

Regulation of Student Loan Servicers - Recent Enactments and a Look Ahead at Pending Legislation

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The May 2019 issue of *Insights* provided high-level background information about the recent trend of state legislation targeting student loan servicers. In the June 2019 issue of *Insights*, we took a deeper dive into New York's Student Loan Servicers Law. In the July 2019 issue of *Insights*, we summarized other student loan servicer laws enacted this year in Colorado, Maine, Maryland, and Nevada. In this fourth and final installment of our series, we will summarize new student loan servicing legislation in New Jersey and Rhode Island and provide a brief snapshot of other student loan servicer legislation still pending.

New Jersey Legislation

On July 30th New Jersey Senate Bill 1149 was signed into law, becoming Chapter 200 of the 2019 New Jersey Session Laws ("Chapter 200"). Chapter 200, which will become effective 120 days after its enactment - or just a few days shy of the Thanksgiving holiday - takes two major steps toward improving the servicing of student loans in New Jersey.

First, it calls for the appointment of a Student Loan Ombudsman by the Commissioner of Banking and Insurance (the "Commissioner"). Chapter 200 tasks the Ombudsman with several major responsibilities, including:

- Receiving, reviewing, and attempting to resolve (in collaboration with schools, servicers, and other industry participants) complaints received from student loan borrowers. Data from these complaints is to be compiled and analyzed by the Ombudsman, so that recommendations can be made to regulatory agencies, legislators and others as to how to resolve common problems and concerns.
- Analyzing and monitoring the development of federal, state, and local laws, regulations, and policies relating to student loan borrowers to identify any changes the Ombudsman deems necessary.
- Assisting student loan borrowers in understanding their rights and responsibilities, including providing a review of a borrower's complete education loan history to any borrower who provides his/her written consent for such a review.

By October of 2020 the Ombudsman and the New Jersey Higher Education Student

Assistance Authority are responsible for developing and maintaining a student loan borrower education course, including presentations and materials on student loans. Among other things, the program will be designed to provide borrowers with additional information on key loan terms, documentation and disclosure requirements, monthly payment obligations, and options for income-based repayment and loan forgiveness.

The Ombudsman is required to file an annual report, discussing his/her progress and any additional steps necessary for the Department of Banking and Insurance to gain regulatory control over the licensing and enforcement of student loan servicers.

In addition to establishing the Ombudsman's office, Chapter 200 also frames a licensing and conduct-regulating scheme for "student loan servicers." As defined in the law, a student loan servicer includes any party (regardless of whether they are located in New Jersey) who "services" (broadly defined to include receiving and processing payments, maintaining loan records, and/or interfacing with borrowers) "student education loans" owed by "student loan borrowers." Two definitions are key here.

First, a "student education loan" is defined to mean any loan that is expressly used to finance postsecondary education expenses or other school related expenses. Both private and federal student loans fall within this definition. Loans to finance grammar or high school education, home equity lines of credit, or other real estate-secured loans are excluded. A "student loan borrower" is defined to include both the primary borrower and any cosigner(s) residing in New Jersey.

Applications for licensure as a student loan servicer are subject to a nonrefundable application fee of \$5,000. Licensed student loan servicers are subject to a \$30,000 bonding requirement as well as an annual fee (in an amount to be determined) to cover the cost of implementing the statute. Licensing administration will be handled through the NMLS. State and federally chartered banks and credit unions are exempt from licensure, as are their wholly-owned subsidiaries. Operating subsidiaries that are not wholly owned are also exempt if each owner is itself wholly owned by the same bank or credit union. Licenses are generally valid for a calendar year. Any party servicing student education loans under contract with the Department of Education will be automatically issued a limited, irrevocable license. Once licensed, student loan servicers will be required to file annual reports with the Commissioner concerning its activities during the prior year.

