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Assessing the Efficacy of the CFPB's Regulation of Student Loan Companies

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ASSESSING THE EFFICACY OF THE CFPB'S REGULATION OF STUDENT LOAN COMPANIES

*Ian Elijah Calhoun**

Outstanding student loan balances totaled over \$1.38 trillion as of December 31, 2017 with 11% of student loan debt over ninety days delinquent or in default. Due to half of all student loans being in deferment, grace periods, or forbearance, the actual delinquency rate is likely double the above figure. Delinquent student borrowers enrolled in some form of college education expect to improve their financial position. Instead, many find themselves unable to break even under the weight of large amounts of debt with confusing, and often misleading, repayment plans.

Many blame the lending practices of student loan providers and servicers for the high student loan default rate. As the primary federal agency charged with the regulation of consumer financial markets, the Consumer Financial Protection Bureau ("CFPB") has used its enforcement powers against student loan companies that have violated federal consumer financial law while also developing rules and suggested practices to make the student loan market less treacherous for indebted students. The CFPB's regulatory and supervisory authority over consumer

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financial markets places the agency in a prime position to address the root causes of the high delinquency rate.

This note will analyze the CFPB's efforts to remedy the student loan problem by assessing its use of enforcement powers, its published industry rules and guidance, and its use of other tools to promote a more transparent and navigable student loan market. Special attention is given to consumer relief resulting from historical enforcement actions, the CFPB's complaint collection and resolution process, and significant obstacles to effective regulation of the student loan market, including insufficient regulatory authority in the private student loan market, uncertainty concerning regulators' expectations of student loan companies, and inconsistent enforcement of consumer financial law.

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I. INTRODUCTION: THE STUDENT LOAN PROBLEM

Outstanding student loan balances totaled over \$1.38 trillion as of December 31, 2017. Of that, 11% of student loan debt over ninety days was delinquent or in default.¹ Due to half of all student loans being in deferment, grace periods, or forbearance, the actual delinquency rate is likely double the above figure when one only considers student loans in the repayment cycle.² By comparing the student loan delinquency rate to the rates of auto loans and credit cards—4.1% and 7.6% respectively—it is clear that students' failure to remain current on student loan payments is an issue that must be addressed.³ These delinquent borrowers enrolled in some form of college education expecting to improve their financial position. Instead, they found themselves unable to break even under the weight of large amounts of debt with confusing, and often misleading, repayment plans.

Many blame the lending practices of student loan providers and servicers for the high default rate of student loans. As the primary federal agency charged with the regulation of consumer financial markets, the Consumer Financial Protection Bureau (CFPB) has used its enforcement powers against student loan companies that have violated federal consumer financial law while also developing rules and suggested practices to make the student loan market less treacherous for indebted students.⁴ While the continuously increasing costs of attending college and some students' unrealistic expectations of their future earning potential play a role in the eventual delinquency of many student loans, those issues are beyond the scope of this Note. However, it should be noted that the CFPB's educational efforts are attempting to address the

¹ See FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT: FEBRUARY 2018 (Feb. 2018), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q4.pdf (reporting data related to household debt and credit as of December 31, 2017).

² *Id.* at n.2.

³ See FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT: FEBRUARY 2018 (Feb. 2018), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHDC_Report_2017Q4.xlsx (click "Page 12" under "National Charts" heading).

⁴ See *Enforcement Actions*, CFPB, <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/> (last visited Oct. 25, 2016) ("The Bureau may enforce the law by filing an action in federal district court or by initiating an administrative adjudication proceeding.").

expectations of student loan consumers and promote greater financial understanding among current and former students. The CFPB's regulatory and supervisory authority over consumer financial markets places the agency in a prime position to address the root causes of the high delinquency rate, particularly the unfair and deceptive practices of some student loan servicers and private student loan providers.

The agency's enforcement actions may be the best method for reining in the troubled student loan market in the short term. However, given the numerous statutes that make up federal consumer financial law and the various federal agencies with overlapping authority to enforce those laws, bringing civil suits and administrative actions against companies and individuals alone is likely not enough to create a more transparent, accessible, and fair student loan market. While establishing an agency that would enforce consumer financial law in a more efficient, streamlined, and consistent manner was the intent behind the creation of the CFPB, until a set of specific, uniform rules and guidance is established for student loan servicers and providers, violations and misleading practices will continue to occur on a large scale, subjecting student borrowers to an unfair and deceptive system while facing a crippling debt load.

