



# **NEW YORKERS FOR RESPONSIBLE LENDING**

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## **Memorandum**

**To:** Linda Lacewell, Superintendent, N.Y.S. Department of Financial Services  
**CC:** Brian Montgomery, Deputy Superintendent, N.Y.S. Department of Financial Services  
**From:** Student Loan Working Group, New Yorkers for Responsible Lending<sup>1</sup>  
**Date:** July 17, 2019  
**Re:** Implementing New York’s Student Loan Servicing Act

### **Introduction**

The new Student Loan Servicing Act (the “Act”) represents an important advancement in consumer protection in New York, particularly for student borrowers. This memorandum was written by New Yorkers for Responsible Lending (“NYRL”), a coalition of statewide consumer advocacy organizations, and makes recommendations that its members believe would increase the Act’s effectiveness in protecting student borrowers. It is our hope that this memorandum will be of use to the Department of Financial Services as it promulgates rules to increase the effectiveness of the Act.

First, this memorandum outlines several comments and recommendations about the Department’s role in student borrower protection. Then, it provides specific proposed rules for the Superintendent to consider while implementing the Act.

### **The Department Can Become a Central Advocate for Student Borrowers**

The Act is an opportunity for the Department to further its role as a key resource for student loan borrowers. The Department can accomplish this by increasing the information that is available to borrowers, acting as a central resource for borrowers and their advocates, and creating a nationwide network of student loan servicing analysts, regulators, and enforcement agencies.

#### *The Department Can Become a Central Resource for Borrowers*

The Department has already taken important steps to consolidate borrower information by creating its Student Lending Resource Center page.<sup>2</sup> This online resource provides valuable information for students at each point of the borrowing experience. However, we recommend that the Department update and add to the student borrower information and materials already available on its website to ensure that borrowers can access comprehensive resources in a single place.

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<sup>1</sup> Contact: Winston Berkman-Breen, Co-chair of the NYRL Student Loan Working Group and Staff Attorney with the New York Legal Assistance Group, wberkman-breen@nylag.org.

<sup>2</sup> *Student Lending Resource Center*, N.Y.S. Dep’t of Fin. Serv., [https://www.dfs.ny.gov/consumers/student\\_protection](https://www.dfs.ny.gov/consumers/student_protection) (visited July 15, 2019).

For example, currently the Department advertises two programs for student loan forgiveness on its website.<sup>3</sup> However, New York offers many programs that are specific to certain professional fields.<sup>4</sup> Providing a comprehensive list of repayment and forgiveness programs on a single resource page would help borrowers maximize their repayment opportunities. Additionally, the Department's Consumer FAQ page has six categories, none of which is student loans.<sup>5</sup> Having a dedicated FAQ student loan category would help concerned or curious borrowers readily identify answers to their questions.

*The Department Should Generate Resources to Promote and Assist Student Borrower Advocacy*  
We recommend that the Department consolidate student loan servicing-related complaints and make them available on its website for borrowers and their advocates to access. Publically-available complaints are invaluable resources for both policy and legal advocates assisting borrowers, who can use them to identify and address broad trends and to establish pattern and practice evidence for defenses or affirmative legal claims. If the Department cannot publish all complaints, it should ensure they are available pursuant to requests under New York's Freedom of Information Law.

Additionally, the Department should designate a student borrower advocate to serve as a point of contact for servicer-related complaints and to monitor student loan and loan servicing policy nationwide. Such an advocate could also oversee borrower education programs, servicing-related rulemaking, and analysis and reporting on data gathered from servicers.<sup>6</sup>

We also believe the Act represents a unique opportunity for the Department to increase oversight of for-profit schools, many of which engage in "loan servicing," *see* § 710(7), and thus are servicers covered by the Act and the Department's authority. This is particularly true for schools that offer and service proprietary loans, but also applies to schools that engage in default management in order to achieve certain cohort default rates. For-profit schools provide high-cost, low-value products and services, and result in disproportionate levels of borrower defaults relative to public and non-profit schools, both of which are "exempt organizations" in the Act. *See* § 710(4). The Department can use the Act to increase transparency around these entities' financials in order to distinguish predatory schools from those that provide their students with valuable and marketable educations. In doing so, we recommend that the Department partner with other New York State agencies that are or should be engaged on this issue, such as Veterans' Services and the Higher Education Services Corporation.

