Federalism to the Rescue

State regulators can and should examine for violations of federal consumer financial law

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STUDENT BORROWER PROTECTION CENTER

About the Author

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Protect Borrowers

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Introduction

Section 1042 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("The Dodd-Frank Act") invites state supervisory agencies and regulators to supervise nonbanks alongside the Consumer Financial Protection Bureau ("CFPB") for compliance with federal consumer financial laws. State regulators should accept this invitation and fill the void left by federal agencies to enhance oversight of student loan servicers.

While academics have written about consumer protection enforcement actions brought by attorneys general and other state enforcers, there is little written about consumer protection supervision, let alone the supervisory tools granted to states under § 1042. Supervision is a little-known government tool (outside the world of industry, regulators, and their lawyers) for ensuring compliance with consumer financial law. Unlike enforcement actions brought by attorneys general and other enforcers, supervision is confidential and non-punitive. It is an ongoing relationship between industry and government, in which the supervisory agency identifies violations of law or management weaknesses and directs the company to quickly fix the problem with little fanfare. Supervision is a softer and more incremental process for advancing consumer protection than lawsuits, but it can also act as a fact gathering function for public enforcement actions; if an examination finds significant issues, examiners can refer the matter to public enforcement.

In recent years, many states have recognized the need to ramp up consumer protection efforts to fill the void left by federal regulators at the CFPB and elsewhere. State attorneys general have used § 1042 to conduct traditional enforcement actions, including investigations and lawsuits for violations of federal consumer financial laws.[1] But state authorities can also use § 1042 to bring a different and powerful tool to the table—supervision.

In particular, there is a dire need for state supervision of student loan servicers. The United States is in the middle of a student loan crisis: there are currently $1.6 trillion in outstanding student loans—more than any other consumer loan class other than mortgages. And according to the Federal Reserve Bank of New York, even before

[1] *See, e.g.*, Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529 (M.D. Pa. 2018), *appeal filed*, No. 19-2116 (3d. Cir. May 17, 2019); Pennsylvania v. Think Finance, Inc., No. 14-cv-7139, 2016 WL 183289 (E.D. Penn. 2016); Illinois v. Alta Colleges, Inc., No. 14 C 3786, 2014 WL 4377579 (N.D. Ill. 2014); King v. HSBC Bank Nevada, No. 13-cv-504, 2013 WL 12138908 (D.N.M. 2013).

the COVID-19 crisis, a whopping 10.9% of those loans were more than 90 days delinquent.[2] To put that in perspective, delinquency rates in the mortgage market did not exceed 10% even at the height of the 2008 Financial Crisis. Student loan delinquencies spiked in 2012, and ever since, student loans have been the most delinquent loan class, with a "stable" 10-11% delinquency rate year-to-year. But the Federal Reserve's estimates may be greatly understated. In documents recently released by the Department of Education (ED) as part of its NextGen procurement, ED revealed that more than a third of federal student loan borrowers who had entered repayment were delinquent or in default on their loans.[3]

As of the publication of this article, the extent to which COVID-19 will affect the student loan crisis is unclear, though it will certainly worsen it to some extent. The CARES Act created a payment moratorium for most federal student loans until September 30, 2020, after which we should expect a massive increase of delinquency and distress if unemployment remains high. Of course, delinquency rates are already skyrocketing in the private student loan market,[4] and the CARES Act only helps to the extent the ED and the private companies that service student loans follow the law.[5]

Unfortunately, the heavy burden of student loans on U.S. consumers (both pre- and post-pandemic) is exacerbated by poor student loan servicing. A CFPB Student Loan Ombudsman report submitted to Congress in 2017 summarized complaints submitted to the CFPB about student loan servicers, and it detailed a wide variety of abuses and errors committed by student loan servicers.[6] Large amounts of debt, high delinquency rates, and servicing errors is the exact combination that mortgage consumers encountered in the 2008 financial crisis. It's happening again. But unlike with mortgages in the financial crisis, the vast majority of student loans are federal

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[2] *See* CTR. FOR MICROECONOMIC DATA, FED. RES. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2019:Q3 (2019), *available at* https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2019Q3.pdf.

[3] NextGen is ED's pending contract for future student loan servicing. In September 2019, as part of the procurement process, ED answered several questions about the size and condition of the federal student loan portfolio. ED revealed there were 40 million Direct Loan borrowers, 60,000 Perkins Loan borrowers, 1.1 million borrowers pursuing Public Service Loan Forgiveness, 75,000 borrowers with TEACH grants, and 1,138,000 applications for total permanent disability discharge since 2013. U.S. DEP'T OF EDUC., ENHANCED PROCESSING SOLUTION, ATTACHMENT 25—RESPONSES TO QUESTIONS, *available at* https://beta.sam.gov/api/prod/opps/v3/opportunities/resources/files/68b0642f2e024251ecfe5bb82af63e25/download?api_key=undefined&token=. It also revealed the percentage of borrowers with loans in various statuses: In School (15%), Grace (4%), Deferment (4%), Forbearance (9%), Current Repayment (38%), Delinquent 6-270 days past due (9%) Delinquent 270+ days past due (1%), Defaulted (19%). *Id.*

[4] FitchRatings, U.S. Private Student Loan ABS Outlook Negative on Coronavirus Pressure (April 10, 2020), *available at* https://www.fitchratings.com/research/structured-finance/us-private-student-loan-abs-outlook-negative-on-coronavirus-pressure-10-04-2020 (downgrading U.S. private student loan asset backed securities from "Stable" to "Negative").

[5] *See, e.g.*, Barber v. Devos, Case No. 1:20-cv-01137 (D.D.C) (filed April 30, 2020) (class action lawsuit alleging the Department of Education did not stop wage garnishments despite the payment moratorium in the CARES Act).

[6] CFPB, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (2017), *available at* https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

loans, which are not privately owned or traded in securities or derivatives. For this reason, the student loan crisis is unlikely to lead to a dramatic stock market crash. Instead, the student loan crisis will continue indefinitely to burden consumers and depress the economy.

The CFPB made several incremental improvements to the student loan servicing market with its supervision program starting in 2014[7] and took large leaps towards bringing the industry into compliance with a couple significant enforcement actions.[8] However, after Secretary DeVos took office in 2016 and Director Cordray left the CFPB at the end of 2017, the federal government has largely stepped away from overseeing the student loan servicing market. First the Department of Education terminated an information sharing agreement with the CFPB in October 2017. Then supervision ceased altogether. The CFPB recently told Congress that since December 2017—right after Director Cordray left office—servicers have refused to cooperate with CFPB examinations at ED's direction.[9] In November 2019, the nonprofit Student Debt Crisis sued the CFPB in federal court for failing to supervise federal student loan servicers.[10]

Seeing this void in consumer protection oversight, state attorneys general have filed enforcement actions attacking specific consumer harms.[11] But the scale of the student loan crisis warrants state supervision as well. We are now seeing the beginnings of a movement, with eleven states and the District of Columbia passing laws that create state supervision of nonbank student loan servicers.[12] However, the place of supervision in the pantheon of state regulation is still under-discussed, and under-recognized, particularly in the context of the student loan crisis. States seeking to fill the void left by the CFPB and ED should focus on supervision just as much as enforcement.

