November 27, 2017

Mr. Christian A. Washington
Legislative Analyst, Office of the Commissioner
Department of Insurance, Securities, and Banking
810 First St. NE, Suite, 701
Washington, DC 20002

RE: Notice NOO65843; Notice of Emergency and Proposed Rulemaking

Dear Mr. Washington:

This letter is in response to the above captioned Notice of Emergency and Proposed Rulemaking (the "Notice") published in the District of Columbia Register by the Department of Insurance, Securities, and Banking ("DISB") on October 27, 2017. The Notice purports to clarify and implement the Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act of 2016, which became effective February 18, 2017 (D.C. Law 21-214; D.C. Official Code §31-106.01 – the "Act").

The National Council of Higher Education Resources ("NCHER") is a national, nonprofit trade association, based in the District of Columbia, representing state, nonprofit, and private organizations that administer education programs that make grant and loan assistance available to students and parents to pay for the costs of postsecondary education. Our membership includes organizations under contract with the U.S. Department of Education (the "Department") to service and recover outstanding loans made under the William D. Ford Federal Direct Loan Program, entities that service and recover outstanding loans made under the legacy Federal Family Education Loan Program ("FFELP"), and organizations that service and recover private education loans. Seven of the organizations included in the group of "larger participants" in the student loan servicing market, as such term is defined by the Consumer Financial Protection Bureau, are members of NCHER.

NCHER understands that, with all the attention being devoted to the cost of college and how to pay for it, states and localities are looking to identify their role in postsecondary education. Our organization agrees that more can be done at both the federal and state levels to increase college affordability, the real problem underlying most of the concerns addressed in the media. Borrowers are overburdened with student loan debt not because of decisions made by their federal and private servicers, but because the cost of college continues to rise as states reduce their investment in higher education and colleges and universities continue to shift the burden of paying tuition and fees to students and their families. To address this challenge, NCHER supports the establishment of state-based student loan ombudsman offices that can serve as a local advocate for student loan borrowers.

NCHER's comments on the Notice cover two main items: the unreasonableness of the annual assessment fee and the need for additional exemptions. We also provide a number of specific comments and questions on the text of the proposed regulation.

A. Unreasonableness of the Annual Assessment Fee

Our principal cause for concern is the annual assessment fee set forth in Appendix A of the Notice. Currently, the federal government owns more than 75 percent of all student loans in the country. That percentage is slated to increase over time as older, lender-held FFELP loans continue to amortize; no new loans were made under this program after July 1, 2010. In order to service its more than 32 million borrowers and $1.0 trillion loan portfolio, the Department currently pays its nine federal student loan servicers a monthly fee that averages around $2.00 per month, or around $24.00 per year, for each borrower account. Since borrowers take out additional student loans for each academic year of study, each account is comprised of several loans; on average, there are nearly 5 loans per account. The proposed assessment fee of $6.60 per loan would total an average of $33.00 for each District of Columbia resident, considerably more than the $24.00 per account that the servicers are paid by the Department. Thus, the entire amount the Department pays its servicers would be consumed solely to pay the required annual assessment fee to the District of Columbia; no revenue would be left to cover the basic operating costs of actually servicing the loans for students and parent borrowers in the District. In short, the annual assessment fee would make it impossible to service federally-owned student loans and is inherently anti-borrower and anti-student. The challenges that the Notice presents for the servicing of Department-owned loans are similar for those entities servicing FFELP loans, where revenue available to cover the cost of servicing is fixed by federal statute, as well as for private education loan lenders and servicers. The assessment fee constitutes an obstacle to the accomplishment of the purposes contemplated by the Congress when is created the federal student loan programs.

As for what could constitute a reasonable fee structure, NCHER draws your attention to the recently-enacted Illinois Student Loan Servicing Rights Act (Public Act 100-0540), which was drafted and promoted by the Attorney General of Illinois. Under the law, the fees for licensure include a $1,000 application fee, an additional $800 investigation fee, and a $1,000 annual renewal fee.[1]

B. Need for Additional Exemptions

Our second cause for concern is the lack of exemptions in the Notice for smaller student loan servicers, including state-based servicers, which service a limited number of loans to District of Columbia residents. The proposed rule would require state-based student loan organizations, all of which were created by their state legislatures to make, acquire, and then service student loans, to obtain a license and potentially comply with new regulatory requirements. Under the federal tax code, these organizations can only service loans to students and parents of students who, at the time the loans were originated, resided in their state or who attended a school within their state. However, recent graduates are mobile, and a certain percentage have moved to states throughout the country, including the District. The cost of licensure and regulatory compliance in multiple states could be prohibitive for these state organizations. The result may very well be that they exit the servicing business, leaving only a small handful of large national servicers remaining.