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<sup>3</sup> *Student Loan Forgiveness*, N.Y.S. Dep't of Fin. Serv., [https://www.dfs.ny.gov/consumers/student\\_protection/student\\_loan\\_forgiveness](https://www.dfs.ny.gov/consumers/student_protection/student_loan_forgiveness) (visited July 8, 2019).

<sup>4</sup> *Loan Forgiveness, Cancellation, and Discharge*, N.Y.S. Higher Educ. Corp., <https://www.hesc.ny.gov/repay-your-loans/repayment-options-assistance/loan-forgiveness-cancellation-and-discharge.html> (visited July 8, 2019).

<sup>5</sup> *Consumer Sections FAQ*, N.Y.S. Dep't of Fin. Serv., [https://www.dfs.ny.gov/consumer\\_faqs/homeowner\\_property](https://www.dfs.ny.gov/consumer_faqs/homeowner_property) (visited July 8, 2019).

<sup>6</sup> The 2019 New Jersey Legislature passed a bill to establish an Office of Student Loan Ombudsman, which provides an example of how such an office could be structured and what responsibilities and authority it would hold. *See* N.J. S-1149/A-455 (2019), "Establishes Office of Student Loan Ombudsman; regulates student loan servicers," available at [https://www.njleg.state.nj.us/2018/Bills/S1500/1149\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/S1500/1149_I1.PDF).

*The Department Is Well-Positioned to Lead a Nationwide Coalition of Advocates, Regulators, and Enforcement Agencies*

With several other states currently proposing, passing, and implementing student loan servicing laws, the Department should coordinate with financial regulators in those jurisdictions and with national consumer advocates to share best practices and information. Coordinating with actors outside New York will be particularly important as questions of federal preemption continue to test the limits of state authority.<sup>7</sup> These relationships can also provide practical support, such as how different agencies create and maintain public complaint databases while still protecting consumers' privacy.

Further, as the Consumer Financial Protection Bureau continues to rollback its borrower protections, New York can lead state-level investigations and enforcement initiatives in partnership with other state actors. We recommend that the Department work with other states and agencies to create a single, consolidated database of complaints. Loan servicers operate across state jurisdictions, and such a database would position the Department and its counterparts in other states to identify and address poor or unlawful servicing practices harming borrowers.

**The Department Should Promulgate Rules to Increase Transparency and Borrower Protections**

The Act is an opportunity for New York to promulgate strong and clear student borrower protections. NYRL believes that the following proposed rules—which reflect both best practices from other states and our clients' experiences—would provide much-needed oversight to loan servicing and would empower student borrowers to make informed decisions.

*The Department should clarify and/or include the following definitions pursuant to its authority under § 718(1)(c):*

- Guarantee agencies are not “exempt organization[s],” *see* § 710(4), and are considered “servicer[s]” or “student loan servicer[s],” *see* § 710(6), when engaged in “servicing,” *see* § 710(7).
- For-profit postsecondary educational institutions are not “exempt organization[s],” *see* § 710(4), and are considered “servicer[s]” or “student loan servicer[s],” *see* § 710(6), when engaged in “servicing,” *see* § 710(7).
- Non-profit and/or government providers of free financial counseling or legal services, that do not act on behalf of a loanholder, are “exempt organization[s],” *see* § 710(4), unless specifically excluded from that definition by the Superintendent.

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<sup>7</sup> On November 21, 2018, the District Court for the District of Columbia held in *Student Loan Servicing Alliance v. District of Columbia* that D.C.'s “Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act” was preempted with respect to servicing federal loans. *See* 351 F. Supp. 3d 26 (D.D.C. 2018). However, on June 27, 2019, the 7th Circuit held in *Nelson v. Great Lakes Educational Loan Services, Inc.* that loan servicers were still subject to the “Illinois Consumer Fraud and Deceptive Business Practices Act,” to the extent that the act did not impose additional disclosures and only prohibited affirmative misrepresentations. *See* No. 18-cv-1531 (7th Cir. 2019). On July 8, 2019, the District Court for the Southern District of New York echoed *Nelson* and cited the opinion in holding that affirmative misrepresentations are not preempted by the Higher Education Act's express preemption of state disclosure requirements. *See Hyland v. Navient Corp.*, No. 18-cv-9031 (S.D.N.Y. 2019).

