May 15, 2019

The Honorable Mark Stone
Member, California Assembly
State Capitol, Room 3146
Sacramento, CA 94249

Re: Assembly Bill 376 (Stone) -- An act to add Title 1.6C.10 (commencing with Section 1788.100) to Part 4 of Division 3 of the Civil Code, and to amend Section 28106 of the Financial Code, relating to student loans.

Position: Oppose

Dear Assembly Member Stone:

I am writing on behalf of the members of the Consumer Bankers Association (CBA) to express opposition to Assembly Bill (AB) 376 as currently drafted. We are concerned the legislation would create conflicting and confusing private education loan regulatory requirements between California, federal and other states' laws. AB 376 would result in consumer confusion over different disclosures required by different governments about the same private education loan. As written, the legislation would create insurmountable conflicts with federal regulatory requirements that would likely make it legally impossible for federally regulated financial institutions to serve California students, greatly reducing consumer choice and access to much-needed financing options.

As the voice of the retail banking industry, CBA represents nearly 70 members whose products and services provide access to credit for consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets. In California, CBA member banks have 5,130 branches, employ nearly 237,000 individuals, and serve over 21.4 million consumers. CBA membership includes private sector lenders who make the majority of private student loans to help families finance a college education. In addition, our members include organizations that are experienced in working with federal student loans, having participated in the legacy Federal Family Education Loan Program (FFELP) and, in some cases, currently holding FFELP loans. A list of our corporate membership can be found at www.consumerbankers.com.

CBA members who provide loans to help students pursue higher education are dedicated to providing the best possible service to their customers in order to make the loan repayment process go as smoothly as possible. CBA members depend on satisfied customers to stay in business. Loan servicing problems lead to losses, especially for private loans where all the risk is borne by the lender. Further, unhappy customers won't be interested in other products their bank may offer. In other words, banks have the same goal as supporters of this legislation - to make sure education loan borrowers are treated fairly and and successfully repay their loans.

CBA has carefully reviewed AB 376 and have serious concerns about how it might be implemented in its current form. In fact, this legislation, which is clearly well intentioned, would create insurmountable conflicts for federally regulated financial institutions who must comply with the National Bank Act and other federal legislation that governs how they must operate. The legislation will cover millions of people as it applies to large numbers of California residents attending schools in another states, in addition to all students in California. In addition to creating conflicts with federal law, the application to students in and from other states will create an intersecting web of conflicting state provisions that will make compliance impossible for our member institutions, despite their best efforts. We urge you to reconsider the need for such sweeping legislation or, at a minimum, to recognize the multi-faceted, thorough federal regulatory regime that requires compliance by national financial institutions, and modify the legislation to avoid regulatory conflicts by exempting banks and their subsidiaries, similar to the approach taken in the Student Loan Servicing Act.

Banks and other private financial institutions only make about 8 percent of education loans. The federal government makes the remaining 92 percent. Of currently outstanding loans, $1.41 trillion of the total $1.5 trillion (92%) are federal. There is a significant performance disparity between private student loans and federal student loans. Due to careful underwriting that assesses the ability to repay the loan <u>before</u> it is made, along with comprehensive advance disclosures to borrowers, 98 percent of private loans are being successfully repaid. The underwriting coupled with the disclosures ensures students do not borrow more than they can afford.

Private lenders are required to make three different plain language disclosures before the loans are funded, covering 18 key provisions about the loan, including the availability of federal loans. Federal loan disclosures are far less clear. Private loan lenders also offer targeted repayment assistance tools -- like loan modification programs -- that effectively help the very small subset of private loan customers experiencing financial distress avoid default. This leads to the less than 2 percent charge-off rate for private loans. Private loan borrowers are successfully repaying their loans, which means they are being serviced correctly without the need for additional legislatively mandated requirements.

Contrary to private loans, federal loans are made in almost unlimited amounts with no assessment of ability to pay or creditworthiness, with the exception of federal PLUS Loans that involve only a rudimentary credit check. As a result, federal loans default at a much higher rate, causing major problems for borrowers. Many federal student loan borrowers are struggling – collectively experiencing double digit delinquency and default rates in contrast to the 2 percent delinquency and default rates for private loans. Indeed, the Findings and Declarations of AB 376 relate to problems with servicing of federal direct loans and do not apply to servicing of privately held loans. We respectfully suggest that the State of California work with federal authorities to find solutions to the federal student loan crisis.

Several provisions of the bill would place State of California representatives, including the Student Borrower Advocate, in the position of exercising "visitorial powers" over banks in violation of federal law. Under 12 C.F.R. Section 7.4(a) and 12 U.S.C. 484, state officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring production of books or records, or prosecuting enforcement actions,

except in limited circumstances authorized by federal law. The regulation states: "[V]isitorial powers include: examination of a bank, inspection of a bank's books and records, regulation and supervision of activities authorized or permitted pursuant to federal banking law and enforcing compliance with any Federal or state laws concerning those activities, including through investigations that seek to ascertain compliance through production of non-public information by the bank, except as otherwise provided [elsewhere in this regulation]."

