MAYER | BROWN

Spring 2021

Student Loans: What to Expect in 2021 and Beyond

Contents

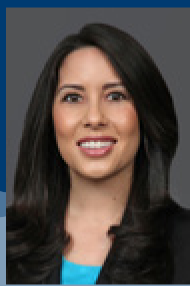
Letter to Readers

We are pleased to provide you with Student Loans: What to Expect in 2021 and Beyond, presenting recent developments in the student loan market and future trends. Student loans are the second-largest category of consumer debt in the US. In this article, we highlight likely student loan priorities under the Biden administration and discuss recent regulatory, legislative and litigation developments affecting the student loan industry. In the coming year, we expect regulators, lawmakers and consumer groups to tackle wide-ranging issues related to student loans, including the effects of the COVID-19 national emergency on student borrowers, student loan forgiveness, and dischargeability in bankruptcy. We also anticipate increased regulation and enforcement activity—particularly by the Consumer Financial Protection Bureau. These developments in the coming year are likely to have broad ramifications for the student loan marketplace in 2021 and beyond.

We hope you will find this newsletter of interest, and we welcome the opportunity to discuss any of the covered developments or topics further.

With regards from the editors,

Tori Shinohara and Jim Williams



2. A Renewed Focus on Student Loans Under the Biden Administration

Key Takeaways

President Biden has proposed: (1) making private student loans dischargeable in bankruptcy, (2) empowering the CFPB to take action against private student loan holders who do not provide students with affordable repayment plans, (3) making community college and other vocational programs free to attend, (4) making it more difficult for for-profit schools to qualify for federal financing, and (5) simplifying federal student loan repayment options. It would be unrealistic to accomplish all of this in 2021, but we do expect the CFPB to scrutinize student lenders and student loan servicers for compliance with federal consumer financial laws. Rohit Chopra—President Biden's nominee to be the next Director of the CFPB—has indicated he will be particularly focused on the student loan industry, including a likely focus on fintech lenders, for-profit schools, as well as student loan servicing issues.

With the rapidly increasing size of the student loan marketplace and the economic recession spurred by the COVID-19 national emergency, student loans appear to be top of mind for the Biden administration. In particular, the Biden administration has proposed significant changes to the federal student loan program, signaled its willingness to support legislation to forgive certain student loans, and nominated a new Director to run the Consumer Financial Protection Bureau (CFPB or Bureau) who has had a longstanding interest in regulating the student loan market. Participants in the student loan industry should pay close attention to the Biden administration's plans.

Biden Presidential Platform

Although the post-secondary education plan put forth by President Biden during the presidential campaign mostly focused on providing additional government financial and operational support to colleges and universities, it also includes some insights into what actions President Biden's administration may take with respect to student loans. With respect to private student loans, there are two notable proposals. First, President Biden has proposed making private student loans dischargeable in bankruptcy. Interestingly, the President's proposal would make only private student loans dischargeable in bankruptcy, but would not appear to affect the dischargeability of federal student loans. This could change the risk calculus for private student lenders and may make such lenders less willing to lend to students who do not have a proven track record of creditworthiness or a creditworthy co-signer. Making loans dischargeable in bankruptcy would also increase the risks associated with private student loans, which might increase the costs of private student loans.

Second, President Biden has stated that he wants to empower the CFPB to take action against private lenders who are "misleading students about their options and do not provide an affordable payment plan when individuals are experiencing acute periods of financial hardship." Rohit Chopra—President Biden's nominee to head the CFPB—has publicly pressured private student lenders to increase the availability of loan modifications for private student borrowers in the past. Moreover, during his confirmation hearing on March 2, Mr. Chopra highlighted student loans as one of his areas of focus if he is confirmed. Unlike the repayment plan framework applicable to federal student loans, holders of private student loans are not required to offer any specific repayment plan options. Although the CFPB does not have the authority to require the reformation of private contracts that were legally made, the Bureau under Mr. Chopra's leadership could "encourage" holders of private student loans to offer expanded repayment options for borrowers who are struggling to make their monthly payments, including income-based repayment plans.

Separately, President Biden has proposed making two years of community college and other training programs that have a track record of participants completing their programs and securing good jobs free for all prospective students. This would reduce the need for students at community colleges and certain vocational schools to take on student debt. President Biden also has proposed making public colleges and universities tuition-free for all families with incomes below $125,000 per year, which could drastically reduce the amount of student loan debt taken on by students who choose to attend such schools. The President also has proposed expanding the Pell grant program, which would provide additional financial support to eligible students and reduce their need for student loans.

With respect to for-profit schools, President Biden has proposed making it more difficult for such schools to become eligible for the federal student loan program. Since most students rely on federal student loans for most of their education financing needs, this may make it difficult for many for-profit schools to stay in business and for students at for-profit schools to access student loans.

With respect to federal student loans, President Biden has proposed simplifying the existing income-based repayment framework. Specifically, he has proposed allowing those who make $25,000 or less per year to not make any payments on their undergraduate federal student loans and to waive the accrual of interest on such loans. Everyone making above $25,000 would be required to pay 5% of their discretionary income (i.e., income less essential spending) over $25,000 toward their loans, with debt forgiveness occurring after 20 years. Unlike the current system, individuals would be automatically enrolled in this program, although they could opt-out if they wished to do so. For those eligible for public service loan forgiveness, President Biden also has proposed changing the public service loan forgiveness program to offer $10,000 of undergraduate or graduate student debt relief for every year of national or community service, up to five years (including prior service). Individuals working in certain jobs would be automatically enrolled in this program. President Biden has also proposed changing the tax code to ensure that debt forgiven through any income-based repayment program would not be taxed. These changes could drastically affect federal student loan borrowers' calculus as to whether refinancing loans with a private lender is worthwhile.

Debt Forgiveness

During the presidential campaign, President Biden indicated that he would support legislation forgiving up to $10,000 of federal student loan debt per borrower. However, he also stated that he would not unilaterally forgive any student debt through executive order or otherwise. Some Congressional Democrats have suggested that this does not go far enough, and have pushed for the forgiveness of up to $50,000 of student debt through legislation or executive order while simultaneously passing legislation that would remove any tax consequences for households whose student debt is forgiven through 2025. The Biden administration has argued that forgiving $50,000 of student debt would disproportionately benefit high-income earners from elite colleges and universities, and has instead pushed to forgive an amount of debt that would primarily help lower income earners and minority borrowers. Notably, current student loan forgiveness proposals would not extend to private student loans. It remains to be seen whether federal student loan forgiveness will receive enough traction to become reality under President Biden.