This Note will analyze the efficacy of the CFPB's efforts to remedy the student loan problem by assessing: the agency's use of enforcement powers against companies facilitating student loans, published industry rules and guidance, and other tools used by the agency to promote a more transparent and navigable student loan market. Part II of this Note will provide background information on the CFPB, including its role and regulatory authority under the Consumer Financial Protection Act, and a brief overview of consumer relief that has resulted from enforcement actions brought since the agency's inception. Part III.A will focus on the CFPB's regulatory and supervisory efforts in the student loan market by assessing enforcement actions against student loan companies, drawing insights regarding both the criteria that trigger an enforcement action and the CFPB's methods in pursuit of relief for consumers. Part III.B will describe the CFPB's complaint collection and resolution process, using data gained from complaints to highlight critical issues facing student borrowers. Part III.C will describe three obstacles to effective regulation of student loans that

have resulted in insufficient regulatory authority in the private student loan market, uncertainty concerning regulators' expectations of student loan companies, and inconsistent enforcement of consumer financial law. Part III.C will also provide potential solutions to these issues and their effect on CFPB regulation and the student loan market. Part IV will conclude.

II. BACKGROUND

A. THE ESTABLISHMENT AND FUNCTIONS OF THE CFPB

In response to the devastating 2008 financial crisis, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the most sweeping financial reform legislation since the New Deal.⁵ Title X of Dodd-Frank, known as the Consumer Financial Protection Act of 2010 (CFPA), established the Consumer Financial Protection Bureau.⁶ The CFPB is a federal agency tasked with implementing and enforcing federal consumer financial law and ensuring that consumer financial markets are “fair, transparent, and competitive.”⁷ The agency aims to accomplish this through financial education programs; collection, investigation, and resolution of consumer complaints; monitoring and researching consumer financial markets and publishing relevant findings; the supervision of entities falling under its regulatory authority and enforcement actions in the event of their noncompliance with federal law; and

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31, 42 U.S.C.). For a summary of the Act, see PRACTICAL LAW, WESTLAW, SUMMARY OF THE DODD-FRANK ACT: REGULATION OF SYSTEMICALLY SIGNIFICANT FINANCIAL INSTITUTIONS, Resource I.D. 1-502-8437(2018).

⁶ 12 U.S.C. § 5491 (2012).

⁷ See 12 U.S.C. § 5511(a)–(c) (2012) (describing the purpose, objectives, and functions of the CFPB); see also 12 U.S.C. §§ 5491–5494 (2012) (establishing the structure of the CFPB). It should be noted that the U.S. Court of Appeals for the D.C. Circuit held the CFPB's structure unconstitutional in October 2016, primarily because the director of the agency was subject to removal by the President only for “inefficiency, neglect of duty, or malfeasance in office.” *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 15 (D.C. Cir. 2016) (citing 12 U.S.C. § 5441(c)(3)). For an explanation of the case and its potential impact on the CFPB, see C. Hunter Wiggins & Ethan Levisohn, *PHH v. Consumer Financial Protection Bureau: What it Means for Current and Future CFPB Enforcement*, JONES DAY (Oct. 2016), <http://www.jonesday.com/phh-v-consumer-financial-protection-bureau-what-it-means-for-current-and-future-cfpb-enforcement-10-21-2016>.

the issuance of “rules, orders, and guidance implementing Federal consumer financial law.”⁸

The CFPB was intended to consolidate the enforcement of federal consumer protection law, which is comprised of several statutes adopted by Congress at various times in response to changes in the consumer financial services industry.⁹ Those statutes have historically been enforced by several different federal agencies, each with regulatory authority over certain types of entities.¹⁰ For example, the Federal Reserve Board of Governors, Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and the United States Department of Housing and Urban Development (HUD) have a role in the regulation and supervision of banks and credit unions, while the Federal Trade Commission (FTC) has enforced consumer protection statutes against non-banks operating in a consumer finance capacity or related function.¹¹ The divided responsibility for the enforcement of consumer financial protection statutes, often resulting in multiple agencies regulating the same entity, created inefficiencies and the potential for inconsistent interpretation of the law.¹² Congress sought to ameliorate such issues by creating the CFPB to work in conjunction with other agencies and granting it regulatory authority over all “[f]ederal consumer financial law,” which includes the CFPA and eighteen “[e]numerated consumer laws.”¹³

Aside from a few specific additions and exceptions provided in the CFPA, the CFPB’s authority extends to any “covered person,” which includes “any person that engages in offering or providing a consumer financial product or service” and any affiliated person that “acts as a service provider [or agent] to such person.”¹⁴ The CFPA also proscribes knowingly or recklessly providing “substantial assistance” to a “covered person” in violation of certain

⁸ 12 U.S.C. § 5511(c)(5).

