VIII. CFPB Investigates Student Loan Servicing Practices

A. Introduction

Student loan debt has recently become one of the largest types of household debt, second only to mortgage debt.[1] The U.S. Department of Education estimates that over 40 million student loan borrowers owe over $1.2 trillion in outstanding principal and interest balances.[2] Student borrowers have accrued the most debt under three types of student loans: loans made under the Federal Family Education Loan program (FFELP), loans made under the William D. Ford Federal Direct Loan program (Direct Loan), and private student loans.[3] Large student loan servicers monitor and finance a majority of each of the three main types of student loans.[4] Student loan servicers are often different than the lenders,[5] and act as middlemen who work with borrowers on behalf of lenders.[6] Borrowers often do not have a choice of which servicer to work with, but rather are assigned a servicer.[7]

Servicers are responsible for managing borrowers' accounts, processing payments, and working with borrowers to create flexible repayment plans.[8] However, the student loan servicing practice is

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[1] Jim Puzzanghera, *Soaring Student Loan Debt Poses Risk to Nation's Future Economic Growth*, L.A. TIMES (Sept. 5, 2015), http://www.latimes.com/business/la-fi-student-debt-20150906-story.html [http://perma.cc/DU2V-MZ9R].

[2] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. 29302, 29303 (May 21, 2015).

[3] *Id.* at 29304.

[4] *Id.*

[5] *Id.*; *Factsheet: Borrower Experiences with Student Debt Stress*, CONSUMER FINANCIAL PROTECTION BUREAU 1 (May 14, 2015), http://files.consumerfinance.gov/f/201505_cfpb-factsheet-student-debt-stress.pdf [http://perma.cc/2NZA-SM29] [hereinafter *Factsheet*].

[6] *See Factsheet*, *supra* note 5, at 1.

[7] *Id.*; Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29304.

[8] *Factsheet*, *supra* note 5, at 1; Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29304-05 ("Student loan servicers' duties typically include managing borrowers' accounts, processing monthly payments, and communicating directly with borrowers. These duties may also include informing borrowers about loan repayment options . . . .").

rather private.[9] There are few federal regulations to set uniform standards among servicers.[10]

The Consumer Financial Protection Bureau (CFPB) sought public comments concerning issues that borrowers have had with their student loan servicers.[11] Borrowers could be receiving vastly different levels of support depending on their servicers.[12] Borrowers have complained of issues with their servicers that cause them harm or stress as they attempt to repay their student loans.[13] Servicers delay posting payments, inflate minimum required payments, and conceal refinancing options.[14] The CFPB recently launched a public investigation into student loan servicing practices, beginning with loan giant Discover Financial Services (Discover).[15] The CFPB has also given notice of potential investigations to Citigroup[16] and Navient.[17] The investigations aim to hold servicers more accountable

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[9] *See* Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29304.

[10] *Id.* at 29305.

[11] *Id.* at 29303.

[12] *See generally Factsheet*, *supra* note 5, at 1.

[13] *Id.*

[14] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29306-08 ("These reports have focused on private student loans and highlighted a range of consumer complaints submitted to the Bureau regarding servicing issues, including: payment posting, . . . repayment incentives, . . . [and] misrepresenting minimum payments . . . .").

[15] Maggie McGrath, *Discover Slammed by CFPB For Illegal Student Loan Servicing Practices*, FORBES (July 22, 2015), http://www.forbes.com/sites/maggiemcgrath/2015/07/22/discover-slammed-by-cfpb-for-illegal-student-loan-servicing-practices/ [http://perma.cc/W2KX-9DMJ] ("The Consumer Financial Protection Bureau announced Wednesday that it is taking action against Discover Financial Services for illegal student loan servicing practices, charging it $18.5 million and ordering the company (and its affiliates) to clean up its billing, interest reporting and collection practices.").

[16] *See* Ashlee Kieler, *Citigroup Facing Federal Investigation into Student Loan-Servicing Practices*, CONSUMERIST (Aug. 3, 2015), http://consumerist.com/2015/08/03/citigroup-facing-federal-investigation-into-student-loan-servicing-practices/ [http://perma.cc/V79A-CJK6].