Similar to the requirements in other states detailed in this survey, the New Jersey statute generally outlines certain affirmative conduct requirements, while prohibiting others. In terms of affirmative requirements, Chapter 200 requires student loan servicers to (among other things):

- Acknowledge inquiries received from borrowers within 10 business days, and affirmatively respond (either with corrective action or an explanation as to why the servicer's position is correct) within 30 business days.
- Ask borrowers how to apply an overpayment to a loan. Future payments received by the servicer are to be applied in the manner instructed by the student loan

borrower, until s/he provides different instructions.

- Apply partial payments in a manner that minimizes late fees and negative credit reporting. In the case of student loan borrower with multiple student education loans, all at the same stage of delinquency, the servicer is required to allocate the partial payment in a manner designed to satisfy as many individual loan payments as possible.
- Ensure a smooth transition when servicing is transferred to another servicer, including (a) requiring the transferee servicer to honor all borrower benefits available to the borrower during repayment (including any for which the borrower may not have yet qualified), (b) transfer all information regarding the borrower and his/her student education loan account to the transferee servicer within 45 calendar days of the sale, assignment, or other transfer of servicing, and (c) ensure that the sale, assignment, or transfer of servicing of a student borrower's student education loan is completed at least 7 days before his/her next scheduled payment.

As a general matter, student loan servicers also are required to comply with all federal laws (such as the Truth-in-Lending Act) when servicing a borrower's student education loan.

The flip side to these affirmative requirements are the acts that Chapter 200 deems to be out-of-bounds. In addition to generally prohibiting any misleading, unfair, or deceptive acts or practices, the statute also prohibits misapplication of payments and the inaccurate reporting of information, as well as the incomplete reporting of information (for example: failing to report both favorable and unfavorable credit history) to credit bureaus. Student loan servicers must also respond to inquiries and customer complaints received from the Department of Banking and Insurance within 15 business days. Servicers may request additional time to respond to complaints, with an absolute limit of 45 business days.

In addition to establishing examination rights for the Department of Banking and Insurance, Chapter 200 also provides student loan borrower with a private right of action if s/he suffers an "ascertainable loss of moneys" due to any method, act, or other practice by a student loan servicer that is deemed unlawful by the statute. Prevailing borrowers may receive, in addition to other relief, treble damages, attorneys fees, and costs.

The Department of Banking and Insurance is empowered by Chapter 200 to adopt regulations necessary to implement the requirements of the statute. A draft of the regulations will likely be forthcoming in the fall.

Rhode Island Legislation

On July 15, 2019, Rhode Island joined the growing list of states enacting student loan servicer licensing legislation when Governor Raimondo signed Senate Bill 737/House Bill 5936 to enact the Rhode Island Student Loan Bill of Rights Act (the "Rhode Island Act"). The Rhode Island Act, which became effective on passage, imposes registration

requirements and substantive conduct requirements and restrictions on servicers of student loans. Highlights include:

- The Rhode Island Act applies to any person or entity engaged in student loan servicing. Student loan servicing is defined to mean (i) receiving scheduled periodic payments (or notification of such payments) and applying the payments to a student education loan account; (ii) maintaining account records for a student education loan, (iii) communicating with a student loan borrower regarding a student education loan on behalf of the loan holder; or (iii) other interactions with a student loan borrower, including activities to help prevent default on student loans.
- Covered student education loan products include both federal student and parent loans as well as private student and parent loans to finance postsecondary education expenses or other school-related expenses, or to refinance or consolidate such loans.
- Covered borrowers include any resident of Rhode Island who receives or agrees to pay a student loan and any person who shares legal responsibility for repayment of a covered student education loan.
- Student loan servicers must register with the Department of Business Regulation, Division of Banking. The registration requirement applies to any servicer of a student education loan issued to a covered borrower after July 1, 2019. Registration is required by no later than September 30, 2019, or within 30 days of conducting servicing of a covered loan, whichever is earlier. The registration requirements do not apply to any person or entity that services:
 - fewer than six student education loans in Rhode Island during any consecutive 12 month period; or
 - loans for education other than postsecondary education.

