

July 17, 2017

Ms. Kathleen Smith  
Acting Assistant Secretary for Postsecondary Education  
U.S. Department of Education  
400 Maryland Avenue, NW  
Washington, DC 20202

Dear Ms. Smith:

The National Council of Higher Education Resources (NCHER) urges the Department to issue regulatory guidance that clearly states that federal student loan servicers and guaranty agencies are governed by the Department's rules and requirements and those of other federal agencies, and preempt state and local laws and actions that purport to regulate the activities of participants in the federal student loan programs, including federal contractors.

Starting largely in 2015, several states have passed laws requiring student loan servicers to obtain licenses to service education loans to borrowers residing in their state.<sup>1</sup> In most cases, these new state laws define an "education loan" to include any loan used to finance a postsecondary education and cost of attendance at a postsecondary education,<sup>2</sup> including loans made under the William F. Ford Federal Direct Loan Program and the Federal Family Education Loan Program (FFELP). The laws also define "servicers" as any organization engaged in servicing, though the definition differs across states. The California and District of Columbia laws define servicing as receiving any scheduled periodic payments from a borrower or any notification that a borrower made a scheduled periodic payment and applying payments to a borrower's account under the terms of the student loan; maintaining account records for the student loan and communicating with a borrower regarding the student loan; and interacting with a borrower with the goal of helping the borrower avoid default.<sup>3</sup> This broad definition would cover all organizations that are commonly considered to be student loan servicers, including all of the Title IV Additional Servicers and the Not-for-Profit Servicers. Depending on the actual language, it could also ensnare master servicers with FFELP loans, guaranty agencies that have agreements with the Secretary of Education to provide supplemental late-stage delinquency assistance, private collection agencies under contract with the Department to collect on Direct Loans, and potentially even third-party

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<sup>1</sup> As of the date of this letter, California, Connecticut, the District of Columbia, and Massachusetts have existing statutes in place. The State of Illinois passed a comparable bill, which was sent to the Governor on June 29, 2017; he has 60 days to sign or veto the bill. Bills have been introduced in California (technical corrections), Colorado, Maine, Massachusetts, Missouri, New Jersey, New York, and Washington State.

<sup>2</sup> Definition of "student loan" as it appears in Assembly Bill 2251, the Student Loan Servicing Act, as passed by the California Legislature and signed into law by Governor Jerry Brown on September 29, 2016. For more information, see [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB2251](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2251).

<sup>3</sup> Definition of "servicing" as it appears in Assembly Bill 2251, the Student Loan Servicing Act, as passed by the California Legislature and signed into law by Governor Jerry Brown on September 29, 2016. For more information, see [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB2251](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2251).

servicers that work with institutions of higher education to identify and assist struggling borrowers (even though these agencies do not encompass the array of duties performed by servicers). All of these entities are already required to comply with the myriad of rules and requirements set forth in the Higher Education Act of 1965 and its governing regulations and, in the case of Department contractors, the detailed requirements of the contracts.

During NCHER's discussions with the authors of many of these state servicing laws, the state representatives and senators have repeated the mantra that the federal government has no existing rules and requirements or protections for students in place – in many cases noting the Secretary's April 11, 2017 withdrawal of the "Mitchell Memo" governing the student loan servicing procurement process as a compelling reason for why the state should pass its new law. These arguments, of course, are incorrect and ignore the fact that servicers are highly-supervised and regulated, both by the Department and the Consumer Financial Protection Bureau (CFPB). They must comply with all statutory, regulatory, and contractual requirements, including compliance with the Federal Information Security Management Act (FISMA), and have highly-specialized systems for handling the unique requirements for servicing federal student loans.

