Student Loan Entities In Hot Seat After CFPB Goes To College

By **Jonathan Joshua** (January 17, 2025)



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Recent Consumer Financial Protection Bureau actions may signal heightened regulatory scrutiny at both the federal and state levels of college and university institutional loan programs, along with the activities of their service providers, such as institutional loan originators, marketers and even strategic enrollment management companies.

On Dec. 16, the CFPB issued a "Special Edition Student Lending" issue of its long-running "Supervisory Highlights" publication[1] describing the CFPB's findings from supervisory examinations of various student loan-related entities. Among the CFPB's findings was a determination that institutional loan originators for various colleges and universities:

> risked engaging in an abusive act or practice by taking unreasonable advantage of consumers' inability to protect their interests when they created and distributed to their clients' contracts for institutional student loans that contained language allowing, as a remedy for default, unconditional withholding of official transcripts as a blanket policy."[2]

This finding reiterates the CFPB's conclusion in the Supervisory Highlights that withholding transcripts due to unpaid institutional debts is typically "abusive" under the Consumer Financial Protection Act.

As the CFPB explained in a 2022 edition of Supervisory Highlights[3], the CFPB believes that refusing to provide transcripts as a means of collecting an institutional debt can be abusive because:

> many students will need official transcripts at some point to pursue employment or future higher education opportunities, the consequences of withheld transcripts are often disproportionate to the underlying debt amount. Additionally, faced with the choice between paying a specific debt and the unknown loss associated with long-term career opportunities of a new job or further education, consumers may be coerced into making payments on debts that are inaccurately calculated, improperly assessed, or otherwise problematic.

More significantly in the 2024 Supervisory Highlights document, however, is the CFPB's apparent conclusion that a service provider engages in abusive acts by including an allegedly abusive provision in a contract template, without regard to whether any of the service provider's clients actually used the provision or if, for example, some of the service provider's clients might have been public colleges or universities that were permitted or even required to withhold transcripts under applicable state requirements.

On Dec. 12, the CFPB convened a law enforcement agency-only discussion titled "Data Enforcers Convening: Lead Generation and the Enrollment Management Industry."[4]

While not opened to the public, the topics discussed likely overlapped with the content of a speech, also on Dec. 12, by the CFPB's student loan ombudsman, Julia Barnard, to the Consumer Federation of America.[5]

In the speech, the ombudsman called on state attorneys general and consumer protection organizations "to approach colleges and universities seriously when they act as brokers, lenders, debt collectors, and data providers."[6]

She further noted that "colleges have become increasingly financialized, and the true price of college is increasingly convoluted - leading many families to simply give up on understanding how the pricing works or which of the financial products they are being offered might be best for them."[7]

Because most colleges and universities offer institutional loans and payment plans, the speech proceeds to describe how state attorneys general and consumer protection organizations can apply federal and state consumer financial protection laws to even nonfinancial activities by colleges and universities.

The speech thus describes how companies that compile and share data about prospective students might qualify as consumer reporting agencies under the Fair Credit Reporting Act, or FCRA,[8] to "prevent prospective and current students from having inaccurate data sold and used for impermissible purposes and ... ensure that when certain negative decisions about individual prospects occur, such as being offered a high-interest loan in place of a grant, they know about it."

The CFPB has likewise recently sought to vastly expand the scope of the FCRA through a notice of proposed rulemaking that would broadly define "data brokers" as consumer reporting agencies.[9]

While the new administration is widely expected to pare back the scope of this proposed regulation, colleges and universities — and their data providers — would be well-served by evaluating their federal and state law and regulatory risks under the FCRA and similar state laws based on the legal theories laid out in the CFPB's notice of proposed rulemaking.

