EVERY TOOL AT ITS DISPOSAL: THE CASE FOR A STUDENT LOAN SERVICING RULEMAKING

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In 2010, following the 2008 financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[2] Among other provisions, the Dodd-Frank Act established the Consumer Financial Protection Bureau ("CFPB" or "Bureau") as a direct response to the risky and harmful actions by the financial industry that precipitated the greatest recession the country had seen in nearly seventy years. In fact, it was precisely because of these actions—actions that led to trillions of dollars of lost wealth for American families—that Congress was able to restructure much of the financial regulatory structure that had existed for decades.[3] With the passage of the Dodd-Frank Act,

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[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203, 124 Stat. 1376.

[3] *See, e.g.*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET

Congress, for the first time, created an independent federal agency with broad new tools and a singular vision: to oversee America's financial markets for violations of consumer financial protection laws.

The Bureau's mission reflected the systemic failures in the consumer finance marketplace that precipitated its creation: the toxic mortgages and widespread consumer harm that ultimately brought on the Great Recession. The CFPB's mission was two-fold: (1) correct the mistakes that wreaked havoc on the mortgage market during the 2008 financial crisis, and (2) ensure that nothing like the 2008 financial crisis ever happened again.[4] And in its early years, the Bureau diligently pursued this mission. In its first two years, the Bureau issued or updated twenty-three different regulations, including expansive new rules affecting the origination and servicing of residential mortgages.[5] The impact of these new rules was significant. For example, the Bureau estimates that without its amendments to the Real Estate Settlement Procedures Act ("RESPA"), "at least 26,000 additional borrowers would have experienced foreclosure within three years, and at least 127,000 fewer borrowers would have recovered from delinquency within three years."[6]

However, the Bureau's mandate extends beyond mortgages—it includes payday loans, credit cards, auto loans, and—the focus of this paper—student loans. In fact, experts have likened the widespread distress in the student loan market to the recession-era mortgage market, noting the striking similarities

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AL., JOINT IMPLEMENTATION PLAN 301-326 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (April 2011), https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-joint-implement-plan-dodd-frank-sec-301-326.pdf.

[4] *See, e.g.*, Press Release, U.S. Dep't of the Treasury, Treasury Deputy Secretary Neal Wolin Written Testimony before the Senate Banking Committee on "Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act" (Sept. 30, 2010), https://www.treasury.gov/press-center/press-releases/Pages/tg881.aspx ("The Act builds a stronger financial system by addressing major gaps and weaknesses in regulation that helped cause the financial crisis that led to the recession. It puts in place buffers and safeguards to reduce the chance that another generation will have to go through a crisis of similar magnitude.").

[5] CFPB, FALL 2013 SEMI-ANNUAL REPORT (Nov. 2013), https://files.consumerfinance.gov/f/201311_cfpb_semi-annual-report.pdf ("In its first two years, the Bureau has issued or updated several rules under the Dodd-Frank Act, including 23 as of September 30, 2013.").

[6] CFPB, 2013 RESPA SERVICING RULE ASSESSMENT REPORT (2019).

between the two, particularly in the years following the financial crisis.[7]

This article reviews the extent to which the Bureau's authorities and subsequent efforts cover the second largest class of consumer debt in this nation—student loan debt. In particular, it focuses on the critical role that student loan servicers play, both as the vehicle through which tens of millions of borrowers participate in this market and the extent to which widespread illegal servicing practices fuel consumer harm and financial distress.

This Article begins with an overview of the student loan market, with a particular focus on the role of non-depository financial companies ("nonbanks"). In Part II, this article will review the role that the Consumer Financial Protection Bureau has played in the student loan market and the extent to which the Bureau employed its broad authorities with respect to the student loan servicing industry. It also discusses how the Bureau's oversight, enforcement, and policy initiatives exposed the need for a student loan servicing rule. In Part III, it explores the features of the student loan servicing market that suggest setting strong, baseline standards through rulemaking is necessary to improve practices by the student loan servicing industry and mitigate consumer harm. In Part IV, it defines the authority under the which the Bureau can write a student loan servicing rule. In Part V, it envisions the scope of a student loan servicing rule.

I. INTRODUCTION

Today, 44.7 million consumers collectively owe $1.598 trillion in student loan debt—exceeding the total volume of credit

[7] Rohit Chopra, Assistant Director & Student Loan Ombudsman, CFPB, Prepared Remarks Before the Federal Reserve Bank of St. Louis (Nov. 18, 2013), transcript available at https://www.consumerfinance.gov/about-us/newsroom/student-loan-ombudsman-rohit-chopra-before-the-federal-reserve-bank-of-st-louis/ ("The student loan-housing connection is actually much deeper than the first-time homebuyer problem. . . . Given these similarities, it should not be surprising to find common problems when loans became due. . . . For struggling homeowners and student loan borrowers, the consequences of being unable to find an affordable repayment option are severe. The impacts of foreclosures may not just be felt by the former homeowner, but potentially by the entire neighborhood. For student loan borrowers who default early in their lives, the negative impact on their credit report can make it more difficult to pass employment verification checks or ever reach their dream of buying a home.").

card debt and vehicle debt, falling behind only mortgages.[8] Student loan debt now makes up 11 percent of all household debt, up from four percent in 2007.[9]

The speed and scale of the growth of student debt is unprecedented in the half-century long history of the modern student loan market—between 2007 and 2019 the number of student loan borrowers in America climbed by nearly 15 million people as the volume of outstanding student debt nearly tripled.[10] The distribution of this burden is not limited to young consumers—in fact, the fastest growing segment of consumers with student debt is people over the age of 60. As of 2017, there were nearly 3.5 million student loan borrowers over the age of 60, an increase of 46 percent from five years prior.[11]

Beyond age, research demonstrates how student debt is impacting vulnerable borrowers, including populations of borrowers for which the Bureau has a Congressional mandate to help protect.[12] For example, the Bureau's Office of Servicemember Affairs repeatedly highlighted the disproportionate burden student loan debt places on military families, and how servicing failures can jeopardize military readiness.[13] Student loan debt also

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[8] U.S. FED. RESERVE BANK, G. 19, Consumer Credit Statistical Release (May 7, 2019), https://www.federalreserve.gov/releases/g19/current/default.htm; *Household Credit Data*, FED. RESERVE BANK OF N.Y. (2018), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/sl_update_2018.xlsx.

[9] *Quarterly Report on Household Debt and Credit*, FED. RESERVE BANK OF N.Y. (Feb. 2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/hhd_c_report_2018q4.xlsx.

[10] U.S. DEP'T OF EDUCATION, OFFICE OF FED. STUDENT AID, FEDERAL STUDENT LOAN PORTFOLIO: PORTFOLIO SUMMARY, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited June 6, 2019).

[11] CFPB, OLDER CONSUMER AND STUDENT LOAN DEBT BY STATE (2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_older-consumers-and-student-loan-debt-by-state.pdf.

[12] *See, e.g.*, 12 U.S.C. §§ 5493(e), (g).

[13] *See, e.g.*, SETH FROTMAN & HOLLISTER PETRAEUS, CFPB, OVERSEAS & UNDERSERVED: STUDENT LOAN SERVICING AND THE COST TO OUR MEN AND WOMEN IN UNIFORM (2015); *see also* Hollister K. Petraeus, Assistant Director, CFPB, Testimony Before the U.S. Senate Committee on Commerce, Science & Transportation (Nov. 20, 2013), transcript available at https://www.consumerfinance.gov/about-us/newsroom/hollister-k-petraeus-before-the-u-s-senate-committee-on-commerce-science-transportation/

disproportionately impacts women, communities of color, and rural communities.[14] Congress tasked the Bureau with protecting all borrowers, including each of these populations, from predatory financial practices.[15]

The Student Loan Market

When examining how and why a student loan servicing rulemaking should be a priority for the Bureau, it is important to understand the unique transition that took place in the student loan market contemporaneous to the consideration and passage of the Dodd-Frank Act in 2010.

Prior to 2010, the student loan market was largely comprised of loans made under the Federal Family Education Loan Program ("FFELP"). Under FFELP, companies originated loans that were subsidized and guaranteed by the federal government, at interest rates set by Congress. In 2010, as part of the Health Care and Education Reconciliation Act ("HCERA"), the FFEL program was ended, and federal student loans were made exclusively through the Direct Loan Program.[16]

The change from lending under the FFEL Program to the Direct Loan Program was part of a significant shift across the student loan market. Shortly before Congress elected to end new originations of FFELP loans, it authorized the Department of Education ("ED") to purchase more than $150 billion in outstanding FFELP loans, while leaving another $350 billion in "commercial" FFELP loans held by private creditors.[17] This made

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(quoting Adm. Mike Mullen, who stated "A sailor's financial readiness directly impacts unit readiness and the Navy's ability to accomplish its mission.. . .").

[14] *Women's Student Debt Crisis in the United States*, AM. ASS'N OF UNIVERSITY WOMEN, https://www.aauw.org/research/deeper-in-debt/ (last updated May 2019); *Report: Defaulted Federal Student Loan Borrowers in Communities of Color Are Disproportionately Sued*, NAT'L CONSUMER LAW CENTER (2019), https://www.nclc.org/media-center/report-defaulted-federal-student-loan-borrowers-in-communities-of-color-are-disproportionately-sued.html; PJ Tabit & Josh Winters, *"Rural Brain Drain": Examining Millennial Migration Patterns and Student Loan Debt*, 1 CONSUMER & COMMUNITY CONTEXT, no. 1, Jan. 2019, at 7, https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf.

[15] *See, e.g.*, 12 U.S.C. §§ 5493(b)(2), (c).

[16] Health Care and Education Reconciliation Act of 2010, P.L. 111-152, 124 Stat. 1029.

