Private Education Lending: Innovations, Opportunities, and Compliance Realities

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This presentation is not legal advice regarding any specific situation, product, or service. Consult an attorney for specific legal guidance.

The Federal Regulatory Framework

- An extension of credit is the legal right to defer payment of a debt.
- Extensions of credit are subject to multiple federal laws.
- The primary Federal laws relevant to student loan providers include:
  - Truth In Lending Act (TILA), implemented by Regulation Z
  - Equal Credit Opportunity Act (ECOA), Regulation B
  - Fair Credit Reporting Act(FCRA), Regulation V
- There are certainly other laws, including the Fair Credit Reporting Act, laws relating to various banks and other financial institutions, privacy and information security, AML/BSA/OFAC requirements, and more.
  - I can't cover all of this here.

The Federal Regulatory Framework

- TILA and Regulation Z regulate Private Education Loans (PEL) differently than other forms of credit.
- Per Reg. Z (12 CFR 1026.46(b)(5)), a PEL is:
  - An extension of credit to a consumer
  - expressly, in whole or in part, for postsecondary educational expenses
  - Does not include:
    - open-end credit or any loan that is secured by real property or a dwelling; and
    - an extension of credit in which the covered educational institution is the creditor if:
      - The term of the extension of credit is 90 days or less; or
      - An interest rate will not be applied to the credit balance and the term of the extension of credit is one year or less, even if the credit is payable in more than four installments.
      - A loan made, insured, or guaranteed under title IV of the Higher Education Act

The Federal Regulatory Framework

- If an extension of credit is a PEL, the creditor must:
  - Provide 3 TILA disclosures, instead of the usual 1 disclosure required for non-PELs.
  - Application and Solicitation Disclosure
  - Approval Disclosure (with a required 30-day acceptance period, during which the terms of the loan cannot be changed except under specified circumstances)
  - Final Disclosure (with a required 3-day cancellation period, before which loan funds cannot be disbursed).
- Also:
  - Borrower self-certification form is required before consummation of the loan
  - If a school maintains a preferred lender list, lenders must provide the information included in the Application and Solicitation Disclosure to the school within 30-days after being included in the preferred lender list, and annually.
  - Co-branding between a school and a lender is prohibited

The Federal Regulatory Framework

- TILA also includes a few other requirements not referenced in Reg. Z
  - Prepayment fees are prohibited
  - A PEL lender may not "directly or indirectly"
    - offer or provide any gift to a covered educational institution in exchange for any advantage or consideration provided to such private educational lender related to its private education loan activities; or
    - engage in revenue sharing with a covered educational institution
  - Any employed in the financial aid office of a school or who has responsibilities at the school relating to financial aid or private loans may accept anything of value from a PEL lender in connection with serving on an advisory board, commission, or group established by the lender or a group of lenders.
  - A PEL lender may not automatically place a PEL into default if a cosigner dies or declared bankruptcy.
  - When notified of the primary borrower's death, a PEL lender must release the cosigner from responsibility for the loan within a reasonable time
  - PEL lenders must allow the borrower to designate a person to have legal authority to act for them if the borrower dies.

The Federal Regulatory Framework

- ECOA (15 U.S.C. 1691) and Regulation B (12 CFR Part 1002)
- Prohibits discrimination in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)
- Reg. B provides that "a creditor shall not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants"
- Requires notifying the borrower of a decision to grant or decline an application for credit within 30-days after the decision.
  - If the decision is to decline the application, an adverse action notice must be sent stating the reasons for the decision.
  - A notice of incompleteness can be sent if the application is incomplete.

The Federal Regulatory Framework

- Disparate Impact
  - The CFPB updated Regulation B to remove 'disparate impact' as a basis for liability.
  - Disparate impact:
    - a theory of liability under the ECOA that a facially neutral practice nevertheless violated the law if it disproportionally impacted a protected class.
    - Statistical evidence was acceptable to demonstrate a disparate impact
    - The creditor could assert as a defense that the practice had a legitimate business justification and that there was no less-discriminatory means of accomplishing that purpose.
  - We're left with disparate treatment and overt discrimination

    [A] credit practice that treats applicants differently on a prohibited basis violates the law because it violates the general rule. Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate.

The Federal Regulatory Framework

- Disparate impact had a lot of implications for student lending.
  - Use of AI and ML in underwriting was considered risky, as was the use of CDR, post-graduation earnings of the borrower's program of study, school attended, or other non-individualized factors
  - It seems possible that AI- and ML-based underwriting could expand further and faster.
  - Cash flow underwriting may be less helpful in the student loan space, but could be relevant for working borrowers or for evaluating cosigners
- But:
  - Some states have laws or regulations that expressly adopt a disparate impact standard
  - With the Supreme Court's Loper Bright decision overruling the Chevron doctrine of deference to agency opinions, Courts may not agree that the ECOA doesn't prohibit policies with alleged disparate impact.
  - There's a business case to be made for not mispricing customers
- Reg. B still provides that "a creditor shall not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants"
- Courts had previously upheld "Reverse Redlining" claims against schools with institutional loan program using the disparate impact theory.