[17] Shahien Nasiripour, *CFPB Considers Suing Student Loan Giant Navient for Cheating Borrowers*, HUFFINGTON POST (Aug. 24, 2015), http://www.huffingtonpost.com/entry/cfpb-considers-suing-student-loan-giant-navient-for-cheating-borrowers_55db83dee4b08cd3359cf4d3 [http://perma.cc/2QK7-PFZZ].

to their borrowers and reduce the stress that comes along with loan repayment.[18]

This article outlines the role student loan servicers have in assisting borrowers in the student loan market. Part B discusses the inherent issues in the current regulatory framework of student loan servicing, and how those issues affect borrowers. Part C moves on to discuss recent CFPB investigations into student loan servicer practices. Finally, Part D discusses similarities between the student loan market and other financial services, and how those similarities might shape forthcoming legislation.

B. Issues Related to Student Loan Repayment

Many of the issues related to student loan repayment stem from the way student loan services are organized and run.[19] Student loan servicers are not presented with economic incentives to improve their services because they receive the same fee per account serviced regardless of the quality of service provided.[20] Further, servicers are not bound by a single regulatory framework under which to provide borrowers with uniform services.[21] This means that borrowers may receive different treatment depending on the servicer they were assigned.[22]

1. Economic Model for Most Student Loan Servicers

One of the responsibilities of third-party student loan servicers is to inform "borrowers about loan repayment options and

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[18] *See* Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29303.
[19] *See generally id.* at 29305 ("While federal student loans feature an array of flexible repayment options, it is not clear whether third-party student loan servicers . . . have adequate economic incentive to enroll borrows in [certain] options to avoid default.").
[20] *Id.*
[21] *Id.* ("For student loan borrowers, there is no existing, comprehensive federal statutory or regulatory framework providing uniform standards for the servicing of all student loans.").
[22] *See id.* at 23305-06 ("There may be variation in the level of service delivered by student loan servicers depending on the type of loan borrowed, the identity of the lender, or the company selected to service the loan.").

facilitat[e] enrollment in alternative repayment plans" if necessary.[23] The current economic model used by most student loan servicers, however, does not actually incentivize servicers to effectively perform this role.[24] For both federal and private student loans, most third-party servicers are compensated based on a flat rate.[25] That is, student loan servicers receive a set monthly fee per borrower account serviced, regardless of the quality or quantity of service provided to each borrower on his or her account.[26]

This model creates at least two adverse incentives.[27] First, under this model, a servicer might have more of an incentive to elongate borrowers' repayment plans than to help borrowers settle their debt efficiently.[28] A servicer can collect more monthly fees the longer a borrower has outstanding debt.[29] Second, because servicers are often allowed to keep ancillary fees charged to borrowers' accounts, they have an incentive to charge more of these ancillary fees if possible.[30] For example, if borrowers send in money to cover a minimum payment on one of their loans, the servicer might instead spread that money among many of the borrowers' accounts causing borrowers to fail to meet the original minimum payment, thus allowing the servicer to collect a late fee.[31] Therefore, servicers are not properly incentivized to help borrowers make their loan payments quickly and efficiently.

2. Regulatory Landscape of Student Loan Servicing

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[23] *Factsheet*, *supra* note 5, at 1.
[24] *See* Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29305.
[25] *Id.*
[26] *Id.*
[27] William Cox, *The Student Borrower: Slave to the Servicer?*, 27 LOY. CONSUMER L. REV. 189, 197 (2015).
[28] *See id.* ("Servicers are likely intentionally committing abuses as a means to prolong the repayment process of students and thereby obtain additional tranches, or cuts, of each student's repayments.").
[29] *Id.*
[30] *See id.* at 199 ("Often, servicers are allowed to keep all ancillary fees collected from the borrower. Therefore, servicers frequently have an incentive to play 'add-on,' so to speak, and charge students as many ancillary fees as possible.").
[31] *Id.*

The student loan market lacks a comprehensive federal regulatory framework.[32] Policymakers have noticed that recent federal regulations have strengthened protections in the mortgage and credit card markets[33] and propose using that regulatory framework as a basis for structuring the student loan market.[34] While regulators are working on creating protections for the entire student loan market, limited federal protections already exist for qualifying borrowers.[35]

Students borrowing FFELP loans can find some protections under Title IV of the Higher Education Act of 1965.[36] Title IV of the Higher Education Act creates a framework for regulators to oversee federal student loan servicers' conduct.[37] Under this framework, servicers are responsible for providing borrowers with a set of flexible repayment plans, loan cancellation options, and other protections.[38] Congress later enacted the Higher Education Opportunity Act as a further protection for borrowers with loans made under FFELP.[39] Under the Higher Education Opportunity Act, which reauthorized the Higher Education Act and amended Title IV, servicers are required to provide borrowers with certain notices throughout the repayment period.[40] The additional protections stipulated under the Higher Education Opportunity Act set forth