⁹ See Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1065–68 (2016) (describing the establishment of the CFPB).

¹⁰ *Id.* at 1065.

¹¹ *Id.* at 1065–66.

¹² See *id.* at 1066 (explaining that the “split responsibility for rulemaking, supervision, and enforcement across multiple different agencies . . . made timely reform and consistent interpretation difficult”).

¹³ 12 U.S.C. § 5481(12), (14) (2012).

¹⁴ *Id.* § 5481(6).

provisions of the Act, potentially expanding the CFPB's authority to entities that would otherwise be outside its reach.¹⁵ These provisions give the agency broad authority to enforce consumer financial laws against a wide variety of companies and certain individuals acting on their behalf.¹⁶

B. ENFORCEMENT POWERS

The CFPB has two primary means of enforcing consumer financial protection law: administrative enforcement procedures under the agency's regulatory authority and civil litigation in federal court.¹⁷ The agency's administrative enforcement procedures typically result in a decision by an administrative law judge in the CFPB that can be reviewed by the director of the agency on appeal.¹⁸ Using either enforcement method, the agency can seek legal and equitable relief for consumers and punitive civil money penalties for violations of consumer financial protection law.¹⁹ Both enforcement methods have been used heavily, with 55% of public enforcement actions from 2012 to 2015 conducted through administrative proceedings under the CFPB's Office of Administrative Adjudication and the other 45% filed in federal court.²⁰

Overall, the CFPB's public enforcement actions resulted in over \$11 billion in consumer relief and forgiven debt from the inception of the agency through the end of 2015, and more than 90% of

¹⁵ 12 U.S.C. § 5536(a)(3) (2012). In 2015, the CFPB began using this tool to bring enforcement actions and issue civil investigative demands with mixed results. For an explanation and analysis of the CFPB's use of the "substantial assistance" provision, see Ori Lev & Stephen Lilley, *Substantial Assistance: The CFPB's Newest Tool*, MAYER BROWN (July 19, 2016), <https://www.mayerbrown.com/substantial-assistance-the-cfpbs-newest-tool-07-19-2016/> (follow "Get the full report" hyperlink).

¹⁶ See 12 U.S.C. § 5481(25) (defining the CFPB's authority over various individuals, including directors, officers, agents, and managerial employees of a "covered person"); see also 12 U.S.C. §§ 5517–5518 (2012) (describing the limitations of, and those excluded from, the CFPB's authority).

¹⁷ 12 U.S.C. §§ 5563–5564.

¹⁸ See 12 C.F.R. §§ 1081.103, .104, .402 (2017) (describing the adjudicative hearing and appeal process within the CFPB's administrative enforcement procedures).

¹⁹ See 12 U.S.C. §§ 5564–5565 (2012) (defining the CFPB's jurisdiction and available relief).

²⁰ See Peterson, *supra* note 9, at 1081 (describing the CFPB's enforcement through civil litigation and administrative procedures based on an analysis of public enforcement actions occurring from January 1, 2012 to December 31, 2015). Note that the percentages cited in the article are based on a review of publicly announced enforcement actions only.

consumer relief was due to cases in which defendants were found to have illegally deceived consumers.²¹ In addition to public enforcement actions, the CFPB, in its supervisory capacity, employs examiners to investigate and monitor companies that fall under its authority, resulting in changes to internal policies and procedures that likely lead to further consumer relief and the prevention of illegal practices; however, the results of such actions are not publicly released.²²

C. PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES

In addition to creating the CFPB, Dodd-Frank also reformed several existing consumer financial protection laws and built upon preexisting legal standards. The CFPA's general statutory prohibition against unfair, deceptive, or abusive acts and practices (UDAAP) is one example of this and has played a significant role in CFPB enforcement actions, including those related to student loans.²³ The CFPA's UDAAP provision, which mirrors the unfairness and deception standard found in the Federal Trade Commission Act, applies to all covered persons under the CFPA and prohibits them from conducting practices that constitute a UDAAP.²⁴ The CFPA's UDAAP prohibition goes a step further than the FTC's standard by introducing an "abusive practices" component, which prohibits any act or practice that "materially interferes" with consumers' understanding of a financial product or service or "takes unreasonable advantage" of consumers' lack of understanding, inability to protect their interests related to a financial product or service, or "reasonable reliance" on a covered person to act in their interests.²⁵

The language used to define abusive practices is much more flexible than the unfairness and deception components of the

²¹ *Id.* at 1104.