- “Records,” *see* § 721(7), shall be defined to include: loan application documents; loan approval and Truth in Lending disclosure documents; any and all account transfer documents, including any and all bills of sales and complete manifests of loans included in those sales; and complete account statements, include any and all disbursements, payments, and fees.
- “Written inquiry,” *see* § 721(6), shall mean a Qualified Written Request, as that term is defined in the Real Estate Settlement Procedures Act, *see* 12 U.S.C. § 2605(e)(1)(B).
- A borrower would “benefit from working with a specialist” if he or she is eligible for a loan discharge program, is eligible for a loan repayment program such as an Income-Driven Repayment plan, or is more than thirty (30) days delinquent on payments.<sup>8</sup>

*Pursuant to §§ 718, 719, 721, the Department can empower and protect borrowers by requiring servicers to disclose important information in the following ways<sup>9</sup>:*

- Require all servicers of non-federal loans to send to any borrower whose non-federal student loans they service an annual written notice listing any and all repayment plans and discharge programs—private, state, and federal—for which the borrower is or may be eligible, and that the servicers specify that state and federal plans or programs are generally unavailable for private loans.
- Require all servicers of non-federal loans to send to any borrower whose non-federal student loans they service an annual written notice informing them that refinancing or consolidating any loans may affect the borrower’s rights or claims with respect to the loan, loan origination activities, and/or the education that the loan was used to fund.
- Require that all servicers maintain records for six (6) years after satisfaction or transfer of a student loan, or after a student loan is charged-off and/or sent to collections
- Require all servicers consider any request for information or notice that there is or may be an error with the borrower’s account as written inquiries, and that all servicers shall accept any written inquiry submitted by any borrower or their representative, regardless of whether it was sent by mail or electronically and regardless of whether it was sent to any address designated for written inquiries.

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<sup>8</sup> Although the Act is an opportunity to identify and assist borrowers at risk of default, the Department should consider initiating additional early intervention programs, which may require separate rulemaking or policy initiatives.

<sup>9</sup> The Higher Education Act expressly preempts Title IV federal loans from state disclosure laws. *See* 20 U.S.C. 1098g. However, the 7th Circuit in *Nelson*, *see supra* n. 7, held that this did not preempt servicers of federal loans from state consumer protection laws as long as those laws do not impose additional disclosure requirements. Although *Nelson* is not binding in New York, it is instructive as to how to regulate loan servicers in light of 20 U.S.C. 1098g’s express preemption, and has already been relied upon by a federal court in New York. *See Hyland*, *supra* n. 7. Therefore, NYRL proposes certain disclosure requirements for the servicing of non-federal loans. Because most non-federal loan borrowers also have federal loans, this would ensure that borrowers receive important repayment and discharge information for their federal loans without falling under Higher Education Act’s preemption provision.

- Require that any servicer that receives by telephone from any borrower whose loans it services a verbal request for information or notice that there is or may be an error with the borrower's account, shall consider the borrower's request or notice to be a written inquiry as if it were made by mail or electronically.
- Require that any servicer that receives any written inquiry from a borrower or a borrower's representative shall send a written notice to the borrower or the borrower's representative within five (5) business days confirming receipt of the written inquiry.
- Require all servicers of non-federal student loans to send to any borrower whose non-federal student loans they service an annual written notice informing him or her that he or she has the right to instruct the servicer how it should apply any nonconforming payments for any loans.
- Require that all servicers of non-federal loans include on any monthly statement to a borrower whose student loans it services a disclosure that the borrower may inform the servicer how he or she would like for the servicer to apply nonconforming payments for any loans.

*To ensure that borrowers experience a smooth transition between servicers, pursuant to §§ 718 & 721, the Department should promulgate the following regulations related to the sale, assignment, or other transfer of servicing:*