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[32] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29305-06 ("For student loan borrowers, there is no existing, comprehensive federal statutory or regulatory framework providing uniform standards for the servicing of all student loans.").
[33] *Id.* at 29305.
[34] *Id.* at 29308 ("On March 10, 2015, the President signed a Presidential Memorandum . . . [which] requires the Secretary of Education, in consultation with the Secretary of the Treasury and the Director of the Consumer Financial Protection Bureau, to issue a report to the President 'after assessing the potential applicability of consumer protections in the mortgage and credit card markets to student loans . . . .'").
[35] *Id.* at 29305.
[36] *Id.* at 29306 n. 25; *see* Higher Education Act, 20 U.S.C. § 1078 (2012).
[37] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29306.
[38] *Id.*
[39] *Id.*; *see* Higher Education Opportunity Act, 20 U.S.C. §§ 1019-1019(d) (2012).
[40] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29306.

basic requirements that servicers must meet in order to "maintain eligibility to participate in FFELP."[41]

The Higher Education Opportunity Act amended not only Title IV of the Higher Education Act, but also the Truth in Lending Act.[42] The amendments to the Truth in Lending Act are largely to protect borrowers with loans from private lenders.[43] One major protection offered by the amendments is protection from lenders extending lines of credit to students that are beyond the cost of attendance and costs associated with education.[44] Lastly, the Fair Credit Reporting Act offers some protection to borrowers by ensuring the accuracy of information gathered by entities that furnish information to consumer reporting agencies.[45] Although the regulatory landscape is far from providing complete protection to borrowers in the student loan market, regulators have worked to add safeguards wherever possible.

C. CFPB Investigations Into Education Lending and Servicing

In July 2011, the CFPB began its supervision program over large banks, thrifts, and credit unions—those with assets over $10 billion—to ensure that they were complying with federal consumer protection laws.[46] In January 2012, the CFPB expanded this program to nonbanks, regardless of size, in certain markets including mortgage companies, payday lenders, and private education lenders.[47] The goal of this expansion was to require nonbank disclosure of practices so as to offer consistent financial protection to

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[41] *Id.*

[42] *Id.*; *see* Truth in Lending Act, 15 U.S.C. § 1650 (2012).

[43] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29306.

[44] *Id.*

[45] *Id.*; *see* Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81x (2012).

[46] Steve Antonakes & Peggy Twohig, *A Consumer-Centered Supervision Program*, CONSUMER FINANCIAL PROTECTION BUREAU (July 22, 2011), http://www.consumerfinance.gov/blog/a-consumer-centered-supervision-program/ [http://perma.cc/E5QS-8QW9].

[47] Steve Antonakes & Peggy Twohig, *The CFPB Launches Its Nonbank Supervision Program*, CONSUMER FINANCIAL PROTECTION BUREAU (Jan. 5 2012), http://www.consumerfinance.gov/blog/the-cfpb-launches-its-nonbank-supervision-program/ [http://perma.cc/F3LW-RSWV].

consumers regardless of the specific institutions with which those consumers choose to transact.[48]

In May 2015, the CFPB put out a request for information from borrowers, lenders, and servicers about their experiences in student loan servicing.[49] This public inquiry was the first step in the CFPB's investigation into student loan servicing practice and how the current system makes "paying back loans a stressful or harmful process for borrowers."[50] Borrowers commented that student loan servicers have added to the stress of repaying their student loans in many ways, including delays in posting payments, handling servicing transfers poorly, servicing borrowers inadequately, holding borrowers accountable for co-signer default, misrepresenting minimum payments, and making debt collection calls at inappropriate times.[51]

1. Delaying Posting Payments

Some borrowers have complained that it may take several days for servicers to post payments that borrowers have made to their accounts.[52] During that processing time, servicers may continue to charge interest on a borrower's outstanding principal balance.[53] Borrowers noted that servicers debit their banking accounts well before payments are actually applied to their loan accounts.[54]

2. Servicing Transfers

Many borrowers have complained to the CFPB that they had issues receiving important paperwork following a change in