CFPB Focus

President Biden has nominated Rohit Chopra to be the next Director of the CFPB. Prior to his tenure as a Commissioner at the Federal Trade Commission (FTC), he served as the CFPB's first Student Loan Ombudsman. As his official FTC biography describes his role, "he led efforts to spur competition in the student loan financing market, develop new tools for students and student loan borrowers to make smarter decisions, and secure hundreds of millions of dollars in refunds for borrowers victimized by unlawful conduct by loan servicers, debt collectors, and for-profit college chains." Between his stints at the CFPB and the FTC, Mr. Chopra also served as a Special Adviser to the Secretary of Education, where he focused on improving student loan servicing, reducing unnecessary defaults, and increasing enforcement.

In light of Mr. Chopra's background and interest in the student loan marketplace, student loans likely will be an area of priority for the CFPB, and Mr. Chopra expressly stated as much during his March 2 confirmation hearing. Given Mr. Chopra's past statements, the CFPB is likely to be focused on private student lending involving fintech lenders and for-profit schools and student loan servicing issues including flexible repayment plan options, payment processing errors, debt collection and servicing transfer issues. Mr. Chopra also previously focused on student loan servicers' administration of the Servicemembers Civil Relief Act, which limits the interest rate that servicers may charge active-duty members of the military. Student loan debt relief companies will also continue to be in the CFPB's crosshairs, given the FTC's numerous enforcement actions against student loan debt relief companies during Mr. Chopra's tenure and the Bureau's aggressive pursuit of these types of companies for alleged UDAAP and other violations of federal consumer financial laws. Mr. Chopra's priorities will likely include increased scrutiny during examinations of companies under the CFPB's supervisory jurisdiction (i.e., private student lenders and student loan servicers servicing more than 1 million accounts) and increased enforcement against those in the student loan marketplace.

Also, given the new administration's focus on racial equity issues, we expect that Mr. Chopra, if confirmed, will restore the CFPB's Office of Fair Lending and Equal Opportunity to its prior role as a critical voice in the agency's fair lending supervision and enforcement efforts, reversing the changes made under the Trump administration. That is likely to mean greater focus on fair lending issues on both the supervision and enforcement sides. It also is likely to mean a revival of the disparate impact theory of liability, which fell out of favor under the Trump administration. This could have ramifications for the student loan industry, including student lenders that use educational data or other forms of alternative data in student loan underwriting and pricing (discussed below).

Conclusion

One thing is for certain: the Biden administration and its nominee to lead the CFPB are laser-focused on the second largest category of consumer debt in the US—student loans. Industry participants should prepare themselves for anticipated heightened regulation and enforcement in the student loan marketplace.

3. Recent Legislative, Regulatory and Supervisory Developments

Relief for Student Loan Borrowers Impacted by COVID-19

Key Takeaways

In 2020, the federal government suspended payments on federal student loans, the accrual of interest on those loans, and involuntary loan collection efforts. A number of states soon followed by partnering with servicers and owners of private student loans to offer private student loan borrowers suffering economic hardship due to the COVID-19 pandemic extended forbearance options, waived late payment fees, suspension of negative credit reporting, and suspension of debt collection lawsuits, among other things. Relief for federal student loan borrowers is slated to end on September 30, 2021, but it is likely that some form of additional relief will be extended beyond this date.

At the outset of the COVID-19 national emergency, the federal government and certain state governments took steps to provide emergency assistance to student loan borrowers affected by the COVID-19 national emergency. At the federal level, the CARES Act was enacted on March 27, 2020. As we previously reported, the CARES Act provided three primary means of relief to all federal student loan borrowers whose loans are held by the Department of Education, without the need for borrowers to demonstrate a financial hardship due to COVID-19:

- Payments on federal student loans held by the Department of Education were initially suspended through September 30, 2020. This has since been extended until September 30, 2021.
  - Suspended federal student loan payments will be treated as if they were regularly scheduled payments made by a borrower for purposes of reporting to consumer reporting agencies. This is consistent with the CARES Act's credit reporting protection provisions with respect to the period of time that consumers receive forbearance.
  - Suspended federal student loan payments will be deemed to be qualifying payments for the purpose of any authorized loan forgiveness or rehabilitation program.
- Interest will not accrue on federal student loans held by the Department of Education during the payment suspension period.

- All involuntary loan collections were initially suspended through September 30, 2020. These efforts have since been suspended through September 30, 2021. This includes wage garnishment, tax refund reductions, administrative offsets of federal benefits, and other involuntary collection activity. Additionally, the Department of Education has ordered collection agencies to cease all collections activities against federal student loan borrowers, including making collection calls and sending collection letters.

A number of state governments sought to extend similar relief to borrowers with private student loans. Because unlike the federal student loan program, holders of private student loans are not required to offer borrowers any particular repayment plan options, the states solicited the cooperation of holders and servicers of private student loans on a voluntary basis. As we previously reported, holders and servicers participating in this initiative agreed to provide eligible borrowers with the following relief, where applicable:

- A minimum of 90 days of forbearance.
- Waived late payment fees.
- Suspension of negative credit reporting.
- Suspension of debt collection lawsuits for 90 days.
- Working with borrowers to enroll them in other borrower assistance programs, such as income-based repayment.

The COVID-19 national emergency remains ongoing, and it will likely take years for certain consumers to fully recover economically from the effects of the pandemic. As a result, some in Congress have proposed various forms of loan forgiveness as a means of helping student loan borrowers recover from the COVID-19 pandemic more quickly.

Regardless of whether student loan forgiveness becomes a reality, it is likely that some form of federal student loan relief will extend beyond September 30, 2021, although it is unclear what form such relief will take. There may also be operational complexities for student loan servicers in restarting borrowers' payment obligations at the appropriate time. Moreover, given the COVID-19 pandemic's outsized impact on certain industries (such as hospitality and tourism), a significant segment of the population with student loans may still be unable to repay them if repayment obligations resume in October 2021.