[7] *See* Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383 (Dec. 6, 2013) (to be codified at 12 C.F.R. pt. 1090).

[8] *See* CFPB v. Navient Corp., No. 3:17-cv-101, 2017 WL 3380530 (M.D. Pa. 2017) (litigation ongoing); Consent Order, Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0013 (Aug. 22, 2016).

[9] Letter from Kathleen L. Kraninger, Exec. Dir., CFPB, to Senator Elizabeth Warren (Apr. 23, 2019), *available at* https://www.npr.org/documents/2019/may/042319-letter.pdf.

[10] Complaint, Student Debt Crisis v. CFPB, No. 2:19-cv-10048, 2019 WL 6327221 (C.D. Cal. Nov. 25, 2019).

[11] *See, e.g.*, Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529 (M.D. Pa. 2018), *appeal filed*, No. 19-2116 (3d. Cir. May 17, 2019); Massachusetts v. Pa. Higher Educ. Assistance Agency, 34 Mass. L. Rptr. 616 (Super. Ct. Mar. 1, 2018).

[12] Cal. Fin. Code §§ 28100–28182 (2018) (California); Colo. Rev. Stat. § 5-20-101 *et seq.* (2019) (Colorado); Conn. Gen. Stat. §§ 36a-25 (2015) (Connecticut); D.C. Code §§ 31-106.01, 31-106.02 (District of Columbia); 110 Ill. Comp. Stat. §§ 992/1-1, et seq. (2018) (Illinois); Me. Rev. Stat. tit 9-A § 14-102 (2020) (Maine); Md. Code Ann. Fin. Inst. § 2-104.1 (2019) (Maryland); N.J. Stat. Ann. § 17-16ZZ-5 (2019) (New Jersey) N.Y. Banking Law § 710 *et seq.* (2020) (New York); R.I. Gen. Laws § 19-33-5 (2019) (Rhode Island); S.B. 6029, 2018 Leg., 65th Sess. (Wash. 2018) (enacted).

In response to this growing movement, the Department of Education and the servicing industry have made the questionable legal argument that state law is preempted by the Higher Education Act.[13] But this paper will argue that state supervisory agencies can sidestep that attack by simply supervising for compliance with federal consumer protection law using § 1042. A federal law cannot preempt another federal law. And federal consumer protection law—in particular the prohibition against unfair, deceptive, or abusive acts or practices ("UDAAP")—gives state examiners broad tools to crack down on payment processing errors, payment plan issues, misleading statements, omissions of key information, systems errors, and the many other problems plaguing the student loan servicing market. Because the student loan servicing market is highly concentrated among only three major players who are all nonbanks,[14] state supervision to drive market reform is achievable.

More broadly, as states expand their supervisory authority over nonbanks in all financial markets, they should consider putting federal consumer financial law and UDAAP at the center of their exam programs. UDAAP is a broad standard, which like the "safety and soundness" standard used by bank supervisors for decades, inherently lends itself to the collaborative and less punitive nature of the supervisory tool. In propping up its relatively new nonbank supervision program, the CFPB proved that UDAAP examiners can drive nonbank markets towards working better for consumers, behind the scenes. States can do the same.

[13] *See* Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619 (Mar. 12, 2018).

[14] States' abilities to fill this void and supervise compliance with federal consumer financial law are greatest with regard to nonbanks like loan servicers, debt collectors, consumer-reporting agencies, data brokers, small-dollar lenders, online lenders, "fintech" companies, and debt-relief companies, because these markets are dominated by nonbank companies for which there is no risk of National Bank Act preemption.

Background

History of Supervision

In its initial conception, the right to supervise a corporation was a power inherently held by the government that created a corporation with a charter. As the Supreme Court noted in 1905, a state's legislature is the "visitor" i.e. supervisor "of all corporations founded by it."[15] As Justice Scalia described it, "[t]he relationship between sovereign and corporation was understood to allow the States to use [their authority] to exercise control 'whenever a corporation [wa]s abusing the power given it, or, . . . acting adversely to the public, or creating a nuisance.'"[16]

The Supreme Court has always understood a state's supervision or "visitation" authority as more than, and different than, the power to merely enforce laws. Visitorial power is "[t]he act of examining the affairs of a corporation."[17]

In the famous *Dartmouth College* case, Justice Story, describing visitation, wrote that every corporation was "'subject to the controlling authority of its legal visitor, who . . . may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of [its] trusts,' and who are 'liable to no supervision or control.'"[18] The state is the "legal visitor" unless it chooses not to be by law or charter.

The banking and financial sector is one of the few markets in which states exercise a relatively expansive version of this supervision authority. Since the beginning of banking, states played a supervisory role, though initial supervision was relatively loose given the simplicity of early banking.[19] Throughout the 1800s bank supervision

[15] Guthrie v. Harkness, 199 U.S. 148, 157 (1905).

[16] Cuomo v. Clearing House Ass'n, LLC, 557 U.S. 519, 526 (2009) (quoting Horace L. Wilgus, *Private Corporations*, in 8 American Law and Procedure § 157, at 224–25 (James P. Hall ed., 1910) (alterations in original)).

[17] *Id.* (quoting 2 John Bouvier, A Law Dictionary 790 (15th ed. 1883)).

[18] *Id.* (quoting Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 676, 681 (1819) (Story, J., concurring)).

[19] *See* Kenneth Spong, Division of Supervision & Risk Mgmt., Fed. Res. Bank of Kansas City, Banking Regulation: Its Purposes, Implementation, and Effects 16 (5th ed. 2000).

became increasingly sophisticated. Between 1836 and 1863, bank supervision primarily consisted of reviewing the bank's own statements of condition.[20]

In 1864, the National Bank Act created federal bank charters, and with the charters came a new Office of the Comptroller of the Currency to supervise federal banks. However, the creation of national banks and national bank supervision did not reduce the role of state supervision. To the contrary, many banks chose to forgo federal charters and keep state charters, and as banking became more complex, state supervision became more rigorous.[21] By 1870, 17 states had created government agencies with the sole responsibility of bank supervision. Just 20 years later in 1890, most states in the union had a state agency devoted to supervising banks.[22] To this day, the United States has a dual banking system, with national and state charters; banks still have the choice to obtain either a state or federal charter, and therefore, a state or federal supervisor.[23]

For most of the history of supervision, examiners focused on "safety and soundness" to prevent bank failures; consumer compliance examinations were considered part of a safety and soundness review.[24] But federal and state bank supervisors started conducting separate exams with the sole purpose of checking for compliance with consumer laws in the 1970s. In September 1974, the Federal Deposit Insurance Corporation ("FDIC") for the first time adopted separate exams and exam reports just for consumer compliance.[25] Soon after, Congress created the Federal Financial Institutions Examination Counsel ("FFIEC") in 1978[26] to coordinate the supervisory actions of federal and state bank supervisors, and almost immediately the FFIEC created a separate task force on consumer compliance to "promot[e] examination uniformity in enforcement of an impressive array of consumer laws and regulations."[27]

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[20] *Id.* at 17.