Any requirement in the bill that would give the State the right to investigate the student loan operations of a National Bank, and/or examine or require the production of the books, accounts, records, and files of a National Bank that services student loans, constitutes an impermissible exercise of visitorial authority under 12 C.F.R. Section 7.4(a) and 12 U.S.C. 484.

Likewise, any requirement that banks must submit reports (annual or otherwise), or produce proprietary business data or written complaint responses would violate national bank preemption principles that give exclusive visitorial authority (e.g. the right to audit, inspect, examine and supervise the operations and books/records of a national bank) to the federal prudential regulators, including the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corp. (FDIC), and the Federal Reserve.

National banks and other national financial institutions are comprehensively examined and regulated by prudential regulators to ensure safety and soundness as well as by the Consumer Financial Protection Bureau (CFPB) for compliance with the types of substantive provisions set forth in the bill. For example, national banks are regularly examined for compliance with (1) federal Unfair, Deceptive and Abusive Acts or Practices requirements (under the Dodd-Frank Act), (2) Equal Credit Opportunity Act/Regulation B requirements, (3) Truth In Lending Act/Regulation Z requirements, (4) Fair Credit Reporting Act/Regulation V, (5) Military Lending Act, and the Servicemembers Civil Relief Act, and (6) Regulation E (Electronic Funds Transfer Act).

Federal law, including the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Federal Trade Commission Act prohibit Unfair, Deceptive or Abusive Acts or Practices (UDAAP). The bill would unnecessarily duplicate this provision.[1] That law also prohibits any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act.[2] (

In addition, the OCC and FDIC enforce Section 5 of the Federal Trade Commission (FTC) Act which covers banks and bank servicers. Section 5 of the FTC Act, Ch. 311, §5, 38 Stat. 719, codified at 15 U.S.C. §45(a), prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce.

There are several provisions in Chapter 2 that would contradict federal law and related court decisions regarding national banks.

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[1] See Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a).
[2] See Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3).

Following are some examples of such provisions.

- Section 1788.102(d) would impose state requirements on the charging of late fees. While the goal of any student loan servicer is for borrowers to make timely payments, thus avoiding late fees, policies setting late fee amounts are governed by the National Bank Act and are not permitted to be set by states. The U.S. Supreme Court recognized this in the "Smiley v. Citibank" decision which established that "late fees" constitute "interest" under federal law and therefore are governed by the interest rate exportation/preemption provisions of the National Bank Act.

- Section 1788.102(i) indicates that a consumer can permanently negate any consequences for any problem they have repaying a loan simply by filing an inquiry or complaint. If the customer contacts the loan servicer with an inquiry or complaint, the servicer must protect the customer against any negative consequence such as negative credit report, late fees or interest capitalization even if the customer is incorrect and there is no error. This provision would violate a servicer's legal obligation under the Fair Credit Reporting Act to make accurate credit reports to credit reporting agencies.

- Section 1788.104(d) essentially gives the California Department of Justice the authority to investigate the business operations (and books, accounts, records, and files) of a national bank concerning loans serviced with respect to California residents or residents of other states studying at California institutions of higher education. This provision would impermissibly place the state of California in the position of exercising visitorial authority over national banks.

- Sections 1788.104(g)(8), 1788.105(b), and 1788.105(c)(1) give state officials (i.e., the Student Borrower Advocate and the Department of Business Oversight), the power to compel production of documents, books, records, and proprietary loan servicing data/information, and supervise the operations, of national banks as part of monitoring and assessing the business conduct of student loan servicers. This clearly conflicts with visitorial authority provisions under the National Bank Act.

- Finally, Section 1788.105(d) gives state officials the authority to exercise visitorial powers over national banks through the compelled production of proprietary loan servicing data/information of national banks identified within the CFPB's proposed Student Loan Market Monitoring initiative. While this provision fails National Bank Act scrutiny, it also seeks to impose a massive, overly intrusive and costly collection of proprietary and confidential data from student loan servicing organizations. The CFPB's proposal is under review by the Office of Management and Budget (OMB), the normal procedure for proposals that would impose costly new requirements on private entities. The OMB may approve, reject or require modifications to the CFPB's proposal. Subdivision (d) requires the State to create within six months a process to securely collect, store and analyze massive amounts of highly sensitive data about student loan borrowers from the entire United States with no consideration of operational and financial burdens to student loan servicers.

AB 376 seeks to improve the experiences of student loan borrowers, which is a commendable goal, but in doing so would create numerous serious legal and practical problems. CBA urges you to recognize the multi-faceted, comprehensive federal regulatory and supervisory regime that oversees national financial institutions and modify AB 376 to avoid regulatory conflicts by exempting banks and their subsidiaries, similar to the approach taken in the Student Loan Servicing Act.

If you have any questions or would like to discuss this further, please contact Kristen Fallon at kfallon@consumerbankers.com or (202) 552-6367. Thank you for your consideration.

Sincerely,

Richard Hunt
President and CEO
Consumer Bankers Association