[17] U.S. DEP'T OF EDUCATION, ENSURING CONTINUED ACCESS TO

ED the largest student loan holder in the country and, as the then-head of its lending arm explained in 2017, "the. . . largest special-purpose consumer bank in the world."[18] The student loan portfolio held by the U.S. Department of Education ballooned to more than $1.2 trillion by 2019.[19]

This is not to dismiss the significance of private student loans in the market. In the years surrounding the financial crisis, private student lending reached its peak as a share of all outstanding student debt—in 2009, private student loans comprised approximately 17 percent of the student loan market, the majority of which were originated by banks.[20] The share of the student loan market comprised of private student loans has since declined; however, the private student loan market remains significant in size—outstanding private student loans collectively total $119 billion.[21]

Today, federal loans comprise approximately 92 percent of outstanding student loans, with private loans remaining an enduring feature of the higher education finance landscape, but

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STUDENT LOANS ACT (ECASLA) ANNUAL REPORT TO CONGRESS (July 2011), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/July2011ECASLAReport.pdf.

[18] U.S. Dep't of Education, Press Release: Secretary DeVos Announces Intent to Enhance FSA's Next Generation Processing and Servicing Environment (Aug. 1, 2017), https://www.ed.gov/news/press-releases/secretary-devos-announces-intent-enhance-fsas-next-generation-processing-and-servicing-environment, ("The FSA Student Loan Program represents the equivalent of being the largest special purpose consumer bank in the world").

[19] *See* OFFICE OF FED. STUDENT AID, FEDERAL STUDENT LOAN PORTFOLIO: PORTFOLIO SUMMARY, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited May 28, 2019).

[20] CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1027 (Aug. 29, 2012), https://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf;
OFFICE OF FED. STUDENT AID, FEDERAL STUDENT LOAN PORTFOLIO: PORTFOLIO SUMMARY, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited May 28, 2019); *see also*, Rohit Chopra, *Too Big to Fail: Student debt hits a trillion*, CFPB BLOG (Mar. 21, 2012), https://www.consumerfinance.gov/about-us/blog/too-big-to-fail-student-debt-hits-a-trillion/

[21] MEASUREONE, https://www.measureone.com/home (last visited May 28, 2019).

increasingly becoming a product used in conjunction with federal student loans.[22]

The Student Loan Servicing Market

The prevalence of federal student loans makes ED the dominant player in the market. ED contracts with private companies to manage the servicing of ED-held FFELP loans and Direct Loans.[23] Currently, the Department of Education has contracts with nine companies, two of which are subsidiaries of the same corporate parent.[24] The majority of the portfolio of outstanding federally owned student debt is allocated to four servicers operated by just three companies: Nelnet, Navient, and the Pennsylvania Higher Education Assistance Agency ("PHEAA")—collectively referred to as Title IV Additional Servicers ("TIVAS").[25] Navient and Nelnet are private, publicly traded financial services companies, while PHEAA is an entity chartered by the state of Pennsylvania.[26] The legacy "commercial"

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[22] *See supra* note 19; *see also, Private Loans Facts and Trends*, INSTITUTE FOR COLLEGE ACCESS & SUCCESS (Apr. 2019) https://ticas.org/sites/default/files/pub_files/pl_facts_trends.pdf; *see also*, *13th Annual Report: Student Debt and the Class of 2017*, INSTITUTE FOR COLLEGE ACCESS & SUCCESS 12 (Sept. 2018), https://ticas.org/sites/default/files/pub_files/classof2017.pdf (noting that 70 percent of private student loan borrowers also have federal student loans).

[23] *Loan Servicing Contracts*, OFFICE OF FED. STUDENT AID, (last accessed May 28, 2019) https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing.

[24] *Id.* While there are four designated TIVAS—Navient, Nelnet, PHEAA, and Great Lakes—in 2018, Nelnet acquired Great Lakes. Direct Loans awarded to Great Lakes are still serviced under the Great Lakes-brand. *See* Press Release, Nelnet Completes Acquisition of Great Lakes Educational Loan Services, Inc. (Feb. 7, 2018), http://www.nelnetinvestors.com/news/press-release-details/2018/Nelnet-Completes-Acquisition-of-Great-Lakes-Educational-Loan-Services-Inc/default.aspx. Not-for-profit entities service the remainder of ED's federal loan portfolio.

[25] *See* OFFICE OF FED. STUDENT AID, FEDERAL STUDENT LOAN PORTFOLIO: SERVICER PORTFOLIO BY LOAN STATUS, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfoliobyLoanStatus.xls (last visited Dec. 2018).

[26] *See, e.g.*, NAVIENT, https://www.navient.com/ (last accessed May 28, 2019); NELNET, https://www.nelnet.com (last visited May 28, 2019); PHEAA, https://www.pheaa.org/about/ (last visited May 28, 2019). PHEAA operates two primary business units- American Education Services, which handles student loans made by banks and other commercial clients, and FedLoan Servicing

FFELP segment of the student loan market is largely serviced by these same three companies.[27]

Many private student lenders manage privately held student loan portfolios in a manner similar to the Department of Education—contracting with third-party entities to service private student loans.[28] PNC Bank and Citizens Bank are among the largest private student lenders in the market, and they contract with PHEAA and Nelnet for servicing, respectively.[29] In addition, both Navient and Nelnet own or control their own substantial portfolios of private student loans, some of which have been securitized and all of which continue to be serviced in-house by their own student loan servicing subsidiaries.[30]

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which handles loans on behalf of the federal government. Collectively, PHEAA's servicing units handle more than $1 out of every $10 in non-housing consumer debt in America. *See* PA. HIGHER EDUCATION ASSISTANCE AGENCY, 2018 HANDBOOK FOR LEGISLATORS (accessed June 8, 2019), https://www.pheaa.org/about/pdf/handbook-legislators.pdf ("Grand Total 422.9B of assets managed on PHEAA's systems"); *Quarterly Report on Household Debt and Credit*, FED. RESERVE BANK OF N.Y. (2019), https://www.newyorkfed.org/microeconomics/hhdc.html (showing $4.02 trillion in non-housing consumer debt outstanding as of Q1 2019.). Further, although PHEAA continues to assert that it is an agency of the Commonwealth of Pennsylvania and thus entitled to sovereign immunity in defense of a wide range of private lawsuits, federal courts have held that PHEAA is legally a private company.); *see*, Natalie Kitroeff, *Court Rules That Student Loan Company Isn't Above the Law*, BLOOMBERG NEWS (2015), https://www.bloomberg.com/news/articles/2015-10-23/court-rules-that-student-loan-company-isn-t-above-the-law.

[27] *Top 100 Current Holders of FFELP Loans for 2017 and 2016 (sequenced from high to low on 9/30/17 $Outstanding)*, OFFICE OF FED. STUDENT AID: FINANCIAL PARTNERS PORTAL (2017), https://fp.ed.gov/attachments/publications/FY2017Top100Lenders.pdf (In addition to being in the top 5 loan holders, these companies contract with many other FFELP loan holders to service commercial FFELP loans.).

[28] For example, Citizens Bank contracts with Nelnet's subsidiary, Firstmark. *See Access My Student Loans*, CITIZENS BANK (last visited May 28, 2019), https://www.citizensbank.com/student-lending/access-my-student-loan.aspx.

[29] *See, e.g.*, *PNC Solution Loan*, PNC (last visited May 28, 2019), https://www.pnc.com/en/personal-banking/borrowing/education-loan-center/pnc-solution-undergraduate-loans.html; *Access My Student Loans*, CITIZENS BANK, (last visited May 28, 2019), https://www.citizensbank.com/student-lending/access-my-student-loan.aspx.

[30] Navient, Annual Report (Form 10-K) (Jan. 21, 2019), https://navient.com/assets/about/investors/shareholder/annual-

As noted above, the student loan servicing market remains dominated by Navient, Nelnet, and PHEAA, which collectively manage more than $1.2 trillion in private and federal student loan debt.[31] In effect, nearly four out of every five dollars of student debt in America is managed by these three nonbank entities.[32] Although no comprehensive accounting exists documenting the distribution of the remaining approximately $400 billion in outstanding student debt serviced by other market participants, evidence suggests this servicing volume is distributed across three very large banks and another approximately three dozen nonbank student loan companies, five of which currently perform student loan servicing under contract with the U.S. Department of Education.[33]

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reports/NAVI_2018_Form_10-K_Final.pdf, (Commercial Servicing, $94.5 billion); Nelnet, Annual Report (Form 10-K) (Dec. 31, 2018), http://s21.q4cdn.com/368920761/files/doc_financials/annual/2018/12911_Annual_Report_2019_Full_0408_r1.pdf (Commercial: $53.13 billion). Readers should note one significant exception to this general observation. At least three banks that issue private student loans, including, for example, Discover Bank and Sallie Mae Bank, elect to service their own loans in house, also known as first-party servicing. *See Student Loans with Great Rates*, DISCOVER, https://www.discover.com/student-loans/; SALLIE MAE, https://www.salliemae.com/.

[31] Based on the authors' analysis of publicly available data on servicing volumes, 77 percent of all student loan servicing is conducted by three large nonbank loan servicers that collectively service more than $1.195T in student loans. Two of these servicers (Nelnet and PHEAA) also lease their servicing technology to smaller firms that collectively service billions of dollars in additional student debt. *See* NAVIENT, https://www.navient.com/ (last accessed May 28, 2019); NELNET, https://www.nelnet.com (last visited May 28, 2019); PHEAA, https://www.pheaa.org/about/ (last visited May 28, 2019).