The States

- States have generally have multiple and potentially overlapping regulatory regimes, depending on the structure of the product.
- Loans
  - state-chartered financial institutions
  - Many states require a license for a non-bank to make loans, but the triggers vary significantly. Some require a license only if the interest rate will exceed a certain amount (typically the applicable usury rate), but other states require a license regarding of the rate.
    - Depending on the terms of the loan, it could be regulated as a 'small loan' or a 'payday loan,' but some states use other terms.
    - For instance, CT defines a 'small loan' as being a loan of under $50,000.
    - States have also started adopting anti-evasion provisions that include in the definition of a lender requiring a license entities that engage market loans and have the predominant economic interest in the loans.
    - Often targeted at bank-partnerships.

The States

- Many states have separate laws for Retail Installment Sales, which (generally) is when a provider of goods or services provides them and the buyer pays in installments.
  - Often less-regulated than loans, but retail installment sellers may be required to obtain a license, register, or file a notification.
  - Buyers of retail installment contracts require a sales finance company license in a lot of states.
- Over the past 10 or so years, many states have adopted laws specifically regulating student loans.
  - They use their own definitions of student loan – they don't adopt the definition in TILA
  - Student loan servicing licenses required in many states
  - A few states require student loan creditors to register and file reports about their loans
    - Note that if you submit sample loan documents you really need to be careful to redact borrower information.

The States

- Take Minnesota for example:
  - "Borrower" is "a resident of this state who has received or agreed to pay a student loan or a person who shares responsibility with a resident for repaying a student loan."
  - "Student loan" is an "extension of credit for actual costs paid for tuition and reasonable education and living expenses."
  - "Servicing" means:

    (1) receiving any scheduled periodic payments from a borrower or notification of payments, and applying payments to the borrower's account pursuant to the terms of the student loan or of the contract governing servicing;

    (2) during a period when no payment is required on a student loan, maintaining account records for the loan and communicating with the borrower regarding the loan, on behalf of the loan's holder; and

    (3) interacting with a borrower, including activities to help prevent default on obligations arising from student loans, conducted to facilitate the requirements in clauses (1) and (2).
  - "Student loan servicer" is "any person, wherever located, responsible for the servicing of any student loan to any borrower . . ."

The States

- Student loan borrower "bill of rights" often impose numerous requirements and restrictions
  - abusive acts or practices prohibited
  - specific notices to borrowers and cosigners relating to cosigner release and other borrower benefits are required
  - dispute resolution timeframes, escalation requirements, and borrower responses
  - notice requirements if the servicing of a student loan is transferred to a different servicer.
  - Some states prohibit defaulting a borrower for any reason other than non-payment.
  - Some states require that a a student loan be forgiven if the student loan borrower dies or becomes totally and permanently disabled
    - *they prohibit a servicer from investigating if a claim for relief is valid*.
    - *"Total and permanent disability" is sometimes defined as any disability that is expected to last for longer than one year.*

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The States

- Many states are also imposing additional debt collection requirements for student loan debts.
  - Debt collectors may be required to have certain documentation relating to a student loan before they can engage in any debt collection activities.
  - May be required to provide specific information or copies of loan documents to student loan borrowers.

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- California prohibits a student loan lender or debt collector from communicating with a debtor to collect a debt unless they "posses" the following information:

The States

- The name of the owner of the loan
- The creditor's name at the time of default (if not the current creditor)
- The creditor's account number for the loan at the time of default.
- The amount due at default
- An itemization of any interest that has accrued on the account
- An itemization of any fees that are owed on the student loan, and whether those fees were imposed by the original creditor or a subsequent owner of the loan
- The date that the loan was incurred
- The date of the first partial payment or that a payment was missed, whichever was earlier, that "precipitated the default"
- The date and amount of the last payment
- Any payments, settlement, or financial remuneration of any kind paid to the creditor by a guarantor, surety, or other party not obligated on the loan as compensation under a separate contract that provides coverage for financial losses incurred as a result of default
- The names of every entity that owned the loan after the time of default, and the date of each sale or transfer
- A copy of the self-certification form and any other "needs analysis" conducted by the original creditor prior to the origination of the loan.
- Documentation "establishing" that the creditor owns the specific loan at issue. If the loan was assigned more than once, the creditor must possess each assignment or other written evidence of each transfer. Each document must include the original creditor's account number for the debt, the date of the transaction, and the borrower's "correct name"
- A copy of all pages of the contract, application or other documents evidencing the debtor's liability for the loan, stating all terms and conditions applicable to the loan.
- A list of all collection attempts in the prior 12 months, including the date and time of all calls and written communication.
- A statement as to whether the creditor is willing to renegotiate the terms of the loan
- Copies of all written settlement communications made in the prior 12 months, or if none exist, a statement to that effect
- A statement as to whether the private education loan is eligible for an income-based repayment plan.

