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A blurred background image showing several people in business attire sitting at a table, looking at documents and laptops, suggesting a professional meeting or conference.

Student Lending and Education Finance:
Legal and Regulatory Trends and New Loan Alternatives

Consumer Finance Monthly Breakfast Briefing

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Agenda

- Federal and State Enforcement Trends
- Federal and State Regulatory and Legislative Developments
- Student Loan Alternatives (ISAs)



Federal and State Enforcement Trends



Federal Enforcement Trends – Historical Enforcement

- Historical Enforcement: 18 CFPB enforcement actions against education finance companies. (Only four since former Director Cordray resigned.)
- Allegations related to student loan servicing have included:
 - Overstatement of minimum amounts due on billing statements
 - Failure to provide information required to obtain federal income tax benefits
 - Charging late fees on the last day of the grace period
 - Processing underpayments in a way that maximized late fees for borrowers with multiple loans
 - Incorrectly cancelling in-school deferments for students who were still in school
 - Failing to provide the required FCRA adverse action notices after declining a co-signer release request

Federal Enforcement Trends – Historical Enforcement (cont'd)

- Allegations related to for-profit schools and related education financing:
 - Deceptive advertising related to job placement statistics and career services offerings
 - Illegal debt collection practices to pressure students into repaying loans
 - Abusive loan scheme because students effectively were required to take out loans in order to attend the for-profit school (90/10 rule)



Federal Enforcement Trends – Recent Enforcement

- No CFPB actions between November of 2017 and May of 2019
- Four actions announced since May of 2019
- May 2019: The CFPB announced a settlement with a student loan servicer for engaging in unfair practices by failing to adjust principal balances of FFEL loans in a timely manner.
- June and August 2019: The CFPB announced settlements with a for-profit educational institution and an LLC that was actively involved in the creation and implementation of the institution's allegedly unfair loan program.
- October 2019: The CFPB announced a lawsuit against a group of student loan debt relief companies that charged advance fees in violation of the Telemarketing Sales Rule and violated federal and state UDAP/UDAAP statutes by making deceptive representations about the companies' student loan debt relief and modification services. Minnesota, North Carolina, and California joined the Bureau's lawsuit.



Federal Enforcement Trends – Recent Enforcement

- FTC Settlements
- Allegations against student lender:
 - Allegations of deceptive advertising related to inflated savings claims
 - Disclosures may be insufficient to cure deceptive claims in advertising
 - Sent letters to other student lenders
- Allegations against student loan debt relief companies:
 - Alleged violations of the Telemarketing Sales Rule (payment of advance fees and false claims about the amount of debt that these companies would help relieve).
 - Some of these companies offered students services that were available at no cost from their student loan servicer.

State Enforcement Trends



- New York, Massachusetts, Illinois, Washington, and California have all been active in student loan space.
- Recent lawsuits:
 - The New York and Massachusetts attorneys general have filed suit against one of the largest student loan servicers for allegedly engaging in unfair, deceptive and abusive acts or practices in violation of state and federal law related to the administration of the Public Loan Forgiveness Program.
 - The allegations include: (i) failure to properly count public loan-forgiveness qualifying payments; (ii) failure to provide borrowers with explanations of its determination; (iii) failure to inform borrowers of their options to appeal the servicer's mistakes; and (iv) steering borrowers to less beneficial repayment options (such as forbearance or consolidation) instead of more cost-effective IDR plans.
- Recent settlements with student loan servicers, student loan debt-relief companies, and entities involved in lending to students at for-profit educational institutions.