[32] *Id.*

[33] CONSUMER FIN. PROT. BUREAU*,* OMB CONTROL NO. 3170, STUDENT LOAN MARKET MONITORING SUPPORTING STATEMENT (Feb. 23, 2017), https://www.regulations.gov/document?D=CFPB-2017-0002-0002 ("This data collection is limited to student loan servicers within the Bureau's supervisory authority. Including selected insured depository institutions with total assets of more than $10,000,000,000 that service their own student loans and larger nonbank participants in the student loan servicing market, which have student loan servicing account volumes exceeding one million. Our research has shown us that there are ten student loan servicers that meet these criteria."); Connecticut Department of Banking, *Downloadable Student Loan Servicers Licensee List as of June 1, 2019* (June 2019), https://portal.ct.gov/-/media/DOB/Consumer-Credit-Licenses/student_loan_servicers.xlsx?la=en, (showing 39 unique nonbank companies had obtained a student loan servicing license from the State of Connecticut); U.S. Department of Education, *Servicer*

Irrespective of whether a loan is made by a bank, a nonbank lender, or the United States government, all student loans are serviced by entities that engage "in offering or providing a consumer financial product or service," as defined by the Dodd-Frank Act.[34] Therefore, all of these entities fall under the purview of the CFPB.[35]

II. THE BUREAU'S EFFORTS IN THE STUDENT LOAN MARKET

It is clear that the drafters of the Dodd-Frank Act were concerned about consumer risk in the student loan market.[36] In fact, Congress specifically mandated certain actions by the CFPB with respect to student loans. For example, the Act calls for the designation of a Student Loan Ombudsman.[37] The Act also mandated a report from the Director of the Bureau and the Secretary of Education to Congress regarding the composition of the private student loan market and recommendations for improving consumer protections for student loan borrowers with both private and federal student loans.[38] Furthermore, the Act establishes enhanced supervisory authority over nonbank private

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Portfolio by Repayment Plan (last visited June 10, 2019), https://studentaid.ed.gov/sa/about/data-center/student/portfolio (identifying approximately $100b in total loan volume assigned to "not for profits" by the Department of Education).

[34] 12 U.S.C. § 5481; *see generally*, 12 U.S.C. Subchapter V. For further discussion of CFPB's authorities as they related to nonbank student loan servicers, *see* CFPB, Letter from Director Richard Cordray to Education Secretary Betsy DeVos (Sept. 2017), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/09/Cordray-DeVos-Letter.pdf.

[35] *Id.*

[36] *See, e.g.*, The White House, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act ("Now, for all those Americans who are wondering what Wall Street reform means for you, here's what you can expect. If you've ever applied for a credit card, a student loan, or a mortgage, you know the feeling of signing your name to pages of barely understandable fine print. What often happens as a result is that many Americans are caught by hidden fees and penalties, or saddled with loans they can't afford.").

[37] 12 U.S.C. § 5535.

[38] 12 U.S.C. § 5602.

student loan originators.[39]

However, the Bureau's authorities that apply to the student loan market are far more expansive than these explicit references would suggest, if only considered in isolation. Under the Dodd-Frank Act, the Bureau has broad authority with respect to markets of "consumer financial products and services," a definition that is inclusive of student loans, mortgages, payday loans, credit cards, and more.[40] Accordingly, in the student loan market, Congress granted the Bureau authority to engage in regulation, research, data collection, complaint handling, and enforcement.[41] Furthermore, while the Bureau's authority to supervise all large banks and certain nonbanks vested immediately,[42] Congress also granted CFPB authority to supervise other nonbank "'larger participant[s]' of markets for other consumer financial products or services, as the Bureau defines by rule."[43] The Bureau chose to exercise this "larger participant" authority in the student loan servicing market, finalizing a rule to establish the first nonbank student loan servicing examination program that went into effect in 2014.[44] Combined with the Bureau's statutory authority to supervise large banks, this 2014 rulemaking ensured that the Bureau's examination program would cover the entirety of the student loan servicing market.[45]

Complementing the structural features of the Bureau that cover participants in the student loan servicing market, the Bureau administers a range of consumer protection laws that govern the conduct of these market participants.[46] For example, the Bureau's "enumerated consumer laws" include the Equal Credit Opportunity Act ("ECOA"), which prohibits discrimination in the offering of credit, including when borrowers with federal student

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[39] 12 U.S.C. § 5481(5).

[40] 12 U.S.C. § 5511(a).

[41] 12 U.S.C. §§ 5511(c)(2), 5514, 5515, 5564.

[42] 12 U.S.C. § 5515.

[43] 12 C.F.R. § 1090 (2013).

[44] 12 C.F.R. § 1090.106.

[45] CONSUMER FIN. PROT. BUREAU, DEFINING LARGER PARTICIPANTS OF THE STUDENT LOAN SERVICING MARKET at 13 (2013), https://files.consumerfinance.gov/f/201312_cfpb_student-servicing-rule.pdf ("As one industry commenter recognized, establishment of supervision over larger nonbank participants in the student loan servicing market is also appropriate because banks that engage in student loan servicing already are subject to Federal supervision with respect to Federal consumer financial law.")

[46] 12 U.S.C. § 5481(12).

loans are applying for income-driven repayment plans.[47] The Bureau's purview also includes administering the prohibition on Unfair, Deceptive, or Abusive Acts and Practices ("UDAAP"), which applies to a range of common servicing practices that are discussed in the next section.[48]

Since 2011, the Bureau has deployed these various authorities to stop abuses by student loan companies and drive reforms across the student loan market, as described in detail below. The Bureau has handled over 60,000 complaints from student loan borrowers.[49] Through the Bureau's supervisory authority, it has identified and halted a range of harmful practices at student loan companies.[50] And perhaps most prominently, the Bureau has taken enforcement action against several players in the student loan market, including Wells Fargo, Discover, and

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[47] *Id.*; For further discussion *see* CONSUMER FIN. PROT. BUREAU, FAIR LENDING REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU (Apr. 2017), https://files.consumerfinance.gov/f/documents/201704_cfpb_Fair_Lending_Report.pdf ("Mortgage and Student Loan Servicing. We will evaluate whether some borrowers who are behind on their mortgage or student loan payments may have more difficulty working out a new solution with the servicer because of their race, ethnicity, sex, or age.")

[48] 12 U.S.C. § 5531.

[49] CONSUMER FIN. PROT. BUREAU, 2017 ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (Oct. 2017), https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf [hereinafter 2017 ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN]. These complaints have also served as the foundation or more than a dozen reports identifying consumer harm in the student loan market. *See, e.g.*, CONSUMER FIN. PROT. BUREAU , 2012 ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (Oct. 2012); CONSUMER FIN. PROT. BUREAU, 2013 ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (Oct. 2013); CONSUMER FIN. PROT. BUREAU, 2014 ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (Oct. 2014); CONSUMER FIN. PROT. BUREAU, 2015 ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (Oct. 2015); CONSUMER FIN. PROT. BUREAU, 2016 ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (Oct. 2016).

[50] *See, e.g.*, CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Fall 2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf; *see also* CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Fall 2014), https://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf.

Navient.[51] Between 2011 and 2017, the Bureau's efforts in the student loan market have returned more than $750 million to borrowers.[52]

The collective body of Bureau actions, summarized above and described in detail below, illustrates that, across the lifecycle of a student loan, servicing errors routinely cause borrowers significant financial harm. The design of the current student loan system is such that servicing errors during even the most basic servicing tasks cause unnecessary interest capitalization that can result in hundreds or thousands of dollars being added to a borrower's loan balance, loss of eligibility for or progress toward loan forgiveness, and lost access to subsidies intended to lessen the interest charged to student loan borrowers.[53] Collectively, these

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[51] *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Wells Fargo for Illegal Student Loan Servicing Practices (Aug. 22, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-wells-fargo-illegal-student-loan-servicing-practices/; Press Release, Consumer Fin. Prot. Bureau, CFPB Orders Discover Bank to Pay $18.5 Million for Illegal Student Loan Servicing Practices (July 22, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-discover-bank-to-pay-18-5-million-for-illegal-student-loan-servicing-practices/; Press Release, Consumer Fin. Prot. Bureau, CFPB Sues Nation's Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment (Jan. 18, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/.

[52] CONSUMER FINANCIAL PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1035 (Oct. 2017), https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

[53] *See, e.g.*, U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION (July 2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities—-Nonbank-Financials-Fintech-and-Innovation_0.pdf [hereinafter U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM] ("Borrowers in the same financial situation who contact two different servicers in the federal student loan program to enroll in a more affordable repayment plan may end up with different results and advice, which may result in a financial impact on the borrowers. Federal student loan servicers are instructed to enroll borrowers looking to reduce their payments into the plan that will cost the borrower the least over time.").

mistakes can result in hundreds of millions, or even billions, of dollars of potential collective harm.[54]

The Bureau's supervisory and law enforcement efforts have identified a range of illegal acts and practices affecting every type of borrower, with every type of loan, at every stage of repayment. For example, through supervision, Bureau examiners have cited a wide range of illegal practices that include:

- Unfairly denying, or failing to approve, income-driven repayment plan applications that should have been approved on a regular basis, causing borrowers to make higher payments and subjecting them to unnecessary interest capitalization.[55]
- Failing to provide an effective choice on how payments should be allocated among multiple loans where the lack of choice can cause a financial detriment to consumers.[56]
- Deceiving borrowers who have made extra payments on their loans about how much interest would accrue or had accrued, and how that would affect the application of consumers' payments when the borrower began making payments again.[57]
- Failing to reverse adverse consequences of erroneous deferment terminations, including late fees charged for non-payment during periods when the borrower should have been in deferment, and interest capitalization that occurred because the borrower's deferment was erroneously terminated.[58]

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[54] *See, e.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB Sues Nation's Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment (Jan. 18, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/ ("From January 2010 to March 2015, the company added up to $4 billion in interest charges to the principal balances of borrowers who were enrolled in multiple, consecutive forbearances. The Bureau believes that a large portion of these charges could have been avoided had Navient followed the law.")