Student Loan Dischargeability in Bankruptcy

Key Takeaways

Currently, student loans are only dischargeable in bankruptcy when they would impose an "undue hardship" on the debtor and the debtor's dependents. The proposed Consumer Bankruptcy Reform Act would allow students to discharge their student loans in bankruptcy. Although the law has the support of some Democrats, it appears unlikely to pass in 2021 (assuming that Senate rules are not changed to eliminate the filibuster).

With the change in presidential administration at the start of 2021, the treatment of student loans in US consumer bankruptcy proceedings has come under renewed scrutiny. Under Section 523(a)(8) of the US Bankruptcy Code, broad categories of student loans are excepted from discharge in an individual bankruptcy proceeding (and thus remain payable even after the debtor's filing) unless the debtor can show that the repayment of such student loans would impose an "undue hardship" on the debtor and the debtor's dependents. Since the passage of the 2005 amendments to the Bankruptcy Code, the categories of student loans that are generally not dischargeable include not only higher education loans issued or guaranteed by governmental and non-profit entities, but also private student loans that qualify under the US Tax Code as indebtedness incurred "solely to pay qualified higher education expenses."

While courts have adopted different interpretations of what constitutes an "undue hardship" for a debtor—leading to a split among circuits and a pending petition for certiorari to the US Supreme Court[1] —the ultimate effect of these provisions has been that the discharge of student loans in bankruptcy is a rare occurrence. As a result, a number of critics have argued that Section 523(a)(8) is inconsistent with the Bankruptcy Code's goals of providing the honest but unfortunate debtor with a "fresh start" and therefore should be limited or eliminated entirely. Champions of such consumer bankruptcy reform include Senator Warren and Representative Jerrold Nadler who, this past December, proposed the Consumer Bankruptcy Reform Act of 2020. If passed, the legislation would have resulted in extensive changes to the Bankruptcy Code for consumers, including, among other things, the complete elimination the 523(a)(8) discharge exception for student loans.

While the proposed bill did not receive a vote and consequently did not become law, the prospects for passage of similar bankruptcy legislation now appear far more likely with Democrats assuming control of both legislative houses and a President who is more likely to support such legislation. In January 2021, Senator Warren and Representative Nadler re-introduced their bill, which would replace Chapter 7 and Chapter 13—the two primary chapters of the Bankruptcy Code for individuals—with a new Chapter 10 that is viewed as more favorable to consumers than to their creditors. The legislation continues to provide for wholesale elimination of the student loan discharge exception.

On a parallel front, Senator Warren and four of her Senate colleagues also have proposed the Medical Bankruptcy Fairness Act of 2021, which proponents advocate would create a more accommodating bankruptcy process for Americans forced into bankruptcy because of medical debt or because they lost their job during the COVID-19 pandemic. Specifically, the bill would provide that with respect to a certain subset of debtors (so-called "medically distressed debtors" who have substantial debt as a result of medical bills), the 523(a)(8) discharge exception for student loans would not apply regardless of whether student loans give rise to an "undue burden."

It remains to be seen whether either bankruptcy reform bill will be passed in their current form or whether there will be any other attempts to modify the Section 523(a)(8) discharge exception. It is not clear whether either bill has sufficient support to pass the Senate, especially given Democrats' narrow control of the chamber and the threat of a Republican filibuster. In addition, given the widespread changes that the Consumer Bankruptcy Reform Act proposes to make to the bankruptcy system as a whole, it is also possible that passage could prove challenging even with the Democratic majority in both houses. For now, however, market participants and commentators should keep a close eye on this legislation, as it could have an outsize impact on the student loan market as compared with other types of consumer loans.

Endnotes

1 *See, e.g., In re Long*, 322 F.3d 549 (8th Cir. 2003) (applying a totality-of-the-circumstances test); *Matter of McCoy,* 810 F. App'x 315 (5th Cir. 2020) (applying three part test under which a debtor must show "(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"). A petition for certiorari to the United States Supreme Court is currently pending in the *McCoy* case.

CFPB Supervisory Highlights

Key Takeaways

The CFPB published special Supervisory Highlights in January 2021 that detailed challenges faced by student loan borrowers and servicers due to the COVID-19 pandemic. The CFPB has indicated that it will continue to focus on issues related to COVID-19 throughout 2021.

In January 2021, the CFPB published special Supervisory Highlights detailing the results of Prioritized Assessments it conducted in response to the COVID-19 pandemic. Undertaken to assess risks posed to consumers by the pandemic, these Prioritized Assessments were high-level inquiries into supervised entities' real-time operations. Looking primarily at information between May and September 2020, a key area of focus for the Bureau's review was the student loan servicing industry.

In response to the COVID-19 pandemic, the federal government automatically suspended loan payments and interest on federal student loan debt. With federal student loan servicers placing accounts into administrative forbearance, the number of delinquent federal loan accounts dropped from nearly 2 million to less than 150. While the CARES Act provided relief for federal student loan borrowers, private student loans were not explicitly addressed by the CARES Act. In the absence of applicable legislation, private student loan servicers developed a variety of payment relief options to assist borrowers affected by the COVID-19 pandemic. Some private student loan servicers allowed borrowers to place their loans into pre-existing forbearance programs for natural disasters or economic hardship, while others created new short-term payment relief options for consumers affected by COVID-19. According to the CFPB, most servicers did not require enrollment documentation for these new COVID-19 programs, and the number of delinquent private student loan accounts dropped from 270,000 to 146,000 between March 2020 and May 2020.

The Bureau recognized challenges faced by student loan servicers, including operational limitations caused by stay-at-home orders and significantly higher call volumes. The Bureau also highlighted several areas of risk in student loan servicing amid efforts to assist borrowers suffering hardship as a result of the COVID-19 pandemic. First, the changing landscape of student loan payment relief caused some servicers to misrepresent the terms, effects, or applicability of forbearance programs available to borrowers. In addition, the CFPB found multiple instances of servicers allegedly routinely failing to disclose all available repayment options to borrowers. The Bureau also noted several issues related to servicers' forbearance extension processes—with one servicer allegedly ignoring extension requests and others allegedly sending extension approval verifications to borrowers that caused delays or denials if borrowers did not respond promptly. Moreover, the Bureau identified instances in which servicers allegedly failed to prevent preauthorized payments on private student loan accounts in forbearance and mistakenly allowed certain ineligible delinquent FFELP borrowers to enroll in natural disaster forbearance online. Finally, when borrowers made voluntary payments on federal student loans in COVID-19 forbearance, the CFPB found that some servicers allegedly did not direct these payments to loans with the highest underlying interest rates, as instructed by the borrower or required by the servicers' internal payment allocation methodology.

