. While focusing for the moment on New York, servicers should also keep an ear to the ground in other jurisdictions as well.

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