[55] *See* CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Fall 2016), https://www.consumerfinance.gov/documents/1389/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.

[56] *See id.*

[57] *See id.*

[58] *See* CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS

- Making deceptive statements about interest capitalization during successive deferments or forbearances, when servicers capitalized interest after each period of deferment or forbearance, instead of capitalizing once when the borrower eventually reentered repayment.[59]
- Making misrepresentations to consumers that late fees may be charged on loans held by the Department of Education. While Department of Education loan notes allow for the charging of late fees, the Department of Education did not and does not charge late fees on its loans and it instructs its servicers not to do so.[60]
- Failing to inform borrowers and co-signers that using forbearance may delay, or even permanently foreclose, eligibility for co-signer release.[61]
- Illegally increasing borrowers' interest rates following a loan sale and subsequent internal servicing conversion.[62]
- Illegally auto-defaulting consumers when a loan's co-signer filed for bankruptcy, regardless of whether the borrower was current on all payments, where the Whole Loan Due clause was ambiguous.[63]

The CFPB has further alleged consumer harm in a variety of enforcement actions related to student loan servicing practices.[64]

(Spring 2017), https://www.consumerfinance.gov/documents/4608/201704_cfpb_Supervisory-Highlights_Issue-15.pdf.

[59] *See id.*

[60] *See* CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Fall 2015), http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.

[61] *See* CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Winter 2016), http://files.consumerfinance.gov/f/201603_cfpb_supervisory-highlights.pdf.

[62] *See id.*

[63] *See id.*

[64] The CFPB is not alone in alleging abuses by the student loan industry. In 2014, the Federal Deposit Insurance Corporation and the U.S. Department of Justice each took an enforcement action against Sallie Mae and Navient for a range of abuses, including violations of the Servicemember Civil Relief Act that resulted in $60 million being returned to nearly 78,000 military borrowers. *See, e.g.*, Press Release, U.S. Dep't of Justice, Nearly 78,000 Service Members to Begin Receiving $60 Million Under Department of Justice Settlement with Navient for Overcharging on Student Loans (May 28, 2015),

- In 2015, the CFPB took action against Discover Bank for providing misinformation on borrowers' billing statements, inflating the minimum amount owed.[65]
- The CFPB found that Discover was making illegal debt collection calls to borrowers early in the morning and late at night, often excessively.[66]
- In 2016, the CFPB found that Wells Fargo was allocating partial payments in a way that maximized fees and failed to give consumers who are repaying two or more loans effective choices about how to apply payments.[67]
- In 2017, the CFPB took action against Navient Corporation and its subsidiaries Navient Solutions and Pioneer Credit Recovery. The Bureau alleges that Navient illegally steered borrowers into forbearance—a repayment option designed to assist borrowers experiencing short-term financial hardship—when borrowers have a right under federal law to enroll in repayment plans that allow for lower monthly payments over the long-term;[68]

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https://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement. Further, state attorneys general have increased the volume of enforcement actions in this market, bringing high profile cases against a range of actors. *See, e.g.*, Press Release, Wash. State Office of the Attorney General, AG Ferguson Files Suit Against Sallie Mae Offshoot Navient Corp., Announces Student Loan Bill of Rights Legislation (Jan. 18, 2017), https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-suit-against-sallie-mae-offshoot-navient-corp-announces-student; Complaint at 1, Commonwealth v. Pennsylvania Higher Educ. Assistance Agency, No. 1784CV02682-BLS2, 2018 WL 1137520 (Mass. Super. Mar. 1, 2018); Press Release, N.Y. Attorney General, Attorney General James And Superintendent Vullo Announce $9 Million Settlement Of Federal Student Loan Servicing Claims With Acs Education Services (Jan. 4, 2019), https://ag.ny.gov/press-release/attorney-general-james-and-superintendent-vullo-announce-9-million-settlement-federal.

[65] Discover Bank, The Student Loan Corporation, and Discover Products, Inc., CFPB No. 2015-CFPB- 0016 (July 22, 2015), https://files.consumerfinance.gov/f/201507_cfpb_consent-order-in-the-matter-of-discover-bank-student-loan-corporation.pdf.

[66] *Id.*

[67] Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0013 (Aug. 22, 2016), https://files.consumerfinance.gov/f/documents/2016-CFPB-0013Wells_Fargo_Bank_N.A.—_Consent_Order.pdf.

[68] Complaint at ¶1-6, Consumer Fin. Protect. Bureau v. Navient Corp. et al., Case No. 3:17-cv-00101-RDM (M.D. PA. Jan 18, 2017),

- The CFPB also alleges that Navient failed to properly inform borrowers of the need to renew their income-driven repayment plans and failed to properly process those renewals, resulting in interest capitalization on borrowers' loans;[69]
- The Bureau's investigation also found that Navient was misreporting to credit bureaus loans discharged under total and permanent disability discharge, including loans owed by servicemembers and veterans with service-connected disabilities;[70]
- The Bureau also alleges that Navient falsely represented to borrowers with cosigned loans the criteria for cosigner release and denied borrowers who obtained the stated criteria.[71]
- In late 2017, the Bureau took action against Citibank for deceiving borrowers about tax-deduction benefits, incorrectly charging late fees, and, like in the Discover case, overstating the minimum amount owed.[72]

These examples illustrate the breadth of consumer harm identified by the Bureau across the student loan market. When considering the scope and authorities deployed when promulgating a student loan servicing rule, past evidence of unfair, deceptive and abusive acts and practices can offer regulators a potential roadmap, as this paper explains in further detail in Parts IV and V of this article. The Bureau took a precursory step in this direction in 2015, predicated, in part, on the breadth of evidence demonstrating rampant consumer harm in the student loan market. The CFPB added student loan servicing to the Unified Regulatory Agenda in 2015.[73] At the time, the Bureau explained that, "[s]tudent loan servicers are a critical link between borrowers and lenders, yet there are no consistent, market-wide federal

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https://files.consumerfinance.gov/f/documents/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Press Release, CFPB Takes Action Against Citibank For Student Loan Servicing Failures That Harmed Borrowers, (Nov. 21, 2017) https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-citibank-student-loan-servicing-failures-harmed-borrowers/.

[73] CONSUMER FIN. PROT. BUREAU, RULEMAKING UNIFIED AGENDA, RIN 3170-AA55: STUDENT LOAN SERVICING (Fall 2015), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=3170-AA55.

standards for student loan servicing."[74] It noted that the rule would potentially include requirements around "specific acts or practices and consumer disclosures."[75]

However, in early 2018, Acting Director Mick Mulvaney removed student loan servicing from the Bureau's rulemaking agenda.[76] Since then, the Bureau has not publicly signaled any intent on returning to a potential rulemaking in the student loan market.[77]

III. THE STRUCTURE AND FEATURES OF THE STUDENT LOAN SERVICING MARKET MAKES CFPB RULEMAKING NECESSARY TO PROTECT STUDENT LOAN BORROWERS

Market features, economic incentives, the absence of a market-wide baseline to standardize industry practices, and limited opportunity for private enforcement in the event of errors or abuses make the student loan servicing market prime for regulatory action. These key elements combine to leave borrowers trapped in a broken system plagued by practices that increase borrowers' costs and routinely deprive borrowers of their repayment rights. The following section briefly describes how each of these elements supports the case for a CFPB rulemaking to

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[74] Kelly Cochran, *Fall 2015 Rulemaking Agenda*, CFPB (Nov. 20, 2015), https://wwcw.consumerfinance.gov/about-us/blog/fall-2015-rulemaking-agenda/; ("Student loan servicers are a critical link between borrowers and lenders, yet there are no consistent, market-wide federal standards for student loan servicing. . . We will continue to monitor the market for trends and developments and evaluate possible policy responses, including potentially proposing rules. Possible topics for consideration might include specific acts or practices and consumer disclosures."); *see also* Consumer Fin. Prot. Bureau, *Student Loan Servicing* (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf [hereinafter STUDENT LOAN SERVICING].

[75] *See* Kelly Cochran, *supra* note 74.

[76] Glenn Thrush & Stacy Cowley, *Mulvaney Downgrade Student Loan Unit in Consumer Bureau Shuffle*, N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/us/student-loans-consumer-financial-protection-bureau-cfpb.html?module=inline.

[77] *See* Consumer Fin. Prot. Bureau, Written Testimony of Kathy Kraninger, Director, Consumer Financial Protection Bureau, Before the House Committee on Financial Services (Mar. 7, 2019), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-kraningerk-20190307.pdf.

protect student loan borrowers.

Student Loan Servicing Market Features

Key features of the student loan servicing market disempower borrowers and create opportunities for abuse. Student loan borrowers cannot select the identity of their student loan servicer and cannot change student loan servicers if they are unsatisfied with the level of service offered by their student loan company.[78] As a consequence, student loan servicers are largely insulated from market forces, removing a key incentive to provide high-quality service to student loan borrowers.[79] Further, observers have noted that the lack of competition and consumer choice may drive poor outcomes for consumers—driving servicers to tolerate an unacceptably high level of borrower distress and default, rather than invest in assisting borrowers seeking to obtain an affordable loan payment.[80]

The Servicing Compensation Structure Discourages High-Quality Service

Student loan servicers compensation structure discourages high-quality, high-touch student loan servicing. As the CFPB described in 2015, the student loan servicing industry, over time, has adopted a business model based on cross-subsidization.[81] Companies charge loan holders a flat rate per borrower, per

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[78] STUDENT LOAN SERVICING, *supra* note 74 (". . .a borrower typically has little or no control over which company services their loan.")