In light of these findings, the CFPB likely will continue to be interested in how student loan servicers are assisting borrowers during the ongoing COVID-19 pandemic. Given the compliance issues highlighted in the report, this could potentially lead to enforcement against student loan servicers whom the Bureau suspects have violated federal consumer financial protection laws in connection with their student loan servicing practices during the COVID-19 national emergency.

CFPB Advisory Opinion Regarding Student Loan Refinancing Products

Key Takeaways

In 2020, the CFPB leveraged its new Advisory Opinions Policy to clarify that student loan refinancing products are "private education loans" under the Truth in Lending Act and Regulation Z that require the three sets of disclosures (Application, Approval and Final TILs) outlined in the regulation.

On November 30, 2020, the CFPB finalized its Advisory Opinions Policy (Policy), which allows industry participants to request an opinion from the Bureau clarifying ambiguities in the statutes or regulations over which it has jurisdiction. The first Advisory Opinion issued by the Bureau under the Policy relates to whether student loan consolidation and refinancing products that replace a consumer's existing federal student loans are considered "private education loans" subject to the applicable disclosures and protections of the Truth in Lending Act (TILA) and its implementing regulation, Regulation Z. The CFPB answered this question in the affirmative.

The Bureau analyzed the changes made to TILA by the Higher Education Opportunity Act of 2008. The Bureau started by noting that a "private education loan" under TILA is a loan that is (1) not made, insured, or guaranteed under title IV of the Higher Education Act of 1965 and (2) issued expressly for postsecondary educational expenses to a borrower, regardless of whether the loan is provided through the educational institution that the subject student attends or directly to the borrower from the private educational lender. The CFPB also noted that commentary to amendments made to TILA's final implementing regulation in 2009 interpreted the term "private education loan" to include "loans extended to consolidate a consumer's pre-existing private education loans."

The Bureau noted that most relevant loans meet the first prong of the "private education loan" definition. However, it is unclear whether student loan refinance and consolidation products are issued "expressly for postsecondary educational expenses." The CFPB noted that TILA is ambiguous as to whether the educational purpose of a particular loan can be transferred to a refinance or consolidation of that loan. According to the Bureau, however, "the best reading of TILA and Regulation Z is that a loan that consolidates Federal loans or a loan that refinances a Federal loan incurred expressly for postsecondary educational expenses is, itself, 'expressly for educational expenses.'"

The CFPB also noted that both borrowers and lenders understand that the student loans that are being refinanced or consolidated were taken on expressly for educational expenses and that TILA refers to "borrowers" rather than "students"—indicating that the statute is best implemented by construing the term "private education loan" to include loans originated to consumers other than those currently in school, such as former students. The Bureau indicated that this interpretation best implements TILA's purpose of assuring a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. Moreover, according to the CFPB, this interpretation is consistent with Regulation Z commentary stating that loans used to consolidate pre-existing private student loans are themselves private education loans originated expressly for postsecondary educational purposes.

The Policy is relatively new, and there are a number of open consumer financial regulatory issues that may impact those in the student loan industry. It will be interesting to see whether other participants in the student loan industry make use of the Policy to help provide clarity on other issues.

Student Loan Servicer Licensing – State Law Developments

Key Takeaways

Virginia and Massachusetts enacted new student loan servicer licensing laws in the past year. Virginia's law could apply to the broadest set of entities of any student loan servicer licensing law enacted to-date. New Jersey's legislature is also considering a law that could reshape the marketing and product structure of private student loans.

Before the COVID-19 pandemic, state legislatures had become increasingly active in enacting legislation regulating student loan servicing activities and requiring student loan servicers to obtain licenses. While the COVID-19 pandemic has largely slowed the pace of new state legislation, Massachusetts and Virginia found time to pass legislation and join a growing number of states that now regulate student loan servicers doing business in their states. Not to be outdone, New Jersey legislators, who previously passed legislation regulating student loan servicers, have proposed legislation that would require student lenders to obtain special licenses and comply with onerous new practice restrictions in the state. We summarize these recent legislative developments below:

- Massachusetts: In January 2021, Massachusetts passed a law requiring student loan servicers to obtain licenses as of July 1, 2021. As with other recently passed student loan servicer licensing laws, a broad range of activities may trigger a licensing obligation under this law, including interacting with student loan borrowers in a manner designed to prevent default. This law is meant to replace the Massachusetts third-party loan servicer registration requirement with respect to student loan servicers.

Virginia: In April 2020, Virginia passed the broadest student loan servicer licensing law to date. The law requires "those act[ing directly or indirectly] as a qualified education loan servicer" to obtain a license. Qualified education loans are loans primarily used to finance a postsecondary education and the associated cost of attendance, including tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses. The term "qualified educational loan servicer" includes those that interact with applicable borrowers, including (but not limited to) activities designed to prevent default. In many ways, this definition mirrors those in other states that extend their student loan servicer licensing laws to persons that provide "other administrative services" with regard to student loans. However, the use of the term "interact" could be interpreted to apply to a much wider class of entities, as some student lenders contact borrowers after origination to check in with them or to provide career-related services, for example, even though those student lenders do not otherwise service borrower accounts.

Virginia's new law also imposes practice requirements on student loan servicers, including requirements to (1) evaluate borrowers for income-based repayment program eligibility before placing them in forbearance or default, (2) respond to inquiries and complaints within a specific time period, and (3) apply partial loan payments in a particular way. The law also provides a private right of action to borrowers who have suffered damages due to student loan servicers' failure to comply with applicable law, which is atypical for licensing laws. The law goes into effect on July 1, 2021.