²² See Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 355–56 (2013) (noting that "[w]hat the CFPB learns during its examinations is confidential" and that "the information can be used by the CFPB, but it cannot be shared with private parties").

²³ See 12 U.S.C. §§ 5481, 5531, 5536(a) (2012) (defining UDAAP and giving enforcement authority to the CFPB upon finding that the UDAAP prohibition was violated).

²⁴ *Id.* § 5536(1); see also 15 U.S.C. § 45 (2012) (declaring "unfair or deceptive acts or practices in or affecting commerce . . . unlawful").

²⁵ See 12 U.S.C. § 5531(d) (defining abusive practices).

UDAAP provision. To be declared unlawful due to unfairness, the practice must cause or be “likely to cause substantial injury” that is “not reasonably avoidable” by consumers.²⁶ The deceptive practices standard typically requires that the practice mislead or be likely to mislead, that the consumer’s interpretation is reasonable, and that the misleading practice is material.²⁷ These criteria require a more specific showing of evidence than the vague language defining abusive practices, giving the CFPB more discretion in finding a violation. The statutes codifying the CFPB’s UDAAP provision are alleged to have been violated in over 90% of CFPB enforcement actions.²⁸ Despite the flexibility the abusive practices standard adds in the determination of a UDAAP violation, only 11.5% of public enforcement actions through the end of 2015 alleged abusive practices, with the majority alleging unfair or deceptive practices.²⁹ This suggests that the CFPB is aware of the flexibility within its UDAAP authority and has cautiously utilized the relatively new “abusive” standard. Further, of the few cases in which abusive practices were alleged, all were accompanied by an allegation of unfair or deceptive practices, meeting the more rigorous criteria of the other standards.³⁰ The UDAAP provision in the CFPB has been instrumental in CFPB enforcement actions and is vital to the deterrence of violations in the student loan market.

III. ANALYSIS: THE CFPB AND STUDENT LOANS

A. ENFORCEMENT ACTIONS

Through the end of 2015, cases involving entities providing, servicing, or otherwise facilitating new and existing student loans have constituted only six public CFPB enforcement actions.³¹ Those cases resulted in approximately \$5 million in consumer relief and \$2.5 million in civil penalties, equivalent to only 4.9% of total

²⁶ See *id.* § 5531(c) (defining an unlawful unfair practice).

²⁷ See CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL 9 (version 2, 2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf (providing an example of the CFPB’s criteria for determining if a practice is unlawfully deceptive).

²⁸ *Id.* at 1095.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *id.* at 1089 (displaying a table showing all public enforcement actions from 2012 through 2015).

enforcement actions, 4.5% of consumer relief, and 0.7% of civil penalties.³² In 2016 alone, however, three administrative enforcement actions related to student loans were filed, resulting in consent orders requiring respondents to pay a combined \$23.9 million in consumer relief and \$11.7 million in civil penalties.³³ This signals the agency's increased focus on the regulation of student loan markets going forward.

Two recent examples of resolved CFPB enforcement actions are the consent orders settling the administrative filings against Wells Fargo Bank and Bridgepoint Education.³⁴ These two cases serve as fitting examples of the types of violations the CFPB is focusing on and the consumer redress it seeks in such cases. On August 20, 2016, the CFPB issued a consent order requiring Wells Fargo Bank pay a \$3.6 million penalty and \$410,000 in consumer refunds; in addition, the order required Wells Fargo to improve its consumer billing and student loan payment processing due to unfair and deceptive practices that violated the CFPA's UDAAP prohibition and the Fair Credit Reporting Act (FCRA).³⁵ The bank failed to provide adequate documentation concerning student loans to consumers, charged illegal fees, and failed to correct inaccurate information submitted to credit reporting companies after becoming aware of the errors.³⁶ These violations caused student borrowers to receive misinformation about their loans, pay unnecessary and illegal late fees, and deal with the far-reaching consequences of a wrongfully decreased credit score.³⁷

The CFPB's consent order against Bridgepoint Education, Inc., a for-profit college, was issued on September 8, 2016, resulting in approximately \$5 million in consumer relief and an \$8 million civil

³² See *id.* (categorizing all public enforcement actions by financial product or service).