[21] *See id.* at 19 (arguing that, in the 1870s and 1880s, state charters bounced back because checks began to outpace bank notes in popularity, and national bank's profits on bank notes declined due to declining yields on bonds eligible for note backing).

[22] *See* Kris James Mitchener & Matthew Jaremski, *The Evolution of Bank Supervision: Evidence from U.S. States* 38 (Nat'l Bureau of Econ. Research, Working Paper No. 20603, 2014), https://www.nber.org/papers/w20603.pdf.

[23] State-chartered banks can receive FDIC-deposit insurance or be a member of a Federal Reserve bank, and FDIC insurance comes with FDIC supervision while Federal Reserve membership comes with FRB supervision. So, state-chartered banks that are also either FDIC-insured or a Federal Reserve member bank have both state and federal supervisors.

[24] *See* COMP. GEN., OCG-77-1, 2 FEDERAL SUPERVISION OF STATE AND NATIONAL BANKS 4-41 (1977) ("Until recently, all three agencies reviewed consumer credit as part of their regular commercial examinations."), *available at* https://www.gao.gov/assets/120/117148.pdf.

[25] *See id.*

[26] Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3641.

[27] *See* 1979 FFIEC ANN. REP. 14, *available at* https://www.ffiec.gov/PDF/annrpt79.pdf.

The rigor of consumer compliance supervision of banks continued to grow, both at the state and federal level, until 2010, when Congress created the CFPB in response to the 2008 financial crisis.[28] Congress transferred primary federal jurisdiction over bank supervision of consumer laws to the CFPB and notably gave the CFPB supervisory authority over *nonbank* financial companies like payday lenders, mortgage servicers, debt collectors, consumer reporting agencies, and student loan servicers, which is something federal bank regulators did not previously have.[29] Before the CFPB, only states held supervisory authority over nonbanks.

Modern Consumer Law Supervision

In practice, today consumer law supervision consists of examiners sending information requests, going on-site to tour facilities and talk with company staff, reviewing accounts to see if the company is in compliance, issuing confidential reports with findings and directions for improvements or remediation, and referring issues to public enforcement officials if warranted.

While every supervision agency's authority is a little different, there are three key and interrelated features of modern supervision. Supervision is (1) not adversarial, (2) voluntary, in a sense, and (3) confidential. Supervision is not adversarial, like typical law enforcement actions. There is no judge. There are no motions and there are no discovery rules. There is little process. The point of supervision is to create an open and continuous dialogue between supervised entities and the government to prevent problems before they arise and remedy problems in the ordinary course of business.[30] Law enforcement is meant to shame and punish companies into compliance. Supervision is meant to coax, persuade, and guide companies into compliance.

[28] Consumer Financial Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1955 (codified at 12 U.S.C. § 5481 (2012)).

[29] *See* 12 U.S.C. § 5515 (2012) (CFPB's authority to conduct bank supervision regarding consumer-protection laws); *id.* § 5514 (CFPB's nonbank supervisory authority).

[30] *See* Ernest T. Patrikis, First Vice President, N.Y. Fed. Res. Bank, Remarks Before the PSA 1997 Annual Meeting: Supervision and Regulation (Mar. 1, 1997) ("I do not regard the supervisory process as an adversarial proceeding. The bank supervisor will want to ascertain whether the bank is operating in a safe and sound manner and in compliance with law and regulation. In most cases, the examiner and the board of directors of the examined institution will have broadly common goals, although they may not always agree on how to get there. Of course, part of a supervisory examination includes compliance and that is regulatory in nature. The bank supervisor can use a number of remedial tools. The key tool is the periodic report of examination. The senior supervisor at the Reserve Bank meets and discusses the results of the examination with the examined institution's board of directors. If the findings are adverse but not serious, various kinds of supervisory action can be taken—such as requesting the institution to sign a supervisory letter or a memorandum of understanding. For more severe problems, formal public action, such as a written agreement or a consent cease-and-desist order, can be taken."), *available at* https://www.newyorkfed.org/newsevents/speeches/1997/ep970303.

To that end, while responding to examiner requests and complying with registration and licensing requirements are all legal requirements, actually complying with the instructions of examiners or even examination reports is often voluntary as a technical matter. Exam reports are typically not enforceable in court. But as Comptroller Dugan said in his testimony before the creation of the CFPB, "because of the tremendous leverage that bank supervisors have over banks, management normally takes great pains to [correct problems that examiners identify]."[31] Of course, if a company refuses to take a recommendation, supervisory agencies often have the authority to rescind a charter or license (which they rarely do for compliance issues) or refer a matter to an internal or external law enforcement official who can sue in court for the underlying legal violation (a more realistic threat for consumer compliance issues).

The fact that a supervisory agency has broad visitorial authority to request any document, and the fact that examiners' recommendations are technically voluntary, means that a supervisory agency has the ability to make recommendations that can extend beyond the absolute minimum necessary to comply with the law. It is this concept that allows a supervisory agency to require, for example, compliance management systems,[32] which are not legally required themselves, but supervisors have long understood are necessary to achieve appropriate levels of compliance with the rules that are legally required. In so doing, examiners know that a company is likely to follow the recommendation only if the examiner could refer the matter to a law enforcement official with authority to sue, or if the threat of the "nuclear option," pulling a license or charter, is realistic. For this reason, to protect their legitimacy, state and federal supervision authorities tend to only cite consumer law violations and recommend remedies where the agency also has authority to litigate over the violation, or the agency has a close relationship with a law enforcement agency such as an attorney general who will litigate for the supervisory agency.

As a general rule, supervisors do not disclose their findings or even the existence of a particular examination to the public.[33] The purpose of this secrecy is to ensure that the process remains non-adversarial and communication and documents flow freely. If exam findings were public, companies would fight every document request like they often do in an enforcement investigation, and companies would monitor every document and conversation in a manner that would reduce efficiency of the supervision tool. It would also decrease the

[31] *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. 19 (2009) (statement of John C. Dugan, Comptroller, Office of the Comptroller of the Currency).

[32] *See* FFIEC, Uniform Interagency Consumer Compliance Rating System, Docket No. FFIEC-2016-0003 (Mar. 31, 2017).

[33] *See, e.g.*, 12 C.F.R. § 1070.2 (2018) (defining confidential supervisory information for CFPB); *id.* § 4.36 (discussing non-public OCC information as confidential and privileged); FDIC, FIL-13-2005, Interagency Advisory on Confidentiality of CAMELs Ratings and Other Nonpublic Supervisory Information (2005) (document of all federal bank regulatory agencies indicating that disclosing confidential supervisory information may result in criminal prosecution under 18 U.S.C. § 641 (2012)).

incentive to come into voluntary compliance after receiving an examination report—in supervision, the government keeps matters confidential to encourage cooperation and quick compliance. The principle of confidentiality is so ingrained in the nature of supervision that the common law has recognized a bank examination privilege against discovery of bank supervision materials in litigation.[34]

History of UDAAP

Any discussion of consumer law supervision would be incomplete without a brief description of the broadest and arguably most important substantive law that consumer compliance examiners enforce—the prohibition against unfair, deceptive, and abusive acts or practices.

