

YOU ARE NOT A LOAN:

BRIDGING THE GAPS IN PROTECTIONS FOR
MASSACHUSETTS STUDENT LOAN BORROWERS
THROUGH A COMPREHENSIVE RESOURCE GUIDE
AND STATE LEGISLATION

Victoria Aronson • Katelyn Burgess • Amy Hahn •
Towhid Islam • Eun Hae Kim • Kris Leevongcharoen •
Efaf Mansouri • Thera McAvoy • Sarah Pavlini •
Justin Pires • Rahwa Sebhat • Meredith Stuart •
Zachary Trkla • Drew Virtue • Alexandra Warren •

Legal Skills in Social Context Professor:
Professor Elizabeth Bloom

Fall Lawyering Fellow:
Matthew Chambers

Winter Lawyering Fellow:
Tanisha Canty

Legal Skills in Social Context
in Conjunction with
the Public Higher Education
Network of Massachusetts
(PHENOM)



Acknowledgements

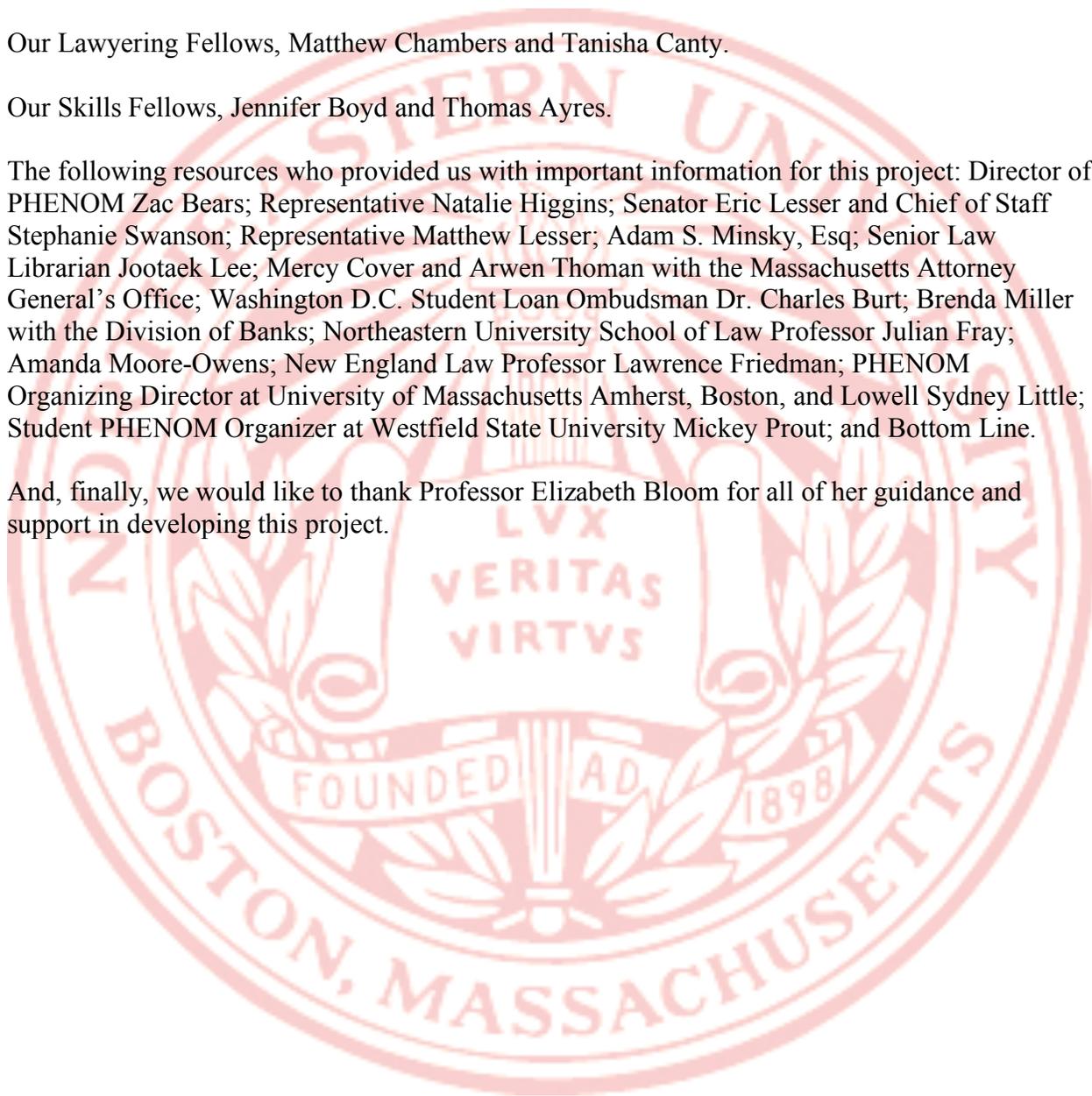
We would like to thank the following people for lending their time, expertise, and assistance to this project:

Our Lawyering Fellows, Matthew Chambers and Tanisha Canty.

Our Skills Fellows, Jennifer Boyd and Thomas Ayres.

The following resources who provided us with important information for this project: Director of PHENOM Zac Bears; Representative Natalie Higgins; Senator Eric Lesser and Chief of Staff Stephanie Swanson; Representative Matthew Lesser; Adam S. Minsky, Esq; Senior Law Librarian Jootaek Lee; Mercy Cover and Arwen Thoman with the Massachusetts Attorney General's Office; Washington D.C. Student Loan Ombudsman Dr. Charles Burt; Brenda Miller with the Division of Banks; Northeastern University School of Law Professor Julian Fray; Amanda Moore-Owens; New England Law Professor Lawrence Friedman; PHENOM Organizing Director at University of Massachusetts Amherst, Boston, and Lowell Sydney Little; Student PHENOM Organizer at Westfield State University Mickey Prout; and Bottom Line.

And, finally, we would like to thank Professor Elizabeth Bloom for all of her guidance and support in developing this project.



OVERVIEW OF CONTENTS

❖ Executive Summary

❖ **Part I**

The Massachusetts Student Loan Bill of Rights: Context
and Commentary through a Social Justice Lens
with Appendix

❖ **Part II**

Know Your Rights: A Comprehensive Guide on Student
Loan Practices

Executive Summary

This project addresses the student loan debt crisis within Massachusetts. Such a broad and complex topic required a multi-faceted approach, and was dealt with by addressing the policies proposed in the Bill and by creating a Know Your Rights Guide to educate student borrowers about the structure of student loans and their rights. The two documents presented here include a commentary on the Massachusetts Student Loan Bill of Rights (“the Bill”) currently under consideration in the state legislature, as well as a detailed *Know Your Rights Guide* for Massachusetts borrowers to help them understand and strategically manage their student loan debt. These documents will help the Public Higher Education Network of Massachusetts (“PHENOM”) in its effort to stop the predatory practices that frequently plague student loan borrowers, particularly marginalized borrowers who are most often the victims of these practices. These works on student loan borrowers were written through a social justice lens by Law Office 13 at Northeastern University School of Law. Law Office 13 is composed of fifteen first year law students, who produced this project as part of their curriculum requirement to develop their legal skills in a social context.

The Massachusetts Student Loan Bill of Rights: Context and Commentary through a Social Justice Lens

Introduction

The introduction provides an overview for the Massachusetts Bill commentary and describes PHENOM’s interest and motivation for producing the commentary. PHENOM believes the Bill to be an important step toward providing easier access to higher education for Massachusetts students.

Financing Higher Education Through Student Debt

There is a student debt crisis in Massachusetts, which is steadily growing and requires servicer regulation. With the consistent increases in higher education tuition, borrowers would benefit from state regulation that limits unfair predatory practices by student loan servicers. This section covers the scope and structure of the student debt crisis, current servicer regulations, threats to those protections, as well as the potential for further state action.

The Massachusetts Student Loan Bill of Rights

The Massachusetts state legislature is currently considering a Bill that would provide new resources for student borrowers and place new restrictions on loan servicers to limit abusive practices. The provided walkthrough goes through each section of the Bill and outlines its provisions in plain language. There is also significant discussion of the proposed Student Loan Ombudsman, and the role they would have in resolving borrower complaints, providing educational outreach, collecting data, and recommending policy.

The Student Loan Landscape and Regulatory Processes

The federal government offers multiple repayment programs and options centered around a borrower’s financial and income-based background. This section sets out to provide an overview of current practices through an examination of student loan characteristics that impact

a borrower's management of their debt, while identifying harmful servicer practices and possible remedies currently available to borrowers. With regard to public policy, the section discusses the role of servicers in the student loan industry and governmental agencies in regulating servicing practices. It concludes with commentary on the gaps in consumer protections for student loan borrowers.

Variations Among Borrower's Bill of Rights

There is a growing trend toward state regulation of student loan servicers to respond to the national student debt crisis. California, Connecticut, Washington, D.C., and Illinois have all passed state-level protection for student loan borrowers. Fifteen other states, including Massachusetts, have introduced similar bills. There are variations in how each state has addressed the crisis. It is worth examining how states' actions vary to identify the strengths and weakness of their legislation to better understand the Massachusetts Bill.

Bill Analysis

The focus of this section is the Bill itself. A brief overview of how to interpret statutes sets up an annotated version of the Bill, which provides specific legal context, analysis, and recommendations. The language analysis that follows discusses ambiguous language within the Bill, which could work to the Bill's benefit or detriment, depending on how the relevant agencies choose to put the Bill into practice.

Recommendations

With the analysis of the Bill complete, the commentary suggests possible changes in order to increase the Bill's effectiveness. The recommendations include: (1) incorporating language to explicitly state the intent of the Bill; (2) clarifying ambiguous language if possible; (3) adding in additional protections for consumers; (4) relocating the Student Loan Ombudsman

within the Attorney General's Office, while leaving the licensing and investigation of servicers to the expertise of the Division of Banks; and (5) utilizing a volume-based funding scheme to ensure adequate funding for the Student Loan Ombudsman.

Impact

The Bill would further strengthen a state-led initiative toward correcting a national crisis. The Bill would work to collect data on how servicer practices disparately impact different populations in order to identify groups who are especially vulnerable. Uncovered data will allow more efficient and targeted programs and policies to assist borrowers. The Ombudsman would also serve a key role as an alternative to litigation for those who do not have the legal resources to fight abusive practices.

Conclusion

Massachusetts has an opportunity to have a positive impact on its student borrowers by filling in the gaps that federal protections have left exposed. By acting on behalf of its student borrowers, Massachusetts would be investing in the education of its residents, and thus in the economic and social well-being of the Commonwealth.

Know Your Rights: A Comprehensive Guide on Student Loan Practices

The *Know Your Rights Guide* is intended to help Massachusetts student loan borrowers navigate their student loans, by covering what student loans are, how they work, and how to handle the challenges they can cause. Besides information on the loans themselves, the end of the guide includes a glossary of relevant terms, answers to frequently asked questions, and additional resources outside of the guide.

Financial Basics

This section provides a brief introduction to the most important finance terms for those who are new to loans.

Financing Your Education

This section covers how to pay for school, apply for aid, and get loans if needed. There are alternatives to loans, such as work study or federal grants for low-income students or underrepresented populations. There is advice on how to apply, what to apply for, and who is eligible for what. Loans are one of the most common, but complicated ways of paying for college, and often students do not understand what they need or what is best for them. For example, students will need to understand the different types of loans, interest rates, loan limits, and fees.

Parents and Co-Signers

Students may not be able to get enough loans on their own, but parents and co-signers can help. Parents may apply for loans for their children to use, and co-signers can help students get more or better loans, although the co-signer will then be responsible for the loans if the student doesn't pay them back.

Repayment Plans

Unlike private loans, federal loans offer flexible repayment plans that accommodate different types of borrowers, depending on their eligibility information. Under the federal Direct Loan Program, student borrowers may be eligible for a number of repayment plans. Alternative repayment plans may be available depending on the student's financial background and total earned income. Students who need additional time may request grace periods to temporarily pause their payments.

Loan Forgiveness & Discharge

While a student borrower's debt does not vanish over time if left unpaid, in certain circumstances, they may have their loans forgiven. This includes individuals working in certain public service professions. It is also possible to have student loans discharged, such as when a borrower's school closes or acts illegally, or if the borrower becomes disabled or declares bankruptcy.

Default Consequences

If the student loan borrower cannot pay their debt after a certain amount of time, the loan goes into default. Once in default, consequences, such as damaged credit or garnished wages may occur. The guide shows the difference in consequences for defaulting on federal and private loans, as well as how to deal with abusive practices by debt collectors.

Unfair Servicer Practices

It is important for a borrower to know their rights when dealing with abusive and unfair loan servicing and debt collection. The guide covers common predatory practices of loan servicers and offers possible solutions for borrowers.

Conclusion

The federal government has not responded sufficiently to the student loan debt crisis, and so state action is needed. If states remain idle, there will be long-term consequences at the local and national levels. The Bill will use public policy to fill in gaps in protections through the licensing scheme and the creation of the Student Loan Ombudsman. There is also an immediate need for individual borrower education which will be provided through the *Know Your Rights Guide*.

The subject is important as it is necessary for Massachusetts to work toward protecting its students. Increased borrower rights and education would both demonstrate the importance of education within Massachusetts and nurture the futures of its students. The Commonwealth of Massachusetts has always served as a beacon for the nation, and now has the opportunity to demonstrate that the right to education is essential for economic and social growth.

The Massachusetts Student Loan Bill of Rights:

Context and Commentary through a
Social Justice Lens

March 12, 2018

Law Office 13

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
	Commentary Roadmap.....	1
	PHENOM’s Goals for the Project	2
II.	FINANCING HIGHER EDUCATION THROUGH STUDENT DEBT	4
	Student Debt in Massachusetts	4
	Legal and Regulatory Framework of Higher Education and Student Loans.....	7
	Human Capital and the Higher Education Act.....	8
	Students as Consumers, Borrower Culpability, and the Rise of Consumer Protections.....	10
	Regulation of Student Loan Servicers	12
	Department of Education.....	14
	Consumer Financial Protection Bureau.....	15
	State Attorneys General.....	17
	<i>Consumer Protection and Student Loan Servicing in Massachusetts.....</i>	<i>18</i>
	Current Threats to Consumer Protections for Students.....	19
	Increasing State Regulation of the Student Loan Industry.....	22
III.	THE MASSACHUSETTS STUDENT LOAN BILL OF RIGHTS.....	24
	Walkthrough of the Proposed Massachusetts Student Loan Bill of Rights.....	25
	Role of the Student Loan Ombudsman	31
	Complaint Resolution.....	32
	Borrower Education.....	32
	Policy Recommendations	33
	Data Collection and Analysis.....	33
	<i>Note: The Importance of Data Collection.....</i>	<i>34</i>
IV.	THE STUDENT LOAN LANDSCAPE AND REGULATORY PROCESSES	37
	Management of Federal and Private Student Loan Debt	38
	Availability of Repayment plans, Deferment Options, and Loan Forgiveness Programs	39
	<i>Federal Student Loans</i>	<i>39</i>
	<i>Private Student Loans.....</i>	<i>40</i>
	Access to Information Regarding Student Loan Repayment Options.....	41
	Role of Loan Servicers in the Student Loan Industry.....	44
	Harmful Loan Servicer Practices	46
	Attempts to Extend the Length of Time the Borrower Stays in Repayment.....	48

Excessive and Inappropriate Fees	49
Preventing the Borrower from Taking Advantage of Available Benefits or Protections	51
Remedies Currently Available to Student Loan Borrowers	53
Reaching Out to a Student Loan Ombudsman	54
<i>Federal Student Aid (FSA) Ombudsman</i>	54
<i>CFPB Student Loan Ombudsman</i>	55
<i>Issue with the Ombudsman Complaint System</i>	55
Filing Legal Claims against Servicers	57
Public Enforcement by Federal and State Agencies.....	59
Gaps and Exceptions in Consumer Protections for Student Loan Borrowers	62
Gaps in Student Loan Borrower Protections.....	62
<i>Limited Options to Discharge Student Loan Debt in Bankruptcy</i>	63
<i>No Statute of Limitations for Collecting on Federal Student Loan Debt</i>	65
<i>Tools of the Debt Collector: Tax Offsets, Social Security and Wage Garnishments</i>	65
<i>Delinquent Borrowers Risk Losing Professional Licenses and College Transcripts</i>	66
<i>Discharged Loans Taxed as Gross Income</i>	68
<i>Lack of Options for Federal Direct Parent PLUS Borrowers</i>	69
Filling the Gaps with the Student Loan Borrowers’ Bill of Rights	71
V. VARIATIONS AMONG STATE BORROWER BILLS OF RIGHTS	73
Trend of State Legislation.....	73
In-depth Look at State Legislation	75
Exempt Entities	75
Licensing Procedure	76
Oversight of the Ombudsman Position.....	77
Funding Scheme.....	78
Enforcement Mechanisms.....	79
Other Notable Features	79
Limits to Borrower Protections	80
The Preemption Problem	82
The PROSPER Threat	83
VI. BILL ANALYSIS.....	88
Tools of Statutory Analysis	88
Annotated Bill.....	91
Language Analysis	102
Meaning of “Unfair or Deceptive Acts or Practices”	102
Entities Subject to Enforcement	104
<i>All Student Loan Servicers, or Licensees Only?</i>	104
<i>Potential Language Issues Between the Bill and Existing Law</i>	107
Language That Leaves Uncertain How the Bill Might be Implemented in Practice	109
<i>Limits of Legislation: The Ombudsman’s Discretion</i>	110
<i>“May” vs. “Shall”: The Commissioner’s Discretion</i>	113

VII. RECOMMENDATIONS	116
Language-Based Recommendations	116
(1) Purpose and Intent Language.....	116
(2) General Application Language	118
(3) Additional Protection Provisions	118
Functional Recommendations.....	120
(4) Housing the Student Loan Ombudsman in the Attorney General’s Office	120
<i>Challenges in Connecticut</i>	121
<i>Massachusetts’ Division of Banks</i>	122
<i>Inspiration from Illinois</i>	125
<i>Massachusetts’ Attorney General’s Office</i>	125
<i>Greater Range of Enforcement Options</i>	129
<i>Standards for an Ombudsman Program and Preferred Agency Placement</i>	130
The Ombudsman’s Independence and Impartiality under the DOB	131
The Ombudsman’s Access to Resources under the Attorney General	132
(5) Funding the Student Loan Ombudsman	133
<i>Insufficient Flat Rate Funding Scheme</i>	133
<i>Proposing a Volume-Based Funding Solution</i>	134
Estimating the Number of Borrowers in Massachusetts	136
<i>Can Servicers Pass the Cost of Licensure on to Borrowers?</i>	137
VIII. IMPACT	139
Impact of a Massachusetts Student Loan Bill of Rights.....	139
Ombudsman as Data Collector.....	139
Ombudsman as Policy Advisor	141
Ombudsman as an Alternative to Litigation	142
<i>Complaint Resolution</i>	144
Potential for Widespread Change.....	145
An Alternative Metaphor: Education as Public Benefit.....	145
IX. CONCLUSION	148
ABBREVIATIONS USED.....	150
GLOSSARY	152

I. INTRODUCTION

Commentary Roadmap

In September 2017, the Public Higher Education Network of Massachusetts ("PHENOM") engaged Law Office 13, a group of students from Northeastern School of Law ("NUSL"), to conduct a statutory analysis of the proposed Massachusetts Student Loan Bill of Rights ("the Bill") from a social justice perspective.¹ In the face of mounting education debt and uncertainty about the adequacy of protections at the federal level, many state legislatures have taken action to provide added protection for student loan borrowers.² Connecticut, California, Illinois, and Washington, D.C. have passed such legislation and at least fifteen additional states have proposed such legislation including Massachusetts.³ The Bill, filed in the Massachusetts House and Senate on January 19, 2017, is part of this recent wave of state action.⁴

The Bill seeks to accomplish three primary goals: (1) to explicitly hold student loan servicers to a common standard of business practices; (2) to provide student loan borrowers with accessible avenues for remedies when they are treated unfairly; and (3) to educate student loan borrowers and empower them to make informed decisions about their loans.⁵ To accomplish these goals, the Bill would establish a licensing system for student loan servicers who operate in Massachusetts, establish an ombudsman's office to receive borrowers' complaints and assist with

¹ See S.B. 129, 190th Gen. Court, Reg. Sess. (Mass. 2017).

² Jillian Berman, *States to DeVos: We'll Keep Cracking Down On Student-loan Companies*, MARKETWATCH (Mar. 3, 2018), <https://www.marketwatch.com/story/states-to-devos-well-keep-cracking-down-on-student-loan-companies-2018-03-02#false>.

³ See Appendix A for a summary of legislation in other states and the District of Columbia.

⁴ S.B. 129, 190th Gen. Court, Reg. Sess. (Mass. 2017); Berman, *supra* note 2.

⁵ S.B. 129, 190th Gen. Court, Reg. Sess. (Mass. 2017); Eric P. Lesser, *It's Time For a Student Loan Bill Of Rights in Massachusetts (Guest Viewpoint)*, MASSLIVE (Mar. 16, 2017), http://www.masslive.com/opinion/index.ssf/2017/03/guest_viewpoint_its_time_for_a.html.

their resolution, and create an education and outreach program for prospective and current student loan borrowers.⁶

The following commentary discusses a number of different aspects regarding student loan borrowing in order to provide a proper analysis of the Bill within its broader context. Part II of this commentary provides context for the Bill by discussing the student loan debt crisis in Massachusetts and the general legal and regulatory framework of higher education financing. Part III provides a detailed walkthrough of the Bill by examining each of its provisions. Part IV describes the political and regulatory context of the student loan debt crisis, which includes an overview of the higher education loan process, the role and practices of student loan servicers, remedies available to student loan borrowers, and gaps in protections available to borrowers. Part V provides a comparative analysis of the various pieces of legislation proposed or enacted in different states. Part VI returns to the Bill, providing an annotated copy of the Bill and an in-depth analysis of its language. Part VII provides language-based and structural recommendations for the Bill. Part VIII discusses the Bill’s potential impact on Massachusetts borrowers.

PHENOM’s Goals for the Project

PHENOM is an organization that strives to build a long-term movement for affordable, accessible, and well-funded public higher education in Massachusetts.⁷ PHENOM’s work focuses on education, agitation, mobilization, and advocacy.⁸ PHENOM “undertakes the research, organization, and coalition-building required to win short-term victories and, ultimately, to build a long-term movement for free higher education.”⁹

⁶ See S.B. 129, 190th Gen. Court, Reg. Sess. (Mass. 2017).

⁷ *Early History & Accomplishments*, PUB. HIGHER EDUC. NETWORK OF MASS., <http://phenomonline.org/history-accomplishments/> (last visited Mar. 5, 2018).

⁸ *Id.*

⁹ *Id.*

PHENOM views the Bill as a specific step toward meaningfully addressing the harmful, predatory practices of many student loan servicers.¹⁰ The organization's primary goals for the Bill include:

- (1) Creating an extensive system of checks on student loan creditors that will deter and prevent unfair, abusive, and deceptive practices that harm borrowers;¹¹
- (2) Providing protections and relief in a manner that is beneficial to the widest possible range of people, including the most marginalized student loan borrowers and victims of predatory student lending; and¹²
- (3) Enacting legislation that refreshes the public's interest and role in financing higher education and can contribute to building the groundwork for a movement towards free higher education.¹³

This commentary provided to PHENOM is a comprehensive study of the Bill with a focus on its social justice implications. It is our hope that PHENOM uses the analysis and recommendations below to amend and improve the Bill and to ensure that the Bill can take into account victims of predatory student lending including the most marginalized student loan borrowers.

¹⁰ Interview with Zac Bears, Exec. Dir., Pub. Higher Educ. Network of Mass., in Boston, Mass. (Sept. 27, 2017).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

II. FINANCING HIGHER EDUCATION THROUGH STUDENT DEBT

Student Debt in Massachusetts

*“My husband and I both work [full time] and very hard but this [student loan] bill has given us nothing but grief and **if it sends me/us into collections and screws up my personal credit we will never be able to move forward in any way...** This is making it very difficult for us to keep up with other bills, [our children’s] daycare expenses, paying our mortgage on time and putting food on the table among other unexpected bills that can occur through the months. I know there are many people, students in this predicament and I feel this needs to be addressed immediately and taken very seriously.”* - Complaint submitted to CFPB from private student loan borrower from Massachusetts¹⁴

Today, more than 44 million Americans have over \$1.4 trillion in student loan debt.¹⁵ In 2014, Massachusetts had approximately 980,000 federal student loan borrowers owing a total of \$24,214,544 in federal student loan debt.¹⁶ As the cost of attending college increases, student loan borrowers (“borrower”) are taking on more and more debt in order to finance their educations. Sixty-five percent of students attending a four-year college in Massachusetts take out education loans by the time they have graduated.¹⁷ In 2014, these borrowers’ average student loan debt upon graduation was \$29,391.¹⁸ Nationwide, average debt per student increased by fifty-five percent between the academic years 2001-2002 and 2011-2012.¹⁹ As seen in Figure 1,

¹⁴ *Complaint 2704438*, CONSUMER FIN. PROT. BUREAU (Oct. 17, 2017), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2704438> (emphasis added). This commentary contains a number of quotations from complaints filed with the Consumer Financial Protection Bureau (CFPB). Citations contain a link to the data set on the CFPB website and an additional copy of the quoted complaints are provided in the Appendix B.

¹⁵ *A Look at the Shocking Student Debt Loan Statistics for 2018*, STUDENT LOAN HERO, <https://studentloanhero.com/student-loan-debt-statistics/> (last updated Jan. 24, 2018).

¹⁶ DOMESTIC POLICY COUNCIL & COUNCIL OF ECON. ADVISERS, TAKING ACTION: HIGHER EDUCATION AND STUDENT DEBT 18 (June 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/student_debt_report_final.pdf.

¹⁷ INST. FOR COLL. ACCESS & SUCCESS, STATE BY STATE DATA 2015, https://ticas.org/posd/state-state-data-2015#overlay=posd/state_data/2015/ma (select Mass.) (last visited Mar.6, 2018).

¹⁸ *Id.*

¹⁹ William J. Cox, *The Student Borrower: Slave to the Servicer?*, 27 LOY. CONSUMER L. REV. 189, 195 (2015), <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1950&context=lclr>.

the cost of attending the University of Massachusetts has increased by eighteen percent over the past five years.²⁰

Figure 1: Weighted Average of In-State Tuition & Mandatory Fees²¹

	FY-2013	FY-2018	5 Year Difference	5 Yr % Change
University of Massachusetts	\$12,486	\$14,734	\$2,248	18.0%
State Universities*	\$8,212	\$9,962	\$1,750	21.3%
Community Colleges	\$5,115	\$6,034	\$919	18.0%

*Excluding Mass Maritime and Mass College of Art and Design

For college students, the decision to take out student loans is often among the first major financial transactions they make.²² Many of these borrowers are not well informed about the types of loans available, and the differences between their options.²³ Many students also overestimate their future ability to repay their loans.²⁴ As discussed below in Section IV, flexible repayment options and loan forgiveness programs present opportunities to help borrowers manage their student debt.²⁵ However, borrowers struggle to take advantage of loan benefits designed to protect them from default, often due to a lack of information about their options.²⁶ Large amounts of student debt can cause many borrowers to put their futures on hold by postponing marriage, delaying having children, moving back in with their parents after graduation, holding off on buying a home, or deferring saving for retirement.²⁷ *The Know Your*

²⁰ See MASS. DEP'T OF EDUC., TUITION AND MANDATORY FEES AT MASSACHUSETTS PUBLIC COLLEGES AND UNIVERSITIES (Feb. 2, 2018), <http://www.mass.edu/datacenter/tuition/AppendixTuitionFeesWeight7.asp>

²¹ *Id.*

²² Cox, *supra* note 19, at 196.

²³ *Id.* at 195-196.

²⁴ *Id.* at 196.

²⁵ See *infra* Section IV: Access to Information Regarding Student Loan Repayment Options.

²⁶ Acacia Squires, *Did You Know You Can Lower Your Student Loan Payments? I Didn't*, NPR (Nov. 16, 2015, 7:03 AM), <https://www.npr.org/sections/ed/2015/11/16/415212006/did-you-know-you-can-lower-your-student-loan-payments-i-didnt>; see also Seth Frotman & Christa Gibbs, *Too Many Student Loan Borrowers Struggling, Not Enough Benefiting From Affordable Repayment Options*, CONSUMER FIN. PROT. BUREAU (Aug. 16, 2017), <https://www.consumerfinance.gov/about-us/blog/too-many-student-loan-borrowers-struggling-not-enough-benefiting-affordable-repayment-options/>.

²⁷ Jennifer Wolf, *More and More Women Are Drowning in College Debt -Meet 5 of Them*, COSMOPOLITAN (Aug. 23, 2017), <https://www.cosmopolitan.com/college/a12007348/college-debt-feature-september-2017/>.

Rights Guide in the second Part of this project addresses these issues by providing a step-by-step resource that borrowers can use to better understand their student loans.

The education loan system overall has adversely affected many Americans. In September 2017 the U.S. Department of Education reported that among the five million borrowers who began repayment on October 1, 2013, over 580,000 of them (about 11.5 percent) defaulted within the first three years of their repayments.²⁸ A borrower's "raw amount of debt" does not by itself predict whether the borrower is at risk for default.²⁹ A better predictor of this risk is a high debt-to-income ratio.³⁰ Student loan debt is considered unmanageable when the borrower is paying more than eight percent of their income towards their student loans.³¹ Certain segments of the population are particularly vulnerable to unmanageable student debt and the risk of default. These include borrowers who are first generation college students,³² borrowers of color – especially Black and Hispanic borrowers,³³ women,³⁴ older borrowers,³⁵ borrowers with

²⁸ Danielle Douglas-Gabriel, *The Number of People Defaulting on Federal Student Loans is Climbing*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/28/the-number-of-people-defaulting-on-federal-student-loans-is-climbing/?utm_term=.8188d7419cbb; Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases National Student Loan FY 2014 Cohort Default Rate (Sept. 27, 2017), <https://www.ed.gov/news/press-releases/us-department-education-releases-national-student-loan-fy-2014-cohort-default-rate>.

²⁹ Daniela Kraiem, *The Cost of Opportunity: Student Debt and Social Mobility*, 48 SUFFOLK U. L. REV. 689, 698 (2015), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1310&context=facsch_lawrev.

³⁰ *Id.*

³¹ *Id.* at 700.

³² FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015 55 (May 2016), <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf>.

³³ *Id.*

³⁴ ANASTASIA WILSON, UNIV. OF MASS. AMHERST, THE CAUSES AND CONSEQUENCES OF MOUNTING STUDENT DEBT IN MASSACHUSETTS 37 (Pub. Higher Educ. Network of Mass. 2015), <http://phenomonline.org/wp-content/uploads/2015/06/AT-2015-Causes--Consequences-Student-Debt-Final-April.pdf> (last visited Mar. 10, 2018); See also Wolf, *supra* note 27.

³⁵ CONSUMER FIN. PROT. BUREAU, SNAPSHOT OF OLDER CONSUMERS AND STUDENT LOAN DEBT 2-11 (Jan. 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf [hereinafter CONSUMER FIN. PROT. BUREAU, OLDER CONSUMERS AND STUDENT LOAN DEBT].

permanent disabilities,³⁶ military service members,³⁷ students who attended for-profit colleges,³⁸ low loan borrowers,³⁹ and borrowers with one or more dependents – such as children or elderly parents.⁴⁰

Legal and Regulatory Framework of Higher Education and Student Loans

“In the next school year alone, 140,000 young men and women will be enrolled in college who, but for the provisions of this bill, would have never gone past high school. We will reap the rewards of their wiser citizenship and their greater productivity for decades to come.” - President Lyndon B. Johnson, upon signing the Higher Education Act of 1965⁴¹

The Higher Education Act of 1965 (HEA) created what is now the current federal student loan program.⁴² Since its passage, market-based metaphors of “education as commodity” and “students as consumers” have dominated discourse and policy about higher education and how it is financed.⁴³ This framework has led to a body of consumer protection law aimed at protecting student loan borrowers, with the Bill being among its most recent progeny.⁴⁴

Identifying the metaphors used to conceptualize higher education and student loans is useful because the metaphors we use “shape not only the way we talk, but also the way we think and

³⁶ CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 11-25 (Oct. 2017), https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf [hereinafter CONSUMER FIN. PROT. BUREAU, 2017 STUDENT LOAN OMBUDSMAN REPORT].

³⁷ HOLLISTER PETRAEUS & SETH FROTMAN, CONSUMER FIN. PROT. BUREAU, OVERSEAS & UNDERSERVED: STUDENT LOAN SERVICING AND THE COST TO OUR MEN AND WOMEN IN UNIFORM 18-19 (JULY 2015), https://files.consumerfinance.gov/f/201507_cfpb_overseas-underserved-student-loan-servicing-and-the-cost-to-our-men-and-women-in-uniform.pdf [hereinafter CONSUMER FIN. PROT. BUREAU, OVERSEAS & UNDERSERVED]; CONSUMER FIN. PROT. BUREAU, 2017 STUDENT LOAN OMBUDSMAN REPORT, *supra* note 36, at 11-25.

³⁸ Kraeim, *supra* note 29, at 699.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ PRESIDENT LYNDON B. JOHNSON, REMARKS ON SIGNING THE HIGHER EDUCATION ACT OF 1965 (November 8, 1965), <http://www.txstate.edu/commonexperience/pastsitearchives/20082009/lbjresources/higheredact.html> (last visited Mar. 5, 2018) (emphasis added).

⁴² For an overview of the history of federal student loan programs, see Appendix C.

⁴³ Kraeim, *supra* note 29, at 690.

⁴⁴ *Id.*

govern.”⁴⁵ In Steven Winter’s research into applying cognitive linguistics to the law, he argues that the metaphors we use to conceptualize complex issues inform the cognitive shortcuts we take and shape our legal reasoning.⁴⁶ Because metaphors “operate at the level of tacit knowledge... [and form] the unexamined basis of legal and policy decision making,” when studying policy options it is important to explore the way that people conceptualize access to higher education and rising student loan debt.⁴⁷

Human Capital and the Higher Education Act

Congress enacted the HEA to provide more people with more affordable opportunities to attend college.⁴⁸ As he signed the HEA into law, President Lyndon B. Johnson framed educational opportunities for Americans as a means toward overall economic prosperity and hoped postsecondary education would result in higher incomes for individuals and their families.⁴⁹ Congress additionally feared that if many young people chose not to attend college due to excessive costs, the United States would be left without a sufficiently trained workforce in the absence of federal assistance.⁵⁰

Title IV of the HEA authorized a list of federal student aid programs to assist students and their families with financing the cost of a postsecondary education, as well as programs that provided federal support to postsecondary institutions of higher education.⁵¹ The intent was to

⁴⁵ *Id.*

⁴⁶ See Keith Cunningham-Parameter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1555 (2011).

⁴⁷ Kraeim, *supra* note 29, at 701.

⁴⁸ Christopher Gorman, *Undoing Hardship: Applying the Principles of Dodd-Frank to the Law Student Debt Crisis*, 47 *U.C.D. L. REV.* 1887, 1892 (2014), https://lawreview.law.ucdavis.edu/issues/47/5/Note/47-5_Gorman.pdf.

⁴⁹ Angelica Cervantes et. al, *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later*, *TG RESEARCH AND ANALYTICAL SERVS.* 17 (Nov. 2005), https://www.tgslc.org/pdf/HEA_History.pdf.

⁵⁰ Gorman, *supra* note 48, at 1892 (2014).

⁵¹ Angelica Cervantes et. al, *supra* note 49, at 17.

make college more accessible to individuals from varying economic backgrounds. Over sixty years after the enactment of the HEA, overwhelming levels of student loan debt challenge President Johnson's vision of social mobility through education.

The idea that access to higher education would increase the country's prosperity and social mobility in general was first popularized by economist Theodore Schultz, who, in 1960, laid out the case for understanding education as an investment in human capital.⁵² Schulz argued that a person's useful skills and knowledge are a form of capital, which can be measured by their effect on the wages earned by that person.⁵³ According to this argument, the educational advancement in knowledge and skill that subsequently increases a person's salary is a form of a return on an investment.⁵⁴

This framework continues to dominate modern discourse and influence the scholars and policymakers of today. In his article *Student Debt and the Siren Song of Systemic Risk*, Jonathan Glater continues Johnson's argument about the merits of federal student loans, and seeks to push federal student aid policies that expand access to higher education for students who have fewer resources or who are historically underrepresented on college campuses.⁵⁵ To do this, Glater frames federal student loans not as a liability or a crisis, but, using the metaphor popularized by Schultz, as an investment that most often yields returns in the form of higher lifetime incomes.⁵⁶ This way of thinking about education as an investment in human capital has now become so commonplace that it is almost second nature for many people.⁵⁷ On its heels comes the question of who is (or should be) making the investment. There are two main schools of thought in

⁵² Kraiem, *supra* note 29, at 703.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. ON LEGIS. 99 (2016), http://harvardjoi.com/wp-content/uploads/2016/02/HLL103_crop.pdf.

⁵⁶ *Id.* at 136.

⁵⁷ Kraiem, *supra* note 29, at 704.

answering this question: one believes the individual should be responsible for the investment, and the other believes the investment should be shared by the public.⁵⁸ Both views have influenced how education is financed in this country, but as Kraiem argues, “individual investment in human capital has outstripped public investment,” which has led to a societal tolerance for high and potentially unmanageable student loan burdens.⁵⁹ Glater and others agree, arguing that policies regarding the financing of higher education have shifted the risk of investing in higher education “away from the state and to the students and their families.”⁶⁰

Students as Consumers, Borrower Culpability, and the Rise of Consumer Protections

If students are taking out loans to invest in their human capital, they are consumers of education.⁶¹ They are expected to make smart consumer decisions.⁶² Kraiem argues that the “students as consumers” metaphor “created the assumption that students were somehow supposed to monitor quality [of their loans and loan servicers] for themselves.”⁶³ This “borrower culpability” narrative blames the borrower for the harms caused by unmanageable student loan debt. It is reminiscent of the way mortgage borrowers were villainized after the 2008 financial crisis.⁶⁴ As when the victims of subprime mortgage lending were blamed for purchasing homes with mortgages that seemed “too good to be true,” there is an insidious narrative that blames students for jumping at the opportunity to take out education loans in order to attend college because “it is easy to find a way to pay for it.”⁶⁵ Higher education, this narrative continues, is

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Glater, *supra* note 55, at 106.

⁶¹ Kraiem, *supra* note 29, at 707.

⁶² *Id.*

⁶³ *Id.* at 749.

⁶⁴ Glater, *supra* note 55, at 136.

⁶⁵ *Id.* at 137.

being over-consumed because “too many people and/or the wrong people are going to college, because it is easy to find a way to pay for it.”⁶⁶

This assumption is reminiscent of the old maxim *caveat emptor*: “let the buyer beware.”⁶⁷ “Buyer beware” absolves the manufacturer and seller of a product from responsibility if a defective or unsuitable product harmed the person who used it.⁶⁸ Its application to rental properties means that a tenant had no legal recourse against a landlord if the rental property was uninhabitable.⁶⁹

Spencer Waller writes that consumer protection evolved in the United States as “specific formal legal responses” to public outrage at the harms caused by dangerous or unregulated products.⁷⁰ Against the backdrop of prevailing values of “freedom of contract” and “buyer beware,” which dominated the country’s common law in the 19th century, “specific crises and political events led to both the creation of government bureaucracies with jurisdiction over specific products and practices affecting consumers, and a broad array of private rights of actions where consumers can sue for damages...if they can show harm from illegal practice.”⁷¹ The quintessential example of this pattern is Upton Sinclair’s exposure of the meat packing industry in his bestselling novel *The Jungle* in 1905.⁷² Public outrage due to the details he exposed led to the creation of the Food and Drug Administration and the first laws regulating food safety.⁷³

⁶⁶ *Id.*

⁶⁷ *Caveat Emptor*, *MERRIAM-WEBSTER DICTIONARY*, <https://www.merriam-webster.com/dictionary/caveat%20emptor> (last visited Mar. 7, 2018).

⁶⁸ *Id.*

⁶⁹ *See* *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

⁷⁰ Spencer Weber Waller et. al., *Consumer Protection in the United States: An Overview* 1 (Loy. Univ. Chi. Sch. Of Law Working Paper, 2011), <https://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/workingpapers/USConsumerProtectionFormatted.pdf>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

The market-based conceptualization of higher education has given rise to market-based solutions to rising student loan debt.⁷⁴ Strong consumer protections in this area challenge the “borrower culpability” narrative and aim to shift a portion of the risk of higher education loans off of the student borrower. In response to rising student loan debt, some pro-student actors have tried to strengthen consumer protections.⁷⁵ The body of current consumer protection law serves as the regulatory context of the Bill. The scope of and gaps in protection will be discussed throughout this commentary.

Regulation of Student Loan Servicers

*“The man on the line told me I was at the ‘escalation department’ and was able to tell me that after a repayment review (90 days) my information should be updated on NSLDS. This was a fairly simple answer to give. I have no idea why I had to go through all of these steps to get it. This whole thing took an hour. I got bad information, received rather [poor] customer service from one representative (to put it politely), was transferred three times, talked to four representatives, and was referred to AES [American Education Services] -- which does not service the Federal Direct Loans I have. Overall this was a rather stark experience. **I have no idea how people without a preexisting understanding of Federal Student Aid programs manage to get any accurate understanding/information about their loans.**”* – Complaint submitted to Consumer Financial Protection Bureau (“CFPB”) by federal student loan borrower from Massachusetts⁷⁶

⁷⁴ Kraiem, *supra* note 29, at 705.

⁷⁵ At the federal level, ombudsman offices for student loans are run through the Department of Education and the Consumer Financial Protection Bureau. The relevant body of federal consumer protection law as it pertains to student loan borrowing, the problems it seeks to remedy, and the gaps in protections will be described in Part II of this commentary. At the state level, most ombudsman offices are administered, as the Massachusetts bill proposes, by the Division of Banks, or a similarly situated agency charged with consumer protection in financial markets. The trend of states to create ombudsman offices for student loans and implement regulations on student loan servicers, is an attempt to assert additional consumer protections for student loan borrowers. *See infra* in Section V: Variations Among Borrower’s Bill of Rights (discussing the details of varying state legislation).

The Bill at the center of this commentary fits neatly into the trend of implementing consumer protection regulations on the student loan servicing market. This trend marks a shift away from a strict “borrower culpability” mindset, where student loan borrowers harmed by unmanageable debt are blamed for their decision to take on those loans.

⁷⁶ *Complaint 2377738*, CONSUMER FIN. PROT. BUREAU (Mar. 9, 2017), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2377738> (emphasis provided). *See* Appendix B for a copy of the full complaint.

Borrowers have “varying levels of knowledge about the way their loans work and the various resources and relief options available to them,” meaning they largely rely on loan servicers to provide accurate and timely information regarding account and repayment information.⁷⁷ While borrowers may expect loan servicers to provide consistent quality service, issues with loan servicers are quite common in the student loan industry.⁷⁸ Currently no “comprehensive federal statutory or regulatory framework providing uniform standards for the servicing of all student loans” exists.⁷⁹ According to Navient, one of the largest federal and private student loan servicers, “there is no expectation that the servicer will ‘act in the interest of the consumer.’”⁸⁰ Under the current system, federal and private student loan servicers have no economic incentives to improve services as they often receive a flat rate compensation and set monthly fees per borrower account regardless of the quality of services provided.⁸¹ Since borrowers cannot elect to change loan servicers in most situations and may not know of ways to address servicer issues, they may face repetitive abuses by their loan servicers and feel as though they have no recourse.⁸²

Federal and state agencies enforce consumer protections and regulate loan servicer practices to discourage unfair and deceptive practices.⁸³ At the federal level, the primary

⁷⁷ Memorandum from Ted Mitchell, Under Sec., U.S. Dep’t of Educ., to James Runcie, Chief Operating Officer, Fed. Student Aid 12 (July 20, 2016), <https://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf>.

⁷⁸ *CFPB Concerned About Servicing Failures Reported by Student Loan Borrowers*, CONSUMER FIN. PROT. BUREAU (Sept. 29, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-concerned-about-widespread-servicing-failures-reported-by-student-loan-borrowers/>.

⁷⁹ Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. 98,29302, 98,29305 (Consumer Fin. Prot. Bureau May 21, 2015).

⁸⁰ Mem. of Law in Supp. of Def.’s Mot. to Dismiss Pl.’s Comp. under 12(b)(6) or, in the alternative, for a More Definitive Statement under Rule 12(e) at 20-21 *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101 (M.D. Pa).

⁸¹ Emily Lee, *CFPB Investigates Student Loan Servicing Practices*, 35 REV. BANKING & FIN. L. 84, 87 (2015).

⁸² Kelly Field, *The Student-Loan Crusader Who Won’t Stop Fighting*, CHRONICLE OF HIGHER EDUC. (MAR. 18, 2015), <https://www.chronicle.com/article/The-Student-Loan-Crusader-Who/228561>.

⁸³ NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW § 5.6.2 (5th ed. 2015), <https://library.nclc.org/node/99568> (last visited Mar. 5, 2018) [hereinafter NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW].

regulators of student loan servicers and consumer protections are the Department of Education (“Dept. of Ed.”) and the Consumer Financial Protection Bureau (“CFPB”).⁸⁴ While these agencies do provide some oversight of the student loan industry, the Trump administration has signaled it may roll back or alter current statutes and regulations, potentially hindering these agencies’ abilities to protect borrowers. These potential rollbacks are discussed in more depth under “Current Threats to Consumer Protections for Students.”⁸⁵ At the state level, attorneys general in a number of states also provide assistance to student loan borrowers and regulate consumer laws.⁸⁶

Department of Education

As the holder of loans under the William D. Ford Federal Direct Loan Program (“Direct Loans”) and enforcer of the HEA, the Dept. of Ed. has the authority to enforce the terms of contracts with loan servicers, terminate contracts as needed, and penalize servicers violating program requirements.⁸⁷ Under the 2009 contracts with Great Lakes, Nelnet, PHEAA, and Sallie Mae (now Navient), the Dept. of Ed. has the authority to unilaterally shift borrowers to other servicers and terminate contracts if conflicts of interest arise.⁸⁸ Critics of the Dept. of Ed.’s relationship with loan servicers claim that relaxed government oversight contributes to poor quality loan servicing practices.⁸⁹ Rohit Chopra, the former Assistant Director and Student Loan Ombudsman at the CFPB, has remarked that the “the [Dept. of Ed.] is doing business with (the

⁸⁴ *Id.*

⁸⁵ *See infra* Section II, Current Threats to Consumer Protections for Students.

⁸⁶ NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.6.2.

⁸⁷ *Id.*

⁸⁸ The 2009 contracts were renewed in 2014 with additional addendums. Copies of the contracts can be found on the Department of Education’s website. *See Loan Servicing Contracts*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing> (last visited Mar. 9, 2018).

⁸⁹ NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.1.

loan servicers) as partners, not as overseers.”⁹⁰ Senator Elizabeth Warren has remarked that “[the Dept. of Ed.] act[s] as our agent, the agent of the US taxpayers, the agent of the people of the United States” and should act on behalf of borrowers to demand better servicer conduct.⁹¹ While the Dept. of Ed. could enforce better practices in the industry by more aggressively policing loan servicers, borrowers may still not receive individual relief for harmful practices committed by the loan servicers.⁹²

Consumer Financial Protection Bureau

When the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) was enacted in 2010, it changed the financial regulatory system.⁹³ Passed in response to the 2008 mortgage crisis, the Dodd-Frank Act aims to protect consumers from large, unregulated banks and consolidates consumer protection responsibilities previously held in a number of bureaus (including the Department of Housing and Urban Development, the National Credit Union Administration and the Federal Trade Commission) into the CFPB.⁹⁴ Title X of the Dodd-Frank Act provides the CFPB with rulemaking, supervisory, and enforcement authorities for all major consumer protection statutes.⁹⁵ The CFPB has authority under the Dodd-Frank Act to supervise “larger participants” in *any* market for consumer financial products or services.⁹⁶ Supervisory authority may require reports and conduct examinations to (1) assess compliance

⁹⁰ Michelle Conlin, *Student Loan Borrowers, Herded Into Default, Face A Relentless Collector: The US*, REUTERS (July 25, 2017, 1:00 PM), <https://www.reuters.com/investigates/special-report/usa-studentloans/>.

⁹¹ Daniel Rivero, *The Debt Trap: How The Student Loan Industry Betrays Young Americans*, GUARDIAN (Sept. 6, 2017, 6:00 AM), <https://www.theguardian.com/money/2017/sep/06/us-student-debt-loans-navient-sallie-mae>.

⁹² NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.6.2.

⁹³ *Id.* § 12.3.

⁹⁴ Kelly Thompson Cochran, *The CFPB at Five Years: Beyond the Numbers*, 21 N.C. BANKING INST. 55, 56 (2017).

⁹⁵ See Appendix D for an overview of the statutes relating to the CFPB and student loan supervision in Dodd-Frank Act.

⁹⁶ 12 C.F.R. § 1090.106 (2018). A “larger participant” is defined as one that services over a million accounts, as measured on December 31 of the prior calendar year.

with federal consumer financial law, (2) obtain information about activities and compliance systems, and (3) assess risks to consumer and markets.⁹⁷

During the first half of 2017 alone, the CFPB recovered restitution payments of approximately \$14 million for over 100,000 consumers harmed by illegal consumer financial practices.⁹⁸ The CFPB began accepting consumer complaints in 2012 and launched an online Consumer Complaint Database in 2013.⁹⁹ Complaint data and consumer narratives filed with the complaints are available to the public through the CFPB's Consumer Complaint database.¹⁰⁰ Within the agency, the CFPB Student Loan Ombudsman is in charge of addressing complaints related to private student loans.¹⁰¹ A more detailed description of the CFPB Ombudsman's duties and complaint process is discussed in the "Remedies Currently Available to Student Loan Borrowers" section below.¹⁰² Between July 21, 2011, and August 31, 2017, the "CFPB handled approximately 50,700 private and federal loan complaints and approximately 9,800 debt collections complaints related to private or federal student loan debt."¹⁰³ As of August 31, 2017, the CFPB has recovered and returned more than \$750 million to student loan borrowers as a result of actions initiated through consumer complaints.¹⁰⁴

⁹⁷ 12 U.S.C. § 5514(b) (2018).

⁹⁸ *CFPB Supervision Recovers \$14 Million in First Half of 2017 for Over 100,000 Consumers Harmed by Illegal Practices*, CONSUMER FIN. PROT. BUREAU (Sept. 12, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-supervision-recovers-14-million-first-half-2017-over-100000-consumers-harmed-illegal-practices/>.

⁹⁹ *CFPB Releases Largest Collection of Federal Consumer Financial Complaint Data*, CONSUMER FIN. PROT. BUREAU (Mar. 28, 2013), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-largest-collection-of-federal-consumer-financial-complaint-data/>.

¹⁰⁰ *See Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/data-research/consumer-complaints/> (last visited Mar. 7, 2018).

¹⁰¹ *CFPB Supervision Finds Some Student Loans and Mortgage Servicers Illegally Fail to Provide Protections to Borrowers*, CONSUMER FIN. PROT. BUREAU (Apr. 26, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-supervision-finds-some-student-loan-and-mortgage-servicers-illegally-fail-provide-protections-borrowers/>.

¹⁰² *See infra* Section IV: Remedies Currently Available to Student Loan Borrowers.

¹⁰³ CONSUMER FIN. PROT. BUREAU, 2017 STUDENT LOAN OMBUDSMAN REPORT, *supra* note 36, at 2.

¹⁰⁴ *Id.* at 2-3.

State Attorneys General

“We sued to hold the company accountable for cheating students and families under Massachusetts law and the Department of Education has no business in this case.”
- Massachusetts Attorney General Maura Healey¹⁰⁵

At the state level, attorneys general often act as public advocates for consumer protection rights.¹⁰⁶ State enforcement agencies promote borrower rights and work to protect citizens from fraud, deceptive conduct, and unfair business practices.¹⁰⁷ In July 2017, attorneys general from nineteen states, including Massachusetts, sued the Dept. of Ed. and Secretary Betsy DeVos for repealing the Borrower Defense Rule, which is designed to protect students from predatory for-profit schools.¹⁰⁸ The rule was part of regulations issued by the Obama administration in 2016, and was intended to go into effect July 1, 2017.¹⁰⁹ Among its provisions, the rule would have limited the ability of schools to require students to sign arbitration agreements and class-action waivers.¹¹⁰ Later that same year, a similar suit challenged the federal government’s failure to enforce the Gainful Employment Rule, which “cuts off access to government loans for underperforming schools that cheat their students and leave them with burdensome debt.”¹¹¹

While these regulations pertain specifically to the predatory practices of for-profit schools,

¹⁰⁵ Nate Raymond, *U.S. Backs Student Loan Servicer In Lawsuit By Massachusetts*, REUTERS (Jan. 10, 2018 10:51 AM) <https://www.reuters.com/article/us-massachusetts-education-lawsuit/u-s-backs-student-loan-servicer-in-lawsuit-by-massachusetts-idUSKBN1EZ210>.

¹⁰⁶ *Frequently Asked Questions*, NAT’L ASS’N OF ATTORNEYS GEN., http://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php (last visited Mar. 10, 2018) (select “What does an attorney general do?”).

¹⁰⁷ Letter from Eric T. Schneiderman, N.Y. Att’y Gen, et al., to Betsy DeVos, Sec’y of U.S. Dep’t of Educ. 2 (Oct. 23, 2017), https://ag.ny.gov/sites/default/files/devos_letter.pdf.

¹⁰⁸ Press Release, Off. of Att’y Gen. Maura Healey, *AG Healey Sues Education Secretary Betsy DeVos and U.S. Department of Education for Abandoning Critical Student Protections* (July 6, 2017), <http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-07-06-ag-healey-sues-education-secretary-betsy-devos.html> (last visited Mar. 7, 2018).

¹⁰⁹ *U.S. Department of Education Announces Final Regulations to Protect Student and Taxpayers from Predatory Institutions*, U.S. DEP’T OF EDUC. (Oct. 28, 2016), <https://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions>.

¹¹⁰ Press Release, Off. of Att’y Gen. Maura Healey, *supra* note 108.

