Consumer Finance Monitor (Season 7, Episode 6): Recent Developments Affecting Student Loan Origination and Servicing

Speakers: Alan Kaplinsky, Tom Burke, Michael Gordon, and John Culhane

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm, and I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr, and I'll be moderating today's program.

For those of you who want even more information, don't forget about our blog, which also goes by the name of Consumer Finance Monitor. We've hosted our blog since July of 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com.

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And I'm very pleased to let our listeners know today that very recently, our podcast show was ranked by Good2bSocial as the best podcast among law firm podcast shows in the United States devoted exclusively to consumer financial services. Good2bSocial is a prominent law firm consultant owned by Best Lawyers, and we're very gratified by this recognition from one of the country's leading social media consultants for law firms. Today, our podcast show is a repurposed webinar that we did on December 14th entitled Recent Developments Affecting Student Loan Origination and Servicing.

Okay. Before I introduce our speakers today, just a little bit of background about the program. Federal student loans are approaching $1.7 trillion. Private student loans are approaching $129 billion. There's a lot of activity on the part of consumer advocacy groups, none of it favorable, of course, to the industry. National elections are on the horizon. Student loan origination and servicing continues to be a major focal point for federal and state regulators.

And so, today, we thought that we would bring all of you that are interested in this area up to date on the key developments in the area. We're going to talk about what's happening at the Department of Education. In fact, we'll lead off with that, then developments at the CFPB, and then we'll talk about recent state legislative and regulatory developments. And finally, we'll put on our prognostication hats and we will talk about what we're anticipating.

So my pleasure right now to introduce our presenters today, Tom Burke, Mike Gordon, and finally John Culhane. . I'm just going to say a few words about each of them. So Tom Burke is a litigator who represents clients in the consumer financial services industry, handles all kinds of private litigation, individual litigation, class actions, gets as heavily involved in enforcement matters involving a full range of regulators at the federal and state level, the CFPB, state attorneys general, and so forth.

Tom has a particular focus on the topic that we're going to be talking about today, has been heavily involved in all of the major developments and has been advising clients about them, the developments that are impacting the industry that originates and services student loans. Next to Tom's picture to the right is Mike Gordon. Mike is a senior former CFPB official, a lawyer with the CFPB, was there almost from the beginning, and was a very high-level assistant to Richard Cordray, who is really the first director of the CFPB. Mike has more than two decades of experience in advising clients on a full range of consumer finance laws.

And next up is John Culhane. I'm sure those of you that are involved in the student lending industry, John is no stranger to you. I mean, I consider him the preeminent scholar and practitioner in the area of student lending, both originations and servicing of student loans.

So the way we're going to proceed today is, I'm first going to turn the program over to Tom Burke. He's going to talk about what's going on at the Department of Education, then we'll go immediately after that to Mike Gordon, who will talk about what's happening at the CFPB, and then finally, other state developments, we'll go to John Culhane. So with that introduction out of the way, Tom, take it away. Cheers.

Tom Burke:

Thank you very much, Alan. I appreciate the introduction. So the first topic that we wanted to cover today was the state of affairs and the recent developments coming out of the Department of Education. I think it's a particularly apt time for that given that the Department of Education seems to have been more active in the last six months than any other time in recent memory, and that's saying a lot. The pace seems to have only accelerated, and I think there are a few reasons for that.

First is that, obviously, the Department's student loan forgiveness plan failed before the Supreme Court, and that represented a significant setback for the administration that they've been trying to find other ways to mitigate. Second, obviously, federal student loan borrowers returned to repayment just a few months ago for the first time in several years. And then third, we're coming up on an election year, and at a time when I think it's fair to say that the Department has turned into more of a political football than it has been regarded over the past several administrations.

There's a concern that if there is a change in administrations, that some of these changes could be rolled back. And so, I think what we're seeing is an effort to entrench some of the things that the Department has done over the last three years and to make it irrevocable in a sense by extending certain benefits that would be very difficult to roll back.