The Department of Business Regulation is authorized to assess a fine of \$10,000 on any student loan servicer that services covered loans for 30 or more days without registering.

- The Rhode Island Act imposes various affirmative servicing requirements on servicers, such as:
 - A student loan servicer shall provide annually, and at the request of a student loan borrower, the terms of their loan, progress toward repayment, and eligibility for any loan relief programs including, but not limited to, income driven repayment plans, public service loan forgiveness, forbearance and deferment.
 - A student loan servicer shall establish policies and procedures, and implement them consistently, in order to facilitate evaluation of private student loan alternative repayment arrangement requests, including providing accurate information regarding any private student loan

alternative repayment arrangements that may be available to the borrower through the promissory note, or that may have been marketed to the borrower through marketing materials.

- A private student loan alternative repayment arrangement shall consider the affordability of repayment plans for a distressed borrower, as well as the investor, guarantor, and insurer guidelines, and previous outcome and performance information.
 - If a student loan servicer offers private student loan repayment arrangements, a student loan servicer shall consistently present and offer those arrangements to borrowers with similar financial circumstances.
 - If a borrower inquires of a servicer of private student loans about consolidating or refinancing a federal student loan into a private student loan, the servicer of private student loans must disclose in advance of the refinancing or consolidation, any benefits or protections exclusive to federal student loans that may be lost as a result of the consolidation or refinancing.
 - A student loan servicer shall respond to a written inquiry from a student loan borrower, or the representative of a student loan borrower, within 10 business days after receipt of the request, and provide information relating to the request and, if applicable, the action the student loan servicer will take to correct the account or an explanation for the student loan servicer's position that the borrower's account is correct.
 - Except as provided by federal law or required by a student loan agreement, a student loan servicer shall inquire of a borrower how to apply an overpayment to a student education loan. A borrower's direction on how to apply an overpayment to a student education loan shall stay in effect for any future overpayments during the term of a student education loan until the borrower provides different directions.
 - Where a borrower has multiple loans at the same level of delinquency, a student loan servicer shall apply partial payments in a manner that minimizes late fees and negative credit reporting by applying such payments to satisfy as many individual loan payments as possible on a borrower's account.
- The Rhode Island Act also prohibits student education loan servicers from:
 - defrauding or misleading student loan borrowers;
 - engaging in unfair or deceptive practices or misrepresenting or omitting material information in connection with servicing a covered student education loan;
 - misapplying student loan payments;

- providing inaccurate information to a consumer reporting agency;
 - knowingly or recklessly providing inaccurate information to a credit bureau, thereby harming a student loan borrower's creditworthiness;
 - failing to report both favorable and unfavorable payment history information to a consumer reporting agency at least annually (if the servicer regularly reports information to a consumer reporting agency);
 - refusing to communicate with an authorized representative of a student loan borrower;
 - negligently making any false statement or knowingly or willfully making any omission of a material fact in connection with any information or reports filed with a governmental agency or in connection with any examination conducted by the department or investigation conducted by the attorney general or other governmental agency; or
 - failing to evaluate a borrower for an income-based or other repayment program or eligibility for a loan forgiveness program before placing the loan in default, if such programs are available.
- The Rhode Island Act includes provisions governing the sale, assignment or other transfer of servicing of a covered student education loan that are intended to ensure that benefits promised to student loan borrowers are maintained and continue to be available after the transfer of the loan.
 - Violations of the Rhode Island Act are deemed to be deceptive trade practices under Rhode Island law, and give rise to liability under the Rhode Island mini-UDAP law. In addition, the Rhode Island regulator can assess fines of \$2,000 per violation for each affected loan.