The history of UDAAP begins with the Federal Trade Commission's founding in 1914. When Congress created the FTC, it was originally conceived as an antitrust agency, with authority to prohibit "unfair methods of competition."[35] In so doing, Congress intentionally left the standard undefined. Instead, the intent of Congress was to create a new pseudo-common law that would evolve over time to prevent all forms of unfair competition both then existing and that might arise in the future. The Senate Committee Report explained:

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one representative of the Illinois Manufacturer's Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.[36]

Similarly, the House Conference Report noted that: "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task."[37]

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[34] *See, e.g.*, In re Bankers Trust Co., 61 F.3d 465, 471 (6th Cir. 1995).

[35] *See* Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 48 (1969).

[36] S. Rep. No. 597, at 13 (1914).

[37] H.R. Rep. No. 1142, at 19 (1914) (Conf. Rep.).

Congress passed the Wheeler-Lea Act in 1938 to amend into the FTC Act a prohibition against "unfair and deceptive acts or practices," or "UDAP." The Wheeler-Lea Act was widely seen at the time as a response to the 1931 Supreme Court case *FTC v. Raladam*,[38] which held that the FTC could only take action against unfair practices if the FTC could prove that the practice injured actual competitors and not just consumers or the general public.[39] Thus Wheeler-Lea was intended to give the FTC authority over unfair and deceptive practices that harmed consumers even if it could not prove direct harm to competitors. The general policy of the prohibition against unfair and deceptive practices is set out in a contemporaneous Supreme Court decision:

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character nor take away its power to deceive others less experienced. There is no duty resting upon the citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.[40]

In the 1960s and 1970s, all 50 states passed their own "mini-FTC Acts" to similarly ban deceptive, unconscionable, or unfair trade practices, though each state's statute is a little different.[41]

In the Supreme Court's landmark 1972 case *FTC v. Sperry & Hutchinson Co.*,[42] the Court endorsed a broad reading of the FTC's unfairness authority that had developed since passage of the Wheeler-Lea Act 40 years prior. It claimed that though the standard was "elusive," the FTC could "like a court of equity, consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[43] Bolstered

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[38] 283 U.S. 643 (1931).

[39] *See id.*; Robert Freer, Commissioner, Fed. Trade Comm'n, Address at the Annual Convention of the Proprietary Association (May 17, 1938), *available at* https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf.

[40] FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937).

[41] The National Consumer Law Center publishes an excellent survey of state UDAP laws. *See* NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES (2018), *available at* http://www.nclc.org/images/pdf/udap/udap-report.pdf.

[42] 405 U.S. 233 (1972).

[43] *Id.* at 245.

by this decision, and emboldened by an emerging consumerism movement,[44] the FTC pursued a series of ambitious policy efforts, including, for example, a proposal to prohibit advertising sugared foods to children.[45]

After this surge of consumer actions came a backlash, resulting in a short closure of the agency.[46] In response, in the early 1980s the FTC embarked on an effort to put significant guardrails on its broad unfair and deception standards, boiling both down to a set of elements that still define both standards today.

Under this 1980s rubric, a deceptive practice is defined as a (1) "representation, omission, or practice that is likely to mislead," (2) as examined "from the perspective of a consumer acting reasonably in the circumstances, and (3) about a "material" subject.[47] An unfair practice is defined as one that (1) causes or is likely to cause substantial injury to consumers, (2) that is not reasonably avoidable by consumers, and (3) not outweighed by countervailing benefits to consumers or competition.[48] The prongs for unfairness were later codified into the FTC Act in 1994.[49]

Meanwhile, in 1975 the Federal Reserve Board was given authority to prescribe rules for banks under the unfair and deception standards, and all the banking regulators were given authority to enforce and supervise against those rules.[50] The FRB used its authority to pass UDAP rules a single time (Regulation AA). But in 2000, the OCC announced a $300 million settlement against Providian National Bank, directing it to cease certain unfair and deceptive practices involving credit protection programs.[51] The matter was controversial at the time because the OCC was not enforcing an FRB rule, but rather, the general UDAP standard in the FTC Act. The OCC justified the action as an inherent extension of its broad supervisory authority to ensure safety and soundness of banks.[52] The

[44] Ralph Nader published an influential report, which many credit as inspiring the subsequent resurgence, arguing that the FTC had been ineffective at achieving its goals. *See* EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969).

[45] *See* Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967 (Apr. 27, 1978).

[46] *See* William C. MacLeod & Robert A. Rogowsky, *Consumer Protection at the FTC during the Reagan Administration*, in REGULATION AND THE REAGAN ERA 71 (Roger E. Meiners & Bruce Yandle eds., 1989).

[47] FTC Policy Statement on Deception, Cliffdale Assocs., Inc., 103 F.T.C. 110, app. at 174 (1984).

[48] FTC Policy Statement on Unfairness, International Harvester Co., 104 F.T.C. 949, app. at 1070 (1984).

[49] 15 U.S.C. § 45(n) (2012).

[50] *See* Magnuson Moss Warranty-Federal Trade Commission Improvements Act of 1975, 15 U.S.C. §§ 2301–12 (2012).

[51] Consent Order, Providian Nat'l Bank, OCC Docket No. 2000-53 (June 28, 2000).

[52] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, News Release 2000-49, *Providian to Cease Unfair Practices, Pay Consumers Minimum of $300 Million Under Settlement with OCC and San Francisco District Attorney* (June 29, 2000) (Comptroller Hawke stated: "When a bank engages in unfair or deceptive marketing practices, it damages its most precious asset—the trust and confidence of its customers. That relationship of trust and confidence is central to the bank's safe and sound operation. We will not tolerate abuses that breach that trust through unfair and deceptive practices."), *available at* https://www.occ.gov/news-issuances/news-releases/2000/nr-occ-2000-49.html.

Federal banking regulators soon started enforcing and supervising for unfair and deceptive practices in earnest, using the FTC's guidance and precedent to guide their interpretation of the standards.[53]

In 2010, Congress created the CFPB and gave it authority to enforce and supervise these UDAP standards against banks and many nonbanks, as well as a new authority to prevent "abusive" practices, defined by statute (the additional "A" creates the acronym "UDAAP"). An act or practice is abusive when it:

(1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) Takes unreasonable advantage of:

(A) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service;

(B) a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or

(C) a consumer's reasonable reliance on a covered person to act in his or her interests.[54]

Given its recency, the abusive standard remains relatively uninterpreted by case law, though there are a few cases interpreting the standard.[55]

Importance of UDAAP Supervision

The importance of UDAP or UDAAP cannot be overstated. It has been the legal basis for nearly all of the most important consumer protection actions in the last few decades. The first cigarette health warning disclosures were the result of an FTC UDAP rule.[56] The most recent settlement involving the famous Equifax data breach was

[53] *See* FDIC, FIL-57-2002, GUIDANCE ON UNFAIR OR DECEPTIVE ACTS OR PRACTICES (2002) (inactive); OFFICE OF THE COMPTROLLER OF THE CURRENCY, AL 2002-3, GUIDANCE ON UNFAIR OR DECEPTIVE ACTS OR PRACTICES (2002).