The first thing I thought would be helpful for us to talk about here is student loan forgiveness, because although the Supreme Court did decide the narrow question of whether the administration could forgive $400 billion in loans under the HEROES Act, the administration has announced that it's moving forward with a plan B. And plan B, I think it has two parts.

First, it has the part that is not getting a lot of discussion, and that is the fact that the current administration has already forgiven $132 billion in student loans for almost 4 million borrowers through several programs that have not drawn a lot of attention or challenge, specifically over $50 billion by making various adjustments and one-time waivers to the PSLF Program, over $40 billion by doing a very similar thing with the income-driven repayment plan, over $20 billion in borrower defense, which the administration tends to bucket together as borrowers who, quote, unquote, "were cheated by their schools," along with schools that, what they call precipitously closed, and related settlements, and then over $10 billion for borrowers with permanent and total disability, which is probably one of the less controversial of these steps.

So apart from that $132 billion in forgiveness that has already happened and the additional amounts that will go into those buckets, the Department has floated a plan B. And the plan B is right now being discussed in something called negotiated rulemaking, which, if you're on this call, you probably know something about. It's the idiosyncratic step in the Department of Education's rulemaking process that precedes traditional formal notice-and-comment rulemaking.

And that basically involves bringing a lot of stakeholders together for several roundtable sessions in an effort to develop, quote, unquote, "consensus," which means unanimous consensus of all the stakeholders at the meetings regarding what the new rule should say. It's nonbinding. The Department can adopt a rule even if no consensus is reached. Even if consensus is reached, it can backtrack on a rule, although that's relatively unlikely.

With respect to the substance of what has happened here, they are proposing a new subpart G of a particular federal regulation that would allow the secretary to waive repayment of a debt under certain circumstances. And you'll note that that language tracks the waiver authority contained within the Higher Education Act. So if the Department were to proceed with this, they would likely rely on the text of the Higher Education Act and not the HEROES Act for a round two, which would change the analysis in some ways for purposes of future litigation. I'm not sure it would be dispositive.

There are a number of categories that they are contemplating. I tend to view this as, previously, there was a pie of $400 billion in student loans they wanted to forgive, and the Supreme Court basically said, "You can't do it that way." And now they have cut up that pie into five or six slices, and it's pretty much still the same pie, but you get there by adding up all the slices. So for instance, there's a proposal to forgive up to $20,000 for borrowers on the SAVE Plan or low-income IDR borrowers, whose current balance exceeds their original principal balance. There are a similar provision for borrowers who don't fit those other buckets but have that balance situation.

There is full waiver proposed for loans, including loans that have been consolidated, which is an important point, that first entered repayment 20 years ago for undergraduates or 25 years ago for graduate students. There is a full waiver where the Department concludes that a borrower is not, but could have been, enrolled in a forgiveness-eligible repayment plan. And I think you can already imagine the headaches that will go into trying to reconstruct borrowers' eligibility for certain plans over the past 20 to 25 years, where they did not submit contemporaneous documentation for those things.

There's a full waiver proposed for borrowers who have not applied for but have otherwise met other forgiveness opportunities, and likewise for borrower defense and school closure. There is a specific provision right now that currently pertains to FFEL loans which are based on the age of loan and/or borrower defense. It's narrower, but it still could be very material for those portfolios.

The point I'll just make about consensus is that although consensus was reached on much of this, there's a real question about who is consenting to these things. The Department of Education gets to decide who has a seat at the table for negotiated rulemaking. And consistent with the Department's priorities, I think we saw that the table consisted, in large part, of borrowers, borrower advocates, and related groups. The industry presence was very limited at these proceedings.

The second topic that I'd like to cover is the framework for servicer accountability that the Department of Education announced, and this is consistent with the tone the Department has taken toward its federal loan servicing contracting partners over the past several years, which is far more of an arm's length and, at times, almost adversarial relationship, where the Department has, I think, in very stark terms, characterized the servicers as having failed borrowers in many respects. Those issues are hotly disputed as a factual matter, including an ongoing litigation. And the Department has nonetheless said, "You know what? We are going to start really policing this situation."

