

# New York's Student Loan Servicing Act of 2019

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As part of this year's budget, New York State passed a law to license, regulate and provide oversight of student loan servicers.<sup>1</sup> Rising student loan debt rivals healthcare in our public discourse today. The most current research published by the Student Borrower Protection Center, states that New York State residents owe \$90.6 billion in student debt. Nearly half of New Yorkers aged 18 to 35 live with student loan debt (2,356,200), with an average debt load of \$38,477. Almost twelve percent of New York borrowers are delinquent on their loans (275,675). Student debt impacts 220,000 older borrowers aged 55 to 85, as well, with more than ten percent of older New Yorkers in default.<sup>2</sup>

The analysis also indicates that since 2012, more than 4,300 New Yorkers have filed complaints about their student loan servicers.<sup>3</sup> More common complaints about servicing include servicers providing bad information about options, steering borrowers into forbearance agreements when an Income Based Repayment plan (IBR) would be better, and failing to communicate when students need to recertify an IBR or when their loan is paid in full. There have also been issues with servicers failing to properly credit a borrower's account when an overpayment is made, or misallocating partial payments in a way that harms the borrower, among other things. In this midst of this growing crisis, over the past two years the Consumer Financial Protection Bureau in Washington, D.C. has rolled back its once strong oversight of the student loan servicing industry, and United States Department of Education Secretary Betsy DeVos is rescinding student borrower protections and oversight of for-profit schools where defaults occur at disproportionately higher levels.<sup>4</sup>

New York's new law generally covers the conduct of servicers of federal, state, private and school loans of New York State resident borrowers.<sup>5</sup> Financial institutions and public and

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<sup>1</sup> NY Banking Law, Article 14-A. The Act also amends other provisions of NY Banking Law which cover more general conduct to add licensed student loan servicers under their covered, such as: Sec. 36(10) regarding confidentiality of reports received by DFS from institutions; Sec. 39 regarding orders issued by DFS.

<sup>2</sup> See Student Borrower Protection Center, <https://protectborrowers.org/state/new-york/>.

<sup>3</sup> Id.

<sup>4</sup> See Cao, Yan, "Grading New York's Colleges," *The Century Foundation*, 2019 <https://tcf.org/content/report/grading-new-yorks-colleges/> (finding 7% of NY students attend for-profit schools, yet account for 25% in default; 47% of students who start college at a NY for-profit school default on federal student loans within 12 years; over 12 years, students of for-profit schools default at more than *four times* the rate of those who attended public and nonprofit colleges in NY).

<sup>5</sup> There is currently a legal debate regarding the extent to which states can regulate servicers of federal student loans. See Berman, Jillian, "Clash Between Student Loan Services and States Could Wind Up in the Supreme Court," *Marketwatch*, Jan.28, 2019, <https://www.marketwatch.com/story/we-may-soon-find-out-whether-student-loan-companies-have-to-follow-state-law-2019-01-28>.

private postsecondary schools which service student loans are considered “exempt organizations”<sup>6</sup> under the law and are not required to get a license under this Act from the Superintendent of the New York State Department of Financial Services (DFS). Nor are exempt organizations subject to examinations or some other requirements under this law.<sup>7</sup> The effective date is October 9<sup>th</sup>, 2019, 180 days from the date the bill was signed into law.

## Licensing

Non-exempt student loan servicers must be licensed through DFS which determines eligibility. In its application, the servicer must affirm its solvency, provide a financial statement, verify its members are over twenty-one years of age, provide information as to its character, fitness, financial and business responsibility, background and experiences, and provide any other information DFS requires through regulation or policy.<sup>8</sup> Exempt organizations do not have to get a license though they must notify DFS that they are servicing student loans in the state, and adhere to other sections of the law. Servicers of federal student loans who were servicing loans of New York residents as of April 1, 2019 are automatically deemed to have a license and do not have to apply, though they also have to notify DFS of their status and adhere to the law.<sup>9</sup> If such federal loan servicer is also servicing state loans, however, the servicer must apply for a license pursuant to the provisions of the new law.<sup>10</sup> Pursuant to Banking Law section 18, DFS shall set a fee to accompany applications to be licensed to service student loans of New York State residents.<sup>11</sup>