³³ See generally Student Aid Institute, Inc., Steven Lamont, CFPB No. 2016-CFPB-0008 (Mar. 30, 2016), http://files.consumerfinance.gov/f/201603_cfpb_consent-order-student-aid-institute-inc-steven-lamont.pdf; Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0013 (Aug. 22, 2016), http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2016-CFPB-0013Wells_Fargo_Bank_N.A.-_Consent_Order.pdf; Bridgepoint Education, Inc., CFPB No. 2016-CFPB-0016 (Sept. 8, 2016), http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092016_cfpb_BridgepointConsentOrder.pdf.

³⁴ Wells Fargo Bank, N.A., No. 2016-CFPB-0013; Bridgepoint Education, Inc., No. 2016-CFPB-0016.

³⁵ Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0013, at 1, 18–26.

³⁶ *Id.* at 14–17.

³⁷ *Id.*

penalty.³⁸ Bridgepoint was found to have committed deceptive acts and practices regarding the amounts of monthly payments due under the company's institutional loan program.³⁹ Students were induced to take out private student loans with the company via advertisements showing a monthly payment amount that was lower than what students would be required to pay, violating the CFPA's UDAAP provision.⁴⁰

Two significant insights can be gleaned from these cases. First, the Wells Fargo case illustrates the CFPB's focus on companies that negatively impact a large number of consumers even when the bulk of violations committed are minor customer service issues. Second, the enforcement action against Bridgepoint illustrates another situation that draws the attention of CFPB officials, a deceptive practice that, although affecting a relatively small percentage of consumers, was so egregious that the damages assessed were much more severe. These two enforcement actions demonstrate the CFPB's focus on bringing widespread unfair practices to a halt while still targeting more reprehensible violations, even if those practices are taking place on a much smaller scale.

B. CONSUMER COMPLAINTS

As demonstrated by the two cases discussed above, the CFPB's enforcement actions based on UDAAP violations are very effective in obtaining consumer relief accompanied with large civil penalties. The UDAAP statutes are the regulatory vehicle best-suited for quickly addressing the most common complaints among student loan consumers. In the 2016 Student Loan Ombudsman's Midyear Report, the processing of income-driven repayment plans (IDRs) was identified as a primary issue plaguing student loan borrowers, a finding based on approximately 3,500 private student loan complaints, 2,400 federal loan complaints, and 1,500 student debt collection complaints received by the CFPB from October 1, 2015 to May 31, 2016.⁴¹

³⁸ Bridgepoint Education, Inc., CFPB No. 2016-CFPB-0016, at 9, 12.

³⁹ *Bridgepoint Education, Inc.*, No. 2016-CFPB-0016, at 6.

⁴⁰ *Id.* (citing 12 U.S.C. §§ 5531(a), 5536(a)(1)(B) (2012)).

⁴¹ CONSUMER FIN. PROT. BUREAU, MIDYEAR UPDATE ON STUDENT LOAN COMPLAINTS 2, 13 (2016), http://files.consumerfinance.gov/f/documents/201608_cfpb_StudentLoanOmbudsmanMidYearReport.pdf.

Complaints concerning IDR plans included unreasonable delays in processing applications, inconsistent or inaccurate processing, and difficulty in successfully recertifying financial information, which is typically an annual requirement to remain in an IDR plan.⁴² These burdensome loan servicing practices often result in increased costs and unaffordable payments for consumers that were unable to obtain approval for an IDR plan before higher payments were due.⁴³ Given the UDAAP standards and enforcement actions described above, many of these complaints, if accurate, are likely describing UDAAP violations. Unexpected jumps in required payments likely meet the unfairness standard by being likely to cause an unavoidable injury to young borrowers with limited budgets, and the loan servicing practices would certainly meet at least one of the requirements needed for the abusiveness standard.⁴⁴ Since the CFPB can identify the loan practices causing the most complaints and tie the bulk of complaints back to a handful of student loan servicers like Navient, Transworld Systems Inc., and AES/PHEAA, the CFPB's complaint collection and resolution system constitutes a key indicator of potential enforcement actions.⁴⁵ It also identifies the specific practices that future regulations and guidance should address to make the greatest impact.⁴⁶ Both enforcement actions and the issuance of new rules and guidance for the student loan market, which are advocated in more detail below, are necessary for a significant change in student loan practices.