The ways that they suggest that they will do that is through closer monitoring of servicers. It's not clear to me why the Department thought that it lacked or was not doing these things over the past 15 years anyway, but they've suggested that they're going to proceed with secret shopper programs, for instance. So for any servicers or other schools that are obviously engaging in recruiting and enrollment activities, just be aware. That person that you're talking to might not actually be a student. They might be a federal employee who is conducting a secret shopper or a mystery shopper program.

They've emphasized that they're going to coordinate with the CFPB and state AGs for that monitoring. I'll talk a little bit more about that in a few minutes, and also emphasized that they plan to review borrower complaints through the FSA Ombudsman, which, of course, is something they've already been doing for a long time, and the ombudsman has been issuing annual reports, aggregating those complaints, and putting forth some trend analysis.

The teeth of this framework comes in the form of remedial action. The Department has suggested and, in fact, has already taken steps to withhold payment from certain servicers for what it characterizes as servicing failures. And there's a lot of question marks around that, over the Department's authority to do that, whether it would be subject to court challenge, exactly how much they're going to consider doing that at a time when servicers are strapped more than ever in light of the amounts that they're being paid by the Department.

In other words, there's not a lot of fat on the bone to cut in terms of withholding payment, given the services that these servicers have to perform in light of the return to repayment. They've suggested that they will suspend or reallocate borrowers from certain servicers, in other words, to change the portfolio size based on performance. That's something they've already been doing. They have suggested perhaps more of an openness to do that.

Contractor performance reports and corrective action plans. Likewise, these are things that they've already been doing. And I think the real teeth here will be the possibility of withholding payment and/or referring servicers to enforcement. Last, they cited the possibility of borrower remedies such as applying administrative forbearances to borrowers who've been affected by servicing issues, possibly extending additional loan forgiveness credit. And likewise, these are things that we've already seen happening.

There will be a transition to a new contracting environment, the USDS program, in spring 2024, and that may change the contractual underpinnings for a lot of this. Currently, most federal servicers are operating under legacy contracts from 2010, 2011 that have been merely extended since that time, and the Department may seek to impose additional and much more aggressive terms relating to some of these measures.

The Department has also taken a few recent steps with respect to the issue of federal preemption of state law. This is a situation that the Department's stance has changed on several times over the last 10 years, and it's largely based on the administration's political views and goals. So in March 2018, the Department issued guidance stating that the Higher Education Act broadly preempts state licensing-based regulation of student loan servicers. In other words, they basically said, "We are going to handle that. There's no need for state licensing in this area. And in fact, it's unlawful."

In August 2021, notwithstanding that the Department lost on that issue several times in federal courts around the country, the Department issued guidance saying that the Higher Education Act does not preempt most state regulation. And most recently, in July 2023, the Department took another stab at that 2021 guidance and they clarified it in a few respects. They said that, "By the way, not just that formal 2018 guidance is superseded, anything anybody said informally about those things at the time is also superseded."

In other words, nothing that the Department said on that issue from 2017 to 2020 is going to be binding in their view, or even relevant. The Department declined to address those unfavorable court opinions that I referenced, even though some commentators did request that they do that, and they revised the discussion of conflict preemption, which is one particular kind of subspecies of preemption, but there were no substantive changes.

So the impact of all of that is that the Biden administration has basically doubled down on its support for proactive state AGs in the enforcement sector. Not much activity in that space had been preempted to begin with, but if you are involved in servicing or if you're a school that has activity in the space where there's been investigations or interest, you should still expect that the big blue state AGs, I'm thinking about New York, Massachusetts, California, Illinois, will continue to be very active in this space. That may come in the form of civil investigative demands or subpoenas, where there's a pre-suit investigation, or it may result in enforcement action, actual lawsuits.