With these new state laws, however, student loan servicers and guaranty agencies will have to comply with rules that would impose state-specific servicing routines, thus creating significant differences between the servicing of borrowers residing in California, Connecticut, DC, potentially Illinois, and Massachusetts who will be governed by both federal and state requirements, and borrowers residing in other states where federal rules would apply. This additional regulatory burden will also add unnecessary complexity to the federal student loan system, creating a regulatory and supervisory maze in the process and confusion for both student loan borrowers and their servicers. In some cases, the patchwork of state rules and regulations are contrary to the Higher Education Act. For example, California's Student Loan Servicing Act mandates that servicers notify the borrower who their servicer is,<sup>4</sup> even though the current student loan servicing procurement put forth by Federal Student Aid (FSA) mandates that borrowers be notified that their servicer is the U.S. Department of Education. In addition, the Illinois Student Loan Servicing Rights Act includes more than three pages imposing new requirements applicable to the transfer of servicing,<sup>5</sup> even though there are already federal rules in place that apply to servicing transfers, and servicers themselves have adopted best practices to handle transfers of borrower accounts.

The numerous state laws will also drive up compliance costs for student loan servicers, which will necessitate additional federal funds being paid to the Department's contractors or fewer services being provided to student and parent borrowers. For example, the Illinois bill would require that all servicers employ repayment specialists to handle all inbound and outbound calls for borrowers meeting certain criteria; the specialists are required to have received enhanced training.<sup>6</sup> The repayment specialist

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<sup>4</sup> Section 28136 of Assembly Bill 2251 requires that a student loan servicer provide "the identity of the new student loan servicer and the number of the license of the new student loan servicer issued by the commissioner; the name and address of the new student loan servicer to whom subsequent payments or communications are required to be sent; and the telephone numbers and Internet Web sites of the new student loan servicer." For more information, see [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB2251](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2251).

<sup>5</sup> Section 5-60 of Senate Bill 1351 requires a student loan servicer to "provide to each borrower subject to the transfer a written notice not less than 15 calendar days before the effective date of the transfer." The bill requires the notice to contain a list of detailed information. For more information, see <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=91&GA=100&DocTypeId=SB&DocNum=1351&GAID=14&LegID=103668&SpecSess=&Session=>.

<sup>6</sup> Section 5-30 of Senate Bill 1351 includes detailed requirements providing specialized assistance for student loan borrowers. For more information, see

provision will also result in potential confusion for borrowers. For example, if an eligible borrower calls into a servicer to discuss his or her problem, he or she may spend several minutes detailing the circumstances for the call before the initial servicer representative realizes that the caller is a federal loan borrower eligible for referral to a repayment specialist, who would need to be on standby. More than likely, the borrower would need to repeat much of the conversation that he or she already had with the initial representative. Borrowers will certainly object to being passed around and having to start the conversation over with another person. Federal student loan servicers employ highly-trained staff who have expertise in federal financial aid regulations, debt management services, and delinquency and default prevention activities. In this case, the requirements would seem to be inefficient, and unworkable for many smaller servicers who would be unable to absorb the expenses of a new staffing structure.

The new laws would also negatively impact many small, state-based organizations established by their state legislatures to promote college access in their states who operate and service FFELP loans. Because of the mobility of today's borrowers, some of these students will likely have moved to other states. The servicers would be required to meet significant regulatory requirements for each state, even though they have few impacted borrowers. Also, there will be additional disruption if a state pulls the licenses of the federal student loan servicers, all of whom have loans from students randomly assigned by the Department.

The issues involving conflicting state laws are being amplified by state regulatory agencies as they implement the new statutes. On June 30, 2017, the Connecticut Department of Banking released a set of new student loan servicing standards<sup>7</sup> saying, "The Department is aware that since regulation of this industry is relatively new, no uniform set of servicing standards for student loan servicers currently exists. Upon review of various resources concerning loan servicing, including existing standards in the mortgage servicing industry, information provided by the Consumer Financial Protection Bureau concerning the student loan servicing industry and the United States Department of Education's Policy Direction on Federal Student Loan Servicing dated July 20, 2016, the Commissioner hereby sets forth the following standards." It is ironic that the State of Connecticut released new standards based on the "Mitchell Memo" even though the Department withdrew the memo, for a variety of reasons, before it became effective. This leads NCHER and its members to theorize that the "Mitchell Memo" is in effect, but just in certain states. In reviewing Connecticut's new regulations, a number of questions come to mind. The new standards require servicers to apply payments in a manner that is the "most beneficial to the borrower," even though this term is open to interpretation. The standards require that servicers have "immediate access" to borrower records, though the master promissory note is not always immediately available. The standards also require student loan services to provide periodic and detailed billing statements to borrowers, including a "date of origination." Many servicers currently provide account level rather than loan level statements; the Connecticut standard would require a significant rewrite of their billing statements. On the billing statements, the standards use "current loan term," but it is unclear if the definition would be consistent with those utilized by the federal servicers. The Department should make clear that federal rules and requirements preempt state student loan servicing