¹¹¹ *AG Healey Sues Education Secretary DeVos for Refusing to Enforce Rule Against Predatory For-Profit Schools*, OFF. OF ATT’Y GEN. MAURA HEALEY (Oct. 17, 2017), <https://www.mass.gov/news/ag-healey-sues-education-secretary-devos-for-refusing-to-enforce-rule-against-predatory-for>.

attorneys general in a number of states, including Massachusetts, have taken on a more prominent role in enforcing student loan regulatory practices during recent years.¹¹²

The Massachusetts Attorney General’s Office accepts consumer complaints online, by mail, or in person at the four offices in Boston, New Bedford, Springfield, and Worcester.¹¹³ While borrowers must file a written complaint, they can call the Consumer Hotline number during normal business hours to ask questions, to seek instructions on how to file a complaint, and to request receipt of a complaint form by mail.¹¹⁴ In addition to providing general consumer protection assistance, the Massachusetts Attorney General’s Office runs a Student Loan Assistance Unit (“SLAU”) that offers an online Student Loan Help Request and a Student Loan Helpline for borrowers.¹¹⁵

Consumer Protection and Student Loan Servicing in Massachusetts

Typically reactionary, consumer protection law is often passed in response to public outrage at industry practices that have caused harm.¹¹⁶ As described above, the Dodd-Frank Act established the CFPB “in the wake of the country’s worst financial crisis since the Great Depression” to regulate and monitor consumer financial products and services, including student loans.¹¹⁷ In this country’s federalist system, national consumer protection law exists alongside a body of consumer protection law passed by each state. The context of both federal and state consumer protection law is essential to the analysis of the Bill.

¹¹² NAT’L CONSUMER LAW CTR., *STUDENT LOAN LAW*, *supra* note 83, § 5.6.2.

¹¹³ *Student Loan Assistance*, MASS.GOV, <https://www.mass.gov/service-details/student-loan-assistance> (last visited Mar. 7, 2018); *File a Consumer Complaint*, MASS.GOV, <https://www.mass.gov/how-to/file-a-consumer-complaint> (last visited Mar. 7, 2018).

¹¹⁴ MASS.GOV, *File a Consumer Complaint*, *supra* note 113.

¹¹⁵ MASS.GOV, *Student Loan Assistance*, *supra* note 113.

¹¹⁶ Weber Waller et. al., *supra* note 70, at 1.

¹¹⁷ Thompson Cochran, *supra* note 94, at 55-56.

Massachusetts enacted the Consumer and Business Protection Act, which became Chapter 93 of the Massachusetts General Law (“Mass. Gen. Law.”) in 1967.¹¹⁸ A key protection of this law is its ban on “unfair or deceptive practices in the conduct of any trade or commerce.”¹¹⁹ State statutes banning unfair or deceptive acts or practices (“UDAPs”) are modeled after the Federal Trade Commission Act, but also give residents a private right of action – the ability to sue – in state courts if they are victims of a UDAP.¹²⁰ State attorneys general can also bring action against such violations, and because significant obstacles to litigation often exist for individuals, the Attorney General’s access to resources and consumer complaint databases often mean they are in a better position to bring action against widespread abuses.¹²¹

Current Threats to Consumer Protections for Students

*“I have spent the last few months trying to find any assistance or relief... however, Navient can offer me no path under my current financial situation... Nonetheless, I find myself encouraged by the recent lawsuit filed against Navient by the Consumer Financial Protection Bureau (CFPB) given that I believe many of the complaints in the lawsuit apply to my circumstance, but **fear that ... the election of President [Trump] may thwart those efforts** and put my new federal loans in jeopardy of being on a similar tract. I see nothing in the way of a stable, financial future for myself if any or all of my student debt is sold to a private, third party not required to work with me on repayment, and I am relying on you and other like-minded politicians within the Federal Government to come up with an answer.” - Complaint submitted to Consumer Financial Protection Bureau (“CFPB”) by federal student loan borrower from California¹²²*

The potential for rollbacks in consumer protections under the current presidential administration is particularly alarming for student loan borrowers. According to a national

¹¹⁸ 52 MASS. PRAC. *Law of Chapter 93A* §1.1 (2017).

¹¹⁹ MASS. GEN. LAWS c 93A, §2(a) (2018).

¹²⁰ Cox, *supra* note 19, at 209-10.

¹²¹ *Id.* at 210.

¹²² *Complaint 2314714*, CONSUMER FIN. PROT. BUREAU (Jan. 28, 2017), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2314714> (emphasis added). See Appendix B for a copy of the full complaint.

survey, approximately forty percent of student borrowers are concerned that the policies of the Trump administration will have a negative impact on their student loans.¹²³ The Trump Administration has already made clear it wishes to roll back current federal legislation that has given rise to federal programs which protect student borrower rights.¹²⁴ Many conservative politicians have also challenged the Dodd-Frank Act since it was first passed by the Obama administration in 2008.¹²⁵

The CFPB has done a great deal on behalf of student loan borrowers by offering them protection from predatory fees charged by servicers as well as encouraging greater transparency by lenders and other financial services providers.¹²⁶ The Trump administration's potential rollback of the Dodd-Frank Act may affect private student loan borrowers in particular, mainly due to its impact on the CFPB.¹²⁷ If the current administration dismantles the Dodd-Frank Act, it is likely that private lenders will be able to freely promote loans without any protective provisions for student borrowers. Without provisions in place under the CFPB, issuance of subprime loans, like the type of loans that were responsible for the housing crisis of 2008, could lead private student loan borrowers, who may feel forced to take up such loans due to a lack of financial support, to accept these high-interest loans.¹²⁸

The CFPB has been active in cracking down on practices it considers to be predatory. Aside from levying a \$100 million fine against Wells Fargo for its "account-opening"

¹²³ Miranda Marquit, *Trump Takes Aim at Dodd-Frank Act: What It Means for You and Your Money*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/dodd-frank-act-trump-executive-order/> (last updated Feb. 3, 2017).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Shahien Nasiripour, *DeVos Tells CFPB to Back Off on Student Loans*, BLOOMBERG LAW (Sept. 8, 2017 11:41 AM), <https://www.bloomberg.com/news/articles/2017-09-08/betsy-devos-tells-cfpb-to-back-off-on-student-loans> [hereinafter Nasiripour, *DeVos Tells CFPB to Back Off*].

¹²⁷ *Id.*

¹²⁸ *Id.*

practices,¹²⁹ the CFPB was also responsible for levying fines against debt-relief companies for charging illegal fees against student borrowers.¹³⁰ Additionally, the CFPB is responsible for issuing rules that require mortgage lenders to verify the ability of borrowers to repay their loans.¹³¹ In regard to consumer protection rights, the agency put a stop to a student loan debt relief scam, and continuously investigates the legality of student loan servicer practices.¹³² Overall, the CFPB has taken a number of necessary steps to ensure student borrowers are protected from predatory practices, creates more transparency in the repayment process, and holds private servicers accountable for predatory practices that leave student borrowers in financial despair.

While the CFPB is not a perfect system of protection from predatory practices against student borrowers, and while there is still much room for improving the federal protections from student loan servicers, the system in place has positively impacted the student-loan crisis. Without the protections that are currently set in place by the CFPB, student borrowers may be exposed to vulnerabilities brought on by certain predatory lenders.

Recent actions by the Dept. of Ed. suggest that borrowers may not be able to look to this agency for help. As discussed above, multiple Dept. of Ed. decisions have led some state attorneys general to file lawsuits. Additionally, in April 2017, Education Secretary DeVos rescinded three memos issued by the Obama administration, including a July 2016 memo from

¹²⁹In 2015, the city of Los Angeles sued Wells Fargo for unethical customer conduct, accusing the bank of secretly opening unauthorized accounts that then accrued bogus fees. See Maggie McGrath, *Wells Fargo Fined \$185 Million For Opening Accounts Without Customers' Knowledge*, FORBES (Sept. 8, 2016 2:10 PM), <https://www.forbes.com/sites/maggiemcgrath/2016/09/08/wells-fargo-fined-185-million-for-opening-accounts-without-customers-knowledge/#5b2ffd2e51fc>.

¹³⁰Nasiripour, *DeVos Tells CFPB to Back Off*, *supra* note 126.

¹³¹ See *Title XIV Rules*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/mortserv/> (last visited Mar. 7, 2018).

¹³² *CFPB Halts Student Loan Debt Relief Scam*, CONSUMER FIN. PROT. BUREAU (Mar. 30, 2016), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-halts-student-loan-debt-relief-scam/>.

former Undersecretary Ted Mitchell that called for the government to hold loan servicers accountable for bad service.¹³³ Overall, while federal agencies do provide some meaningful protections to student loan borrowers, due to the current political landscape those protections are at risk of disappearing.

Increasing State Regulation of the Student Loan Industry

While state action is no replacement for reform and action at the federal level, regulation at the state level can help hold loan servicers accountable.¹³⁴ Maggie Thompson, the executive director of Generation Progress, has suggested that federal oversight of the student loan industry is inadequate given the size of the student loan market.¹³⁵ In a letter to the CFPB from July 2015, General Counsel for the Connecticut Department of Banking remarked that states can play an important role in the regulation of loan servicers:

Robust enforcement authority over all student loan servicers at the state level is necessary in order to allow states to protect their student borrowers and identify issues that may be unique to that state, to an individual servicer's in-state practices, or to a particularly relevant borrower population. States have a unique ability to work on a granular level while simultaneously spotting trends and systemic issues at a state or regional level.¹³⁶

¹³³ Danielle Douglas-Gabriel, *DeVos Dials Back Consumer Protections for Student Loans Borrowers*, WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/11/devos-dials-back-consumer-protections-for-student-loan-borrowers/?utm_term=.2cc335c1b963; Memorandum from Ted Mitchell, *supra* note 77; Letter from Betsy DeVos, Sec'y U.S. Dep't of Educ., to James W. Runcie, Chief Operating Officer of Fed. Student Aid (Apr. 11, 2017), <https://www2.ed.gov/documents/press-releases/student-loan-servicer-recompete.pdf>.

¹³⁴ Ben Barrett, *States Can and Should Hold Federal Student Loan Servicers Accountable*, NEW AMERICA (Aug. 24, 2017) <https://www.newamerica.org/education-policy/edcentral/states-can-and-should-hold-federal-student-loan-servicers-accountable/>.

¹³⁵ *After Education Secretary Betsy DeVos Rescinds Consumer Protections, Massachusetts Mulls More Regulations for Student Loan Industry*, MASSLIVE (updated Sept. 13, 2017), http://www.masslive.com/politics/index.ssf/2017/09/should_machusetts_regulate.html.

¹³⁶ Letter from Bruce H. Adams, Gen. Counsel, Conn. Dep't of Banking, to Monica Jackson, Consumer Fin. Prot. Bureau (July 13, 2015), <https://www.regulations.gov/document?D=CFPB-2015-0021-0381>. *See also* CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING 142 (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf [hereinafter CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING].

On the state level, Borrower Bill of Rights ("BBOR") legislation can safeguard borrower interests by providing students and their families additional protections and services during the repayment process.¹³⁷ These BBORs have the potential to protect borrower interests in a number of ways, such as using a state's licensing authority to set standards for servicing, establishing a data reporting system to detect servicing issues, and setting up a state ombudsman office to educate consumers and address complaints at a local rather than national level.¹³⁸ Enacting a BBOR can also help a state's attorney general pursue enforcement actions against abusive servicing practices, with an Ombudsman serving as an important partner to target enforcement efforts.¹³⁹ With relaxed oversight and threats to consumer protections for student loan borrowers at the federal level, states should not delay in using legislative tools to provide better protections for borrowers. A detailed comparative analysis of various state BBORs is presented later below in Section V,¹⁴⁰ but before discussing those pieces of legislation this commentary introduces you to the main subject of this commentary: the Bill.

¹³⁷ *Id.*

¹³⁸ *Id.* at 3-4.

¹³⁹ *Id.* at 5.

¹⁴⁰ *See infra* in Section V: Variations Among Borrower's Bill of Rights.

III. THE MASSACHUSETTS STUDENT LOAN BILL OF RIGHTS

The drafters of the Bill used the Connecticut Student Loan Bill of Rights as a template.¹⁴¹ While an annotated version of the full text of the Bill is shown later in Section VI,¹⁴² this section provides a detailed overview of each of the Bill’s nine sections. The Bill has three complementary aims: (1) to hold student loan servicers to the standard of business practices established by Massachusetts consumer protection law; (2) to provide borrowers with accessible avenues for remedies when they are treated unfairly; (3) to educate student loan borrowers as consumers who are empowered to make informed decisions.

To accomplish these aims, the Bill would create a new Student Loan Ombudsman (“the Ombudsman”) within the Division of Banks (“DOB”), and give the Commissioner of the Division of Banks (“Commissioner”) the power to license and investigate student loan servicers within Massachusetts.¹⁴³ The Bill seeks to alter and insert new definitions in Chapter 93 (“Regulation of Trade and Certain Enterprises”) Section 24 (“Definitions”) of the Mass. Gen. Laws, and would also create several new sections that detail how the Ombudsman’s office will be run and how licensing and investigations will take place.¹⁴⁴ The DOB would be responsible for investigating servicers and removing their ability to collect on loans if they commit abuses.¹⁴⁵ The Ombudsman would be responsible for providing educational, outreach, and advisory resources to student borrowers, among other responsibilities.¹⁴⁶

¹⁴¹ Compare An Act Concerning A Student Loan Bill of Rights, Public Act No. 15-162, 2015 Conn. Acts 656 (Reg. Sess.), with S.B. 129, 190th Gen. Court, Reg. Sess. (Mass. 2017).

¹⁴² See *infra* Section VI: Annotated Bill.

¹⁴³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 §§ 24L-N (Mass. 2017).

¹⁴⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 2-4 §§ 24, 24A, 24L-N (Mass. 2017).

¹⁴⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 §§24M-O (Mass. 2017).

¹⁴⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 §§24L(b)-(c) (Mass. 2017).

Walkthrough of the Proposed Massachusetts Student Loan Bill of Rights

The Bill is divided into nine sections.¹⁴⁷ This detailed overview looks at the Bill in depth, section by section.

SECTION 1

The Bill proposes that new definitions be introduced to the Mass. Gen. Laws to cover borrowers and servicers.¹⁴⁸ “Servicing” in Section 24 would be rewritten to include student loans.¹⁴⁹ The current definition of “servicing” in Section 24 is:

[R]eceiving a scheduled periodic payment from a borrower pursuant to the terms of a loan, including amounts for escrow accounts, and making the payments to the owner of the loan or other third party of principal and interest and other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the servicing loan document or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower.¹⁵⁰

The Bill proposes the following addition to the existing definition:

In the case of a student education loan as referenced in this section, servicing includes applying the payments of principal and interest and other such payments with respect to the amounts received from a student loan borrower as may be required pursuant to the terms of a student education loan and performing other administrative services with respect to a student education loan.¹⁵¹

SECTION 2

The Bill would add new definitions for “student education loan,” “student loan borrower,” and “student loan servicer” to Chapter 93.¹⁵² The proposed definition for “student education loan” is “any loan primarily used to finance education or other school-related expenses.”¹⁵³ The proposed definition for “student loan borrower” is “any resident of Massachusetts who has received or agreed to pay a student education loan, or any person who

¹⁴⁷ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 1-9 (Mass. 2017).

¹⁴⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 1 § 24 (Mass. 2017).

¹⁴⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 1 § 24 (Mass. 2017).

¹⁵⁰ MASS. GEN. LAWS ANN. ch. 93, § 24 (2018).

¹⁵¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 1 (Mass. 2017).

¹⁵² S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 2 § 24 (Mass. 2017).

¹⁵³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 2 § 24 (Mass. 2017).

shares responsibility with such Massachusetts resident for repaying the student education loan.”¹⁵⁴ The Bill’s proposed definition for “student loan servicer” is “any person responsible for the servicing of a student education loan to a student loan borrower.”¹⁵⁵ It is important to note that the term “student loan servicer” could refer to both servicers required to have a license and to those who are not, because not all servicers will be subject to the licensure requirement.¹⁵⁶ This distinction is discussed in more detail below Section VI.¹⁵⁷

SECTION 3

In addition to inserting new definitions in Section 24, the Bill would add a sentence to Section 24A that would require student loan servicers acting as third party loan servicers to be subjected to the licensing scheme set up by the Bill in Sections 24M through 24O.¹⁵⁸

SECTION 4

Section 4 of the Bill contains the bulk of its content. It proposes inserting four new sections (Sections 24L-24O) that would both grant new duties and responsibilities to the DOB and detail under which circumstances student loan servicers can receive and keep their licenses to operate in Massachusetts.¹⁵⁹

Section 24L seeks to establish the Ombudsman in the DOB and outline its duties.¹⁶⁰ Section 24L(a) would establish the position of the Ombudsman, state that the position is to be created within the DOB, and state that the Ombudsman is to be appointed by the Commissioner for the purpose of providing “timely assistance” to student loan borrowers with education loans.¹⁶¹ Section 24L(b) would state that the Ombudsman is to work in consultation with the

¹⁵⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 2 § 24 (Mass. 2017).

¹⁵⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 2 § 24 (Mass. 2017).

¹⁵⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 2 § 24 (Mass. 2017).

¹⁵⁷ See *infra* Section VI, Bill Analysis.

¹⁵⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 3 § 24A (Mass. 2017).

¹⁵⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 §§ 24L-O (Mass. 2017).

¹⁶⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L (Mass. 2017).

¹⁶¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24(a) (Mass. 2017).

Commissioner and would include a non-exhaustive list of the Ombudsman duties.¹⁶² The proposed duties are: (1) to receive complaints from student loan borrowers and to assist in their resolution; (2) to compile and analyze data on student loan borrower complaints and their resolution; (3) to help student loan borrowers understand their rights and responsibilities under the terms of their student education loans; (4) to make information available to the public about the issues facing student loan borrowers; (5) to make recommendations to the Commissioner about resolving problems facing student loan borrowers; (6) to monitor the development and implementation of laws, regulations, and policies surrounding student loan borrowers at the local, state, and federal level, and to recommend changes in conjunction with those developments; (7) to review the complete student education loan history for borrowers who ask for such review; and (8) to share information with current and future student loan borrowers, public institutions of higher education, student loan servicers, and any other participants in student loan lending.¹⁶³ Section 24L(c) would state that the Ombudsman must develop a student loan borrower education course that is to include both presentations and educational materials.¹⁶⁴

Section 24M seeks to create a student loan servicer licensing mechanism.¹⁶⁵ Section 24M(a) would state that persons or entities acting directly or indirectly as a student loan servicer for Massachusetts borrowers must first obtain a license from the Commissioner, unless such a person or entity falls under one of the exemptions listed in Section 24(b).¹⁶⁶ The exempted parties pursuant to Section 24(b) would be (1) any bank, Massachusetts credit union, federal credit union, or out-of-state credit union; (2) any wholly owned subsidiary of any such bank or

¹⁶² S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24(b) (Mass. 2017).

¹⁶³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

¹⁶⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(c) (Mass. 2017).

¹⁶⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M (Mass. 2017).

¹⁶⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(a)-(b) (Mass. 2017).

credit union; and (3) any operating subsidiary where each owner of such operating subsidiary is wholly owned by the same bank or credit union.¹⁶⁷ Section 24M(c) would require any person or entity wishing to act as a student loan servicer in Massachusetts to submit an application to the Commissioner along with a license fee of \$1,000 and an investigation fee to be determined annually.¹⁶⁸ This section would additionally state that the Commissioner may require the applicant to provide a financial statement prepared by a public accountant, a history of the applicant's criminal convictions, or any other information the Commissioner may deem necessary for assessing whether an applicant is fit to service student loans in Massachusetts.¹⁶⁹

Section 24M(d) would state that the Commissioner shall investigate each applicant before granting it a license to service student loans in Massachusetts, and also lay out the conditions under which a license may be granted.¹⁷⁰ This section would state that the Commissioner may grant a license to an applicant if the applicant's financial condition is sound; if its business will be conducted honestly and equitably; if the applicant is qualified and of good character; if no person on behalf of the applicant has knowingly made an incorrect statement or omission of material fact in the application or in any report required under the Bill; if the applicant has paid the required fees; and if the applicant has met other requirements deemed necessary by the Commissioner.¹⁷¹

Section 24M(e) would state that licenses expire after one year unless renewed, suspended, or revoked in accordance with this Bill.¹⁷² Section 24M(f) would state that a student loan servicer must file an application for renewal each year along with a license fee,

¹⁶⁷ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(b) (Mass. 2017).

¹⁶⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(c) (Mass. 2017).

¹⁶⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(c) (Mass. 2017).

¹⁷⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(d) (Mass. 2017).

¹⁷¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(d) (Mass. 2017).

¹⁷² S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(e) (Mass. 2017).

investigation fee, and potentially a late fee, if applicable. The Commissioner would be able to refuse to renew a license.¹⁷³ Section 24M(g) would state that the Commissioner shall automatically suspend a servicer's license if a check it files to pay for a license or renewal fee has been dishonored.¹⁷⁴ The Commissioner would notify the licensee in writing and provide the opportunity for a hearing.¹⁷⁵ Section 24M(h) would state that the Commissioner may treat a license application as abandoned if the applicant fails to respond to any of the Commissioner's requests for information or fails to respond to any regulations adopted in accordance with the provisions of the Bill.¹⁷⁶

Section 24N(a) seeks to describe the types of behavior in which student loan servicers are expressly prohibited from engaging, such as misleading, defrauding, or refusing to communicate with student loan borrowers to resolve issues.¹⁷⁷ Section 24N(b) would prohibit entities licensed to act as student loan servicers under this scheme from doing business at any other place of business or under any other name than that listed on their license, which would not be transferable or assignable.¹⁷⁸ Section 24N(c) would require student loan servicers, including those entities exempt from the licensing requirement, to maintain adequate records for the requisite time period, and to furnish such records to the Commissioner upon request.¹⁷⁹

Section 24N(d) would simply require that student loan servicers comply with all applicable federal laws and regulations pertaining to servicing student education loans.¹⁸⁰ It

¹⁷³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(f) (Mass. 2017).

¹⁷⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(g) (Mass. 2017).

¹⁷⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(g) (Mass. 2017).

¹⁷⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M(h) (Mass. 2017).

¹⁷⁷ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24N(a) (Mass. 2017).

¹⁷⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24N(b) (Mass. 2017).

¹⁷⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24N(c) (Mass. 2017).

¹⁸⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24N(d) (Mass. 2017).

would additionally state that violating federal law is to be treated as a violation of this Bill against which the Commissioner may take enforcement action.¹⁸¹

Section 24O is the last section that the Bill proposes as an addition to Chapter 93 of the Mass. Gen. Laws¹⁸². This section would cover the Commissioner's ability to investigate servicers and respond to servicers who do not comply with the Bill's provisions.¹⁸³ Section 24O(a) would give the Commissioner the authority to investigate and examine loan servicers in connection with licensure and related to violations of the Bill's provisions.¹⁸⁴ Section 24O(b) would state that the Commissioner may access documents and records of the student loan servicer under examination or investigation, and Section 24O(c) would prohibit student loan servicers from knowingly withholding or destroying records or other information.¹⁸⁵ Section 24O(d) would state that the Commissioner may suspend, revoke, or refuse to renew the license of a student loan servicer if the Commissioner finds that either the servicer has violated a provision of the Bill or a condition that would have prevented a servicer from initially acquiring a license.¹⁸⁶ Section 24O(e) would allow the Commissioner to take action against a student loan servicer in accordance with the Commissioner's powers under Chapter 93 of the Mass. Gen. Laws if the Commissioner determines that the servicer (or any person or entity associated with a licensee) has violated the Bill's provisions, committed fraud, made a misrepresentation, or engaged in dishonest activities.¹⁸⁷

¹⁸¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24N(d) (Mass. 2017).

¹⁸² S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24O (Mass. 2017).

¹⁸³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24O (Mass. 2017).

¹⁸⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24O(a) (Mass. 2017).

¹⁸⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24O(b)-(c) (Mass. 2017).

¹⁸⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24O(d) (Mass. 2017).

¹⁸⁷ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24O(e) (Mass. 2017).

SECTION 5

This Bill would require the Commissioner to file an annual report on the Ombudsman’s work with the clerks of both the Massachusetts Senate and House of Representatives.¹⁸⁸ This report would need to include (1) the number of complaints received; (2) the types of complaints received; (3) any recommendations to improve the effectiveness of the Ombudsman position; and (4) any recommendations to improve the DOB’s regulation, oversight, and enforcement of student loan servicers.¹⁸⁹

SECTION 6

The Bill would require the Ombudsman to ensure that state employees are informed of their right to public loan forgiveness.¹⁹⁰

SECTION 7

The Bill would state that the Commissioner shall promulgate all rules and regulations necessary for the enactment of this Bill within three months of its effective date.¹⁹¹

SECTIONS 8, 9

These final sections of the Bill would state when its provisions are to take effect.¹⁹²

Role of the Student Loan Ombudsman

The Bill seeks to establish a Student Loan Ombudsman as an institutional resource for Massachusetts student loan borrowers.¹⁹³ The role of an Ombudsman grew out of an historical need to “protect the rights and interests of citizens from abuses arising from a powerful and impersonal bureaucracy.”¹⁹⁴ An Ombudsman is intended to be an independent and impartial

¹⁸⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 5 (Mass. 2017).

¹⁸⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 5 (Mass. 2017).

¹⁹⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 6 (Mass. 2017).

¹⁹¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 7 (Mass. 2017).

¹⁹² S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 8-9 (Mass. 2017).

¹⁹³ S.B. 129, 190th Gen. Court, Reg. Sess. (Mass. 2017).

¹⁹⁴ Arthur L. Alarcón, *A Prescription for California’s Ailing Inmate Treatment System: An Independent Corrections Ombudsman*, 58 HASTINGS L.J. 591, 597 (2007), http://heinonline.org/HOL/Page?handle=hein.journals/hastlj58&div=24&g_sent=1&casa_token=&collection=journals.

resource that can be used by people seeking to resolve particular issues.¹⁹⁵ The Student Loan Ombudsman’s duties can be divided into four categories: (1) complaint resolution; (2) borrower education; (3) policy recommendations; and (4) data collection and analysis.¹⁹⁶

Complaint Resolution

Establishing the Ombudsman as a resource for complaint resolution is an essential component of this Bill. The Bill would charge the Ombudsman with “reviewing and assisting in resolving complaints from student loan borrowers.”¹⁹⁷ The Bill seeks to encourage the Ombudsman to resolve complaints in collaboration with colleges and universities, student loan servicers, and other participants in the student loan lending industry.¹⁹⁸ With a borrower’s consent, the Ombudsman would have the authority to review that borrower’s individual loan history.¹⁹⁹ As will be discussed below in Section VIII, the Ombudsman’s role in assisting borrowers to resolve complaints outside of the courtroom could increase borrowers’ access to justice when they are treated unfairly by their loan servicers.²⁰⁰

Borrower Education

The second key responsibility of the Ombudsman would be to provide education and outreach to Massachusetts residents.²⁰¹ The Bill would charge the Ombudsman with creating a student loan borrower course that would include presentations and materials about student loans.²⁰² The program would be required at a minimum to include a breakdown of key industry terms, documentation requirements, payment obligations, repayment options, and disclosure

¹⁹⁵ *Id.* at 598.

¹⁹⁶ *See* S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L (Mass. 2017).

¹⁹⁷ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

¹⁹⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

¹⁹⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

²⁰⁰ *See infra* Part VII.

²⁰¹ *See* S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(c) (Mass. 2017).

²⁰² S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(c) (Mass. 2017).

requirements.²⁰³ The Ombudsman would also be expected to help borrowers understand their rights and responsibilities,²⁰⁴ publicize information about common borrower concerns,²⁰⁵ and inform state employees about their right to public loan forgiveness.²⁰⁶ To accomplish this, the Bill would make the Ombudsman responsible for reaching out to current and future student loan borrowers, universities and colleges, and servicers.²⁰⁷

Policy Recommendations

The Bill would charge the Ombudsman with (1) making information about the issues facing student loan borrowers available to the public; (2) making recommendations to the Commissioner about resolving problems facing student loan borrowers; (3) monitoring the development and implementation of laws, regulations, and policies surrounding student loan borrowers at the local, state, and federal level; and (4) recommending changes in conjunction with those developments.²⁰⁸ Based on the information gathered by the Ombudsman, the Commissioner would advise the state legislature (1) on how to improve the Ombudsman's office;²⁰⁹ and (2) on how to improve the DOB's role in regulating the servicers.²¹⁰

Data Collection and Analysis

The Bill would charge the Ombudsman to collect and analyze data, a process that has the potential to give detailed illustration on many potential problems that are currently unknown or must be guessed at based on wide-ranging federal data. The Ombudsman's proposed data collection responsibilities are to (1) review received complaints; and (2) compile and analyze

²⁰³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(c) (Mass. 2017).

²⁰⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

²⁰⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

²⁰⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 6 (Mass. 2017).

²⁰⁷ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

²⁰⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

²⁰⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 5 (Mass. 2017).

²¹⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 5 (Mass. 2017).

received complaints.²¹¹ Data collection and analysis is essential to building up relevant data, information, and records at the state level, which have not yet been comprehensively recorded.

Note: The Importance of Data Collection

The lack of available data on the effects of student loan debt on particular groups of people is problematic. Attempts to gain insight into how racial patterns impact student loan debt are impaired by this lack of necessary data.²¹² The Dept. of Ed., for example, fails to regularly track borrowers by race.²¹³ The data that is available comes from infrequent studies.²¹⁴ The Federal Student Aid (“FSA”) Feedback System does not track race and its relation to borrowers’ complaints. In a letter to the former Secretary of Education, The National Consumer Law Center (“NCLC”) argued that FSA has failed to meet its responsibilities to determine if and how borrowers of color are disproportionately impacted by lending practices.²¹⁵ Without the help of this kind of data, policymakers cannot adequately create initial policies or subsequently change those policies to better meet their desired ends, namely to provide a better educational experience *for all*.

There are some issues that are so pervasive that they may be assumed to be true throughout the United States, and thus Massachusetts as well. One of these is that student loan borrowers of color, particularly women of color are more likely to struggle with their loans than their white counterparts.²¹⁶ They are more likely to default and consequently struggle with

²¹¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

²¹² Judith Scott-Clayton & Jing Li, *Black-white disparity in student loan debt more than triples after graduation*, BROOKINGS (Oct. 20, 2016), <https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Letter from Nat’l Consumer Law Ctr. et al., to John B. King Jr., Sec’y of Educ., U.S. Dep’t of Educ. 1, 6 (Aug. 17, 2016) (<http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/ltr-sec-king-race-student-debt.pdf>).

²¹⁶ *Id.* at 2-3.

abusive collection tactics, in large part due to the economic and societal inequalities found in all other parts of their lives.²¹⁷ These issues are compounded by the further discrimination found in labor and housing markets for borrowers of color.²¹⁸ This discrimination makes it harder for those impacted to accumulate wealth, which in turn can lengthen the life of their loan, and make paying it back more difficult.²¹⁹

Other groups of borrowers are adversely impacted as well. Borrowers from lower socioeconomic backgrounds as well as first-generation college students struggle more with their debt than do those from families who have the resources (such as wealth and personal experience with financing higher education) to help their family members navigate the student loan system.²²⁰ First-generation students may lack the knowledge necessary to make informed financial decisions compared to those students from continuing-generation backgrounds, whose families are able to serve as educational guides through the process of funding their college educations.²²¹ Perhaps counter-intuitively, minorities from middle-class backgrounds may be most impacted by student debt, as minorities from poorer socio-economic backgrounds often do not possess the necessary credit to obtain loans or attend college.²²² The failure of servicers to provide sufficient information regarding military deferment or maintain consistent application criteria, for example, can cause a myriad of issues for service members.²²³ These issues are often

²¹⁷ *Id.* at 3-5.

²¹⁸ Marshall Steinbaum & Kavya Vaghul, *How the Student Debt Crisis affects African Americans and Latinos*, WASH. CTR. FOR EQUITABLE GROWTH (Feb. 17, 2016), <http://equitablegrowth.org/research-analysis/how-the-student-debt-crisis-affects-african-americans-and-latinos/>.

²¹⁹ *Id.*

²²⁰ FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2016-MAY 2017 (June 14, 2017), <https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf>.

²²¹ Jason Lee & John A. Mueller, *Student Loan Debt Literacy: A Comparison of First-Generation and Continuing-Generation Students*, 55 J. C. STUDENT DEV. 714, 716-717 (2014), <https://muse.jhu.edu/article/558257/pdf>.

²²² Steinbaum & Vaghul, *supra* note 218.

²²³ CONSUMER FIN. PROT. BUREAU, OVERSEAS & UNDESERVED, *supra* note 37, at 5-11.

exacerbated, as servicemembers may not become aware of the issue until returning from deployment.²²⁴ Additionally, if service members are killed in action, the burden of their student loans may fall to parents who acted as co-signers, and who must then pay off the loans while mourning their child.²²⁵ Older borrowers may be placed in such untenable financial situations that they must choose between making their loan payments and foregoing needed health care such as prescription medications or doctors' visits.²²⁶

Once more detailed data exists, it can be used to create targeted policies and programs that may address specific and unforeseen needs of Massachusetts borrowers. For example, the CFPB's Office of Students issued reports and worked on targeted policy responses in conjunction with the Dept. of Ed. and the Department of Treasury in response to borrower complaints collected and analyzed by the CFPB's Student Loan Ombudsman.²²⁷ It may be safely expected that given detailed data, Massachusetts agencies would similarly be able to efficiently target tailored programs to the populations that need them the most. The Ombudsman's data collection and analysis responsibilities are thus very important and may have the potential to be the most impactful outcome that the Bill would bring about.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Thompson Cochran, *supra* note 94, at 71.

IV. THE STUDENT LOAN LANDSCAPE AND REGULATORY PROCESSES

Understanding the context of the student loan industry is essential to determine how the Bill can impact borrowers in Massachusetts. Managing student loan debt can be a confusing and frustrating experience for borrowers.²²⁸ Over a loan's lifetime, a borrower interacts with numerous entities involved in the student loan industry, including lenders, loan servicers, debt collectors, and governmental regulatory agencies.²²⁹ It is important to recognize that these entities play different roles throughout a loan's lifetime and have obligations to assist borrowers in different ways.²³⁰ To emphasize the complexity of the student loan industry and the need for changes in the current regulatory system, this section (1) provides an overview of the federal and private student loan characteristics that impact a borrower's management of student loan debt; (2) discusses the role of loan servicers in the student loan industry and the role of governmental agencies in regulating loan servicing practices; (3) identifies harmful loan servicer practices; (4) summarizes remedies currently available to borrowers; and (5) comments on gaps in consumer protections for student loan borrowers.

²²⁸ CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING, *supra* note 136, at 66.

²²⁹ Ryan Lane, *Know Who's Who in the Student Loan World*, U.S. NEWS (Nov. 25, 2015 10:00 AM), <https://www.usnews.com/education/blogs/student-loan-ranger/2015/11/25/understand-the-many-facets-of-the-student-loan-process>.

²³⁰ *Id.*

Management of Federal and Private Student Loan Debt

“My heart aches as I reflect on the fact I had no clue about private vs. public loan differences [when I took out my loans]... I have daily stress and lose sleep at night over my private loans - and I hope my own children (assuming I can afford to have them in the future) will never experience this.” -Complaint submitted to CFPB by private student loan borrower from Missouri²³¹

Student loan borrowers generally have two types of loans available to them: federal loans, which are funded by the federal government, and private loans, which are issued and funded by a variety of nonfederal lenders including banks, credit unions, state agencies, and schools.²³² Excluding loans previously issued under the Federal Family Education Loan program (“FFEL”), the majority of federal loans are issued through the William D. Ford Federal Direct Loan program (“Direct Loans”) and are held by the same lender—the U.S. Department of Education (“Dept. of Ed.”).²³³ In contrast, private loans are issued by a number of lenders, with loan terms varying from lender to lender.²³⁴ While federal and private student loans offer different benefits that impact loan management and repayment,²³⁵ a borrower’s ability to successfully manage student loan repayment can depend on (1) the availability of repayment

²³¹ *Complaint 2679665*, CONSUMER FIN. PROT. BUREAU (Sept. 20, 2017), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2679665>. See Appendix B for a copy of the full complaint.

²³² *Federal Versus Private Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/federal-vs-private> (last visited Mar. 10, 2018).

²³³ The Federal Family Education Loan Program (“FFEL”) was initiated under the Higher Education Act of 1965 and funded through private lenders who made federally-guaranteed student loans. FFEL participants received subsidies from the U.S. government that were used to control interest rates at federally mandated levels. The government also guaranteed a large portion of the loans, insuring private lenders against default. If a parent or student defaulted, the private lender was reimbursed by the government for its losses. The FFEL Program was terminated following the passage the Health Care and Education Reconciliation Act on January 5, 2010. While the Dept. of Ed. no longer issues FFEL loans, a number of loans are still outstanding and in pay status.

See Higher Education Act of 1965, Public Law 89-329, 20 U.S.C.A. § 1071 (West 2010); Federal Family Education Loans (federal program no. 84.032), 4 West’s Fed. Admin. Prac. § 4904 (June 2017).

²³⁴ Jordi Lippe-McGraw, *How to Apply for Private Student Loans*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/how-to-apply-for-private-student-loans-guide/> (last updated Dec. 21, 2017).

²³⁵ See Appendix E for a comparison of federal and private student loan characteristics. A list of summary of available federal and private student loan types is available in Appendix F.

plans, deferment options, and loan forgiveness programs and (2) access to accurate information regarding loan repayment options.²³⁶

Availability of Repayment plans, Deferment Options, and Loan Forgiveness Programs

Federal Student Loans

Federal loans have a number of “built-in” protections under the Higher Education Act (“HEA”) that aim to help financially-stressed borrowers.²³⁷ Federal loan programs generally do not require payments if the student is enrolled in classes at least part-time and additionally offer a grace period postponing repayment after a student graduates or leaves school.²³⁸ For borrowers experiencing short-term periods of financial distress after they graduate or leave school, deferment and forbearance options temporarily postpone repayment and can help borrowers avoid default.²³⁹ Income-based repayment options consider a borrower’s income and can reduce monthly payments to manageable amounts during periods of financial distress.²⁴⁰ While FFEL borrowers have the option to switch repayment plans at least once a year, Direct Loan borrowers can switch repayment plans at any time by notifying the Dept. of Ed.²⁴¹

In addition to repayment plans and deferment options, there are several loan forgiveness and discharge options under the HEA that federal loan borrowers can take advantage of based on

²³⁶ *Repayment Plans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans> (last visited Mar. 5, 2018).

²³⁷ Tara Sigel Bernard, *The Many Pitfalls of Private Student Loans*, N.Y. TIMES (Sept. 4, 2015), <https://www.nytimes.com/2015/09/05/your-money/student-loans/the-many-pitfalls-of-private-student-loans.html>.

²³⁸ FED. STUDENT AID, *Repayment Plans*, *supra* note 236; *Deferment and Forbearance*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/deferment-forbearance> (last visited Mar. 10, 2018).

²³⁹ FED. STUDENT AID, *Deferment and Forbearance*, *supra* note 238; *Postponing Repayment*, STUDENT LOAN BORROWER ASSISTANCE, <http://www.studentloanborrowerassistance.org/repayment/federal-loans/federal-loans-postponing-repayment/> (last visited Mar. 10, 2018).

²⁴⁰ *Payment Plans*, STUDENT LOAN BORROWER ASSISTANCE, <http://www.studentloanborrowerassistance.org/repayment/federal-loans/payment-plans/> (last visited Mar. 10, 2018). A summary of repayment options available for federal loans is in available in Appendix G.

²⁴¹ *Id.*

their careers or circumstances such as permanent disability.²⁴² Forgiveness offers the most complete financial remedy for borrowers trying to manage student loan debt by relieving borrowers of the obligation to repay all or part of their loans.²⁴³ Public interest careers traditionally offer lower wages and certain federal programs, including the Public Service Loan Forgiveness (“PSLF”) program, which encourages individuals to give back to their communities by using loan forgiveness to lessen the financial burden.²⁴⁴ Changing attitudes towards loan forgiveness, including a perceived threat to the PSLF program, suggest that borrowers need to keep up-to-date on policy changes impacting their loan forgiveness options.²⁴⁵

Private Student Loans

Private loan servicers are not required under law to offer multiple repayment plans, deferment and forbearance options, or loan forgiveness programs.²⁴⁶ With private lenders, there is no “standardized protocol for dealing with payments” and each lender may handle repayment and forgiveness options differently.²⁴⁷ As each lender can incorporate different terms and conditions into loan agreements, private loan borrowers must rely on the promises and conditions made in their loan contracts to determine available benefits and penalties.²⁴⁸ Private loan terms

²⁴² *Forgiveness, Cancellation, and Discharge*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness/cancellation> (last visited Mar. 4, 2018). See Appendix H for more information regarding loan cancellation and forgiveness options.

²⁴³ NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 10.1.

²⁴⁴ CONSUMER FIN. PROT. BUREAU, STAYING ON TRACK WHILE GIVING BACK 21 (Jun. 2017), https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf.

²⁴⁵ *Trump Student Loan Forgiveness*, STUDENT DEBT RELIEF (Jan. 22, 2018), <https://www.studentdebtrelief.us/forgiveness/trump-student-loan-forgiveness/>.

²⁴⁶ *Is forbearance available for loan forgiveness?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/is-forbearance-available-for-private-student-loans-en-647/> (last updated Aug. 4, 2016); *What should I do if I can’t afford my student loan payment?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-should-i-do-cant-afford-student-loan-payment-en-639/> (last updated Aug. 8, 2017); *Private Loans*, STUDENT LOAN BORROWER ASSISTANCE, <http://www.studentloanborrowerassistance.org/loan-cancellation/private-loans-cancellation/> (Last visited Mar. 10, 2018).

²⁴⁷ Melanie Lockert, *What to Do When You Can’t Afford Private Student Loan Payments*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/how-to-lower-private-student-loan-payments/> (last updated Aug. 26, 2016).

²⁴⁸ STUDENT LOAN BORROWER ASSISTANCE, *Private Loans*, *supra* note 246.

are generally based on a borrower's or co-signer's credit history, causing borrowers with lower credit scores to receive less favorable loan terms.²⁴⁹ Co-signers are equally responsible for the repayment of the loan and failure to make loan payments can have negative impacts on both a borrower's and co-signer's credit.²⁵⁰ Private lenders have wide discretion to discharge loans and often are not required to cancel loans if the borrower dies or becomes permanently disabled.²⁵¹ Although private lenders have discretion to cancel loans, they are not required to go beyond the provisions in individual loan contracts to help borrowers requesting relief.²⁵²

Access to Information Regarding Student Loan Repayment Options

As borrower protections and repayment options vary according to loan type, understanding federal and private loan benefits can play an important role in managing student loan debt and avoiding default.²⁵³ Federal loans have disclosure requirements under the HEA and private lenders need to provide a series of disclosures about the terms of the loan under the Truth in Lending Act ("TILA").²⁵⁴ However, it is unclear how helpful these disclosures are to borrowers, especially when provided at an early stages in the lending process:

"Too many words and not enough pictures" may be overstating and trivializing the issue, but it does aptly describe the problem. The issue is really about providing borrowers with the right information at the right time, rather than inundating them with text-heavy disclosures that are ignored or discarded.²⁵⁵

²⁴⁹ NAT'L CONSUMER LAW CTR., *STUDENT LOAN LAW*, *supra* note 83, § 12.2.1.

²⁵⁰ *If I co-signed for a student loan and it went into default, what happens?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/if-i-co-signed-for-a-student-loan-and-it-has-gone-into-default-what-happens-en-671/> (last updated Aug. 16, 2016).

²⁵¹ *What happens to my private student loans if I die or become disabled?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-happens-to-my-private-student-loans-if-i-die-or-become-disabled-en-617/> (last updated Aug. 4, 2016); STUDENT LOAN BORROWER ASSISTANCE, *Private Loans*, *supra* note 246.

²⁵² STUDENT LOAN BORROWER ASSISTANCE, *Private Loans*, *supra* note 246; STUDENT LOAN BORROWER ASSISTANCE, *Postponing Repayment*, *supra* note 239.

²⁵³ *Avoiding Default*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/default/avoid> (last visited Mar. 10, 2018).

²⁵⁴ Higher Education Act, 34 C.F.R. §682.205. Truth in Lending Act, 12 C.F.R. § 1026. *See* Appendix I for an overview of federal statutes relating to disclosure terms.

²⁵⁵ CONSUMER FIN. PROT. BUREAU, *STUDENT LOAN SERVICING*, *supra* note 136, at 36.

Accurate information about loan repayment options needs to be accessible in order for borrowers to manage loan repayment and mitigate the risks of default.²⁵⁶ While deferment and flexible repayment plans offered under the HEA should protect federal loan borrowers struggling to afford monthly payments, these benefits are ineffective if borrowers do not use them to avoid default.²⁵⁷ If they stop making payments on their loans, federal loan borrowers have about nine months to change repayment plans or enroll in deferment and forbearance programs before the loans default.²⁵⁸ When federal loans default, borrowers cannot select a new repayment plan and are not eligible to receive deferment or forbearance.²⁵⁹ As a government agency, the Dept. of Ed. can authorize the seizure of tax refunds, offset Social Security benefits, and instruct employers to withhold wages in order to collect on outstanding loan balances in default.²⁶⁰ For borrowers struggling to balance finances, the use of these government collection tools can break household budgets and make it difficult to cover living expenses.²⁶¹

If private student loan borrowers do not proactively seek information about their repayment options, they risk defaulting on their loans.²⁶² While federal loan borrowers have additional protections under the HEA,²⁶³ private student loan borrowers are subject to “the mercy of their creditors” and may not have flexible repayment options to help them avoid default.²⁶⁴ Many private student loans default when a borrower misses three monthly payments.²⁶⁵ Private

²⁵⁶ *Id.* at 150.

²⁵⁷ *Id.* at 39.

²⁵⁸ *Understanding Delinquency and Default*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/default#default> (last visited Mar. 10, 2018).

²⁵⁹ *Id.*

²⁶⁰ NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 9.1.

²⁶¹ *Id.*

²⁶² CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING, *supra* note 136, at 27.

²⁶³ NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, LAW § 12.2.1.

²⁶⁴ *Id.* § 12.7.1.

²⁶⁵ *What does it mean to default on my private student loans?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-does-it-mean-to-default-on-my-private-student-loans-en-665/> (last updated Aug. 4, 2016).

loan borrowers have less time to explore their potential repayment and deferment options since private student loans generally enter default faster than federal loans.²⁶⁶ However, statutes of limitations and limited collection tools place restrictions on a lender's ability to collect on private student loans.²⁶⁷ Under state contract law, private student loans generally have a statute of limitations that limits the time period in which lenders or collectors can sue borrowers to collect on unpaid debts.²⁶⁸ Private lenders have fewer collection tools than the federal government, but lenders can still bring legal actions against borrowers in order to recover outstanding debt.²⁶⁹ Accessibility of information about available loan benefits is an important issue in the student loan industry.²⁷⁰ Federal and private student loan borrowers can take steps to avoid default, but they need to know what their options are and take timely action.²⁷¹ However, the CFPB recently reported that borrowers struggle to take advantage of loan benefits designed to protect them from default.²⁷² In the student loan industry, loan servicers' sloppy practice and poor dissemination of information contribute to this problem.²⁷³

²⁶⁶ Elyssa Kirkham, *Facing Private Student Loan Default? Here Are Your Options*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/options-private-student-loan-default/> (last updated Apr. 27, 2017).

²⁶⁷ Betsy Mayotte, *Understanding the Statute of Limitations on Student Loans*, U.S. NEWS (Oct. 26, 2016 10:00AM), <https://www.usnews.com/education/blogs/student-loan-ranger/articles/2016-10-26/understanding-the-statute-of-limitations-on-student-loans>. The time frame for statute of limitations vary from state to state. In Massachusetts, the statute of limitations for written contracts is 6 years. *See* MASS. ANN. LAWS ch. 260, § 1 et seq.

²⁶⁸ *Id.*

²⁶⁹ *How might a private student lender collect payments?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/how-might-a-private-student-lender-collect-payments-from-me-en-667/> (last updated Aug. 5, 2016).

²⁷⁰ Equal Justice Works, *Lack of Information Can Be Devastating to Student Loan Borrowers*, U.S. News (April 11, 2012 10:00 AM), <https://www.usnews.com/education/blogs/student-loan-ranger/2012/04/11/lack-of-information-can-be-devastating-to-student-loan-borrowers>.

²⁷¹ Shannon Insler, *Student Loan Default: Everything You Need to Know*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/student-loan-default-what-happens/> (last updated Aug. 4, 2017).

²⁷² Frotman & Christa, *supra* note 26; *see also* Acacia Squires, *supra* note 26.

²⁷³ *CFPB Monthly Snapshot Spotlights Student Loan Complaints*, CONSUMER FIN. PROT. BUREAU (Apr. 25, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-monthly-snapshot-spotlights-student-loan-complaints/>.

Role of Loan Servicers in the Student Loan Industry

Loan servicers play an important role in the student loan industry and often serve as the point of contact for borrowers with questions regarding their loans and payment options.²⁷⁴ Whereas lenders originate and determine the terms of a loan, student loan servicers are responsible for (1) managing borrowers' accounts; (2) processing payments; (3) communicating directly with borrowers; and (4) informing borrowers about loan repayment options.²⁷⁵ A “competent and efficient” servicer can ensure payments are properly applied to a borrower’s account and help financially distressed borrowers avoid default.²⁷⁶ Even “well-conceived consumer protections” may be ineffective if loan servicers do not provide high-quality service.²⁷⁷ Private and federal loans have a number of loan servicers. For private loans, the originating institution or another non-bank entity usually services the loan.²⁷⁸ The Dept. of Ed. contracts servicing of Direct federal loans with a number of companies, including Great Lakes Educational Loan Services, Nelnet, FedLoan Servicing (d/b/a Pennsylvania Higher Education Assistance Agency, or “PHEAA”), and Navient (formerly Sallie Mae).²⁷⁹ These contracts generally last five years, though the Dept. of Ed. may terminate the contracts or hire new servicers at any point in this period.²⁸⁰ Federal loan borrowers generally do not get to choose their loan servicers or

²⁷⁴ CONSUMER FIN. PROT. BUREAU, *What happens to my private student loans if I die or become disabled?*, *supra* note 251.

²⁷⁵ *Request for Information Regarding Student Loan Servicing*, *supra* note 79. See also *Lee*, *supra* note 81.

²⁷⁶ NAT’L CONSUMER LAW CTR., *STUDENT LOAN LAW*, *supra* note 83, § 5.1.

²⁷⁷ CONSUMER FIN. PROT. BUREAU, *STUDENT LOAN SERVICING*, *supra* note 136, at 19.

²⁷⁸ *Comment submitted to the CFPB, Docket No. CFPB-2015-0021*, NAT’L CONSUMER LAW CTR. 3 (Jul. 13, 2015), https://www.nclc.org/images/pdf/special_projects/sl/NCLC_Comments_Student_Loan_Servicing_Jul2015.pdf.

²⁷⁹ *Loan Servicers*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/servicers> (last visited Mar. 10, 2018). See also *Loan Servicers*, STUDENTLOANS.GOV, <https://studentloans.gov/myDirectLoan/additionalInformation.action> (last visited Mar. 5, 2018).

As of February 2018, the Dept. of Ed. works with nine loan servicing companies for the Direct loan program: Title IV Additional Servicers (TIVAS): Great Lakes Educational Loan Services, Nelnet, FedLoan Servicing (PHEAA), and Navient (formerly Sallie Mae).

Not-for-profit Loan Servicers: Cornerstone, Granite State, HESC/EdFinancial, MOHELA, and OSLA

²⁸⁰ NAT’L CONSUMER LAW CTR., *STUDENT LOAN LAW*, *supra* note 83, § 5.2.1.1.

switch servicers once assigned.²⁸¹ The Dept. of Ed. assigns exclusive management of certain benefit programs to specific servicers.²⁸² For example, Nelnet services all federal loans with total and permanent disability discharge applications and PHEAA is the PSLF servicer.²⁸³

The Dept. of Ed. refers to the FSA's performance metric allocations, which are released to the public online to determine allocation of loans to servicers.²⁸⁴ The Dept. of Ed. compiles customer satisfaction survey scores and default prevention statistics every six months.²⁸⁵ According to the Dept. of Ed., customer satisfaction is measured on a scale of zero to 100.²⁸⁶ The guidelines do not appear to indicate that borrower narratives or complaints filed with the Federal Student Aid ("FSA") Feedback System are considered when determining loan allocations to servicers. It is unclear whether the surveys used by the Dept. of Ed. are reliable measures to determine whether borrowers are both satisfied with their servicers and actually receiving optimal outcomes.²⁸⁷ There is very limited data on actual performance beyond what is available for the number of accounts in default or delinquency.²⁸⁸ If the surveys are not a reliable source of data for allocating loan accounts to servicers, the Dept. of Ed. may be assigning loan accounts to

²⁸¹ Borrowers consolidating their loans through the Direct Loan Consolidation program do have the option of selecting one of the following servicers to manage their loans: Great Lakes Educational Loan Services, Nelnet, FedLoan Servicing (PHEAA), or Navient (formerly Sallie Mae). *See* NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.2.1.1.

²⁸² NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.2.1.1.

²⁸³ *Id.*

²⁸⁴ *Id.* *See Servicer Performance Metrics and Allocations*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing/servicer-performance> (last visited Mar. 5, 2018).

²⁸⁵ *See Explanation of Allocation and Performance Measure Methodology*, FED. STUDENT AID (June 2017), <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/servicer/06302017/ExplanationQuarterEnd063017.pdf>. *See* Appendix J for a copy of the Methodology and Federal Servicer allocations for the period of January 1, 2017 through June 30, 2017.

²⁸⁶ *Id.*

²⁸⁷ NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.2.1.2.

²⁸⁸ *Id.*

servicers that score well according to the metrics but provide poor services to borrowers in practice.²⁸⁹

Federal loan borrowers can use the National Student Loan Data System (“NSLDS”) to retrieve information regarding the servicer in charge of their federal loans.²⁹⁰ According to our research, a comparable database does not exist for private loans. To determine the servicer for a private loan, borrowers need to look at their billing statements or to contact the lender to see whether a loan servicer has been assigned.²⁹¹ Borrowers report confusion when dealing with servicers that manage both federal and private loans, including Navient and PHEAA, because the distinction between federal and private loan balances is not always clear on communications received from the servicer.²⁹²

Harmful Loan Servicer Practices

“As a young professional with significant student loan debt, I am trying to be proactive and responsible with my repayment. FedLoan is making that exceedingly difficult.” -Complaint submitted to CFPB by federal student loan borrower from Massachusetts²⁹³

Through its consumer complaint system, the CFPB has amassed comments from thousands of student loan borrowers documenting the issues prevalent in the student loan servicing market.²⁹⁴ Abusive practices, including errors, harm student borrowers by (1) increasing the length of time the borrower stays in repayment and thus the total amount the

²⁸⁹ For examples of complaints regarding poor federal loan servicing, see CONSUMER FIN. PROT. BUREAU, MONTHLY COMPLAINT REPORT (Apr. 2017), https://files.consumerfinance.gov/f/documents/201704_cfpb_Monthly-Complaint-Report.pdf [hereinafter CONSUMER FIN. PROT. BUREAU, MONTHLY COMPLAINT REPORT].