There's also an increase in number of states with loan servicing licensing requirements. The Department's current view is that its federal partners need to comply with all of those. And the result is obviously that that's an increased regulatory burden for those servicers, because the states may be asking for different kinds of data, different times. They may have individualized rules that, although not literally conflicting, are hard to comply with because there's a patchwork of a dozen standards instead of just one standard.

And so, one particular point is that the fees that servicers had kind of baked into their servicing contracts way back in 2010 or 2011 are, in many cases, no longer really sufficient to allow for the kind of highly state-specific compliance needs that these regimes are generating. And so, there's a tension there that I think servicers will have to find a way to focus on, even though it's economically challenging to do so.

The last initiative I wanted to talk about today was the SAVE Plan, which is a new repayment plan that is replacing the popular REPAYE Plan. The Department rolled this out a few months ago. There were 5.5 million borrowers enrolled already as of November. 2.9 million of those borrowers have $0 payments. The key characteristics of the plan are that it does allow for $0 payments for a larger pool of borrowers based on income and family size. It allows for accelerated forgiveness for borrowers with low balances, meaning that they can get to that forgiveness threshold in 10 years instead of 20 years.

There's automatic enrollment for some borrowers, which is a key feature, because requiring the affirmative step of enrolling had been troublesome for some borrowers. No interest accrues if borrowers make their monthly payments, and that includes if they're making, or not making, as the case may be, $0 monthly payments. That's important because a huge piece of what I'll call cognitive dissonance among borrowers historically has been the fact that, "I've been making my loan payments as scheduled for X number of years, five years, 10 years, 20 years, and yet I owe more than I started with. How can that possibly be?"

And that's because of the tension between income-driven repayment plans that allow borrowers to pay a fraction of their income as opposed to the amount that will cover the interest on their loans. And so, a lot of borrowers have had trouble understanding how interest can keep accruing on all of that if they're making their payments. And that's actually one reason why those plans typically offered 20- to 25-year forgiveness, because if it didn't, those borrowers would just, in perpetuity, be repaying.

So that interest accrual has stopped with this plan if the borrowers are making their monthly payments. So no longer will you expect to see borrowers who are owing more than they started with. There is no need to recertify income or reapply each year, and that should take a little bit of the burden off loan servicers, because they won't be processing all of that paperwork. It'll just be happening automatically for borrowers who have opted in to share their income from IRS-related submissions.

Now, all of that comes with a cost. The Congressional Budget Office has estimated that the SAVE Plan will cost $260 billion over 10 years versus existing plans. So for those of you counting at home, this has almost as much of a budgetary impact as the original loan forgiveness plan did. And yet, it has drawn far less media attention. It, as far as I know, has not courted any legal challenges yet.

And so, what we're seeing here is that the Department is finding other ways, ways that are less likely to be challenged, of accomplishing these goals of helping borrowers pay less on their federal loans. Now, if the issue ends up at the Supreme Court again, either with respect to SAVE somehow or the new loan forgiveness program, I think we will see that there continues to be a real tension between a Department of Education that was initially charged with overseeing borrower repayment of loans and that now is quite transparently and admittedly focused on helping borrowers not repay those loans, or at least get out from under the burden of those loans in different ways. So with that, I will pass it to Mike Gordon.

Mike Gordon:

Thank you. We'll turn to everybody's favorite topic, the CFPB, and I just wanted to highlight a few recent developments. But the overall theme is that it's more of the same in terms of the Bureau's focus on this industry and concerns about student protections. So first, I want to draw attention to a report that came out a few months ago that may have come as a surprise to a number of schools.

It was the Tuition Payment Plan Report. Tuition payment plans, for those who don't know, allow students to pay for their tuition and education expenses in installments, and these can be administered by the school or by a third party. And the Bureau is concerned about certain aspects of these tuition payment plans, which, I would hazard a guess, a lot of institutions wouldn't have considered to be necessarily regulated financial products. But they are driving the point home that there's going to be more action in this space.