[79] *See* Susan Dynarski, *An Economist's Perspective on Student Loans in the United States*, BROOKINGS INSTITUTE (Sept. 2014), http://www.brookings.edu/~/media/research/files/papers/2014/09/economist_perspective_student_loans_dynarski/economist_perspective_student_loans_dynarski.pdf (stating "Here we have a classic 'principal-agent' problem, with the agent (the student loan servicers) having little incentive to act in the best interests of the principal (the federal government). Student loan servicers don't have much incentive to prevent borrowers from defaulting, because the servicers either don't own the underlying loans or, if they do, face few costs if a borrower defaults. Restructuring a borrower's payments and preventing default requires effort, and the beneficiary of this effort is the government and the student – not the servicer.").

[80] *Id.*

[81] STUDENT LOAN SERVICING, *supra* note 74 ("Economic incentives for student loan servicers may contribute to limited utilization of income-driven repayment plans.").

month, irrespective of the level of service demanded by an individual customer.[82] When setting rates, companies must anticipate the share of borrowers who will require significant assistance by customer service representatives and the share of borrowers who will make payments on time each month and demand little in the way of personalized service.[83] In effect, revenue generated by a large volume of "low-touch" borrowers is intended to offset the significant cost to servicers associated with providing personalized service to a minority of "high touch" borrowers.[84] While this business model may make sense in the abstract, persistent, high levels of student loan borrower distress can make this economic model financially disastrous for industry and create a powerful disincentive for servicers to provide adequate customer service to all borrowers in need.[85]

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[82] The CFPB described this structure in 2015: "This monthly servicing fee may be set as a flat dollar amount per month per account, or set based on a percentage of a borrower's aggregate principal balance. In both cases, the fee paid to student loan servicers may vary depending on repayment status (generally rising as borrowers transition from "in school" to "in grace" to "in repayment") but generally do not vary depending on the level of service provided in a given month." *See, e.g.*, First Marblehead Corporation, PROSPECTUS SUPPLEMENT: THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3 (Sept. 17, 2007), http://www.snl.com/interactive/lookandfeel/4094003/NCSLT_2007_3_FPS.PDF; *Title IV Redacted Contract Awards 12-13*, U.S. DEP'T OF EDUCATION (last visited June 19, 2019), https://www.fbo.gov/spg/ED/FSA/CA/FSA-TitleIV09/listing.html. For Direct Loans, contracts fix monthly compensation on a per-borrower basis, and the compensation depends on the repayment status of each borrower being serviced. *See also*, U.S. DEP'T OF EDUCATION, STUDENT AID ADMINISTRATION FISCAL YEAR 2015 REQUEST at AA-15, http://www2.ed.gov/about/overview/budget/budget15/justifications/aa-saadmin.pdf (estimating the average cost per-borrower to be $1.67 per month, based on the contractual prices and the proportion of borrowers with different repayment statuses).

[83] *Id.*

[84] *Id.*

[85] For further discussion, *see* U.S. DEP'T OF EDUCATION, RECOMMENDATIONS ON BEST PRACTICES IN PERFORMANCE-BASED CONTRACTING (2015), available at http://www2.ed.gov/finaid/loans/repay/best-practices-recommendations.pdf; *see also* ASS'N OF COMMUNITY COLLEGE TRUSTEES, COLLEEN CAMPBELL & NICHOLAS HILLMAN, A CLOSER LOOK AT THE TRILLION: BORROWING, REPAYMENT, AND DEFAULT AT IOWA'S COMMUNITY COLLEGE (Sept. 2015), available at http://www.acct.org/files/Publications/2015/ACCT_Borrowing-Repayment-

The Student Loan Servicing Market Lacks Market-Wide Baseline Standards

The absence of baseline standards yields inconsistent practices across the industry and drives disparate outcomes for similarly situated student loan borrowers. Borrowers often encounter significantly different practices at different servicers, despite having rights to the same federal protections. For example, borrowers searching for loan information on servicers' websites or seeking information directly from customer service representatives may receive incompatible, conflicting, or contradictory advice—stymying borrowers' efforts to access their rights under the law.[86] Further, as the U.S. Department of the Treasury explains, "federal borrowers have also faced financial harm in even more straightforward circumstances, such as the application of over- and underpayments. Some servicers have not provided borrowers the ability to direct payments to a specific loan or have not fully implemented guidance from [the Department of] Education on how to process over- and underpayments."[87] As a result, borrowers face obstacles at every stage of repayment, and one study suggests that their ultimate repayment success is more reflective of their servicer rather than where they went to school or if they graduated.[88]

The Higher Education Act does not Provide Borrowers with a Private Right of Action

Federal higher education law does not provide borrowers with a private remedy to address breakdowns when they occur.[89] Despite far-reaching and powerful protections against economic distress, including income-driven repayment and debt cancellation options, student loan borrowers continue to struggle and default at near-historic levels. Observers have attributed this persistent distress, in part, to the limited mechanisms available to consumers when a student loan servicer fails to effectively and timely facilitate access to borrowers' repayment rights.[90] Specifically,

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Iowa_CCs_09-28-2015.pdf.

[86] U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM, *supra* note 53; STUDENT LOAN SERVICING, *supra* note 74.

[87] U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM, *supra* note 53.

[88] ASS'N OF COMMUNITY COLLEGE TRUSTEES, supra note 85.

[89] *See generally*, 20 U.S.C. § 1070 et seq.

[90] *See, e.g.*, Nat'l Consumers Law Center, Comments on Reauthorization of the Higher Education Act of 1965

under the Higher Education Act of 1965, these repayment rights are only enforceable by the Secretary of Education, leaving borrowers with little legal recourse under federal higher education law if their rights are improperly denied.[91] The absence of a federal cause of action creates a powerful incentive for the student loan industry to maximize profits at the expense of borrowers' rights, as described in the preceding section of this paper.

Taken together, a review of the structure and features of the student loan servicing market, coupled with the broad and economically devastating consumer harm identified by the CFPB across the industry, make a compelling case for regulatory action by the CFPB to be a top priority for the Bureau. As the following section discusses in detail, the CFPB has the authority under current law to take such an action, addressing the structural flaws and widespread abuses detailed above.

IV. THE CFPB'S AUTHORITY TO WRITE A STUDENT LOAN SERVICING RULE

Title X of the Dodd-Frank Act gives the Bureau extensive discretionary rule writing authorities. The Bureau can write a student loan servicing rule based on its existing authorities to address many of the harms in the market. Two rule writing provisions in particular give the Bureau ample authority to implement regulations in this market: Dodd-Frank Act § 1031,[92] the Bureau's authority to prescribe rules identifies UDAAP, and Dodd-Frank Act § 1032,[93] the Bureau's authority to prescribe

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to the Senate Committee on Health, Education, Labor and Pensions (Feb. 23, 2018), https://www.studentloanborrowerassistance.org/wp-content/uploads/2018/02/comments-senate-help-re-hea-reauth.pdf ("The HEA does not explicitly state that students and borrowers have the right to enforce their rights under the Act. Because the Act is silent about whether students or borrowers have a "private right of action," many entities have argued and some courts have decided—to the detriment of students and borrowers—that the HEA provides no such right of private enforcement.").

[91] *Id.* Readers should note that individual borrowers and classes of borrowers can sue to enforce state prohibitions on unfair and deceptive practices, where the denial of borrowers' rights under federal higher education law rises to the level of unfairness or deception. *See, e.g.*, Hyland v. Navient, No. 1:18-cv-09031 (S.D.N.Y. 2018), available at https://www.courtlistener.com/docket/7974080/hyland-v-navient-corporation/.

[92] 12 U.S.C. § 5531.

[93] 12 U.S.C. § 5532.

disclosure rules. Drawing on these two authorities combined, the Dodd-Frank Act granted the Bureau far-reaching authority to address consumer harms in the student loan servicing market through rulemaking. As discussed further below, the two authorities complement each other and would work well together to address harms in the student loan servicing market.

Section 1031: Unfair, Deceptive, Abusive Acts or Practices

Section 1031 of the Dodd-Frank Act provides that "[t]he Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[94] The section further provides that "[r]ules under this section may include requirements for the purpose of preventing such acts or practices."[95] This broad provision gives the Bureau ample authority to identify UDAAPs and impose requirements to prevent them.

Although the Bureau's authority is broad, it is derived from authority other agencies have exercised for decades. The Bureau's UDAAP rule writing authority is derived from the Federal Trade Commission's ("FTC") authority under §§ 5 and 18 of the Federal Trade Commission Act.[96] The FTC has used its authority to write rules identifying market failures and prescribing requirements to prevent them.[97] The Federal Banking agencies[98] also had authority to write rules under § 5 of the FTC Act for the entities they regulated until that provision was repealed by the Dodd-Frank

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94 12 U.S.C. § 5531(b).

95 *Id.*

96 15 U.S.C. § 45; 15 U.S.C. § 57a (authorizing the FTC to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of § 5(a)(1) of the FTC Act). The FTC does not have authority to identify abusive practices under § 5, so the Bureau's authority under § 1031 is more expansive in that way than the FTC's.

97 *See, e.g.*, Business Opportunity Rule, 16 C.F.R. §§ 437.1-437.10; Credit Practices Rule, 16 C.F.R. §§ 444.1-444.5; Funeral Industry Practice, 16 C.F.R. §§ 453.1-453.9.

98 The Federal Deposit Insurance Corporation, the Federal Reserve Board, the National Credit Union Administration, and the Office of the Comptroller of the Currency.