²⁹⁰ *National Student Loan Database*, FED. STUDENT AID, www.nsls.ed.gov (last visited Mar. 5, 2018).

²⁹¹ Melanie Lockert, *How to Track Down Your Student Loan Servicer*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/find-student-loan-servicers/> (last updated Dec. 11, 2015).

²⁹² NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.3.

²⁹³ *Complaint 2568803*, CONSUMER FIN. PROT. BUREAU (July 8, 2017), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2568803>. See Appendix B for a copy of the full complaint.

²⁹⁴ See CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING, *supra* note 136. A summary of common loan servicing issues is provided in Appendix K.

borrower pays over the life of the loan; (2) incurring additional or excessive ancillary fees or interest; and (3) preventing the borrower from taking advantage of available benefits, flexible repayment options, and consumer protections.²⁹⁵ In the end, student borrowers impacted by these practices end up owing or paying more on the loans than they initially owed.²⁹⁶

The way that student loan servicers are compensated can incentivize servicers to keep a student in repayment for as long as possible.²⁹⁷ Loan servicers receive a cut of students' repayment, called a tranche.²⁹⁸ For many private loan servicers, the tranche received is a predetermined percentage of the unpaid principal balance of the loan.²⁹⁹ This scheme is similar to how mortgage servicers are compensated.³⁰⁰ Federal loan servicers are often compensated with a monthly flat rate per loan, which varies depending on the status of the loan.³⁰¹ The loan servicer collects the largest amount possible when a loan is current, and the tranche shrinks when a loan goes into delinquency.³⁰² While mechanically different, both methods of compensation incentivize the servicer to keep the loan principal large and in repayment for as long as possible.³⁰³

²⁹⁵ Cox, *supra* note 19, at 197.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 198.

²⁹⁸ *Id.* at 197.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 198.

³⁰³ *Id.*

Attempts to Extend the Length of Time the Borrower Stays in Repayment

“In 13 years I was never advised repayment options ... I was only advised that I could keep asking for forbearance and deferment. I discovered consolidation and income based repayment myself after I filed bankruptcy. Now my debt has doubled ... [The servicers] benefitted from my hardships and now I have 3 closed accts that reflect negative on my credit when I have been diligent in rebuilding my credit.” -Complaint submitted to CFPB by federal student loan borrower from Colorado³⁰⁴

When a student borrower has multiple unconsolidated loans, they will have a minimum payment due on each loan every month. The CFPB has received reports of loan servicers ignoring student instructions and/or misapplying payments when the borrower over-pays or under-pays.³⁰⁵ A borrower in the fortunate position of being able to make payments over the minimum each month is incentivized to do so and to apply the extra payments to the loan(s) with the highest interest rate or principal in order to ultimately reduce the amount that they will pay over the lifetime of the loan. Servicers often disregard borrower instructions to apply extra payments to those loans, a practice that increases the total amount the borrower pays back over the life of the loan, and potentially extends the length of time the loans are in repayment.³⁰⁶ Similarly, when a borrower is unable to pay the minimum amount due but pays a smaller “good faith” payment instead of paying nothing at all, servicers may split up the underpayment among the students’ loans so that none of the loans are recorded as having the minimum amount paid.³⁰⁷ The borrower is then charged a late fee on every loan, interest continues to accrue on the principal, and the loans take longer to pay back.³⁰⁸

³⁰⁴ *Complaint 2748578*, CONSUMER FIN. PROT. BUREAU (July 8, 2017), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2748578> (emphasis added). See Appendix B for a copy of the full complaint.

³⁰⁵ Appendix L provides an overview of the order in which lenders can apply payments to outstanding loan balances.

³⁰⁶ Cox, *supra* note 19, at 199.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

Excessive and Inappropriate Fees

*“[T]he use of penalties by student loan companies are predatory and excessive. I recently had a student loan payment due...for the amount of \$200.00. I fully admit I was late on this payment by a duration of approximately two hours. My loan servicer...immediately penalized me for being late. I fully acknowledge the responsibility of paying my loans and the fines that may come with a late payment. However, **the fine placed another \$200.00 which brought my actual payment to \$410.00. This penalty, in my view, is completely excessive and obscene.** It follows a disheartening trend of student loan companies taking advantage of young graduates and students who simply want to gain an education to better their lives and the world around them... There is no logical reasoning, for doubling my payment for paying my debt two hours past the deadline. I do what I can to make sure I can meet my financial needs each month and this has put a serious strain on my ability to stay financially solvent...”* -Complaint submitted to CFPB by private student loan borrower from Oregon³⁰⁹

Excessive ancillary fees, including late fees and fees involved in collection, can be considered unfair practices from two perspectives.³¹⁰ For example, borrowers have reported that although they made timely payment before the due date, payment processing delays from the servicers led to late fees.³¹¹ Additionally, when a student borrower’s loan is transferred from one servicer to another, inadequate notice of the transfer often causes students to pay the former servicer instead of the new one or attempt to pay with a method accepted by their former servicer that is not accepted by their new servicer.³¹² Both errors lead to late or other types of fees.³¹³

Extrapolating from the experience of consumers charged with inappropriate fees by mortgage servicers, it is likely that many of the inappropriate fees charged to student loan borrowers may never be discovered.³¹⁴ Inappropriate ancillary fees charged to those struggling with their mortgages were often only discovered in bankruptcy hearings.³¹⁵ Student loan

³⁰⁹ *Complaint 2729057*, CONSUMER FIN. PROT. BUREAU (July 8, 2017), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2729057> (emphasis added). See Appendix B for a copy of the full complaint.

³¹⁰ Cox, *supra* note 19, at 199.

³¹¹ CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING, *supra* note 136, at 74.

³¹² *Id.* at 52-53.

³¹³ *Id.*

³¹⁴ Cox, *supra* note 19, at 200.

³¹⁵ *Id.*

borrowers, however, are unable to discharge their student loans in bankruptcy unless they can show an undue hardship such as permanent disability preventing them from working.³¹⁶ Without the investigation involved in a bankruptcy proceeding uncovering inappropriate fees, most student borrowers are unlikely to notice that they are being unfairly charged, and unlikely to successfully challenge the fees if they do notice.³¹⁷ More information about the challenges student loan borrowers face in bankruptcy proceedings is below in “Gaps and Exceptions in Consumer Protections.”³¹⁸

Again drawing from patterns in mortgage lending, student loan servicers are unjustly enriched through the charging of systemic inappropriate fees, or fees that are the result of their own sloppy or deceptive business practices.³¹⁹ For small fees in particular, the time and expense required to challenge those fees may likely deter most student loan borrowers from doing so.³²⁰ Loan servicers are thus often able to keep ancillary fees collected from the borrower, which gives them an incentive to tack on as many fees as possible.³²¹ For example, “just one improper \$15 late fee assessed to 7,000 loans results in the servicer receiving an additional \$105,000 in revenue, and the consumer has no way of knowing if these fees are systemic in nature.”³²²

³¹⁶ See *infra* Section IV: Gaps in Student Loan Borrower Protections.

³¹⁷ Cox, *supra* note 19, at 201.

³¹⁸ See *infra* Section IV: Gaps in Student Loan Borrower Protections.

³¹⁹ Cox, *supra* note 19, at 201.

³²⁰ *Id.*

³²¹ *Id.* at 199.

³²² *Id.* at 206.

Preventing the Borrower from Taking Advantage of Available Benefits or Protections

“I have been trying to enter an income-based repayment plan, however most of my online request forms have been ignored and 2 of them have been put on hold. One of the emails said the request was put on hold until closer to the end of my grace period, however while I’m in my grace period interest is still accruing and I therefore want to start making payments as soon as possible. I have tried emailing them several times about the issue with no response. Thus I am being forced to make payments outside of a payment plan (which won’t go towards my public service loan forgiveness) in order to prevent any additional interest build-up.” -Complaint submitted to CFPB by federal student loan borrower from Kentucky³²³

Flexible repayment plans, benefits, and consumer protections are all available to student loan borrowers.³²⁴ These benefits and protections can include alternative repayment plans, forbearance, repayment incentives, loan forgiveness, discharge, and cancellation.³²⁵ Unfortunately, the system is complex and often confusing to navigate.³²⁶ For example, participation in certain benefits may disqualify a borrower from participating in others. Loan servicers have commented on the complexity of the options available to borrowers. One servicer remarked that “based on data [from servicing records], we found that more than half of borrowers enrolling in income-driven repayment (“IDR”) for the first time could not navigate the options on their own and one in five customers renewing required support.”³²⁷ As a result of this complexity, borrowers often rely on their loan servicers to help them navigate their options, particularly borrowers who are experiencing financial hardship.³²⁸

The CFPB has documented numerous borrower complaints regarding their loan servicer providing them with incomplete or inaccurate information about available benefits or consumer

³²³ *Complaint 2571681*, CONSUMER FIN. PROT. BUREAU (Jul. 12, 2017), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2571681>. See Appendix B for a copy of the full complaint.

³²⁴ CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING, *supra* note 136, at 20-21.

³²⁵ *Id.*

³²⁶ *Id.* at 18.

³²⁷ *Id.* at 30.

³²⁸ *Id.* at 20.

protections.³²⁹ For example, servicers often do not tell borrowers about IDR options and associated benefits unless the borrower affirmatively requests that information.³³⁰ For a borrower experiencing an unmanageable amount of student loan debt (often defined as debt in excess of eight percent of the borrower's income), IDR plans extend the life of their loans, but reduce the monthly payment to a more manageable level.³³¹ This way the borrower can remain current and in good standing, avoiding late fees, delinquency, and/or default.

Even when borrowers are informed of their options, loan servicers' slow or sloppy practices can prevent borrowers from accessing them. One organization providing assistance to low-income student loan borrowers remarked:

*The problems are likely caused by a combination of inferior information systems, staff incompetence, skewed monetary incentives and lack of training. Regardless of causes, the result is that servicers frequently lose documents and repeatedly ask borrowers to provide documents they have already submitted. Far too often, servicers provide inferior administration of basic programs such as income-based repayment ("IBR"), including problems with initial application and re-certification.*³³²

Specific examples of the practices described in the above comment include: paperwork errors that can cause borrowers to be enrolled in a repayment plan that they did not choose, processing delays that keep the borrower from utilizing the repayment plan most appropriate to their needs, and inadequate notice and processing delays for the required annual recertification.³³³

The CFPB reports that fifty-seven percent of borrowers using Income-Based Repayment ("IBR") do not recertify their income by the deadline.³³⁴ Recertifying on-time allows a borrower

³²⁹ *Id.* at 25.

³³⁰ *Id.* at 27.

³³¹ FED. STUDENT AID, *Repayment Plans*, *supra* note 236.

³³² CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING, *supra* note 136, at 31.

³³³ *Id.* at 27-37 (emphasis added).

³³⁴ *Id.* at 32.

to take advantage of an important protection that stops their unpaid interest for the year from being capitalized (added to the outstanding principal balance accruing interest in the next year).³³⁵ Servicers can take up to two months to process recertifications that are otherwise filed on time by the borrower, causing borrowers to lose that protection if the deadline passes while the recertification is being processed.³³⁶ When unpaid interest is capitalized, it can cause the overall balance to grow exponentially over time, even when payments are being made.³³⁷

Remedies Currently Available to Student Loan Borrowers

Within the current regulatory and legal framework, student loan borrowers have limited options available for recourse if they experience issues with a loan servicer. The borrower must first try to resolve the issue with the loan servicer directly.³³⁸ If the issue with the servicer remains unresolved, the borrower may reach out to an Ombudsman at the Dept. of Ed. or CFPB.³³⁹ In limited circumstances, borrowers may be able to file claims against the servicers under federal or state law.³⁴⁰ During recent years, state attorneys general and federal regulatory agencies have played an important role in initiating legal action against loan servicers on behalf of injured student loan borrowers.³⁴¹

³³⁵ *Id.* at 37.

³³⁶ *Id.*

³³⁷ Honey Smith, *How Does Capitalized Interest Affect My Student Loans*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/capitalized-interest-affect-student-loans/> (Last updated July 7, 2016).

³³⁸ *Getting Prepared Before Getting Help*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/disputes/prepare> (last visited Mar. 10, 2018).

³³⁹ NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.6.3.

³⁴⁰ *Id.* §5.6.4.

³⁴¹ *Id.* §5.6.2.

Reaching Out to a Student Loan Ombudsman

A Student Loan Ombudsman is intended to be a neutral contact that helps borrowers resolve issues with their loan servicers.³⁴² While an Ombudsman can help resolve disputes, they do not necessarily act as an advocate for the borrowers or make binding decisions for other entities.³⁴³ There are two federal ombudsman offices that currently work with borrowers to address federal and private student loan servicer issues: (1) FSA Ombudsman and (2) the CFPB Student Loan Ombudsman.

Federal Student Aid (FSA) Ombudsman

The FSA Ombudsman is part of the Dept. of Ed. and only addresses complaints against federal student loan servicers.³⁴⁴ On its website, the FSA Ombudsman is listed as a “last resort” resource to address loan servicing issues.³⁴⁵ Before filing a complaint against a loan servicer, borrowers are required to contact the servicers directly in order to resolve the dispute and need to maintain a detailed record of any interactions with their servicer regarding the issue.³⁴⁶ If a borrower files an online complaint through the FSA Feedback System, the Dept. of Ed. should respond in fifteen days and the complaint should be resolved within sixty days.³⁴⁷ The FSA Ombudsman published its first annual report regarding student loan complaints in December 2017, but public data regarding loan complaints is limited.³⁴⁸

³⁴² FED. STUDENT AID, *Getting Prepared Before Getting Help*, *supra* note 338.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Resolving Disputes*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/disputes> (last visited Mar. 10, 2018).

³⁴⁶ FED. STUDENT AID, *Getting Prepared Before Getting Help*, *supra* note 338.

³⁴⁷ NAT'L CONSUMER LAW CTR., *STUDENT LOAN LAW*, *supra* note 83, § 1.12.1.1.

³⁴⁸ *FSA Feedback System*, FED. STUDENT AID, <https://feedback.studentaid.ed.gov/> (last visited Mar. 10, 2018); *FSA Feedback System Reports*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/business-info/feedback-system-reports> (last visited Mar. 10, 2018).

CFPB Student Loan Ombudsman

The CFPB Student Loan Ombudsman is responsible for compiling and analyzing data on private student loan complaints.³⁴⁹ Complaints are generally compiled through online submissions on the CFPB website.³⁵⁰ Borrowers are encouraged to include all relevant information in the initial complaint as they generally cannot submit a second complaint regarding the same issue.³⁵¹ Once a borrower has submitted a complaint, they generally receive a response from CFPB within fifteen days.³⁵² If the borrower consents, CFPB may publish a copy of the complaint with personal information redacted on the Consumer Complaint Database.³⁵³ Based on data analysis of the complaints received, the CFPB Ombudsman makes policy recommendations to the Secretary of the Treasury, the Director of the CFPB, the Secretary of Education, and Congress about how to address recurring issues in the student loan industry and highlights concerns from a consumer protection standpoint.³⁵⁴ Annual Reports of the CFPB Student Loan Ombudsman are published each fall and made available on the CFPB website.³⁵⁵

Issue with the Ombudsman Complaint System

Before 2016, the Dept. of Ed. did not describe the complaint process, leaving borrowers confused about where they could file a complaint or how the complaint would be handled.³⁵⁶ The

³⁴⁹ *Students and Young Consumers*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/practitioner-resources/students/> (last visited Mar. 10, 2018).

³⁵⁰ *Submit a Complaint*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/complaint/> (last visited Mar. 10, 2018).

³⁵¹ *Id.* While it is noted that borrowers cannot generally submit a second complaint on the same issue, the CFPB website does not clearly describe what circumstances would allow a borrower to submit a second complaint.

³⁵² CONSUMER FIN. PROT. BUREAU, MONTHLY COMPLAINT REPORT, *supra* note 289.

³⁵³ *Learn How The Complaint Process Works*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/complaint/process/> (last visited Mar. 10, 2018). See Appendix M for a description of the CFPB Complaint Process.

³⁵⁴ *How We Use Complaint Data*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/complaint/data-use/> (last visited Mar. 10, 2018); CONSUMER FIN. PROT. BUREAU, 2017 STUDENT LOAN OMBUDSMAN REPORT, *supra* note 36, at 6.

³⁵⁵ *Research and Reports*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/data-research/research-reports/> (last visited Mar. 10, 2018).

³⁵⁶ NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.6.3.

Dept. of Ed. was previously asked to develop and implement a simple process for borrowers to file complaints against the federal government and create a system to share the complaint data with other enforcement agencies.³⁵⁷ Although the 2017 Feedback System Report provides general examples of the types of complaints received about federal student loan servicers,³⁵⁸ copies of the complaints filed have not been made accessible to the public in a system similar to the CFPB Consumer Complaint Database.

Although complaint systems offered by the Dept. of Ed. and CFPB provide an avenue for borrowers to address issues with their servicers, it is unclear how many borrowers know about these services. The Dept. of Ed. claims a low volume of complaints indicates effective oversight, but has not made loan complaint data public to support these assertions.³⁵⁹ While CFPB prepares annual reports on trends and issues in the student loan industry and makes complaint data public, borrowers might not be taking full advantage of the complaint system. Over forty million borrowers have outstanding student loan debt, but fewer than 51,000 complaints were filed with the CFPB Ombudsman between July 2011 and August 2017.³⁶⁰ The small number of complaints, when compared to the outstanding number of student loan borrowers, could suggest that student loan servicing issues are not extensive. However, it is also possible that borrowers are not aware of the services offered by these ombudsman offices, including the complaint mechanisms.³⁶¹

³⁵⁷ Memorandum of March 10, 2015: Student Aid Bill of Rights to Help Ensure Affordable Loan Repayment, 80 Fed. Reg. 49,13475-76 (Mar. 13, 2015); *See also* U.S. DEP'T OF EDUC., *STRENGTHENING THE STUDENT LOAN SYSTEM TO BETTER PROTECT ALL BORROWERS* (Oct. 1, 2015), <https://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf>.

³⁵⁸ *See e.g.* FED. STUDENT AID, *Federal Student Aid Feedback System Preliminary Report 22* (Dec. 2016), <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/feedback-system-prelim-report.pdf>.

³⁵⁹ NAT'L CONSUMER LAW CTR., *STUDENT LOAN LAW*, *supra* note 83, § 8.2.3.

³⁶⁰ CONSUMER FIN. PROT. BUREAU, *2017 STUDENT LOAN OMBUDSMAN REPORT*, *supra* note 36.

³⁶¹ NAT'L CONSUMER LAW CTR., *POUNDING STUDENT LOAN BORROWERS: THE HEAVY COSTS OF THE GOVERNMENT'S PARTNERSHIP WITH DEBT COLLECTION AGENCIES 5* (Sept. 2014), <https://www.nclc.org/images/pdf/pr-reports/report-sl-debt-collectors.pdf>.

To complicate enforcement of servicer regulations, former cooperative efforts between the Dept. of Ed. and CFPB have effectively ended.³⁶² Although the CFPB Ombudsman’s authority is limited to private loan servicers, the agency previously worked with the Dept. of Ed. to address federal loan complaints and share information necessary for enforcement of student loan servicing practices.³⁶³ On August 31, 2017, the Dept. of Ed. effectively ended its cooperative efforts with the CFPB.³⁶⁴ Although the Dept. of Ed. claims it ended the relationship in order to “ensure fair and consistent enforcement... and the efficient resolution of borrower complaints,” decreased cooperative efforts between these two student loan “watchdogs” suggest that the administration could take a more lenient approach to policing student loan servicers over the next few years.³⁶⁵

Filing Legal Claims against Servicers

The current regulatory and legal situation makes it difficult for individual borrowers to file a legal claim against a lender or loan servicer.³⁶⁶ As litigation can be both a timely and expensive process, hiring legal counsel could result in additional costs and liabilities for the

³⁶² Letter from Kathleen Smith, Acting Assistant Sec’y, Off. of Post-Secondary Educ., & Dr. A. Wayne Johnson, Chief Operating Officer, Fed. Student Aid, to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (Aug. 31, 2017), https://edworkforce.house.gov/uploadedfiles/2017-09-01_signed_letter_to_cfpb.pdf.

³⁶³ Press Release, U.S. Dep’t of Educ., Departments of Education and Treasury and the Consumer Financial Protection Bureau Announce New Joint Efforts to Protect and Support Student Loan Borrower (Apr. 28, 2016), (available at <https://www.ed.gov/news/press-releases/departments-education-and-treasury-and-consumer-financial-protection-bureau-announce-new-joint-efforts-protect-and-support-student-loan-borrowers>); Anya Kamenetz, *The Department of Education Cuts off a Student Loan Watchdog*, NPR (Sept. 20, 2017, 6:18 AM), <https://www.npr.org/sections/ed/2017/09/20/551857172/the-department-of-education-cuts-off-a-student-loan-watchdog>.

³⁶⁴ Letter from Kathleen Smith, *supra* note 362.

³⁶⁵ Nasiripour, *DeVos Tells CFPB to Back Off*, *supra* note 126.

³⁶⁶ NAT’L CONSUMER LAW CTR., *STUDENT LOAN LAW*, *supra* note 83, § 5.6.4.1.

borrowers.³⁶⁷ Legal avenues for borrowers against servicers are limited by loan type and applicable federal or state consumer protection laws.³⁶⁸

Most consumer protections for federal loans, including disclosure regulations, are contained in the Higher Education Act (HEA).³⁶⁹ However, there are no private rights of action to enforce HEA provisions.³⁷⁰ If a conflict exists between state and federal laws in regards to loan servicer regulations, servicers can argue that federal law preempts state law and it is impossible for the servicer to comply with both.³⁷¹ In state courts, servicers have had some success in raising preemption arguments against breach of contract claims.³⁷² The HEA provides that FFEL loans agreements are enforceable in all federal and state courts in accordance with the master promissory notes, but there is confusion about what FFEL provisions are applicable to Direct Loans.³⁷³ For example, while the HEA contains servicer due diligence requirements for FFEL loans, there are not similar regulations in place for Direct Loans.³⁷⁴

Private loans are not governed by the HEA and borrowers generally can raise more claims against private lenders than federal lenders.³⁷⁵ For example, private loan borrowers can raise claims against lenders under TILA for improper disclosure of loan terms.³⁷⁶ However, actions against loan servicers are fairly limited.³⁷⁷ The Fair Debt Collection Practices Act

³⁶⁷ See Andrew Pentis, *4 Questions to Ask Before Hiring a Student Loan Lawyer*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/can-a-lawyer-help-with-student-loans-questions/> (last updated Sept. 6, 2017).

³⁶⁸ See NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.6.4.

³⁶⁹ See Appendix I for a summary of disclosures required for federal and private student loans.

³⁷⁰ NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.6.4.1.

³⁷¹ *Id.*

³⁷² *Id.* at § 5.6.4.2.

³⁷³ *Id.* at § 5.6.4.1.

³⁷⁴ *Id.*; See Appendix N for a summary of servicer due diligence requirements for FFEL loans.

³⁷⁵ National Consumer Law Center, *Student Loan Law*, loc. 12.2.1 (5th ed. 2015) (e-book), available at www.nclc.org/library (Last visited Feb. 26, 2018).

³⁷⁶ 15 U.S.C. § 1640(a)(3). See Appendix O for a summary of federal consumer protection statutes related to student loan regulations. An overview of TILA disclosure requirements for private loans is provided in Appendix I.

³⁷⁷ NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 5.6.4.2.

(“FDCPA”) is the primary federal statute regarding debt collection practices, but the act only applies to debt collectors.³⁷⁸ To qualify as a debt collector and be subject to the provisions of the act, the servicer would need to receive the loans while the loan was already in default.³⁷⁹

Whether or not a loan servicer, including those who service student loans, is covered under state UDAP statutes varies from state to state.³⁸⁰ This is because there is no contractual relationship, also known as privity, between the borrower and the servicer.³⁸¹ Massachusetts courts have indicated that the Chapter 93A UDAP provisions would apply to loan servicers,³⁸² but with its explicit statement prohibiting a student loan servicer from “engag[ing] in any unfair or deceptive practice toward any person... in connection with the serving of a student education loan,” the Bill clearly states the legislature’s intention for student loan servicers to be held to the same standards as other businesses in the state.^{383 384}

Public Enforcement by Federal and State Agencies

Federal agencies, including the CFPB, may investigate consumer complaints and initiate enforcement efforts against loan servicers and other actors in the student loan industry.³⁸⁵ Since 2014, the CFPB has initiated fourteen public enforcement matters against numerous types of student-lending businesses, including for-profit colleges, loan servicers, and financial

³⁷⁸ *Id.* at § 8.2.2.

³⁷⁹ *Id.* at § 5.6.4.3.

³⁸⁰ Cox, *supra* note 19, at 210.

³⁸¹ *Id.*

³⁸² *In re Hart*, 246 B.R. 709, 736 (Bankr. D. Mass. 2000) (finding that the conduct of GMAC, which serviced the mortgage loan owned by Fannie Mae, constituted a violation of Chapter 93A).

³⁸³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 §24N(a)(2) (Mass. 2017).

³⁸⁴ There is a series of regulations passed by the Office of the Massachusetts Attorney General which defines unfair or deceptive practices involving student loans and financial aid for for-profit and occupational schools. *See* 940 MASS. CODE REGS. 31.07 (LexisNexis 2018).

³⁸⁵ *Enforcing Consumer Protections by Gathering Information for Investigations*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/blog/enforcing-consumer-protections-by-gathering-information-for-investigations/> (last visited Mar. 10, 2018).

counselors.³⁸⁶ Since 2011, the CFPB has returned more than \$750 million in relief for student loan borrowers.³⁸⁷ In January 2017, the CFPB filed a complaint against Navient, the nation's largest federal and private loan servicer.³⁸⁸ The complaint alleges that Navient engaged in a number of poor servicing practices, including failing to correctly apply borrower payments, steering borrowers away from repayment plans that would lower monthly payments, and providing inaccurate information to borrowers about repayment and forgiveness programs.³⁸⁹ Over a year since the initial filing, the case is still open and unresolved. Meanwhile, consumers are still subject to Navient's poor servicing practices.³⁹⁰ Individual consumers cannot be made parties in CFPB lawsuits as the agency represents the interests of the government in court proceedings.³⁹¹ Although they cannot take part in CFPB lawsuits, borrowers are encouraged to share stories of unfair servicer practices and may be eligible to receive payments in the event of a settlement.³⁹²

The repeated grievances of student loan borrowers against certain servicers for unfair or abusive lending practices has led several state attorneys general to take legal action. These lawsuits have been met with varying degrees of success, and those that remain pending may have

³⁸⁶ Laurie A. Lucas & Christopher L. Peterson, *Developments in Federal Student-Lending Law: Harbingers of Change?*, 72 BUS. LAW. 465, 468 (2017). For a summary of CFPB's enforcement efforts, see Appendix P

³⁸⁷ *CFPB Report Finds Consumer Complaints Spurred Actions That Brought More Than \$750 Million in Relief for Student Loan Borrowers*, CONSUMER FIN. PROT. BUREAU (Oct. 16, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-consumer-complaints-spurred-actions-brought-more-750-million-relief-student-loan-borrowers/>.

³⁸⁸ *Gathering Consumer Protections by Gathering Information for Investigations*, CONSUMER FIN. PROT. BUREAU (Sept. 21, 2012), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/>.

³⁸⁹ *Id.*

³⁹⁰ As of February 2018, the CFPB Consumer Complaint Database shows that over 11,000 complaints were filed against Navient between January 1, 2017, and February 10, 2018. *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/data-research/consumer-complaints/> (last visited Mar. 5., 2018).

³⁹¹ *Can I be part of the lawsuit?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/i-saw-that-the-cfpb-is-suing-a-company-that-i-believe-has-harmed-me-can-i-be-part-of-the-lawsuit-en-1899/> (last updated Aug. 26, 2016).

³⁹² *Id.*

significant precedential value. In 2016, Attorney General Maura Healey secured a \$2.4 million settlement against ACS Education Services ("ACS") for delaying borrower applications for IDR plans.³⁹³ However, Healey's more recent suit against PHEAA, filed in August of 2017, has been met with opposition both from the servicer and from the U.S. Justice Department.³⁹⁴ PHEAA possess an exclusive contract with the Dept. of Ed. to manage PSLF and the Teacher Education Assistance for College and Higher Education ("TEACH") program.³⁹⁵ In her complaint, Healey alleges that PHEAA's failure to process IBR plan applications and teachers' annual certification forms in a timely manner has prevented borrowers from making qualifying monthly payments towards loan forgiveness and resulted in the conversion of TEACH grants to loans.³⁹⁶ In January, PHEAA challenged Healey's state law claims, claiming that they conflicting with federal law, including the HEA.³⁹⁷ On March 1, 2018, the court denied PHEAA's motion to dismiss, allowing the lawsuit against PHEAA to proceed forward.³⁹⁸ In response, Healey commented the court's decision is "a victory for thousands of students and families in Massachusetts who have been victimized for too long by student loan servicers."³⁹⁹

Massachusetts is not the only state pursuing legal action against student loan servicers. In October of 2017, Pennsylvania Attorney General John Shapiro filed suit against Navient, whose

³⁹³ Danielle Douglas-Gabriel, *ACS's \$2.4 Million Settlement in Massachusetts Highlights Problems in Student Loan Servicing*, WASH. POST (Nov. 22, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/11/22/acss-2-4-million-settlement-in-massachusetts-highlights-problems-in-student-loan-servicing/?utm_term=.317473ec458f.

³⁹⁴ Raymond, *U.S. Backs Student Loan Servicer*, *supra* note 105.

³⁹⁵ *AG Healey Sues to Protect Public Loan Forgiveness*, MASS.GOV (Aug. 13, 2017), <http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-08-23-pheaa-lawsuit.html>.

³⁹⁶ Complaint at 9-12, *Commonwealth v. Pa. Higher Educ. Assistance Agency*, No. 1784CV02682 (Mass. Super. Ct. Aug. 23, 2017), <http://www.mass.gov/ago/docs/consumer/com-of-ma-v-pheaa-complaint-8-23-17.pdf>.

³⁹⁷ Raymond, *U.S. Backs Student Loan Servicer*, *supra* note 105.

³⁹⁸ Nate Raymond, *Massachusetts Can Sue Federal Loan Servicer, Judge Rules*, REUTERS (Mar. 1, 2018), <https://www.reuters.com/article/us-massachusetts-education-lawsuit/massachusetts-can-sue-federal-student-loan-servicer-judge-rules-idUSKCN1GD602>.

³⁹⁹ *Id.*

servicing center is located within the state.⁴⁰⁰ The complaint alleges that Navient engaged in predatory lending practices such as “pedaling risky and expensive subprime loans that they knew or should have known were likely to default” and “failing to perform core servicing duties, thereby causing harm to borrowers and cosigners.”⁴⁰¹ Shapiro explained his decision to sue in light of federal rollbacks of protections for borrowers, stating “I am stepping up to fill that breach and ensure that student loan holders are protected in Pennsylvania and across the U.S.”⁴⁰² Illinois Attorney General Lisa Madigan and Washington Attorney General Bob Ferguson filed suits against Navient earlier in 2017 as well.⁴⁰³

Gaps and Exceptions in Consumer Protections for Student Loan Borrowers

“We treat struggling student loan borrowers the same as deadbeat parents and tax cheats...Even gambling addicts have more protections.” - Seth Frotman, CFPB Student Loan Ombudsman⁴⁰⁴

Gaps in Student Loan Borrower Protections

It is important to consider the gaps that exist in the current relief, protections, and benefits available to student loan borrowers. Broadly speaking, when borrowers fall through these gaps in protections, they are exposed to additional hardships that make it more difficult to manage their student loan debt. Some gaps represent challenges and exceptions that are unique to those saddled with student loan debt compared to other kinds of debt. Others are gaps within the federal education loan system that excludes certain types of borrowers from accessing flexible

⁴⁰⁰ Shahien Nasiripour, *Why This State’s Navient Lawsuit Could Affect Your Student Loan*, BLOOMBERG (Oct. 5, 2017), <https://www.bloomberg.com/news/articles/2017-10-05/why-pennsylvania-s-navient-suit-may-impact-your-student-loans>.

⁴⁰¹ Complaint at 2-3, *Commonwealth v. Navient Corp.*, No. 3:17-cv-01814 (M.D. Pa. Oct. 5, 2017), <https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf>.

⁴⁰² Nasiripour, *Why This State’s Navient Lawsuit Could Affect Your Student Loan*, *supra* note 400.

⁴⁰³ Danielle Douglas-Gabriel, *Student Loan Servicer Navient In The Crosshairs of Pennsylvania Attorney General*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/10/05/student-loan-servicer-navient-lands-in-the-crosshairs-of-pennsylvania-attorney-general/?utm_term=.fa7512c45fe4.

⁴⁰⁴ Conlin, *supra* note 90.

repayment options and borrower benefits. The hardships discussed below impact student loan borrowers in every state. However, since they are caused by gaps in the body of federal student loan law, rather than practices of student loan servicers, solutions to these problems are beyond the scope of Borrower Bill of Rights (“BBOR”) legislation in Massachusetts and other states.

Limited Options to Discharge Student Loan Debt in Bankruptcy

The Bankruptcy Code treats student loan debt differently than other types of debt. While obtaining bankruptcy discharge wipes out many types of debt (including medical and mortgage debt), student loan debt is generally “nondischargeable.”⁴⁰⁵ This means that if a person’s non-student-loan debt is discharged through bankruptcy, their student loan debt remains, notwithstanding other relief options such as deferment or forbearance that may be available. Prior to 2005, federal student loan debt was nondischargeable in bankruptcy, but private student loan debt could be discharged.⁴⁰⁶ The justification for this was that federal student loans are made with taxpayer money, which thus deserve a higher level of protection to ensure that taxpayers are paid back by the student loan borrower.⁴⁰⁷ With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), private student loan debt also become nondischargeable.⁴⁰⁸ As implied by the reference to “bankruptcy abuse” in the title of the act, this move was likely done to prevent those with high levels of student debt from taking advantage of bankruptcy by “discharg[ing] their student loans shortly before beginning lucrative careers.”⁴⁰⁹

⁴⁰⁵ 11 U.S.C.A § 523(a)(8) (providing student loan debt cannot be discharged).

⁴⁰⁶ Alexei Alexandrov & Dalie Jimenez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL’Y REV. 175, 178 (2017).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ Kurtis Wiard, *Hope for the Hopeless: Discharging Student Loans in Bankruptcy*, 84 J. KAN. B. ASS’N 24, 25 (Nov. 2015), <https://issuu.com/ksbar/docs/10novdec2015>.

To qualify for the exception to the nondischargeability rule, a borrower must prove that their student loan debt creates an “undue hardship” for them and their family.⁴¹⁰ The current standard to prove “undue hardship” is very strict and typically is only successful if the student loan borrower has suffered a permanent disability preventing them from working.⁴¹¹ The most common standard for determining whether student loans can be discharged in bankruptcy proceedings due to “undue hardship” was developed in *Brunner v. New York State Higher Educ. Services Corp.*⁴¹² The so-called *Brunner* test requires the borrower to show three things:

(1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.⁴¹³

In Massachusetts, however, bankruptcy courts have rejected *Brunner* in favor of a standard that considers the “totality of the circumstances.”⁴¹⁴ In the Commonwealth, courts ask “can the debtor now, and in the foreseeable future, maintain a reasonable, minimal standard of living for the debtor and the debtor’s dependents and still afford to make payments on the debtor’s student loans?”⁴¹⁵ In answering that question, courts consider relevant evidence about the borrower’s specific circumstances, because “the lives of all debtors are complex and each individual case is *entitled* to be evaluated in its context.”⁴¹⁶

Whether using *Brunner*, or considering the “totality of circumstances” to determine whether a borrower can meet the “undue hardship” standard, the outcome of the case often

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

⁴¹³ *Id.*

⁴¹⁴ *In re Hicks*, 331 B.R. 18, 31 (Bankr. D. Mass. 2005).

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

depends on the discretion of the particular judge.⁴¹⁷ An empirical study that looked at borrowers attempting to discharge student loan debt in bankruptcy concluded that “outcomes for debtors turned on judges’ individual and often inconsistent perceptions of the meaning of the phrase ‘undue hardship,’ and the degree to which the judges found the debtor ‘worthy of relief.’”⁴¹⁸

No Statute of Limitations for Collecting on Federal Student Loan Debt

Private loans are subject to statutes of limitations established in state contract law, which are typically anywhere from three to ten years.⁴¹⁹ In Massachusetts, the statute of limitations for written contracts is six years.⁴²⁰ Under the original HEA, federal student loans were subject to a six year statute of limitations,⁴²¹ but that protection has since been removed, meaning collection efforts on delinquent loans can continue until the borrower’s death.⁴²² This elimination seems to derive from the premise that a defaulter’s ability to repay increases over time.⁴²³ Others have argued that a borrower’s ability to receive student loans without consideration of their creditworthiness is a benefit that outweighs the burden of giving up the protection of a statute of limitations.⁴²⁴ Either way, without a statute of limitations, the government has the power to collect on student loans indefinitely.⁴²⁵

Tools of the Debt Collector: Tax Offsets, Social Security and Wage Garnishments

As a government agency, the Dept. of Ed. has a set of powerful tools used to collect on defaulted student loan debt. The Dept. of Ed. has the authority to instruct the Treasury

⁴¹⁷ Glater, *supra* note 55, at 115.

⁴¹⁸ *Id.*

⁴¹⁹ Kara O’Neill, *Small Claims Statutes of Limitations*, NOLO (Oct. 5, 2017), <https://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html>.

⁴²⁰ MASS. ANN. LAWS ch. 260 §1 et seq.

⁴²¹ NAT’L CONSUMER LAW CTR., *STUDENT LOAN LAW*, *supra* note 83, § 8.5.3.1.

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

Department to garnish or offset a borrower's wages, social security benefits, and tax refunds.⁴²⁶

Using these methods, the Dept. of Ed. collected \$349 million through administration wage garnishment, and \$16 million through Treasury offsets in 2011.⁴²⁷

For a student loan borrower in default, offsets and garnishments initiated by the federal government, the prospect of being sued at any point, and the lack of relief through bankruptcy can perpetuate a cycle of financial instability and crisis.

Delinquent Borrowers Risk Losing Professional Licenses and College Transcripts

In twenty states, including Massachusetts, professional licenses can be denied, can be revoked, or renewal can be refused if a student borrower fall into default on their student loans.⁴²⁸ In relevant part, the Massachusetts law states:

Any board of registration...upon receiving a written list of names of educational loan defaulters from the Massachusetts Education Financing Authority...shall deny issuance of a professional or occupational certificate, registration, license, or authority to any applicant who is in such default on an educational loan made under any of the programs administered by said authority or corporation, hereinafter referred to in this paragraph as the loan agency.⁴²⁹

Proponents of these state licensing laws argue that because it is the taxpayers who fund federal student loans, they deserve extra protection to ensure those loans are paid back by the borrower.⁴³⁰ Acting upon these laws is “an extreme step for a lender” and, though statistics are not kept on the frequency of these proceedings, anecdotal evidence suggests that it is relatively uncommon, including in Massachusetts.⁴³¹

⁴²⁶ *Id.* § 6.1.3.1.

⁴²⁷ *Id.* § 9.1.

⁴²⁸ MASS. GEN. LAWS ch. 30A § 13 (2018).

⁴²⁹ *Id.*

⁴³⁰ Jessica Silver-Greenberg et al., *When Unpaid Student Loan Bills Mean You Can No Longer Work*, N.Y. TIMES (Nov. 18, 2017), www.nytimes.com/2017/11/18/business/student-loans-licenses.html?_r=0.

⁴³¹ *Id.*; Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215, 253 (2014).

Many student loan borrowers are unaware that delinquency on their student loans can cost them their professional license.⁴³² Losing a professional license makes it difficult or impossible to work in the field for which they are trained.⁴³³ For someone struggling with an unmanageable debt-to-income ratio, the consequence is counterproductive because losing their license makes it harder for them to work, which then makes it harder for them to resume payments on their student loans.⁴³⁴

Colleges and universities can also withhold transcripts or certificates from students who are behind in their payments.⁴³⁵ A majority of jurisdictions hold that a “university withholding the transcript of a student debtor whose debt is presumptively nondischargeable violates the automatic stay...[with] the sole purpose for withholding the transcript...[being] to collect on a pre-petition debt [which] is expressly prohibited by §362” of the bankruptcy code.⁴³⁶ However, “the courts appear recently to have relaxed this restriction on allowing creditor institutions to withhold the debtor student’s transcript.”⁴³⁷

There is an unquestioned power disparity as well as an information gap between an educational institution and a student, and the policy aimed at general deterrence disproportionately harms those who are most vulnerable. Students, even if they manage to get a debt discharged, often face difficulties getting their records from their educational institutions

⁴³² Silver-Greenberg et al., *supra* note 430.

⁴³³ *Id.*

⁴³⁴ Anne Johnson & Maggie Thompson, *We Can’t Afford to Wait: How States and Municipalities can Help Curtail the Student Debt Crisis*, GENERATION PROGRESS 6 (Jan. 2016), http://genprogress.org/wp-content/uploads/2016/01/07101304/HEND-State-Solutions-Paper_LINKED.pdf.

⁴³⁵ Dave Lindorff, *Holding Transcripts Hostage*, L.A. TIMES (May 2, 2012), <http://articles.latimes.com/2012/may/02/opinion/la-oe-lindorff-student-loan-default-20120502>.

⁴³⁶ Sara Hollan, *Student Loan Debtors and the Automatic Stay: Can A University Lawfully Withhold the Transcript of A Defaulting Student Debtor?*, 56 BAYLOR L. REV. 205, 228 (2004); 11 U.S.C.A. § 362 (West).

⁴³⁷ Matthew C. Welnicki, *Dischargeability of Students’ Financial Obligations: Student Loans Versus Student Tuition Account Debts*, 31 J.C. & U.L. 665, 673 (2005).

because these institutions were left on the hook for the debt.⁴³⁸ This is particularly troublesome for students who left school before completing their degree. These borrowers are saddled with debt and left unable to access their transcripts, which are necessary if they attempt to complete the degree at a later date.

Discharged Loans Taxed as Gross Income

Flexible Income Based Repayment programs allow the loans to be discharged after twenty-five years of qualifying payments in good faith.⁴³⁹ In the colorful words of Gregory Crespi, a “tax bomb” may be waiting for those borrowers who take advantage of certain loan cancellation opportunities.⁴⁴⁰ Since discharged debt is counted toward a borrower’s gross income for tax purposes, borrowers whose loans are cancelled after twenty-five years of qualifying IBR payments face a substantial increase in their tax burden the year in which their loans are discharged.⁴⁴¹ Since student loan cancellation is available through programs designed for borrowers with lower incomes, a substantial increase in their tax burden at the end of the year can be unmanageable.⁴⁴²

At present, §108(f) (“Student Loan”) of the Internal Revenue Code does protect borrowers whose loans will be forgiven through the PSLF Program after ten years of loan payments while working for PSLF-qualified employers.⁴⁴³ Many taxpayers use the exclusion under §108 every year: the Internal Revenue Service (“IRS”) reported that more than 453,000

⁴³⁸ Hollan, *supra* note 436, at 207.

⁴³⁹ Jonathan M. Layman, *Forgiven but Not Forgotten: Taxation of Forgiven Student Loans Under the Income-Based-Repayment Plan*, 39 CAP. U. L. REV. 131, 139 (2011).

⁴⁴⁰ Gregory Crespi, *Should We Defuse the "Tax Bomb" Facing Lawyers Who Are Enrolled in Income-Based Student Loan Repayment Plans?*, 68 S.C. L. REV. 117, 133–34 (2016).

⁴⁴¹ Layman, *supra* note 439, at 139.

⁴⁴² *See Id.* at 139.

⁴⁴³ I.R.C. § 108 (West 2018).

taxpayers excluded a total of over \$39 billion in 2013.⁴⁴⁴ However, this protection does not apply to borrowers who are working outside of the public service profession.⁴⁴⁵ Student loans discharged through other programs, such as IBR, Pay As You Earn, or Income Contingent Repayment programs, are treated as taxable income in the year they are forgiven.⁴⁴⁶ Additionally, reports have found that a large number of taxpayers with low incomes who are eligible for this §108 exclusion do not take advantage of it, and are thus significantly overpaying in their taxes.⁴⁴⁷

Lack of Options for Federal Direct Parent PLUS Borrowers

Many parents or guardians take out federal education loans (called Parent PLUS loans) to help finance their child's college education.⁴⁴⁸ Parent PLUS borrowers have fewer flexible repayment options and face unique challenges as they pay down student debt while preparing for or entering retirement.⁴⁴⁹ These loans have no cumulative limit, and the annual limit is equal to the full cost of attendance, minus other aid, which means that the amount of debt can get very high.⁴⁵⁰ Because the loans are in the parents' names, they are responsible for repayment, and face the consequences of default if payments are not made, including the garnishment of wages and social security benefits.⁴⁵¹

Parent PLUS loans are not eligible for the flexible repayment options that are available for the loans taken out directly by students, including IBR, Income Contingent Repayment, and

⁴⁴⁴ Robert C. Gallup, *Payments on Debt After Discharge: When A Discharge Is Not Really A Discharge and the Limits of Taxpayer Recourse*, 101 MINN. L. REV. 789, 794–96 (2016).

⁴⁴⁵ Crespi, *supra* note 440, at 133–34.

⁴⁴⁶ *Id.*

⁴⁴⁷ Gallup, *supra* note 444, at 794–96.

⁴⁴⁸ *PLUS Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/plus> (last visited Mar. 10, 2018).

⁴⁴⁹ CONSUMER FIN. PROT. BUREAU, OLDER CONSUMERS AND STUDENT LOAN DEBT, *supra* note 35, at 14.

⁴⁵⁰ Kamille Wolff Dean, *Foreclosures and Financial Aid: Mind Over Mortgages in Closing the PLUS Loan Gap*, 4 COLUM. J. RACE & L. 129, 145.

⁴⁵¹ *Id.* at 165.

PSLF.⁴⁵² Because there is no cumulative limit for Parent PLUS loans, parent borrowers can be burdened with large amounts of debt and are left without the repayment options that would allow them to make smaller payments over a longer period of time.⁴⁵³ This burden grows if they have borrowed to finance the education of multiple children.

Parent PLUS loan borrowers can gain access to income contingent repayment if they consolidate the PLUS loans through the Federal Direct Consolidation Loan.⁴⁵⁴ If the parent is also repaying their own federal student loans, which are eligible for income-based repayment or have lower interest rates, those loans lose access to IBR and the interest rates may increase.⁴⁵⁵ The CFPB reports that borrowers over the age of sixty are the fastest growing age-segment of the student loan market.⁴⁵⁶ About seventy-three percent of student loan borrowers over the age of sixty owe on loans taken out on behalf of their dependent children or grandchildren.⁴⁵⁷ According to the 2011-2012 National Postsecondary Student Aid Study, 10% of Parent PLUS loan borrowers earn less than \$25,000 a year.⁴⁵⁸ Without access to flexible repayment options, Parent PLUS loan borrowers can find themselves struggling to make payments on an unmanageable amount of debt compared to their incomes.⁴⁵⁹ If they fall into default, their wages or social security benefits can be garnished by loan servicers, putting their ability to care for themselves in retirement at risk.⁴⁶⁰

⁴⁵² *Id.* at 164.

⁴⁵³ *Id.* at 144-45.

⁴⁵⁴ Ann Carrns, *A Student Debt Repayment Option for Some Parents*, N.Y. TIMES (Apr. 9, 2013), http://bucks.blogs.nytimes.com/2013/04/09/a-student-debt-repayment-option-for-some-parents/?_php=true&_type=blogs&_r=0.

⁴⁵⁵ *Id.*

⁴⁵⁶ CONSUMER FIN. PROT. BUREAU, OLDER CONSUMERS AND STUDENT LOAN DEBT, *supra* note 35, at 14.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Consequences of Parent Loans*, EDVISORS, <https://www.edvisors.com/plan-for-college/advice-for-parents/loan-consequences/> (last visited Mar. 10, 2018).

⁴⁵⁹ *Id.*

⁴⁶⁰ CONSUMER FIN. PROT. BUREAU, OLDER CONSUMERS AND STUDENT LOAN DEBT, *supra* note 35, at 14.

This growing population of older adult student loan borrowers are often left out of the discussion about the impact of student loan debt. When they borrow through Parent PLUS loans, their options and rights are different than those of the “traditional” student loan borrower.⁴⁶¹ Because the debt comes due toward the end of their careers, Parent PLUS borrowers with high debt-to-income ratios are particularly vulnerable to adverse effects of that debt as they prepare for and begin their retirement.⁴⁶²

Filling the Gaps with the Student Loan Borrowers’ Bill of Rights

With a focus of preventing and remedying harmful practices of student loan servicers in Massachusetts, the Bill at the center of this commentary does not purport to fill these gaps in protections. Because the hardships described in this section stem from gaps in protections in national law, policy and regulatory changes to mitigate these hardships directly needs to come from the federal government.

The most recent and comprehensive attempt to do so is through the proposed federal Student Loan Borrowers’ Bill of Rights Act introduced in 2017 by Representative Wilson of Florida.⁴⁶³ This is the third iteration of the bill, which was also introduced in 2013 and 2015.⁴⁶⁴ While this bill has yet to make it out of committee in the 115th Congress,⁴⁶⁵ it is valuable to consider its potential as a tool to protect struggling student loan borrowers. The bill seeks to address many of the gaps in protections discussed above and expand opportunity for loan cancellation for borrowers engaged in public service careers by applying loan forgiveness after

⁴⁶¹ See Wolff Dean, *supra* note 450, at 164.

⁴⁶² CONSUMER FIN. PROT. BUREAU, OLDER CONSUMERS AND STUDENT LOAN DEBT, *supra* note 35, at 14.

⁴⁶³ H.R. 3630 115th Cong. (2017). A summary of the main provisions in the proposed Student Loan Borrowers’ Bill of Rights Act is provided in Appendix Q.

⁴⁶⁴ Legislation search performed on <https://www.congress.gov/>. Bills with the same title were introduced in 2007 and 2009, but the content is different.

⁴⁶⁵ *Current Legislation Activities*, CONGRESS.GOV, <https://www.congress.gov/> (last visited Mar. 10, 2018).

five years (or sixty eligible monthly payments) instead of the current ten years (or 120 eligible monthly payments) requirement.⁴⁶⁶

⁴⁶⁶ H.R. 3630 115th Cong. (2017).

V. VARIATIONS AMONG STATE BORROWER BILLS OF RIGHTS

Predatory lending practices and insufficient information only serve to exacerbate the issue of excessive student loans debt among borrowers. The lack of adequate recourse available to student loan borrowers coupled with gaps in consumer protections at the national level leaves many borrowers at the mercy of servicers.⁴⁶⁷ In response, several states have begun pioneering the movement towards state-level protections for resident student loan borrowers. This section discusses (1) the increasing movement towards state level regulation of the student loan industry; (2) an in-depth analysis of legislation introduced in the various states to protect student loan borrowers; and (3) the threat of federal preemption of state-level BBORs.

Trend of State Legislation

In response to the national student loan debt crisis, state legislators have increasingly sought to expand consumer protections to protect student loan borrowers and their families from the predatory practices of student loan servicers.⁴⁶⁸ As the first state to enact a BBOR in 2015, Connecticut created the general framework for such legislation, including provisions for (1) the licensing and investigation of student loan servicers; (2) a standard set of duties and regulations to be imposed on servicers; (3) a Student Loan Ombudsman to collect and analyze complaints from student loan borrowers; and (4) the creation of educational programs designed to educate borrowers of their rights.⁴⁶⁹ While its Ombudsman position has not yet been filled due to funding

⁴⁶⁷ See *supra* Part IV: The Student Loan Landscape and Regulatory Practices.

⁴⁶⁸ A summary of state legislation efforts is provided in Appendix A.

⁴⁶⁹ Thompson et. al., *supra* note 137.

issues,⁴⁷⁰ Connecticut has nevertheless pioneered the move towards state action.⁴⁷¹ The extent to which these provisions have been adopted in other states' legislation varies, though at a minimum the majority implement a licensing scheme for student loan servicers.⁴⁷²

To date, only Connecticut, California, Washington, D.C., and Illinois have enacted similar legislation, though bills have been introduced in at least thirteen other states.⁴⁷³ California passed its Student Loan Servicing Act in 2016, providing for the general licensing of student loan servicers through the Department of Business Oversight.⁴⁷⁴ However, the proposed regulations to be imposed on student loan servicers were subject to comment until November 6, 2017.⁴⁷⁵ Accordingly, much of the Act has yet to take effect, and lacks provisions for the creation of a student loan Ombudsman or an educational program to inform borrowers of their rights.⁴⁷⁶ Washington, D.C., which passed its Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act in February of 2017, experienced delays in hiring an Ombudsman, leaving the position vacant for several months.⁴⁷⁷ Most recently, Illinois enacted its Student Loan Servicing Rights Act, which takes effect in December 31, 2018, and it appears to

⁴⁷⁰ Email from Matthew Lesser, Representative, Connecticut State Legislature, to Victoria Aronson, J.D. Candidate, Northeastern Univ. Sch. of Law (Nov. 16, 2017, 18:50 EST) (on file with Victoria Aronson).

⁴⁷¹ Thompson et. al., *supra* note 137.

⁴⁷² Lari Derks, *Student Loan Servicing Regulations: 50 State Guide on Law and Regulations*, HINSHAW & CULBERTSON LLP iii-v (June 2017), <https://www.hinshawlaw.com/assets/htmldocuments/Booklets/50%20State%20Guide%20-%20Student%20Loan%20Servicing%20Regulations.pdf>.

⁴⁷³ *Id.*

⁴⁷⁴ Michael C. Barnhill, *California's New Student Loan Servicing Act*, NAT'L L. REV. (Feb. 16, 2017), <https://www.natlawreview.com/article/california-s-new-student-loan-servicing-act>.

⁴⁷⁵ John L. Culhane, Jr., et. al., *California and Washington, D.C. Issue Student Loan Servicing Regulations*, CONSUMERFINANCEMONITOR.COM (Sept. 27, 2017), <https://www.consumerfinancemonitor.com/2017/09/27/california-and-washington-d-c-issue-student-loan-servicing-regulations/>.

⁴⁷⁶ See Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 5586.