A license shall remain in effect, unless it is surrendered by the servicer, suspended or revoked.<sup>12</sup> Servicers must notify DFS of any changes in officers, directors or partners. If there is going to be a change in control of a servicer, the servicer must seek approval from DFS and pay an investigation fee to be set by DFS.<sup>13</sup> DFS may suspend a license for thirty days if there is good cause or substantial risk of public harm. DFS may only suspend for a longer period, or revoke a

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<sup>6</sup> An “exempt organization” is defined as “any banking organization, foreign corporation, national bank, federal savings association, federal credit union, or any bank, trust company, savings bank, savings and loan association, or credit union organized under the laws of any other state, any public postsecondary educational institution or private nonprofit postsecondary educational institution or any person licensed or supervised by [DFS].” NY Banking Law Article 14-A, sec. 710(4).

<sup>7</sup> Exempt organizations may be licensed by NYS and subjected to examination under another law or regulation.

<sup>8</sup> NY Banking Law Art. 14-1 sec. 712.

<sup>9</sup> Id. at sec. 711. The law requires servicers of federal student loans in NYS to adhere to other provisions of our Banking Law including section 33 regarding reserve depositories, section 39 regarding orders of the Superintendent, and section 44 regarding violations and penalties.

<sup>10</sup> Id.

<sup>11</sup> Id. at sec. 712(2).

<sup>12</sup> Id. at sec. 712(1). Voluntary surrender of a license does not exonerate the servicer from prior civil or criminal acts.

<sup>13</sup> Id. at secs. 714 and 715.

license after notice and a hearing is conducted pursuant to New York State’s Administrative Procedure Act. DFS may suspend or revoke a license if DFS determines: (a) the servicer violated the law, engaged in fraud, intentional misrepresentation, or gross negligence, or if a civil judgment has been entered against a servicer upon grounds of fraud, misrepresentation or deceit ; (b) circumstances changed that make the servicer ineligible for licensing; (c) the servicer fails to cooperate with an examination or investigation; (d) the servicer engages in unsafe or unsound practices, or DFS determines it is not in the public interest to allow the servicer to continue servicing student loans; or (e) the servicer becomes insolvent or if other financial concerns exist.<sup>14</sup>

DFS must execute a written order, served on the student loan servicer, to suspend or revoke a license. DFS may require restitution to consumers of fees or other charges improperly charged before reinstatement of the license.<sup>15</sup> (Additional penalties may be required, described below.) If a non-exempt servicer is operating in New York State without a license, DFS may order the servicer to “desist and refrain” from servicing. The servicer may request a hearing which must be held within sixty days.<sup>16</sup>

## Responsibilities and Prohibited Practices

The law affirmatively addresses common abuses reported in the student loan servicing industry by prohibiting a number of practices. These regulations apply to all student loan servicers. Prohibited practices set forth in the law are: a) defrauding or misleading a borrowers; (b) engaging in unfair, deceptive or predatory acts or practices, or misrepresenting any material information; (c) misapplying a payment; (d) providing inaccurate information to a credit reporting agency; (e) refusing to communicate with a representative of the borrower authorized in writing to do so; (f) lying, providing false information or omitting material information to a government body investigating the servicer including DFS; (g) failing to respond to a request from DFS within fifteen days or sooner if required by DFS; (h) failing to respond to a consumer complaint submitted by DFS to the servicer within fifteen days, unless the servicer requests additional time to respond but only up to forty-five days.<sup>17</sup>

The law also sets forth a number of responsibilities all student loan servicers must comply with: (a) accurately report information for each borrower to at least one major credit reporting agency if they regularly report; (b) ask a borrower how they want a non-conforming payment to be applied, and follow those instructions for all future non-conforming payments unless directed otherwise by the borrower; (c) when servicing is transferred resulting in a new entity

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<sup>14</sup> Id. at sec. 716.