Act.[99]

Unfairness

Section 1031 defines unfairness by limiting the Bureau's authority to declare acts or practices unfair unless the act or practice meet three elements. First, the act or practice must cause or be likely to cause "substantial injury."[100] Second, that injury must not be "reasonably avoidable by consumers."[101] And, third, the substantial injury must not be "outweighed by countervailing benefits to consumers or to competition."[102]

Because the Bureau's unfairness authority mirrors the FTC's, there are decades of case law, official policy statements, guidance, and enforcement actions based on the prongs of unfairness.[103] The FTC developed its unfairness doctrine in its Policy Statement, even prior to its codification in the FTC Act.[104] Any student loan servicing rule by the Bureau would be rooted in this precedent and based on similar considerations.

Deception

Unlike unfairness, deception is not defined or described in either the FTC Act or the Dodd-Frank Act. However, the FTC issued a Policy Statement on deception, similar to its Unfairness Policy Statement, in 1983.[105] The FTC Policy Statement provides that an act or practice is deceptive if: 1) there was "representation, omission or practice that is likely to mislead the consumer";[106] 2)

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[99] *See* 81 Fed. Reg. 8133 (Feb. 18, 2016) (repealing UDAP regulations written under the prudential regulators' authority under § 5 of the FTC Act because § 1092(2) of the Dodd-Frank Act repealed section 18(f)(1) of the FTC Act, thus eliminating the prudential regulators' rule writing authority under the FTC Act).

[100] 12 U.S.C. § 5531(c).

[101] *Id.*

[102] *Id.*

[103] 15 U.S.C. § 45(n).

[104] FTC Policy Statement on Unfairness, Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984), available at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[105] FTC Policy Statement on Deception, Appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014 deceptionstmt.pdf [hereinafter FTC Policy Statement on Deception].

[106] *Id.*

the consumer was "acting reasonably in the circumstances";[107] and 3) "the representation, omission, or practice must be a 'material' one."[108] Numerous cases have followed the FTC's policy statement on deception.[109] The Bureau has noted that in its UDAAP exam procedures that cases under the FTC Act, as well as policy statements, guidance, exam procedures, and enforcement actions by the federal banking regulators and the FTC, "may inform the CFPB."[110] The Bureau has also noted that its examiners should be informed by the FTC's standard for deception.[111]

Abusiveness

Unlike unfairness and deception, the Bureau's authority to declare acts and practices abusive is not drawn from the FTC Act. However, abusiveness is clearly laid out in the Dodd-Frank Act. There are different prongs of abusiveness laid out in § 1031(a)(1)(B):

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service
- Takes unreasonable advantage of:
    - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
    - The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
    - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[112]

The Bureau relied on its abusiveness authority, as well as its unfairness authority, in its first UDAAP rule. In its Payday, Vehicle Title, and Certain High Cost Installment Loans rule the Bureau identified two unfair and abusive practices: lending certain

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[107] *Id.*

[108] *Id.*

[109] *See, e.g.*, F.T.C. v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009); F.T.C. v. Cyberspace.Com LLC, 453 F.3d 1196, 1199 (9th Cir. 2006).

[110] CFPB, EXAMINATION PROCEDURES, UNFAIR, DECEPTIVE AND ABUSIVE ACTS OR PRACTICES at 1, n.2 (Oct. 2012), https://files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

[111] *Id.* at 5, n.10.

[112] 12 U.S.C. § 5536(a)(1)(B).

types of loans without reasonably determining that consumers have the ability to repay the loans according to their terms ("Underwriting Provisions") and, for certain types of loan, making attempts to withdraw payment from consumers' accounts after two consecutive payment attempts have failed, unless the consumer provides a new and specific authorization to do so ("Payments Provisions").[113] The Bureau relied on both the lack of understanding of material risks and costs prong of abusiveness and the inability to protect interests prong of abusiveness.[114] The Bureau has subsequently proposed to rescind its findings of unfair and abusive practices with respect to the Underwriting Provisions.[115] However, the Bureau has not proposed to rescind the unfairness and abusiveness findings with respect to the Payments Provisions, which are scheduled to go into effect on August 19, 2019 or when a judicial stay issued by a federal district court in the Western District of Texas is lifted.[116] The discussion of unfairness and abusiveness in the Payments Provisions findings of the Payday Rule is instructive because it is the only UDAAP rule the Bureau has done to date that is not likely to be rescinded by the Bureau. The Bureau could draw on the analysis and type of findings it made in the Payments Provisions to write UDAAP rules in the student loan servicing market.

Application of UDAAP in student loan servicing enforcement and supervision by the Bureau

As described in detail in the preceding section, the Bureau has identified numerous unfair, deceptive, and abusive practices in the student loan servicing market through its enforcement and supervisory activities. These finding could help form the basis for a UDAAP rulemaking in this space.

Most prominently, the Bureau sued Navient on January 18, 2018, alleging eight different UDAAPs (as well as violations of the Fair Debt Collection Practices Act ["FDCPA"] and Regulation V

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113 82 Fed. Reg. 54,472, 54,615-24 (Nov. 17, 2017).

114 *Id.*

115 84 Fed. Reg. 4252, (Feb. 14, 2019); *see also Proposed Rule: Payday, Vehicle Title, and Certain High-Cost Installment Loans*, CONSUMER FIN. PROT. BUREAU (Feb. 6, 2019), https://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development/payday-vehicle-title-and-certain-high-cost-installment-loans/

116 84 Fed. Reg. 4253; *see* Order Staying Compliance Date, Community Fin. Service of Am. v. Consumer Prot. Fin. Bureau, No. 1:18-cv-00295-LY, at 1 (W.D.Tex. Mar. 9, 2019).

of the Fair Credit Reporting Act ["FCRA"]).[117] Of particular relevance in the context of potential rulemaking, the Bureau alleged that Navient steered borrowers into costly forbearance without advising them about other, more appropriate, repayment options, as it promised to do on its website.[118] The District Court held that the Bureau had stated a claim that this was both an unfair and abusive (reasonable reliance) practice.[119] The District Court also held that the Bureau had stated a claim for an unfair practice related to Navient's electronic recertification notices[120] and a deceptive practice related to Navient's mailed recertification notices.[121] The District Court also found that the Bureau had stated a claim for a deceptive practice under § 1031 of the Dodd-Frank Act and under the FDCPA for statements made about the rehabilitation process.[122]

The Bureau has found that certain practices relating to the application and aggregation of payments are unfair practices and these findings could help indicate market failures that the Bureau could address by rule. For example, as described above, the Bureau settled administratively with Wells Fargo over unfair and deceptive practices related to its private student loan servicing practices.[123] The Bureau found that it was an unfair practice for Wells Fargo to fail to disclose its payment allocation methodology to consumers and the ability to provide payment instructions on how to allocate payments, while allocating partial payments towards grouped loan accounts in a manner that maximized late fees incurred by many consumers.[124] The Bureau also found that Wells Fargo's failure to aggregate multiple partial payments submitted by consumers within the same billing cycle, where the payments, if aggregated, would have satisfied the total amount due for that loan's billing cycle, and its failure to refund or waive any resulting improper late fees assessed was an unfair practice.[125]

Further, the Bureau's supervision program routinely

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117 Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530, at *1 (M.D. Pa. Aug. 4, 2017).

118 *Id.* at 19.

119 *Id.* at 19-21.

120 *Id.* at 21-23.

121 *Id.* at 23-24.

122 *Id.* at 24-26.

123 Wells Fargo Bank N.A., CFPB No. 2016-CFPB-0013 (Aug. 22, 2016) at 9. https://files.consumerfinance.gov/f/documents/2016-CFPB-0013Wells_Fargo_Bank_N.A.—_Consent_Order.pdf.

124 *Id.*

125 *Id.* at 14-15.

examines the breadth of servicers' operations to assess compliance with the prohibition on unfair, deceptive and abusive acts and practices, focusing on key features of the student loan repayment process including the processing of income-driven repayment plan paperwork, communication related to federal and contractual benefits and protections, and the processing of borrowers' loan payments.[126] Bureau examiners have determined that student loan servicers committed unfair and deceptive practices, as outlined above, with respect to each of these broad categories of industry practices.[127] The Bureau keeps supervisory information confidential but periodically shares key findings from its supervisory work.[128] These findings could support identification of these or related unfair and deceptive practices in a Bureau rule on student loan servicing under its UDAAP authority.

Section 1032 disclosure authority

In addition to its broad rule writing authority under § 1031, the Bureau also has authority to require disclosures under § 1032 of the Dodd-Frank Act. Section 1032 permits Bureau to write rules "to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances."[129] As discussed below, this broad provision of authority permits the Bureau to require timely and effective disclosures and requires testing of model forms to ensure they actually are conveying the information to consumers so that the information is understood.

Of course, disclosures are not a cure for many market failures, system problems, or illegal acts or practices. Even the most effective disclosures cannot completely protect borrowers, particularly from UDAAPs like those discussed above.[130] But when

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[126] *Education loan examination procedures*, CONSUMER FIN. PROT. BUREAU (last updated June 22, 2018), https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/education-loan-examination-procedures/.

[127] *See infra* Part II.

[128] For further discussion, *see infra* Part II.

[129] 12 U.S.C. § 5532.

[130] State attorneys general have alleged similar steering claims as those alleged by the Bureau against Navient. Courts have repeatedly found that those claims are not "disclosure requirements" under a provision of the Higher

used in conjunction with the Bureau's UDAAP rule writing authority under § 1031 as discussed above, § 1032 may be a powerful tool to protect student loan borrowers by providing them with carefully chosen information in a format and at a time that they can best use that information.