- If the sale, assignment, or other transfer of the servicing of a non-federal student loan results in a change in the identity of the person to whom the borrower is required to send subsequent payments or direct any communications concerning the student loan, a notice shall be sent to borrowers at least seven (7) days before the borrower's payment is due to any new owner, assignee, or transferee and related to the sale, assignment, or other transfer of servicing. Such notice shall include clear and conspicuous instructions stating the servicer to whom the borrower is required to send subsequent payments or direct any communications concerning the student loan.
- Require that any payment immediately subsequent to a change in the identity of the servicer to whom a borrower must make payments that is erroneously sent to the previous servicer to whom payments were due shall not result in a negative payment performance in any report to a consumer reporting agency.
- Require that, where practicable, any former servicer of any student loan that receives a payment from a borrower subsequent to the sale, assignment, or other transfer of servicing of that borrower's student loan shall transfer the payment within three (3) business days to the new servicer to whom the borrower is required to send payments and shall send written notice to the borrower within three (3) business days informing him or her of the transfer of payment and of the identity of the servicer to whom subsequent payments should be made.
- Require that, where a former servicer erroneously receives payment and it is not practicable for the former servicer to transfer the payment to the servicer to whom

payment should be made, the former servicer that erroneously received the payment shall return the payment to the borrower within one (1) business day and shall send written notice to the borrower within one (1) business day informing him or her of the rejection of payment and of the identity of the servicer to whom subsequent payments should be made.

*Because loan servicers are often student borrowers' first and only source of loan counseling, the Department should ensure that servicers provide borrowers with accurate and individualized advice by adding the following Responsibilities to § 721:*

- All servicers shall designate and train repayment and loan counseling specialists who are knowledgeable about any and all repayment plans and discharge program—private, state, and federal—available to borrowers in New York.
- All servicers shall identify borrowers whose loans they service who would benefit from working with a specialist and automatically direct any call from such borrowers to repayment and loan counseling specialists.

*Section 17(2) of the Act empowers the Superintendent to require servicers to issue annual, other regular, and special reports related to student loan servicing. This is a valuable opportunity for the Department to gather statistics related to student-borrower outcomes, as well as about the servicers themselves. The Department should require servicers to submit the following information<sup>10</sup>:*

- Default rates, broken down by school.
- Total volume of loans in default and collection.
- Number of defaults, rehabilitation of loans in default, consolidation of loans in default, loans placed in forbearance, loans placed in deferment, total and permanent disability discharges and applications for discharge, school-related discharges and applications for discharge, defaults based on failure to certify income, recertifications of income for income-driven repayment plans, failures to recertify income for income-driven repayment plans.
- Annual audited financial statements.

*Although § 719 provides certain prohibited practices, the Department can enhance borrower protections by promulgating the following additional prohibited practices pursuant to § 718(b):*

- No servicer shall engage in any abusive or unlawful conduct.

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<sup>10</sup> Gathering and analyzing data may impose burdens on both the Department and servicers. We recommend using the Consumer Financial Protection Bureau's proposed rulemaking on data collection as an example of how any burden can be minimized, as well as an example of additional data points that can be collected. See Notice and Request for Comment on "Student Loan Servicing Market Monitoring," Consumer Fin. Prot. Bureau (82 Fed. Reg. 11440, Feb. 23, 2017), available at <https://www.regulations.gov/docket?D=CFPB-2017-0002>.

- It shall be an unfair and abusive act or practice for a servicer to communicate, or threaten to communicate, with anyone other than the borrower, the borrower's representative, or a representative of local, state, or federal government regarding the borrower's student loan(s).
- No servicer shall initiate a communication with any borrower via telephone, either in person or via text messaging or recorded audio message, in excess of two such communications in each seven (7) day period to either the borrower's residence, cellular telephone, or other telephone number provided by the borrower as his or her personal telephone number, and two such communications in each thirty (30) day period other than at a borrower's residence, cellular telephone, or other telephone number provided by the borrower as his or her personal telephone number, for each student loan, provided that for purposes of this section, a servicer may treat any billing address of the debtor as his or her place of residence, and provided further, that a servicer shall not be deemed to have initiated a communication with a borrower if the communication by the servicer is in response to a request made by the borrower for said communication.
- No servicer shall place telephone calls at times known to be times other than the normal waking hours of a borrower, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M. eastern time.
- It shall be "unfair" and "deceptive" for the purpose of the Act for a servicer to steer any borrower toward forbearance without first treating that borrower as if he or she would "benefit from working with a specialist."
- No servicer shall implement an incentive compensation policy or shall otherwise sustain a rewards program that relies in whole or in part on specific metrics such as frequency of calls, duration of calls, or steering borrowers toward specific loan counseling programs.
- No servicer shall charge borrowers fees for any activities related to loan servicing for which fees are not specifically permitted by the borrower's student loan contract or state or federal law.
- It shall be a violation of the Act for any servicer of a loan issued under and subject any federal law to fail to abide by the terms of that federal law.