⁴⁷⁷ Danielle Douglas-Gabriel, *Activist Urge D.C. Government to Hire Student Loan Point Person As Promised*, WASH. POST (Apr. 25, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/25/activists-urge-d-c-government-to-hire-student-loan-point-person-as-promised/?utm_term=.a9288b25d07a.

be the most comprehensive legislation of its kind to date.⁴⁷⁸ The Illinois Act introduces several notable provisions, including servicer-provided repayment specialists to assist borrowers of both federal and private student loans, explicit avenues to pursue legal action against servicers, and oversight of the Ombudsman position by the Attorney General's Office.⁴⁷⁹

In-depth Look at State Legislation

A comparative analysis of the BBOR legislation regulating student loan servicers in other states can provide valuable insight with respect to the Bill currently pending in Massachusetts.⁴⁸⁰ Connecticut, California, Washington, D.C., and Illinois have served as pioneers for the increasing movement to state level protections.⁴⁸¹

Exempt Entities

The legislation in each state contains a section exempting various entities servicing student loans from the regulatory and licensing schemes imposed by the bill.⁴⁸² Common exemptions include federal and state banks, credit unions, wholly owned subsidiaries of both, trust companies, and savings and loan associations.⁴⁸³ However, some states exempt additional entities.⁴⁸⁴ For example, the Illinois Act exempts a public or private non-profit post-secondary educational institution servicing a loan it extended to a borrower, licensed debt management servicers, the Illinois Student Assistance Commission, licensed collection agencies collecting post-default debt, state or private non-profit institutions acting as guarantee agencies that have an

⁴⁷⁸ John J. Culhane, Jr., *Illinois Lawmakers Override Governor's Veto of Student Loan Servicing Bill*, NAT'L L. REV. (Nov. 9, 2017), <https://www.natlawreview.com/article/illinois-lawmakers-override-governor-s-veto-student-loan-servicing-bill>.

⁴⁷⁹ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540.

⁴⁸⁰ See Appendix A for a summary of legislation efforts in other states.

⁴⁸¹ See Derks, *supra* note 472.

⁴⁸² See *id.*

⁴⁸³ *Id.* at 1, 6-7, 12, 20, 25, 29, 33, 38, 43, 48, 51, 56, 61, 64.

⁴⁸⁴ See *e.g. id.* at 12.

agreement with the Dept. of Ed., and state or private non-profit institutions servicing fewer than 20,000 borrowers in the State.⁴⁸⁵

Licensing Procedure

The licensing and investigation of student loan servicers is a key provision of the legislation in each state.⁴⁸⁶ Illinois adopted a model by which student loan servicers must submit an application developed by the Secretary of the Department of Financial and Professional Regulation to the Nationwide Mortgage Licensing System (“NMLS”), which serves as an official record system for licensing and registration.⁴⁸⁷ Currently, NMLS is the sole licensure system for mortgage companies and Mortgage Loan Originators for many state and territorial agencies, though it can also manage other debt and consumer finance related licenses.⁴⁸⁸ Along with an application, servicers applying for licensure in Connecticut must submit a notarized financial statement prepared by a public accountant; a history of criminal convictions of the applicant or its officers, partners, or members; a nonrefundable license fee of \$1,000; and a non-refundable investigation fee of \$800.⁴⁸⁹ According to Representative Matthew Lesser of Connecticut, the State recently amended its law to allow for volume-based assessment of servicers, a development which is discussed in greater detail below.⁴⁹⁰ Licenses must be renewed on a biannual basis and are additionally subject to potential late fees.⁴⁹¹ Several states have adopted similar licensing schemes to Connecticut, although the exact fees charged may vary.⁴⁹²

⁴⁸⁵ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540.

⁴⁸⁶ See Derks, *supra* note 472.

⁴⁸⁷ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §15-15(a)(1).

⁴⁸⁸ *About NMLS*, NMLS RESOURCE CENTER, <https://nationwidelicencingsystem.org/about/Pages/default.aspx> (last visited Mar. 4, 2018).

⁴⁸⁹ CONN. GEN. STAT. §36a-847(b) (West, Westlaw current through the 2017 Regular and 2017 Special Sessions).

⁴⁹⁰ Email from Matthew Lesser, *supra* note 470.

⁴⁹¹ CONN. GEN. STAT. §36a-847(e) (West, Westlaw current through the 2017 Regular and 2017 Special Sessions).

⁴⁹² For example, California imposes a \$300 application fee, \$100 investigation fee, and the costs of a criminal background check and fingerprint processing. Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 5586.

Some states require student loan servicers to submit additional documentation or fees to obtain a license, such as audited financial statements indicating a net worth of at least \$250,000;⁴⁹³ fees for the costs of fingerprinting and criminal background checks;⁴⁹⁴ a list of judgments entered against, and bankruptcy petitions by the servicer for the preceding ten years;⁴⁹⁵ affirmation that the applicant's members, partners, directors, officers, or principals are at least 21 years of age;⁴⁹⁶ or information as to the character and fitness of the applicant or its members, partners, directors, officers, or partners.⁴⁹⁷

Oversight of the Ombudsman Position

The majority of the BBORs provide for the creation of the Student Loan Ombudsman position, one exception being California's Act.⁴⁹⁸ The Ombudsman position is typically housed within the same state agency tasked with the licensure and investigation of servicers, such as the Department of Banking in Connecticut⁴⁹⁹ or the Department of Insurance, Securities, and Banking in D.C..⁵⁰⁰ While most of the states allocate these duties to state agencies operating within the spheres of finance or consumer protection, Missouri's bill allocates these duties to the Department of Higher Education.⁵⁰¹ Of particular interest, the Illinois Act, perhaps one of the most comprehensive to date, tasks the licensure and investigation of servicers to the Department of Financial and Professional Regulation,⁵⁰² but provides for the creation of the Ombudsman

2251 §28122. The Massachusetts Bill imposes a \$1,000 application fee, but leaves the investigation fee to be determined by the Commissioner. S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 (Mass. 2017).

⁴⁹³ Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 5586 §28112(c).

⁴⁹⁴ Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 5586 §28114(a).

⁴⁹⁵ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §15-15(a)(2).

⁴⁹⁶ Derks, *supra* note 472, at 48.

⁴⁹⁷ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §15-15(5).

⁴⁹⁸ Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 5586 §28110.

⁴⁹⁹ CONN. GEN. STAT. §36a-847 (West, Westlaw current through the 2017 Regular and 2017 Special Sessions).

⁵⁰⁰ D.C. CODE § 31-106.01 (West, Westlaw current through Mar. 1, 2018).

⁵⁰¹ H.B. 1274, 99th Gen. Assemb., 2nd Reg. Sess. (Mo. 2018).

⁵⁰² Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 10-5(b).

position within the Attorney General's Office.⁵⁰³ According to the Act, the Ombudsman works in consultation with the Secretary of the Department of Financial and Professional Regulation, suggesting collaboration between the two state agencies.⁵⁰⁴

Funding Scheme

Connecticut's Act initially established a \$1,000 license application fee and an \$800 investigation fee, a scheme which has served as a general model for several other states drafting similar legislation.⁵⁰⁵ According to Representative Lesser of Connecticut, since enacting the BBOR in 2015, the State has encountered issues with respect to funding and consequently has yet to implement the Ombudsman position.⁵⁰⁶ Lesser explained that initially the Ombudsman position was designed to be funded through the licensing fees, but this has proved inadequate.⁵⁰⁷ Accordingly, Connecticut's law has been amended to allow for volume-based assessment of servicers.⁵⁰⁸ In a similar vein, Washington, D.C.'s BBOR originally accounted for application fees to be determined by the Commissioner of the Department of Insurance, Securities, and Banking.⁵⁰⁹ However, according to Dr. Charles Burt, the recently appointed Student Loan Ombudsman in Washington, D.C., the state has recently adopted a \$0.50 fee to be charged per borrower serviced by a servicer.⁵¹⁰ In addition, the Ombudsman is tasked with handling mortgage foreclosures, and consequently some of the funding for Dr. Burt's position presumably already existed.⁵¹¹

⁵⁰³ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §10-5(a).

⁵⁰⁴ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §10-5(b).

⁵⁰⁵ CONN. GEN. STAT. §36a-847(b) (West, Westlaw current through the 2017 Regular and 2017 Special Sessions).

⁵⁰⁶ Email from Matthew Lesser, *supra* note 470.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ D.C. CODE § 31-106.01 (West, Westlaw current through Mar. 1, 2018).

⁵¹⁰ Telephone Interview with Dr. Charles Burt, Student Loan Ombudsman, D.C. Department of Insurance, Securities and Banking (Feb. 1, 2018).

⁵¹¹ *Id.*

Enforcement Mechanisms

While the existing legislation generally provides for the power to deny, revoke, and suspend servicer licenses for failure to comply with the law, some of the states afford additional mechanisms of enforcement.⁵¹² For instance, the Illinois Act authorizes the Attorney General to enforce any violation of the law as a violation of the Consumer Fraud and Deceptive Business Practices Act⁵¹³ and further creates an avenue by which the Secretary of the Department of Financial and Professional Regulation, tasked with licensure, may pursue legal action through the Attorney General's Office.⁵¹⁴ The Act explicitly establishes fines to be imposed against servicers; up to \$75,000 for each count of fraud or misrepresentation and \$25,000 for other counts.⁵¹⁵ D.C. requires servicers to file a surety bond to be used for the recovery of damages incurred by student loan borrowers as a result of the servicer's noncompliance with the law.⁵¹⁶

Other Notable Features

The Illinois Act mandates that servicers must designate personnel who have received enhanced training regarding repayment options to serve as repayment specialists.⁵¹⁷ According to the Act, all inbound and outbound calls from student loan borrowers eligible for repayment assistance must be directed to a repayment specialist.⁵¹⁸ A federal student loan borrower may be eligible for referral to a repayment specialist if he or she has satisfied any of the following requirements: (1) requested information to reduce or suspend his or her monthly payments; (2) indicated that he or she is experiencing financial hardship or difficulty making payments; (3)

⁵¹² Derks, *supra* note 472, at 16-18.

⁵¹³ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 25-5.

⁵¹⁴ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 20-85.

⁵¹⁵ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 20-30.

⁵¹⁶ D.C. CODE § 31-106.02(c)(1)(D) (West, Westlaw current through Mar. 1, 2018).

⁵¹⁷ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 5-30(a).

⁵¹⁸ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 5-30(c).

missed two consecutive monthly payments; (4) is at least 75 days delinquent; (5) is enrolled in discretionary forbearance for more than 9 of the previous 12 months; (6) consolidated one of more loans out of default within the past 12 months; or (7) not completed a program of study.⁵¹⁹ In contrast, private loan borrowers are eligible for referral to a repayment specialist only if they satisfy one of the first two requirements listed above.⁵²⁰ A provision is included prohibiting servicers from implementing compensation schemes which may incentivize repayment specialists to violate any of the provisions of the Act.⁵²¹ Given that one of the key purposes of the legislation is to guard against the deceptive or abusive practices of servicers, it is unclear whether the servicers themselves can be trusted to provide repayment specialists who have the student borrowers' best interests at heart.⁵²² On a positive note, the Illinois Act requires servicers to disclose the date that a borrower's IDR plan certification expires, and the consequences of failing to re-certify, including the newly calculated repayment amount.⁵²³

Limits to Borrower Protections

Since the Bill may still be amended at a later date, it is also critical to identify provisions in other states' legislation that effectively serve to undermine or limit the protections afforded to borrowers. For instance, the term "student loan" is defined in such a way in both the California and Illinois Acts so as to exclude loans to borrowers who have failed to graduate or complete their educational programs, and have a balance at the time of disenrollment.⁵²⁴ Specifically, both states' legislation defines student loans to exclude credit extended by a postsecondary educational institution if any of the following conditions apply: (1) the term of the extension of

⁵¹⁹ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 1-5.

⁵²⁰ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 1-5.

⁵²¹ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §5-30(i).

⁵²² Thompson et. al., *supra* note 137.

⁵²³ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §5-40.

⁵²⁴ See Derks, *supra* note 472, at 16-18.

the credit is no longer than the borrower’s education program; (2) the remaining unpaid principal balance at the time of graduation is less than \$1,500; or (3) the borrower fails to graduate or complete his or her educational program and has a balance at the time of disenrollment.⁵²⁵ Of these provisions, the most alarming from a social justice perspective is the exclusion of loans for borrowers who have not graduated, but still may be left saddled with a hefty amount of student debt. These students would be effectively barred from accessing the basic protections put in place by the Bill, including, potentially, access to the Student Loan Ombudsman.

The term “student loan” is used repeatedly throughout the text of both the California and Illinois Acts.⁵²⁶ Article 5 of the Illinois Act, titled The Student Loan Bill of Rights, mandates that “[a] [s]ervicer shall not engage in any unfair or deceptive practice toward any borrower or cosigner or misrepresent or omit any material information in connection with the servicing of a student loan.”⁵²⁷ Given that the definition of a student loan excludes credit extended to borrowers who have failed to graduate, it unfortunately follows that under the text of the Illinois Act, servicers arguably would not be prohibited from engaging in deceptive practices towards or deliberately omitting information from this class of borrowers. The phrasing “fails to graduate”⁵²⁸ seems to insinuate that the borrower is to blame for his or her predicament, without taking into consideration factors which may have prevented his or her ability to graduate. This language seems indicative of the “buyer beware” mentality discussed earlier in this commentary, emphasizing borrower culpability without lending consideration to factors such as unforeseen medical conditions, family issues, economic pressures, or other events which may interfere with

⁵²⁵ Student Loan Servicing Act, Bill No. 2251, 2016 Cal AB 2251 §28104; Student Loan Servicing Rights Act, Pub. Act 100-540, 2017 Ill. Laws 540.

⁵²⁶ See Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 5586; Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §1-5.

⁵²⁷ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 § 5-5(a).

⁵²⁸ See *e.g.* Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §1-5.

a student's ability to complete schooling.⁵²⁹ According to the National Center for Education Statistics, only fifty-nine percent of full-time undergraduate students who began pursuing a bachelor's degree at a four-year post-secondary institution in 2009 had graduated at the same institution by 2015.⁵³⁰ Approximately 44.2% of white students were able to graduate within four years from the same institution, in contrast to only 20.6% percent of black students and 30.5% of Hispanic students.⁵³¹ Given the significant number of students who are unable to graduate from post-secondary institutions within four to six years, large portions of the population may be barred from accessing consumer protections put in place in California and Illinois, creating a loophole by which student loan servicers may escape accountability.

The Preemption Problem

When a state collection law is in direct conflict with a federal law, the federal law often controls.⁵³² This is called preemption.⁵³³ It is likely that state BBORs, which provide a right of action for student loan borrowers through UDAP provisions that explicitly prohibit student loan servicers from engaging in “unfair or deceptive acts or practices,” may face preemption challenges if lawsuits are brought under their provisions.⁵³⁴ While there is a strong presumption that the Dodd-Frank Act only preempts those state laws which are *inconsistent* with it – and that state laws which provide additional protections like the BBORs are not inconsistent – preemption of state law by the HEA is less clear.⁵³⁵

⁵²⁹ See *supra* Section II: Students as Consumers, Borrower Culpability, and the Rise of Consumer Protections.

⁵³⁰ *Fast Facts*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=40> (last visited Mar. 5, 2018).

⁵³¹ *Table 326.10*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d16/tables/dt16_326.10.asp (last visited Mar. 5, 2018).

⁵³² NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 8.4.4.

⁵³³ *Id.*

⁵³⁴ Cox, *supra* note 19, at 216; see also NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 8.4.4. See *infra* Section VI: Meaning of “Unfair or Deceptive Acts or Practices.”

⁵³⁵ Cox, *supra* note 19, at 215.

As student loan servicers or collectors have been sued, they have raised the preemption defense, arguing that the HEA's scheme of student loan collection preempts any state regulation of the servicers.⁵³⁶ Courts are split on whether certain provisions of the HEA preempt state law claims against student loan servicers.⁵³⁷ In *Chae v. SLM Corp.*, the Ninth Circuit held that the HEA does preempt state UDAP provisions, meaning that borrowers and state attorneys general are unable to bring claims against student loan servicers for violations of state prohibitions on UDAPs in that jurisdiction.⁵³⁸ Other circuits have declined to apply the preemption argument that broadly.⁵³⁹ The question of preemption for student loan claims in still appears unsettled in Massachusetts.⁵⁴⁰ At the time of this writing, there is an ongoing lawsuit brought by Massachusetts' Attorney General against PHEAA, accusing the loan servicer of deceptive practices that harm borrowers.⁵⁴¹ PHEAA asserted the preemption defense in a motion to dismiss the suit. On March 1, 2018, a Massachusetts Judge denied the motion and allowed the lawsuit to go forward.⁵⁴²

The PROSPER Threat

The U.S. House of Representatives is currently considering the Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act.⁵⁴³ The

⁵³⁶ NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 8.4.4. *See infra* Section VII: Housing the Student Loan Ombudsman in the Attorney General's Office, Massachusetts Attorney General's Office (In a suit brought by Massachusetts's Attorney General against PHEAA, Dept. of Ed. raised the preemption defense).

⁵³⁷ Cox, *supra* note 19, at 216; *see also* NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 8.4.4.

⁵³⁸ Cox, *supra* note 19, at 216.

⁵³⁹ *Id.* at 217; *see also* NAT'L CONSUMER LAW CTR., STUDENT LOAN LAW, *supra* note 83, § 8.4.4.

⁵⁴⁰ *See* Raymond, *supra* note 398.

⁵⁴¹ *See infra* Section VII: Housing the Student Loan Ombudsman in the Attorney General's Office, Massachusetts Attorney General's Office.

⁵⁴² *See* Raymond, *supra* note 398.

⁵⁴³ *Prosper Act: Bill Summary*, COMM. ON EDUC. AND WORKFORCE 1, https://edworkforce.house.gov/uploadedfiles/the_prosper_act_-_short_summary_-_1.17.18.pdf (last visited Mar. 6, 2018).

PROSPER Act is intended to modify the HEA in response to what the bill’s supporters perceive as a financial crisis and shifts in the higher education landscape since the HEA’s passage.⁵⁴⁴

PROSPER’s stated intent is to ensure that more students are able to enter and complete higher education.⁵⁴⁵ If the PROSPER Act is passed, however, it may strengthen HEA preemption challenges to claims against student loan servicers brought under state law.

If passed, the PROSPER Act would explicitly preempt state BBORs, and the licensing mechanism created by the BBORs to promote state regulation of student loan servicers.⁵⁴⁶ The PROSPER Act would also bar states from regulating how often servicers may contact borrowers, or how servicing and collection is carried out.⁵⁴⁷ States would not be allowed to require servicers to disclose information about their operations.⁵⁴⁸ These provisions appear to be a direct response to the National Council of Higher Education Resources’ (NCHER) letter to the Department of

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ Danielle Douglas-Gabriel, *House GOP Higher Ed bill could limit D.C.’s oversight of student loan companies*, Wash.Post (Dec. 15, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/12/15/house-gop-higher-ed-bill-could-limit-d-c-s-oversight-of-student-loan-companies/?utm_term=.47e61cc030fb; PROMOTING REAL OPPORTUNITY, SUCCESS, AND PROSPERITY THROUGH EDUCATION REFORM ACT, H.R. REP. NO. 115-550, at 215 (2018).

The relevant part of the PROSPER Act reads:

“(d) *FEDERAL PREEMPTION.*—

“(1) *IN GENERAL.*—Covered activities shall not be subject to any law or other requirement of any State or political subdivision of a State with respect to—

“(A) disclosure requirements;

“(B) requirements or restrictions on the content, time, quantity, or frequency of communications with borrowers, endorsers, or references with respect to such loans; or

“(C) any other requirement relating to the servicing or collection of a loan made under this title.

“(2) *SERVICING AND COLLECTION.*—The requirements of this section with respect to any covered activity shall preempt any law or other requirement of a State or political subdivision of a State to the extent that such law or other requirement would, in the absence of this subsection, apply to such covered activity.

“(3) *STATE LICENSES.*—No qualified entity engaged in a covered activity shall be required to obtain a license from, or pay a licensing fee or other assessment to, any State or political subdivision of a State relating to such covered activity.”

⁵⁴⁷ PROMOTING REAL OPPORTUNITY, SUCCESS, AND PROSPERITY THROUGH EDUCATION REFORM ACT, H.R. REP. NO. 115-550, at 215 (2018).

⁵⁴⁸ PROMOTING REAL OPPORTUNITY, SUCCESS, AND PROSPERITY THROUGH EDUCATION REFORM ACT, H.R. REP. NO. 115-550, at 215 (2018).

Education on July 17, 2017 requesting that the federal government act to preempt state licensing of student loan servicers.⁵⁴⁹ NCHER is a higher education finance trade association.⁵⁵⁰

Purporting to reform how higher education is financed, the PROSPER Act seeks to simplify how student aid is obtained.⁵⁵¹ The PROSPER Act proposes to streamline financial aid by eliminating all current loans and grants, and replacing them with one grant, one loan, and one work-study award.⁵⁵² This would drastically alter how repayment is handled.⁵⁵³ The PROSPER Act provides for only two repayment plans: a standard 10-year plan and an income-based plan.⁵⁵⁴ Current federal regulations and reporting requirements would be eliminated, and the Secretary of Education's powers would be reduced.⁵⁵⁵

The PROSPER Act also seeks to expand the use of Pell Grants, and allow the Federal Work-Study program to fund students working in private-sector companies.⁵⁵⁶ It would encourage institutions to develop more apprenticeship programs, allow federal financial aid for a broader range of distance-learning programs, allow educational providers who are unaffiliated with universities to receive students with financial aid from partnered universities, and give bonus Pell Grants to students who take more classes each semester.⁵⁵⁷ There would also be changes to institutional accountability, institutional reporting, loan counselling, and the financial aid education student receive.⁵⁵⁸

⁵⁴⁹ Letter from James P. Bergeron, President, Nat'l Council of Higher Educ. Resources, to Kathleen Smith, Acting Assistant Sec'y, Off. of Post-Secondary Educ. (July 17, 2017) (available at http://c.ymcdn.com/sites/www.ncher.us/resource/resmgr/images/letters-testimony/2017/07-18-17_NCHER_Letter_to_ED_.pdf).

⁵⁵⁰ *About Us*, NAT'L COUNCIL OF HIGHER EDUC. RESOURCES, <http://www.ncher.us/?page=about> (last visited Mar. 6, 2018).

⁵⁵¹ COMM. ON EDUC. AND WORKFORCE, *supra* note 543, at 2.

⁵⁵² *Id.* at 2-3.

⁵⁵³ *Id.* at 3.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.* at 4.

⁵⁵⁶ *Id.* at 1.

⁵⁵⁷ *Id.* at 1-2.

⁵⁵⁸ *Id.* at 3.

The National Association of Student Financial Aid Administrators (NASFAA), an organization of some 20,000 professional members at 3,000 higher education institutions,⁵⁵⁹ sent a letter to the House Education Committee on December 8, 2017, concerning the PROSPER Act.⁵⁶⁰ NASFAA President Justin Draeger wrote that while revisiting HEA to more effectively help students access higher education is important, he is concerned at the size and scope of the bill, given the speed with which it is being moved through committees, and would prefer more time to determine its full potential impact.⁵⁶¹ House Democrats have argued that the legislative process has been rushed, and that the PROSPER Act would result in financial aid going to for-profit colleges and universities, which have a history of taking advantage of students and granting degrees that prove disadvantageous in the labor market.⁵⁶²

States enacting BBORs are taking an active role in the creation of borrower protections and working to establish a dual state-federal regulatory regime for student loan borrowers.⁵⁶³ In response to the mortgage crisis, former Illinois Attorney General Lisa Madigan said that “a dual state-federal regulatory regime...is vital to the health of our economy.”⁵⁶⁴ In the years leading up to the mortgage crisis, federal regulators preempted states attempting to enforce state-level consumer protections for mortgage borrowers.⁵⁶⁵ The federal protections were then largely

⁵⁵⁹ *About NASFAA*, NAT'L ASS'N OF STUDENT FIN. AID ADMIN., https://www.nasfaa.org/About_NASFAA (last visited Mar. 6, 2018).

⁵⁶⁰ Letter from Justin Draeger of Nat'l Ass'n of Student Fin. Aid Adm'rs to Virginia Foxx, Chairwoman, & Bobby Scott, Ranking Member, Comm. on Educ. and the Workforce at the U.S. H.R. at 1 (Dec. 8, 2017), <https://www.nasfaa.org/uploads/documents/NASFAAPROSPERLetter1.pdf>.

⁵⁶¹ *Id.*

⁵⁶² Lauren Camera, *House Republicans Finalize Overhaul of Higher Education Act: The PROSPER Act would streamline student aid, elevate job training and eliminate certain regulations*, U.S. NEWS (Dec. 13, 2017 11:24 AM), <https://www.usnews.com/news/education-news/articles/2017-12-13/house-republicans-finalize-overhaul-of-higher-education-act>.

⁵⁶³ See Cox, *supra* note 19, at 223-4.

⁵⁶⁴ *The Causes and Current State of the Fin. Crisis: Hearing Before the Fin. Crisis Inquiry Comm'n* 4 (Ill. 2010) (Testimony of Att'y Gen. Lisa Madigan), http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0114-Madigan.pdf.

⁵⁶⁵ Cox, *supra* note 19, at 209.

unenforced.⁵⁶⁶ Federal claims against financial institutions were dropped, and borrowers were left effectively unprotected by government regulators.⁵⁶⁷

The PROSPER Act seeks to reform the federal financial aid landscape, and in doing so would preempt states from regulating the student loan servicers operating within their jurisdictions.⁵⁶⁸ The recent mortgage crisis has shown that federal regulation alone can be insufficient protection for borrowers, and that protections are best enacted at both the federal and state levels.⁵⁶⁹ The PROSPER Act, however, would prevent states from acting, thus reducing the protections available to student borrowers.

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

⁵⁶⁸ COMM. ON EDUC. AND WORKFORCE, *supra* note 543, at 2-3.

⁵⁶⁹ Cox, *supra* note 19, at 209.

VI. BILL ANALYSIS

Returning to the proposed legislation at the center of this commentary, this section provides a comprehensive analysis of the Bill. To assist the reader through the analysis, this section starts with an overview of common tools used to analyze or interpret a statute. This is followed by a copy of the Bill which has been annotated to provide specific legal context, analysis, and recommendations. The last part of this section provides insight into the Bill’s language, and what those language choices may mean for the Bill’s implementation.

Tools of Statutory Analysis

The process of creating a law requires that it be written, and once passed, that it be interpreted.⁵⁷⁰ This involves a two-fold process: the drafters must try to distill their intentions into a very precise written format, and then those who come after them must use those same words to determine what the bill was meant to do and how it was meant to do it.⁵⁷¹

Any statute goes through stages of interpretation. Those interpreting the statute initially look to the language itself and typically first interpret it through “plain meaning,” or what an ordinary person would take the meaning to be.⁵⁷² If the language is unclear or ambiguous, the context of the whole act is considered, to gain an understanding of the spirit of the act and ensure that terms and phrases are not being interpreted differently throughout the whole.⁵⁷³ If there are still ambiguities, then those interpreting the statute typically look to the intent of the drafters to determine the purpose of the act.⁵⁷⁴ This process can involve looking at any preamble or purpose

⁵⁷⁰ LEGAL SKILLS IN SOCIAL CONTEXT: LEGAL RESEARCH AND WRITING – CUSTOM EDITION 29 (Stephanie Hartung ed., Aspen Custom Pub. Series 2017) [hereinafter LSSC: LEGAL RESEARCH AND WRITING].

⁵⁷¹ *Id.* at 35-37.

⁵⁷² 82 C.J.S. *Statutes* § 395 (2018).

⁵⁷³ 82 C.J.S. *Statutes* § 416 (2018).

⁵⁷⁴ 82 C.J.S. *Statutes* § 395 (2018).

clause if it is included in the act, the legislative history, or other textual documents from the creation of the act, if they exist.⁵⁷⁵ Legal scholars differ with regard to how much weight should be given to language versus intent, and various competing theories exist as to how to conduct interpretation without undermining the law.⁵⁷⁶ Policy considerations are often used to determine which possible interpretation will be chosen, and so there may be variations depending on who is responsible for the interpretation and their determination of what the best interpretation for state policy is.⁵⁷⁷ All of this leads in turn to differing interpretations of the law, and in the case of the Bill, those interpretations will likely be seen as soon as the relevant agencies begin creating the required regulations to allow them to enforce the Bill, and when court opinions begin to accumulate and attach to the issue.⁵⁷⁸ It is possible that this Bill could be passed and not immediately become subject to interpretation. It would be carried out to the best of the interpreters' abilities, but if language is ambiguously worded, then the resulting interpretations might diverge from the actual legislative intent.

Massachusetts State Senator Lesser considers the intent of the Bill to be (1) to create the Ombudsman as a centralized resources for students and that can advocate on their behalf; (2) to create more oversight of the servicers and introduce those standards necessary to prevent abuse; (3) to allow the Division of Banks ("DOB") to investigate those servicers and enforce the Bill's rules; and (4) to allow the state to fine servicers when abuses occur and compel them to repay borrowers if necessary.⁵⁷⁹ While the Bill would work towards those goals, there are instances of ambiguous language that may complicate or conflict with them as well. Many of these instances

⁵⁷⁵ 82 C.J.S. *Statutes* § 395 (2018).

⁵⁷⁶ Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 595 (1996).

⁵⁷⁷ See LSSC: LEGAL RESEARCH AND WRITING, *supra* note 570.

⁵⁷⁸ *Id.* at 36-7.

⁵⁷⁹ Lesser, *It's time for a student loan bill of rights in Massachusetts (Guest Viewpoint)*, *supra* note 5.

may be avoided entirely, or at least minimized, by changing the wording to be more specific, or if that is not possible, by understanding that new interpretations may lead to unexpected outcomes and preparing accordingly.

The following is an annotated version of the Bill.⁵⁸⁰ The annotations take the form of footnotes inserted into the original text. They identify portions of the Bill that may benefit from clearer phrasing, indicate where the provisions may be in danger of creating unintended consequences, and provide additional context to help the reader understand the Bill as it may fit into Massachusetts law. It must be emphasized that none of the comments here should be taken as true legal advice, but rather as possible points that have been identified for further discussion with the lawyers involved in the drafting process.

⁵⁸⁰ The version used is the Bill as introduced in the Senate. S.B. 129, 190th Gen. Court, Reg. Sess. (Mass. 2017). This version is identical to the version introduced in the House. H.B. 2173, 190th Gen. Court, Reg. Sess. (Mass. 2017).

Annotated Bill⁵⁸¹

SENATE DOCKET, NO. 1229 FILED ON: 1/19/2017

SENATE No. 129

By Mr. Lesser, a petition (accompanied by bill, Senate, No. 129) of Eric P. Lesser, Julian Cyr, Jack Lewis, Jason M. Lewis and other members of the General Court for legislation to establish a student loan bill of rights. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

An Act establishing a student loan bill of rights.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 24 of chapter 93 of the General Laws, as so appearing, is hereby
2 amended by striking the definition of “servicing” and inserting thereof the following definition:-
3 “Servicing”, receiving a scheduled periodic payment from a borrower pursuant to the
4 terms of a loan, including amounts for escrow accounts, and making the payments to the owner
5 of the loan or other third party of principal and interest and other payments with respect to the
6 amounts received from the borrower as may be required pursuant to the terms of the servicing
7 loan document or servicing contract. In the case of a home equity conversion mortgage or
8 reverse mortgage as referenced in this section, servicing includes making payments to the
9 borrower.⁵⁸² In the case of a student education loan as referenced in this section, servicing includes
10 applying the payments of principal and interest and other such payments with respect to the
11 amounts received from a student loan borrower as may be required pursuant to the terms of a
12 student education loan and performing other administrative services with respect to a student
13 education loan.

⁵⁸¹ S.B. 129, 190th Gen. Court, Reg. Sess. (Mass. 2017).

⁵⁸² The definition of “Servicing” from lines 3 to 9 is the original definition. The remaining information from lines 9 to 13 would be added to the definition under the Bill in order to include student loan servicing. MASS. GEN. LAWS ch. 93 § 24 (2018).

14 SECTION 2. Section 24 of chapter 93 of the General Laws, as so appearing, is hereby
15 amended by inserting after the definition of “ Servicing” the following definitions:-

16 “Student education loan”, any loan primarily used to finance education or other school-
17 related expenses.

18 “Student loan borrower”, any resident of Massachusetts who has received or agreed to
19 pay a student education loan, or any person who shares responsibility with such Massachusetts
20 resident for repaying the student education loan.⁵⁸³

21 “Student loan servicer”, any person responsible for the servicing of a student education
22 loan to a student loan borrower.⁵⁸⁴

23 SECTION 3. Section 24A of Chapter 93 of the General Laws, as so appearing, is hereby
24 amended by adding at the end of subsection (b)⁵⁸⁵ the following sentence:- “A student loan
25 servicer who also acts as a third party loan servicer shall⁵⁸⁶ also be required to comply with sections
26 24M to 24O, inclusive. ⁵⁸⁷

⁵⁸³ The language “any person who shares responsibility with such Massachusetts resident” would potentially extend the Bill’s power beyond Massachusetts, as it could apply, for example, to a parent in California who co-signed a Massachusetts resident’s loans. If the Bill is not explicitly intended to extend outside the state boundaries in such a manner, this phrase should be reconsidered, as it may lead to more complicated interstate concerns.

⁵⁸⁴ Section 24 already contains two definitions that may cause confusion in the future: “debt collector” and “third party loan servicer.” MASS. GEN. LAWS ch. 93 § 24 (2018). Student loan servicer would be created as a third category outside those two existing categories. The Bill is ambiguous as to how student loan servicers should be treated alongside debt collectors and third party loan servicers, which could serve to cause confusion and lead courts to interpret the Bill in ways that are not intended. Very broadly stated, debt collector includes persons who collect on loans owed to another entity or directly to the collector itself, while third party loan servicers are those who manage loans owned by someone else. MASS. GEN. LAWS ch. 93 § 24 (2018). This could potentially become an issue if, for example, a private student loan enters default and is sold to a debt collector for further action.

⁵⁸⁵ Subsection (b) reads: “A person shall not directly or indirectly engage in the commonwealth in the business of a third party loan servicer without registering with the commissioner. A registrant shall not be required to comply with sections 24F to 27, inclusive.” MASS. GEN. LAWS ch. 93 § 24A(b) (2018). This in effect would establish student loan servicers as a subtype of third party loan servicers who, like all third part loan servicers, would not have to obey sections 24F to 27, but would have additional requirements placed on them beyond what third party loan servicers must normally do. Subsections 24F to 27 would cover a wide range of powers of the Commissioner, such as fines and imprisonment for failure to produce records, police authority, cease and desist orders, and the requirement that a licensee file a bond with the state treasurer. MASS. GEN. LAWS ch. 93 §§ 24F-27 (2018).

⁵⁸⁶ “Shall” carries with it an implication of requirement and mandatory actions that would allow far less discretion than a word such as “may” would permit. *Shall*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁸⁷ As section 24A(b) makes no reference to debt collectors, only student loan servicers acting as third party loan servicers would be bound by the proposed addition of sections 24M to 24O. MASS. GEN. LAWS ch. 93 §

27 SECTION 4. Chapter 93 of the General Laws, as so appearing, is hereby amended by
28 inserting after section 24K the following sections:-

29 Section 24L. (a) There is hereby established the position of the Student Loan
30 Ombudsman, within the Division of Banks, to be appointed by the commissioner to provide
31 timely assistance to any student loan borrower who has a student education loan.

32 (b) The Student Loan Ombudsman shall⁵⁸⁸ work in consultation with the commissioner. The
33 responsibilities of the Student Loan Ombudsman will include, but not be limited to:⁵⁸⁹ (1) receive,
34 review and assist in resolving complaints from student loan borrowers, including, but not limited
35 to, attempts to resolve such complaints in collaboration with institutions of higher education,
36 student loan servicers, and any other participants in student loan lending, including, but not
37 limited to, the University of Massachusetts, the Board of Higher Education, the Office of Higher
38 Education, The Massachusetts Educational Financing Agency, or the Massachusetts Student
39 Loan Authority; (2) compile and analyze data on student loan borrower complaints and any
40 subsequent resolutions; (3) assist student loan borrowers to understand their rights and
41 responsibilities under the terms of student education loans; (4) provide information to the public
42 regarding the problems and concerns of student loan borrowers; (5) make recommendations to
43 the commissioner for resolving those problems and concerns; (6) analyze and monitor the
44 development and implementation of federal, state and local laws, regulations and policies
45 relating to student loan borrowers and recommend any related changes deemed necessary; (7)
46 review complete student education loan history for any student loan borrower who has provided
47 written consent for such review; and (8) disseminate information to student loan borrowers,
48 potential student loan borrowers, public institutions of higher education, student loan servicers
49 and any other participant in student education loan lending.⁵⁹⁰

24A(b) (2018). Anyone engaged as a debt collector for a student loan would still be treated under the current rules for all debt collectors.

⁵⁸⁸ “Shall” carries with it an implication of requirement and mandatory actions that would allow far less discretion than a word such as “may” would permit. *Shall*, BLACK'S LAW DICTIONARY (10th ed. 2014). Here, the use of “shall” means that the Ombudsman would be required to work with the commissioner, though the extent of this collaboration and practice remains unclear based on the language of the Bill.

⁵⁸⁹ The phrasing “include but not be limited to” implies that the agency could have broad discretion when creating and delegating responsibilities to the office. This language would effectively create a minimum set of responsibilities for the Ombudsman, but in such terms that the details of enforcement must be determined by those who will be putting it into practice. This may be to the benefit of the Bill’s goals, but it must be understood that doing so means that enforcement would become heavily open to individual interpretation.

⁵⁹⁰ The breadth of the stated goals for the Ombudsman would ensure that the individuals involved would have very broad interpretive powers. The agency that would house the Ombudsman may refine the listed tasks

50 (c) The Student Loan Ombudsman, in consultation with the commissioner, shall establish
51 and⁵⁹¹ a student loan borrower education course to include educational presentations and materials
52 regarding student education loans. Said program shall include, but not be limited to, an
53 explanation of key loan terms, prescribed documentation requirements, monthly payment
54 obligations, income-based repayment options, loan forgiveness and disclosure requirements. Any
55 license, renewal, late filing, or investigation fees, as well as any penalties assessed under this
56 section, shall be used to fund the student loan borrower education course.⁵⁹²

57 Section 24M. (a) No person or entity shall act as a student loan servicer, directly or
58 indirectly,⁵⁹³ without first obtaining a license from the commissioner, unless such person is exempt
59 from licensure pursuant to this this section.

60 (b) The following persons or entities are exempt from student loan servicer licensing
61 requirements: (1) any bank, out-of-state bank, Massachusetts credit union, federal credit union or
62 out-of-state credit union; (2) any wholly owned subsidiary of any such bank or credit union; and

63 (c)⁵⁹⁴ any operating subsidiary where each owner of such operating subsidiary is wholly owned by
64 the same bank or credit union.⁵⁹⁵

extensively by creating regulations, but how they choose to do so would depend on that agency's goals and internal philosophies. It is preferable that the empowered agency be one with extensive prior experience in handling student loan concerns. *See infra* Section VII: The Ombudsman's Access to Resources under the Attorney General.

⁵⁹¹ Typo: a word appears to be missing between "establish" and "and."

⁵⁹² This funding stream could be insufficient. *See infra* Section VII: Funding the Student Loan Ombudsman.

"Shall" appears several times in Section 24L (c), so that the Ombudsman would be compelled to produce the educational program and fulfill the listed requirements, but those requirements could potentially be fulfilled in a variety of ways, so that the Ombudsman would still retain significant discretion. *Shall*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁹³ Given the ambiguous differences between third party loan servicers and debt collectors in the Bill, it is unclear if the phrase "directly or indirectly" is intended to include debt collectors for loans that have entered default. *See infra* Section VI: Language Analysis, Entities Subject to Enforcement.

⁵⁹⁴ Typo: "(3)" not "(c)."

⁵⁹⁵ The exemption for the listed entities here, which may be roughly summarized as banks and their subsidiaries, would mean that many private student loan servicers would not be covered here. The CFPB reported that from Sept. 1, 2016 to August 31, 2017 Wells Fargo had 303 private student loan complaints nationwide, Discover Bank had 189, and both were two of the five private student loan lenders to receive the highest volume of complaints. CONSUMER FIN. PROT. BUREAU, 2017 STUDENT LOAN OMBUDSMAN REPORT, *supra* note 36, at 19. While this only made up 5% and 3%, respectively, of the total volume of private loan complaints that the CFPB collected, that is still potentially a significant portion of borrowers who would not be protected under this bill because their servicers are banks or bank subsidiaries. *Id.* The choice in the Bill to exempt the listed entities may have been made due to additional oversight that banks receive through

65 (c) Any person or entity seeking to act within Massachusetts as a student loan servicer
66 shall submit a written application to the commissioner for a license in such form as the
67 commissioner prescribes. The application for a license shall be accompanied by a \$1000
68 nonrefundable license fee and an investigation fee to be determined annually by the
69 commissioner of administration under section 3B of chapter 7.⁵⁹⁶ The commissioner may require a
70 financial statement prepared by a certified public accountant or a public accountant, a history of
71 criminal convictions of the applicant or any other information deemed necessary.⁵⁹⁷

72 (d) Upon the filing of an application for an initial license and the payment of the fees for
73 license and investigation, the commissioner shall investigate the financial condition and
74 responsibility, financial and business experience, character and general fitness of the applicant.⁵⁹⁸
75 The commissioner may issue a license if the commissioner finds that: (1) the applicant's financial
76 condition is sound; (2) the applicant's business will be conducted honestly, fairly, equitably,
77 carefully and efficiently within the purposes and intent of this act;⁵⁹⁹ (3) (A) if the applicant is an
78 individual, such individual is in all respects properly qualified and of good character,⁶⁰⁰ (B) if the

other channels, or restraints on what oversight may be applied to banks. *See e.g.* MASS. GEN. LAWS ch. 167
§§ 1A-21 (2018).

⁵⁹⁶ Please note that there is extensive discussion of whether this fee-generating scheme will be sufficient within the body of the commentary, *see infra* Section VII: Funding the Student Loan Ombudsman, and extensive changes have been proposed here. In short: it is likely that the method of funding currently described in the Bill would generate only sufficient monies to cover the Division of Banks' typical investigation and licensing costs.

⁵⁹⁷ The use of the word "may" here would most likely allow the Commissioner to make use of their discretion and decide whether or not a financial statement would be required at all. *May*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁹⁸ The use of "shall" would compel the commissioner to carry out this investigation, though the precise parameters of the investigation are not defined and are left to the commissioner's discretion. *Shall*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁹⁹ After a law is written and enacted, agencies looking to enforce the provisions are charged with interpreting it. 39 MASS. PRAC., *Administrative Law & Practice* § 12:35 (2017). Requiring that the applicant's business be conducted "within the purposes and intent of this act" may require an analysis about the intent of a bill. 82 C.J.S. *Statutes* § 395-96 (2018). *See also* Section VI: Tools of Statutory Analysis. Common law interpretations often rely on the judge's determination of what the legislature intended the act to do. 82 C.J.S. *Statutes* § 368 (2018). To make that determination, judges use the language of the text, previous legal interpretations, the legal context of the legislation, and the legislative history regarding the passing of a bill. 82 C.J.S. *Statutes* § 395-98 (2018). A Preamble declaring the intent of the Bill would help to clarify the meaning of the text here and might serve to guide future judicial interpretations. 73 Am. Jur. 2d *Statutes* § 101 (2018).

⁶⁰⁰ This is another example of vague phrasing that may be subject to interpretation. The terms "properly qualified" and "good character" are judgment-based values that can vary from person to person and would likely require agency regulations and common law rulings to clarify. *See* 39 MASS. PRAC., *Administrative Law &*

79 applicant is a partnership, each partner is in all respects properly qualified and of good character,
80 (C) if the applicant is a corporation or association, the president, chairperson of the executive
81 committee, senior officer responsible for the corporation's business and chief financial officer or
82 any other person who performs similar functions as determined by the commissioner, each
83 director, each trustee and each shareholder owning ten per cent or more of each class of the
84 securities of such corporation is in all respects properly qualified and of good character, or (D) if
85 the applicant is a limited liability company, each member is in all respects properly qualified and
86 of good character; (4) no person on behalf of the applicant has knowingly made any incorrect
87 statement of a material fact in the application, or in any report or statement made pursuant to this
88 act; (5) no person on behalf of the applicant knowingly has omitted to state any material fact
89 necessary to give the commissioner any information lawfully required by the commissioner; (6)
90 the applicant has paid the investigation fee and the license fee required under subsection (b) of
91 this section; and (7) the applicant has met any other requirements as determined by the
92 commissioner.

93 (e) A license shall be for a period of 1 year as of a date determined by the commissioner
94 and shall expire unless renewed, suspended or revoked pursuant to this act.
95 Not later than fifteen days after a licensee ceases to engage in the business of student loan
96 servicing in Massachusetts for any reason, including a business decision to terminate operations
97 in this state, license revocation, bankruptcy or voluntary dissolution, said licensee shall provide
98 written notice of surrender to the commissioner and shall surrender to the commissioner said
99 license for each location in which such licensee has ceased to engage in such business.
100 A written notice of surrender shall identify the location where the records of the licensee
101 will be stored and the name, address and telephone number of an individual authorized to
102 provide access to the records. The surrender of a license does not reduce or eliminate the
103 licensee's civil or criminal liability arising from acts or omissions occurring prior to the
104 surrender of the license.

105 (f) A license may be renewed for the ensuing one year period upon the filing of an
106 application containing all required documents and fees as provided in subsection (c) of this
107 section. A renewal application shall be filed at least 30 days prior to the date the license expires.
108 The commissioner may assess a late fee for renewal applications filed within 30 days of license

Practice § 12:35 (2017). If more guidance is given as to what these terms mean in the language of the Bill, it might prevent confusion and improper reinterpretation during enforcement.

109 expiration.⁶⁰¹ If an application for a renewal license has been filed with the commissioner on or
110 before the date the license expires, the license sought to be renewed shall continue in full force
111 and effect until the issuance by the commissioner of the renewal license or until the
112 commissioner has notified the licensee in writing of the commissioner's refusal to issue such
113 renewal license together with the grounds upon which such refusal is based. The commissioner
114 may refuse to issue a renewal license on any ground on which the commissioner might refuse to
115 issue an initial license.

116 (g) If the commissioner determines that a check filed with the commissioner to pay a
117 license or renewal fee has been dishonored, the commissioner shall automatically suspend the
118 license. The commissioner shall notify the licensee in writing of the automatic suspension
119 pending proceedings for revocation or refusal to renew and an opportunity for a hearing on such
120 actions.

121 (h) The commissioner may deem an application for a license abandoned if the applicant
122 fails to respond to any request for information required under this act, or any regulations adopted
123 pursuant to said sections. The commissioner shall notify the applicant, in writing, that if the
124 applicant fails to submit such information not later than sixty days after the date on which such
125 request for information was made, the application shall be deemed abandoned. An application
126 filing fee paid prior to the date an application is deemed abandoned and shall not be refunded.
127 Abandonment of an application pursuant to this subsection shall not preclude the applicant from
128 submitting a new application for a license under the provisions of this act.

⁶⁰¹ The use of the word "may" here would indicate that the late fee is not necessary, but rather left to the Commissioner's discretion. *May*, BLACK'S LAW DICTIONARY (10th ed. 2014).

129 Section 24N.⁶⁰² (a) A student loan servicer shall not:⁶⁰³ (a)⁶⁰⁴ Directly or indirectly employ any
130 scheme, device or artifice to defraud or mislead student loan borrowers; (2) engage in any unfair
131 or deceptive practice⁶⁰⁵ toward any person or misrepresent or omit any material information in
132 connection with the servicing of a student education loan, including, but not limited to,
133 misrepresenting the amount, nature or terms of any fee or payment due or claimed to be due on a
134 student education loan, the terms and conditions of the loan agreement or the borrower's
135 obligations under the loan;⁶⁰⁶ (3) obtain property by fraud or misrepresentation; (4) knowingly
136 misapply or recklessly apply student education loan payments to the outstanding balance of a
137 student education loan; (5) knowingly or recklessly⁶⁰⁷ provide inaccurate information to a credit

⁶⁰² The prohibitions in this section would not be new to Massachusetts consumer protection law. For example, a survey of the Code of Massachusetts Regulations (CMR) reveals that the general conduct in (2), and (4)-(7) of this Bill is enumerated as “unfair servicing practices” of third party loan servicers. 209 MASS. CODE REGS. § 18.21 (2018); *see also* 36 MASS. PRAC., *Consumer Law* § 20:116 (2017). This Bill would explicitly extend prohibitions on third party loan servicer conduct to cover conduct by student loan servicers. It would put student loan servicers on notice that they must conduct business in a fair and honest manner, and would give a more direct means of enforcement. Thompson et. al., *supra* note 137.

⁶⁰³ This section would explicitly identify several practices that would be deemed “unfair or deceptive” *per se*. For additional protection of student loan borrowers, we recommend inserting a provision clarifying that the practices prohibited in Section 24N are illustrative, but not exclusive. Compare to language in 209 CMR 18.21, which states “[a] third party loan servicer may not use unfair or unconscionable means in servicing any loan. *Without limiting the general application of the foregoing*, the following conduct is a violation of 209 CMR 18.21...” 209 MASS. CODE REGS. § 18.21 (2018) (emphasis added). The regulations explicitly enumerate thirteen practices that are considered unfair *per se*, but do not exclude other practices from being considered unfair or unconscionable under 209 CMR 18.21.

⁶⁰⁴ Typo: “(a)” should be “(1).”

⁶⁰⁵ “Unfair or deceptive acts or practices” is a term of art in consumer protection law. Massachusetts courts have colorfully declared that unfair or deceptive conduct “must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.” *Levings v. Forbes & Wallace, Inc.*, 369 N.E.2d 149, 153 (Mass. App. Ct. 1979). While certain practices are explicitly enumerated in Chapter 93A and in regulations promulgated by the Attorney General’s Office and other state agencies, “unfair or deceptive acts or practices” is used as a standard instead of a bright line rule, so it has the flexibility to be applied to specific circumstances by courts or other forums of mediation. 35 MASS. PRAC., *Consumer Law* § 4:16 (2017).

⁶⁰⁶ The practices listed in (2) – (7) are common abusive practices, as evidence by other consumer protection laws prohibiting them and complaints made by student loan borrowers through the CFPB. *See* 209 MASS. CODE REGS. § 18.21 (2018); *see also* Cox, *supra* note 19, at 231. As discussed *infra* in Section VII, additional protections can be added to this section that would strengthen the Bill, including (1) forbidding servicers from placing student borrowers on the wrong repayment plan, (2) prohibiting negligent provision of inaccurate information about repayment options available, (3) requiring that servicers apply payments in a timely manner, and (4) requiring servicers to give borrower adequate notice if their loan servicer changes. Cox, *supra* note 19, at 231.

⁶⁰⁷ “Knowingly,” “recklessly,” and “negligently” all refer to mental states required for the conduct to be a violation of the Bill. Knowingly refers to an awareness and consciousness that the conduct may be wrong;

138 bureau, thereby harming a student loan borrower's creditworthiness; (6) fail to report both the
139 favorable and unfavorable payment history of the student loan borrower to a nationally
140 recognized consumer credit bureau at least annually if the student loan servicer regularly reports
141 information to a credit bureau; (7) refuse to communicate with an authorized representative of
142 the student loan borrower who provides a written authorization signed by the student loan
143 borrower, provided the student loan servicer may adopt procedures reasonably related to
144 verifying that the representative is in fact authorized to act on behalf of the student loan
145 borrower; or (8) negligently make any false statement or knowingly and willfully make any
146 omission of a material fact in connection with any information or reports filed with a
147 governmental agency or in connection with any investigation conducted by the Banking
148 Commissioner or another governmental agency.

149 (b) No person or entity licensed to act within Massachusetts as a student loan servicer
150 shall do so under any other name or at any other place of business other than that named in the
151 license. Any change of location of a place of business of a licensee shall require prior written
152 notice to the commissioner. Not more than one place of business shall be maintained under the
153 same license. A license shall not be transferable or assignable.

154 (c) A student loan servicer or a person or entity exempt from licensure pursuant to section
155 3 of this act shall maintain adequate records of each student education loan transaction for not
156 less than two years following the final payment on such student education loan or the assignment
157 of such student education loan, whichever occurs first, or such longer period as may be required
158 by any other provision of law. The commissioner may request a student loan servicer to make
159 such records available. A student loan servicer must comply with said request within than five
160 business.⁶⁰⁸ The commissioner may grant a licensee additional time to make such records available
161 upon request.⁶⁰⁹

recklessness is a conscious disregard of risk, and negligence is a deviation from what a reasonable person would or would not do. *See Knowingly*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Recklessly*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Negligently*, BLACK'S LAW DICTIONARY (10th ed. 2014). Knowingly is a higher standard of proof than recklessness, which is in turn a higher standard than negligence. Therefore, if a servicer negligently provided inaccurate information through sheer carelessness, the servicer would not be held accountable under this section, as mere negligence would not be serious enough to meet the requirement for knowingly or recklessly.

⁶⁰⁸ Sentence fragment, suggested revision: "A student loan servicer must comply with said request within five business days."

⁶⁰⁹ This is a section where the language would benefit from a clearer definition of 'licensee.' Would this passage refer only to debt collectors engaged in student loan servicing, or would it also apply to banks, though the bill has previously declined to cover them? It is unclear, and would make enforcement easier if the language was changed to allow more specificity. While broad wording such as this can make it possible to

162 (d) A student loan servicer shall comply with all applicable federal laws and regulations
163 relating to student loan servicing.⁶¹⁰ Any violation of federal law or regulation shall be deemed a
164 violation of this section and a basis upon which the commissioner may take enforcement action
165 pursuant to this act.

166 Section 24O. (a) The Commissioner shall⁶¹¹ have the authority to conduct investigations
167 and examinations for purpose of: (1) initial licensing, license renewal, license suspension, license
168 revocation or termination, or general or specific inquiry or investigation to determine compliance
169 with this act, the commissioner may access, receive and use any books, accounts, records, files,
170 documents, information or other evidence; (2) investigating violations or complaints arising
171 under this act.

172 (b) In making any examination or investigation authorized by this section, the
173 commissioner may access documents and records of the student loan servicer or person under
174 examination or investigation.⁶¹² Unless the commissioner has reasonable grounds to believe the
175 documents or records of the student loan servicer licensee or person have been, or are at risk of
176 being, altered or destroyed for purposes of concealing a violation of this act, the student loan
177 servicer or owner of the documents and records shall have access to the documents or records as
178 necessary to conduct ordinary business affairs.