Section 1032 permits the Bureau to time disclosures for when they would be most helpful to student loan borrowers. The provision provides that the Bureau may require disclosures "over the term of the product or service," which makes clear that the Bureau could require disclosures about any aspect of the servicing of student loans, from leaving the grace period to default prevention.[131] It also provides that the disclosures will enable borrowers to "understand the costs, benefits, and risks . . . in light of the facts and circumstances."[132] The Bureau might interpret this authority to allow for flexible or tailored disclosures, that are triggered by certain events, such as a missed payment triggering a disclosure about income-based repayment or an expression of interest in public service loan forgiveness for a borrower who was not in an eligible repayment plan triggering a disclosure about enrollment in eligible repayment plans. The Bureau has previously highlighted problems at every stage of the life cycle of servicing of student loans.[133] Section 1032 would permit the Bureau to time disclosures to provide student loan borrowers with information they could use to protect themselves. This authority would be particularly powerful when used in conjunction with prohibitions on UDAAPs in the market, so that consumers were both protected and, where consumer choice is needed, properly informed.

Education Act that preempts such requirements under state law. State of Illinois v. Navient, 17-CH-761 (Cir. Ct. Cook Cnty Ill. Ch. Div., July 10, 2018); Transcript of Oral Argument at 36-37, Washington v. Navient Corp., No. 17-2-01115-1 SEA (Wash. Sup. Ct. July 7, 2017). Some cases involving individual borrowers' claims have held that steering claims are "disclosure requirements," but their reasoning is not well-developed. Nelson v. Great Lakes Educ. Loan Servs., No. 3:17–CV–183, 2017 WL 6501919, at *4 (S.D. Ill., Dec. 19, 2017). In this case, the 7th Circuit Court of Appeals rejected this holding and overturned the trial court's decision. Nelson v. Great Lakes Educational Loan Services, Inc., No. 18-1531 (7th Cir. June 27, 2019). The Bureau's provision of disclosures would not be preempted by the HEA. A disclosure rule by the Bureau under § 1032 would not substitute for identification and prevention of UDAAPs, but would instead complement that the exercise of that authority.

[131] 12 U.S.C. § 5532.

[132] 12 U.S.C. § 5532.

[133] 2017 ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN, *supra* note 49.

Section 1032 provides the Bureau with authority to ensure that any disclosures it requires actually provide borrowers about information they need to know. Section 1032(a) explicitly provides the Bureau the authority to require that student loan servicers "fully, accurately, and *effectively*" disclose the "features" of the consumer financial product or service to borrowers.[134] (emphasis added). In addition, § 1032(b) permits the Bureau to prescribe model forms for its required disclosures. Model forms must "use[] plain language comprehensible to consumers," "contain[] a clear format and design," and "succinctly explains the information that must be communicated to the consumer."[135] These requirements would ensure that model forms are drafted to ensure that consumers understand the intended message of the disclosure. Section 1032 goes even further to ensure the model forms are appropriately drafted by requiring that model forms "shall be validated through consumer testing."[136] Rigorous consumer testing will help the Bureau ensure that student loan borrowers understand the import of disclosures they receive. Student loan servicers likely would support the use of model forms in a Bureau disclosure rule because § 1032(d) provides a safe harbor for compliance if student loan servicers use the Bureau's model form.[137]

The Bureau will need to develop an evidentiary basis for disclosures it requires pursuant to its § 1032 authority. In addition to the regular APA requirements for rulemaking, § 1032(c) requires that the Bureau "consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services."[138] The Bureau likely could draw on internal expertise and published literature on disclosures generally and in the student loan context to support disclosure requirements it imposed under § 1032.

The Bureau has relied on § 1032 in conjunction with other disclosure authorities and on its own to impose disclosure requirements.[139] In the Bureau's Small Dollar Rule, the Bureau interpreted § 1032 to provide that "the Bureau may prescribe rules

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[134] 12 U.S.C. § 5532(a).
[135] 12 U.S.C. § 5532(b).
[136] 12 U.S.C. § 5532(c).
[137] 12 U.S.C. § 5532(d).
[138] 12 U.S.C. § 5532(c).
[139] *See, e.g.*, Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902, 10916 (Feb. 14, 2013).

containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features."[140] The Bureau could expect to get *Chevron* deference for interpretations of the provisions of § 1032 discussed above, if it issued an interpretation that satisfied the requirements for deference.

V. THE SUBSTANCE AND SCOPE OF A UDAAP- AND DISCLOSURE-BASED STUDENT LOAN SERVICING RULEMAKING

In defining the parameters of a student loan servicing rule, this article recommends the Bureau consider the following interventions. While this list is not exhaustive of interventions the Bureau may consider addressing via a student loan servicing rule, the following topics are areas where consumer injury has previously been identified, and where a servicing rule could stem harmful practices by servicers.

Posting and Handling of Payments

While loan servicing is critical for consumers with other types of credit, borrowers with student loans are particularly dependent on student loan servicers to timely and accurately process payments and to clearly communicate payment handling procedures to ensure borrowers have the information necessary to successfully repay these debts.[141] Failure by servicers to properly apply payments can result in significant financial harm to the borrower, including interest capitalization, late fees, loss of loan benefits like cosigner release, or even loss of long-term repayment protections like Public Service Loan Forgiveness.[142] A student loan servicing rulemaking should include new standards to ensure payments are timely and accurately processed, requiring payments be posted to borrowers' accounts effective the date on which they are received, and requiring servicers "hold harmless" any payments submitted in accordance with prior servicer instructions, even when a servicer changes its internal payment handling policies.[143] These new standards can be accompanied by a robust

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[140] 82 Fed. Reg. 54,521-22 (2017).

[141] STUDENT LOAN SERVICING, *supra* note 74.

[142] *See infra* Part II*; see also* STUDENT LOAN SERVICING, *supra* note 74.

[143] In 2009, Congress enacted the Credit CARD Act, addressing a similar set of issues by establishing strong standards to govern the crediting and posting

disclosure regime to ensure borrowers' understand their rights and servicers obligations under these new rules.

Allocation of Payments

Unique among major classes of consumer debt, student loan borrowers typically repay multiple student loans owed to the same creditor and managed by the same student loan servicer.[144] These loans are combined, or "grouped" together in a single loan account and borrowers typically receive a single billing statement with one amount due for all loans. Because borrowers' debts are legally a series of individual financial obligations, but are serviced as one combined account, servicers typically develop their own internal policies for directing or "allocating" payments across these individual loans.

As previously discussed, enforcement and supervisory actions by the Bureau reveal a wide range of predatory practices by servicers stemming from how payments are allocated across accounts, including maximizing late fees charged to borrowers, increasing interest charges, and damaging borrowers' credit profiles.[145] A student loan servicing rulemaking should include new standards that govern the allocation of payments to borrowers' accounts, ensuring that partial payments and prepayments are applied in borrowers' best financial interests.

Billing Statements and Payment Histories

As discussed above, there are currently no federal standards governing the routine billing communications sent by student loan servicers to borrowers and borrowers do not have the right to demand basic information about their loan accounts. In effect, even basic functions such as the timing and content of billing statements are determined at the discretion of loan servicers, ensuring that the identity of a borrower's student loan company determines how often he or she receives basic information, including how much debt is outstanding, how payments have been applied and what late fees and interest charges have been assessed. As a consequence, borrowers often lack the information necessary to monitor their progress when repaying their loans or pursuing a

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of payments. Regulators may wish to look to the CARD Act for an instructive analogy when promulgating regulations to govern similar practices in the student loan servicing market. *See* P.L. 111-24.

[144] STUDENT LOAN SERVICING, *supra* note 74.

[145] *See infra* Part II.

wide range of loan features that depend on accurate record-keeping. This creates significant barriers to repayment, costing some borrowers thousands of dollars in lost eligibility for interest subsidies, loan forgiveness, and other protections and benefits.[146]

State and federal law enforcement officials have identified a range of problems stemming from opaque, confusing, or improper servicer communications about borrowers' accounts, suggesting that borrowers would benefit from comprehensive, baseline standards across the industry.[147] A student loan servicing rulemaking should require monthly billing statements that contain clear information about borrowers' outstanding balances, interest charges, payments received, payments due, and progress toward protections or benefits tracked by the loan servicer. Further, a student loan rulemaking should provide borrowers and cosigners with an affirmative right to access complete information about borrowers' accounts, including histories of payments and records related to payments, charges, disputes, and other interactions with loan servicers.

Alternative Repayment Arrangements

For the vast majority of borrowers with a federal student loan, the federal Higher Education Act provides an entitlement to make loan payments pegged to a borrower's income.[148] In circumstances where a borrower is unemployed or receives low wages, a "payment" under these options may be as low as zero dollars per month—offering borrowers a powerful protection against financial distress and default.[149] However, significant evidence, including many of the abuses described in the preceding section of this paper, demonstrates how servicing practices inhibit borrowers' ability to access or benefit from these options.[150]

Options for vulnerable borrowers extend beyond programs

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[146] For further discussion *see Domino: A Blog About Student Debt*, STUDENT BORROWER PROTECTION CTR., https://protectborrowers.org/qualifying-payments/.

[147] *See infra* Part II. For further discussion *see, e.g.*, CFPB v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Pa., filed Jan. 18, 2017); State of Illinois v. Navient, 17-CH-761 (Cir. Ct. Cook Cnty Ill. Ch. Div., July 10, 2018); Washington v. Navient Corp., No. 17-2-01115-1 SEA (Wa. Sup. Ct. July 7, 2017); *see also Student Loan Payback Playbook*, CFPB (last visited May 29, 2019), https://www.consumerfinance.gov/payback-playbook/.

[148] For further discussion, *see* STUDENT LOAN SERVICING, *supra* note 74.