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<http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=91&GA=100&DocTypeId=SB&DocNum=1351&GAID=14&LegID=103668&SpecSess=&Session=>

<sup>7</sup> In 2015, Connecticut became the first state to require licensing of student loan servicers pursuant to Public Act 15-162. The legislation required that any person who services student education loans in Connecticut become licensed with the Banking Commissioner effective July 1, 2016, unless exempt. The law also required the Commissioner to set service standards for licensed student loan servicers and post them on the Department's website on or before July 1, 2017. For more information, see [http://www.ct.gov/dob/lib/dob/consumer\\_credit\\_nonhtml/student\\_loan\\_standards\\_7-1-17.pdf](http://www.ct.gov/dob/lib/dob/consumer_credit_nonhtml/student_loan_standards_7-1-17.pdf).

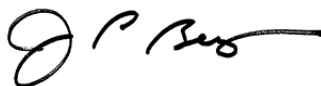
laws and regulations in the governing of federal student loans. This would reduce potential confusion to student and parent borrowers.

On top of this, a number of Attorneys General (AG) have begun to take action against student loan servicers for activities that are already governed by the Higher Education Act, federal regulatory requirements, and the terms of federal contracts. For example, our information indicates that AGs in Illinois, Massachusetts, New York, and other jurisdictions around the country are conducting “investigations” of federal loan servicers regarding their work as contractors for the Department. The Department must take a leadership role and assume full responsibility for the actions of its federal contractors who are simply adhering to programmatic requirements and guidance issued by the Department. This course of action could include the Department intervening with the AG’s office on behalf of any agency under scrutiny, or working with both parties to achieve a resolution. In either case, the Department should assert its authority in this and all matters regarding federal student loan servicers and their engagements with state AG offices. State AG offices should not be permitted to make an end run around the Department by intimidating its contracted loan servicers.

On a related issue, Connecticut is also attempting to apply its consumer collection agency registration obligations to Educational Credit Management Corporation (ECMC), even though guaranty agencies hardly fit within the business model associated with debt buyers that are subject to that underlying law. Officials from ECMC and NCHER had a conversation with Brian Siegel with the Department’s Office of General Counsel in early June concerning the applicability of state licensing laws to guaranty agencies, and discussed how attempts to apply these state laws to guaranty agencies will hinder the ability of the agencies to satisfy the requirements imposed on them by the Higher Education Act and the Department’s regulations. Similar to student loan servicing, there is a real possibility of excessive overregulation interfering with the ability of guaranty agencies performing their statutory responsibilities on behalf of the Department. Smaller guaranty agencies generally insure a small number of loans of borrowers who, due to their mobility or for other reasons, reside in states outside of their designated state. It is unreasonable to subject them to state licensing rules throughout the country. The potential burden on the agencies is extensive, particularly coming at a time when their portfolios are winding down and the agencies are struggling to continue to offer outreach services for both FFELP and Direct Loan borrowers. This issue potentially affects all agencies, whether large or small, whether state agency or nonprofit organization. A background memo outlining many of these legal concerns will be sent directly to Mr. Siegel. In the meantime, NCHER believes that the Department should publish a notice pre-empting state laws and regulations governing guaranty agencies that have agreements with the Secretary of Education. To further discuss the latter issue, NCHER would like to schedule a meeting where we and officials from ECMC can review with you those issues that threaten to get in the way of the ability of guaranty agencies to perform their critical statutory role.

Thank you for the opportunity to share our concerns with state student loan servicing licensing laws, the impact of recent actions by State Attorneys General offices, and the impact of such laws and actions on guaranty agencies. If you have any questions or need additional information, please feel free to contact me at [jbergeron@ncher.us](mailto:jbergeron@ncher.us) or (202) 822-2106.

Sincerely,



James P. Bergeron  
President