179 (c) No student loan servicer or person subject to investigation or examination under this
180 section may knowingly withhold, abstract, remove, mutilate, destroy or any⁶¹³ books, records,
181 computer records or other information.⁶¹⁴

182 (d) The commissioner may suspend, revoke or refuse to renew any license issued under
183 this act if the commissioner finds that: (1) the licensee has violated any provision of this act or

target more servicers, it also makes it harder to determine what the original intent was when an
interpretation is in question.

⁶¹⁰ Please see *infra* Section II for a discussion of federal laws and regulations that may be applicable.

⁶¹¹ This instance of the use of “shall” would not compel action from the Commissioner, but would only specify that the commissioner must have the powers listed. The use of those powers would be left to the Commissioner’s discretion.

⁶¹² The use of “student loan servicer or person under examination” would raise the question of when people who are not student loan servicers might come under investigation.

⁶¹³ Typo: insert proper word between “or” and “any” or delete the word “or” following “destroy.”

⁶¹⁴ This prohibition against destroying records is also found in the Massachusetts General Laws governing the investigations and examinations of licensed mortgage loan originators in the Commonwealth. MASS. GEN. LAWS ch. 255F §14(f) (2018).

184 any regulation made pursuant to this act, or (2) any fact or condition exists which, if it had
185 existed at the time of the original application for the license, clearly would have warranted a
186 denial of such license.⁶¹⁵ No abatement of the license fee shall be made if the license is
187 surrendered, revoked or suspended prior to the expiration of the period for which it was issued.

188 (e) If the commissioner determines that a person or entity has violated any of the
189 provisions of his⁶¹⁶ act, or any regulation adopted pursuant to this act, or any person or entity
190 associated with said licensee has committed any fraud, engaged in dishonest activities or made
191 any misrepresentation, the commissioner may take action against such person or licensee⁶¹⁷ in
192 accordance his⁶¹⁸ powers promulgated in chapter 93 of the Massachusetts General Laws.⁶¹⁹

193 SECTION 5. Notwithstanding any general or special law to the contrary, the
194 commissioner shall file a report on the work of the Student Loan Ombudsman annually with the
195 clerks of the senate and house of representatives, the chairs of the house and senate committees
196 on ways and means and the house and senate chairs of the joint committee on financial services
197 beginning on January 1, 2018. The report shall include, but not be limited to: (1) the number of
198 complaints received by the Student Loan Ombudsman from student loan borrowers; (2) the types
199 of complaints received by the Student Loan Ombudsman from student loan borrowers; (3) any
200 recommendations to improve the effectiveness of the position of Student Loan Ombudsman; and
201 any recommendations to improve regulation, oversight, and enforcement of the Division of
202 Banks over the licensing and enforcement of student loan servicers.

⁶¹⁵ Any use of the word “may” in reference to the powers of the Commissioner would effectively mean that the Commissioner would have the power to decide to make use of that power or not. The use of, for example, “must” or “shall” would compel the commissioner to act, while “may” would allow them to choose what they believed the best course of action would be. *May*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶¹⁶ Typo: “his” should read “this.”

⁶¹⁷ The use of “any person or entity associated with said licensee” would imply that the bill could potentially have far wider reach outside its immediate impact on student loan servicers, so long as those persons or entities were potentially involved in one of the listed crimes and had an association with the licensee.

⁶¹⁸ Typo: insert proper word between “accordance” and “his.”

⁶¹⁹ The phrasing “...in accordance his [sic] promulgated in chapter 93 of the Massachusetts General Laws” would seem to imply that the Commissioner would have broad discretion in applying those powers detailed in chapter 93 but not detailed here. However, many of those powers are intended to apply only to certain licensees, and not all of them indiscriminately. For example, chapter 93 section 24H details the Commissioner’s police power, including the ability to direct the police in the course of an investigation. MASS. GEN. LAWS ch. 93 §24H(b) (2018). This is one of the Commissioner’s various powers that are not typically applied and exercised over third party loan servicers. MASS. GEN. LAWS ch. 93 §24A (2018). This in turn raises the question of which further powers are intended to apply to those covered by the bill, and a return to precisely who is covered.

203 SECTION 6. Notwithstanding any general or special law to the contrary, the Student
204 Loan Ombudsman shall ensure state employees are informed of their right to public loan
205 forgiveness.

206 SECTION 7. The commissioner shall promulgate rules and regulations necessary to
207 implement the provisions of this act not later than three months after the effective date of this act.⁶²⁰

208 SECTION 8. Sections 1, 2, 3 and 6, inclusive, shall take effect September 1, 2017.⁶²¹

209 SECTION 9. Section 4 shall take effect January 1, 2018.⁶²²

Language Analysis

Following the annotated Bill, this section further investigates and develops potential issues regarding the Bill’s use of particular language including (1) the meaning of “unfair or deceptive acts or practices;” (2) how the Bill defines loan servicers and licensees; (3) and how the Bill’s language implicates the discretion of the Ombudsman and the Commissioner. Many of the issues discussed form the basis of our specific recommendations regarding the Bill, which are presented in Part VII.⁶²³

Meaning of “Unfair or Deceptive Acts or Practices”

The Bill would prohibit student loan servicers from engaging in “unfair or deceptive acts or practices” and defines this term in the student loan context.⁶²⁴ “Unfair or deceptive acts or practices (UDAPS)” is a term of art in consumer protection law.⁶²⁵ Certain practices are

⁶²⁰ The Bill would empower the DOB to pass regulations necessary for its enforcement. The Massachusetts government has passed analogous regulations for the Mortgage Loan Servicing industry in 209 MASS. CODE REG. § 18.21A (2018), where it identifies unfair and unconscionable means of servicing mortgage loans. 209 MASS. CODE REGS. § 18.21A (2018).

⁶²¹ This date has, of course, passed and would need to be modified.

⁶²² This date would also need to be modified.

⁶²³ See *infra* Section VII: Recommendations.

⁶²⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(a) (Mass. 2017).

⁶²⁵ 35 MASS. PRAC., *Consumer Law* § 4:16 (2017).

explicitly banned by Massachusetts law as well as in regulations promulgated by the Attorney General’s Office and other state agencies.⁶²⁶ Regulations passed by the Attorney General supplement the law by defining specific acts as violations of the UDAP provision.⁶²⁷ However, the broad prohibition against UDAPs is used as a standard instead of a bright line rule.⁶²⁸ So while courts thus have the flexibility to apply the protection to the circumstances of each case, this standard provides little notice on its face to businesses about what types of conduct constitutes a UDAP.⁶²⁹ In Massachusetts, courts have declared that to meet the standard of a UDAP, conduct “must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.”⁶³⁰

The Bill would explicitly prohibit several UDAPs described *supra* in Section IV, including the misapplication of over- or under-payments and the misrepresentation of amount, nature, terms of fees, payments due, or obligations on the loans.⁶³¹

These prohibitions are not new to Massachusetts consumer protection law. A survey of the Code of Massachusetts Regulations (“CMR”) reveals that such practices are already explicitly banned as “unfair servicing practices” for third party loan servicers doing business in Massachusetts.⁶³² This means that the Bill would not hold student loan servicers to a higher standard than other third party loan servicers in the Commonwealth.⁶³³ Rather, it would explicitly extend existing prohibitions on third party loan servicer conduct to cover conduct by

⁶²⁶ 35 MASS. PRAC., *Consumer Law* § 4:17 (2017); *see e.g.* 209 MASS. CODE REGS. §§ 21, 21A (2018).

⁶²⁷ 35 MASS. PRAC., *Consumer Law* § 4:16 (2017).

⁶²⁸ 35 MASS. PRAC., *Consumer Law* § 4:16 (2017).

⁶²⁹ *See* 940 MASS. CODE REGS. §8.06 (2018) (regulations describing prohibited “unfair or deceptive acts or practices” of mortgage brokers and lenders written by the Massachusetts Attorney General); 35 MASS. PRAC., *Consumer Law* §4:16 (2017).

⁶³⁰ *Levings v. Forbes & Wallace, Inc.*, 396 N.E. 2d 149, 153 (Mass. App. Ct. 1979).

⁶³¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(a) (Mass. 2017).

⁶³² 209 MASS. CODE REGS. §18.21 (2018); *see also* 36 Mass. Prac., *Consumer Law* §20:116 (2017).

⁶³³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(a) (Mass. 2017); 209 MASS. CODE REGS. §18.21 (2018). *See also* 36 MASS. PRAC., *Consumer Law* §20:116 (2017).

student loan servicers.⁶³⁴ The Bill would put student loan servicers on notice that they too will be held to the standard of conducting business in a fair and honest manner, and would give a more direct means of enforcement to Massachusetts agencies.⁶³⁵

Entities Subject to Enforcement

Two particular linguistic features of the Bill could create confusion about which entities would be subjected to oversight by the DOB. First, the Bill uses several different terms to identify parties who may or may not be regulated by its provisions. Second, there are drafting differences between existing provisions of Chapter 93 of the Mass. Gen. Laws and the current language of the Bill that could introduce conflicting interpretations of how to implement the Bill if it becomes law. These two sources of uncertainty are explored below.

All Student Loan Servicers, or Licensees Only?

One of the main features of this Bill is that it would require many student loan servicers to obtain a license from the Commissioner before they could service loans in Massachusetts.⁶³⁶ It is important to note that the Bill would exempt certain entities from the licensure requirement.⁶³⁷ The Bill's proposed language referring to licensed servicers and exempt servicers is inconsistent. As a result of the uncertainty surrounding this exemption, it becomes unclear exactly which provisions would apply to all student loan servicers and which would apply only to those subjected to the licensure requirement.

Section 2 of the Bill would create a definition of "student loan servicer" and add it into Chapter 93 of the Mass. Gen. Laws.⁶³⁸ That definition would read: "any person responsible for

⁶³⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(a) (Mass. 2017).

⁶³⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(a) (Mass. 2017).

⁶³⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24M(a) (Mass. 2017).

⁶³⁷ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24M(b) (Mass. 2017).

⁶³⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 2 § 24 (Mass. 2017). The definition of "student loan servicer" would be inserted into Section 24 of Chapter 93. *See* MASS. GEN. LAWS ch. 93 §24 (2018).

the servicing of a student education loan to a student loan borrower.”⁶³⁹ This definition makes no mention of the distinction between servicers required to obtain a license and those exempt from the requirement. This part of the Bill therefore could easily lead one to believe that the term “student loan servicer” would apply to all servicers, exempt and non-exempt.

However, the portion of the Bill that would introduce the exemption raises the idea that perhaps the framers of this Bill intend for the term “student loan servicer” to have a more narrow application in proposing the addition of Section 24M to Chapter 93 of the Mass. Gen. Laws.⁶⁴⁰ The first sentence in the proposed Section 24M would read: “no *person or entity shall act as a student loan servicer*, directly or indirectly, without first obtaining a license from the commissioner, unless such person is exempt from licensure pursuant to this section.”⁶⁴¹ It additionally would state that “any *person or entity seeking to act* within Massachusetts *as a student loan servicer* shall submit a written application...”⁶⁴² This phrasing suggests that an entity that wishes to act as a student loan servicer would not already be a student loan servicer and therefore, that it would only be officially deemed a student loan servicer once it has obtained a license.

Occasionally after the proposed language in Section 24M(a)-(c), the Bill would use the term “applicant” or “licensee” to refer to specific parties, seemingly drawing a clear distinction between those servicers who have licenses and those who do not.⁶⁴³ After this point in the text, the distinction becomes less clear; Section 4 of the Bill would continue on to list what “a student loan servicer shall not” do.⁶⁴⁴ One would assume that this list of offenses would apply to both

⁶³⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 2 § 24 (Mass. 2017).

⁶⁴⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24M(a) (Mass. 2017).

⁶⁴¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24M(a) (Mass. 2017) (emphasis added).

⁶⁴² S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24M(d) (Mass. 2017) (emphasis added).

⁶⁴³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24M(d) (Mass. 2017).

⁶⁴⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N (Mass. 2017).

licensed and exempt servicers given the intention behind this Bill, but the text alone does not make that point clear. Later parts of the Bill would add to the ambiguity. For example, the proposed Section 24N(c) would be ambiguous in that it is not exactly clear to whom the provision applies.⁶⁴⁵

Section 24N(c) would begin by saying that “a student loan servicer or a person or entity *exempt* from licensure pursuant... to this act” is responsible for maintaining adequate records for each transaction related to a student loan borrower’s education loans for at least two years following the final payment or assignment of such loan or such longer period required by law.⁶⁴⁶ This makes it appear as though all of proposed Section 24N(c) would limit even student loan servicers who are exempt from the licensure requirement of the Bill. The next part of proposed Section 24N(c) would state that the Commissioner may request that a student loan servicer make these records available and that this must happen within five business days.⁶⁴⁷ However, the last sentence of this section states that the Commissioner “may grant *a licensee* additional time to make such records available upon request.”⁶⁴⁸ The result is that it is not clear how much of Section 24N(c) would apply to student loan servicers exempt from licensure and how much would apply to those who are not.

Finally, the proposed Section 25O(e) in the Bill reads as follows:

If the commissioner determines that a *person or entity* has violated any provisions of [t]his act, or any regulation adopted pursuant to this act, or *any person or entity associated with said licensee* has committed any fraud, engaged in dishonest activities or made any misrepresentation, *the commissioner may take action against such person or licensee* in accordance [with] his powers promulgated in chapter 93 of the Massachusetts General Laws.⁶⁴⁹

⁶⁴⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(c) (Mass. 2017).

⁶⁴⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(c) (Mass. 2017) (emphasis added).

⁶⁴⁷ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(c) (Mass. 2017) (emphasis added).

⁶⁴⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24N(c) (Mass. 2017) (emphasis added).

⁶⁴⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24O(e) (Mass. 2017) (emphasis added).

The use of several different terms used previously in the Bill to refer to different kinds of servicers, all appearing in this last sentence of Section 4, would arguably create more uncertainty as to which terms refer to all servicers and which refer only to those who are required to have licenses. “Person or entity” could refer to those who have not yet (or are not required to) secure licenses. However, the second clause of this sentence would use the phrase “said licensee” to refer to the “person or entity” that may have violated a provision of the Bill referenced in the first clause of this sentence.⁶⁵⁰ After that, the sentence would state that the Commissioner may take action against “such person or licensee” for violating the provisions of the Bill.⁶⁵¹ It is unclear if “person” in that part of the sentence would refer only to someone associated with a licensee who engages in problematic behavior, or if the use of the word “person” there would be meant to include people acting as servicers who are exempt from the licensure requirement.

Essentially, there is no explicit explanation that makes it clear when the Bill would be referring to all student loan servicers, only to those who require a license to operate in Massachusetts, or only to those who are exempt from this requirement. One might argue that the intent of the Bill should lead one to conclude that the Bill’s prohibitions would apply to all servicers. A servicer disciplined under this act might try to argue otherwise. It is necessary to clarify exactly to whom each section of the Bill would apply in order to eliminate this ambiguity.

Potential Language Issues Between the Bill and Existing Law

There are some discrepancies between language that would be used in the Bill and the language in Section 24 of Chapter 93 of the Mass. Gen. Laws that could make interpretation and enforcement more difficult in the future.⁶⁵² The Bill would create a new category of servicers to

⁶⁵⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24O(e) (Mass. 2017).

⁶⁵¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24O(e) (Mass. 2017).

⁶⁵² MASS. GEN. LAWS ch. 93 § 24 (2018).

stand alongside those that already exist in current law, and would create standards for how those new servicers are to be treated.⁶⁵³ However, it is not clear how much of the rest of the preexisting Chapter 93 Sections 24 through 24K are intended to apply to student loan servicers.

One of the additions to Chapter 93 that the Bill proposes, Section 24O(e), would state that “[i]f the commissioner determines that a person or entity has violated any of the provisions of this [sic] act, or any regulation adopted pursuant to this act, or any person or entity associated with said licensee has committed any fraud, engaged in dishonest activities or made any misrepresentation, the commissioner may take action against such person or licensee in accordance his powers promulgated in Chapter 93 of the Mass. Gen. Laws.”⁶⁵⁴ The inclusion of the Commissioner’s full powers would seem intended to extend the Commissioner’s full powers as listed through Section 24 to 24K over the student loan servicers, but not all of said powers may be applied to everyone overseen by the DOB. Section 24A (“Term of license; bond, registration; rules and regulations”) places different burdens upon debt collectors and third party loan servicers, as the latter are not required to obtain licenses or to comply with sections 24F to 27.⁶⁵⁵ The new category of student loan servicers would not fit into the law as it exists now, and the Bill would not make clear if certain powers are intended to apply to them, or if the normal treatment of third party loan servicers and debt collectors should be preserved as much as possible.

The Bill would also fail to clarify whether student loan servicers are required to file bonds with the state treasurer, as debt collectors are required to do.⁶⁵⁶ As given in Section 25, the bond for debt collectors is intended to act as a guarantee for collection agreements, and it would

⁶⁵³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 1-4 (Mass. 2017).

⁶⁵⁴ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 § 24O(e) (Mass. 2017).

⁶⁵⁵ MASS. GEN. LAWS ch. 93, §24A (2018).

⁶⁵⁶ MASS. GEN. LAWS ch. 93, §24A(e) (2018).

potentially be useful to extend that protection to cover potential abuses by student loan servicers, so that the state treasury would already have the bond in its possession as a guarantee that any potential damages would be covered.⁶⁵⁷

Any new act would be subject to interpretation after it is passed, which can lead to unintended consequences.⁶⁵⁸ The Bill's wording would not clearly define how the new category of student loan servicers is intended to overlap with the existing third party loan servicers and debt collectors.⁶⁵⁹ The wording also would not clearly state whether only third party loan servicers should be considered covered by the Bill, or if debt collectors might be included in some circumstances.⁶⁶⁰ This would mean that those tasked with putting the Bill into practice would be required to work with their own interpretations of the Bill and its intent.⁶⁶¹ If debt collectors are to be covered by some parts of the Bill, it would be better to state that more explicitly within the Bill.

Language That Leaves Uncertain How the Bill Might be Implemented in Practice

The Bill in its current form would give the Ombudsman and the Commissioner discretion in deciding how to implement the Bill's provisions.⁶⁶² What is left to the discretion of the Ombudsman is the result of the limits of legislation in general; there is only so much that a Bill itself can lay out, and so details about daily operation are typically left to administrative officials, and indeed, to whoever will occupy the position of the Ombudsman. The discretion left to the Commissioner would be built into the Bill; for the most part, violation of the Bill's provisions

⁶⁵⁷ MASS. GEN. LAWS ch. 93, §25 (2018).

⁶⁵⁸ *See supra* Section VI: Tools of Statutory Analysis.

⁶⁵⁹ *See supra* note 584 and accompanying text.

⁶⁶⁰ *See supra* note 619 and accompanying text.

⁶⁶¹ *See supra* Section VI: Tools of Statutory Analysis.

⁶⁶² *See supra* notes 588-89 and accompanying text.

would not automatically trigger license revocation, and instead would leave room for the Commissioner to make decisions using their own judgment.⁶⁶³

Overall, a major concern for the Bill's future, if it becomes law, is that it is uncertain how the officials occupying the positions of Ombudsman and the Commissioner would execute the Bill's provisions.⁶⁶⁴ Because there would be much room for these officials to exercise their discretion in implementing their mandated duties, whoever holds those offices could execute the duties of their office stringently or leniently.⁶⁶⁵ This section will explore how the language of the Bill would create the opportunity for officials to exercise their independent judgment to the Bill's benefit or its detriment.

Limits of Legislation: The Ombudsman's Discretion

The Bill seeks to create an institutional resource in the Ombudsman and describes what the Ombudsman's duties would be.⁶⁶⁶ However, because the Bill would only serve as a framework for how the Ombudsman will operate, there is nothing specifically in the Bill's language to ensure that the Ombudsman would be any more effective than the resources for borrowers that already exist. The framework the Bill would create is general in scope and thus would provide little detail about exactly how those duties are to be accomplished and what the materials it produces are to look like.⁶⁶⁷ The language of the Bill would leave it open for the person who becomes the Ombudsman to steer the direction of the office.⁶⁶⁸

For example, all that would be specified in regards to the substance of the borrower education course that the Ombudsman must develop in consultation with the Commissioner is

⁶⁶³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec 4 (Mass. 2017); *see supra* notes 597-601 and accompanying text.

⁶⁶⁴ *See supra* notes 589-90, 597-98, 600-01, 611, 615 and accompanying text.

⁶⁶⁵ *Id.*

⁶⁶⁶ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L (Mass. 2017); *see supra* notes 588-90 and accompanying text.

⁶⁶⁷ *See supra* note 590 and accompanying text.

⁶⁶⁸ *See supra* note 589-90 and accompanying text.

that it must “include educational presentations and materials regarding student education loans” and that the program shall include at a minimum “an explanation of key loan terms, prescribed documentation requirements, monthly payment obligations, income-based repayment options, loan forgiveness and disclosure requirements.”⁶⁶⁹ While this is all important information to be made available to current and future borrowers, as a lack of understanding about the lending process is such a pervasive problem, the topics for the borrower education course would be presented very topically. Depending on how the Ombudsman decides to prepare the course and materials, they could be difficult to follow, difficult to find, and be generally inaccessible. How good of a job would the Ombudsman do at making these materials widely available? How many people would know that these materials exist and where to find them? Would people need computers to access this information? How easily navigable would such a website be? And how tailored to the different needs of different borrowers would these resources be? Who would be able to take the class? Would it be available in multiple languages? The Bill would not reference anywhere the idea that certain groups of people are disparately impacted and therefore require additional protection. This omission would mean that the duty of recognizing the need to provide assistance to different groups of people in different ways would be left entirely up to the Ombudsman officeholder.

The Bill would require that the Ombudsman shall process and facilitate the resolution of complaints, but would provide no details as to what system would be used to accomplish these tasks.⁶⁷⁰ The Bill’s language would make it sound as if a single person would perform the job that the Ombudsman is meant to accomplish. Would there be any staff? Would the Ombudsman work alone, and if so, would they be quickly overwhelmed? Or would the fact that there is only

⁶⁶⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(c) (Mass. 2017).

⁶⁷⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24L(b) (Mass. 2017).

one Ombudsman working on the problem mean that the office would be made less accessible in order to manage the Ombudsman's workload?

The Bill would be most clear about what information the Commissioner, with the Ombudsman's input, must provide to the Massachusetts legislature each year. It would specify that this report must include the number of complaints the Ombudsman received from student loan borrowers, the types of complaints received, the Ombudsman's recommendations to improve the effectiveness of its own position, and the Ombudsman's recommendations to improve the DOB's regulation, oversight, and enforcement of student loan servicers.⁶⁷¹ This clarity would be good in that it would allow the legislature to make adjustments to the system created by the Bill. However, there is also a risk that the information that the Ombudsman collects and relays about the number and kinds of complaints they receive could be misleading rather than informative. For example, the Dept. of Ed. has pointed to the low number of complaints received as evidence that its system is working, when this result is just as likely to be indicative of how difficult the complaint system is to use.⁶⁷² Therefore even the legislature's oversight of the Ombudsman would be in part dependent on how the Ombudsman chooses to collect this data. As a result, it is uncertain from the text of the Bill alone whether the Ombudsman would be a better resource than those already available without knowing who is going to occupy the position.

At this time, there is not sufficient information from the other states which have passed similar legislation to predict what direction the Ombudsman could go in implementing the

⁶⁷¹ S.B. 129, 190th Gen. Court, Reg. Sess. at sec. 4 (Mass. 2017).

⁶⁷² DEANNE LOONIN & PERSIS YU, NAT'L CONSUMER LAW CTR., POUNDING STUDENT LOAN BORROWERS: THE HEAVY COSTS OF THE GOVERNMENT'S PARTNERSHIP WITH DEBT COLLECTION AGENCIES 21 (2014), <https://www.nclc.org/images/pdf/pr-reports/report-sl-debt-collectors.pdf>.

proscribed duties. The Illinois Act does not go into effect until December 2018,⁶⁷³ the California Act did not create a Student Loan Ombudsman,⁶⁷⁴ and Connecticut has experienced significant delays in filling the Student Loan Ombudsman position due to funding issues.⁶⁷⁵ Dr. Charles Burt was recently hired as the Student Loan Ombudsman in Washington D.C., and as such, it may be useful to observe his work as an example of what the Massachusetts Student Loan Ombudsman might look like.⁶⁷⁶

“May” vs. “Shall”: The Commissioner’s Discretion

Oversight of student loan servicers by the DOB is an important component of the Bill. Giving the Commissioner the authority to use the state’s power to punish servicers for violations of the Bill’s guidelines (prohibiting servicers from deceiving borrowers or withholding information from the DOB) would ideally force servicers to behave and disengage with predatory lending practices. However, the Commissioner would have a large amount of discretion, and it is possible that oversight and enforcement against violating servicers would not be all that effective.

This result is likely because the Bill would give a lot of freedom to the Commissioner to treat the provisions of the Bill as suggestions rather than orders.⁶⁷⁷ Some of the Commissioner’s duties would be stated as things that he or she ‘shall’ do, while most others would be stated as steps that the Commissioner ‘may’ take. There are only a few instances in the Bill where some condition would automatically trigger a particular response from the Commissioner according to the letters of this proposed law. So while the Commissioner “*shall* automatically” suspend a license if they determine that a check filed to pay a license or renewal fee has been dishonored,

⁶⁷³ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540.

⁶⁷⁴ Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 5586.

⁶⁷⁵ Email from Matthew Lesser, *supra* note 470.

⁶⁷⁶ Interview with Dr. Charles Burt, *supra* note 510.

⁶⁷⁷ See *supra* notes 589-90, 597-98, 600-01, 611, 615 and accompanying text.

and the Commissioner “*shall* notify the licensee in writing of the automatic suspension,” the Bill would not *demand* that the Commissioner take action in a number of other situations, mostly in regards to how the Commissioner is to enforce against servicer violations.⁶⁷⁸

For example, the Bill would state that the Commissioner “*may* require a financial statement prepared by a certified public accountant or a public accountant, a history of criminal convictions of the applicant or any other information deemed necessary” to supplement a servicer’s license application, but would not require the Commissioner to do so.⁶⁷⁹ The Bill additionally, and perhaps more significantly, would say that the Commissioner “*may* suspend, revoke, or refuse to renew any license issued” according to the Bill’s provisions for violations, and that the Commissioner “*may* take action” against servicers in accordance with his or her powers under Chapter 93 of the Mass. Gen. Laws.⁶⁸⁰ If the Commissioner is not particularly motivated to strictly enforce the provisions of this Bill, there would be no formal structure in place to provide the incentive to do so because the decision to take such measures would be left to the discretion of the Commissioner.

One feature of the Bill that would seem to provide the Commissioner with the incentive *not* to strictly enforce the guidelines set out by the Bill is that the licensing fees would make up the source of funding the Ombudsman.⁶⁸¹ It would be possible that the Ombudsman could lose a significant portion of its funding if the Commissioner is aggressive in revoking licenses from loan servicers. The overall concern here is that whoever would become responsible for facilitating the oversight of loan servicers as Commissioner may do so in a manner that is merely convenient while still fulfilling the letter of the law. It therefore matters enormously how

⁶⁷⁸ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24M-O (Mass. 2017) (emphasis added).

⁶⁷⁹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24N(c) (Mass. 2017) (emphasis added).

⁶⁸⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 § 24O(d) (Mass. 2017) (emphasis added).

⁶⁸¹ See *supra* note 596 and accompanying text.

seriously they would take this important issue, what their specific relationship to loan servicers would be, and how well they would understand the disparate impacts different groups of borrowers face in trying to finance their education.

VII. RECOMMENDATIONS

So far, this commentary has walked through the context of student loan debt, the existing regulatory framework, the variations of BBORs in different states, and an analysis of how the Bill fits into the student loan landscape and how it may help Massachusetts borrowers. This section shifts focus to presenting five key recommendations that will better promote the Bill's goals. The recommendations are as follows: (1) incorporate language to explicitly state the intent of the Bill; (2) clarify ambiguous language if possible; (3) add in additional protections for consumers; (4) relocate the Student Loan Ombudsman within the Attorney General's Office, while leaving the licensing and investigation of servicers to the expertise of the Division of Banks; and (5) utilize a volume-based funding scheme to ensure adequate funding for the Student Loan Ombudsman.

Language-Based Recommendations

(1) Purpose and Intent Language

Interpretation of statutes by those empowered to enforce it often includes consideration or inquiry into the intent of the legislation and the legislature that passed it.⁶⁸² The Bill refers to its own purposes when it requires that student loan servicers applying for licenses conduct their business “honestly, fairly, equitably, carefully and efficiently *within the purposes and intent of this act.*”⁶⁸³ It would be prudent to include a statement of purpose within the Bill itself to help people understand what the drafters were trying to do and how they should adapt their enforcement and practice to fill in those inevitable gaps that will be left in the Bill's language.

⁶⁸² *A Guide to Reading, Interpreting and Applying Statutes*, GEORGETOWN U. L. CENTER 1, 9 (2017), <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/A-Guide-to-Reading-Interpreting-and-Appling-Statutes.pdf>.

⁶⁸³ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 §24M(d)(2) (Mass. 2017) (emphasis added).

Massachusetts State Senator Eric Lesser, who sponsored the Bill in the Senate, indicated that the legislation’s purpose of the is to “give students and their families new rights and protections as they navigate the loan repayment process.”⁶⁸⁴ **Since the Bill is meant to protect the rights and interests of borrowers of education loans, we recommend changing the title of the Bill from “Student Loan Bill of Rights” to “Student Loan Borrower’s Bill of Rights.”** While several states, including Connecticut and Illinois, have named their legislation, or sections thereof “Student Loan Bill of Rights,” others, including the U.S. Government, have centered the borrower in the title.⁶⁸⁵ Refer to Appendix A for a list of proposed and enacted state BBORs and their titles.

We also recommend including a Preamble to the Bill. Preambles generally serve two related functions: to articulate the purpose of the legislation through a description of the “mischief” it is designed to cure, and to provide guidance to statutory interpretation.⁶⁸⁶ For example, the Federal Student Loan Borrower Bill of Rights contains a preamble that reads:

To establish student loan borrowers' rights to basic consumer protections, reasonable and flexible repayment options, access to earned credentials, and effective loan cancellation in exchange for public service, and for other purposes.⁶⁸⁷

As described above in Section VI, provisions in the Bill may be subject to interpretation once it is enacted.⁶⁸⁸ A Preamble will frame the purpose of the Bill and will provide valuable guidance for any statutory interpretation that may occur in the future.⁶⁸⁹

⁶⁸⁴ Eric Lesser, *It's time for a student loan bill of rights in Massachusetts*, MASSLIVE (Mar.17, 2017), http://www.masslive.com/opinion/index.ssf/2017/03/guest_viewpoint_its_time_for_a.html.

⁶⁸⁵ An Act Concerning A Student Loan Bill of Rights, Public Act No. 15-162, 2015 Conn. Acts 656 (Reg. Sess.); Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540; Student Loan Borrowers' Bill of Rights Act of 2017, H.R. 3630, 115th Cong. (2017).

⁶⁸⁶ Kent Roach, *Uses and Audiences of Preambles in Legislation*, 47 MCGILL L.J. 129, 153 (2001) <http://www.lawjournal.mcgill.ca/userfiles/other/8178207-47.1.Roach.pdf>.

⁶⁸⁷ Student Loan Borrowers’ Bill of Rights Act of 2017, H.R. 3630, 115th Cong. (2017).

⁶⁸⁸ See *supra* Section VI: Tools of Statutory Interpretation.

⁶⁸⁹ Roach, *supra* note 686, at 153.

(2) General Application Language

As described above in Section VI, the Bill explicitly identifies several practices that would be deemed “unfair or deceptive” *per se*.⁶⁹⁰ **To leave the door open for general application of the “unfair or deceptive” standard, we recommend inserting a provision clarifying that the practices prohibited in the Bill are illustrative, but not exhaustive.** This technique is used in the CMR, which states: “[a] third party loan servicer may not use unfair or unconscionable means in servicing any loan. *Without limiting the general application of the foregoing*, the following conduct is a violation of 209 CMR 18.21...”⁶⁹¹ The Regulations explicitly enumerate thirteen third party loan servicer practices that are considered unfair *per se*, but also leaves the door open for other practices not enumerated to be considered unfair or unconscionable.⁶⁹² Amending the Bill with similar inclusive language would make it clear that student loan servicers who engage in unfair or deceptive conduct may still be in violation of the statute even when their specific conduct is not explicitly forbidden in the Bill.

(3) Additional Protection Provisions

In addition to general application language, the Bill can guarantee further protections for student borrowers by responding directly to commonly reported problems and abuses. **Requiring or banning specific practices, either in the proposed Bill or through supplementary regulations, can have the benefit of giving notice to student loan servicers, providing direction to enforcement agencies, and empowering student borrowers and their advocates.**

As stated above in Section V, the Illinois BBOR provides additional protections in this manner.⁶⁹³ Illinois now mandates that student loan servicers specially train designated repayment

⁶⁹⁰ See *supra* Section VI: Meaning of “Unfair or Deceptive Acts or Practices.”

⁶⁹¹ 209 MASS. CODE REGS. 18.21 (LexisNexis 2018) (emphasis added).

⁶⁹² 209 MASS. CODE REGS. 18.21 (LexisNexis 2018).

⁶⁹³ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540.

specialists, to whom borrowers are automatically directed if they require or request specialized assistance.⁶⁹⁴ Servicers in Illinois are also prohibited from implementing compensation schemes which may incentivize repayment specialists to violate any provisions of the statute.⁶⁹⁵ Adopting these or similar measures could benefit Massachusetts borrowers as well.

Additional provisions to consider implementing through the Bill or supplementary regulations include: (a) Illinois-style requirements for trained repayment specialists dedicated for borrowers experiencing financial hardship or other complex issues; (b) prohibition on compensation schemes that may incentivize loan servicer employees to violate the provisions of the Bill; (c) forbidding servicers from placing student borrowers on the wrong repayment plan, (d) prohibiting negligent provision of inaccurate information about repayment options available, (e) requiring that servicers apply payments in a timely manner, (f) requiring servicers to give borrowers adequate notice if their loan servicer changes,⁶⁹⁶ and (g) requiring servicers to visibly disclose a borrower's income certification expiration date and the consequences of failing to re-certify, including the newly calculated repayment amount.⁶⁹⁷

More defined regulations may make it easier for Massachusetts residents to adjudicate UDAPs by student loan servicers, either through the courts or the Student Loan Ombudsman.⁶⁹⁸ Clear regulations would also provide explicit notice to student loan servicers about what type of

⁶⁹⁴ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 (a federal student loan borrower may be eligible for referral to a repayment specialist if he or she has (1) requested information to reduce or suspend his or her monthly payments; (2) indicated that he or she is experiencing financial hardship or difficulty making payments; (3) missed two consecutive monthly payments; (4) is at least 75 days delinquent; (5) is enrolled in discretionary forbearance for more than 9 of the previous 12 months; (6) consolidated one of more loans out of default within the past 12 months; or (7) not completed a program of study. Private loan borrowers are eligible for referral to a repayment specialist only if they fall into one of the first two requirements).

⁶⁹⁵ See Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540.

⁶⁹⁶ Cox, *supra* note 19, at 231.

⁶⁹⁷ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540.

⁶⁹⁸ Cox, *supra* note 19, at 231.

conduct is unfair or deceptive, and therefore unlawful, which would likely have a deterring effect on the servicers.⁶⁹⁹

Functional Recommendations

Connecticut and D.C. have both faced significant setbacks in establishing the Student Loan Ombudsman position after passing their respective BBORs.⁷⁰⁰ These setbacks stemmed from a combination of a misalignment of priorities among agencies responsible for housing the Ombudsman position and an inadequate funding structure.⁷⁰¹ The recommendations that follow seek to learn from the challenges faced by other jurisdictions as they implement their BBORs and amend Massachusetts' Bill in a way that addresses those challenges.

(4) Housing the Student Loan Ombudsman in the Attorney General's Office

The effectiveness of the Ombudsman will likely depend on the priorities and resources of the agency that hires and supports them. **For this reason, we recommend amending Section 4 of the Bill to locate the new Student Loan Ombudsman within the Office of the Attorney General rather than the DOB. The DOB would continue to be responsible for the licensing and investigation requirements.** The following section demonstrates that the DOB, while well-equipped to license and investigate student loan servicers, may lack the resources and incentive needed to effectively carry out the critical responsibilities of the Ombudsman position. On the other hand, the Attorney General's Office's expertise, practices, and focus align with the Ombudsman's required duties.

⁶⁹⁹ *Id.*

⁷⁰⁰ *See supra* Section V: Variations Among Borrower's Bill of Rights, In-depth Look at State Legislation, Funding Scheme.

⁷⁰¹ *Id.*

As the Bill now reads, the DOB would be responsible for the investigation and licensing of student loan servicers (a new industry for the agency), as well as the creation of the Ombudsman position. This section examines how the Bill's proposed tasks would interact with the DOB's current operations and policies, and questions whether it is the agency best suited to take on all responsibilities for implementation.

The structure proposed in this section is modeled after Illinois' BBOR, which passed in 2017. Functionally, it means that the Attorney General's Office would be tasked with appointing the Ombudsman and other staff as necessary. The Ombudsman would still work in consultation with the DOB and the Commissioner to ensure and facilitate communication between the two agencies.

Challenges in Connecticut

Massachusetts legislators used Connecticut's Student Loan Bill of Rights as a template when drafting the Bill.⁷⁰² As such, the responsibilities and duties of the Ombudsman in Connecticut and Massachusetts are virtually identical.⁷⁰³ Challenges experienced in Connecticut may therefore occur in Massachusetts as well if the Bill is passed in its current form. Even though Connecticut passed its BBOR in 2015, the position of the Ombudsman has not yet been created or filled.⁷⁰⁴ Connecticut State Representative Matthew Lesser explained that this is partially explained by funding issues, but not entirely.⁷⁰⁵ In response to an inquiry regarding any sources of opposition to the Connecticut Bill before it was passed, Lesser wrote:

We did not have opposition from Connecticut Banking Department to regulating student loan servicers. On the contrary, we have had their active cooperation and they have built on their expertise regulating and examining mortgage servicers. As mentioned above, *we have had problems finding a place to house the Student Loan*

⁷⁰² Interview with Natalie Higgins, Rep., Mass. ST. Leg. in Boston, Mass, in Boston, Mass. (Oct. 25, 2017).

⁷⁰³ *Id.*

⁷⁰⁴ E-mail from Matthew Lesser, Rep., *supra* note 470.

⁷⁰⁵ *Id.*

*Ombudsman - some of that relates to funding, but also reflects a tension within the [Connecticut] Department [of Banking] over what their priorities should be.*⁷⁰⁶

Representative Lesser's response suggests that although the Department of Banking is well equipped to license servicers, it may lack the resources or vested interest in managing the extensive responsibilities of the Ombudsman.⁷⁰⁷ If Massachusetts' DOB experiences similar struggles in housing the Ombudsman, it could render the office far less effective.

Massachusetts' Division of Banks

The DOB is responsible for supervising a wide array of lending institutions, including banks, debt collectors, mortgage lenders and brokers, and consumer finance companies.⁷⁰⁸ Its mission is "to ensure a sound, competitive, and accessible financial services environment throughout the Commonwealth."⁷⁰⁹ The DOB's stated goals emphasize supervision and regulation of relevant industries, while also providing consumer protection and outreach to help people make informed financial decisions.⁷¹⁰ Its relevant powers are established in Chapter 93, Section 24 of the Mass. Gen. Laws, which, among other things, grants the Commissioner the ability to license all debt collectors wishing to operate in the Commonwealth.⁷¹¹

The Commissioner may investigate the licensee's records, and has free access to the records for this purpose.⁷¹² The licensee has an obligation to maintain the records for the Commissioner.⁷¹³ The Commissioner may revoke the license for a violation or another reason that the Commissioner considers suitable, provided that there is first a hearing.⁷¹⁴ Instead of

⁷⁰⁶ *Id* (emphasis added).

⁷⁰⁷ *Id*.

⁷⁰⁸ *Division of Banks*, MASS.GOV, <https://www.mass.gov/orgs/division-of-banks> (last visited, Mar. 6, 2018).

⁷⁰⁹ *Goal of the Division of Banks*, MASS.GOV, <https://www.mass.gov/service-details/goals-of-the-division-of-banks> (last visited, Mar. 6, 2018).

⁷¹⁰ *Id*.

⁷¹¹ MASS. GEN. LAWS ch. 93, § 24A (2018).

⁷¹² MASS. GEN. LAWS ch. 93, §§ 24C, 24D (2018).

⁷¹³ MASS. GEN. LAWS ch. 93, §§ 24C, 24D (2018).

⁷¹⁴ MASS. GEN. LAWS ch. 93, § 24D (2018).

revoking the license the Commissioner can choose to suspend it for a period of time.⁷¹⁵ He has the power to summon licensees to make reports and can punish the licensees with fines of up to \$500 or imprisonment not more than six months.⁷¹⁶ Each separate day a violation occurs or continues occurring is considered a separate offense, so fines or imprisonment time could add up quickly.⁷¹⁷ In more extreme cases, the Commissioner may choose to give directions to the state or local police to aid in the agency's investigations, which the Commissioner is allowed to make as he considers necessary.⁷¹⁸ The Commissioner, if he believes that the licensee has or is going to violate any of the restrictions, may issue a "cease and desist" order after a hearing, or a "temporary cease and desist" order immediately without a hearing, if a delay would hurt the public interest.⁷¹⁹ Finally, the Commissioner may pursue any needed civil action to enforce these powers.⁷²⁰

As described above, the DOB has the experience and expertise to fulfill the provisions in the Bill that require it to license and investigate student loan servicers in order to hold them to a common standard of business practices that are in accordance with Massachusetts consumer protection law. The licensing and investigation activities would be at home within the DOB. Shifting the activities to another agency would be inefficient and duplicative, requiring the recreation of full powers and abilities of the DOB within that other agency.

As of January 18, 2018 the DOB has not taken an official stance on the Bill. The only discovered, published opinion from the DOB on licensing student loan servicers comes from 1995, stating:

⁷¹⁵ MASS. GEN. LAWS ch. 93, § 24D (2018).

⁷¹⁶ MASS. GEN. LAWS ch. 93, § 24F (2018)

⁷¹⁷ MASS. GEN. LAWS ch. 93, § 24F (2018)

⁷¹⁸ MASS. GEN. LAWS ch. 93, § 24H (2018).

⁷¹⁹ MASS. GEN. LAWS ch. 93, § 24J (2018).

⁷²⁰ MASS. GEN. LAWS ch. 93, § 24K (2018).

The business of servicing student loans does not require a Massachusetts license. If any student loan account becomes 30 days overdue, however, it would be considered a "debt" under Mass. Gen. Laws chapter 93 § 24. The entity servicing such a debt would thus be required to obtain a collection agency license to collect payments on the debt. The entity would also be subject to all other restrictions on the conduct of a collection agency contained in 209 CMR 18.00.⁷²¹

While its opinion on the usefulness of licensing student loan borrowers may have changed in the intervening twenty-two years, the DOB has published no public opinion to indicate such a change. A DOB representative indicated that the agency is unlikely to put out a public opinion on the Bill in the near future.⁷²²

While the DOB cites consumer education as one of its primary goals, this education has been focused on mortgage issues such as foreclosure, counseling for first-time homebuyers, broad financial literacy, and the impact of identity theft and ATM skimming.⁷²³ DOB staff give talks on identity theft, ATM skimming, and regulatory burden.⁷²⁴ The audience of these talks are industry professionals rather than consumers.⁷²⁵ To achieve its other education objectives, the DOB provides funding to other organizations to conduct the additional education programs.⁷²⁶ The DOB does not appear to be prepared to host a position charged with the scope of education and outreach duties proposed for the Ombudsman in the Bill. The Ombudsman may face challenges implementing their education and outreach duties if they are housed within the DOB.

⁷²¹ *Second Quarter 1995 Digest of Opinions: 95-053 Student Loan Servicing*, MASS.GOV, <http://www.mass.gov/ocabr/banking-and-finance/laws-and-regulations/opinions-and-decisions/dob-selected-opinions/selected-opinions-1993-q-2-1997/second-quarter-1995-digest-of-opinions.html> (last visited, Mar. 6, 2018).

⁷²² Telephone Interview with Brenda Miller, Staff Member, Massachusetts Division of Banks (Jan. 18, 2018).

⁷²³ MASS. DIV. BANKS, ANNUAL REPORT 2016 2 (2017), <http://www.mass.gov/ocabr/docs/dob/dob2016annualreport-pdf.pdf>.

⁷²⁴ *Id.* at 3.

⁷²⁵ *Id.*

⁷²⁶ *Id.*

Inspiration from Illinois

Unlike the legislation in Connecticut, the Illinois BBOR allocates critical responsibilities between various state agencies. Illinois assigned licensing and investigation of student loan servicers to the Department of Financial and Professional Regulation, which encompasses the Division of Banking,⁷²⁷ and housed the Student Loan Ombudsman with the Office of the Attorney General.⁷²⁸ While apportioning these tasks between separate actors, the Illinois BBOR includes provisions for collaboration between the two state agencies. For instance, the Ombudsman, while overseen by the Attorney General's Office, is designed to work in consultation with the Secretary of the Department of Financial and Professional Regulation.⁷²⁹ The Act explicitly provides that the Secretary may pursue legal action against a servicer through the Attorney General's Office, including maintaining an action in the name of the people of Illinois and applying for an injunction to enjoin a person from engaging in unlicensed student loan servicing activity.⁷³⁰ The Attorney General's Office may, on its own, enforce a violation of Article 5 of the Act, which regulates the activities of student loan servicers, under the Consumer Fraud and Deceptive Business Practices Act.⁷³¹

Massachusetts' Attorney General's Office

Drawing on inspiration from the Illinois BBOR, we recommend housing Massachusetts' Ombudsman position within the Attorney General's Office. It appears that the Office may be receptive to the goals of the Ombudsman position, and better equipped to carry out its responsibilities than the DOB. The Attorney General's Office has publicly recognized the

⁷²⁷ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §15-15.

⁷²⁸ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §10-5.

⁷²⁹ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §10-5.

⁷³⁰ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §20-85.

⁷³¹ Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540 §20-85.

student debt crisis and is involved in several initiatives related to student loan debt which appear align well with the goals of the Ombudsman position.⁷³²

The Attorney General's Consumer Protection Division, for example, is involved with work pertaining to student loan and debt relief, for-profit schools, and litigation against the Dept. of Ed.⁷³³ As discussed above, Massachusetts Attorney General Maura Healey filed a lawsuit in August of 2017 against the FedLoan Servicing (d/b/a Pennsylvania Higher Education Assistance Agency) ("PHEAA") for practices causing borrowers to lose benefits granted under the PSLF and TEACH Program in violation of federal and state law.⁷³⁴ While the court's denial of PHEAA's motion to dismiss is promising, the lawsuit is still pending and should be monitored for developments.⁷³⁵

In November of 2016, Healey secured a \$2.4 million settlement from ACS Educational Services for abusive practices against borrowers, including failing to properly process applications for IDR plans, charging excessive late fees, and inaccurately reporting to credit agencies.⁷³⁶ Healey stated:

To address this student debt crisis, we need students to be on repayment plans that will help them succeed, not fall further into debt....ACS failed to meet this standard and regularly undermined the opportunity for students to access appropriate repayment plans. This conduct increases the already high cost of education, damages credit, and prevents students and their families from achieving long-term economic security.⁷³⁷

⁷³² *AG's Office, Great Boston Chamber of Commerce Issue Report Addressing Student Loan Debt Crisis*, MASS.GOV (Nov. 2, 2017), <https://www.mass.gov/news/ags-office-greater-boston-chamber-of-commerce-issue-report-addressing-student-loan-debt-crisis>.

⁷³³ E-mail from Mercy Cover, Assistant Att'y Gen., Att'y General of Mass., to Thera McAvoy, J.D. Candidate, Northeastern Univ. Sch. of Law (Feb. 5, 2018, 14:10 EST) (on file with Thera McAvoy).

⁷³⁴ MASS.GOV, *AG Healey Sues to Protect Public Service Loan Forgiveness*, *supra* note 395.

⁷³⁵ Raymond, *Massachusetts can sue federal student loan servicer, judge rules*, *supra* note 398.

⁷³⁶ *AG Healey Secures \$2.4 Million, Significant Policy Reforms in Major Settlement with Student Loan Servicer*, MASS.GOV (NOV. 22, 2016), <http://www.mass.gov/ago/news-and-updates/press-releases/2016/ag-healey-secures-2-4-million-student-loan-servicer.html>.

⁷³⁷ *Id.*

In contrast to the DOB's silence with respect to the student debt crisis, the Attorney General's Office has been an active advocate for student loan borrowers. In collaboration with the Boston Chamber of Commerce, the Attorney General's Office established a Student Debt Working Group in 2016 to provide resources for student loan borrowers.⁷³⁸ The group issued a report highlighting five key areas of concern surrounding the student loan crisis in Massachusetts: financial education and transparency, college affordability, degree completion, debt repayment, and bankruptcy relief.⁷³⁹ It has also published an online resource to aid students with understanding their financial aid award letters.⁷⁴⁰ The group's focus areas are compatible with the duties and responsibilities of the Ombudsman, particularly the handling of borrower complaints and the creation of educational resources. This suggests that the Attorney General's Office, in contrast with the DOB, would have a vested interest in the effective management of the position.

The Attorney General's Office also houses a Student Loan Assistance Unit ("SLAU"), which is responsible for investigation and litigation involving student loan borrowing.⁷⁴¹ The SLAU is "dedicated to helping student borrowers directly, especially through mediation with loan servicers."⁷⁴² This is an important service given that "one of the primary problems borrowers face is inability to get substantive responses from loan servicers."⁷⁴³ The SLAU helps

⁷³⁸ *AG Healey Announces Financial Aid Education Campaign for Students Considering College*, MASS.GOV (Mar. 15, 2017), <http://www.mass.gov/ago/news-and-updates/press-releases/2017/financial-aid-education.html>.

⁷³⁹ ATT'Y GEN. MAURA HEALEY AND THE GREATER BOSTON CHAMBER OF COM., *STUDENT DEBT WORKING GROUP REPORT 3* (Oct. 2017), <https://www.mass.gov/files/documents/2017/11/01/STUDENT%20DEBT%20WORKING%20GROUP%20REPORT%20OCTOBER%202017.pdf>.

⁷⁴⁰ *Understanding Your Student Financial Aid Award Letter*, MASS.GOV, <http://www.mass.gov/ago/consumer-resources/consumer-information/schools-and-education/understanding-your-student-aid-award-letter.html> (last visited Mar. 5, 2018).

⁷⁴¹ E-mail from Mercy Cover, *supra* note 733.

⁷⁴² *Id.*

⁷⁴³ *Id.*

borrowers decide between loan repayment options, avoid default, resolve disputes with the servicers, resolve wage garnishment and tax refund issues, stop harassing collection calls, and apply for loan discharge in rare circumstances.⁷⁴⁴ It also offers a Student Loan Hotline as well as an online mechanism to file a student loan assistance request at no charge to borrowers.⁷⁴⁵ These functions overlap with many of the Ombudsman's education, outreach, and complaint resolution responsibilities as outlined in the Bill.

Finally, the Attorney General's complaint filing system is more accessible for borrowers. This is relevant because the Ombudsman would be charged with collecting, responding to, and analyzing complaints from student loan borrowers living in Massachusetts. The Attorney General offers an online form and hotline to access free mediation services for borrowers, and provides access to additional resources.⁷⁴⁶ While borrowers may also submit complaints to the Consumer Advocacy and Response Division ("CARD"),⁷⁴⁷ the student loan assistance request forms are specifically designed to collect information from student loan borrowers.⁷⁴⁸ In 2017, the Attorney General's Office secured \$3 million in refunds for students.⁷⁴⁹ At present, the DOB does not respond to student loan concerns, but rather directs borrowers to submit complaints to the CFPB.⁷⁵⁰ For complaints on other financial industries, however, the DOB only accepts forms via fax and mail.⁷⁵¹ To be accessible, a modern complaint system should make it as easy and

⁷⁴⁴ *Student Loans Assistance*, MASS.GOV, <http://www.mass.gov/ago/consumer-resources/consumer-information/schools-and-education/student-loans/> (last visited Mar. 5, 2018).

⁷⁴⁵ *Id.*

⁷⁴⁶ *Id.*

⁷⁴⁷ *Get Consumer Support*, MASS.GOV, <http://www.mass.gov/ago/bureaus/public-protection-and-advocacy/card/> (Mar. 10, 2018).

⁷⁴⁸ MASS.GOV, *Student Loans Assistance*, *supra* note 744.

⁷⁴⁹ *AG Healey's Fiscal Year 2017 Recoveries and Savings Exceed \$800 Million for State, Taxpayers*, MASS.GOV (Feb. 6, 2018), <https://www.mass.gov/news/ag-healeys-fiscal-year-2017-recoveries-and-savings-exceed-800-million-for-state-taxpayers>.

⁷⁵⁰ *File a banking complaint with the Division of Banks*, MASS.GOV, <https://www.mass.gov/how-to/file-a-banking-complaint-with-the-division-of-banks> (last visited Mar. 5, 2018).

⁷⁵¹ *Id.*

convenient as possible to file a complaint. Requiring a complaint to be submitted via fax or mail instead of online or over the phone increases the burden on the person filing it, and decreases accessibility. In 2016, the DOB resolved 287 consumer complaints across multiple financial industries, which resulted in \$38,182 in reimbursements.⁷⁵²

The above comparison of the current operations of both agencies demonstrates that the Attorney General's Office may be better prepared than the DOB to house an Ombudsman and to mediate individual student loan concerns. Placing the Student Loan Ombudsman in the Attorney General's Office would allow the Ombudsman to build off the experience and expertise that already exists there, without creating dual roles between the Attorney General's Office and the DOB. It is worth noting that this structure may also be more cost efficient, because it allows the Ombudsman to draw on existing resources within the Attorney General's Office.

Greater Range of Enforcement Options

If the Bill furnished both the Attorney General's Office and the DOB with responsibilities to Massachusetts student loan borrowers, it would yield a greater range of enforcement options. The Attorney General and Commissioner would be able to work towards oversight and regulation from two directions. Most of the power the Attorney General would wield here would come from her ability to pursue civil action based on the collected borrower complaints. This is a reactive power that would only come into play once abuses have already taken place. This means that the borrowers must first be harmed before they can be helped. The Attorney General's Office can play a valuable role, but would be a poor resource to rely on alone.

⁷⁵² MASS. DIV. BANKS, ANNUAL REPORT, *supra* note 723, at 3.