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[48] *Id.*
[49] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29303; *CFPB Launches Public Inquiry Into Student Loan Servicing Practices*, CONSUMER FINANCIAL PROTECTION BUREAU (May 14, 2015), http://www.consumerfinance.gov/newsroom/cfpb-launches-public-inquiry-into-student-loan-servicing-practices/ [http://perma.cc/AD7E-W387].
[50] *See CFPB Launches Public Inquiry into Student Loan Servicing Practices*, *supra* note 49.
[51] *See* Antonakes & Twohig, *supra* note 47.
[52] *Factsheet*, *supra* note 5, at 2.
[53] *Id.*
[54] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29306.

servicer.[55] Many borrowers were not even put on notice that their accounts had been transferred to another servicer.[56] This has caused some borrowers to continue sending payments to their old servicers, while their new servicers charged fees for late payments due to the confusion.[57] Even when borrowers became aware of a transfer of their servicers and made timely payments to the new servicers, the new servicers have failed to process the payments correctly.[58]

3. Servicing Borrowers

Borrowers have complained of a general lack of adequate customer service from their student loan servicers.[59] When trying to ask questions of their servicers, borrowers have been transferred to multiple departments, given conflicting information, or given no information at all.[60] Borrowers have also complained about the struggle to reach the specific service members that are responsible for their accounts.[61]

4. Holding Borrowers Accountable for Co-Signer Default

Borrowers have reported issues relating to co-signer requirements, including mandatory accelerated payments in cases of co-signer death and auto-default statuses in cases of co-signer default.[62] Many servicers allow, or require, borrowers to obtain a co-signer in order to get a lower interest rate on their loans.[63] After borrowers make a specified number of on-time payments to their account, the borrower may be able to release the co-signer from the

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[55] *Id.* at 29307.
[56] *Factsheet*, *supra* note 5, at 3.
[57] *Id.*
[58] *Id.*
[59] *See* Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29307.
[60] *See id.*
[61] *See id.*
[62] *Factsheet*, *supra* note 5, at 2.
[63] *CFPB Finds 90 Percent of Private Student Loan Borrowers Who Applied for Co-Signer Release Were Rejected,* CONSUMER FINANCIAL PROTECTION BUREAU (June 18, 2015), http://www.consumerfinance.gov/newsroom/cfpb-finds-90-percent-of-private-student-loan-borrowers-who-applied-for-co-signer-release-were-rejected/ [http://perma.cc/9W68-Z7DV].

loan.[64] However, many borrowers have found that servicers change the terms of co-signer release or make it much more difficult than the servicers initially represented.[65] Further, many borrowers do not realize that if a co-signer goes into default on any of their own loans or dies, the servicer can accelerate the loan period and require full payment immediately.[66]

5. Representing Minimum Payments

CFPB examiners found that at least one servicer had been representing minimum payments as larger than were necessarily due on borrowers' accounts.[67] The servicer inflated the required payments to include amounts that were in deferment and not overdue.[68]

6. Making Debt Collection Calls

The CFPB found that at least one servicer was making illegal debt collection calls to borrowers either in the early morning or late at night.[69] These calls contributed to borrowers' stress arising from their repayment plans.[70]

After gaining some knowledge of the types of issues borrowers are facing with student loan servicers, the CFPB began

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[64] *See* Ann Carrns, *Student Loan Co-Signers Face a Tangled Path to Release*, N.Y. TIMES (July 10, 2015), http://www.nytimes.com/2015/07/11/your-money/student-loan-co-signers-face-a-tangled-path-to-a-release.html?_r=0 [http://perma.cc/6EFB-8VKF].

[65] *See CFPB Finds Private Student Loan Borrowers Face "Auto-Default" When Co-Signer Dies or Goes Bankrupt*, CONSUMER FINANCIAL PROTECTION BUREAU (Apr. 22, 2014), http://www.consumerfinance.gov/newsroom/cfpb-finds-private-student-loan-borrowers-face-auto-default-when-co-signer-dies-or-goes-bankrupt/ [http://perma.cc/Q5K3-RKCZ].

[66] *See id.*

[67] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29308.

[68] *Id.*

[69] *See* McGrath, *supra* note 15.