They often will do something like this: focus on an issue, write a report, identify their concerns, and then follow it up with supervisory or enforcement activity to try to change practices that are disfavored. So here, they wrote this report by reviewing just public information on hundreds of school websites as well as reviewing their complaint database and talking to folks in the industry. And their concerns are in a few different categories. The first really is, is this a loan or is it not a loan?

And as I say, I think most institutions probably don't think of it as a loan. Some actually did on their website use that language, although that was a small minority. But the Bureau makes it clear that it does consider many of these tuition payment plans to be loans. By that, they mean either loan or retail installment contracts. And whether or not it's a loan, depending on how the product is structured or priced, it can trigger certain regulatory requirements such as disclosures.

And I think that's really what the Bureau is driving at here, which is, whether it's under the TILA, Truth in Lending Act rubric, or just UDAAP, notions of not deceiving consumers, I think they want to put pressure to make sure that the disclosures are clear and that students understand what they're getting into. And they noted in the report that the way these plans are discussed on websites, at least, the schools are quite inconsistent and they vary a lot, and they're concerned that these kinds of disclosures could confuse students or maybe even obscure the nature of the financial arrangement.

These plans can be interest-free, although the Bureau did note that in some cases, they convert to interest-bearing upon missed payment. But even if there's no interest, the Bureau highlighted several types of fees that it's concerned about, enrollment fees, for example, late fees, returned payment fees. Particularly, it noted the great variation in late fees, which, they noted from their review, could range from 30 bucks to 100 bucks.

A final category, and this again is a familiar theme to CFPB watchers, is contract terms that the Bureau believes may waive rights that the consumers have. And in this particular context, this is one of those areas where the Bureau would have sort of a heightened concern about terms like that, because they would view this population as more of a captive population that may not have the same degree of choice in providers.

If you're going to a school, you've got basically one choice for who's going to offer your tuition payment plan, which is separate from financing, and in fact even indicating even less choice among the students. The Bureau points out that some students might be forced into such a plan if there's a delay, for example, in their receipt of federal financial aid. But in terms of the terms themselves, it's kind of the usual suspects of contract terms that the Bureau frowns upon, such as class action waivers, mandatory arbitration, and the like.

I'm going to keep things moving and mention quickly a few other developments at the CFPB that are relevant to this industry. First, there's the junk fees initiative that continues apace. And for those who aren't familiar, junk fees is not a defined term or a regulatory term, but it is a favored term of this administration from the White House down, and there's been a big political push in all industries to reduce so-called junk fees, which are in the eye of the beholder, but fees that the various regulators don't like when they see them.

And in our industry, the Bureau has repeatedly highlighted a few examples of the kinds of fees they don't like, like the ones I just mentioned relating to tuition payment plans, but also fees to get account information or other enrollment fees. Particularly, transcript fees, depending on the context, have been highlighted by the Bureau.

And I would say, one thing that may not be intuitive to those not used to dealing with the Bureau is they are concerned about fees that really don't bear a relationship necessarily, the amount of the fee, to the cost of the service provided for which the fee is assessed. And the Bureau has, of course, no rate-setting authority in that regard in general, but they have been putting pressure on institutions and asking questions to justify, "How much does it cost you to provide this service, to provide this account information?" or whatever it may be. And if there's a huge difference between the cost to the company and the fee being charged, the Bureau will be... You can expect higher scrutiny.

Another document that just caught our eye recently is a future survey that the Bureau is going to do. They had to announce it, and they did so in August, that they want to do a survey of student loan borrowers. They had to do this as part of a legal requirement to get their approval from the Office of Management and Budget to collect information in this way. And so, they've announced that they're going to do it, but they have not released the details of what questions they're going to ask.