NCHER recommends that smaller servicers, including state-based servicers who are already regulated by their individual states, be exempt from the licensure requirements of the Act. In this regard, we draw your attention – again - to the recently-enacted Illinois Student Loan Servicing Rights Act (Public Act 100-0540), which includes a number of important exemptions. Specifically, the new law exempts “a State institution or a nonprofit private organization designated by a governmental entity to make or service

[1] Illinois Student Loan Servicing Rights Act (Public Act 100-0540), Section 20-80.

student loans, provided in each case that the institution or organization services fewer than 20,000 student loan accounts of borrowers who reside in Illinois."[2]

The Notice should also make clear that guaranty agencies are not subject to the Act. At our meeting with you on October 19, 2017, DISB staff acknowledged guaranty agencies that provide default prevention services to struggling borrowers under the legacy FFELP program are not subject to the licensing requirements under the Act. The discussion noted that a party other than the guaranty agency is actually responsible for servicing these guaranteed loans. Guaranty agencies do not perform the activities generally considered to be "servicing," such as keeping loan records and applying payments. We note that the Illinois Student Loan Servicing Act (Public Act 100-0540) specifically exempts guaranty agencies performing their responsibilities under their agreements with the Department[3] from the licensing requirements of the new law.

C. Specific Comments

In addition to the general comments above, NCHER offers the following more technical comments on the Notice:

- The proposed rule provides that an application for a license shall include the "general plan and description of the applicant's business (Section 3002.2(j)). How detailed should this plan description be?
- By stating that a "licensee shall not submit a challenge to protest a disciplinary action that the Commissioner has taken against the licensee or to appeal the underlying reasons for the disciplinary action," the Notice would appear to deprive a licensee of fundamental due process (Section 3008.2).
- It seems unfair to require a licensee to pay its annual assessment fee even after it has surrendered its license, as would seem to be required under Section 3015.5. A request to surrender a license would presumably only be made after the servicer has ceased servicing student loans. A servicer should not be required to continue to pay an annual assessment when it is no longer servicing loans.
- The requirement for a servicer to notify the Commissioner of facts or conditions that could have a negative impact on a licensee's financial condition under Section 3016.1(b) should be conditioned by a materiality standard, as should the authority of the Commissioner to suspend or revoke a license if the licensee has violated any provision of the regulations (Section 3019.1(b)).
- The proposed regulation requires a licensee to continue to maintain adequate records of each transaction for at least three years after a loan is assigned or transferred (Section 3018.1). In cases where a servicer is exiting the business and records are transferred to a successor servicer, the licensee might not be able to meet the requirement. The Notice should make clear that the servicer should transfer the records to the successor servicer.
- The proposed rule requires a licensee upon request to send records to the Commissioner (Section 3018.2). The Notice should make clear that DISB is required to maintain the confidentiality of such records.
- The Notice provides that the Commissioner may provide information on consumer complaints to the Nationwide Mortgage Licensing System and Registry ("NMLS") (Section 3022.2). NCHER questions whether the complaint information will be made available to the public as we have serious concerns with any public disclosure of unverified complaints?

[2] Illinois Student Loan Servicing Rights Act (Public Act 100-0540), definition of "student loan servicer" in section 1-5.
[3] Id.

- The proposed regulation provides for the assessment of penalties for violations of the Act (Section 3023.2). Under the Notice, the penalty can be $5,000 per occurrence if the entity is a licensee and $25,000 per occurrence if the entity is not licensed. Depending on how "each occurrence" and "violation of the Act" are defined, the penalties could be so large as to be unreasonable.

As a final item, NCHER would be remiss if we did not mention the Emergency Rulemaking that is part of the Notice, and the impact that being out of immediate compliance with the Act could have on federal and private student loan servicers that have contracts with federal and state governments. We take comfort from the statements made by DISB staff at the October 19, 2017 meeting with NCHER and other industry representatives that DISB does not intend to enforce the licensing requirements prior to the adoption of a final rule and would consider making clear that such entities are not out of compliance with the statute during development of the final regulation.

NCHER hopes that that final rule takes into consideration the important comments made above. We look forward to continuing to work together on all of the identified issues in support of student borrowers in the District of Columbia. If you have any questions, please contact me at jbergeron@ncher.us or at (202) 822-2106.

Sincerely,

James P. Bergeron
President

cc: Stephen C. Taylor, Commissioner
Dr. Charles Burt, Ombudsman