C. OBSTACLES TO EFFECTIVE REGULATION

While enforcement actions have been an unequivocal success on a case-by-case basis, the overall market-wide effect is yet to be seen. The number of student borrowers in default or over ninety days delinquent increased every year from 2011 to 2015.⁴⁷ Since then, the

⁴² *Id.* at 2.

⁴³ *Id.*

⁴⁴ See *supra* notes 23–27 and accompanying text (explaining the CFPB's prohibition against unfair, deceptive, or abusive acts and practices and its applicable legal standards).

⁴⁵ See MIDYEAR UPDATE, *supra* note 41, at 8, 10 (displaying complaint data categorized by the type of complaint, type of loan, and private loan company or student loan servicer in “Table 1,” “Figure 2,” and “Table 2”).

⁴⁶ *Id.*

⁴⁷ FED. RESERVE BANK OF N.Y. CONSUMER CREDIT PANEL, 2016 STUDENT LOAN UPDATE (2016), <https://www.newyorkfed.org/microeconomics/data.html> (click to expand “Balances”

number of delinquent student loans has hovered around 11% through the end of 2017;⁴⁸ Enforcement actions alone cannot significantly shift practices in the market. Three primary obstacles to the effectiveness of the CFPB's regulatory efforts are: (1) the limited reach of the CFPB's authority, particularly regarding small private loan servicers, (2) the lack of defined practices that constitute UDAAPs, and (3) inconsistent regulation by the CFPB and the Department of Education (DOE), leaving students facing varying levels of service and compliance with federal law and leading to uncertainty concerning regulators' expectations of student loan companies.

1. *Limited Reach of the CFPB's Authority.* The CFPB's authority over nonbank student loan servicers stems from the "larger-participant" rule, which brings large companies in consumer financial markets under the agency's supervisory authority.⁴⁹ The CFPB determined that the rule applies to any student loan servicer and its affiliates if it services over one million accounts.⁵⁰ This criterion is likely only met by the seven largest student loan servicers. These seven are responsible for an estimated 75 million accounts, comprised of 30 million federal loans and 45 million private loans.⁵¹ That leaves an estimated 7%–29% of the nonbank student loan servicing market outside the CFPB's authority.⁵² Supervising and pursuing enforcement actions against the seven largest student loan servicers is likely to have an impact on servicing practices market-wide, and enforcement actions against those companies are likely to yield the greatest relief to the greatest number of consumers. However, potentially leaving 29% of the nonbank student loan servicer market without regulatory oversight is problematic and constitutes a significant obstacle to a uniform improvement in student loan practices.

under "Student Debt" heading; then click "2016 Student Loan Data Update"; finally, click "Number of Borrowers by Repayment Status").

⁴⁸ See FED. RESERVE BANK OF N.Y., *supra* note 3.

⁴⁹ 12 U.S.C. § 5514(b)(1) (2014).

⁵⁰ 12 C.F.R. § 1090.106(b) (2014).

⁵¹ Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,395 n.75 (Dec. 6, 2013).

⁵² *Id.* at 73,396.

2. *Failure to Define UDAAPs.* Thus far, the only regulation the CFPB has issued concerning the student loan servicing market defined what constitutes a larger participant in the market, which subjected all entities meeting the definition to CFPB authority.⁵³ No regulations have been issued regarding the CFPB's expectations of student loan company practices.⁵⁴ Many in the wider financial services industry have criticized the CFPB for not issuing new rules to clarify its expectations, particularly concerning the definition of UDAAPs, while deeming the agency's approach thus far "regulation by enforcement."⁵⁵ Richard Cordray, former Director of the CFPB, rejected this idea and stated that "explicitly articul[at]ing rules for every eventuality" would lead to paralysis.⁵⁶ Student Loan Servicing is listed on the Agency Rule List as a "Long-Term Action" in the regulatory agenda published by the CFPB in Fall 2016, but any final rule will likely not include an enumerated list of defined UDAAPs.⁵⁷

However, establishing rules that define UDAAPs would eliminate a significant amount of uncertainty in the market surrounding the CFPB's expectations and enforcement actions, in addition to other benefits.⁵⁸ Under the CFPA, the CFPB can prescribe rules that identify UDAAPs "in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service" and establish requirements for preventing those practices.⁵⁹

⁵³ 12 C.F.R. § 1090.106 (2014). For a description of final rules, rules under development, and the CFPB's regulatory agenda, see *Rulemaking*, CFPB, <http://www.consumerfinance.gov/policy-compliance/rulemaking/> (last visited Oct. 25, 2016).