But it's another tool in the tool kit that the Bureau has to gather information and inform their regulatory activities. Their stated goal for this survey is to understand borrowers' decisions, their experience managing their loans, and their expectations for their future. So it's kind of broad, and we'll see what they focus on in the survey. But the feedback we can expect from the survey will be used, as it does with the consumer complaints, by the Bureau to... It will influence their thinking about issues in the marketplace and also inform their priority setting.

Finally, a couple notes about delinquencies and collections and enforcement. I want to pound on this theme of transcript withholding, which the Bureau has made repeated public statements about, even going so far as to say they deem it to be an abusive practice to withhold transcripts, for example, if there's a balance due. That and other kind of tactics that the Bureau may see as coercive, I think, are going to continue to be a focus, and I wouldn't be surprised if they find a school to make an example of in a public enforcement on those issues.

Another delinquency and collections issue that the Bureau has spoken about repeatedly is bankruptcy. They issued a bulletin in March that warned that student loan servicers must proactively identify which loans have been discharged in bankruptcy and not take any attempts to collect on them. What's notable here is there is sort of a shift in the burden or in the expectations for servicers. The bankruptcy rules around student lending and student loans are a bit complicated. There are certain special protections that apply to certain classes of loans, but not to all classes of loans, particularly private loans.

But the Bureau wants to make sure servicers aren't just collecting without taking some affirmative steps rather than the borrower having to raise their hand and say, "Hey, this was discharged." I think the Bureau would like to shift that burden, if it could, to the servicers. And there is also already a publicly disclosed enforcement matter by the Bureau on this very topic, so future enforcement that could be coming in addition to the things I've mentioned.

There's the transcript withholding, but also, I wouldn't be surprised to see some tuition payment plan that is on the one end of an extreme on a certain issue regarding disclosures that the Bureau doesn't like, or fee structure become a target of the Bureau in the coming years. Finally, a couple of quick notes about a report that came out in October by the Student Loan Ombudsman. For those who don't remember, that was Rohit Chopra's job when I was working at the CFPB. That was his initial job at the Bureau, and it launched him to other things.

It's not a job that has direct enforcement authority, but it does write these reports and track student loan complaints, and this was their latest summary of what their concerns are, what they're seeing in the complaint database. And just a couple highlights here. Not surprisingly, the majority, 75%, of complaints relate to servicing and collections rather than origination. Interestingly, complaints regarding federal programs went up since their last report, but complaints about private loans decreased.

In terms of the federal loans, I would highlight customer service problems here, because again, this is part of a broader theme that we're seeing the Bureau sound in lots of different industries, where they're concerned about long wait times when you're trying to call with an issue or application processing times, or getting incorrect information when you request information about your payments due or your account.

The Bureau is looking to make these customer service problems into UDAAP violations when they can, frankly. They sound themes about customer service in ways that the industry, particularly the banking industry, has pushed hard back against, but they're not giving up. And we see a lot of questions like this in exams and other efforts by the Bureau where pain points for consumers, whether they are legally required services or not, or legal regulatory requirements, those pain points are going to be a focus for the Bureau. And oftentimes, those are just everyday customer service issues.

And then with both federal and private loans, the Bureau is always very focused on the cancellation programs, whether they're for the federal loans or special programs that may exist for private loans, and whether those are being explained and delivered in ways that are clear and fair for student borrowers.

John Culhane:

So I'm going to highlight a few things that jumped out at us from California, final regulations and proposed regulations in Maine and Nevada, and then just identify a few areas where we think there's likely to be activity in 2024, primarily focusing on private education lens. So starting with California, I think everybody is aware of the main change here with the California regulations.

These are regulations that are supposed to be implementing both the Student Borrower Bill of Rights and the California Student Loan Servicing Act. And California discovered, as it's been progressing, that there are a lot of ways in which education is financed, and all of those ways don't fit neatly into the characterization of a student loan.

So what they've done is they've come up with a bunch of different definitions that they're now using in the regulations in an attempt to, as broadly as possible, sweep within their jurisdiction every possible way that education might be financed. So they've broadened the definition of federal loan in Maryland and Connecticut to pick up all Title IV loans, not just direct loans and FFELP loans. They've picked up the definition of private student loans under Regulation Z. I'll come back to that. It's got some interesting wrinkles.