Pending Legislation

The following are student loan servicing bills pending in state legislatures as of the date of this article:

California:

AB 376: "An act to add Title 1.6C.10 (commencing with Section 1788.100) to Part 4 of Division 3 of the Civil Code, and to amend Sections 28104, 28106, and 28130 of, and to repeal Sections 28134 and 28136 of the Financial Code, relating to student loans"

This bill would impose new requirements on student loan servicers, including:

- timely posting, processing, and crediting of student loan payments within certain timeframes;

- applying overpayments consistent with the best interest of a student loan borrower;
- applying partial payments to minimize late fees and negative credit reporting;
- maintaining accurate records;
- timely processing of paperwork;
- diligently overseeing service providers; and
- providing specialized training for customer service personnel that advise military borrowers, borrowers in public service, borrowers with disabilities, and older borrowers.

The bill would also prohibit student loan servicers from engaging in certain specified unfair, deceptive or abusive acts or practices in connection with the servicing of a student loan, and would authorize a consumer who suffers damages as a result of a person's failure to comply with these provisions to bring an action for actual damages, injunctive relief, restitution, punitive damages, attorney's fees, and other relief, including treble damages in certain circumstances.

It would require the Commissioner of Business Oversight, within 180 days following the operative date of these provisions, to designate a Student Borrower Advocate within the Department of Business Oversight to provide timely assistance to student loan borrowers, and to hire additional staff, as needed to implement these provisions. The bill would require the Student Borrower Advocate to receive and review complaints, to refer complaints to an appropriate unit within the department that would be authorized to investigate the complaint, and to refer complaints regarding servicers not subject to licensing under the Student Loan Servicing Act to the Department of Justice, which would be permitted to investigate those complaints. Complaints regarding any private postsecondary educational institution licensed by the Bureau for Private Postsecondary Education would be required to be referred to the Bureau for Private Postsecondary Education's Office of Student Assistance and Relief. The bill would require the Student Borrower Advocate to confer with the Department of Justice and the Office of Student Assistance and Relief regarding the student loan servicing complaints, the proper referral processes for those complaints and the reporting requirements imposed by the bill. The Student Borrower Advocate, not later than 18 months after the operative date of the bill, and no less than once yearly thereafter, would also be required to submit a report to the appropriate committees of the Legislature regarding the implementation of these provisions, the effectiveness of the Student Borrower Advocate, the types of complaints received, and other data and analysis on student loan issues.

Under the current version of the bill, the Department of Business Oversight would be tasked with monitoring for risks to consumers in the provision of student loan servicing and the bill would authorize the commissioner to gather information regarding the organization, business conduct, and activities of student loan servicers. The bill would require the commissioner, not later than 180 days following operative date of the act,

and thereafter pursuant to certain timeframes, to gather and compile information from such servicers and to develop and publicize metrics based on the data collected. Among other actions, the bill would authorize the commissioner to require servicers to file, under oath or otherwise, annual or special reports or answers in writing to specific questions.

The bill was referred to the Senate Appropriations Committee on August 12, 2019, with hearings scheduled for August 30, 2019.

Massachusetts:

HB 3977, "An Act Establishing a Student Loan Bill of Rights."

This bill would establish a Student Loan Ombudsman in the Office of the Attorney General, to receive, review and assist in resolving complaints from student loan borrowers including, but not limited to, those concerning attempts to resolve complaints in collaboration with institutions of higher education, student loan servicers, and any other participants in student loan lending, to provide educational materials and presentations regarding student loans, and to share information with the Massachusetts Division of Banks. The Ombudsman's responsibilities would include helping borrowers:

- explore repayment options;
- apply for federal programs, including income-driven repayment plans;
- avoid or remove a default;
- end wage garnishments, tax refund interceptions or benefit offsets;
- resolve billing disputes;
- obtain loan account details and information;
- stop harassing collection calls; and
- apply for discharges.