Given the volume of states that have considered student loan licensing legislation and states' tendency to base proposed legislation off of recently passed bills in other states, it is likely that more states will take up and pass student loan servicer licensing laws in the coming year. Many of these laws may contain unique practice requirements (continuing a trend that has arisen over the past few years), which makes it imperative that student loan servicers keep abreast of newly enacted legislation and the specific requirements that these laws impose on their business.

Private student lenders may be required to obtain licenses in a number of states under state consumer loan licensing laws, depending on the principal amounts and interest rates of the loans offered, among other factors. New Jersey is one of those states. However, in January 2021, the New Jersey Senate passed a bill that would require private education lenders to register with the state. If passed, this bill also would impose a number of new practice requirements on private student lenders, including requiring private education lenders to do the following:

- Provide a variety of disclosures to cosigners, including annual notices about cosigner release provisions and eligibility.
- Provide for cosigner release after a borrower makes 12 consecutive on-time payments.
- State flexible repayment options they offer on their website.
- For refinance loans, provide a disclosure regarding the benefits that may be lost as a result of the refinancing (most lenders already provide such a disclosure).
- If a private education lender does not offer the same interest rate to all borrowers, publish the criteria used to determine the rate for which a borrower is eligible in all places where the interest rate is published.
- Private education lenders would be prohibited from placing any loan in default or accelerating a loan while a borrower is seeking a loan modification or enrollment in a flexible repayment plan (i.e., analogous to prohibitions on dual-tracking in the mortgage industry).

The proposed bill would also give private student loan borrowers a private right of action with respect to many of these provisions. These practice requirements, coupled with a private right of action, would go beyond any state regulatory regime currently in place with respect to private student lenders. If New Jersey passes this bill into law, other legislatures could follow suit, including in California, Connecticut, the District of Columbia, Illinois, Massachusetts, and New York, which have all been particularly active in regulating private student loan servicers.

Focus on Alternative Underwriting Criteria

Key Takeaways

Regulators, consumer groups and a number of Democratic Senators—including now Vice-President Kamala Harris—have expressed concerns about the use of educational data in student loan underwriting.

Regulators, lawmakers and consumer groups have expressed concerns about the use of alternative underwriting criteria in connection with private student loans and other consumer credit. In early 2020, a group of Democratic Senators (including now-Vice President Harris) sent letters to five lenders and two data service providers regarding their use of educational data—i.e., a range of variables tied to a consumer's postsecondary education, such as school attended and college major—in credit underwriting decisions. The Senators raised concerns about whether the use of such data could have a disparate impact on borrowers of color. Disparate impact risk can arise when a facially neutral policy causes a disproportionately adverse impact on a prohibited basis under the Equal Credit Opportunity Act (such as race or national origin) and such policy is not supported by a legally sufficient business justification.

The Senators' letter was in response to a report issued by the Student Borrower Protection Center (SBPC), a special interest group founded by another former CFPB Student Loan Ombudsman, Seth Frotman. That report alleged that the use of education data in private student loan underwriting and pricing could have a disparate impact on minority borrowers. In the past, regulators have raised fair lending concerns when certain aggregated or non-individualized factors are used to assess the creditworthiness of an individual applicant. For example, regulators including the CFPB and the FDIC have criticized the use of cohort default rate (a measure of the rate at which students at a given institution default on their student loans) in certain circumstances. In light of the SBPC's report and citing to past criticism from regulators, the Senators asked the lenders and data service providers for information about their use of educational data and the potential disparate impact such use could have on minority borrowers.

Within a few weeks of receiving the letter, each company provided responses to the Senators' questions. Five months later and with election season fast approaching, Senators Sherrod Brown, Elizabeth Warren, and Kamala Harris wrote to the CFPB with their findings, recommendations, and the companies' responses. The Senators expressed particular concerns about lenders' use of the school an applicant attended and the use of an applicant's anticipated income for their major or program in determining creditworthiness. The findings and recommendations attached to the Senators' letter also ask the CFPB to take various immediate actions, including the following:

- Send a supervisory information request to all supervised entities to discuss the prevalence of the above underwriting practices.
- Conduct fair lending investigations of all supervised entities, including private student lenders, that rely upon educational criteria in underwriting or credit decision-making.
- Issue guidelines on recommended fair lending compliance management systems for all lenders.
- Encourage creditors, including private student lenders, to conduct voluntary self-tests to determine the extent or effectiveness of their compliance with ECOA and Regulation B.

Although the CFPB does not appear to have made any public statements regarding the use of educational data in credit underwriting in response to the Senators' letter, this type of public scrutiny may discourage lenders from using alternative data in credit underwriting, despite that fact that alternative data can expand access to credit for traditionally underserved consumers. Given the stated priorities of the Biden administration and the CFPB's acting Director Uejio to advance racial equity, balancing these competing priorities may be challenging.

4. Recent Enforcement and Litigation Developments

Recent Enforcement and Litigation Developments

Key Takeaways

Most regulatory enforcement in 2020 (and early 2021) focused on student loan debt settlement companies' deceptive marketing and violation of the Telemarketing Sales Rule. While we expect the CFPB and FTC to continue bringing enforcement actions against student loan debt settlement companies, these agencies also likely will be looking to step up enforcement against student loan companies that are more likely to result in larger penalties.

The CFPB and FTC brought a number of enforcement actions against debt settlement companies in 2020 and early 2021, including against student loan debt settlement companies. Most of the actions allege that student loan debt settlement companies either violated the Telemarketing Sales Rule (TSR) or engaged in deceptive acts or practices. For instance, regulators alleged that a debt settlement company misled consumers into believing that their monthly payments would be reduced or loan balances forgiven, which resulted in a monetary judgment totaling over $43 million. Other actions involved specific deceptiveness claims related to the unique features of student loans, such as the various repayment options and relief programs associated with federal student loans. For instance, the FTC and CFPB brought deception claims against companies that misrepresented that they were affiliated with the Department of Education, that they would properly instruct consumers on how to file loan modification requests with the Department of Education or would accurately file such requests on a consumer's behalf, and that they would renegotiate, settle, or alter payment terms on a consumer's student loan debt, remove tax liens and wage garnishments, or fully refund fees if they failed.