And they've added terms that they're using in their regulations, traditional student loans, which are actually federal loans, and private loans that are documented with a promissory note or loan agreement, and then education finance products which are documented in any other way and which are not traditional student loans.

So that term is clearly intended to pick up things like income-share agreements, which they address at great length, retail installment contracts, other installment contracts, likely intended to pick up tuition payment plans, at least some tuition payment plans, and even "buy here, pay here" programs that are available at some for-profit schools.

What's interesting about the way they've teed up these definitions is, they're tracking the definition of private student loan in Regulation Z, which has exclusions for open-end credit and mortgage credit, but also has exclusions for emergency loans, loans that have terms of 90 days or less, and the traditional payment plans where no interest accrues and the term is one year or less.

And they haven't referenced at all definitions or exclusions in the Student Loan Bill of Rights for financing offered by the school where the term is no greater than or is less than the term of the education program without regard to whether there's interest being assessed so that that exclusion could apply even if interest is being assessed.

And they've also not made any reference to the small balance exception that exists under the Student Loan Borrower Bill of Rights for financing when the borrower gets to the point of graduation, assuming the borrower only has a small amount due of $1,500 or less, throwing those exclusions away or whether they are going to still follow them as they move forward.

The other thing we have here is kind of a registration-like process for non-licensees, providing an address where you can receive certified or registered mail, return receipt requested. So presumably, that wouldn't be a PO box. It would have to be a place where mail could actually be delivered and someone would sign for it. And if an address is not provided, that defaults to the address specified for service of process, if there is one.

And then if there's none specified for service of process, then it defaults to any location where an entity has a branch, which means that communications could go just about anywhere. Communications from the DFPI could show up just about anywhere. I'm going to skip communication preferences and I'll come back to it in a bit, but one of the things that we're seeing as really challenging for servicers is this proliferation of information that has to appear clearly and conspicuously on the website.

Each state has its own ideas as to what ought to be presented, and we're just seeing this general ratcheting up of information on the assumption, I guess, that students are primarily engaged with websites. And yet, we have this communication preference notion that allows students to say they don't really want to engage through websites or electronically.

Anyway, there's a lot of information that now has to be put on the website, complete detailed information and account records for a borrower, very detailed consolidated report and loan history. Cutoff hours for payment processing have to be there, a process for co-signers to follow if they want to make choices as to how payments they're submitting are applied to co-signed loans, a toll-free telephone number for calling a live person for customer service, and then for federal student loans, clear and complete information about repayment options and loan forgiveness benefits.

And although that's not specifically required for private student loans, there certainly seems to be a signal there that maybe that information ought to be provided as well. Big change with payment processing was they did away with the "any payment by 11:59 Pacific Time is current," in part, but they're now requiring same-day crediting for electronic payments that are received on or before the payment cutoff hour specified on the website.

Checks have to be credited on the date received, and accounts have to be adjusted pretty quickly to reflect the receipt of payments. They have to be adjusted within three days of the date of receipt. And then there's an exception, which is in the statute, it's just repeated in the regulation, for checks that come in without identifying the loan account to which they are to be applied. And for those checks, servicers are expected to identify the proper loan account within 10 days, within a reasonable period of time, not to exceed 10 days, and then promptly apply the check.

That may end up being a real challenge in some instances. In other industries, it's been a recurring problem. And in fact, checks that come in that don't identify the account to which they're applied are one of the big sources of funds for states that they go after when they're looking for unclaimed property. So that could be a challenge as well.

Qualified written requests. I think the one thing that I want to point out here is, you're required to engage with the borrower for some period of time before you can get rid of them. If you respond and answer the question the first time around, you acknowledge it within 10 days. You respond within 30. And the same complaint or inquiry comes back, you have to respond three more times before you can wipe your hands of the interaction with the borrower. So that's at least potentially a fairly hefty requirement.