[54] Dodd–Frank Wall Street Reform and Consumer Protection Act § 1031(d) (2010), 12 U.S.C. § 5531(d) (2012).

[55] *See, e.g.*, CFPB v. ITT Educational Services, Inc., 219 F.Supp.3d 878, 918-21 (S.D. Ind. 2015).

[56] *See* Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (July 2, 1964) (to be codified at 16 C.F.R. pt. 408) ("Cigarette Rule").

filed using the FTC's and CFPB's UDAP authorities.[57] The OCC and CFPB could only take action against Wells Fargo's fake account practices using their respective UDAP authorities.[58] Most federal data privacy law enforcement actions are based on UDAP.[59] The CFPB brought its lawsuit alleging that Navient steered millions of student loan borrowers into forbearance instead of generous payment plans using the CFPB's UDAAP authority.[60] And the landmark $25 billion multi-state mortgage servicing settlement for wide-spread robo-signing practices in the wake of the 2008 financial crisis was a settlement of, primarily, a combination of state and federal UDAP claims. There are *many* other examples.

In addition, in recent years UDAAP has increasingly been the basis for significant supervisory accomplishments. By definition, supervisory advancements and accomplishments are confidential, so they can often go unnoticed. But since 2012, the CFPB has been publishing *Supervisory Highlights* editions every quarter to publicize supervisory actions while maintaining confidentiality of supervised entities.[61] Many of the achievements described in those publications used the CFPB's UDAAP authority.

Given the importance of UDAAP to the progression of consumer protection law over the last few decades, state and federal supervisory agencies should continue to embrace the flexible standards of UDAAP and place the standards at the middle of their consumer protection exams, especially in markets where there isn't a comprehensive consumer protection law like student loan servicing. The standards are broad enough to allow examiners and supervisory agencies to use examiner discretion to prevent emerging problems, similar to the traditional "safety and soundness" standard. And because supervision is confidential and non-punitive, examiners can apply new interpretations of UDAAP without fear that such an interpretation might be unfair to an unsuspecting company. Supervision is a soft but quick way to give companies notice that a certain practice is illegal—more like a pre-enforcement warning to stop violating the law than a full-blown lawsuit. Without the punishing consequences of a law enforcement action, examiners can remedy UDAAPs quickly and move on to the next one.

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[57] *See* Stipulated Order for Permanent Injunction and Monetary Judgment, FTC v. Equifax, Inc., No. 1:19-mi-99999-UNA (N.D. Ga. July 22, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/172_3203_equifax_proposed_order_7-22-19.pdf.

[58] *See* Consent Order, Wells Fargo Bank, N.A., OCC Docket No. 2018-025 (Apr. 20, 2018), *available at* https://www.occ.gov/static/enforcement-actions/ea2018-025.pdf.

[59] *See* FTC Releases 2018 Privacy and Data Security Update, FTC (Mar. 15, 2019), https://www.ftc.gov/news-events/press-releases/2019/03/ftc-releases-2018-privacy-data-security-update.

[60] Complaint, CFPB v. Navient Corp., No. 3:17-cv-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017).

[61] CFPB, *Supervisory Highlights*, https://www.consumerfinance.gov/policy-compliance/guidance/supervisory-highlights/ (last visited Mar. 10, 2020).

For example, according to the CFPB's Fall 2016 *Supervisory Highlights* edition, CFPB examiners found that auto loan companies were keeping personal property found in repossessed vehicles and only returning the personal property after a consumer paid a fee. By definition, these consumers were cash-strapped and were being deprived of personal property of all types—from the mundane to the essential. The CFPB announced: "CFPB examiners concluded that it was an unfair practice to detain or refuse to return personal property found in a repossessed vehicle until the consumer paid a fee or where the consumer requested return of the property, regardless of what the consumer agreed to in the contract."[62] The CFPB found the issue and quickly resolved it in the ordinary course of their regular exam work. State supervisors do the same thing every day, but they too could be using this broad and powerful federal UDAAP tool to achieve even more gains.

[62] FALL 2016 CFPB SUPERVISORY HIGHLIGHTS 5, *available at* https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.

State Regulator Authority under § 1042

Section 1042 of the Dodd-Frank Act

Section 1042[63] gives states authority to enforce federal consumer financial law, after providing notice to the CFPB and an opportunity to join the matter. Mark Totten wrote an insightful article describing the importance of this authority in 2013.[64] Traditionally, commenters and states have focused on the grant of authority to state Attorneys General. The basic statutory structure is that § 1042 gives AGs authority to "enforce provisions of this title" and "regulations issued under this title," referring to Title X of the Dodd-Frank Act. The prohibition against UDAAP appears in Title X, and thus, the statute is clear that AGs can sue for violations of UDAAP. In his 2013 article, Totten described a broader reading of the statute: since any violation of federal consumer financial law is a violation of § 1036 of Title X,[65] state AGs can enforce all federal consumer financial laws, not just UDAAP.[66]

History has vindicated Totten's argument. There have been at least five state AG actions using § 1042 to sue for violations of federal consumer financial laws other than UDAAP.[67] None were dismissed for lack of authority.

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[63] Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 § 1042, 12 U.S.C. § 5552 (2012).

[64] Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd–Frank*, 99 Iowa L. Rev. 115 (2013).

[65] *See* 12 U.S.C. § 5537 (2012) ("It shall be unlawful for any covered person or service provider to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law.").

[66] Totten, *supra* note 64, at 136–41.

[67] Navajo Nation v. Wells Fargo & Co., 344 F. Supp. 3d 1292 (D.N.M. 2018), *appeal filed*, No. 18-162 (10th Cir. Oct. 26, 2018); Att'y Gen. v. Ocwen Fin. Corp., No. 9:17-cv-80496 (S.D. Fla. Apr. 20, 2017); Notice of Removal, Pennsylvania v. Think Finance, Inc., No. 2:14-cv-7139, 2018 WL 1620981 (E.D. Pa. Dec. 17, 2014), ECF No. 1; Illinois v. CMK Invs., Inc., No. 14 C 2783, 2014 WL 6910519 (N.D. Ill. Dec. 9, 2014); Notice of Removal, Mississippi v. Experian Info. Sols., Inc., No. 1:14-cv-00243 (S.D. Miss. June 12, 2014), ECF No. 1.

State Supervisors' Authority to Supervise for Violations of Federal Consumer Financial Law

While commenters like Totten have observed that Dodd-Frank created "the largest dual-enforcement regime[] ever,"[68] and that state AG enforcement of federal consumer financial law under § 1042 was a core feature of the law, scholars and the consumer protection community have largely ignored the fact that § 1042 also grants state supervisory authorities the power to supervise for compliance with federal consumer financial law. Section 1042(a)(1) states:

> A **state regulator** may bring a civil action or other appropriate proceeding to enforce the provisions of this title or regulations under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law, and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity.[69]

The most conservative reading of this section is that, in addition to state attorneys general, state government agencies including supervisory agencies that charter, license, or otherwise have authority over an entity can sue them for violations of federal consumer financial law. In those proceedings, the agency can secure either remedies normally available to it or the remedies found in Title X.