[149] *Id.*

[150] *See infra* Part II

that provide payment relief—borrowers are entitled to a wide range of debt cancellation and loan forgiveness programs, and, in each instance, are similarly dependent on their student loan servicers to provide accurate information and facilitate access.[151]

Not only do student loan borrowers rely on servicers to tell them about the availability of these options, but they are specifically instructed by the Department of Education to contact their servicer to learn about available repayment and debt cancellation options.[152] In effect, student loan servicers are paid to act as gatekeepers to the myriad features of student loans, particularly federal student loans, that purport to make these financial products safe for consumers.

A student loan servicing rulemaking should set standards for routine communications related to alternative repayment arrangements, requiring that servicers who advise borrowers about their rights and benefits do so in a manner that considers borrowers' financial circumstances and operates in borrowers' financial interests, rather than in the financial interests of the servicer or the loan holder. Further, a student loan servicing rulemaking should set standards for the processing of applications and other paperwork related to alternative repayment arrangements, ensuring servicers do not improperly deny borrowers' applications and instead communicate with borrowers about key deadlines, the status of applications, and other paperwork.

Servicing Transfers

Over the last decade, approximately 10 million borrower accounts were transferred to new servicers.[153] As the FFELP loan market continues to consolidate and as the number of federal student loan servicers continues to dwindle, this number will only increase. Further, a planned restructuring of the federal

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[151] *See* STUDENT LOAN SERVICING, *supra* note 74.

[152] *See* STUDENT LOAN SERVICING, *supra* note 74, at 19, 92 ("Student loan servicers' successful administration of [borrower benefit] programs may depend in part on their capacity to accurately inform borrowers of available options. Consequently, well-conceived consumer protections may not be effective absent high-quality student loan servicing. . . . Borrowers rely on their servicer to provide information about repayment options . . .").

[153] *CFPB Concerned About Widespread Servicing Failures Reported by Student Loan Borrowers*, CONSUMER FIN. PROT. BUREAU (Sept. 29, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-concerned-about-widespread-servicing-failures-reported-by-student-loan-borrowers/.

government's servicing contracts is expected to trigger a large scale servicing transfer, causing more than 37 million student loan borrowers' loans to change companies.[154] This presents a vast and emergent risk to these borrowers' financial lives, given the wide range of negative consequences following servicing transfers, including lost paperwork, missing records and loan documents, and disruptions in the process of applying for affordable loan payments and other benefits.[155]

A student loan servicing rulemaking should protect borrowers from any negative consequences stemming from such a transfer, including but not limited to 1) negative credit reporting, or 2) denial of eligibility for any benefit or protection established under federal law or included in a loan contract, as a result of a payment made to their old servicer, consistent with their old servicer's policy. Further, a student loan servicing rulemaking should require all necessary information accompany a loan when it transfers, ensuring borrowers do not lose access to important records. This should include, at minimum:

- Schedule of all transactions credited or debited to the student loan account;
- A copy of the promissory note for the student loan;
- Any notes created by servicer personnel reflecting communications with the borrower about the student loan account;
- A report of the data fields relating to the borrower's student loan account created by the servicer's electronic systems in connection with servicing practices;
- Copies of any information or documents provided by the borrower to the servicer;
- Usable data fields with information necessary to assess qualification for forgiveness including Public Service Loan Forgiveness; and
- Any information necessary to compile a payment history.

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[154] *See* Persis Yu, *Student Loan Forgiveness Cannot Work Without a Right to a Payment History*, STUDENT BORROWER PROT. CTR. (May 22, 2019), https://protectborrowers.org/qualifying-payments ("The Trump Administration has raised the stakes for tens of millions of borrowers, pulling down planned consumer protections while advancing a sweeping new proposal that will cause more than 37 million borrowers' loans to change companies in the coming years."); *see also* U.S. Dep't of Education, Solicitation/Contract/Order for Commercial Items, https://www.fbo.gov/utils/view?id=f1ea5ae6a55d0c74209faa9ab1d225c8.

[155] *Id.*

Assisting Military Borrowers

Military borrowers have rights under federal and state laws that provide for interest rate reductions, loan forgiveness, and other consumer protections designed to lessen the burden of student debt.[156] Unfortunately, the student loan industry has served as an obstacle to borrowers' seeking to invoke their rights, both through illegal practices and through routine, substandard customer service.[157] A student loan servicing rulemaking should address the unique risks facing military borrowers, prohibiting the specific types of abuses identified in past enforcement actions, including banning imposition of additional, unnecessary administrative requirements on military borrowers seeking to invoke their rights. Further, such a rulemaking should require student loan servicers to proactively identify military borrowers and provide specialized resources and specially trained personnel to provide direct assistance.

The preceding topics for a potential rulemaking offer a roadmap for regulators to address specific industry practices and market features where significant consumer harm has occurred. These topics are not necessarily comprehensive and a thorough and diligent rulemaking process—guided by the Administrative Procedures Act and informed by market developments that may occur subsequent to the publication of this article—may spur the Bureau to take a more expansive approach, setting standards for practices in addition to those discussed above.

VI. CONCLUSION

The student loan market has reached unprecedented levels of debt, which is only made more perilous by illegal practices by

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[156] For further discussion, see Hollister Petraeus & Seth Frotman, Overseas & Underserved: Student Loan Servicing and the Cost to Our Men and Women in Uniform, CONSUMER FIN. PROT. BUREAU (July 2015), https://files.consumerfinance.gov/f/201507_cfpb_overseas-underserved-student-loan-servicing-and-the-cost-to-our-men-and-women-in-uniform.pdf.

[157] *See, e.g,*, Consent Order, United States v. Sallie Mae, Inc. et. Al, Case No. 14-00600-LPS (D. De. Sept, 29, 2014) https://www.justice.gov/sites/default/files/crt/legacy/2015/07/17/salliesettle.pdf; *see also* Hollister Petraeus & Seth Frotman, *Overseas & Underserved: Student Loan Servicing and the Cost to Our Men and Women in Uniform*, CONSUMER FIN. PROT. BUREAU (July 2015), https://files.consumerfinance.gov/f/201507_cfpb_overseas-underserved-student-loan-servicing-and-the-cost-to-our-men-and-women-in-uniform.pdf.

student loan servicers. The impact on the broader financial health of tens of millions of Americans demonstrates that the need for a student loan servicing rulemaking is emergent and dire.[158] The Bureau should be using every tool at its disposal to protect student loan borrowers across the market. This necessarily means prioritizing a broad-based rulemaking to set standards for the student loan servicing industry.

Such a rulemaking need not be controversial. The sheer magnitude of the student debt crisis unfolding across America should render any effort to fix it beyond the reach of the gridlock and dysfunction that characterizes our current hyper-partisan political environment. The Bureau was created because the mortgage crisis led to broad-based financial fallout—and the current state of the student loan market is no different. Currently, 11 million consumers have seen their credit profiles severely damaged due to loan defaults and delinquencies that are preventable and needless—in effect, this damage is the direct result of student loan market failures.[159]

The population of borrowers who have fallen behind on their student loan payments likely understates the breadth of the student debt crisis. The burden of student debt effects the lives and livelihoods of consumers in myriad ways—diminishing household wealth, shaping career decisions and household formation, and increasing economic inequality.[160] For millions of Americans, student debt will cause a ripple of harm across their financial lives—harm that could be prevented if these borrowers were able to access to the very protections designed to mitigate financial hardship caused by student debt and prevent distress, including delinquencies and defaults.[161]

While the best course of action is for the CFPB to engage immediately in a student loan servicing rulemaking, there is considerable work that can be done in the near-term if the Bureau

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[158] *See* Seth Frotman, Broken Promises: How Debt-financed Higher Education Rewrote America's Social Contract and Fueled a Quiet Crisis, 2018 Utah L. Rev. 811, 811 (2018).

[159] Author's analysis of administrative data released by the U.S. Department of Education's Office of Federal Student Aid. *See Federal Student Aid Data Center*, U.S. DEP'T OF EDUCATION (last visited June 6, 2019), https://studentaid.ed.gov/sa/about/data-center/student/portfolio.

[160] For further discussion, *see* Frotman, *supra* note 158.

[161] Daniel Herbst, *Liquidity and Insurance in Student Loan Contracts: The Effects of Income-Driven Repayment on Borrower Outcomes* 1, 2 (updated Mar. 12, 2019), available at https://drive.google.com/file/d/1A-gq_LIqffY6r2gDTcUK9-Y3ZV8Go6SU/view.

continues to ignore growing evidence of the broken and dysfunctional student loan servicing marketplace and pursue its current course of inaction. Researchers can work to ensure that robust data and objective analysis exists to substantiate market failures and provide critical groundwork for a future Bureau leadership inclined to take regulatory action in the student loan servicing market. Researchers across the country are pursuing this important foundational work—academic, federal, state, and even local research on the disparate impact of student loan servicing breakdowns will prove critical in any future rulemaking effort. State supervision and enforcement actions will further demonstrate consumer harm in this market and serve as an important basis for substantive federal rules. Additionally, policymakers and researchers should study the effectiveness of injunctive relief by state law enforcement and regulators, and conduct additional studies to assess the most effective policy interventions to eliminate the harmful servicing breakdowns.

Regulators and law enforcement officials continue to take steps to address individual illegal practices across the student loan marketplace. This law enforcement and supervisory work is essential, as is the growing body of rigorous, empirical research generated by government economists, academics and other experts. However, one critical tool remains absent—federal rulemaking to set baseline standards for the entire student loan servicing industry.

The Bureau was created to give the federal government a new toolbox to address emerging risks to consumers and head off the next crisis in the consumer finance marketplace. As this paper demonstrates, forty-five million American student loan borrowers depend on the CFPB to follow through with its mission by taking decisive action to set strong, enforceable new rules.