Other debt settlement enforcement actions have included somewhat novel claims. For example, the CFPB filed a complaint against a debt settlement company that allegedly represented to consumers that it could help consumers obtain a loan, including through the use of terminology such as "underwriting" or "qualifying," when in fact the company did not underwrite or make loans. The CFPB separately filed a complaint against a debt settlement company and two owners alleging that their advertisements deceptively claimed that student loan debt relief services would result in eliminated or reduced student loan payments, improved credit scores, and the removal of negative credit-status codes or ratings from credit reports when that was not always the case. With regard to these allegations, the CFPB also noted that the debt settlement company did not track whether it achieved results advertised and thus could not substantiate its claims, signaling that the Bureau may expect debt settlement companies to affirmatively track results to ensure that their advertising claims remain accurate.

The CFPB and FTC have conducted enforcement sweeps focused on debt settlement companies in recent years, including those in the student loan industry. Although many of the allegations made in enforcement actions against these companies demonstrate bad conduct, these enforcement actions have generally led to minimal consumer relief, as the companies have often been unable to pay. Although the CFPB and FTC will likely continue bringing actions against student loan debt settlement companies when they identify bad actors, they also will likely bring enforcement actions against other participants in the student loan industry that are more likely to result in larger paydays for the FTC and the CFPB.

Student Loan Servicing

Key Takeaways

In a recent filing, the CFPB disclosed that it is investigating whether guaranty agencies, student loan servicers and debt collectors have caused student borrowers to incur collection costs in a manner that violates the FDCPA and the prohibition against unfair, deceptive or abusive acts or practices. If Rohit Chopra is confirmed as the Bureau's next director, we anticipate student loan servicers will face increased scrutiny given his focus on student loan servicing in his prior role at the CFPB.

The CFPB recently filed a petition to enforce two Civil Investigative Demands (CIDs) it issued to a student loan guaranty agency in September 2020. In its petition, the CFPB alleged that the company failed to produce all emails that were responsive to these CIDs. According to the petition, the CIDs relate to an investigation by the Bureau into whether guaranty agencies, student loan servicers and debt collectors have engaged in illegal practices by causing student borrowers to incur collection costs in a manner that violates the prohibition against unfair, deceptive or abusive acts or practices (UDAAPs) or the Fair Debt Collection Practices Act (FDCPA). Borrowers who default on student loans may be subject to collection costs that can be significant—in certain circumstances, these costs can exceed 20% of the loan balance. However, borrowers can avoid collection costs if they enter into a loan rehabilitation or other repayment agreement within 65 days of default. The Bureau is investigating whether the target companies have employed practices to delay borrowers' repayment agreements until after the 65-day period has elapsed so that the companies could add collection costs to the borrowers' accounts. In the CIDs, the CFPB requested both internal and external communications from the company going back to January 1, 2015. Through documents produced to the CFPB by other entities doing business with the company, the Bureau identified at least 70 allegedly responsive emails that the company did not produce to the CFPB. It remains to be seen how the court will rule on the CFPB's petition, but the publicly-filed petition provides relevant insight into some of the CFPB's previously non-public enforcement activities.

For-Profit Schools

Key Takeaways

Businesses associated with for-profit schools were subject to enforcement and litigation in 2020, and are likely to remain subject to significant scrutiny in the year to come.

Continuing the trend of enforcement against for-profit schools and related entities, the CFPB also reached a settlement with a student loan trust and its trustees based on their alleged substantial assistance to ITT Technical Institute's (ITT) alleged unfair practices in collecting on certain private student loans. The CFPB had separately sued ITT over the origination and collection of those loans, which the CFPB alleged students were coerced into taking and that ITT knew were likely to default. The CFPB alleged that the trust and its trustees similarly knew, or were reckless in not knowing, that ITT students had been pushed into the loans and were often unaware of their terms and that students were defaulting on the loans at significantly high rates. The settlement requires the trust to forgive approximately $330 million in debt for about 35,000 borrowers. Forty-seven states and the District of Columbia also settled with the trust. The CFPB had previously settled with another company set up to hold and manage ITT private student loans as well as with ITT itself.

Recent State Activity

Key Takeaways

While the CFPB was relatively quiet on the student loan front in 2020, a number of states took action against those in the student loan industry, including against debt collectors, for-profit schools, and student loan debt relief companies.

While the CFPB was relatively quiet on the student loan front in 2020, a number of states have taken action against participants in the student loan industry. Similar to past actions by federal regulators, many of the state actions focused on debt collection, student loan debt relief and for-profit schools. We discuss certain representative examples of recent state actions below.

- Debt Collection – In September 2020, the Office of the Attorney General of New York (NY AG) entered into a settlement with a debt collector—the principal debt collector for the National Collegiate Student Loan Trusts—resolving the NY AG's allegations that the debt collector violated multiple federal and state consumer protection laws by making false, misleading, and deceptive statements in communications and collection lawsuits, and for filing these lawsuits beyond the applicable statute of limitations. Under the settlement agreement, the debt collector agreed to make substantial changes to its debt collection practices and to pay $600,000.
- For-Profit Schools – In August 2020, a Colorado district court judge found that CollegeAmerica and its related entities' engaged in deceptive trade practices in violation of the state's consumer protection laws and unconscionable conduct in violation of the state's consumer lending laws. The court found that the

defendants knowing lured students into high-priced, low-quality programs with promises of high-earning job placements that it knew were not attainable. The court imposed $3 million in civil penalties for violations of the Colorado Consumer Protection Act. This decision is the culmination of a lawsuit originally filed by the Colorado attorney general in 2014.

In November 2020, the Office of the Attorney General of Maryland (MD AG) reached a settlement with a third-party debt buyer who purchased the student loan debts of Brightwood College, a now-defunct for-profit school. The school allegedly misled students about its accreditation status and career development services. As part of the settlement, the third-party debt buyer agreed to approximately $2.6 million in debt relief for Maryland residents.

- Student Loan Debt Relief – The Office of the Attorney General of Pennsylvania has brought actions against student loan debt relief companies, including an August 2020 settlement to resolve allegations that the company's misrepresentations and failure to provide required disclosures related to the transactions violated the state's consumer protection laws and TILA. The company was required to cancel almost $200,000 in debt for Pennsylvania consumers.