The ombudsman's speech also lays out how, under the Equal Credit Opportunity Act, or ECOA, "anti-discrimination protections may apply to behavior by colleges and third-party enrollment management companies that is intended to maximize revenue if it causes certain groups of students to be treated differently in any aspect of a credit transaction."[10]

Finally, the speech calls for the use of prohibitions against unfair, deceptive and abusive acts or practices (known as UDAAP) "to protect students from unfair and abusive conduct by their schools," stating:

> While this reasoning has been applied to the case of transcript withholding, the logic may be applicable to a wide range of potentially abusive institutional debt origination and collection practices in the coming years. In fact, student debt cases have been at the forefront of developing UDAAP law precisely because of this power dynamic, and because students are so vulnerable to conditions such as "lack of understanding" "reasonable reliance" and "inability to protect [their] interests," all of which can be elements of establishing abusiveness.

In April 2023, the CFPB filed an amicus brief in Roberson v. Health Career Institute LLC in the U.S. District Court for the Southern District of Florida,[11] highlighting the potential regulatory risks to colleges and universities under the ECOA that were later described in the ombudsman's speech.

The amicus brief asserted that a college could be liable for "reverse redlining" under the ECOA because the college allegedly marketed its program based on race, and, because the college offered institutional loans, such marketing was "in connection" with a credit transaction.

Notably, the amicus brief relied on the U.S. District Court for the District of Maryland's 2022 decision in Carroll v. Walden University[12] upholding a similar so-called reverse redlining claim against a university whose "local advertising budget was dedicated almost exclusively to metropolitan areas with higher-than-median percentage of Black residents."

In this 2022 decision, the court held:

> [T]hese [marketing] efforts would be laudable if they resulted in increased access to such educational opportunities on fair, non-predatory terms. Here, however, the result is to subject Black prospective students and communities to a fraudulent, predatory scheme to extract loan proceeds and tuition funds by misleading students and the public about the nature of the program and the resulting costs. As it stands, [the University] is marketing a predatory product, and when it intentionally markets the [loan program] to Black prospective students, it engages in impermissible reverse redlining.

Thus, colleges and universities — and their service providers — should be wary of reverse redlining allegations because a plaintiff does not need to prove that a defendant intended to discriminate to bring a claim under the ECOA. Statistical or other evidence of a disparate impact from an otherwise neutral practice can be sufficient to state a claim.

With this background, one can thus imagine that the CFPB's Dec. 12 law-enforcement-only convening about "Lead Generation and the Enrollment Management Industry" may have been a discussion about how agencies can investigate and prosecute potentially discriminatory effects of strategic enrollment management providers and other admissions-related activities.

The discussion may also have touched on other aspects covered in the ombudsman's speech, such as the potential applicability of the FCRA to college and university data providers, and the potential liability of other service providers for allegedly unfair, deceptive, or abusive acts or practices with respect to institutional lending and other financial programs offered by colleges and universities.

It was notable, too, that the CFPB ombudsman's speech called for increased regulatory enforcement action by state attorneys general and consumer protection and advocacy groups.

While incoming President Donald Trump has not announced a nominee to be the director of the CFPB, the ombudsman's speech implicitly acknowledges that the CFPB may have different priorities under the incoming administration and calls upon state attorneys general and advocacy groups to step into an expected enforcement gap.

Whether such an enforcement gap will occur, however, remains to be seen.

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[1] https://www.consumerfinance.gov/about-us/newsroom/cfpb-uncovers-illegal-practices-across-student-loan-refinancing-servicing-and-debt-collection/.

[2] Id.

[3] https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf.

[4] https://www.consumerfinance.gov/about-us/events/archive-past-events/data-enforcers-convening-lead-generation-and-the-enrollment-management-industry/.

[5] https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-the-student-loan-ombudsman-julia-barnard-to-the-consumer-federation-of-america/.

[6] Id.

[7] Id.

[8] 15 USC § 1681, et. seq.

[9] https://www.federalregister.gov/documents/2024/12/13/2024-28690/protecting-americans-from-harmful-data-broker-practices-regulation-v.

[10] 15 U.S.C. § 1691 et seq.

[11] https://www.consumerfinance.gov/compliance/amicus/briefs/roberson-v-health-career-institute-llc/.

[12] See, Carroll v. Walden Univ., 650 F. Supp. 3d 342 (D. Md. 2022).