The bill directs the Division of Banks to license, investigate and examine student loan servicers. It also directs the Division of Banks to establish and maintain a consumer assistance unit to provide assistance in complaints involving persons or entities it has authority to regulate or other areas as the commissioner deems appropriate which may include, but shall not be limited to, complaints and requests for assistance involving student loan servicers. The Commissioner of Banks would be required to file a report with the Legislature each year, which report will include, but not be limited to:

- the number of complaints received by the division from student loan borrowers and the names of the student loan servicers against whom complaints are filed;
- the types of complaints received by the division from student loan borrowers;
- the types of resolutions reached for complaints received;

- recommendations to improve regulation, oversight and enforcement by the division over the licensing and enforcement of student loan servicers; and
- an overview of any information received from the student loan ombudsman concerning:
 - the number of complaints received by the student loan ombudsman;
 - the types of complaints received by the student loan ombudsman;
 - the types of resolutions reached by the student loan ombudsman; and
 - recommendations to improve the effectiveness of the position of student loan ombudsman.

The bill also prohibits unfair methods of competition and unfair or deceptive acts or practices, and the commissioner is authorized to promulgate rules and regulations to implement the legislation.

This bill was referred to the House Ways and Means Committee by the Financial Services Committee on July 18, 2019, with a recommendation of ought to pass.

North Carolina:

H.B. 875, "An Act to Enact a Student Borrowers' Bill of Rights by Establishing the Position of a Student Loan Ombudsman in the Office of the Commissioner of Banks and by Providing that the Commission of Banks Shall License and Regulate Student Loan Servicers."

This bill establishes the position of Student Loan Ombudsman within the Office of the Commissioner of Banks, and delineates the duties of the Ombudsman, including:

- receiving, reviewing, and attempting to resolve complaints from borrowers;
- assisting borrowers in understanding their rights and responsibilities under the terms of student loans; and
- monitoring the development and implementation of federal, state, and local laws concerning borrowers and recommended necessary changes;
- in consultation with the Commissioner, preparing a student loan borrowing course by January 1, 2021, to be available to high school students and students in higher education, and to any borrower who requests it.

The bill also establishes a student loan servicer license. The bill identifies five exemptions from the license requirement, including:

- banks, credit unions, and savings and loan associations or their wholly owned

subsidiary;

- any federal entity;
- a student loan servicer contracted by the US Department of Education; and
- any state entity.

Certain acts would be prohibited by a licensee, including engaging in unfair and deceptive trade practices and communicating with a borrower in any manner designed to harass or intimidate the borrower. The bill also authorizes the Commissioner to subpoena, investigate and examine a student loan servicer to determine compliance with the law, regardless of licensure, and to assess a civil penalty of up to \$25,000 for any violation. In addition, the bill creates a civil action for borrowers injured by any violation of the act, which is deemed an unfair trade or deceptive practice, and allows for a prevailing borrower to recover actual damages and costs as well as any remedies available under North Carolina's mini-UDAP statute.

The bill was referred to the Committee on Rules, Calendar and Operations of the House on April 22, 2019. No further action has occurred.

Pennsylvania:

SB 400, "Higher Education Loan Protection Act."

While this bill does not address student loan servicer licensing, it would create a Student Loan Ombudsman to be an advocate for student loan borrowers in the Commonwealth and be responsible for conducting education and outreach regarding student loans throughout the Commonwealth. Specifically, the bill would authorize the ombudsman to:

- receive, review and attempt to resolve any complaints from student loan borrowers, including, but not limited to, attempts to resolve complaints in collaboration with institutions of higher education, private lenders, student loan servicers and any other participants in student loan lending;
- compile and analyze data on student loan borrower complaints and post the results on the Department of Education's publicly accessible Internet website;
- assist student loan borrowers with understanding their rights and responsibilities under the terms of the student loans;
- provide information to the Governor and General Assembly regarding the problems and concerns of student loan borrowers and make recommendations to resolve any problems or concerns;
- analyze and monitor the development and implementation of federal, state and local laws, regulations and policies relating to student loan borrowers and recommend any state or local changes deemed necessary;

- review the complete student loan history for any student loan borrower who has provided written consent for such review; and
- disseminate information concerning the availability of the ombudsman to assist student loan borrowers and potential student loan borrowers, as well as institutions of higher education, student loan servicers and any other participant in student loan lending, with any student loan servicing concerns.

The bill was referred to the Education Committee on May 3, 2019. No further action has occurred.

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