Update on National Collegiate Student Loan Trusts Litigation

Key Takeaways

In March 2021, a federal district court dismissed the CFPB's complaint against the NCSLTs because (1) the Bureau lacked the authority to bring suit when it did, (2) its attempt to ratify its prior action came too late, and (3) equitable tolling principles did not apply. The court also expressed doubt as to whether securitization trusts are "covered persons" subject to the CFPB's authority. Otherwise, the other NCSLT litigations remain ongoing, and are unlikely to be completely resolved in 2021. The resolution of these remaining cases could have broad ramifications for the secondary market.

There were a number of major developments in 2020 in certain of the cases involving the National Collegiate Student Loan Trusts, an ongoing series of litigations described by one industry writer as a "multicourt, multistate legal war." A quick recap of the NCSLT matter:

The National Collegiate Student Loan Trusts (the Trusts) are 15 special purpose Delaware statutory trusts that were organized by First Marblehead Corporation. From 2001 to 2007, these trusts acquired and provided financing for over 800,000 private student loans with a principal amount of more than $15 billion through the issuance of approximately $12 billion in investor notes. Until 2009, the Trusts were owned jointly by an affiliate of First Marblehead Corporation and The Educational Research Institute (TERI). In 2008, TERI went bankrupt and subsequently Vantage Capital Group (VCG), a Florida-based private investor, through its affiliates acquired the residual interests in the Trusts.

Starting in 2014, VCG began to take a number of actions in its capacity as residual holder of the Trusts. In December 2014, it directed the Owner Trustee for the Trusts, to enter into a Servicing Agreement with Odyssey Education Resources, LLC, a VCG affiliate, to service non-performing loans for certain of the Trusts, notwithstanding that those Trusts had existing agreements with special servicers to collect those loans. This agreement, among other things, allowed Odyssey to purchase such loans from the Trusts at a discount from market price. During the course of 2015 and early 2016, Odyssey incurred more than $1.24 million dollars in legal fees and costs conducting diligence on the Trusts' portfolio. It then submitted those invoices as the Indenture Trustee, for payment from Trust assets. The Indenture Trustee promptly commenced a Trust Instruction Proceeding (TIP) in Minnesota seeking judicial direction (later removed to federal district court for the District of Delaware). Other counsel were appointed by VCG, resulting in millions of dollars of additional legal fees that were also submitted to the Trusts for payment. The result of all of this was multiple litigations in multiple jurisdictions, including an action commenced in 2017 by the CFPB in Delaware federal district court seeking, among other things, to hold the Trusts themselves liable under the Consumer Financial Protection Act of 2010 (CFPA) for servicing violations, to place servicing control of the entire 800,000 loan portfolio into the hands of VCG, to require proceeds of collections to be turned over to an account in VCG's control, and to authorize VCG to audit all 800,000 loans.

In 2020 and early 2021, there were four milestone decisions involving these cases: two by the federal district court in Delaware in the CFPB proceeding, one by the Third Circuit Court of Appeals involving the former TIP action and one by the Delaware State Chancery Court in a consolidated action involving various state law claims both by investors against VCG, as well as VCG claims against investors.

In May 2020, Judge Noreika of the federal district court for the district of Delaware denied the CFPB's request to enter a proposed consent judgment against the 15 Trusts. The consent judgment would have required the Trusts to pay almost $20 million in restitution, disgorgement and civil money penalties. The consent judgment had been signed by the law firm of McCarter & English purporting to represent the Trusts, but the court found that under Delaware statutory law, only the Owner Trustee had authority to bind the Trusts to such a judgment. Accordingly, the court rejected the proposed "consent" judgment as not having been properly consented to by the defendant Trusts. Subsequently, the Trusts filed motions to dismiss that raised a variety of issues. These issues included whether the Trusts are "covered persons" under the CFPA (and thus subject to the CFPB's enforcement authority for the unfair and deceptive practices alleged in the complaint) and whether the lawsuit should be dismissed as a result of the Supreme Court's ruling in *Seila Law v. CFPB* that the CFPB was unconstitutionally structured at the time the lawsuit was originally filed. Oral argument on the motions occurred in late January.

On March 26, 2021, the federal district court for the district court of Delaware dismissed the CFPB's action, finding that the Bureau lacked the authority to bring suit when it did, that its attempt to ratify its prior action came too late, and that based on its conduct, the CFPB could not benefit from equitable tolling principles. In doing so, the court avoided ruling on the question of whether the Trusts are "covered persons" under the CFPB – a more substantial question with greater long-term implications for the CFPB and the securitization industry. However, in dicta, the court noted that it "harbors some doubt that the Trusts are 'covered persons' under the plain language of the statute," which suggests that the CFPB may have a difficult time asserting similar authority against securitization trusts in the future. In sum, this holding was a major victory for the Trusts and a marginal victory for the securitization industry as a whole. For a more detailed discussion of this decision, please refer to our previous coverage here.

On August 19, 2020, the Third Circuit Court of Appeals issued a ruling in the former TIP action commenced by US Bank, as Indenture Trustee, reversing a finding by the lower Delaware district court on the validity of the Odyssey Servicing Agreement. In its decision, the circuit court held that the Odyssey Agreement violated both the covenant not to modify the Trusts' "Basic Documents" without consent of the Indenture Trustee and Noteholders (the "Consent Clause") and the clause granting rights in the Trusts' assets to the Indenture Trustee (the "Granting Clause"), which clause contained language providing both a security interest grant as well as a conveyance. The case has been remanded to the lower court to address whether the Odyssey invoices are payable even though the agreement itself is void.

On August 27, 2020, the Delaware Chancery Court issued a ruling in a proceeding involving four state court consolidated actions. In a 191-page opinion by Vice Chancellor Joseph Slights, the court held that VCG as a statutory trust residual interest owner had a fiduciary obligation to the other Trust participants to act in the best interests of the Trusts and not in their own self-interest. In addition, similar to the decision of the Third Circuit, the Delaware state court viewed the Granting Clause as being both a lien grant and an absolute assignment of collateral, and held that therefore, the residual owners had no current beneficial interest in or control over the Trust assets. The court reserved numerous factual issues for further determination and cited its decision as a "valuable first step toward bringing clarity . . . regarding the trusts' governance and operations."Given their importance to securitization investors, the progress of the remaining cases will be closely watched in 2021.