⁵⁴ See *Final Rules*, CFPB, <http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/> (last visited Oct. 25, 2016) (generating a list of final rules promulgated by the CFPB, none of which describe unlawful student loan company practices).

⁵⁵ Alan S. Kaplinsky, *Director Cordray Acknowledges Industry-Wide Application of Consent Orders*, CONSUMER FIN. MONITOR (Mar. 10, 2016), <https://www.cfpbmonitor.com/2016/03/10/director-cordray-acknowledges-industry-wide-application-of-consent-order/>.

⁵⁶ *Id.*

⁵⁷ AGENCY RULE LIST – FALL 2016: CONSUMER FINANCIAL PROTECTION BUREAU, OFF. INFO. & REG. AFF., http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=201604&showStage=longterm&agencyCd=3170&Image58.x=51&Image58.y=11&Image58=Submit (last visited Oct. 25, 2016).

⁵⁸ See William J. Cox, *The Student Borrower: Slave to the Servicer?*, 27 LOY. CONSUMER L. REV. 189, 232 (2015) (arguing that "[d]efined-UDAAP regulations provide three benefits: (1) easier adjudication of UDAAP violations; (2) upfront notice to service as to what constitutes a UDAAP; and (3) a second line of defense for students in the form of SAG enforcement of these rules").

⁵⁹ 12 U.S.C. § 5531(b) (2012).

Utilizing this provision would allow states to enforce violations under their own authority, streamline adjudication of enforcement actions, and provide student loan companies notice of what acts constitute a UDAAP.⁶⁰

Dodd-Frank enables state attorneys general to enforce regulations promulgated under the CFPA's UDAAP provision, but they cannot enforce the UDAAP prohibition itself.⁶¹ Therefore, without regulations defining UDAAPs, states cannot enforce the law despite the statute's clear intent to empower them to do so.⁶² Many states have similar prohibitions of deceptive and unfair practices;⁶³ however, these provisions vary from state to state and likely only allow for enforcement against private student lenders and loan servicers since state enforcement actions against federal student loan servicers may be preempted by the Higher Education Act of 1965.⁶⁴ Further, in *Cuomo v. Clearing House Ass'n*, the Supreme Court held that it is illegal for a state to use its investigative authority under these provisions if it does not intend to bring a claim, effectively eliminating states' ability to supervise student loan companies under a state prohibition against deceptive and unfair practices.⁶⁵ Thus, state prohibitions of unfair and deceptive practices are not sufficient to enable state attorneys general to properly regulate student loan servicers. If the CFPB

⁶⁰ Cox, *supra* note 58, at 232.

⁶¹ See 12 U.S.C. § 5552(a)(2)(B) (2012) (giving state attorneys general the authority to enforce regulations prescribed under the CFPA); see also Cox, *supra* note 58, at 220 (citing 12 U.S.C. § 5552(a)(2)(B) (2012) and Gail Hillebrand, The Consumer Financial Protection Bureau: Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Address at the Dodd-Frank Symposium (Mar. 11, 2011), in 8 BERKELEY BUS. L.J., 2011, at 219, 223) (noting that state attorneys general cannot enforce the statutory UDAAP provision itself, only rules promulgated under it).

⁶² See Cox, *supra* note 58, at 232 (noting that "[i]f the CFPB does not define what constitutes a UDAAP, at least nine states and the District of Columbia will be unable to protect students from servicer abuses").

⁶³ See, e.g., CAL. CIV. CODE § 1770 (2017); O.C.G.A. § 10-1-393 (2017); DEL. CODE ANN. tit. 6, § 2507A (2017).

⁶⁴ See 20 U.S.C. § 1098g (2012) (exempting federal student loans from state disclosure requirements). For an example of this type of preemption, see *Chae v. SLM Corp.*, 593 F.3d 936, 942–43, 950 (9th Cir. 2010), where the court held that the Higher Education Act's exemption effectively barred any state claims concerning deceptive business practices because they would be "the converse" of a state requiring alternate disclosures. Courts are divided on this issue; however, the fact that many jurisdictions do consider state enforcement actions against federal loan servicers preempted is sufficient to demonstrate the need for another vehicle for enforcement. For an in-depth explanation of the exemption's effect, see Cox, *supra* note 58, at 215–17.