But when this authority is read in concert with the organic state statutes granting supervisory authority to state regulators, it becomes clear that state regulators also have authority to *supervise* for compliance with federal consumer financial law. This is the best reading of the statute, even though the words "supervision," "visitorial power," or "examination" do not appear in § 1042, for the below reasons.[70]

First, the statute provides that a state regulator can seek "remedies otherwise provided under other provisions of law with respect to such an entity." Supervisory agencies are provided with supervisory remedies under other provisions of law—their own organic statutes—with respect to supervised entities.

[68] *See* Totten, *supra* note 64, at 118.

[69] 12 U.S.C. 5552(a)(1).

[70] The legislative history does not shed much light on the statute. The Senate Committee on Banking, Housing, and Urban Affairs describes the purpose of this section with a simple, high-level sentence: "State regulators are also authorized to take appropriate action against State chartered entities." S. Rep. No. 111-176, at 175 (2010). This sentence does not appear to resolve the matter one way or the other.

Second, § 1042 at the very least grants state regulators authority to “bring a civil action” against its supervised entities for violations of federal consumer financial law. Inherent in that grant of authority is a corresponding authority to use its existing investigative powers to prepare such an action. Authority to sue would mean nothing without authority to prepare a lawsuit. And the most common way that state supervisory agencies uncover potential lawsuits is through their supervisory authority. State AGs use their more formal investigation and subpoena power. To date, nobody has questioned whether state AGs with authority to enforce federal consumer financial law also have authority to investigate for violations. Similarly, state supervisory agencies should be able to look for violations of laws in their own way when they have authority to sue.

Third, to suggest otherwise would border on the absurd. State agencies with clear grants of supervisory and licensing authority can examine an entity more generally for compliance with licensing requirements, state laws, and other matters enumerated in the agency’s organic statute. If an agency comes across a violation of federal consumer financial law in the course of an examination to look for other issues, even under the most conservative reading of the statute, it could sue the company to stop the violation and get other remedies. What, then, would it mean if a state agency doesn’t also have supervisory authority over compliance with federal consumer financial law? Does it mean the agency can only sue for violations but not put violations in examination reports? Does it mean the agency can sue for violations but only if it didn’t try really hard to find the violations? Is the examiner prohibited from speaking to a company employee about the potential violation at all before a complaint is filed (even for settlement purposes)? To conclude that a supervisory agency has enforcement authority, but not supervisory authority, leads to a number of practical absurdities.

Presumably, nobody would argue that the supervisor cannot even speak to the supervised entity about something it sees. Nor would anyone argue that examiners cannot speak freely about findings with enforcement attorneys within the same agency. At a minimum, there is no legal principle stopping a state supervisor from sending a non-binding communication to a company about a perceived violation and if the company does nothing about it, sending an internal referral to an employee with authority to prosecute. And that is, more-or-less, a description of supervision.

Fourth, the *Federal Register* notices issued by the CFPB while promulgating 12 CFR 1082.1 suggest this is the appropriate reading of § 1042. That regulation specifies the process for state agencies to provide the CFPB with notice of a pending action under § 1042. In the rulemaking process, commenters asked the CFPB to clarify whether state agencies would need to notify the CFPB of “examination findings or licensing proceedings.”[71] In

[71] *See* State Official Notification Rule, 77 Fed. Reg. 39,112 (June 29, 2012) (to be codified at 12 C.F.R. pt. 1082).

particular, the Conference of State Bank Supervisors, an association of state supervisory agencies, pleaded with the CFPB to not include examination findings as "actions" requiring notice because to do so would create an unreasonable burden.[72] The CFPB gave CSBS relief from the notice requirement and concluded that notice would only be necessary for pending "adjudicative proceeding[s]" and not examinations.[73] However, the CFPB also "encourage[d] State Officials to consult with the Bureau whenever interpretation of Federal consumer financial law . . . is relevant to a State regulatory or law enforcement matter, even if it is not the type of action for which notification is required."[74] Such a response appears to recognize that state regulators, like state supervisory agencies, have a reason to interpret federal consumer financial law as part of their exams.[75]

And fifth, even if § 1042 did not exist, where a state supervisory agency has broad authority to examine the general affairs of a covered person based on its own organic statute, it would likely have authority to supervise for violations of federal consumer financial law anyway. Regardless of the state agency's authority, companies already have to comply with the Consumer Financial Protection Act. Supervisory authority typically means that the agency can look into all the affairs of the company. Violations of the law, any law, could fall within the typically broad grant of supervisory authority in the same way that the OCC had authority over UDAP before the Dodd-Frank Act even though it wasn't explicitly in the OCC's authorizing statute.

For example, in January 2017 California passed the Student Loan Servicing Act, which gave the Department of Business Oversight ("DBO") authority to license and supervise student loan servicers. The law gave DBO broad visitorial rights. The Commissioner can "examine the affairs of each licensee," including by reviewing books, records, and documents, and examining employees and officers.[76] The Commissioner has the authority to "direct the discontinuance of . . . unsafe or injurious practices"[77] or "direct the discontinuance of the failure to comply [with the Student Loan Servicing Act]."[78] As is typical with state supervisory authorities, the Commissioner "may immediately revoke the licensee's license if the licensee fails to comply with any order issued under this

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[72] *See* Letter from John Ryan et al., President, Conf. of State Bank Supervisors, to Monica Jackson, Exec. Sec'y, CFPB (Sept. 26, 2011), *available at* https://www.regulations.gov/document?D=CFPB-2011-0005-0007.

[73] *Id.*

[74] *Id.*

[75] This chain of events, while informative is, admittedly, not conclusive. That is because some state laws incorporate or mirror federal consumer-financial law.

[76] CA. FIN. CODE § 28152 (2018).

[77] *Id.* § 28158.

[78] *Id.* § 28160.

division."[79] And the Commissioner is directed to "cooperate with any agency of the state, the federal government, or other states."[80]

DBO should clearly have authority to instruct a student loan servicer to cease violating federal consumer financial law. DBO can "examine the affairs" of student loan servicers and direct discontinuance of "unsafe or injurious practices."[81] Compliance with a federal law governing student loan servicing is an important "affair" of a student loan servicer, and noncompliance is an "unsafe or injurious practice." In this way, DBO would have authority to supervise to prevent UDAAP even without § 1042. And since § 1042 does exist, it has authority to sue over those violations as well.

Connecticut was the first state to pass a specific student loan servicer supervision statute in 2016. That law requires servicers to obtain a license.[82] The statute gives broad authority to Connecticut's Department of Banking to license and examine student loan servicers to ensure, among other things, that licensees' "business will be conducted honestly, fairly, equitably, carefully and efficiently . . . and in a manner commanding the confidence and trust of the community."[83] Connecticut's law represents a broad visitorial power over nearly every aspect of the servicer's business, including compliance with Federal law. In fact, the statute explicitly states that:

> A student loan servicer shall comply with all applicable federal laws and regulations relating to student loan servicing . . . . In addition to any other remedies provided by law, a violation of any such federal law or regulation shall be deemed a violation of this section and a basis upon which the commissioner may take enforcement action pursuant to section 36a-852.[84]

Together, this language already provides the Connecticut Department of Banking with the authority to supervise for compliance with federal consumer financial law, including the UDAAP standard. Section 1042 merely bolsters that authority.