Navient Litigation

Key Takeaways

The CFPB's lawsuit against Navient is currently awaiting a Third Circuit decision as to whether the statute of limitations was tolled while the *Seila* case regarding the constitutionality of the Bureau's structure was being decided. The issues being litigated have important implications for the student loan servicing industry and may finally be resolved in 2021.

In January 2017, the CFPB filed suit against the Navient Corporation for multiple alleged violations of federal consumer financial law. Seeking monetary damages and injunctive relief, the CFPB alleges Navient engaged in a pattern of unlawful and deceptive conduct. Specifically, the CFPB claims Navient failed to provide borrowers with accurate information on repayment plans and forbearance and steered borrowers into forbearance as opposed to income-driven repayment programs, misallocated loan payments, and misled defaulted borrowers. Among the CFPB's largest actions against a student loan servicer, this lawsuit has important implications for the student loan servicing industry.

In May 2020, an extensive and contentious discovery process was completed and the CFPB and Navient filed cross-motions for summary judgment. Although the CFPB's motion remains sealed, Navient's summary judgment brief argues that the CFPB lacks sufficient evidence to support its claims. Specifically, Navient points to evidence showing it repeatedly informed borrowers about the availability of income-driven repayment options and that it did not unlawfully steer borrowers toward forbearance. Furthermore, Navient claims there is no evidence that it made materially misleading representations or that it substantially injured borrowers. As of March 2021, the motions remain pending. The court's ruling on the motions, and its analysis of the CFPB's steering claims, may provide important guideposts regarding what level of information servicers are obligated to provide to borrowers regarding available repayment options and whether providing general information about repayment options and more limited counseling in interactions with specific borrowers is sufficient.

Another key issue in the case is the effect of the Supreme Court's decision in *Seila Law LLC* on this case. In *Seila*, the Supreme Court held that the CFPB's structure—specifically, that its Director was removable by the President only "for cause"—violated the US Constitution. Importantly, however, the Court noted that the CFPB could continue to operate because the unconstitutional removal provision was severable from the rest of the statute that created the CFPB. The Supreme Court did not address what impact, if any, its decision should have on pending CFPB enforcement cases. Following the Court's decision in *Seila*, then-CFPB Director Kathy Kraninger purported to ratify the decision to bring suit against Navient. Navient, in turn, moved for judgment on the pleadings, arguing that (1) the CFPB lacked the constitutional authority to bring its suit when it was filed and (2) the current CFPB director could not now ratify that action because the statute of limitations had expired.

The district court denied Navient's motion. Addressing Navient's first argument, the court reasoned that *Seila's* statements on constitutional severability and the CFPB's continued operation indicated that the Supreme Court did not intend to invalidate all prior CFPB actions. Furthermore, relying on Supreme Court precedent and similar rulings by the Ninth and DC Circuits, the court found that the CFPB had the authority to lawfully bring the suit in 2017. As to Navient's second argument, the court agreed that a valid ratification required the CFPB Director to have the power to bring suit at the time of ratification. Since the statute of limitations had expired at the time of Director Kraninger's ratification, she would have lacked the power to ratify absent some reason to toll the statute of limitations. Agreeing with the CFPB, the court held that equitable tolling principles applied in light of the CFPB's aggressive prosecution of the action, thus effectively extending the applicable statute of limitations and rendering Kraninger's ratification effective. The court has since certified the ruling denying Navient's motion to dismiss the case. As a result, the Third Circuit will decide whether the statute of limitations in the Navient case was tolled while the *Seila* case was being decided. The issue of whether a government agency's alleged constitutional defects amount to an extraordinary circumstance warranting equitable tolling of the statute of limitations for a separate claim is a novel one, and it remains to be seen how the Third Circuit will rule on the issue.

A number of state Attorneys General have also brought similar lawsuits against Navient that include similar allegations. The resolution of these lawsuits will have ripple effects throughout the student loan servicing industry. While some student loan servicers have adopted practices and procedures to avoid enforcement exposure based on this ongoing litigation, a resolution favorable to Navient may lead some entities to re-think required best practices.

5. Looking Ahead

There were relatively few notable legal developments affecting the student loan industry in 2020. However, President Biden has stated that he wants the CFPB to focus on student loans. Moreover, Rohit Chopra – Biden's nominee to head the CFPB – is the former Student Loan Ombudsman at the Bureau and a former Special Advisor to the Secretary of Education, so student loan issues are particularly important to him. Given Mr. Chopra's statements while at the FTC, we expect the CFPB to pursue an aggressive enforcement agenda that focuses on bringing enforcement actions against large players in the student loan marketplace. Given the COVID pandemic's impact on student loan borrowers, we expect both federal and state regulators to pay particular attention to how servicers of both federal and private student loans treat consumers who are struggling to repay their student loans as a result of the pandemic. Finally, key student loan issues—including loan forgiveness and dischargeability in bankruptcy—are likely to be on the legislative agenda in the coming year. In short, participants in the student loan industry should follow these developments closely, as actions taken in the next year are likely to have ramifications for the industry for years to come.

6. Mayer Brown's Student Loan Capabilities

Mayer Brown has a broad practice representing companies engaged in the student loan and education finance marketplace, including:

- Extensive experience conducting consumer financial regulatory reviews of student lenders, student loan servicers, student loan debt collectors, and other education finance companies on behalf of investors;
- Providing consumer regulatory advice to student lenders and education finance providers, student loan servicers, and holders of student loans related to federal and state consumer financial regulatory laws and regulations;
- Advising financial institution clients with respect to the acquisition and sale of student loan portfolios and education finance companies;
- Representing finance companies, commercial banks and investment banks as sellers, purchasers, lenders, issuers and underwriters in securitizations of student loans;
- Advising on conduit transactions and term transactions, both public and Rule 144A, involving student loans, including those subject to private guaranty arrangements; and
- Defending student lenders and student loan servicers in connection with high-stakes litigation and government enforcement actions.

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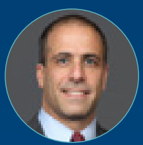

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