⁶⁵ 557 U.S. 519, 536 (2009).

were to establish regulations defining UDAAPs, states would be able to supplement the CFPB's efforts in preventing illegal practices, further deterring violations.

Additionally, regulations defining UDAAPs would streamline the adjudication process because the CFPB would only have to prove that one of the defined UDAAPs occurred to justify an enforcement action instead of being required to prove that a certain act is unfair, deceptive, or abusive based on its investigation in each case.⁶⁶ Lastly, the proposed regulations would provide regulated entities notice of what constitutes a UDAAP, reducing uncertainty in the market and making it easier for companies to ensure they are complying with the law.⁶⁷

3. Inconsistent Application of Regulatory Authority by the CFPB and the Department of Education. Another source of inefficiency and confusion concerning regulators' expectations of student loan services is the difference in supervision and enforcement of federal student loan servicers by the CFPB and the Department of Education (DOE). The DOE's Office of Federal Student Aid (FSA) supervises federal student loan servicers through compliance and performance standards in its loan servicing contracts, while the CFPB has regulatory authority over only those federal servicers that fall under the "larger participants" designation.⁶⁸ The DOE typically declines to publicly admonish its loan servicers and occasionally defends them from criticism from other federal agencies.⁶⁹ In contrast, the CFPB treats federal student loan servicers with the same scrutiny as private student loan companies, threatening legal action for violations of any federal consumer financial law.⁷⁰ This arrangement potentially leads to uncertainty for federal student loan servicers given the flexibility of CFPB enforcement and the lack of defined parameters for what constitutes a UDAAP.

While a federal student loan servicer in compliance with the FSA's standards in its loan servicing contract is unlikely to be

⁶⁶ Cox, *supra* note 58, at 232.

⁶⁷ *Id.*

⁶⁸ Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383, 73,398–99 (Dec. 6, 2013).

⁶⁹ "The Government Can't Agree With Itself On Policing Student Loan Companies Banking Report," 107 Banking Rep. (BNA) No. 08, at 279 (Aug. 29, 2016).

⁷⁰ *Id.*

subject to a CFPB enforcement action, the CFPB notes that it expects increased compliance of federal student loan servicers with consumer financial protection laws due to its regulatory supervision, albeit to a lesser extent than that expected of private student loan servicers.⁷¹ Though joint efforts between the CFPB and the DOE, such as the Joint Statement of Principles on Student Loan Servicing released in September 2015 and the Policy Direction on Federal Student Loan Servicing memorandum in July 2016, suggest that the two governmental entities are attempting to address the market in a unified manner, any inconsistent application of their respective regulatory authorities creates inefficiencies and uncertainty.⁷²

VI. CONCLUSION

The rising number of delinquent student borrowers and the abysmal default rate of student loans call for consistent, efficient regulation of student loan companies. The CFPB's enforcement actions to date have successfully obtained millions of dollars in relief and civil penalties for consumers, which is a significant step in the right direction. However, uncertainty among student loan services due to a lack of regulations defining UDAAPs and inconsistent supervision among regulatory authorities is limiting the law's impact on the student loan market. The CFPB should issue regulations specifically defining UDAAPs in addition to continuing to issue guidance concerning industry practices and ensuring that consumer financial protection laws are enforced consistently by itself and the DOE. These actions will eliminate much of the uncertainty in the student loan market, facilitate

⁷¹ 78 Fed. Reg. at 73,399 (Dec. 6, 2013).

⁷² See Brian Slagle, *CFPB, DOE, Treasury Issue Joint Statement on Student Loan Servicing*, CONSUMER FIN. MONITOR (Oct. 5, 2015), <https://www.cfpbmonitor.com/2015/10/05/cfpb-doe-treasury-issue-joint-statement-on-student-loan-servicing/> (providing a general overview of the document and noting that one of the Joint Statement's four broad target areas is the lack of clear expectations and minimum requirements for student loan servicers); U.S. DEPT OF EDUC., EDUCATION DEPARTMENT TO IMPLEMENT IMPROVED CUSTOMER SERVICE AND ENHANCED PROTECTIONS FOR STUDENT LOAN BORROWERS (2016), <https://www.ed.gov/news/press-releases/education-department-implement-improved-customer-service-and-enhanced-protections-student-loan-borrowers> (announcing and summarizing the memorandum from U.S. Under Secretary of Education Ted Mitchell).

increased industry compliance, and protect student borrowers from harmful practices.