Federal and State Regulatory and Legislative Developments

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Federal Regulatory Developments



- CFPB folds its Office of Students and Young Consumers into its Office of Financial Education
 - Critics and politicians fear that this will lead to less robust regulation and enforcement of the student loan market
 - SYC primarily had data analysis responsibilities
 - After a lull, CFPB enforcement related to student loan companies has picked back up
- Proposed legislation targets discrete issues in the education finance market
 - Improvements to Public Service Loan Forgiveness Program
 - Making student loans dischargeable in bankruptcy
 - Allowing tax-advantaged employment-sponsored student loan repayment plans
 - Setting clear legal standards for ISAs

State Regulatory Developments



- Student loan “bill of rights” legislation
 - Student loan servicer licensing or notification regimes
 - Creation of a student loan ombudsman to handle borrower complaints, collect data from student loan companies, and publish reports about how well those companies serve borrowers
 - Proposed legislation in some states would give borrowers a private right of action against student loan companies
- Debate over preemption for federal student loan servicers

State Student Loan Servicer Laws – Generally



- Student loan servicer licensing or notification laws
 - 11 states currently have independent student loan servicer licensing or notification regimes
 - Student loan servicers may need to be licensed under state consumer lending laws too
 - Five states have enacted laws in the past year
 - Many of these laws are just now coming into effect or will come into effect in Q1 2020
 - We are aware of pending legislation in seven states
- Bills are often called a “student loan bill of rights” and generally include the creation of a state student loan ombudsman designed to handle borrower complaints and deal directly with student loan servicers
- Legislation being pushed by outside group led by Seth Frotman, former CFPB Student Loan Ombudsman
- Trend is to include unique practice requirements

State Student Loan Servicer Laws – Practice Requirements



Example: New Jersey P.L. 2019, c. 200

- Requirements:
 - Responding to written borrower inquiries within 30 days
 - Inquire how borrowers would like a servicer to apply an overpayment or prepayment
 - Following requirements in connection with loans that are sold, assigned, or transferred to a different servicer
 - Adopting policies and procedures to verify receipt of all relevant account information regarding each student loan borrower, and
 - Not engaging in certain "prohibited acts" (as is standard in many similar licensing laws)
- Many servicers already comply with some of these requirements, although some may be more difficult to implement



Student Loan Alternatives

Student Loan Alternatives – ISAs

- Income Share Agreements (ISAs)

- Providers: typically large financial institutions and educational institutions with large student populations, although growing increasingly diverse
- Structure: ISA provider advances funds for student's education costs in exchange for a set percentage of the student's post-attendance income
 - No principal balance
 - Payments are usually limited by a variety of factors:
 - Minimum income level to trigger repayment
 - Cap on aggregate amount of payments made or number of total monthly payments
 - Defined term (no early repayment in full unless payment cap is triggered)
- Underwriting:
 - Generally based on a student's projected post-graduation income, factoring in school attended, major, and sometimes GPA/student performance
 - Generally, providers do not set eligibility criteria related to a student's performance, major or employment decisions, so students are generally free to change majors or take any job they like, regardless of salary

ISAs – Legal and Regulatory Considerations



- Are ISAs “credit” (i.e., do they trigger the myriad of consumer protection laws that apply to student loans)?
 - TILA/Reg Z: “Credit” is “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment”
 - No ISA-specific case law but case law related to MCAs and factoring agreements is informative
 - MCAs and factoring usually “credit” if (1) there is an absolutely repayable obligation or (2) there are other indicia of credit (i.e., use of credit history in underwriting, origination fees, use of “loan” terminology)
- ISAs generally aren’t absolutely repayable because a student could theoretically never seek employment or never make enough money to trigger repayment
- ISAs generally aren’t underwritten using a student’s credit history, don’t charge origination fees, and don’t call themselves “loans”



ISAs – Legal and Regulatory Considerations (cont'd)

- Most ISA providers choose to comply with various consumer financial laws and regulations to reduce regulatory compliance risk
 - ECOA and Regulation B
 - Primarily concerned with underwriting for estimated post-graduation income that takes into account school, major, and (sometimes) performance because these may lead to disparate impact risk
 - Payment caps and minimum income triggers for repayment partially address this
 - Servicemembers Civil Relief Act (and other servicemember protections)
 - GLBA and Regulation P
 - Disclosure regimes (TIL)
 - Compliance Management Programs
 - Regulatory change management
 - Compliance training
 - Consumer complaint handling policy and procedures, consumer complaint log
 - Quality control auditing
 - Vendor management

Questions?

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