And then we've got these student loan servicing reports with aggregate information and PII, which it's pretty clear that the regulatory agencies and the state ombudsman in all of these states are going to be using that information for their own purposes, as they're currently doing, trying to get servicers to provide information about repaying and consolidating federal student loans.

Let me move on here to Maine. The only thing I want to note here with Maine, and then I'll move on, is that there is a complaint resolution requirement for exempt persons, that is, financial institutions and the financial agency in Maine, the state agency. The statute says that they have to respond and assist the ombudsman when the ombudsman reaches out and seeks assistance. And basically, the rule set up the same response times for those situations as it exists for written inquiries.

Let me go on to Nevada. Nevada, I'm going to just hit a few things here so I can get to what might be coming in 2024. There's a lender licensing requirement here, but it's not a unique student loan licensing requirement. Lenders are going to have to get installment loan licenses. And I just wanted to flag one of the problems we're seeing with examinations under generic lending licenses, is the examiners don't really understand how student loan programs work. They don't understand the documentation, and they're constantly raising questions about whether the disclosures are compliant and how the loans work.

The other thing is that servicers have to get an authorization for electronic communications if one wasn't provided at the time of origination. It's not entirely clear how specific that authorization has to be at the time of origination, whether it's enough to have a space in the application or the screen for an email to be entered or whether there's got to be associated text that specifically says, "By providing my email, I'm authorizing you to contact me electronically."

And technically, this authorization is supposed to apply to all communications, but there's some tension with the required payoff statement, where payoff statements can be provided electronically if there's consent. So it's unclear whether that's just an additional consent or even if you've already gotten an authorization for electronic communications, or whether a general authorization will suffice.

Let me jump from here, just because we're running out of time, and hit some things that we're focusing on and we're going to be watching for in 2024. We think we're going to see a lot more scope expansion for licensing along the lines of what happened in California with the servicer licensing, but not just for servicer licensing, for origination as well, so that licensing is going to be required for companies offering products that don't currently have to get licensed and for companies servicing products that may not necessarily have to be licensed right now.

We're a little concerned about these communication preferences that are proliferating, although they're mostly showing up in connection with communications about inquiries or written requests, because there seems to be the potential here for these preferences to become communication roadblocks. And once selected, there doesn't seem to be an easy way for a lender or servicer to work around those preferences and communicate in other ways.

Another thing we're seeing, as is the case in California, is this gradual creep towards real-time payment processing and reporting. So you get the payment and you have to immediately reflect it in the account balance that the customer can see. The times for doing this kind of processing keeps shrinking, and we're concerned that there may be more pressure there going forward in 2024.

Default avoidance, alternative repayment options, and loan forgiveness. Obviously, we're familiar with the pressure, and Tom talked about the federal programs. And what we're seeing and what we expect to continue is going to be pressure for those programs to be replicated with private education loans, more activity around default avoidance, maybe efforts to require not just to have servicers talk about what's available, but actually require originators and servicers to provide particular repayment options, and we think there will be more stress on loan forgiveness.

And in the private level, the loan forgiveness has basically been forcing co-signer release and forcing credit life and disability insurance by requiring release of borrowers and co-signers when one or the other dies and requiring a release on total and permanent disability. What we're watching for here in particular is required hardship forgivenesses, and we'll just have to see what happens there. I mentioned, and I think everybody is aware of states pressuring servicers to provide notice of federal refinancing options. We may see that extend to private refinancing options as well.

We've seen the initial steps to push the borrower defense to repayment on the federal loan side into private student loans through the FTC Holder Rule, and we think there'll be more of that. And lastly, it just seems likely that there will be a ratcheting up of penalties for noncompliance as a way to provide consumer relief and reduce consumer loan balances. I've run over a little bit. Let me stop here and turn it over to Alan to close.

Alan Kaplinsky:

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