The DOB has a combination of preventative and reactive powers. The license requirement would allow the DOB to deny or revoke licenses for student loan servicers that engage in unfair or deceptive conduct.⁷⁵³ The ability to preemptively revoke licenses is an important tool for preventing abusive behaviors.⁷⁵⁴ The DOB's enforcement role through the licensing requirement is more focused on the servicers than the borrowers. Our proposed split of responsibilities would mean that the Attorney General's Office could continue to focus efforts on borrowers and their needs, while the DOB could focus on regulating the student loan servicer industry.

The Bill seeks to empower the Ombudsman to recommend possible ways to resolve borrower concerns to the Commissioner.⁷⁵⁵ This cooperation between Ombudsman and Commissioner should be preserved between the two agencies even after the duties are divided. As the Ombudsman would be responsible for compiling borrower complaints, they would be in the best position to determine when certain servicers engage in activities that produce complaints. They could then direct that information to the DOB for possible investigation.

Standards for an Ombudsman Program and Preferred Agency Placement

Our recommendation to house the Student Loan Ombudsman within the Attorney General's Office is also supported by the best practices and standards established for Ombudsman positions. Ombudsmen facilitate complaint resolution and are intended to do so in a fair and unbiased manner.⁷⁵⁶ For the process to work, all involved parties should have confidence that complaints brought to the Ombudsman would be handled appropriately. Standards from the

⁷⁵³ Adam Minsky, a Boston lawyer who specializes in student loan debt and was involved in drafting the Bill through Senator Lesser's office, holds that the ability to preemptively revoke licenses will be an important tool for preventing abusive behaviors. Skype Interview with Adam Minsky, Principal and Owner, Law Office of Adam Minsky (Jan. 17, 2018).

⁷⁵⁴ *Id.*

⁷⁵⁵ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 (Mass. 2017).

⁷⁵⁶ *Ombudsman*, BLACK'S LAW DICTIONARY (10th ed. 2014).

U.S. Ombudsman Association (“USOA”) stress that an Ombudsman should be independent and impartial.⁷⁵⁷ Trust is necessary for the office to function properly. It is best practice for Ombudsmen to be independent, in order to avoid the appearance of any conflict of interest.⁷⁵⁸

Complaints from student loan borrowers often cite “dealing with your lender or servicer” as the main problem for which they seek help.⁷⁵⁹ As an involved party, servicers have a clear interest in the situation. It is understandable that many borrowers would not believe that making complaints to their loan servicers directly would lead to their resolution. This is where an independent Ombudsman steps into the process.

The Ombudsman’s Independence and Impartiality under the DOB

The USOA recommends that Ombudsmen should be as independent as possible from all oversight matters.⁷⁶⁰ Since the DOB is intended to handle student loan servicer licensing, investigation, and enforcement in the cases of violations, there may be an appearance of conflict of interest were the Ombudsman to be housed there.⁷⁶¹ If the Ombudsman is located in the Attorney General’s Office, it would separate the goals of the Ombudsman from the DOB, and enable servicers to have more confidence that the investigations were being handled in a fair manner. While the purpose of this Bill is to provide support for the borrowers, it would only weaken the Bill’s impact if servicers were able to challenge it as establishing a systemic bias against them.

Hiring and housing the Ombudsman independently from the DOB may also give them discretion and security in making their recommendations to the DOB. The USOA recommends

⁷⁵⁷ *Governmental Ombudsman Standards*, U. S. OMBUDSMAN ASS’N 1 (Oct. 2003), <http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf>.

⁷⁵⁸ Alarcón, *supra* note 194, at 593-94 (2007).

⁷⁵⁹ CONSUMER FIN. PROT. BUREAU, 2017 STUDENT LOAN OMBUDSMAN REPORT, *supra* note 36, at 8.

⁷⁶⁰ U. S. OMBUDSMAN ASS’N, *supra* note 757, at 2.

⁷⁶¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4(Mass. 2017).

that an Ombudsman should have as much freedom to act without fear of reprisal as possible.⁷⁶² Ombudsmen are best able to do their job when they are not concerned that an unpopular report could endanger their employment.⁷⁶³ With the reporting and investigation responsibilities divided across the DOB and the Attorney General's Office, the Ombudsman would be able to operate more effectively. If the Ombudsman is overseen by the Attorney General, they will enjoy more discretion in making recommendations to the DOB that may not be popular or well received there.

The Ombudsman's Access to Resources under the Attorney General

Finally, it is important that the agency chosen to house the Ombudsman be able to provide staff training, publicity, and legal access.⁷⁶⁴ A report comparing the effectiveness of ombudsman programs across six states found that the most successful programs were able to provide those resources to the Ombudsman.⁷⁶⁵ Staff training is crucial to a successful program, as is knowledge of relevant issues.⁷⁶⁶ The report noted that publicity, community outreach, and hotlines are essential for communicating with the public about available resources.⁷⁶⁷ Five of the six highlighted programs also cited legal access and the ability to take legal action as one of their strongest traits.⁷⁶⁸ As described earlier in this section, the work that the Attorney General's Office has already done towards addressing student loan complaints means that they are already

⁷⁶² U. S. OMBUDSMAN ASS'N, *supra* note 757, at 1.

⁷⁶³ *Id.* at 3-4.

⁷⁶⁴ RICHARD P. KUSSEROW, DEP'T OF HEALTH AND HUMAN SERV. OFF. OF INSPECTOR GEN., EFFECTIVE OMBUDSMAN PROGRAMS: SIX CASE STUDIES 3-14 (June 1991), <https://oig.hhs.gov/oei/reports/oei-02-90-02122.pdf>.

⁷⁶⁵ *Id.* at ii.

⁷⁶⁶ *Id.* at 3.

⁷⁶⁷ *Id.* at 4.

⁷⁶⁸ *Id.* at 3-4.

ahead of the DOB in the realms of staff training, publicity, and legal access for the Ombudsman.⁷⁶⁹

Ultimately, we believe that placing the Ombudsman in the Attorney General's Office would grant them more independence and impartiality and allow them to draw on the considerable ground work and experience that already exists within the Attorney General's Office. Conversely, an Ombudsman housed in the DOB would have to begin with more limited resources and risk duplicating work the Attorney General's Office has already done. The lack of resources available to the Ombudsman in the DOB and the likely duplication of efforts would be inefficient, possibly frustrating for the Ombudsman, and confusing for borrowers who are already accustomed to making use of the Attorney General's resources.

(5) Funding the Student Loan Ombudsman

Insufficient Flat Rate Funding Scheme

Based on the experiences in Connecticut and Washington D.C., the current plan to fund the Ombudsman position outlined in the Bill would likely be insufficient. If passed, the Bill would implement a funding scheme by which servicers will be charged a \$1,000 non-refundable license application fee and an investigation fee to be determined annually by the Commissioner.⁷⁷⁰ It is unclear from the text of the Bill whether an annual renewal fee would be imposed on servicers, though the Commissioner may impose a late fee for renewal applications filed within thirty days of license expiration.⁷⁷¹ Modeled closely after the text of the Connecticut Act, which imposes a \$1,000 licensing application fee and \$800 investigation fee on servicers,

⁷⁶⁹ See *infra* Section VII: Housing the Student Loan Ombudsman in the Attorney General's Office.

⁷⁷⁰ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 (Mass. 2017).

⁷⁷¹ S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 (Mass. 2017).

the Bill as it stands likely may be ineffective in achieving adequate funding for the Ombudsman.⁷⁷²

To date, Connecticut has been unable to implement the position of the Ombudsman due partially to funding issues. Representative Lesser, who worked closely on the Connecticut Bill, commented “[i]nitially, we had no idea how many servicers were out there, and funded the office through \$1,000 licensing fees. The last I checked, we had about two dozen servicers get licensed, so that's nowhere near enough money to operate an office.”⁷⁷³ Since Massachusetts has modeled its funding scheme in a similar way, it is foreseeable that should the Bill pass, the Ombudsman position would not be sufficiently funded, and may face delays in getting started. The revenue raised would be strictly contingent upon the number of qualifying entities servicing student loans in Massachusetts, while taking into account any compensation needed to adequately fund the DOB for the added labor of licensing and investigating the student loan servicers. Commenting further on the funding issue, Representative Lesser explained that Connecticut has since amended its law to allow for volume-based assessment of servicers, though the Department of Banking had not yet implemented this strategy. In his email, Lesser further wrote “I'm pretty confident we'll find a way to fund the office in the next year, possibly by mandating assessment.”⁷⁷⁴

Proposing a Volume-Based Funding Solution

Funding the Ombudsman through a flat licensing fee has proven insufficient as a means of funding the Ombudsman position in Connecticut. **Instead, Massachusetts should consider**

⁷⁷² An Act Concerning A Student Loan Bill of Rights, Public Act No. 15-162, 2015 Conn. Acts 656 (Reg. Sess.).

⁷⁷³ E-mail from Matthew Lesser, *supra* note 470.

⁷⁷⁴ *Id.*

implementing a volume-based assessment fee which yields revenue based on the number of loans, or borrowers, serviced within the state.

Washington D.C. is in the process of implementing this type of funding plan. Originally, D.C.'s Student Loan Bill of Rights introduced a flat-rate funding scheme with unspecified application fees.⁷⁷⁵ On September 8, 2017, the Department adopted emergency regulations establishing an annual assessment fee of \$800 plus a \$6.60 fee charged per loan serviced within the District.⁷⁷⁶ The per loan fee has since been reduced to \$0.50 per loan.⁷⁷⁷ Despite initial hiring delays, Dr. Charles Burt was hired as the District's Student Loan Ombudsman, with an annual salary of \$110,000.⁷⁷⁸ In addition to handling student loan complaints, Dr. Burt is tasked with overseeing mortgage foreclosures, and consequently, his position is partially funded through that program.⁷⁷⁹

Rough estimates regarding either the total number of loans serviced within the state, or the total number of student loan borrowers within the state, may assist with determining an initial fee which could be subject to amendment at the discretion of the Commissioner. In 2014, there were approximately 980,000 federal student loan borrowers in Massachusetts.⁷⁸⁰ Assuming those 980,000 federal student loan borrowers each have taken out a single federal loan, imposing a \$0.50 fee per loan would yield \$490,000 in revenue.

⁷⁷⁵ Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act of 2016, D.C. Act 21-571, 63 D.C. Reg. 15334 (Dec. 16, 2016).

⁷⁷⁶ Heather S. Klein, *Washington, D.C. Amends Student Loan Servicing Regulations*, CONSUMER FIN. MONITOR (Jan. 9, 2018), <https://www.consumerfinancemonitor.com/2018/01/09/washington-d-c-amends-student-loan-servicing-regulations/>.

⁷⁷⁷ *Id.*

⁷⁷⁸ *D.C. Government Employment Listing*, D.C. DEP'T OF HUMAN RES. 512 (Dec. 2017), https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/public_body_employee_information_123117_0.pdf.

⁷⁷⁹ Telephone Interview with Dr. Charles Burt, *supra* note 510.

⁷⁸⁰ DOMESTIC POLICY COUNCIL & COUNCIL OF ECON. ADVISERS, *supra* note 16, at 18.

Estimating the Number of Borrowers in Massachusetts

Our research has revealed no precise number of student loan borrowers whose loans are serviced in Massachusetts. The figure of 980,000 *federal* student loan borrowers from the 2014 survey provides a decent estimate from which to start.⁷⁸¹ However, it is under-inclusive because it does not include any student loan borrowers who only took out private loans.⁷⁸² It may also be over-inclusive by including students at Massachusetts colleges and universities who will leave the state after graduation, and have their loans serviced elsewhere. Studies by the Boston Consulting Group and World Class Cities Partnership indicate an approximate fifty percent retention rate of graduates in the Boston area.⁷⁸³ This is partially offset by students who attend school outside of Massachusetts and then move to the state later on, as students post-graduation are attracted to Boston's labor market from across the nation.⁷⁸⁴

The U.S. Census Bureau's five-year estimate for 2012 to 2016 lists some 316,457 residents of Massachusetts between the ages of eighteen to twenty-four who have some college education in 2016.⁷⁸⁵ It may be assumed that that age range contains a significant number of students who moved to Massachusetts solely to pursue their education, and may be moving out of state after graduation. Among Massachusetts residents who are twenty-five years or older, more of whom may be finished with school and more likely to be settled in the state, approximately 3,020,514 people have some college education.⁷⁸⁶ Of that number, many might have paid off their loans, or gone to school before student loans became as pervasive as they are

⁷⁸¹ *Id.*

⁷⁸² *Id.*

⁷⁸³ *Retaining Recent College Graduates in Boston: Is There a Brain Drain?*, BOS. REDEVELOPMENT AUTHORITY 8 (2014), <http://www.bostonplans.org/getattachment/170db5fb-ad3b-4fbb-a143-82f7d7f4539e/>.

⁷⁸⁴ *Id.*

⁷⁸⁵ U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT 2012-2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES (2016), https://factfinder.census.gov/bkkmk/table/1.0/en/ACS/16_5YR/S1501/0400000US25.

⁷⁸⁶ *Id.*

now. As it currently takes an average of 21.1 years to pay off student debt⁷⁸⁷ and sixty percent of all Massachusetts graduates in 2016 have some student loan debt, a respectable number may still be retained.⁷⁸⁸ The Census Bureau does not give the number of all college students by their age, but among twenty-five to forty-four year olds, 1,208,361 obtained either a Bachelor's or higher degree.⁷⁸⁹ Even losing some fifty percent of graduates, Massachusetts retains a respectably large and educated resident population. While there are currently no easily accessible numbers on the precise number of student loan borrowers who remain in Massachusetts for the long-term, given the number of people who have college educations in Massachusetts, and the scope of the student loan crisis, the true number may not be very far off from the 980,000 estimate.⁷⁹⁰

Can Servicers Pass the Cost of Licensure on to Borrowers?

It may be possible for servicers to offset the cost of obtaining a license by passing it on to borrowers through increased interest rates on private education loans. While the interest rates of federal student loans are set by Congress annually and remain fixed for the life of the loan, the interest rates of private student loans are set by the lender and may be fixed or variable.⁷⁹¹ Variable interest rates, which fluctuate throughout the life of a loan, are typically calculated upon an applicable financial index, such as the London Interbank Offered Rate (LIBOR), and the borrower's credit score.⁷⁹² If the borrower is not monitoring the relevant financial index, it is unlikely that they would be able to tell whether their interest rate is aligned with the market.

⁷⁸⁷ *Survey Results: Impact of Student Loan Debt on Homeownership Trends and Vehicle Purchasing*, ONE WIS. INST. 4 (June 13, 2013), <https://drive.google.com/file/d/0B8LurBVUNQZfQVhYZWZvamlfd00/view>.

⁷⁸⁸ INST. FOR COLLEGE ACCESS AND SUCCESS, 12TH ANNUAL REPORT: STUDENT DEBT AND THE CLASS OF 2016 10 (Sept. 2017), https://ticas.org/sites/default/files/pub_files/classof2016.pdf.

⁷⁸⁹ U.S. CENSUS BUREAU, *supra* note 785.

⁷⁹⁰ DOMESTIC POLICY COUNCIL & COUNCIL OF ECON. ADVISERS, *supra* note 16, at 18.

⁷⁹¹ *Federal Versus Private Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/federal-vs-private> (last visited Mar. 4, 2018).

⁷⁹² *Spread Between Prime and Libor*, FINAID, http://www.finaid.org/loans/prime_libor.phtml (last visited Mar. 4, 2018).

Accordingly, it may be possible for servicers to offset some of the costs associated with the licensure and assessment fees by charging a slightly higher interest rate on private loans, particularly in the absence of stringent regulations. While it is a hypothetical at this stage, it is worth noting.

VIII. IMPACT

Impact of a Massachusetts Student Loan Bill of Rights

We believe that passing the Bill in Massachusetts has the potential to help student loan borrowers in the Commonwealth. This section discusses the Ombudsman’s role collecting data, advising policy, and as an alternative to litigation – and how those activities can benefit Massachusetts borrowers. As one of the first in a wave of state-level BBORs, passing the Bill in Massachusetts has the potential to spur more states to action. Finally, while the Bill may help Massachusetts borrowers, it is important to remember how the Bill fits into the “education as commodity, students as consumers” framework of financing higher education. The Bill is ultimately a response to student loan debt that fits squarely in the consumer protection framework dominating thought and policy around the issue. It is important to extend consumer protections to student loan borrowers and hold servicers to the same standard of business practices to which other third party loan servicers are held. However, it may be necessary to think outside of the market-based metaphors in order to more fully address the root of the issue. This section concludes with a discussion of an alternative way of conceptualizing the issue, by framing “education as a public good.”

Ombudsman as Data Collector

Certain communities struggle with managing their student debt more than others, based on a variety of factors beyond the borrower’s control.⁷⁹³ For example, students of color, particularly black and Latinx students, face disadvantages in the financial aid process beginning

⁷⁹³ Richard Fry, *A Record One-in-Five Households Now Owe Student Loan Debt*, PEW RESEARCH CTR. (Sept. 26, 2012), <http://www.pewsocialtrends.org/2012/09/26/a-record-one-in-five-households-now-owe-student-loan-debt/>.

with disparities in household income.⁷⁹⁴ As a result they may take out more loans in order to attend college. They may face additional struggles paying off these loans due to discriminatory hiring and workplace practices.⁷⁹⁵ The CFPB documents a number of populations as particularly susceptible to predatory student lending practices, including first generation college students, borrowers of color, women, borrowers over the age of sixty, borrowers with permanent disabilities, low loan borrowers (particularly those who attended for-profit colleges), and borrowers with one or more dependents.⁷⁹⁶ However, data is not available on how the loan collection policies and practices may impact those groups.⁷⁹⁷ This is because the government and servicers either do not collect this information or do not make it available.⁷⁹⁸ The United States government does not appear to keep and collect data on how collection policies disparately impact different demographics, particularly in regards to borrowers of color.⁷⁹⁹

This lack of data is the subject of a pending lawsuit brought by the American Civil Liberties Union ("ACLU") against the Dept. of Ed. *ACLU v. U.S. Department of Education*.⁸⁰⁰ The ACLU filed a Freedom of Information Act ("FOIA") Request with the Dept. of Ed. on May 7, 2015. The ACLU requested information relating to the Dept. of Ed.'s debt collection practices- particularly, their partnerships with private collection agencies and especially their practices collecting debt from borrowers of color.⁸⁰¹

⁷⁹⁴ Rakesh Kochhar and Richard Fry, *Wealth inequality has widened along racial, ethnic lines since end of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

⁷⁹⁵ Fiona Blackshaw et. al, *Nine Charts about Wealth Inequality in America (Updated)*, URBAN INSTITUTE, <http://apps.urban.org/features/wealth-inequality-charts/> (last updated on Oct. 24, 2017).

⁷⁹⁶ See *supra* Section VII: Housing the Student Loan Ombudsman in the Attorney General's Office.

⁷⁹⁷ Blackshaw et. al., *supra* note 795.

⁷⁹⁸ Scott-Clayton & Li, *supra* note 212.

⁷⁹⁹ Letter from Nat'l Consumer Law Ctr. et al., *supra* note 215, at 6.

⁸⁰⁰ *ACLU and NCLC File Lawsuite Against U.S. Department of Education over Failure to Disclose Debt Collection Practice Data*, ACLU (Mar. 30, 2016), <https://www.aclu.org/news/aclu-and-nclc-file-lawsuit-against-us-department-education-over-failure-disclose-debt>.

⁸⁰¹ *Id.*

Charged with the responsibility of collecting data from student loan servicers and complaints from borrowers, the Ombudsman has the potential to fill this gap. Once such data is available, Massachusetts would likely have a better idea of the impact that servicers' policies have on different members of the community. The results of that data can lead to meaningful change for the identified disadvantaged demographics.

Whether things improve for the groups disparately impacted by student loan debt and debt collection practices and policies depends on the efficacy of the Ombudsman to act as an accessible resource and process complaints for student loan borrowers and the efficacy of the licensing and investigative mechanisms in compelling good behavior from student loan servicers. For now the issue of which populations will be most impacted remains an open question. There is a need for further research in order to better identify and address borrowers' needs. Without such research it is more difficult to create the direct, targeted programs that such communities need for aid to be truly effective.

Ombudsman as Policy Advisor

Another important feature of the Ombudsman position created by this Bill is its advocacy role. In addition to receiving and resolving complaints, the Ombudsman would be charged with analyzing the development and implementation of relevant laws, regulations, and policies, and recommend changes deemed necessary.⁸⁰² Massachusetts was cited by the Department of Health and Human Services as a case study for effective elder care Ombudsman programs.⁸⁰³ Its Ombudsman was praised for making recommendations that led to legislation requiring training for nurses' aids.⁸⁰⁴ Ombudsmen charged with protecting "the legitimate interests and rights of

⁸⁰² S.B. 129, 190th Gen. Court, Reg. Sess., at sec. 4 §24L(b) (Mass. 2017).

⁸⁰³ KUSSEROW, *supra* note 764, at 7.

⁸⁰⁴ *Id.* at 8.

individuals,” who then become intimately familiar with the challenges faced by a particular population, are uniquely well-suited to making effective recommendations for policies, reforms, or protections that will benefit the population that they serve.⁸⁰⁵

Ombudsman as an Alternative to Litigation

Access to justice through litigation can be a difficult goal to achieve for most people. When consumer debt cases are brought by creditors, they have access to private attorneys who have the specialized knowledge and experience that are needed to navigate civil courts.⁸⁰⁶ In contrast, debtors rarely have access to legal counsel.⁸⁰⁷ This disparity in legal resources means that it is possible for creditors to file claims and obtain judgments against debtors without even going to a hearing or trial, or indeed ever showing proof of their claims at all.⁸⁰⁸ A 2008 survey conducted in New York showed that only 7.2% of consumer debt defendants filed answers in response to creditor complaints.⁸⁰⁹ Creditors may deliberately choose to not serve a defendant with notice of the complaint and summons to court.⁸¹⁰ Those who do receive their complaint and summons usually do not know how to proceed without knowledge of the process of court.⁸¹¹ For example, many defendants are not aware that they must answer after a default judgment is entered against them and that there are consequences, such as frozen bank accounts, if they do not answer.⁸¹² Civil defendants do not have a guaranteed right to counsel, as is found in the

⁸⁰⁵ AMERICAN BAR ASS'N, STANDARDS FOR ESTABLISHMENT AND OPERATION OF OMBUDSMAN OFF. 2 (Aug. 2001), <https://www.americanbar.org/content/dam/aba/migrated/leadership/2001/107d.authcheckdam.pdf>.

⁸⁰⁶ *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases*, NEW YORK APPLESEED AND JONES DAY 1-2 (Mar. 2010), https://www.ftc.gov/sites/default/files/documents/public_comments/protecting-consumers-debt-collection-litigation-and-arbitration-series-roundtable-discussions-august/545921-00031.pdf.

⁸⁰⁷ *Id.*

⁸⁰⁸ *Id.* at 2.

⁸⁰⁹ *Id.*

⁸¹⁰ *Id.* at 12.

⁸¹¹ *Id.* at 21.

⁸¹² *Id.*

criminal system. Those who enter into civil litigation without the money to hire a lawyer are therefore reliant on whatever free resources they can access.⁸¹³ Many debtors face an unbalanced playing field against their creditors, who have the money to expend on winning litigation.

These barriers to litigation directly impact debtors' access to justice through the court system. Litigation is a method for resolving disputes, but is also a method of pursuing political change.⁸¹⁴ When people are able to bring civil litigation, they are acting to force new court rulings and change common law.⁸¹⁵ When the common law changes, it changes society with it, as others react by altering their conduct to reflect the new laws and resulting regulations.⁸¹⁶ Without access to the courts, debtors are denied a measure of the democratic process, and denied their ability to impact the way that the law evolves.

Ombudsmen respond to these issues by providing an alternative to litigation.⁸¹⁷ They receive complaints and questions, work to resolve those issues, and make recommendations for improvement of the entities they serve.⁸¹⁸ Massachusetts has several statutorily-created Ombudsmen concerning specialized topics or particular populations such as older adults,⁸¹⁹ people with disabilities,⁸²⁰ children and families,⁸²¹ and One Care enrollees.⁸²²

⁸¹³ *Id.* at 32-33.

⁸¹⁴ Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 45 EMORY L. J. 1657, 1658 (2016),

⁸¹⁵ *Id.*

⁸¹⁶ *Id.*

⁸¹⁷ Alarcón, *supra* note 194, at 594.

⁸¹⁸ AMERICAN BAR ASS'N, *supra* note 805, at 2.

⁸¹⁹ *Ombudsman Programs*, MASS.GOV, <https://www.mass.gov/service-details/ombudsman-programs> (last visited Mar. 4, 2018).

⁸²⁰ *Massachusetts Rehabilitation Commission Ombudsman*, MASS.GOV, <https://www.mass.gov/service-details/mrc-ombudsman> (last visited Mar. 4, 2018).

⁸²¹ MASS.GOV, *Ombudsman Programs*, *supra* note 819.

⁸²² *One Care Ombudsman*, ONE CARE OMBUDSMAN, <https://onecareombuds.org/> (last visited Mar. 4, 2018).

Complaint Resolution

The role of an Ombudsman grew out of an historical need to “protect the rights and interests of citizens from abuses arising from a powerful and personal bureaucracy.”⁸²³

Ombudsmen offices act as advocates for the vulnerable, for example the Long Term Care Ombudsman serving older adults in the Commonwealth, “is an advocate. **The ombudsman service offers a way for older adults to voice their complaints and have concerns addressed so they can live with dignity and respect.**”⁸²⁴

As described above, student loan borrowers face significant barriers to accessing remedies when they experience problems with their loan servicer.⁸²⁵ Offering student loan borrowers a forum through which to voice their complaints and receive resolution to their problems with unmanageable education debt, inappropriate ancillary fees, or unfair loan servicer practices, is offering them access to justice.

The CFPB receives complaints from consumers of a variety of financial services, and sends them to the relevant companies in order to resolve them for the consumer.⁸²⁶ Approximately ninety-seven percent of those complaints are responded to in a timely manner, many of which lead to remedies for the consumer.⁸²⁷ Similarly, an independent ombudsman program for the California prison system was proposed to more effectively resolve disputes and problems faced by inmates and their families:

By emphasizing practical solutions to prisoner grievances, rather than assessing fault, *an autonomous Ombudsman is well-positioned to resolve inmate complaints informally, quickly, knowledgeably, and cost effectively.* Over the long term, an independent Ombudsman can also document alleged misconduct or mistreatment.

⁸²³ Alarcón, *supra* note 194, at 597.

⁸²⁴ MASS.GOV, *Ombudsman Programs*, *supra* note 819 (emphasis added).

⁸²⁵ See *supra* Section IV: Remedies Currently Available to Student Loan Borrowers.

⁸²⁶ Thompson Cochran, *supra* note 94, at 68.

⁸²⁷ *Id.* at 68–69.

The resulting systemic and administrative changes would increase prison security and reduce inmate litigation.⁸²⁸

A Student Loan Ombudsman in Massachusetts can similarly receive complaints, and work as an independent and neutral party to resolve them quickly and cost-effectively. The Ombudsman could prove to be invaluable for student loan borrowers, especially when compared to the time and resources required to hire a lawyer, pursue litigation, or bring action against their loan servicer.

Potential for Widespread Change

States have begun to pass BBORs in response to rising student loan debt. However, states may continue to be challenged by private servicers, which would hinder the progress made towards consumer protection rights. Given the legal and possible preemptory challenges that arise with pending federal legislation, it is imperative that more states continue the campaign set in motion by states that have passed legislation to protect student loan borrowers. Through a collaborative national movement, there is potential that the federal administration can be pressured into enacting legislation that permanently protects student borrowers and improves the way that higher education is financed in this country. We believe that as more states pass BBORs, it may strengthen the ability of states to protect their residents in the face of rollbacks to federal protections.

An Alternative Metaphor: Education as Public Benefit

The Bill at the center of this commentary is designed to fill gaps in the body of federal and state consumer protection law as they impact student loan borrowers. As discussed in Section II, higher education is typically framed as a commodity consumed by students to

⁸²⁸ Alarcón, *supra* note 194, at 594 (emphasis added).

improve their human capital, and measured by an increase in their individual wealth.⁸²⁹ Thus, our current system of financing higher education seems inevitable, as do the market-based solutions in the form of consumer protections.⁸³⁰ Despite this body of law, many student loan borrowers find themselves under stress due to unmanageable education debt.⁸³¹ By its nature, consumer protection law is reactionary, and therefore limited in its ability to address the root of the problem. To break out of the limitations of consumer protection solutions, it is helpful, or perhaps essential, to consider alternative metaphors.

One such alternative is to think about “education as a public good.”⁸³² An investment in a person’s human capital can result in a higher lifetime salary for the individual, but the public also benefits.⁸³³ Many jobs that serve a vital public need require higher education. Some of these result in lucrative careers (such as the engineer or surgeon), but others result in modest salaries (such as the social worker or the public defender). Additional social benefits of higher education and widespread social mobility include: a workforce prepared to meet the challenges of a global economy, state and local economic growth; university-based research leading to advances in technology, medicine, and other fields; the promotion of substantive equality for historically underrepresented minorities; and a community’s access to cultural activities like theatre, art, and sports.⁸³⁴

A first step in combatting the effect of increasing student loan debt across the country is the formation of strong and effective consumer protections to protect individuals and families from unfair practices and the establishment of resources that can assist them with unmanageable

⁸²⁹ Kraiem, *supra* note 29, at 705.

⁸³⁰ *Id.*

⁸³¹ *Id.* at 691.

⁸³² *Id.* at 704.

⁸³³ *Id.*

⁸³⁴ *Id.* at 691.

debt. However, “[t]o truly address the root cause of the student debt crisis, states must adopt policies that make higher education a public good again, rather than an increasingly unaffordable private investment undertaken by students and families.”⁸³⁵ Such efforts seek to shift the burden and risk of the investment in higher education off of students and onto the public, by restoring support of public institutions of higher education to pre-recession levels, financing free community college programs, or increasing opportunities for student loan forgiveness.⁸³⁶ Loan forgiveness programs for student borrowers who go into careers that serve a national need acknowledge how society benefits from a student’s investment in their own education. Versions of these programs currently exist at the federal and state levels, though the future of these programs is uncertain.⁸³⁷

⁸³⁵ Johnson & Thompson, *supra* note 434.

⁸³⁶ *Id.*; Wilson, *supra* note 34.

⁸³⁷ *Public Service Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> (last visited Mar. 4, 2018).

IX. CONCLUSION

This commentary is an analysis of whether the Bill is a step towards PHENOM's ultimate goal of achieving accessible, low-cost higher education for all students within Massachusetts. Since BBORs have been passed in only four jurisdictions, and those jurisdictions are just now starting to implement the provisions, our analysis on how the Bill could impact Massachusetts student loan borrowers is a prediction. The Bill, if passed, would be imperfect. This inevitable imperfection is no reason to deny this Bill to the student loan borrowers of Massachusetts. The Bill can serve as a foundation to be built upon and improved. Passing it would declare the Commonwealth's dedication to aiding and protecting their students, and its belief that access to education is important for Massachusetts' residents to thrive.

The goals of this Bill are: (1) to explicitly hold student loan servicers to a common standard of business practices; (2) to provide student loan borrowers with accessible avenues for remedies when they are treated unfairly; and (3) to educate student loan borrowers and empower them to make informed decisions about their loans. The Ombudsman would be able to work to protect borrowers from harm through education and mediation, and the licensing mechanism would allow the regulation of harmful servicers. At present there are few protections at the federal level sufficient to guard Massachusetts residents. It is possible, some may say necessary, to act now at the state level to protect student loan borrowers, and ensure that they have access to the resources they need.

We have provided PHENOM with recommendations of how to improve the Bill before it is passed. Our language-based recommendations are intended to explicitly state the intent of the Bill, clarify ambiguous language, and add in additional protections for consumers. Our functional recommendations are intended to give the Ombudsman the best opportunity to

succeed in their role. We strongly recommend that the Ombudsman be placed within the Attorney General's Office instead of the DOB in order to take advantage of the experience and expertise available in that office. Finally, we recommend funding the Ombudsman through a volume-based scheme rather than a flat rate based on licensing fees.

This Bill has the potential to help Massachusetts residents. There is a national student loan crisis. More and more borrowers will be harmed if it is not addressed. This Bill is something new; it is an attempt by States to add protections and programs to assist borrowers in their jurisdiction. Massachusetts has the opportunity to become one of the first states to act to protect its students with a BBOR, joining the forefront of this movement as more states mobilize to do the same.

ABBREVIATIONS USED

ACS Education Services	<i>“ACS”</i>
American Civil Liberties Union	<i>“ACLU”</i>
American Education Services	<i>“AES”</i>
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005	<i>“BAPCPA”</i>
Borrower's Bill of Rights	<i>“BBOR”</i>
Code of Massachusetts Regulations	<i>“CMR”</i>
Consumer Financial Protection Bureau	<i>“CFPB”</i>
Division of Banks (a/k/a Massachusetts Division of Banks)	<i>“DOB”</i>
Dodd-Frank Wall Street Reform and Consumer Protection Act	<i>“Dodd-Frank Act”</i>
Federal Family Education Loan Program	<i>“FFEL”</i>
Federal Student Aid	<i>“FSA”</i>
FedLoan Servicing (d/b/a Pennsylvania Higher Education Assistance Agency)	<i>“PHEAA”</i>
Freedom of Information Act	<i>“FOIA”</i>
Higher Education Act of 1965	<i>“HEA”</i>
Income-Based Repayment	<i>“IBR”</i>
Income-Driven Repayment	<i>“IDR”</i>
Internal Revenue Service	<i>“IRS”</i>
Massachusetts Commissioner of Banks	<i>“Commissioner”</i>
Massachusetts Consumer Advocacy and Response Division	<i>“CARD”</i>
Massachusetts Department of Education	<i>“DHE”</i>
Massachusetts General Law	<i>“Mass. Gen. Law”</i>
Massachusetts Student Loan Bill of Rights	<i>“the Bill”</i>
National Student Loan Data System	<i>“NSLDS”</i>

Nationwide Mortgage Licensing System (a/k/a Nationwide Multistate Licensing System)	<i>“NMLS”</i>
Navient Corporation	<i>“Navient”</i>
Pennsylvania Higher Education Assistance Agency (d/b/a FedLoan Servicing)	<i>“PHEAA”</i>
Public Higher Education Network of Massachusetts	<i>“PHENOM”</i>
Public Service Loan Forgiveness Program	<i>“PSLF”</i>
Student Loan Assistance Unit f/k/a Student Lending Assistance Unit	<i>“SLAU”</i>
Student Loan Borrower	<i>“Borrower” (with discretion)</i>
Student Loan Ombudsman	<i>“Ombudsman” (with discretion)</i>
Student Loan Servicer	<i>“servicer” (with discretion)</i>
Teacher Education Assistance for College and Higher Education Grant Program	<i>“TEACH”</i>
The Fair Debt Collection Practices Act	<i>“FDCPA”</i>
Truth In Lending Act	<i>“TILA”</i>
U.S. Department of Education	<i>“Dept. of Ed.”</i>
Unfair or Deceptive Acts or Practices	<i>“UDAPs”</i>
United States Ombudsman Association	<i>“USOA”</i>
William D. Ford Federal Direct Loan Program	<i>“Direct Loans”</i>

GLOSSARY

Ancillary fees	Any cost or expense indirectly involved in a transaction. The expense does not necessarily need to be related to the original cost or expense. ⁱ
Borrower's Bill of Rights (BBOR)	Type of legislation that provides additional consumer protections to borrowers. In a student loan context, a Borrower's Bill of Rights provides student loan borrowers with additional rights and protections during the repayment process. A Student Loan Borrower's Bill of Rights may include provisions for licensing of servicers in the state, standards for servicing, data reporting, and the establishment of an ombudsman's office. ⁱⁱ
Co-signer	A joint signer of a loan or promissory note. Co-signers are equally responsible for repayment of the loan. ⁱⁱⁱ
Debt collector	Someone or some entity whose business or job is to seek payment of past-due bills and other outstanding debts. ^{iv}
Default	Failure to repay a loan according to the agreed upon terms in a loan's promissory note. ^v
Deferment	Temporary pause to a borrower's student loan payments for specific situations, including active duty military service and re-enrollment in school. For unsubsidized loans, interest accrues during deferment. Private loans do not necessarily have deferment options. ^{vi}
Delinquent	Loan that is not paid by the due date. Loans become delinquent on the first day after a borrower misses a payment. ^{vii}
Discharge	A permanent order that releases the debtor from personal liability for certain specified types of debts, thereby releasing the debtor from any legal obligation to repay any discharged debts. ^{viii}
Federal student loan	A loan funded by the federal government. Types of federal student loans include Direct Subsidized and Direct Unsubsidized Loans, Direct PLUS Loans, and Federal Perkins Loans. ^{ix} With Subsidized Federal loans, the government pays interest while the student is in school or the borrower is in periods of deferment. ^x

Financial Aid Package	Total combined amount of federal and nonfederal financial aid offered by a college or school that is intended to fill the gap between a student’s ability to pay, their expected family contribution (EFC), and total cost of attendance (COA). ^{xi}
Financial need	“The difference between the cost of attendance (COA) and the expected family contribution (EFC).” Usually the cost of attendance (COA) refers to the total amount of education expenses (tuition, books and supplies, housing and dining, personal expenses, transportation expenses, etc.). ^{xii}
Forbearance	Temporary postponement or reduction of loan payments due to financial difficulty. Interest continues to accrue during periods of forbearance, which the borrower is responsible for paying back.. ^{xiii}
Free Application for Federal Student Aid (FAFSA)	Form prepared annually by current and prospective students entering higher education (undergraduate and graduate) in the United States ^{xiv} to determine their eligibility for federal financial aid, including federal grants, loans, and work study. ^{xv}
Grace period	“Time after student graduates, leaves school, or drops below half-time enrollment” during which borrower does not need to make payments on qualified student loans. Grace periods may vary for federal and private loans. ^{xvi}
Interest	<p>“The charge for the privilege of borrowing money, typically expressed as annual percentage rate” of the unpaid principal amount.^{xvii}</p> <p>Fixed interest rates remain the same throughout the life of the loan. Variable interest rates are based on an index and change periodically if the index changes.^{xviii}</p>
Knowingly	In such a manner that the actor engaged in prohibited conduct with the knowledge that the social harm that the law was designed to prevent was practically certain to result; deliberately. ^{xix}
Lender	Person or entity that originates a loan and provides the borrowed funds. ^{xx}

Licensee	One to whom a license is granted. ^{xxi}
Loan Holder	Entity that holds the loan’s promissory note and has the right to collect from the borrower. ^{xxii}
Loan disclosures	“A document outlining the specific terms and conditions of a loan, including the interest rate of the loan, any loan fees, the amount borrowed, insurance, prepayment rights and the responsibilities of the borrower.” ^{xxiii}
Loan Forgiveness	Benefit that relieves a borrower of the obligation to repay some or all of the remaining outstanding balance of their loan. Loan forgiveness is also referred to as cancellation. With cancellation or loan forgiveness, an individual who originally took out a loan is no longer expected or required to repay that loan. ^{xxiv}
Loan servicer	Company that collects payments on a student loan, provides customer service and information regarding a borrower’s loan and repayment options, and performs various administrative tasks associated with loan maintenance. When borrowers receive a monthly billing statement and remit payment, they are interacting with their loan servicers. ^{xxv}
Loan servicing	“Aspect of a loan from the time the proceeds are dispersed until the loan is paid off.” ^{xxvi} This includes sending monthly payment statements and collecting monthly payments, maintaining records of payments and balances, collecting and paying taxes and insurance (and managing escrow and impound funds), remitting funds to the note holder, and following up on delinquencies. ^{xxvii}
National Student Loan Data System (NSLDS)	U.S. Department of Education’s database for student aid. NSLDS receives data from schools and federal loan programs, offering borrowers a consolidated view of their federal student loans and grants. ^{xxviii}
Nationwide Mortgage Licensing System (NMLS)	The system of record for non-depository, financial services licensing or registration in participating state agencies. NMLS is the official system for companies and individuals seeking to apply for, amend, renew and surrender license authorities managed through NMLS by 62 state or

territorial governmental agencies. NMLS itself does not grant or deny license authority. ^{xxix}

- Negligent** Characterized by a person’s failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. ^{xxx}
- Ombudsman** Individual appointed to receive, investigate, and report on private citizens’ complaints about the government. ^{xxxi}
- Both the U.S. Department of Education and Consumer Financial Protection Bureau have Student Loan ombudsman offices. Student Loan Ombudsmen are intended to be neutral parties that help borrowers resolve problems with loan servicers. ^{xxxii}
- Origination fee** Fee charged by a lender for preparing and processing a loan. ^{xxxiii}
- Private loan** Nonfederal loan, made by lender such as a bank, credit union, state agency, or school. Private student loans are not subsidized, meaning the lender does not pay the interest on the loan. Private loans may require an established credit record from the borrower, co-signers, and payments while a borrower is still in school. ^{xxxiv}
- Promissory Note** Binding legal document which a borrower signs when they take out a loan. The promissory note contains terms and conditions for loan repayment, including an explanation of the borrower’s rights and responsibilities. ^{xxxv}
- Reasonable** Fair, proper, or moderate under the circumstances; sensible. ^{xxxvi}
- Reckless** Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. ^{xxxvii}
- Repayment specialist** Individual in the profession of student loan repayment counseling. Repayment specialists are responsible for recommending student loan repayment strategies to current or potential borrowers; offering personalized guidance based on an individual borrower’s personal financial situation; explaining the complexities of particular loans a borrower may take out; researching a borrower’s particular loan details;

and giving recommendations on financial securing a borrower's future.

xxxviii

Statute of Limitations

Law that bars claims after a specified period. The purpose of such a statute is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.

xxxix

Surety Bond

Similar to a security deposit, with one party promising to do something for the person to whom they owe obligations. Thus, if the party that made the promise fails to perform their duty, the obligee is compensated out of the bond.^{x1}

-
- ⁱ *Ancillary Charge*, THE FREE DICTIONARY (2012), <https://financial-dictionary.thefreedictionary.com/Ancillary+Charge> (last visited Mar. 5, 2018).
- ⁱⁱ Maggie Thompson et al., *Borrower's Bill of Rights: States Step Up to Protect Student Loan Borrowers*, GENERATION PROGRESS (Aug. 10, 2017), <http://genprogress.org/ideas/2017/08/10/45690/borrowers-bill-of-rights/>.
- ⁱⁱⁱ *Cosigner*, Merriam-Webster (2018), <https://www.merriam-webster.com/dictionary/cosigner> (last visited Mar. 5, 2018).
- ^{iv} *Debt Collector*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^v *Glossary*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/glossary> (last visited Mar. 5, 2018).
- ^{vi} *What is Deferment?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-deferment-en-629/> (last updated Aug. 4, 2016).
- ^{vii} FED. STUDENT AID, *Glossary supra* note v.
- ^{viii} *Discharge*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/dischargeinbankruptcy.asp> (last visited Mar. 5, 2018).
- ^{ix} *Federal Versus Private Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/federal-vs-private> (last visited Mar. 5, 2018).
- ^x *What Is a Subsidized Loan?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-a-subsidized-loan-en-573/> (last updated Aug. 4, 2016).
- ^{xi} FED. STUDENT AID, *Glossary supra* note v; *Guide to Financial Aid Award Letters*, FINAID.ORG, <http://www.finaid.org/fafsa/awardletters.phtml> (last visited Mar. 5, 2018).
- ^{xii} *How Aid Is Calculated*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/fafsa/next-steps/how-calculated> (last visited Mar. 5, 2018).
- ^{xiii} *What Is Forbearance?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-forbearance-en-631/> (last updated Aug. 8, 2017).
- ^{xiv} FED. STUDENT AID, *Glossary supra* note v.
- ^{xv} Greg Daugherty, *What Is FAFSA and Who Should Fill It Out?*, TIME (Nov. 13, 2015), <http://time.com/money/4108122/what-is-fafsa-and-who-should-fill-it-out/>.
- ^{xvi} *Understanding Repayment*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand#grace-period> (last visited Mar. 5, 2018).
- ^{xvii} *Interest*, INVESTOPEDIA, <https://www.investopedia.com/terms/i/interest.asp> (last visited Mar. 5, 2018).
- ^{xviii} *Understanding Student Loan Interest Rates*, DISCOVER (June 23, 2015), <https://www.discover.com/student-loans/college-planning/understanding-interest-rates.html>.

-
- ^{xix} *Knowingly*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^{xx} FED. STUDENT AID, *Glossary supra* note v.
- ^{xxi} *Licensee*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^{xxii} FED. STUDENT AID, *Glossary supra* note v.
- ^{xxiii} *Disclosure Statement*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/disclosurestatement.asp> (last visited Mar. 5, 2018).
- ^{xxiv} FED. STUDENT AID, *Glossary supra* note v; *Forgiveness, Cancellation, and Discharge*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation> (last visited Mar. 5, 2018).
- ^{xxv} *What Is a Student Loan Servicer?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-student-loan-servicer-en-583/>, (last updated Aug. 8, 2017).
- ^{xxvi} *Loan Servicing*, INVESTOPEDIA, https://www.investopedia.com/terms/l/loan_servicing.asp, (last visited Mar. 5, 2018).
- ^{xxvii} *Id.*
- ^{xxviii} *What Is the National Student Loan Data System?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-the-national-student-loan-data-system-nslds-en-589/>, (last visited Aug. 4, 2016).
- ^{xxix} *About NMLS*, NMLS RESOURCE CENTER, <https://nationwidelicensingsystem.org/about/Pages/default.aspx>, (last visited Mar. 5, 2018).
- ^{xxx} *Negligent*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^{xxxi} *Ombudsman*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^{xxxii} Kat Tretina, *Battling Your Servicer? How a Student Loan Ombudsman Can Help*, STUDENT LOAN HERO (Apr. 5, 2017), <https://studentloanhero.com/featured/student-loan-ombudsman-help/>.
- ^{xxxiii} *Origination Fee*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^{xxxiv} FED. STUDENT AID, *Federal Versus Private Loans supra* note ix.
- ^{xxxv} FED. STUDENT AID, *Glossary supra* note v.
- ^{xxxvi} *Reasonable*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^{xxxvii} *Reckless*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^{xxxviii} Cat Alford, *Student Loan Repayment: Is Hiring a Consultant Worth It?*, STUDENT LOAN HERO (Dec. 2, 2015), <https://studentloanhero.com/featured/student-loan-repayment-consultant-worth-it/>.
- ^{xxxix} *Statute of Limitations*, BLACK'S LAW DICTIONARY (10 ed. 2014).
- ^{xl} *Surety Bond*, CORNELL L. LEGAL INFO. INST., https://www.law.cornell.edu/wex/surety_bond, (last visited Mar. 5, 2018).

APPENDIX

APPENDIX A.	Legislation in Other States	1
APPENDIX B.	Selected CFPB Complaints	7
APPENDIX C.	Overview of Federal Student Loan History.....	22
APPENDIX D.	Statutes Relating to the CFPB and Student Loans in the Dodd-Frank Act	23
APPENDIX E.	Comparison of Federal and Private Student Loans	24
APPENDIX F.	Types of Federal and Private Loans	26
APPENDIX G.	Federal Loan Repayment Plans	28
APPENDIX H.	Federal Loan Cancellation and Loan Forgiveness Options.....	32
APPENDIX I.	Loan Disclosure Requirements for Federal and Private Loans	34
APPENDIX J.	Federal Loan Servicer Allocations (June 2017)	39
APPENDIX K.	Summary of Loan Servicing Issues Identified by the CFPB	46
APPENDIX L.	Allocation of Loan Payments with Federal Loans	50
APPENDIX M.	Consumer Financial Protection Bureau Complaint Process.....	51
APPENDIX N.	Due Diligence and Loan Servicing Provisions Under FFEL Program.....	52
APPENDIX O.	Relevant Federal Consumer Protection Statutes.....	54
APPENDIX P.	CFPB Enforcement Actions	57
APPENDIX Q.	Proposed Student Loan Borrowers’ Bill Of Rights Act	59
APPENDIX R.	General Recommendations for PHENOM	63

APPENDIX A. LEGISLATION IN OTHER STATES

STATES WITH ENACTED BBOR LEGISLATION:

- **CONNECTICUT:** An Act Concerning A Student Loan Bill of Rights, Public Act No. 15-162, 2015 Conn. Acts 656 (Reg. Sess.).
- **DISTRICT OF COLUMBIA:** Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act of 2016, D.C. Act 21-571, 63 D.C. Reg. 15334 (Dec. 16, 2016).
- **CALIFORNIA:** Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 5586.
- **ILLINOIS:** Student Loan Servicing Rights Act, Pub. Act 100-0540, 2017 Ill. Laws 540.

<i>CONNECTICUT</i>					
<i>Date Passed</i>	<i>Date Effective</i>	<i>Legislation</i>	<i>Overseeing Office(s)</i>	<i>Ombudsman</i>	<i>Borrower Education Course</i>
7/2/15	10/1/15; 6/1/16	Student Loan Bill of Rights	Department of Banking	The Act provides for the creation of an Ombudsman, but the position had not been filled as of November 2017, largely due to funding issues.	✓
<i>Notable Features</i>					
Commissioner submits annual reports to the legislature.					
Servicer applications submitted via Nationwide Mortgage Licensing System.					
License application fee of \$1,000; Investigation fee of \$800. Has since been amended to allow for volume-based assessment.					

<i>DISTRICT OF COLUMBIA</i>					
<i>Date Passed</i>	<i>Date Effective</i>	<i>Legislation</i>	<i>Overseeing Office(s)</i>	<i>Ombudsman</i>	<i>Borrower Education Course</i>
12/7/16	2/18/17	Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act of 2016	Department of Insurance and Securities Regulation	After delays in hiring, D.C. has appointed Dr. Charles Burt as the Ombudsman. He is tasked with handling mortgage foreclosure cases in addition to student loan borrower complaints.	✓
<i>Notable Features</i>					
Commissioner submits annual reports to the Mayor.					
Servicer must file surety bond with Mayor.					
According to emergency regulations adopted 12/26/2017, servicers will be charged an annual assessment fee of \$0.50 per borrower serviced in D.C.					
Published Borrower Bill of Rights in Layman's Terms.					

<i>CALIFORNIA</i>					
<i>Date Passed</i>	<i>Date Effective</i>	<i>Legislation</i>	<i>Overseeing Office(s)</i>	<i>Ombudsman</i>	<i>Borrower Education Course</i>
9/29/16	Operative 7/1/18	Student Loan Servicing Act	Department of Business Oversight	Does not provide for the creation of a Student Loan Ombudsman.	None.
<i>Notable Features</i>					
<p>Regulatory amendments pending</p> <p>Restrictive definition of student loan effectively excludes borrowers who have failed to graduate from the protections afforded by the Act.</p> <p>\$300 application fee, \$100 investigation fee, and cost of fingerprinting/criminal background check.</p>					

<i>ILLINOIS</i>					
<i>Date Passed</i>	<i>Date Effective</i>	<i>Legislation</i>	<i>Overseeing Office(s)</i>	<i>Ombudsman</i>	<i>Borrower Education Course</i>
11/8/17	12/31/18	Student Loan Servicing Rights Act	Department of Financial and Professional Regulation & Office of Attorney General	Provides for creation of Ombudsman position within the Attorney General's Office. Ombudsman will work in consultation with the Secretary of the Department of Financial and Professional Regulation.	None.
<i>Notable Features</i>					
<p>Application via Nationwide Mortgage Licensing System.</p> <p>Restrictive definition of student loan effectively excludes borrowers who have failed to graduate from the protections afforded by the Act.</p> <p>Servicers must provide Repayment Specialists for borrowers who qualify.</p> <p>\$1,000 application fee, \$800 investigation fee, \$1,000 renewal fee.</p> <p>Secretary may impose a fine up to \$75,000 for each count of fraud or misrepresentation or up to \$25,000 for other offenses.</p> <p>Attorney General authorized to enforce any violation of the law as a violation of the Consumer Fraud and Deceptive Business Practices Act.</p> <p>Servicer must disclose to borrower when income-driven repayment plan certification is about to expire.</p>					

STATES WHICH HAVE INTRODUCED (BUT NOT YET PASSED) BBOR LEGISLATION:

- **ARIZONA:** H.B. 2226, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).
- **COLORADO:** H.B. 1352, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).
- **DELAWARE:** H.B. 349, 148th Gen. Assemb., Reg. Sess. (Del. 2015).
- **MAINE:** S.B. 532, 128th Leg., 1st Reg. Sess. (Me. 2017).
- **MARYLAND:** H.B. 1642, 438th Gen. Assemb., Reg. Sess. (Md. 2018).
- **MINNESOTA:** H.F. 21, 90th Legis. Sess., 1st Reg. Sess. (Minn. 2017).
- **MISSOURI:** H.B. 1274, 99th Gen. Assemb., 2nd Reg. Sess. (Mo. 2018).
- **NEW JERSEY:** S.B. 1149, 218th Leg., 1st. Ann. Sess. (N.J. 2018).
- **NEW MEXICO:** S.B. 85, 53rd Legis. Sess., 2nd Sess. (N.M. 2018).
- **NEW YORK:** A.B. 8862, 240th Legis. Sess., Reg. Sess. (N.Y. 2017).
- **OHIO:** H.B. 432, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017).
- **RHODE ISLAND:** H.B. 6056, 2017 Legis. Sess., Reg. Sess. (R.I. 2017).
- **VIRGINIA:** S.B. 1053, 2017 Reg. Sess. (Va. 2016).
- **WASHINGTON:** S.B. 6029, 65th Leg., 2018 Reg. Sess. (Wash. 2017).