To summarize, §1042 gives state regulators enforcement authority over federal consumer financial law. Since state regulators' enforcement actions start in supervision, they can supervise for federal consumer financial law

[79] *Id.* § 28164.

[80] *Id.* § 28152(a).

[81] *Id.* §§ 28152, 28164.

[82] CONN. GEN STAT. § 36a-847(a)(1) (2018).

[83] *Id.* § 36a-847(c)(2).

[84] *Id.* § 36a-853.

too, both because it naturally follows from the grant of enforcement authority and because supervisors already have broad authority to review what they wish.

Student Loan Servicing

The theory in this article is especially important to state regulators overseeing the student loan servicing market. As noted in the Introduction, the US is in the middle of a student loan crisis driven in part by student loan servicers. The federal government has washed its hands of the problem, and eleven states and counting have stepped up to fill the void by passing laws to create state-level supervision of student loan servicers.

Those regulators should consider using § 1042 to supervise for federal consumer financial law for two reasons: (1) regulators can use it to side-step the preemption roadblocks put up by the Department of Education, and (2) federal consumer financial law is effective.

ED's Preemption Roadblocks Cannot Stop State Supervision for Compliance with Federal Law

After states began creating student loan servicing licensing and supervision programs, the Department of Education sought to obstruct states from overseeing student loan servicers through a series of extraordinary steps. First, as revealed in litigation in the District Court of Connecticut, in December 2017 ED issued a memorandum to its servicers stating that all documents held by servicers pertaining to federal student loans were protected by the federal Privacy Act as if they were government records.[85] Next, in March 2018 ED issued a guidance document arguing that state laws and licensing requirements were preempted by the Higher Education Act.[86] ED combines these two conclusions: (1) that the Privacy Act covers all federal loan records and (2) that state laws are preempted by the HEA, to justify telling servicers to refrain from giving state examiners federal loan records (thereby preventing all effective supervision). The second piece is essential to ED's strategy of obstruction because the Privacy Act does not prevent disclosure to state agencies engaged in civil law

[85] *See* Pa. Higher Educ. Assistance Agency v. Perez, 416 F. Supp. 3d 75, 83 (D. Conn. 2019).

[86] Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619 (interpretation issued Mar. 12, 2018).

enforcement activity *if the activity is authorized by law*.[87] ED argues the state supervision is not authorized by law because state law is preempted.

As of the writing of this article, some judges have been skeptical of ED's interpretation, while others have been receptive.[88] However, the court decisions that pose the biggest threat to state student loan servicing supervisory programs approached the preemption question differently than ED did in its notice. For example, on April 30, 2020, a district court judge ruled that (1) Connecticut's licensing authority over a student loan servicer's handling of loans owned by the federal government was an invalid exercise of state authority and thus preempted, (2) any document request based on that preempted state authority was invalid, and (3) the servicer was bound by ED's above interpretation of the Privacy Act, and thus complying with a supervisory document request would come in direct conflict with that reading of the federal law.[89]

This article does not address the merits of the preemption debate. Instead, it proposes a simple work-around—states should just supervise for compliance with federal consumer financial law because a federal law cannot preempt another federal law. State examiners can indicate in their opening letters with servicers, document requests, and in Privacy Act notices to the Department of Education that they are examining for compliance with federal consumer financial law pursuant to § 1042 of the Consumer Financial Protection Act.[90] By doing this, states can sidestep having to litigate over these preemption issues or, where a potential Privacy Act dispute would be rooted in a state law preemption argument, the Privacy Act itself.[91]

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[87] *See* 5 U.S.C. § 552a(b)(7) (2012).

[88] KEVIN M. LEWIS & NICOLE VANATKO, CONG. RES. SERV., PREEMPTIVE STRIKE: DOES FEDERAL LAW DISPLACE STATE REGULATION OF STUDENT LOAN SERVICERS? 3–5 (2019), *available at* https://fas.org/sgp/crs/misc/LSB10302.pdf.

[89] Pa. Higher Educ. Assistance Agency v. Perez, No. 3:18-cv-1114, 2020 WL 2079634 (D. Conn. April 30, 2020); *see also* Student Loan Servicing Alliance v. District of Columbia, 351 F. Supp. 3d 26, 48–49 (D.D.C. 2018).

[90] Although this approach would clearly moot preemption arguments, it would not necessarily obviate all potential Privacy Act disputes. For example, the Consumer Financial Protection Bureau encountered an effort to obstruct discovery in litigation against Navient Corporation in 2018 and was forced to obtain a court order from a federal judge compelling Navient to produce records over the objections of ED. *See* Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017) (litigation ongoing). Recent litigation shows that state banking regulators can also follow the roadmap CFPB built in litigating against Navient—seeking a judicial remedy (a court order) to address any residual Privacy Act disputes and enforce its access to records, all while sidestepping broader questions about preemption and the applicability of state law. *See* California v. Pa. Higher Educ. Assistance Agency, California Department of Business Oversight, 60DBO-104155 (complaint filed Apr. 1, 2020), *available at* https://dbo.ca.gov/wp-content/uploads/sites/296/2020/04/PHEAA-lawsuit.pdf.

[91] Courts might still argue that the HEA preempts a state's licensing authority (and thus that the servicer is not properly within the regulator's jurisdiction such that it could use § 1042) because the state could "veto" the Department of Education's choice of servicer, which is the primary justification in the *PHEAA v. Perez* decision. However, states could easily sidestep this by vesting supervisory authority in a regulator without giving the regulator the "nuclear option" of pulling a license. While licensing and supervisory authority often come in tandem, it is not an absolute requirement. Since the first federal court

Of course, when supervising for compliance with federal consumer financial law, examiners should still be careful not to cite violations for conduct affirmatively required by the Higher Education Act. While a federal law cannot preempt another federal law, two federal laws can come into conflict. *Theoretically*, though the author is unaware of any such conflicts, certain interpretations of federal consumer financial law—including the prohibition against unfair, deceptive, or abusive acts or practices—could conflict with the Higher Education Act. A court would resolve such a conflict using the normal canons of statutory interpretation, such as the cannon of *generalia specialibus non derogant*, the specific governs the general.[92] Using this canon, one presumes that if there were a direct conflict, the law of UDAAP would yield to the more specific Higher Education Act in most instances.

There is, however, another canon of interpretation that would lead to the opposite conclusion—that the more recent statutory enactment controls.[93] A judge could interpret Congress' passage of the Dodd-Frank in 2010, and its decision to subject the student loan servicing market to UDAAP, as an implied repeal of any previously passed, and contrary, provision of the HEA.