[70] *See id.* ("Illegal servicing and debt collection practices add insult to injury for borrowers struggling to pay back their loans.").

looking into individual servicers' practices.[71] On July 22, 2015, the CFPB announced that it was taking action against Discover, a student loan servicer.[72] The CFPB found that Discover "overstated the minimum amounts due on billing statements, failed to provide student loan interest information required for certain tax benefits, and engaged in illegal debt collection practices by calling borrowers early in the morning or late at night."[73] The CFPB is requiring that Discover pay $18.5 million to borrowers that were hurt by its servicing and to shift its servicing practices into compliance with regulations.[74] Citigroup, Inc., another student loan servicer, is reportedly under investigation by a federal organization over its student loan servicing practices.[75] It is not yet clear whether this federal organization is the CFPB, but commentators believe it to be.[76] The CFPB did, however, announce that it is considering suing student loan giant Navient for violating consumer protection laws.[77]

D. Forthcoming Legislation

After the 2008 economic crisis, the federal government made strides to strengthen consumer protection laws and the federal regulatory landscape.[78] Congress passed new legislation targeted at the mortgage market to increase regulation and decrease illegal servicing practices.[79] The regulatory legislation provides additional disclosure requirements for mortgage loan servicers.[80] Again, in 2010, the federal government made an effort to increase consumer protection with the enactment of the Dodd-Frank Wall Street Reform

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[71] *See CFPB Launches Public Inquiry into Student Loan Servicing Practices*, *supra* note 49.
[72] McGrath, *supra* note 15.
[73] *Id.*
[74] *Id.*
[75] *See* Kieler, *supra* note 17.
[76] *Id.* ("While the company didn't specify which regulator was investigating its practices, the Consumer Financial Protection Bureau's ongoing probe and recent enforcement action against Discover suggests it's the watchdog in question.").
[77] Nasiripour, *supra* note 17.
[78] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29305.
[79] *Id.* at 29308.
[80] *Id.*

and Consumer Protection Act (Dodd-Frank Act).[81] The Dodd-Frank Act granted the CFPB rulemaking, oversight, and enforcement authority to improve customer protections for mortgage borrowers.[82] The CFPB has noticed that some of the issues arising from student loan servicing practices are similar to those issues facing the mortgage lending market before the Dodd-Frank Act more heavily regulated it.[83] Although no public legislation proposals are underway to improve student loan servicing practices, the legislation enacted to clean up the mortgage lending market might provide a blueprint for legislation to clean up the student loan servicing market.

E. Conclusion

The market for student loans has grown rapidly in recent years.[84] Borrowers of student loans often do not have a choice of servicer with which they must work.[85] "Opaque" student loan servicing practices have created several issues for borrowers in the student loan market.[86] Student loan servicers are not required to disclose all of their practices to the public, causing borrowers to rely on their servicers to provide them with accurate and honest information regarding their accounts.[87] At least one larger student

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[81] *See* Cox, *supra* note 27, at 214 ("After the subprime mortgage bubble burst and we entered an economic recession, the federal government slowly realized that the old regulatory scheme did not work. Therefore, the government made several changes to the scheme . . . .").

[82] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29308-09.

[83] *Id.* at 29308 ("The Bureau has observed similarities between the servicing problems encountered by student loan borrowers and those experienced by borrowers with other financial products. Loan servicing generally includes many common functions, irrespective of the underlying . . . product . . . .").

[84] *See id.* ("Congress has passed several significant legislative and regulatory interventions to protect mortgage borrowers from illegal and deceptive mortgage servicing practices . . . In 2010, Congress again intervened by providing [consumers] additional protections through the Dodd-Frank Act.").

[85] *Id.* at 29304.

[86] *See id.* ("The market for private student loans is opaque, as market participants generally do not make available key origination and performance information, and reporting requirements on outstanding balances and performance are extremely limited.").

[87] *See id.* at 29305.

loan servicer, however, has allegedly delayed posting payments to borrowers' accounts, inflated the minimum required payments for borrowers, and concealed borrowers' repayment options.[88]

The CFPB recently launched an investigation into the practices of student loan servicers.[89] The CFPB has already charged Discover with violating federal consumer protection laws,[90] and has given notice to both Citigroup and Navient regarding potential investigations.[91] The CFPB has relied on comments from the public regarding their experiences dealing with student loan servicers.[92] The CFPB seeks to bring the student loan service market into compliance with federal laws and to provide a better, less stressful lending experience to borrowers.

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[88] *See id.* at 29306-08.
[89] *CFPB Launches Public Inquiry into Student Loan Servicing Practices*, *supra* note 49.
[90] McGrath, *supra* note 15.
[91] Nasiripour, *supra* note 17; *see* Kieler, *supra* note 16.
[92] *See* Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. at 29303.
[93] Student, Boston University School of Law (J.D. 2017).