<i>State</i>	<i>Title</i>	<i>Overseeing Office</i>	<i>Ombudsman</i>	<i>Borrower Education Course</i>	<i>Notable Features</i>
AZ	Student Loan Servicers; Licensure House Bill No. 2226	Department of Financial Institutions	✓	✓	<p>§6-1807 Violations of applicable federal law, such as the Truth in Lending Act, serve as violations of this bill. Superintendent may take action against servicers for said violations.</p> <p>§6-1812 Civil penalties up to \$100,000 may be imposed against servicers.</p> <p>§6-1813 Servicers who willfully violate bill may be liable to borrowers for: damages incurred, a monetary award equal to three times the amount collected from the consumer, punitive damages, and cost of action/attorney fees. Servicers who negligently violate bill may be liable for the damages incurred and cost of action/attorney fees.</p>
CO	Regulate Student Education Loan Servicers House Bill No. 1352	Uniform Consumer Credit Code			

<i>State</i>	<i>Title</i>	<i>Overseeing Office</i>	<i>Ombudsman</i>	<i>Borrower Education Course</i>	<i>Notable Features</i>
DE	An Act to Amend Title 5 of the Delaware Code Relating to Student Loans House Bill No. 349	Office of the State Bank Commissioner	✓	✓	Does not establish a licensing scheme for servicers.
ME	An Act to Establish a Student Loan Bill of Rights to License and Regulate Student Loan Servicers Senate Paper No. 532	Department of Professional and Financial Regulation/Bureau of Consumer Credit Protection	✓	✓	§14-110 Violations of applicable federal law, such as the Truth in Lending Act, serve as violations of this bill. Superintendent may take enforcement action against servicers for said violations.
MD	Commissioner of Financial Regulation- Student Education Loans- Ombudsman and Licensing of Servicers House Bill No. 1642	Department of Financial Regulation	✓	✓	§12-1120 Servicers who willfully violate bill may be liable to borrowers for damages incurred, a monetary award equal to three times the amount collected from the borrower, punitive damages, and cost of action/attorney fees. Servicers who negligently violate bill may be liable for damages incurred and cost of action/attorney fees.
MN	Student Loan Ombudsperson, Student Loan Servicer Licensure Required, and Student Loan Servicing Practices Prohibited House File No. 21	Department of Commerce	✓	✓	

MO	Establishes the "Student Loan Bill of Rights" House Bill No. 1274	Department of Higher Education	✓	✓	
<i>State</i>	<i>Title</i>	<i>Overseeing Office</i>	<i>Ombudsman</i>	<i>Borrower Education Course</i>	<i>Notable Features</i>
NJ	Establishes Office of Student Loan Ombudsman; Regulates Student loan Servicers Senate Bill No. 1149	Department of Banking and Insurance	✓	✓	§9(b)(2) Provides that servicers may be liable for civil penalties capped at \$5,000 for the first violation, \$10,000 for the second violation, and \$15,000 for any violations thereafter. §10 Violations of applicable federal law, such as the Truth in Lending Act, serve as violations of the bill. Commissioner may take enforcement action against servicers for said violations.
NM	Student Loan Bill of Rights Act Senate Bill No. 85	Department of Regulation and Licensing	✓	✓	§13 Servicers may be liable for civil penalties of \$5,000 per violation. §14 Servicers may be charged criminally for operating without a license. §15 Violations of applicable federal law, such as the Truth in Lending Act, serve as violations of this bill. Director may take enforcement action against servicers for said violations.
NY	Relates to Establishing a Student Loan Borrower Bill of Rights Assembly Bill No. 8862	Department of Financial Services	✓	✓	
OH	To Require Student Loan Servicers to be Licensed by the Division of Financial Institutions and to Create the Position of Student Loan Ombudsperson in	Division of Financial Institutions	✓	✓	§1323.17 Servicers may liable for criminal offenses. Civil penalties of not less than \$100 but not more than \$500 shall be imposed on servicers for the first offense, and fines of not less than \$500 but not more than \$1,000 for additional offenses.

	the Division of Financial Institutions to Provide Assistance to Student Loan Borrowers House Bill No. 432				
<i>State</i>	<i>Title</i>	<i>Overseeing Office</i>	<i>Ombudsman</i>	<i>Borrower Education Course</i>	<i>Notable Features</i>
RI	An Act Relating to Education- The Student Loan Bill of Rights House Bill No. 6056	Department of Business Regulation	✓	✓	§16-59.1-14 Violations of applicable federal law, such as the Truth in Lending Act, serve as violations of this bill. Commissioner may take enforcement action against servicers for said violations.
VA	Student Loan Servicers, Student Loan Ombudsman Senate Bill. No. 1053	State Corporation Commission/ Bureau of Financial Institutions	✓	✓	§6.2-2605 Servicers must file surety bonds of \$50,000 per location of business, capped at \$500,000 total. §6.2-2612 The Commissioner shall set an annual fee for servicers. §6.2-2615 The Commissioner may issue cease & desist order against servicers. §6.2-2616 Violations of applicable federal law, such as the Truth in Lending Act, serve as violations of this bill. Commissioner may take enforcement action against servicers for said violations. §6.2-2617 The Commissioner may impose civil penalties of up to \$2,500 against servicers.
WA	Establishing a Student Loan Bill of Rights Senate Bill No. 6029	Department of Financial Institutions	✓ *(termed Student Loan Advocate)	✓	§1 The Student Loan Advocate works in collaboration with the Attorney General’s Office to handle complaints from borrowers. §13 Director may impose fines up to \$100 per day per violation on servicer. Bill was recently passed by legislature, but is awaiting signature by Governor.

APPENDIX B. SELECTED CFPB COMPLAINTS



[Submit a Complaint](#)

[Back to search results](#)

[What do all these data points mean?](#)

2314714

Date CFPB received the complaint
1/28/2017

Consumer's state
CA

Consumer's zip
959XX

Submitted via
Web

Tags

Did consumer dispute the response?
No

Product
Student loan
Sub-product: Non-federal student loan

Issue
Dealing with my lender or servicer
Sub-issue: Having problems with customer service

Consumer consent to publish narrative
 Consent provided

Consumer complaint narrative

As a XXXX school student in XXXX, I took out a private student loan with my step-mother as a co-signer. I graduated with honors from XXXX (XXXX, which closed its doors in XXXX) in XXXX and worked as a XXXX for the next six years. In XXXX, I decided to pursue a degree in XXXX. I graduated XXXX from XXXX University, XXXX with a XXXX in XXXX in the XX/XX/XXXX with aspirations to work as an XXXX. Since graduating, employment has eluded me, and I worry that given the current government takeover by the Republican party few job openings within public service will be available. The years surrounding my attendance at XXXX were a brief period of reconciliation between my father and I. My father appeared to be supportive and offered to help me attend XXXX school, which it is important to note was contrasted by years of XXXX. At the time, I believed we could get past our history and XXXX. Although I have cut off communication with him, we seem to be eternally, financially linked because of this private student loan. Before returning to school in XXXX, I was able to pay off nearly half of the balance of the Signature student loan, but XXXX XXXX was never willing to assist me in removing the co-signer, my step-mother, from the loan agreement. In school deferment enabled me to return to school, but ran out in the middle of my senior year, XXXX XXXX. The last year has eaten up the last of my available forbearance, and I am now being threatened with default. Bear in mind that throughout the history of this loan whenever a payment was misallocated or late, or forbearance/deferment was applied to the wrong loan, XXXX XXXX, now Navient, called my estranged father and step-mother ; they do n't call me, they call my XXXX father, and then he calls me. It is crucial that you grasp the XXXX this poses to me. Finding myself in this current financial crisis is only exacerbated by the looming risk of regular, XXXX from my father. In a state of XXXX, I have spent the last few months trying to find any assistance or relief from this loan, however, Navient can offer me no path under my current financial situation ; I, essentially, do not qualify for any program offered by Navient that would go towards lowering payments, removing my co-signer, or delaying payments until my financial position improves. Nonetheless, I find myself encouraged by the recent lawsuit filed against Navient by the Consumer Financial Protection Bureau (CFPB) given that I believe many of the complaints in the

lawsuit apply to my circumstance, but fear that the appointment of XXXX XXXX and the election of President XXXX may thwart those efforts and put my new federal loans in jeopardy of being on a similar tract. I see nothing in the way of a stable, financial future for myself if any or all of my student debt is sold to a private, third party not required to work with me on repayment, and I am relying on you and other like-minded politicians within the Federal Government to come up with an answer.

Company information

Date complaint sent to company
1/28/2017

Timely response?
 Yes

Company name
Navient Solutions, LLC.

Company response to consumer
Closed with explanation

Company public response

-
- [Contact Us](#)
 - [Newsroom](#)
 - [Careers](#)
 - [Industry Whistleblowers](#)
 - [CFPB Ombudsman](#)

[FOIA](#)

[Plain Writing](#)

[Privacy](#)

[Website Privacy Policy & Legal Notices](#)

[Open Government](#)

[Administrative Adjudication](#)

[Accessibility](#)

[Office of Civil Rights](#)

[No FEAR Act Data](#)

[Tribal](#)

[USA.gov](#)

[Office of Inspector General](#)

An official website of the United States Government


[Submit a Complaint](#)
[Back to search results](#)
[What do all these data points mean?](#)

2341238

Date CFPB received the complaint

2/13/2017

Consumer's state

OR

Consumer's zip

972XX

Submitted via

Web

Tags
Did consumer dispute the response?

No

Product
Student loan

Sub-product: Non-federal student loan

Issue
Dealing with my lender or servicer

Sub-issue: Received bad information about my loan

Consumer consent to publish narrative
 Consent provided

Consumer complaint narrative

RE : XXXX coverage of Student Loans and Navient behaviors and activity I was XXXX years old when I decided to move directly past my XXXX year of high school and apply to the XXXX of XXXX. That was in XX/XX/XXXX. I applied to a handful of XXXX and was accepted by XXXX, but XXXX offered an almost immediate acceptance as well as a modest scholarship. I soon applied for student loans to cover the wide gap between my scholarship and the rest of tuition, filling out my FAFSA. My father, XXXX also filled out FAFSA and consented to co-sign for the initial school loan for an education that would assist in my goal of working as a professional XXXX with a background in XXXX. During all encounters in the loan process with the Financial Aid office at XXXX, the financial assistance counselor - XXXX XXXX - spoke to be about my "scholarship" from XXXX as credit against tuition, which was a fraction of the annual tuition of roughly (\$22000.00). With the scholarship talk done, XXXX XXXX never : -- Never mentioned any differences between a government-underwritten loan, i.e. XXXX XXXX, with a decent interest rate. -- Never discussed interest rates, and what repayment procedures would be. -- Never discussed a difference between private loans, bank loans, federal student loans. -- Never informed me that "grants" disbursed by XXXX were, in fact, new loans for which I would be held completely responsible. I have spent more time than I would wish or consider wise in forbearance arrangements - either during periods of unemployment following the XX/XX/XXXX economic crash, or periods when I was not financially able to make a loan payment without crashing my rent and deferring on basic needs, such as groceries and medical care. At the same time, Navient came after me - and my father who co-signed on the original loan. Navient pursued its collection claims with continuous rounds of telephone calls, sometimes when I was at work (I have achieved employment in my profession, but still lack a college degree because of Navient and XXXX loan practices). My father also received a cascade of daily, and sometimes hourly phone calls, either to track me down, or to dun him for payments they described as overdue that would be used to report him to credit reporting agencies, as well as myself. The calls came during working hours, and also during the late evening hours when law prescribes that as illegal collections activity. I attempted starts to payment programs

that, if terms were fulfilled, would release my father from his status as co-signer, but I also have read, and understand, that Navient, rarely, if ever, releases a co-signer. The XXXX of XXXX will not release my college transcripts for review by other institutions, saying I am several XXXX dollars in arrears to them, but the terms of those arrears have never been outlined or explained. XXXX, the same financial assistance officer at XXXX, also has said my records can not be found. Initially, I am asking that my name - and my father 's name - XXXX, and XXXX - be added to the " Class " in the lawsuit against Navient. However, we also are considering our own legal response. I would also like to add my name and voice to the list of student loan borrowers. It is my reasonable person 's opinion that I was enticed, while still a teenager - and never explained adequately the nature of the commitment I was making, while also assigning co-signer status to my father. In awarding me so-called " grants, " and never explaining that it was an additional repayment obligation - and in appending my father 's name as co-signer on debts and obligations that he was never copied in on or had a chance to review - that this reinforces the pattern of fraudulent dealing assigned to Navient. XXXX, XXXX, co-signer

Company information

Date complaint sent to company

2/13/2017

Timely response?

Yes

Company name

Navient Solutions, LLC.

Company response to consumer

Closed with explanation

Company public response

[Contact Us](#)

[Newsroom](#)

[Careers](#)

[Industry Whistleblowers](#)

[CFPB Ombudsman](#)

[FOIA](#)

[Plain Writing](#)

[Privacy](#)

[Website Privacy Policy & Legal Notices](#)

[Open Government](#)

[Administrative Adjudication](#)

[Accessibility](#)

[Office of Civil Rights](#)

[No FEAR Act Data](#)

[Tribal](#)

[USA.gov](#)

[Office of Inspector General](#)

An official website of the United States Government



[Submit a Complaint](#)

[← Back to search results](#)

[What do all these data points mean?](#)

2377738

Date CFPB received the complaint
3/9/2017

Consumer's state
MA

Consumer's zip
019XX

Submitted via
Web

Tags

Did consumer dispute the response?
Yes

Product
Student loan
Sub-product: Federal student loan servicing

Issue
Dealing with my lender or servicer
Sub-issue: Trouble with how payments are handled

Consumer consent to publish narrative
 Consent provided

Consumer complaint narrative
I had questions about incorrect information I found on the National Student Loan Data System. I called my servicer, Fed Loan Servicing. The woman I spoke with told me that Fed Loan owned my loan, as opposed to merely serviced it, and that Fed Loan did not report any payments to FSA, only credit reporting agencies. I knew this was incorrect information. I asked for a supervisor and was transferred to AES. They sent me back to Fed Loan where I talked to a woman who kept interrupting me and would not let me ask any questions about my NSLDS information. She kept saying my question was about PSLF, but it was n't. I was trying to ask about my repayment history. I was not allowed to ask her any questions, I kept being cutoff mid-sentence. She refused to open up my NSLDS information and look at it with me on the phone. Finally, I let her transfer me to the division that dealt with PSLF. The man on the line told me I was at the " escalation department " and was able to tell me that after a repayment review (90 days) my information should be updated on NSLDS. This was a fairly simple answer to give, I have no idea why I had to go through all of these steps to get it. This whole thing took an hour, I got bad information, received rather XXXX customer service from one representative (to put it politely), was transferred three times, talked to four representatives, and was referred to AES -- which does not service the Federal Direct Loans I have. Overall this was a rather stark experience. I have no idea how people without a preexisting understanding of Federal Student Aid programs manage to get any accurate understanding/information about their loans.

Company information

Date complaint sent to company
3/9/2017

Company name
AES/PHEAA

Timely response?
 Yes

Company response to consumer
Closed with explanation

Company public response



[Submit a Complaint](#)

[Back to search results](#)

[What do all these data points mean?](#)

2425006

Date CFPB received the complaint

4/7/2017

Consumer's state

CA

Consumer's zip

950XX

Submitted via

Web

Tags

Did consumer dispute the response?

No

Product

Student loan

Sub-product: Non-federal student loan

Issue

Dealing with my lender or servicer

Sub-issue: Received bad information about my loan

Consumer consent to publish narrative

Consent provided

Consumer complaint narrative

I had XXXX student loans from XXXX on my credit report. I was contacted by someone named XXXX from their company in XX/XX/2014 telling me there was a new government program that would remove all the student loans from my credit if I successfully made 6 months of payments, as long as I email him stating that I would n't dispute the loans. I set up an autopay from my bank account to pay my loan and ended up speaking to them again, where they offered me a forbearance period. During this time, they sold my loans to Navient without me being aware. My autopay stopped paying my loans to the new lender and I ended up getting 6 months late on my credit report as a result. Since then, I've fully paid off all my student loans and am in a terrible situation because I now have XXXX 6 month lates on my credit report.

Company information

Date complaint sent to company

4/7/2017

Company name

Navient Solutions, LLC.

Timely response?

Yes

Company response to consumer

Closed with explanation

Company public response

[Contact Us](#) [Newsroom](#) [Careers](#) [Industry Whistleblowers](#) [CFPB Ombudsman](#)


[Submit a Complaint](#)
[Back to search results](#)
[What do all these data points mean?](#)

2568803

Date CFPB received the complaint

7/8/2017

Consumer's state

MA

Consumer's zip

021XX

Submitted via

Web

Tags
Did consumer dispute the response?

N/A

Product

Student loan

Sub-product: Federal student loan servicing

Issue

Dealing with your lender or servicer

Sub-issue: Trouble with how payments are being handled

Consumer consent to publish narrative
 Consent provided

Consumer complaint narrative

I am writing to file a complaint against FedLoan Servicing. In XX/XX/XXXX, I filed for employment certification for Public Service Loan Forgiveness, and I was notified that my outstanding \$ 150,000+ of student loans would be transferred to FedLoan for servicing because my employment qualifies me for this program. <P/>From XX/XX/XXXX-XX/XX/XXXX, my monthly payment was {\$0.00} in the Income Driven Repayment plan I had been enrolled in for nearly 4 years, as I had limited income after finishing my XXXX Degree. In XX/XX/XXXX, I receive notification from FedLoan that it was time to recertify my income to calculate the new annual payment. I reviewed the materials available to me, and determined that the best move for me would be to switch from the Income Driven Repayment Plan to the REPAYE plan. I called FedLoan in XX/XX/XXXX before filling out the certification form to let them know I was looking for the cheapest monthly payment option, and was told to indicate that in a checkbox on the form. <P/>Given that the online portal to pull IRS tax information was shut down, I was required to submit my tax return and form through the document upload portal, which I did at the beginning of XX/XX/XXXX - well before the XX/XX/XXXX deadline to submit the form. <P/>About a week later I received an email from FedLoan letting me know they had received my information, and would begin processing. About another 2 weeks later, I received another email telling me they were still processing it and not to worry. Another 2 weeks later, on XX/XX/XXXX, I received an email from FedLoan telling me my request had been put on hold, with no description of what that meant. <P/> I called FedLoan to get information on what " on hold " meant. When I called, FedLoan told me that everything was fine with the application and they were waiting to process it until it was closer to the actual payment start date (which would be in XX/XX/XXXX). I expressed my frustration, explaining that I needed to know what my monthly payment would be to appropriately allocate funds. They apologized and said I 'd have to wait until XX/XX/XXXX to get the bill, but could estimate the payment around {\$230.00} with my submitted information. At this point, I was also told that to change plans from the Income Driven Repayment into any other plan, I was required to make one month of the full, standard payment, which was {\$860.00}. I told the representative on the

phone that I could not afford that payment, and that that was not indicated anywhere in the forms to me. She said it was listed and I must have missed it, however I would be allowed to make an adjusted payment if I could not afford the {\$860.00}, in order to kick in the new REPAYE plan. She said I could choose the payment amount as long as it was more than {\$5.00}. I told her I could afford {\$200.00}, and she entered that information on file. <P/>On XX/XX/XXXX, I received an email about my " Deferment of Forbearance " from FedLoan, when I opened it, I determined that the " adjusted payment " suggested to me by the customer service representative was actually a month of forbearance, which was not communicated to me at the time. <P/>Then on XX/XX/XXXX, I received notification from FedLoan via email that my new Repayment Terms were available. When I opened the document, it was for the full standard repayment at a payment of more than {\$1700.00} per month. I immediately called FedLoan. They told me the repayment information had been incorrectly applied to my account, and they could see the income recertification form with my account, and as long as I made my adjusted payment of {\$200.00} before the due date on XX/XX/XXXX, I should receive my updated, correct billing statement on XX/XX/XXXX. <P/>On XX/XX/XXXX I made my adjusted payment of {\$210.00} to FedLoan, expecting to receive the correct monthly repayment amount for XX/XX/XXXX on XX/XX/XXXX. I received my billing statement today, XX/XX/XXXX with a monthly payment of {\$1800.00} - the standard repayment plan amount. FedLoan does not offer customer service on weekends, and now I need to wait until Monday to resolve this issue. <P/>I have been extremely proactive about my student loan repayment. The amount of time and effort I put forth to ensure my monthly payment was affordable and correct seems wasted at this point. I also find it extremely deceptive that a month of the standard repayment amount is required in order to determine your new, income based payment for the year. I was told this was only done once, when switching out of the IDR plan and into any other plan, however the fact that I was required to make a payment in order to find out my new monthly payment (which was n't even correct), on top of the fact that the adjustment was actually a month of forbearance (which was not communicated to me), is extremely concerning to me. As a young professional with significant student loan debt, I am trying to be proactive and responsible with my repayment. FedLoan is making that exceedingly difficult.

Company information

Date complaint sent to company
7/8/2017

Timely response?
 Yes

Company name
AES/PHEAA

Company response to consumer
Closed with non-monetary relief

Company public response

[Contact Us](#) [Newsroom](#) [Careers](#) [Industry Whistleblowers](#) [CFPB Ombudsman](#)



[Submit a Complaint](#)

[← Back to search results](#)

[What do all these data points mean?](#)

2571681

Date CFPB received the complaint

7/12/2017

Consumer's state

KY

Consumer's zip

405XX

Submitted via

Web

Tags

Did consumer dispute the response?

N/A

Product

Student loan

Sub-product: Federal student loan servicing

Issue

Struggling to repay your loan

Sub-issue: Can't get other flexible options for repaying your loan

Consumer consent to publish narrative

Consent provided

Consumer complaint narrative

I have been trying to enter an income-based repayment plan, however most of my online request forms have been ignored and 2 of them have been put on hold. One of the emails said the request was put on hold until closer to the end of my grace period, however while I'm in my grace period interest is still accruing and I therefore want to start making payments as soon as possible. I have tried emailing them several times about the issue with no response. Thus I am being forced to make payments outside of a payment plan (which wo n't go towards my public service loan forgiveness) in order to prevent any additional interest build-up.

Company information

Date complaint sent to company

7/12/2017

Timely response?

Yes

Company name

AES/PHEAA

Company response to consumer

Closed with explanation

Company public response

[Contact Us](#)

[Newsroom](#)

[Careers](#)

[Industry Whistleblowers](#)

[CFPB Ombudsman](#)



[Submit a Complaint](#)

[Back to search results](#)

What do all these data points mean?

2679665

Date CFPB received the complaint

9/20/2017

Consumer's state

MO

Consumer's zip

641XX

Submitted via

Web

Tags

Did consumer dispute the response?

N/A

Product

Student loan

Sub-product: Private student loan

Issue

Struggling to repay your loan

Sub-issue: Can't get other flexible options for repaying your loan

Consumer consent to publish narrative

Consent provided

Consumer complaint narrative

In XX/XX/XXXX, at XXXX years of age, I embarked upon my journey to become a XXXX and help my community. As the first in my family to attend college, this was a really big deal. Unfortunately, based on my age and my parents lack of experience with higher education, we trusted my university's financial aid. We were encouraged to use XXXX XXXX to take out loans to cover costs of my XXXX training. I did not have family or friends to cosign after my first loan - yet XXXX XXXX engaged in unethical lending practices by pushing to approve high interest, high sum loans to a XXXX without a cosigner. I had to start working through college and drop out of my XXXX training. Now, at XXXX years of age, as a resident XXXX (grateful to the state for subsidizing affordable post-bacheloreate XXXX training), only now can I appreciate the truly disgusting, predatory practices of XXXX XXXX. Their practices are even more out of hand now as I am trying to repay my debt. I have called multiple times, as detailed below, and every time was told they are unable to offer affordable repayment plans until I default. I worked very hard for my excellent credit score and genuinely want to repay my debt despite feeling so taken advantage of by their lending practices when I was a XXXX. Let me clarify - XXXX XXXX was willing to lend an XXXX year old, first to college in her family, who dropped out of XXXX training, loans at ridiculously high interest rates, in the sums of tens of thousands of dollars. I will now outline my attempts at repaying my loans. After graduation (XX/XX/XXXX), after rejection from post-graduate programs, I took a job as a XXXX XXXX in an under served community. Around XX/XX/XXXX, my loans went into repayment, and I had to move in with family. Unfortunately, XXXX XXXX, XXXX XXXX, XXXX and XXXX barely totaled enough for me to afford > \$ 1000 month payments. I called for my options - only three were given. 1) pay " interest only " at around {\$900.00} a month 2) pay {\$150.00} every three months for forbearance 3) default. I opted to pay {\$150.00} every three months until I was able to figure out an alternative. I ended up going back to school for post-bacheloreate XXXX studies at state university in XX/XX/XXXX. At some point during this time XXXX XXXX turned into Navient. My loans remained deferred while I was in school, as expected. I am grateful this company was at least held ethically accountable for in-school forbearance. Now that I have graduated and

taken my first position as a XXXX XXXX in training, still with a meager income, Navient is playing the same unethical game. I have called three times between XX/XX/XXXX-XX/XX/XXXX requesting repayment options. Same story as before ; options were unchanged : interest only payments, \$ XXXX/3 months forbearance (for only twice more and then it is no longer an option), or default and they can consider repayment plans. I again opted for the forbearance in the hopes I could refinance or find another option before tanking my hard earned credit. So, despite they fact I am been trying to give Navient my money in a reasonable affordable way, and despite the fact I will essentially being paying them for the rest of my life on a XXXX XXXX 's income, they refuse to allow a payment plan until they default me and report to credit. I now face going into severe debt after XX/XX/XXXX when I no longer qualify to continue the \$ XXXX/3 month forbearance option. I consider myself an upstanding citizen who wants to contribute positively to my community and served the under served populations in need of healthcare. I would like to afford my rent, groceries, hopefully have a modest wedding and invest in a car or home one day. If my student loan payments will not allow that, then I will take responsibility - and adjust my spending priorities as needed. It is still emotionally painful, exhausting and mentally draining to feel so abused by Navient. I feel violated by their predatory lending practices and even more disturbed by their complete lack of regard for my credit and need for repayment options. I am now in the position where I can afford monthly payment towards at least one of the loans, but unfortunately the others will default. I appreciate your time and consideration in this matter. I understand private higher education debt is a large scale, serious national problem right now. I am having no problem repaying my federal debt and will be working loan-for-service in under served communities to repay XXXX XXXX debt. Obviously, the US Government is held to a higher, ethical standard from this regard. I am very grateful. My heart aches as I reflect on the fact I had no clue about private vs. public loan differences at XXXX years of age. I have daily stress and lose sleep at night over my private loans - and I hope my own children (assuming I can afford to have them in the future) will never experience this. Although my current political work is focused on healthcare for children ; I am also working to become more involved in the politics around higher education loans. Hopefully, there will be an end in sight. Sincerely, XXXX

Company information

Date complaint sent to company
9/20/2017

Timely response?
 Yes

Company name
Navient Solutions, LLC.

Company response to consumer
Closed with explanation

Company public response



[Submit a Complaint](#)

[Go to search home page](#)

What do all these data points mean?

2704438

Date CFPB received the complaint
10/17/2017

Consumer's state
MA

Consumer's zip
021XX

Submitted via
Web

Tags

Did consumer dispute the response?
N/A

Product
Student loan
Sub-product: Private student loan

Issue
Struggling to repay your loan
Sub-issue: Can't get other flexible options for repaying your loan

Consumer consent to publish narrative
 Consent provided

Consumer complaint narrative

Good Morning, So here is my issue I 'm more concerned with how to fix the problem with private loans as I have no issues with the one small loan I have as a XXXX federal fixed rate loan. I graduated in XXXX XXXX and it 's like I 'm paying a second mortgage back (over \$ 40K) after consolidating years ago on several fixed rated loans through XXXX XXXX, now known as Navient. I wanted one bill instead of several so I made that mistake, I will never consolidate again!! Learned my lesson. I have reached out to Navient multiple times and they keep saying the same option and very hard but this bill has given us nothing but grief and if it sends me/us into collections and screws up my personal credit we will never be able to move forward in any way, new house, new car if needed, any medical expenses we are trying to pay off etc. We have a house to pay for, cars, medical bills, daycare expenses etc. and two young ones to make sure they are taking care of at Drs. appt., when needed etc. This is making it very difficult for us to keep up with other bills, their daycare expenses, paying our mortgage on time and putting food on the table among other unexpected bills that can occur through the months. I know there are many people, students in this predicament and I feel this needs to be addressed immediately and taken very seriously. I ca n't even transfer this loan to a personal or to another lender if I want to as it 's too much money to pay off anywhere else and I ca n't get a personal loan in this amount, it 's not allowed. The interest rate on this loan has risen at least 3 times in the past several months and if the bill goes up to {\$300.00} as it 's already XXXX, I will have no choice but to not pay it as food on the table for our boys and being able to keep our house and have heat from oil deliveries needed is more important. I do n't want this to affect our credit as we hope to move within the next year or two. However, if we lose our home etc. because of them it would be a tragedy and I would be very furious. This is unfair!!!!!! PRIVATE LOANS MUST BE ADDRESSED!!!!!! I ca n't

stress this enough. SOMETHING MUST BE DONE BEFORE THEY DESTROY MY LIFE AND SO MANY OTHERS!! Sincerely, XXXX XXXX XXXX

Company information

Date complaint sent to company
10/17/2017

Timely response?
 Yes

Company name
Navient Solutions, LLC.

Company response to consumer
Closed with explanation

Company public response

-
- [Contact Us](#)
 - [Newsroom](#)
 - [Careers](#)
 - [Industry Whistleblowers](#)
 - [CFPB Ombudsman](#)

[FOIA](#)

[Plain Writing](#)

[Privacy](#)

[Website Privacy Policy & Legal Notices](#)

[Open Government](#)

[Administrative Adjudication](#)

[Accessibility](#)

[Office of Civil Rights](#)

[No FEAR Act Data](#)

[Tribal](#)

[USA.gov](#)

[Office of Inspector General](#)

An official website of the United States Government



[Submit a Complaint](#)

[← Back to search results](#)

[What do all these data points mean?](#)

2729057

Date CFPB received the complaint
11/14/2017

Consumer's state
OR

Consumer's zip
974XX

Submitted via
Web

Tags

Did consumer dispute the response?
N/A

Product
Student loan
Sub-product: Private student loan

Issue
Dealing with your lender or servicer
Sub-issue: Don't agree with the fees charged

Consumer consent to publish narrative
 Consent provided

Consumer complaint narrative
Hello, I am submitting this complaint in order to help the CFPB identify a systemic problem with student loans. In this regard, the use of penalties by student loan companies are predatory and excessive. I recently had a student loan payment due on XX/XX/XXXX for the amount of (\$200.00). I fully admit I was late on this payment by a duration of approximately two hours. My loan servicer, XXXX, immediately penalized me for being late. I fully acknowledge the responsibility of paying my loans and the fines that may come with a late payment. However, the fine placed another (\$200.00) which brought my actual payment to (\$410.00). This penalty, in my view, is completely excessive and obscene. It follows a disheartening trend of student loan companies taking advantage of young graduates and students who simply want to gain an education to better their lives and the world around them. Millennials on average have starting salaries 20 % lower than preceding generations, while saddled with more debt as well. This is a systemic issue. I understand if I get no reprieve from Nelnet over this. However, I would like the CFPB to at least investigate the extreme level of punishment that is levied on post-graduates such as myself, for being even an a couple hours late. There is no logical reasoning, for doubling my payment for paying my debt two hours past the deadline. I do what I can to make sure I can meet my financial needs each month and this has put a serious strain on my ability to stay financially solvent as I prepare my budget for bills going into XX/XX/XXXX, when I will inevitably have to pay another (\$200.00) payment on the XX/XX/XXXX. I hope you can look into this and ultimately resolve the issue of loan servicers preying on post-graduates such as myself.

Company information

Date complaint sent to company
11/14/2017

Company name
NELNET, INC.

Timely response?
 Yes

Company response to consumer
Closed with explanation

Company public response



[Submit a Complaint](#)

[← Back to search results](#)

[What do all these data points mean?](#)

2748578

Date CFPB received the complaint
12/7/2017

Consumer's state
CO

Consumer's zip
809XX

Submitted via
Web

Tags

Did consumer dispute the response?
N/A

Product
Student loan
Sub-product: Federal student loan servicing

Issue
Dealing with your lender or servicer
Sub-issue: Received bad information about your loan

Consumer consent to publish narrative
 Consent provided

Consumer complaint narrative
I have been struggling with my student debt since XX/XX/XXXX. In 13 years I was never advised repayment options by XXXX or navient. I was only advised that I could keep asking for forbearance and deferment. I discovered consolidation and income based repayment myself after I filed bankruptcy. Now my debt has doubled since XX/XX/XXXX. I was never advised about the income based repayment and even then this increases my balance by XXXX every mth. I filed BKXXXX XX/XX/XXXX and filed a complaint with Ombudsman that required they remove all payment history from XX/XX/XXXX to XX/XX/XXXX and they refuse. I would like this acct investigated since it opened. They benefitted from my hardships and now I have 3 closed accts that reflect negative on my credit when I have been diligent in rebuilding my credit. When I call Navient they tell me it 'll be resolved and someone dropped the ball.

Company information

Date complaint sent to company
12/7/2017

Company name
Navient Solutions, LLC.

Timely response?
 Yes

Company response to consumer
Closed with explanation

Company public response

[Contact Us](#)
[Newsroom](#)
[Careers](#)
[Industry Whistleblowers](#)
[CFPB Ombudsman](#)

APPENDIX C. OVERVIEW OF FEDERAL STUDENT LOAN HISTORY

1944 Servicemen’s Readjustment Act (“G.I. Bill”)	Military personnel guaranteed a year of education for 90 days of service, plus one month for each month of active combat duty; maximum award capped at 48 months of benefits
National Defense Education Act of 1958	Federal student loans offered to students pursuing degrees in math, science, and modern foreign language according to a need-based formula
Higher Education Act of 1965	Created the Guaranteed Student Loan Program, in which the government guaranteed loans provided by private sources; established the following programs: <ul style="list-style-type: none"> ● Federal Family Education Loan Program (FFEL) ● Federal Insured Student Loan (FISL)
Higher Education Act Amendments of 1992	Created the FAFSA, as well as the following programs: <ul style="list-style-type: none"> ● Federal Family Education Loans (FFELs) ● Unsubsidized Stafford loan program
Student Loan Reform Act of 1993	Created the Federal Direct Loan Program, with government loans originating through the Department of Education
Higher Education Reconciliation Act of 2005	Loan fees were reduced from 4% to 1%; allowed graduate students to take out PLUS Loans
Health Care and Education Reconciliation Act of 2010	Eliminated FFEL program and requires all new federal student loans to be Direct loans <ul style="list-style-type: none"> ● Existing FFEL loans continue to be held, serviced, and collected by lenders, servicers, and guaranty agencies
Bipartisan Student Loan Certainty Act of 2013	Established formula to determine interest rates for all Direct Loan Program loans <ul style="list-style-type: none"> ● Interest rates apply for life of loan (fixed-rate) ● Maximum interest rates imposed by Congress, depending on the type of loan and whether student is an undergraduate or graduate students

See NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW § 1.3 (5th ed. 2015), <https://library.nclc.org/node/99568> (last visited Mar. 9, 2018); Angelica Cervantes et. al, *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later*, TG RESEARCH AND ANALYTICAL SERVS. 17 (Nov. 2005), https://www.tgslc.org/pdf/HEA_History.pdf.

**APPENDIX D. STATUTES RELATING TO THE CFPB AND STUDENT LOANS IN
THE DODD-FRANK ACT**

<i>12 U.S.C. §5491</i>	Establishment of the Bureau of Consumer Financial Protection
<i>12 U.S.C. §5492-5493</i>	Description of the CFPB’s administrative functions
<i>12 U.S.C. §5511</i>	Purpose, objectives, and function of CFPB
<i>12 U.S.C. §5512</i>	Provides CFPB with rulemaking authority and power to administer, enforce, and implement provisions of Federal consumer financial law
<i>12 U.S.C. §5514</i>	Supervision of nondepository (i.e. nonbank) covered persons
<i>12 U.S.C. §5515</i>	Provide CFPB with exclusive authority to supervise and examine depository institutions with assets exceeding \$10 billion
<i>12 U.S.C. §5516</i>	Depository institutions with assets less than \$10 billion remain under supervision of their federal banking regulator, but CFPB may still play a role and share reports with regulator
<i>12 U.S.C. §5531</i>	Prohibits a covered person or service provider from committing “unfair, deceptive or abusive acts or practices” (UDAAPs)
<i>12 U.S.C. §5532</i>	CFPB may prescribe rules requiring disclosure of costs, benefits, and risks associated with a product/service to consumers
<i>12 U.S.C. §5533</i>	Addresses consumer rights to access information; CFPB in charge of implementing/maintaining a standard format for maintaining consumer data
<i>12 U.S.C. §5534</i>	CFPB maintains centralized consumer complaint function and clearly states procedures for covered persons to respond to consumer complaints
<i>12 U.S.C. §5535</i>	Requires appointment of Education Loan Ombudsman within the CFPB
<i>12 U.S.C. §5551</i>	State consumer protection laws that provide greater protections to consumers not deemed inconsistent with federal law (“reverse” federal preemption), but Bureau still has authority to address whether state laws are inconsistent on petition of interested party
<i>12 U.S.C. §5552</i>	Provides Attorneys General with authority to enforce consumer protection laws against state entities and bring enforcement actions against national banks and federal thrifts

* 2018 Code Edition

APPENDIX E. COMPARISON OF FEDERAL AND PRIVATE STUDENT LOANS

	Federal Loan	Private Loan
<i>Origination</i>	Issued and guaranteed by Department of Education	Issued by various financial institutions
<i>Application Process</i>	Submit FAFSA	Apply directly through bank or financial institution, with ability to shop around for plan options
<i>Repayment Timeline</i>	Repayment of loans not required until student: <ul style="list-style-type: none"> ● Graduates; ● Leaves school; or ● Changes enrollment to less than half-time 	Many lenders require payment while student is still in school
<i>Interest Rates</i>	Fixed interest rate that does not change over life of the loan; with subsidized loans, government pays the interest while student in school	Variable interest rates that can reset every month or quarter
<i>Credit Check</i>	With the exception of PLUS loans, a credit check is not required	May require an established credit record, with the cost of a private student loan tied to financial factors including a borrower's credit score
<i>Co-signer</i>	Not necessary in most cases	May be required by the lender
<i>Borrowing Limits</i>	Amount student can borrow is limited General loan caps: <ul style="list-style-type: none"> ● Undergraduates: up to \$5,500-12,000 per year ● Graduate students: up to \$8,000-20,500 per year 	Generally higher borrowing limits than federal loans; total amount borrowed generally should not exceed student's college costs
<i>Consolidation</i>	Loans can be consolidated through the Direct Consolidation Loan program	Cannot be consolidated into a Direct Consolidation Loan
<i>Forbearance / Deferment</i>	In times of economic need, borrower may be able to temporarily postpone or lower payments	Lenders may not have provisions allowing forbearance or deferment

<i>Treatment of loan upon death/disability</i>	Discharged upon borrower's death or permanent disability (in some cases)	Lenders have discretion to discharge loan; no requirement to cancel student loans if borrower dies or becomes disabled
<i>Repayment plan options</i>	<p><u>Repayment plan with Direct Loans:</u></p> <ul style="list-style-type: none"> ● Standard ● Extended ● Graduated <p><u>Income-Dependent Repayment Plans:</u></p> <ul style="list-style-type: none"> ● Income Contingent Repayment (ICR) ● Income Based Repayment (IBR) ● Pay As You Earn (PAYE) ● Revised Pay As You Earn (REPAYE) 	Generally cannot change your repayment plan after you take out a loan. Lenders may not offer repayment options to support borrowers in financial distress.
<i>Loan Forgiveness Programs</i>	<p><u>Programs offered include:</u></p> <ul style="list-style-type: none"> ● Public Service Loan Forgiveness (PSLF) ● Teacher Loan Forgiveness ● Loan forgiveness following income-dependent repayment 	Unlikely that the lender offers loan forgiveness programs
<i>Debt Collection Tools</i>	<p>Government has a variety of collection tools, including:</p> <ul style="list-style-type: none"> ● Income Tax Offsets ● Wage Garnishment ● Income Tax Refund Seizure 	Private lenders have more limited collection tools
<i>Point of contact for issues</i>	Department of Education- Federal Student Aid Ombudsman Group https://feedback.studentaid.ed.gov/	CFPB Student Loan Ombudsman www.consumerfinance.gov/complaint

See *Choosing a Loan That's Right For You*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/paying-for-college/choose-a-student-loan/#o3> (last visited Mar. 9, 2018); *Federal Student Loan Programs*, FED. STUDENT AID (Sept. 2017), <https://studentaid.ed.gov/sa/sites/default/files/federal-loan-programs.pdf>; *Federal Versus Private Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/federal-vs-private> (last visited Mar. 9, 2018); *Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans#types> (last visited Mar. 9, 2018).

APPENDIX F. TYPES OF FEDERAL AND PRIVATE LOANS

Types of Federal Loans Currently Available to Borrowers

<i>Perkins Loans</i>	<ul style="list-style-type: none"> ● Subsidized with fixed interest rate ● Administered through school, with school as lender ● Borrowing limits determined by school ● Awarded based on financial need ● May have different loan servicer than other federal loans ● Grace period of 9 months ● Longest repayment term is 10 years
<i>Direct Loans</i>	<ul style="list-style-type: none"> ● Also known as Stafford Loans ● Subsidized or unsubsidized <ul style="list-style-type: none"> ○ Subsidized Direct Loans awarded based on financial need and available only to undergraduates ○ Unsubsidized Direct Loans available to all eligible borrowers, regardless of financial need ● Grace period of 6 months ● Standard repayment plan is 10 years from date of borrower's first payment ● Annual and lifetime limits vary depending on status of student and year of schooling <ul style="list-style-type: none"> ○ Undergraduate borrowing limits: \$5,500-\$12,500 per year ○ Graduate borrowing limits: \$20,500 per year
<i>Grad PLUS Loans</i>	<ul style="list-style-type: none"> ● Available to graduate and professional students ● Unsubsidized Direct loan with fixed interest rates ● Can be used to cover costs not covered by other financial aid, up to the full cost of attendance
<i>Parent PLUS Loans</i>	<ul style="list-style-type: none"> ● Available to parents of dependent students ● Unsubsidized Direct loan with fixed interest rates ● Credit check is required ● Parents with Parent PLUS loans financially responsible for repayment ● Can be used to cover costs not covered by child's financial aid package, up to the full cost of attendance ● No cumulative limits regarding amount borrowed ● No grace period, but parents may be able to delay payment while child in school or for an additional 6 months after child graduates, leaves school, or drops below half-time enrollment
<i>Direct Consolidation Loans</i>	<ul style="list-style-type: none"> ● Allows borrower to consolidate multiple federal education loans into one loan ● Benefits include single monthly payment and access to additional repayment plans and loan forgiveness options ● Private education loans not eligible for consolidation

See *Choosing a Loan That's Right For You*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/paying-for-college/choose-a-student-loan/#o3> (last visited Mar. 9, 2018); *Federal Student Loan Programs*, FED. STUDENT AID (Sept. 2017), <https://studentaid.ed.gov/sa/sites/default/files/federal-loan-programs.pdf>; *Loan Consolidation*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/consolidation> (last visited Mar. 9, 2018); *Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans#types> (last visited Mar. 9, 2018); *What is a Direct PLUS loan?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/paying-for-college/choose-a-student-loan/#o3> (last updated Aug. 4, 2017); *What is a Perkins Loan?*, CONSUMER FIN. PROT. BUREAU <https://www.consumerfinance.gov/ask-cfpb/what-is-a-perkins-loan-en-551/> (last updated Aug. 7, 2017).

General Kinds of Private Loans Available to Borrowers

<i>State Agency Loans</i>	<ul style="list-style-type: none"> ● Offered by states to residents or for students attending in-state schools ● Students should contact school’s financial aid office and request information regarding availability
<i>Traditional Bank Loans</i>	<ul style="list-style-type: none"> ● Issued by commercial banks ● Co-signers likely required
<i>School Loans</i>	<ul style="list-style-type: none"> ● Issued through the school ● Tend to have fixed rates ● Students should contact school’s financial aid office and request information regarding availability

See *Choosing a Loan That's Right For You*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/paying-for-college/choose-a-student-loan/#o3> (last visited Mar. 9, 2018) (select “Private Loan Options”).

APPENDIX G. FEDERAL LOAN REPAYMENT PLANS

Repayment Plans Not Based On Borrower's Income

<i>Standard Repayment Plan</i>	<ul style="list-style-type: none"> ● Payments are fixed amount ● <u>Repayment period:</u> Up to 10 years (10 to 30 years for Consolidation loans) ● All borrowers eligible ● Borrower pays less over time in comparison with other repayment plans
<i>Graduated Repayment Plan</i>	<ul style="list-style-type: none"> ● Payments lower at first and usually increase every 2 years ● <u>Repayment period:</u> Up to 10 years (10 to 30 years for Consolidation loans) ● All borrowers eligible ● Borrower pays more over time than under Standard Repayment Plan
<i>Extended Repayment Plan</i>	<ul style="list-style-type: none"> ● Payments fixed or graduated ● <u>Repayment period:</u> Up to 25 years ● Direct Loan borrowers eligible if they have over \$30,000 in outstanding Direct Loans ● FFEL borrowers eligible if they have more than \$30,000 outstanding under FFEL loan program ● Monthly payment lower than Standard Repayment Plan or Graduated Repayment Plan ● Borrower pays more over time than under Standard Repayment Plan

See Repayment Plans, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans> (last visited Mar. 8, 2018).

Repayment Plans Based On Borrower's Income

<p><i>Revised Pay As You Earn Repayment Plan (REPAYE)</i></p>	<ul style="list-style-type: none"> ● Monthly payments are 10% of borrower's discretionary income ● Payments recalculated each year and may change based on borrower's updated income and family size ● Considers both borrower's and spouse's income and/or loan debt ● Outstanding balance forgiven is borrower has not repaid loan in full after 20 or 25 years of qualifying payments, but borrower may have to pay income tax on amount forgiven ● Borrower pays more over time than under Standard Repayment Plan
<p><i>Pay As You Earn Repayment Plan (PAYE)</i></p>	<ul style="list-style-type: none"> ● Maximum monthly payments are 10% of borrower's discretionary income, with payment never more than under Standard Repayment Plan ● Payments recalculated each year and may change based on borrower's updated income and family size ● Considers both borrower's and spouse's income if tax returns filed jointly ● Outstanding balance forgiven is borrower has not repaid loan in full after 20 years of qualifying payments, but borrower may have to pay income tax on amount forgiven ● Requires borrower to have high debt in comparison to income ● Borrower pays more over time than under Standard Repayment Plan
<p><i>Income-Based Repayment Plan (IBR)</i></p>	<ul style="list-style-type: none"> ● Monthly payments are 10% or 15% of borrower's discretionary income, with payment never more than under Standard Repayment Plan ● Payments recalculated each year and may change based on borrower's updated income and family size ● Considers both borrower's and spouse's income if tax returns filed jointly ● Outstanding balance forgiven is borrower has not repaid loan in full after 20 or 25 years of qualifying payments, but borrower may have to pay income tax on amount forgiven ● Requires borrower to have high debt in comparison to income ● Borrower pays more over time than under Standard Repayment Plan
<p><i>Income-Contingent Repayment Plan (ICR)</i></p>	<ul style="list-style-type: none"> ● Monthly payments are lesser of: <ul style="list-style-type: none"> ○ 20% of borrower's discretionary income ○ Amount borrower would pay on repayment plan with fixed payment over 12 years ● Payments recalculated each year and may change based on borrower's updated income, family size, and total amount of borrower's Direct Loans ● Considers both borrower's and spouse's income if tax returns filed jointly or borrower chooses to repay their Direct Loans jointly with spouse ● Outstanding balance forgiven is borrower has not repaid loan in full after 25 years of qualifying payments, but borrower may have to pay income tax on amount forgiven ● Requires borrower to have high debt in comparison to income ● Borrower pays more over time than under Standard Repayment Plan

See *Repayment Plans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans> (last visited Mar. 8, 2018).

Comparison of Income-Based Repayment Plans Amounts and Repayment Periods

	REPAYE	PAYE	IBR	ICR
Amount	10 % of discretionary income	10 % of discretionary income but never more than the amount for a Standard Repayment Plan	10 % for borrowers new on or after 7/1/2014 ----- 15% for borrowers not new on or after 7/1/2014	20 % of discretionary income -OR- Payment amount for a 12 year fixed payment plan
Repayment Period	20 Years for if all loans undergrad loans ----- 25 Years if any loans are grad/professional	20 Years	20 Years for borrowers new on or after 7/1/2014 ----- 25 Years for borrowers not new on or after 7/1/2014	25 Years

See Income-Driven Plans, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> (last visited Mar. 8, 2018).

Income-Based Repayment Plans Available By Loan Type

Loan Type	REPAYE	PAYE	IBR	ICR
<i>Direct Subsidized</i>	✓	✓	✓	✓
<i>Direct Unsubsidized</i>	✓	✓	✓	✓
<i>Direct PLUS made to graduate/professional students</i>	✓	✓	✓	✓
<i>Direct PLUS made to parents</i>	X	X	X	Eligible if consolidated
<i>Direct Consolidation Loans that did not repay any PLUS loans made to parents</i>	✓	✓	✓	✓
<i>Direct Consolidation Loans that repaid PLUS loans made to parents</i>	X	X	X	✓
<i>Subsidized Federal Stafford Loans (FFEL)</i>	Eligible if consolidated	Eligible if consolidated	✓	Eligible if consolidated
<i>Unsubsidized Federal Stafford Loans (FFEL)</i>	Eligible if consolidated	Eligible if consolidated	✓	Eligible if consolidated
<i>FFEL PLUS Loans made to graduate or professional students</i>	Eligible if consolidated	Eligible if consolidated	✓	Eligible if consolidated
<i>FFEL PLUS Loans made to parents</i>	X	X	X	Eligible if consolidated
<i>FFEL Consolidation Loans that did not repay any PLUS loans made to parents</i>	Eligible if consolidated	Eligible if consolidated	✓	Eligible if consolidated
<i>FFEL Consolidation Loans that repaid PLUS Loans made to parents</i>	X	X	X	Eligible if consolidated
<i>Federal Perkins Loans</i>	Eligible if consolidated	Eligible if consolidated	Eligible if consolidated	Eligible if consolidated

See *Income-Driven Plans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> (last visited Mar. 8, 2018).

APPENDIX H. FEDERAL LOAN CANCELLATION AND LOAN FORGIVENESS OPTIONS

Summary of Federal Loan Forgiveness, Cancellation, and Discharge Programs

	Description	Relevant Section of FSA Website
Closed School	Borrowers unable to complete a program due to the school's closure	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/closed-school
False Certification	Borrower may be eligible for discharge if eligibility to borrow falsely certified by school	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation#false-certification
Unpaid Refund	Borrower may be eligible for discharge if school failed to make owed refund to student	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation#unpaid-refund
Defense to repayment	Borrower may be entitled to full or partial based if school misled them or violated certain laws	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/borrower-defense
Total and Permanent Disability Discharge	Some physical or mental impairments can qualify borrower for total and permanent discharge of federal student loans	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/disability-discharge
Discharge due to Death	Borrower's death is defense to collection Death of parents or death of student qualifies for discharge	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/death
Public Service Loan Forgiveness (PSLF)	Remaining balance of Direct loan forgiven after 120 qualifying monthly payments under a qualifying repayment plan while working for government organizations at any level and qualified non-profits	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service
Teacher Loan Forgiveness	Up to \$17,500 loan balance forgiven for full-time teaching for five consecutive academic years in a low-income or educational services agency	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/teacher
Perkins Loan Cancellation and Discharge	For individuals working in certain types of public service or in certain occupations, a certain percentage of Perkins loans may be canceled for each complete year of service	https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation#perkins
Cancellation for repayment	Loans may be eligible for cancellation after 20 or 25 years if repayment through income-driven repayment plan	https://studentaid.ed.gov/sa/repay-loans/understand/plans

See Forgiveness, Cancellation, and Discharge, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation> (last visited Mar. 8, 2018).

Forgiveness, Cancellation, and Discharge Programs Available by Loan Type

	Direct Loans	FFEL Loans	Perkins Loan
<i>Closed School Discharge</i>	✓	✓	✓
<i>False Certification Discharge</i>	✓	✓	X
<i>Unpaid Refund Discharge</i>	✓	✓	X
<i>Borrower Defense Discharge</i>	✓	Only under circumstances described in 34 C.F.R. 682.209(g).	X
<i>Total and Permanent Disability Discharge</i>	✓	✓	✓
<i>Discharge Due to Death</i>	✓	✓	✓
<i>Public Service Loan Forgiveness (PSLF)</i>	✓	Only if consolidated into Direct Loan Program	Only if consolidated into Direct Loan Program
<i>Teacher Loan Forgiveness</i>	✓	✓	X
<i>Perkins Loan Cancellation and Discharge (Including Teacher Cancellation)</i>	X	X	✓

See *Forgiveness, Cancellation, and Discharge*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation> (last visited Mar. 8, 2018).