Ultimately, this is an academic debate that need not be resolved here because a third canon, "the canon against reading conflicts into statutes," is likely to prevent any conflicts in the first place.[94] And in fact, the CFPB reads the two statutes harmoniously. In its examination procedures relating to student loan servicing, the CFPB states that: "adherence to [the Department of Education's contracts or regulations] may be relevant as the Bureau reviews for risks to consumers and the prohibition against UDAAPs." So, state examiners should just avoid conflict issues altogether and refrain from citing violations of federal consumer financial law where the conduct is expressly required or allowed in the HEA.

enjoined a state licensing law in 2018 on preemption grounds in *Student Loan Servicing Alliance v. District of Columbia*, several states have enacted laws that require state regulators to automatically issue a limited, irrevocable license to federal student loan servicers. *See* Colorado S.B. 19-002, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019); Maine L.D. 995, 129th Leg., Reg. Session (Me. 2019); New Jersey Assemb. B. 455, 218th Leg., Reg. Sess. (N.J. 2019); New York S01958, 2019 N.Y. State Assemb., Reg. Sess. (N.Y. 2019); Rhode Island H.B. 5936, 2019 Gen. Assemb., Reg. Sess. (R.I. 2019).

[92] *See* Perez-Guzman v. Lynch, 835 F.3d 1066, 1075 (9th Cir. 2016).

[93] *See* State v. Hall, 102 S.E. 694, 696 (W. Va. 1920) ("Frequently the order in which inconsistent statutes or inconsistent provisions of the same statute relating to like or similar subjects are enacted has a decisive effect or bearing upon the question of the legislative intent, meaning, and purpose where there is ambiguity, doubt, or uncertainty as to the object intended by it.").

[94] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018).

Supervision for compliance with federal consumer law is effective

In the prior section, this article lays out how state examiners can use § 1042 to sidestep ED's obstruction. This section shows why they should do it. Supervision for compliance with federal consumer financial law, and in particular UDAAP, can be used to review all aspects of a student loan servicers' business. It is an effective tool. Before the change in administration, the CFPB used this same tool to remedy the following UDAAP violations:

1. Allocating partial payments in a way that maximizes late fees,
2. Making misrepresentations about minimum payments on billing statements,
3. Charging improper late fees,
4. Failing to provide accurate tax information,
5. Making misrepresentations about discharging student loans in bankruptcy,
6. Making improper telephone communications,[95]
7. Allocating partial payments in a detrimental manner while failing to disclose the ramifications,
8. Processing automatic payments early, or late,
9. Making misrepresentations about late fees, like claiming there could be late fees for federal loans that do not carry late fees,[96]
10. Using "auto-default" to put a consumer's loan in default when her co-signer dies or files for bankruptcy even though the consumer continues to make on-time payments,
11. Failing to disclose the impact of forbearance on cosigner release eligibility,

[95] FALL 2014 CFPB SUPERVISORY HIGHLIGHTS, *available at* https://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf.

[96] FALL 2015 CFPB SUPERVISORY HIGHLIGHTS, *available at* https://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.

12. Using erroneous interest rates due to systems conversion errors,[97]

13. Systemically failing to approve valid Income-Driven Repayment plan applications,

14. Failing to provide consumers with an effective choice about which loans a payment would be allocated to,

15. Misleading consumers about whether prepayments would be applied to principal,

16. Systems errors affecting monthly payments,[98]

17. Failing to reverse late fees and interest capitalization caused by known errors in data received from the National Student Clearinghouse, and

18. Deceptive statements about interest capitalization during successive deferments.[99]

The CFPB also required servicers to maintain reasonable policies and procedures regarding the accuracy and integrity of information furnished to consumer reporting agencies, as required by the Fair Credit Reporting Act.[100] The details on all of these violations are spelled out in the *Supervisory Highlights* editions cited above.

Of course, examiners can also use the CFPB's public enforcement action against Navient as guidance when trying to determine the scope of their § 1042 authority to supervise for UDAAPs. In that case, the CFPB alleged[101] that Navient engaged in the following UDAAP violations:

1. Steering borrowers experiencing long-term financial hardship to forbearance rather than adequately advising them about income-driven repayment plans that would have been financially beneficial to those borrowers.

[97] WINTER 2016 CFPB SUPERVISORY HIGHLIGHTS, *available at* https://files.consumerfinance.gov/f/201603_cfpb_supervisory-highlights.pdf.

[98] FALL 2016 CFPB SUPERVISORY HIGHLIGHTS, *supra* note 62.

[99] SPRING 2017 CFPB SUPERVISORY HIGHLIGHTS, *available at* https://files.consumerfinance.gov/f/documents/201704_cfpb_Supervisory-Highlights_Issue-15.pdf.

[100] FALL 2015 CFPB SUPERVISORY HIGHLIGHTS, *supra* note 96.

[101] CFPB v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530, at *1 (M.D. Pa. Aug. 4, 2017).

2. Failing to adequately notify borrowers who consented to receive electronic communications of the need to recertify an Income-Driven Repayment plan, because email notifications did not include information to that end in the subject line or body of the email.

3. Sending Income-Driven Repayment plan renewal notices that only warned of delay resulting from a failure, and not mentioning the significant financial consequences.

4. Failing to grant co-signer release when the stated criteria for co-signer release is met.

5. Misallocating and misapplying payments.

6. Claiming that rehabilitating a student loan would result in removal of all adverse information regarding the student loan on a consumer report.

Perhaps more importantly, state supervisory agencies can use an already-made set of examination procedures when supervising for compliance with federal consumer financial law. Module 3 of the CFPB's Education Loan examination procedures provides comprehensive steps for reviewing whether a servicer is engaging in UDAAPs relating to payment processing, fees, billing statements and payment histories, borrower communications, cosigners, payoffs, servicing transfers, in-school deferments, repayment status, borrower benefits, variable interest rates, and Public Service Loan Forgiveness.[102]

If state regulators used § 1042 to supervise student loan servicers, they could initially lean on this precedent and the CFPB's exam procedures as guidance. And those state regulators already familiar with the market should consider going further by examining for new or yet-to-be-detected practices that harm consumers and violate federal consumer financial law.

[102] CFPB, EDUCATION LOAN EXAMINATION PROCEDURES 20–36 (2017), *available at* https://files.consumerfinance.gov/f/documents/201706_cfpb_Education-Loan-Servicing-Exam-Manual.pdf.

Conclusion

State supervisors have a powerful and flexible tool just waiting to be pulled off the shelf—§ 1042 gives state supervisors the authority to supervise for violations of federal consumer financial law including the broad prohibition against unfair, deceptive, and abusive acts or practices. State AGs have been using this authority for a few years now, and state supervisors should too.

Regular state supervision of nonbanks for violations of UDAAP, in particular, would create an opportunity for incremental improvements in consumer marketplaces. As Congress said in passing the Consumer Financial Protection Act: "State initiatives can be an important signal to Congress and Federal regulators of the need for Federal action. States are much closer to abuses and are able to move more quickly when necessary to address them."[103]

States should head this call and take the initiative to supervise for UDAAP and other federal consumer financial laws, starting with student loan servicers, so that regardless of the changing winds in Washington DC, markets will increasingly work for consumers.

[103] S. Rep. No. 111-176, at 174 (2010).

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