<sup>15</sup> Id. at sec. 716.

<sup>16</sup> Id. at sec. 720.

<sup>17</sup> Id. at sec. 719.

the borrower is to make payment or communicate with (i) the servicer must transfer all information regarding the borrower within forty-five days, (ii) the new servicer must have policies and procedures to ensure all information has been received, (iii) such transfer must be completed within seven days of the borrower's next payment, and (iv) the transfer agreement must include a condition that the new servicer "shall honor all borrower benefits originally represented as being available to the borrower" even if the borrower had not yet qualified for the benefit; (d) respond to any written inquiry from a borrower or their representative within thirty days; and (e) preserve all records for each borrower for at least two years after the transfer of servicing of the loan or repayment by the borrower.

DFS is authorized to promulgate additional rules and regulations to protect student loan borrowers in New York State. The law specifically authorizes, but does not limit such regulations to further define unfair and deceptive acts and practices, interpret or further explain terms used in the law, as well as to clarify rules and regulations regarding enforcement.<sup>18</sup> There is also a provision noting that servicers must comply with New York's financial services law, federal law, and of course, with regulations prescribed by DFS.<sup>19</sup>

## Records Retention and Reporting

In addition to the requirement stated above for student loan servicers to maintain a borrower's individual records for at least two years after servicing is sold or repayment, all student loan servicers are required to keep their business books, accounts and records for at least three years to be available to DFS for examination. Non-exempt servicers are required to file a verified annual report to DFS, the date and content of which shall be determined by DFS. DFS has the authority to require additional or special reports deemed necessary, as well.<sup>20</sup>

## Examinations, Enforcement and Penalties

The law empowers DFS to examine and investigate a non-exempt student loan servicer, and their affiliates' books, accounts, records and files for every student at any time, and prohibits the servicer from withholding any information.<sup>21</sup> When an examination occurs, the servicer must allow free access to all offices and records and may require the attendance of and testimony under oath of any person connected with the servicer. The servicer shall be

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<sup>18</sup> Id. at sec. 718.

<sup>19</sup> Id. at sec. 725.

<sup>20</sup> Id. at sec. 717. DFS may require electronic submission of reports.

<sup>21</sup> Since non-exempt organizations include financial institutions, as well as schools that are otherwise licensed by the State, presumably DFS or the New York State Department of Education could examine records regarding student loan servicing through other means.

responsible for paying expenses related to the investigation apart from travel and subsistence costs incurred by DFS employees.

If a violation is suspected, the servicer has a right to notice and a hearing. After such hearing, in addition to suspension or revocation of the servicer's license, described above, DFS may impose a penalty for each violation of the law, regulation or policy applicable to exempt servicers as well. The penalty shall be the greater of: (i) \$2,000, or \$10,000 if the misconduct was willful, (ii) two times the aggregate damages attributable to the violation, or (ii) two times the aggregate economic gain attributable to the violation. Borrowers may also bring their own judicial action for a violation, as can the State.<sup>22</sup>

## Conclusion

With this law, as well as the actions already taken by the NYS Department of Financial Services through its Student Protection Unit, New York joins an increasing number of states increasing protections for student loan borrowers within their borders.<sup>23</sup> Mortgage servicing regulations implemented by DFS in 2010 were an important piece of the puzzle to addressing the foreclosure crisis in New York State and similarly, these student loan servicing regulations set very reasonable standards for the student loan servicing industry. More will be needed to fully protect students from predatory lending, sham for-profit schools, debt management scams and the growing cost of tuition but this Act is an important first step.

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<sup>22</sup> Sec. 723.

<sup>23</sup> See, Backstrom, Brian, "How States are Protecting Student Loan Borrowers," *Rockefeller Institute of Government*, Dec. 13, 2018, <https://rockinst.org/blog/how-states-are-protecting-student-loan-borrowers/>.