APPENDIX I. LOAN DISCLOSURE REQUIREMENTS FOR FEDERAL AND PRIVATE LOANS

HIGHER EDUCATION ACT (HEA)- Applicable to Federal Loans

20 U.S.C. § 1098g	Loans issued under Title IV of the HEA are exempt from State disclosure requirements
34 C.F.R. §682.205(c)	Lender required to provide disclosure information at no cost to borrower
34 C.F.R. §682.205(d)	Disclosures can be made in writing or electronically
34 C.F.R. §§ 682.205(a)(1), (2)	<p style="text-align: center;"><u>Disclosure at or prior to repayment</u></p> <p>Information disclosed to borrower must be in simple and understandable terms</p> <p>Statement of disclosure must be made at the beginning of or prior to repayment period</p> <ul style="list-style-type: none"> ● For Federal Stafford or Federal PLUS loans, disclosures must be made no less than 30 days but no more than 150 days before first payment due from borrower ● If borrower enters repayment period without lender’s knowledge, lender needs to provide disclosures immediately <p><u>Lender needs to provide:</u></p> <ul style="list-style-type: none"> ● Lender’s contact information (name, toll-free number, and address for communications to be sent to) ● Scheduled date that repayment begins and, if applicable, deferment ends ● Estimated balance, including estimated amount of interest capitalized, owed by borrower on day that repayment begins ● Actual interest rate on loan ● Explanation of fees that may accrue or be charged to borrower during repayment ● Borrower’s repayment schedule, including the due date of first installment, as well as the number, amount, and frequency of payments based on repayment schedule ● Explanation of any special options for the borrower to consolidate or refinance the loan ● Estimated amount of interest to be paid on the loan based on repayment plan selected ● Information about special repayment benefits, including limitations on the benefits ● Description of payment plans available ● Description of options available to avoid or be removed from default, as well as any fees ● List of any additional resources, including the Department of Education’s Student Loan Ombudsman

<p style="text-align: center;">34 C.F.R. § 682.205(a)(3)</p>	<p style="text-align: center;"><u>Required Disclosures During Repayment</u></p> <p>Lender must provide borrower with bill or statement for each payment installment period that includes:</p> <ul style="list-style-type: none"> ● Original principal amount of loan ● Current Balance as of time of bill or statement ● Interest rate on loan ● Total amount of interest for the preceding installment paid ● Aggregate amount paid, including breakdown of interest and fees paid ● Description of each fee borrower has been charged during the preceding installment period ● Date by which payment needs to be paid to avoid additional fees ● Amount of payment and fees ● Lender’s or servicer’s address and toll-free contact number ● Reminder that borrower may change payment plans, a list of all repayment plans available to borrower, a link to the Department of Education’s website, and directions on how borrower may request a change in repayment plans
<p style="text-align: center;">34 C.F.R. § 682.205(a)(4)(i)</p>	<p style="text-align: center;"><u>Required Disclosures for Borrowers having Difficulty making payments</u></p> <p>When borrower notifies lender that they are having difficulty making payments, lender must provide:</p> <ul style="list-style-type: none"> ● Description of repayment plans available and how borrower may request a change in repayment ● Description of requirements for obtaining forbearance and costs associated with forbearance ● Description of options available to the borrower to avoid default and the fees or costs associated with these options
<p style="text-align: center;">34 C.F.R. § 682.205(a)(5)</p>	<p style="text-align: center;"><u>Required Disclosures for Borrowers 60-days delinquent in loan payments</u></p> <p>Within 5 business days of borrower becoming 60-day delinquent, lender shall provide:</p> <ul style="list-style-type: none"> ● Date on which loan will default if not payment made ● Minimum payment borrower must make as of date of notice to avoid default, including payment amount bring loan current or for payment in full ● Description of options available to the borrower, including deferment and forbearance options ● Options for discharging the loan ● Any additional resources lender is aware of to provide additional advice and assistance to borrower on loan repayment

TRUTH IN LENDING ACT (TILA)- Applicable to Private Loans

	<p style="text-align: center;"><u>Advertising of terms</u></p> <p>Advertisements need to be clear and conspicuous and state specific credit terms that actually are arranged/offered by the lender (12 C.F.R. §§ 1026.24(a)-(b))</p> <ul style="list-style-type: none"> ● If advertisement uses any “triggering” terms, it needs to meet the requirements listed under 12 C.F.R. § 1026.24(d)(2) <ul style="list-style-type: none"> ○ “Triggering” terms under 12 C.F.R. § 1026.24(d)(1) <ul style="list-style-type: none"> ■ Amount or percentage of any down payment ■ Number of payments or period of repayment ■ Amount of any payment ■ Amount of any finance charge ○ Advertisement using “triggering” terms needs to state the following under 12 C.F.R. § 1026.24(d)(2): <ul style="list-style-type: none"> ■ Amount or percentage of the down payment ■ Terms of repayment, reflecting the obligations over the full term of the loan and any balloon payments ■ “Annual Percentage Rate” and if the rate may be increased after consummation of loan
<p style="text-align: center;">12 C.F.R. § 1026.47</p>	<p style="text-align: center;"><u>Disclosure of terms/interest rates</u></p> <p>In solicitations for private education loans, disclosures must include:</p> <ul style="list-style-type: none"> ● Interest rates at the time of solicitation and a statement of whether the interest rate will depend on borrower’s credit worthiness, whether rate is fixed or variable, and additional info regarding interest rates that may increase after loan consummation ● Fee and default/late payment costs ● Repayment terms ● Cost estimates ● Eligibility ● Alternatives to private education loans <ul style="list-style-type: none"> ○ Need to include statement that borrower may qualify for federal financial assistance under Title IV, as well as the interest rates available under each Title IV program and whether the rates are fixed/variable (12 C.F.R. § 1026.47(a)(6)(i) and (ii)) ● Rights of consumers ● Self-certification information
<p style="text-align: center;">12 C.F.R. § 1026.18</p>	<p style="text-align: center;"><u>General disclosures for closed-end credit</u></p> <p>Disclosures needs to be clear and conspicuous; must be made prior to loan consummation</p> <ul style="list-style-type: none"> ● Information disclosed must include: <ul style="list-style-type: none"> ○ Creditor ○ Amount financed ○ Finance charge ○ Annual Percentage Rate (APR) ○ Variable Rate ○ Payment schedule (amount, timing, number of payments) ○ Total of payments

	<ul style="list-style-type: none"> ○ Demand feature ○ Late payments
<p>12 C.F.R. § 1026.46(d)(1)</p>	<p style="text-align: center;"><u>Application disclosures</u></p> <p>Need to be provided on or with an application for a private student loan</p> <ul style="list-style-type: none"> ● If application taken over the phone, creditor may choose to (1) provide disclosures orally while on phone, (2) provide application disclosure within 3 business days, or (3) place disclosure in mail within 3 business days <ul style="list-style-type: none"> ○ <u>Exceptions:</u> <ul style="list-style-type: none"> ■ Creditor denies application ■ Creditor approves loan and supplies approval disclosures within three business days
<p>12 C.F.R. § 1026.46(d)(2)</p>	<p style="text-align: center;"><u>Approval disclosures</u></p> <p>Need to be provided prior to consummation of the loan, OR on/with any notice of approval</p> <ul style="list-style-type: none"> ● If approval notice provided in person, needs to include approval disclosure ● If approval notice provided over phone, approval disclosure needs to be mailed within 3 business days <p>Approval disclosure must include:</p> <ul style="list-style-type: none"> ● Interest rate information ● Fees and default/late payment costs ● Repayment terms ● Alternatives to private education loans ● Rights of the consumer
<p>12 C.F.R. § 1026.46(d)(3)</p>	<p style="text-align: center;"><u>Final disclosures</u></p> <p>Need to be provided after consumer accepts the loan but prior to disbursement</p> <ul style="list-style-type: none"> ● Disclosure must include: <ul style="list-style-type: none"> ○ Interest rate information ○ Fees and default/late payment costs ○ Repayment terms ○ Cancellation rights <ul style="list-style-type: none"> ■ Consumer has right to cancel loan without penalty at any time before midnight on third business day following receipt of the final loan disclosures→ need to provide specific date on which cancellation period expires ■ Loan proceeds won't be disbursed until expiration of cancellation period ■ Disclosure needs to identify method(s) by which consumer may cancel loan
<p>12 C.F.R. §1026.21</p>	<p style="text-align: center;"><u>Crediting of payments</u></p> <p>If credit balance in excess of \$1 created in connection with transaction, creditor shall:</p> <ul style="list-style-type: none"> ● Credit amount of credit balance to consumer's account;

	<ul style="list-style-type: none">● Refund any remaining credit balance upon written request of the consumer; and● Make good faith effort to refund by cash, check, money order, or credit to deposit account any part of the credit balance remaining in the account for more than 6 months<ul style="list-style-type: none">○ <u>Exceptions:</u><ul style="list-style-type: none">■ Consumer's current address unknown■ Consumer cannot be traced through last known address or telephone number
--	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**2018 U.S.C. Edition*

**2018 C.F.R. Edition*

APPENDIX J. FEDERAL LOAN SERVICER ALLOCATIONS (JUNE 2017)

ALLOCATIONS AS OF JUNE 30, 2017:

Servicer	Allocation Percentage
MOHELA	18%
Great Lakes	15%
HESC/Edfinancial	15%
Cornerstone	11%
Nelnet	11%
Granite State	10%
Navient	9%
OSLA	7%
PHEAA	4%
Total:	100%

Effective September 1, 2017 through February 28, 2018.

See Servicer Performance Metrics and Allocations, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing/servicer-performance> (last visited Mar. 9, 2018) (first select “6/30/2017” then “Federal Servicer (TIVAS and NFP) Allocations”).

Quarterly Performance Results
Quarter Ending June 30, 2017

JUNE SCORE BY ALLOCATION METRIC

METRIC	Comeritene	HES/ Influential	FedLoan Servicing (FHEAM)	Grants State- COME	MOHELA	Nadent	Nelnet	OSLA	Servicers					
									Great Lakes Educational Loan	Grants State- COME	MOHELA	Nadent		
1 Percent of Borrowers in Current Repayment Status	Segment 1: Borrowers with at least one Consolidation or ParentPLUS loan	84.46%	70.64%	83.34%	90.66%	82.05%	85.94%	78.11%						
	Segment 2: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,284 days or less from the last day of the current quarter, and an enrollment status code of G (graduated)	72.66%	67.31%	58.75%	77.80%	83.44%	83.96%	85.68%						
	Segment 3: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,285 days or greater from the last day of the current quarter, and an enrollment status code of G (graduated)	90.49%	92.51%	81.36%	90.86%	90.86%	85.47%	92.25%						
	Segment 4: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,284 days or less from the last day of the current quarter, and without an enrollment status code of G (graduated)	58.58%	37.22%	45.31%	58.47%	49.22%	57.25%	54.46%	32.90%					
	Segment 5: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,285 days or greater from the last day of the current quarter, and without an enrollment status code of G (graduated)	87.15%	90.27%	65.87%	75.56%	69.40%	68.69%	70.87%	84.16%					
2 Percent of Borrowers 91-278 Days Delinquent	Segment 1: Borrowers with at least one Consolidation or ParentPLUS loan	4.99%	2.70%	7.65%	6.11%	2.67%	6.25%	6.92%						
	Segment 2: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,284 days or less from the last day of the current quarter, and an enrollment status code of G (graduated)	7.94%	9.70%	8.60%	5.16%	7.81%	5.89%	11.98%						
	Segment 3: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,285 days or greater from the last day of the current quarter, and an enrollment status code of G (graduated)	2.11%	2.10%	6.23%	4.24%	2.44%	6.51%	4.75%	2.88%					
	Segment 4: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,284 days or less from the last day of the current quarter, and without an enrollment status code of G (graduated)	96.87%	20.53%	20.30%	27.80%	21.75%	17.45%	19.38%	28.45%					
	Segment 5: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,285 days or greater from the last day of the current quarter, and without an enrollment status code of G (graduated)	2.25%	2.61%	13.36%	8.31%	3.75%	11.22%	10.92%	4.32%					
3 Percent of Borrowers 271-360 Days Delinquent	Segment 1: Borrowers with at least one Consolidation or ParentPLUS loan	0.70%	0.56%	2.00%	1.38%	0.45%	1.64%	0.86%						
	Segment 2: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,284 days or less from the last day of the current quarter, and an enrollment status code of G (graduated)	0.66%	1.66%	1.71%	0.84%	1.03%	0.72%	1.03%	1.06%					
	Segment 3: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,285 days or greater from the last day of the current quarter, and an enrollment status code of G (graduated)	0.52%	0.50%	2.02%	1.12%	0.37%	0.84%	1.51%	0.49%					
	Segment 4: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,284 days or less from the last day of the current quarter, and without an enrollment status code of G (graduated)	3.00%	5.84%	6.94%	4.85%	3.43%	3.43%	5.19%	5.92%					
	Segment 5: Borrowers with no Consolidation or ParentPLUS loans, separation dates 1,285 days or greater from the last day of the current quarter, and without an enrollment status code of G (graduated)	1.12%	0.61%	4.71%	2.83%	0.86%	1.86%	4.91%	0.79%					
4 Borrower Survey	84.55%	68.23%	65.90%	68.00%	69.25%	58.25%	70.25%	65.50%						
5 Federal Personnel Survey	87.55%	72.55%	62.00%	68.00%	78.00%	71.00%	73.00%	70.00%						

See Servicer Performance Metrics and Allocations, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing/servicer-performance> (last visited Mar. 9, 2018) (first select “6/30/2017” then “Federal Servicer (TIVAS and NFP) Results”).

Explanation of Allocation and Performance Measure Methodology

This document discusses allocation and performance measure methodology for each of the Department of Education's (the Department's) federal loan servicers. The federal loan servicers with customer service performance results for the period January 1, 2017 through June 30, 2017 and the allocations in effect from September 1, 2017 through February 28, 2018 are as follows:

- CornerStone
- FedLoan Servicing (PHEAA)
- Granite State – GSMR
- Great Lakes Educational Loan Services, Inc.
- HESC/Edfinancial
- MOHELA
- Navient
- Nelnet
- OSLA

Allocation Methodology

The Department has provided its federal loan servicers broad latitude to determine how best to service their assigned loans in order to yield high-performing portfolios and high levels of customer satisfaction. We use a common set of metrics to measure the performance of each federal loan servicer and a common calculation methodology to allocate new loan volume to all servicers.

The Department compiles customer satisfaction survey scores and default prevention statistics for the members of the federal loan servicer team every six months to determine each servicer's allocation of loan volume.

The Department will calculate allocations for all members of the federal loan servicer team as follows:

Step 1: Establish Segmented In-Repayment Portfolios by Servicer

After excluding loan rehabilitations, for each performance period each servicer's in-repayment portfolio is divided across the following five borrower segments:

- Borrowers with consolidation or parent PLUS loans (S1)
- Borrowers who graduated less than three years ago (S2)
- Borrowers who graduated more than three years ago (S3)
- Borrowers who did not graduate but left school less than three years ago (S4)

- Borrowers who did not graduate but left school more than three years ago (S5)

Step 2: Calculate Base Scores Under Current Portfolio-Based Metrics

- Metric 1 (M1) – For each servicer and each segment, the number of borrowers who are in repayment and no more than 5 days delinquent is divided by the total number of borrowers in repayment.
- Metric 2 (M2) – For each servicer and each segment, the number of borrowers who are in repayment and between 91 and 270 days delinquent is divided by the total number of borrowers in repayment.
- Metric 3 (M3) – For each servicer and each segment, the number of borrowers who are in repayment and between 271 and 360 days delinquent is divided by the total number of borrowers in repayment.

Across the three metrics we will have 15 scored segments for each servicer for each performance period. See example below:

Metric 1 – Percent Current	S1	S2	S3	S4	S5
Metric 2 – Percent 90-270 Days Delinquent	S1	S2	S3	S4	S5
Metric 3 – Percent 271-360 Days Delinquent	S1	S2	S3	S4	S5

Note: Metrics 4 and 5, borrower and Federal Student Aid staff customer satisfaction surveys, are not calculated by segment. Borrowers are already surveyed by status, so additional segmentation is not necessary. Accordingly, steps 3-5 below do not apply to these metrics.

Step 3: Assign Points for Each Segment Based on Relative Placement of Servicers

- For each segment and each performance period, servicer base scores are arrayed from most to least successful (under metric 1, the highest percentage is best, while under metrics 2 and 3, the lowest is best).
- For each segment and each performance period, the servicer with the best score is assigned 9 points, the servicer with the next highest score 8 points, and so forth down to the least successful servicer, which receives 1 point. In case of ties, servicers with identical scores divide the placement points equally.

Step 4: Calculate and Apply Weighting Factors Based on Distribution of FSA In-Repayment Portfolio Across Segments

- For the total portfolio of FSA-held borrowers in repayment, the number of borrowers in repayment within each segment for each performance period is divided by the corresponding total number of borrowers in repayment.
- For each servicer and each segment, the points awarded for each performance period are multiplied by the weighting factor for that segment to produce a weighted score by segment.

Step 5: Calculate and Apply Delinquency Adjustment Factor

- For the total portfolio of FSA-held borrowers in repayment, the delinquency rate for each segment for each performance period is divided by the corresponding delinquency rate for the overall portfolio.
- For each servicer and each segment, the weighted score by segment for each performance period is multiplied by the corresponding delinquency adjustment factor for that segment to produce an adjusted weighted score by segment.

Step 6: Calculate Total Across the Two Performance Periods

- For metrics 1, 2, and 3, the adjusted weighted scores by segment for the two performance periods are added together, with the resulting sums divided by two to produce average adjusted weighted scores.
- For each servicer and each metric, the adjusted weighted scores by segment are added to produce a total average adjusted weighted score.
- For metrics 4 and 5, the customer satisfaction score is calculated for each servicer for the six-month period. (Note: The frequency of the customer satisfaction surveys was changed to every six months beginning in January 2017.)

Step 7: Assign Points Based on Relative Placement of Servicers

- For each metric, servicers are arrayed from highest to lowest by total average adjusted weighted score (for metrics 1, 2, and 3) and average score (for metrics 4 and 5).
- For each metric, the servicer with the best score is assigned 9 points, the servicer with the next best score 8 points, and so forth down to the least successful servicer, which would receive 1 point. In case of ties, servicers with identical scores divide the placement points equally.

Step 8: Apply Metric Weights to Adjusted Weighted Scores

- Metrics are weighted as follows:
 - Metric 1 (Percent Current) – 30 percent
 - Metric 2 (Percent 91-270 days delinquent) – 15 percent
 - Metric 3 (Percent 271-360 days delinquent) – 15 percent
 - Metric 4 (Borrower Satisfaction Survey) – 35 percent
 - Metric 5 (FSA Staff Satisfaction Survey) – 5 percent
- Each servicer's point total for each metric is multiplied by the overall weighting factor for that metric to derive final scores.

Step 9: Calculate Overall Final Scores By Servicer and Allocation Percentages

- For each servicer, final scores for all five metrics are added to produce an overall final score.
- Each servicer's overall final score for the allocation period is divided by the sum of the corresponding overall final score for all servicers to derive the allocation percentage for each servicer.
- The allocation percentage is rounded to the nearest whole number. Highest or lowest allocation percentages are rounded down or up as needed if the sum of the rounded percentages does not equal 100.

Performance Measure Methodology

Customer Satisfaction

As applicable, the Department has segmented performance scores to ensure comparability across the federal loan servicers regardless of differences in the types of borrowers serviced. We calculate separate borrower customer satisfaction scores for each loan status (borrowers in repayment, in grace, in school, and delinquent). We use the average of the segment scores in our allocation methodology.

The analytical methodology used by our independent vendor, [CFI Group](#), to evaluate customer satisfaction is consistent with that used in the ACSI. The [ACSI](#), established in 1994, is a uniform, cross-industry measure of satisfaction with goods and services available to U.S. consumers, including both the private and public sectors. The ACSI summarizes the responses to three uniform survey items that measure customer satisfaction with a score that has a minimum score of zero and a maximum score of 100. The CFI Group encourages companies that measure customer satisfaction using the ACSI to strive to achieve and maintain overall customer satisfaction scores in the low 80s. The highest ACSI score ever recorded is a 91, and the national average across all economic sectors is 76.

CFI Group specializes in the application of the ACSI methodology to individual organizations. As our independent vendor, CFI Group develops the surveys and conducts the analysis.

Default Prevention

As noted above, the Department generates default prevention measures with simple arithmetic and rounds all results to the hundredths place.

The Department divides the number of borrowers in current repayment status who are not more than 5 days delinquent at the end of the quarter by the number of all borrowers in both current and delinquent repayment status at the end of each quarter to generate the percent of "borrowers in current repayment status" statistic.

The Department divides the number of borrowers who are greater than 90 days delinquent and less than 271 days delinquent at the end of the quarter by the number of borrowers in both current and delinquent repayment status at the end of each quarter to generate the percent of "borrowers greater than 90 days but less than 271 days delinquent" statistic.

The Department divides the number of borrowers who are greater than 270 days delinquent and less than 361 days delinquent at the end of the quarter by the number of borrowers in both current and delinquent

repayment status at the end of each quarter to generate the percent of “borrowers greater than 270 days and less than 361 days delinquent” statistic.

Page 5 of 5

See Servicer Performance Metrics and Allocations, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing/servicer-performance> (last visited Mar. 9, 2018) (first select “6/30/2017” then “Explanation”).

APPENDIX K. SUMMARY OF LOAN SERVICING ISSUES IDENTIFIED BY THE CFPB

General Issues¹

Payment Processing Problems

Payment delays can increase borrower costs

- Delays in processing can result in additional fees and interest charges.

Underpayments may be applied in ways that rake up late fees

- If borrower is unable to pay bill in full and is instructed by servicer to make whatever payment they can afford, servicer may apply payment across all loans in accounts. The amount paid on each loan may therefore be below the minimum and borrower can pay late fees on more than one loan.

Issues regarding Co-signers

Full-loan balances demanded upon death of co-signer

- Private lenders may demand full loan balance upon death of the loan cosigner.
 - “[A] little over a month ago my father passed away unexpectedly. He was the co-signer of a couple of my student loans . . . I haven’t missed a payment on any of my loans in 3- 4 years at this point. I got a call yesterday . . . alerting me that one of my loans that was co-signed by my father was referred to [a third party debt collector] and that they were responsible for collecting . . . [the remaining balance] that was left. . . . They referred this loan to a debt collector when nothing was wrong!! . . . This is completely uncalled for, and something that should not have happened. I am at risk of hurting my credit score for something completely out of my control.”²

Loans in good-standing can be placed into “auto default” when cosigner declares bankruptcy³

- If one co-signer declares bankruptcy, servicer may place loans in default and demand full payment regardless of whether a borrower is in good standing. Placement in default often results in negative information being furnished to credit bureaus and referral of account to debt collector.

¹ CONSUMER FIN. PROT. BUREAU, FACTSHEET: BORROWER EXPERIENCES WITH STUDENT DEBT STRESS 2 (May 14, 2015), http://files.consumerfinance.gov/f/201505_cfpb-factsheet-student-debt-stress.pdf.

² See CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 56 (Oct. 2017), https://www.consumerfinance.gov/documents/5702/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

³ See CFPB Finds Private Student Loan Borrowers Face “Auto-Default” When Co-signer Dies or Goes Bankrupt, CONSUMER FIN. PROT. BUREAU (Apr. 22, 2014), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-private-student-loan-borrowers-face-auto-default-when-co-signer-dies-or-goes-bankrupt/>.

Transfers between Servicers

Borrowers may experience problems when servicers change

- Borrowers assigned servicers and have little say when loan has been transferred.
- Borrowers may not even have knowledge that loans have been transferred to new servicers until they encounter an issue.
- Change in servicers may cause borrowers to experience delayed or interrupted communications and fall behind on their payments.

Borrowers may be hit with late fees during transfer

- If payments mailed to old servicer, late charges may be applied to account by new servicer.

Roadblocks for Distressed Borrowers

Servicers may not know where to send distressed borrowers for help

- Borrowers transferred to multiple departments and receive unclear answer or conflicting responses.
- Servicing personnel may be unwilling or unable to correct mistake in how payment is applied to account.

Servicing personnel may not be trained to provide help

- Borrowers reported inadequate training and insufficient knowledge of resources available to borrowers.

Federal Student Loan Servicing Issues⁴

Issues with Income Based Repayment (IBR) Plans

Issues enrolling in IBR plans

- Common issues include unexpected delays, lost paperwork, poor customer service, and inconsistent application processing.
- Using a pay stub to verify income may cause application to sit in review status for months or may cause service to calculate income incorrectly.
- Issues typically result in increased loan costs, reduced benefits, and extended repayment terms.

Issues recertifying IBR plans

- Recertifying IBR plans may cause loans to go into forbearance, despite borrower's right to continue making IBR payments while new income amount is determined. Borrowers are required to recertify income and family size annually to qualify for program. Servicers expected to process recertifications in a few weeks, but borrowers entitled to keep making payments at same amount until new payment calculated.
- While waiting for certification, servicers may place loans in forbearance or direct borrowers to make full standard monthly payment amount. If account spends months in forbearance, prevents borrower from working towards loan forgiveness through IBR options or PSLF options.

⁴ See CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 56 (Oct. 2017), https://www.consumerfinance.gov/documents/5702/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

Inaccessible Loan Protections

Borrowers with older federal loans complain about struggles accessing basic loan protections

- FFELP borrowers experience roadblocks when trying to enroll in IDR plans and consolidation efforts. Borrowers complain they are not receiving accurate information from servicers about current eligibility for certain benefits.

Borrowers with less than \$20K in debt unable to access full benefits of affordable repayment plans⁵

- Borrowers who did not complete degree are often driven into forbearance rather than receiving help to enroll in IBR plan.

Military borrowers complain about access to servicemember protections

- Servicemembers report difficulty accessing student loan protections guaranteed by federal law, including:
 - Interest rate caps under SCRA
 - Automatic re-certification of IDR plans
 - 0% interest rate reductions while serving in areas of hostility

Borrowers with permanent disabilities who receive SS disability benefits risk having benefits offset if federal loan defaults

- Borrowers have a right to discharge loans through Total and Permanent Disability (TPD) discharge process, but they reportedly don't receive information on how and when to apply.

Private Student Loan Servicing Issues⁶

Limited repayment options

Limited options for payment relief during periods of financial distress

- During periods of short-term inability to pay (unpaid parental leave, unemployment, etc.) borrowers struggle to modify payments until income is restored.
 - *"I am scheduled to go on maternity leave next month and will be on leave for 12 weeks. I asked that my payments be temporarily placed on deferment due to the change in my pay. Unfortunately, I was told there were no options to be offered. That I would continue to be responsible for the monthly payments. I have consistently made my payments on time for the last six years. This situation will create an unnecessary burden and stress to an already difficult situation."*

Borrowers and cosigners with severe disabilities have limited repayment options when they can't afford monthly payments

⁵ See Seth Frotman & Christa Gibbs, *Too Many Student Loan Borrowers Struggling, Not Enough Benefiting From Affordable Repayment Options*, CONSUMER FIN. PROT. BUREAU (Aug. 16, 2017) <https://www.consumerfinance.gov/about-us/blog/too-many-student-loan-borrowers-struggling-not-enough-benefiting-affordable-repayment-options/>; CONSUMER FIN. PROT. BUREAU, CFPB DATA POINT: STUDENT LOAN REPAYMENT (Aug. 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_student-loan-repayment.pdf.

⁶ See CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (Oct. 2017), https://www.consumerfinance.gov/documents/5702/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

- No right under federal law to have private loans forgiven if borrower becomes permanently disabled. There are limited options for modified payments.
- Some private lenders will discharge loan, but the requirements are unclear and the process is lengthy and confusing.
- Cosigners equally liable for debt, but don't have same protections available to primary borrower. Since they remain obligated to pay loan, they may have trouble accessing other forms of credit in order to support their everyday needs.

Unclear information provided by servicer

Difficulty accessing advertised loan benefits and protections

- Some servicers advertise for interest-rate reductions for on-time payments, but borrowers have trouble accessing benefits claiming requirements are unclear or difficult to satisfy.
- Borrowers report they are unable to access repayment incentives during times of deferment and that it can take months to reactivate benefits if servicer errors resulted in removal of benefits.

Servicer do not explain how borrower can successfully qualify for cosigner release

- Although borrower seemingly complete all steps necessary for cosigner release, servicers deny applications and fail to explain what requirements must be satisfied. Continued obligations to pay may limit cosigner's ability to access other forms of credit (ex. mortgage and home equity loans).

Payment Processing Issues

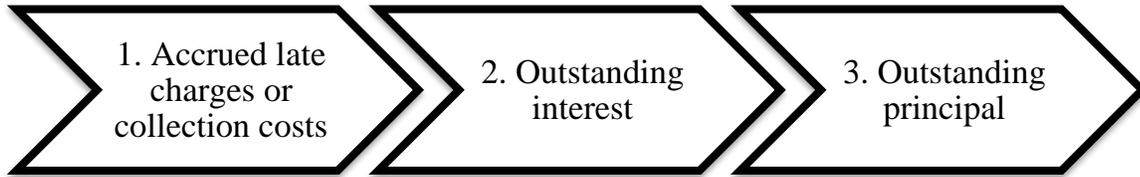
Servicer incorrectly allocates payment according to borrowers' instructions

- Borrowers complain that servicers incorrectly apply payments when one payment is submitted to cover multiple private loans.
- Extra payments on loans may cause servicers to re-disclose loan, lower monthly payments, and extend loan terms.
 - *"I was repaying a student loan to [my lender] for about \$300 a month when suddenly [my servicer] extended my loan for ten years and lowered payments without my permission. Now it seems that despite asking [my servicer] to remedy the changes they made without my permission, and despite paying the \$300 a month the loan has been extended beyond the 10 years. I was supposed to pay based on what I believed to be the terms of the loan. . . . I believe by changing the loan the company intended to collect more interest and has somehow managed to do that despite never getting my permission to change the loan."*⁷

⁷ Complaint 2302598, CONSUMER FIN. PROT. BUREAU (Jan. 21, 2017), https://www.consumerfinance.gov/documents/5702/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

APPENDIX L. ALLOCATION OF LOAN PAYMENTS WITH FEDERAL LOANS

ORDER IN WHICH LOAN HOLDER CREDITS PAYMENTS:



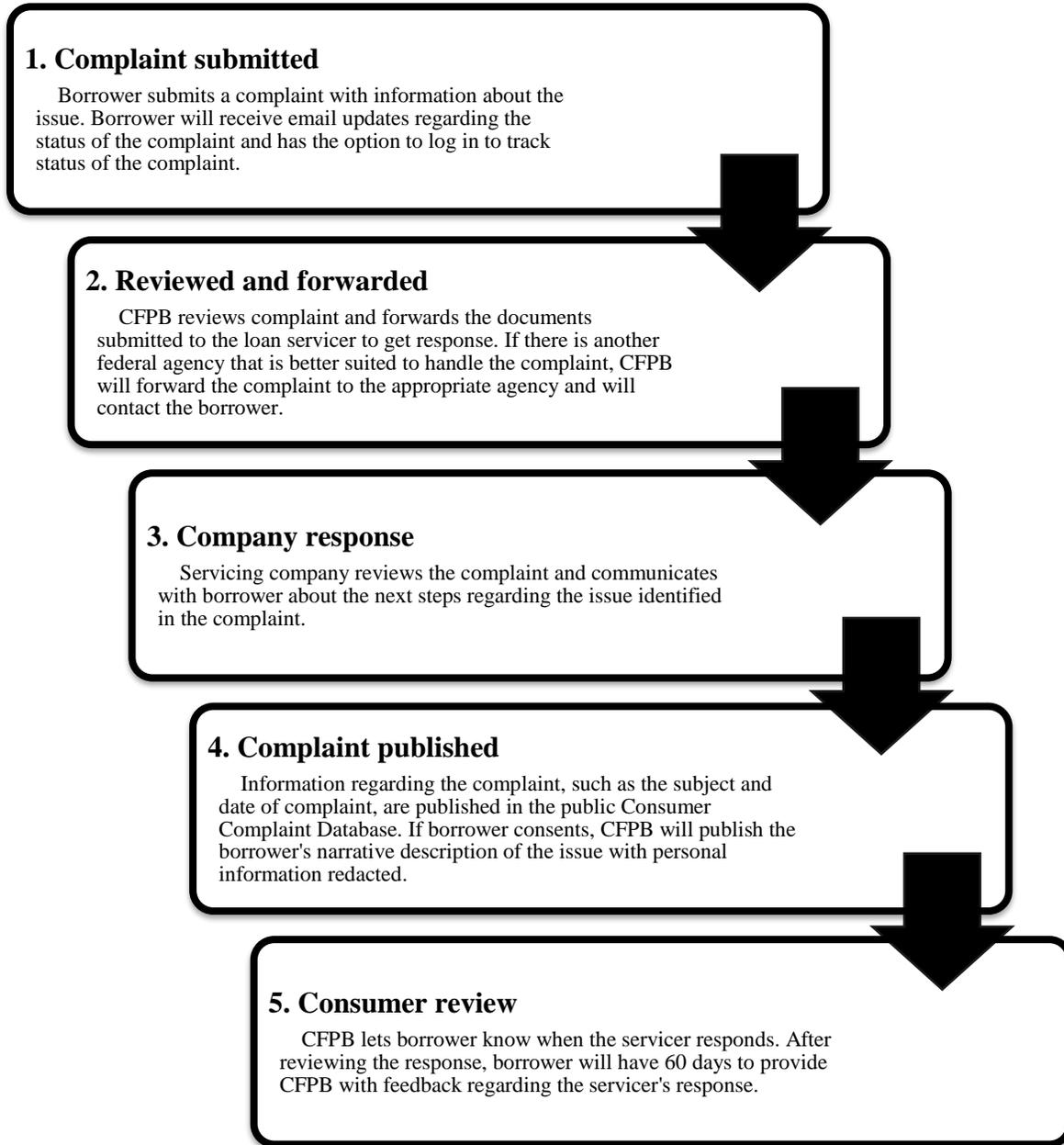
See 34 C.F.R. § 682.209(b)(1) (2018).

ORDER OF PAYMENT ALLOCATION FOR IBR, PAYE, AND REPAYE PLANS:



See 34 C.F.R. §§ 685.209(a)(3)(i), 685.209(c)(3)(i), 685.221(c) (2018).

APPENDIX M. CONSUMER FINANCIAL PROTECTION BUREAU COMPLAINT PROCESS



See Complaint Process, CONSUMER FIN. PROT. BUREAU,
<https://www.consumerfinance.gov/complaint/process/> (last visited Mar. 9, 2018).

**APPENDIX N. DUE DILIGENCE AND LOAN SERVICING PROVISIONS UNDER
FFEL PROGRAM**

FFEL Due Diligence Requirements:

34 C.F.R. § 682.411(b)(3)	Once loan delinquent, FFEL lenders must provide borrowers with information regarding the availability of the FSA Ombudsman’s office.
34 C.F.R. § 682.411(c)	<p><u>If 1-15 days delinquent:</u> Lender must send at least one written notice or collection letter during this period informing the borrower of the delinquency and urging the borrower to make payments.</p> <p>Notice / letter must include:</p> <ul style="list-style-type: none"> ● Lender or servicer contact ● Telephone number ● Prominent statement that assistance may be available if borrower experiencing difficulty in making payments
34 C.F.R. § 682.411(d)	<p><u>If 16-180 days delinquent:</u> Lender must engage in at least four diligent efforts to contact the borrower by telephone and send at least four collection letters urging the borrower to make the required payment(s). At least one attempt at contact by phone must occur on or before the 90th day of delinquency.</p> <p>Collection letters must include:</p> <ul style="list-style-type: none"> ● Options available to avoid default, including deferment, forbearance, income-sensitive repayment, and loan consolidation ● Notice in at least two letter to warn borrower that lender will assign loan to guaranty agency if loan not paid and, if sent to guaranty lender, the defaulted loan will be reported to national consumer reporting agencies ● Notice that agency may institute tax refund offsets, offsets of other federal payments, wage garnishment, or assignment to federal government for litigation
34 C.F.R. § 682.411(e)	<p><u>If 181-270 days delinquent:</u> Lender during this period must provide information to the borrower regarding options to avoid default and the consequences of default. On or after the 241st day of delinquency, lender must send final demand letter. Lender needs to provide borrower at least 30 days after demand letter to respond and to bring the loan out of default.</p>

FFEL Provisions Regarding Loan Servicing:

<p>34 C.F.R. § 682.208(a)</p>	<p>Loan servicing includes:</p> <ul style="list-style-type: none"> ● Reporting to nationwide consumer reporting agencies ● Responding to borrower inquiries ● Establishing the terms of repayment ● Reporting a borrower’s enrollment and loan status information
<p>34 C.F.R. § 682.208(c)(1)</p>	<p>Lender needs to respond within 30 days of receiving inquiry from borrower or any endorser on a loan.</p>
<p>34 C.F.R. § 682.208(c)(3)</p>	<p>If a borrower disputes the terms of the loan in writing and the lender does not resolve the dispute, the lender’s response must provide the borrower with an appropriate contact at the guaranty agency for resolution of the dispute. If guaranty agency does not resolve dispute, the agency’s response must provide the borrower with information about the Department of Education Student Loan Ombudsman’s office.</p>
<p>34 C.F.R. § 682.208(e)(1)</p>	<p>If a loan assignment results in a change in the identity of the party to whom the borrower must send payments, the assignor and assignee of the loan must, no later than 45 days from the date the assignee acquires a legally enforceable right to receive payment, provide either jointly or separately a notice to the borrower containing:</p> <ul style="list-style-type: none"> ● Notice of assignment; ● Identity of the assignee; ● Name and address of the party to whom subsequent payments or communications must be sent; ● Telephone numbers of both the assignor and assignee; ● Effective date of the assignment or transfer of the loan; ● Date, if applicable, on which the current loan servicer will stop accepting payments; and ● Date on which the new loan servicer will begin accepting payments.
<p>34 C.F.R. § 682.208(h)</p>	<p>If a loan has not been assigned, but there is a change in the identity of the party to whom the borrower must send payments, the holder of the loan must, no later than 45 days after the change, provide notice to the borrower of:</p> <ul style="list-style-type: none"> ● Name of the party to whom subsequent payments or communications must be sent ● Telephone number of the party to whom subsequent payments or communications must be sent; and ● Address of the party to whom subsequent payments or communications must be sent.
<p>34 C.F.R. § 682.401(b)(4)</p>	<p>Guaranty agency must be able to receive and respond to written, electronic, and telephone inquiries.</p>

* 2018 Code Edition

APPENDIX O. RELEVANT FEDERAL CONSUMER PROTECTION STATUTES

<p><i>Fair Debt Collection Practices Act (FDCPA)</i></p>	<p>Enacted by Congress in 1977 to eliminate abusive debt collection practices, to insure collectors refraining from abusive practices are not competitively disadvantaged, and to promote consistent State action to protect consumer against debt collection abuses (15 U.S.C. § 1692(e))</p> <ul style="list-style-type: none"> ● Governs activities of debt collectors, including collectors seeking payment on private student loans ● Primary federal statute governing debt collection
<p><i>Truth in Lending Act (TILA)</i></p>	<p>Implemented under Regulation Z (12 C.F.R. § 1026)</p> <ul style="list-style-type: none"> ● Imposes requirements on creditors regarding disclosure of terms and interest rates, advertisement of loan terms, crediting of payments, etc.
<p><i>Electronic Fund Transfer Act (EFTA)</i></p>	<p>Implemented by Regulation E (15 U.S.C. § 1693; 12 C.F.R. §1005.10)</p> <ul style="list-style-type: none"> ● Imposes requirements on student loan servicer if it obtains recurring electronic payments from borrowers within the scope of coverage <ul style="list-style-type: none"> ○ Authorizations for EFT transfer must be made in writing or similarly authenticated by consumer (12 C.F.R. §1005.10(b)) ○ Servicer needs to provide copy of authorization to consumer (12 C.F.R. §1005.10(b))
<p><i>Gramm-Leach-Bliley Act (GLBA)</i></p>	<p>Implemented by Regulation P (12 C.F.R. § 1016)</p> <ul style="list-style-type: none"> ● Requires entities to provide privacy notices and limits information sharing in particular ways
<p><i>Fair Credit Reporting Act (FCRA)</i></p>	<p>Implemented by Regulation V (12 C.F.R. § 1022)</p> <ul style="list-style-type: none"> ● Requires entities providing information to consumer reporting agencies to have reasonable policies and procedures to ensure the accuracy of the information reported
<p><i>Equal Credit Opportunity Act (ECOA)</i></p>	<p>15 U.S.C. § 1691; Implemented by Regulation B (12 C.F.R. pt. 1002)</p> <ul style="list-style-type: none"> ● Makes it unlawful for creditor to discriminate against any applicant for any aspect of a credit transaction: <ul style="list-style-type: none"> ○ On the basis of race, color, religion, national origin, sex or marital status, or age (applicant needs to have capacity to contract though); ○ Because all/part of the applicant’s income derives from any public assistance program; or ○ Because applicant in good faith exercised any right under the Consumer Credit Protection Act

* 2018 U.S.C. Edition; 2018 C.F.R. Edition

See CONSUMER FIN. PROT. BUREAU, EDUCATION LOAN EXAMINATION PROCEDURES (June 2017), https://www.consumerfinance.gov/documents/4858/201706_cfbp_Education-Loan-Servicing-Exam-Manual.pdf.

FDCPA Provisions Relevant to Student Loan Borrowers

<p>15 U.S.C. § 1692c(c)</p>	<p>Collection agency must stop contacting the borrower if the borrower so requests in writing</p> <p><u>Exceptions:</u></p> <ul style="list-style-type: none"> ● to advise the consumer that the debt collector’s further efforts are being terminated; ● to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or ● where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.
<p>15 U.S.C. § 1692g</p>	<p>In its initial communication or within five days of that communication, collection agency required to send the borrower a written notice identifying:</p> <ul style="list-style-type: none"> ● Amount of the debt; ● Name of creditor to whom debt is owed; ● Consumer has 30 days after receipt of notice to dispute validity of debt; ● If consumer notifies the debt collector of the disputed debt in writing within 30 days, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and will mail copies to the consumer; and ● Upon the consumer’s written request within the 30 day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. <p>If the borrower raises a dispute in writing within thirty days of receiving notice of the right to dispute, the collector must suspend collection efforts on the disputed portion of the debt until the collector responds to the request.</p>
<p>15 U.S.C. §§ 1692b, 1692c(b)</p>	<p>Collection agency may not speak to third parties about a borrower’s debt unless borrower or a court has given the collection agency permission.</p> <p><u>Exceptions:</u></p> <ul style="list-style-type: none"> ● Collector may contact creditors, attorneys, credit reporting agencies, co-signers, spouses, and parents if borrower is a minor ● Collectors may contact third-party contacts if the contacts are solely for the purpose of locating the borrower, but the collectors are not allowed to reveal the purpose behind the contact
<p>15 U.S.C. § 1692c(a)</p>	<p>Debt collector may not contact consumer:</p> <ul style="list-style-type: none"> ● During inconvenient hours. Unless collector knows otherwise, period between 8:00am to 9:00pm considered convenient times for contact. ● If represented by a lawyer, unless the lawyer gives permission or fails to respond to the collector’s communications. ● At place of employment if collector knows or has reason to know that the employer prohibits personal calls

<p>15 U.S.C. § 1692d</p>	<p>Debt collector may not engage in behavior that harasses, abuses, or abuses any person in connection with collection of a debt. Violations include:</p> <ul style="list-style-type: none"> ● Use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person ● Use of obscene, profane, or abusive language ● Repeatedly calling consumer continuously with the intent to annoy, abuse, or harass any person at the called number ● Telephoning without disclosing collector’s identity, when required
<p>15 U.S.C. § 1692e</p>	<p>Debt collector may not make false, misleading, or deceptive representations in collecting debts. Violations include:</p> <ul style="list-style-type: none"> ● Falsely representing the character, amount, or legal status of a debt or of services rendered or compensation owed ● Falsely stating or implying a lawyer’s involvement ● Using any false representation or other deception to collect or attempt to collect any debt or to obtain information about the borrower ● Threatening to take any action that cannot legally be taken or that is not intended to be taken ● Failing to disclose in the initial written communication with the debtor that the collector is attempting to collect a debt
<p>15 U.S.C. § 1692f</p>	<p>Debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Violations include:</p> <ul style="list-style-type: none"> ● Collecting fees or charges unless expressly authorized by the agreement creating the debt or permitted by law

* 2018 U.S.C. Edition; 2018 C.F.R. Edition

APPENDIX P. CFPB ENFORCEMENT ACTIONS

Entity	Date Filed	Alleged Wrongful Conduct	Additional Information
Citibank, N.A. <i>Inactive or Resolved</i>	11/21/17	<ul style="list-style-type: none"> • Misled borrowers regarding eligibility for tax deduction on interest paid on student loans • Incorrectly charged late fees • Adding interest to student loan borrower balances while still in school, even though they would be eligible for deferment • Misled consumers about monthly bills 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/citibank-na-student-loan-servicing/
National Collegiate Student Loan Trusts and Transworld Systems, Inc. <i>Active</i>	9/18/17	<ul style="list-style-type: none"> • Sued consumers for private student loan debt that could not be proven as owed or was too old to sue 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/national-collegiate-student-loan-trusts-and-transworld-systems-inc/
Aequitas Capital Management, Inc., et al. <i>Inactive or Resolved</i>	8/17/17	<ul style="list-style-type: none"> • Enabled Corinthian to make high-cost private loans so that it would seem as though the school was generating enough external revenue to meet federal aid requirements 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/aequitas-capital-management-inc-et-al/
Navient Corporation, Navient Solutions, Inc., and Pioneer Credit Recovery <i>Active</i>	1/18/17	<ul style="list-style-type: none"> • Illegally failed borrowers at every stage of repayment • Provided bad information • Processed payments incorrectly • Failed to act when borrowers complained • Cheated borrowers out of rights to lower repayments 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/navient-corporation-navient-solutions-inc-and-pioneer-credit-recovery-inc/
Bridgepoint Education, Inc. <i>Inactive or Resolved</i>	9/12/16	<ul style="list-style-type: none"> • Deceived students into taking out private student loans that cost more than advertised 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/bridgepoint-education-inc/
Wells Fargo Bank, N.A. <i>Resolved</i>	8/22/16	<ul style="list-style-type: none"> • Engaged in illegal private loan servicing practices that increased costs and unfairly penalized loan borrowers • Failed to provide important payment information to consumers • Charged consumers illegal fees • Failed to update credit report information 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/wells-fargo-bank-n/
Student Aid Institute, Steven Lamont <i>Inactive or Resolved</i>	3/30/16	<ul style="list-style-type: none"> • Tricked borrowers into paying fees for federal loan benefits • Misrepresented that it was affiliated with the Department of Education 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/student-aid-institute-steven-lamont/

Student Financial Resource Center, and Armond Aria <i>Open</i>	10/29/15	<ul style="list-style-type: none"> Charged students and their families millions of dollars in fees for sham financial services 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/student-financial-resource-center-college-financial-advisory/
Student Financial Aid Services, Inc. <i>Inactive or Resolved</i>	7/23/15	<ul style="list-style-type: none"> Engaged in illegal sales and billing practices 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/student-financial-aid-services-fafsa-com/
Discover Bank, the Student Loan Corporation, and Discover Products, Inc. <i>Inactive or Resolved</i>	7/22/15	<ul style="list-style-type: none"> Engaged in illegal private loan servicing practices 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/discover-bank-student-loan-corporation-discover-products/
IrvineWebWorks, Inc. d/b/a Student Loan Processing. US, et al. <i>Resolved</i>	12/11/14	<ul style="list-style-type: none"> Tricked borrowers into paying upfront fees for federal loan benefits 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/irvine-web-works-student-loan-processing/
College Education Services; Marcia Elena Vargas; and Frank Liz <i>Inactive or Resolved</i>	12/11/14	<ul style="list-style-type: none"> Tricked borrowers into paying upfront fees for federal loan benefits 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/college-education-services-marcia-elena-vargas-and-frank-liz/
Corinthian Colleges, Inc. d/b/a Everest College, WyoTech, and Heald College <i>Inactive or Resolved</i>	9/16/14	<ul style="list-style-type: none"> Engaged in predatory lending scheme Lured students to take out private loans to cover expensive tuition Advertised bogus job prospects and career services Used illegal debt collection tactics to make students pay back loans while still in school 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/corinthian-colleges/
ITT Educational Services, Inc. <i>Open</i>	2/26/14	<ul style="list-style-type: none"> Engaged in predatory student lending 	https://www.consumerfinance.gov/policy-compliance/enforcement/actions/itt-educational-services-inc/

See also *Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/?topics=student-loans> (last visited Mar. 9, 2018).

APPENDIX Q. PROPOSED STUDENT LOAN BORROWERS' BILL OF RIGHTS ACT

Student Loan Borrowers' Bill of Rights Act (H.R. 3630; 115th Congress)

The proposed Student Loan Borrowers' Bill of Rights Act of 2017 is meant to establish student loan borrowers' rights to 1) basic consumer protections; 2) reasonable and flexible repayment options, 3) access to earned credentials, and 4) effective loan cancellation in exchange for public service, and for other purposes.” The Act was introduced by Representative Wilson on July 28, 2017 and is currently in committee. The likelihood is low that it will pass through this Congress. The Act is organized by the four goals listed above.

Title I: Borrowers' Right to Basic Consumer Protections: Title I seeks to expand the situations under which student loans can be discharged in bankruptcy, subject federal student loans to a 6-year statute of limitations, and prevent collection on student loans through garnishment of wages or social security and tax offsets.

Dischargeability of Student Loans in Bankruptcy: Student loan debt is treated differently than other types of debt under Bankruptcy Code. When a person files for Chapter 13 Bankruptcy, they are unable to discharge their student loan debt unless they can prove “undue hardship.” The current standard to demonstrate “undue hardship” is very high, making it difficult to discharge student loan debt even after declaring bankruptcy.⁸ The Student Loan Borrowers' Bill of Rights Act proposes to lower that bar and to make it easier for a borrower who has declared Chapter 13 bankruptcy to discharge their student loans.

Statute of Limitations: Title I also seeks to establish a 6-year statute of limitations for federal student loans. Private loans are generally subject to statutes of limitations established in

⁸ Kurtis Wiard, *Hope for the Hopeless: Discharging Student Loans in Bankruptcy*, 84 J. Kan. B. Ass'n 24, 25 (Nov. 2015), <https://issuu.com/ksbar/docs/10novdec2015>.

state contract law (typically anywhere from 3 to 10 years).⁹ Federal student loans, however, have no statute of limitations. By reinstating a 6-year statute of limitations, the Act requires servicers of federal student loans and other agencies to file suit or take other actions to collect the debt within 6 years of the original default.

Prohibition of Offsets and Wage Garnishments: To collect on defaulted student loan debt, loan servicers and collection agencies can garnish or offset a borrower’s wages, social security benefits, and tax refunds. The Student Loan Borrowers’ Bill of Rights Act will exempt federal student loan debt from being collected through those means.

Title II: Borrower’s Right to Reasonable and Flexible Repayment Options: Title II seeks to exclude the discharging of student loan debt from gross income for taxation purposes, to permit the funds in tax-advantaged college savings plans to be used to pay back student loans, and to allow parents and guardians to take advantage of repayment programs for loans they have taken out on behalf of a dependent student.

Exclusion from Gross Income: Section 201 (“Exclusion from Gross Income for Discharge of Student Loan Indebtedness”) of the federal bill proposes amendments to the language of Section 108(f) (“Student Loan”) of the Internal Revenue Code.¹⁰ At present, the section allows individuals to exclude forgiveness of student loan debt from their gross income, and the amount of student loan debt forgiveness is given a “tax-free treatment,” but only if these individuals work in certain professions for a specific period of time.¹¹ Also, Section 108(f) sets out limitations on the kinds of loans that are eligible for tax exemption and does not mention private

⁹ Cara O’Neill, *Small Claims Statutes of Limitations*, NOLO, <https://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html> (last updated Oct. 5, 2017).

¹⁰ 26 U.S.C. § 108 (2018).

¹¹ George Salimbas, *Educational Opportunities for Taxpayers*, 18 Akron Tax J. 1, 11 (2003).

student loans.¹² By striking these restrictions, Section 201 of the proposed federal bill aims to expand protection to a broader range of student loan borrowers.

529 Savings Plans: 529 savings plans are tax-advantaged savings or investment plans that encourage saving for college expenses.¹³ Contributions are made to the plans and invested so that it grows over the life of the plan. Earnings are tax-exempt so long as withdrawals are spent on eligible college expenses.¹⁴ Eligible college expenses include tuition, fees, books, supplies, equipment, expenses related to special needs and accommodations, and costs associated with a computer and internet access. The Student Loan Borrowers' Bill of Rights Act proposes to expand the types of eligible expenses to include payments on the interest and principal of a student loan.

Parent PLUS Loans: Many parents or guardians take out federal education loans to help finance their child's college education.¹⁵ These kinds of loans, taken out by parents and guardians on behalf of a dependent student are called Federal Direct PLUS Loans. The Act proposes to give such borrowers access to repayment programs that are already available to federal loans taken out by the students themselves. Such programs include income based repayment, loan consolidation, and loan forgiveness for service in areas of national need.

Title III: Borrower's Right to a Meaningful Degree: Title III aims to protect a student loan borrowers' professional license and access to transcripts. If a borrower defaults on their repayment of student loans, the Act will prohibit evidence of that default from being used in a proceeding involving their professional or vocational license. It will further prevent colleges,

¹² 26 U.S.C. § 108 (2018).

¹³ *An Introduction of 529 Plans*, U.S. SEC. EXCH. COMM'N (Dec. 4, 2017), <https://www.sec.gov/reportspubs/investor-publications/investorpubsintro529htm.html>.

¹⁴ *Id.*

¹⁵ *PLUS Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/plus> (last visited Mar. 10, 2018).

universities, or other institutions from blocking a student or former student's access to their transcripts, degree scrolls, or certifications while they are in default.

Title IV: Right to Effective Loan Cancellation for Borrowers Engaged in Public Service

Careers: The current Public Service Loan Forgiveness program forgives the remaining balance of a borrower's federal student loans after they have worked for ten years in jobs that serve the public interest.¹⁶ Borrowers become eligible for forgiveness after they have made 120 qualified payments on their student loans (12 monthly payments per year for 10 years) while employed by a government organization or nonprofit agency.¹⁷ The Student Loan Borrowers' Bill of Rights proposes to lower the time requirement from ten years of payments down to five years of payments.

¹⁶ *Public Service Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> (last visited Mar. 10, 2018).

¹⁷ *Id.*

APPENDIX R. GENERAL RECOMMENDATIONS FOR PHENOM

In addition to the proposed alterations to Bill S.129/H.2173, we provide some additional, relevant recommendations for PHENOM.

Keep an eye on staffing changes

The Bill can only do so much on its own. The language of the Bill sets up the office of the Ombudsman and what some of its duties would be, but the Bill does not specifically describe how those duties would be fulfilled. Its proper implementation therefore will depend in large part on who the actors are putting it into effect.

Keep in mind the Massachusetts Department of Higher Education and the Office of Student Financial Aid as Allies

The Massachusetts Department of Higher Education (DHE) is made up of a 13 member Board of Higher Education (BHE), its staff, and a Commissioner of Higher Education. Indeed, the bill currently lists BHE as an entity to collaborate with in resolving student loan lending complaints. DHE could have an important role to play both in advancing state level policy in regards to issues impacting higher education and as a resource for current and future student loan borrowers.

The main purpose of DHE is to run the network of UMASS colleges and community colleges. However, this is not DHE's only purpose; it has a broader purpose in ensuring that all Massachusetts citizens have the opportunity to access public higher education. In fact, DHE explicitly articulates its goal of making higher education truly accessible "to the people of the commonwealth in all their diversity". In this way, DHE directly acknowledges the need to eliminate the disparate availability of higher education to people along racial, gender, and socioeconomic lines. Eliminating these disparities is a key outcome of DHE's "Vision Project", a plan to boost college completion rates, close achievement gaps, and attract and graduate more

students from underserved populations. This all suggests that DHE might be an important ally not only in the passage of this bill, but in its genuine implementation.

The head of DHE is the Commissioner of Higher Education, who is responsible for providing direction to the Board of Higher Education and shaping state level politics that maximize the benefits of higher education for citizens of Massachusetts. The current commissioner is Carlos Santiago, appointed by Governor Charlie Baker in 2015. He has an extensive academic background in economics. It might be worth appealing to him for his help to shape Massachusetts policy on student loan debt, an issue which certainly has an impact on who can access higher education in the state.

Additionally, DHE might be a good entity through which to distribute educational resources and to communicate with students and borrowers. DHE has an Office of Student Financial Assistance (OSFA) whose primary purpose is to manage and oversee state funded financial aid programs and to advise BHE about financial aid policy matters. OFSA additionally promotes access to higher education by providing information resources to students. Their website is easily navigable and provides a lot of information to students on the entire financial aid process. OFSA might be helpful in distributing materials and information to future and current borrowers.

Follow the Progress of Relevant Lawsuits

It would be useful to track the progress of several lawsuits that are currently working their way through the legal system, such as *ACLU v. U.S. Department of Education* and *Commonwealth of Massachusetts v. PHEAA, d/b/a FedLoan Servicing*. The results of these lawsuits could have important implications for the efficacy of the bill as well as the general landscape behind the student loan debt crisis.