The States

- Impact on Innovation?

Other Regulatory Developments

- GENIUS ACT
  - I'm not going to get into the details, but the GENIUS Act will, among other things, allow US financial institutions to issue stablecoins backed 1:1 by reserves.
  - While the The GENIUS Act expressly doesn't apply to non-US persons or financial institutions, it could lead to wider adoption.
  - Consumer-facing use-cases aren't particularly clear yet, but I think there is at least one good case: international remittances.
  - What are the implications to schools and to lenders of widespread adoption of stablecoin, including for international remittances?

Other Regulatory Developments

- EWA is "earned wage access" – 2 general models
  - Employer sponsored: where the employer lets employees access earned but unpaid wages. Costs may be paid by the employer, but some models have the worker pay the fees.
  - D2C, where the provider provides an "advance" and gets authorization to debit the consumer's account when they get paid
  - There is generally no obligation to "repay" the EWA if, for any reason, the wages aren't paid.
- A number of states have adopted laws governing only EWA.

Other Regulatory Developments

- California, however, regulated "income-based advances"
  - "Income-based advance" means an advance made to a consumer by a provider and that has all of the following characteristics:

    (1) The advance is based on income the provider has reasonably determined to have accrued to the benefit of the consumer but has not, at the time of the advance, been paid to the consumer;

    (2) When the advance is made, the advance is scheduled for collection in a single payment on a date within 34 days, and that date corresponds to the date that the provider anticipates the income described in paragraph (1) of this subdivision will be paid to the consumer; and

    (3) The provider warrants to the consumer as part of the contract between the parties on behalf of the provider and, if applicable, any business partners that:

    The provider and any business partners have no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in full the amount due; and

    If the amount due is not repaid on the collection date, the provider and any business partners will not engage in any debt collection activities, place the amount due as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount due. In this paragraph, "debt collection activities" do not include initiating with the consumer's authorization an electronic fund transfer or payroll deduction to collect any outstanding amount due.

- Cal. Code Regs. tit. 10, §

Other Regulatory Developments

- NY's BNPL law:

  "Buy-now-pay-later loan" means closed-end credit provided to a consumer in connection with such consumer's particular purchase of goods and/or services, other than a motor vehicle as defined under section one hundred twenty-five of the vehicle and traffic law. A "buy-now-pay-later loan" does not include credit where the creditor is the seller of such goods and/or services, unless it is credit pursuant to an agreement whereby, at a consumer's request, the creditor purchases a specific good and/or service from a seller and resells such specific good and/or service to such consumer on closed-end credit.

  N.Y. Banking Law § 736

- Could this apply to student loans?

Other Regulatory Developments

- Illinois BNPL law:
  - "Buy-now-pay-later loan" or "loan" means closed-end credit provided to a consumer at the time of a transaction in
  - connection with the consumer's particular purchase of goods or services that:
  - (1) is payable in 4 or fewer installments; or
  - (2) has a term of 120 days or less.
  - "Buy-now-pay-later loan" or "loan" includes any other loan identified by the Secretary by rule. "Buy-now-pay-later loan" or "loan" also includes (i) a buy-now-pay-later loan payable in one or more installments without any interest or finance charge and (ii) a buy-now-pay-later loan with either interest or finance charges or both.
  - "Buy-now-pay-later loan" or "loan" does not include credit where the creditor is the seller of the goods or services, unless it is credit pursuant to an agreement where, at a consumer's request, the creditor purchases specific goods or services from a seller and resells the specific goods or services to the consumer on closed-end credit.
  - "Buy-now-pay-later loan" or "loan" also does not include (i) a loan for a motor vehicle or (ii) a residential mortgage loan, as that term is defined in Section 1-4 of the Residential Mortgage License Act of 1987. "Buy-now-pay-later loan" or "loan" also does not include any loan to a seller of goods or services for the purchase of inventory for sale or resale by the seller of goods or services in the normal course of business.
  - Illinois SB3561 - Buy-Now-Pay-Later Loan Consumer Protection Act

Other Regulatory Developments

- Automated decision-making technology and AI use
  - Colorado enacted a law regulating the use of "automated decision-making technology," to make "consequential" decisions. Effective on Jan 1st.
    - Requires "adverse action" type notices describing the outcome of the decision, what factors contributed to the decision, and that the decision was automated.
    - Impacted consumers can request copies of personal data used to make the decision and that incorrect information be corrected.
    - Consumers can also request human review of the automated decision.
    - Proposed regulations include examples that trigger this requirement, including a decision to refer a debt to a debt collector and schools' financial aid award determinations.
- NY passed a law prohibiting "surveillance pricing."
  - Again, not tied specifically to AI use – it applies to anyone who uses an algorithm to set the price of goods or services using a potential consumer's personal information.
  - An "algorithm" is defined as a "computational process or system that applies one or more sets of rules . . . to generate outputs based on inputs and/or to define a sequence of operations."
  - "Surveillance pricing" is "pricing set completely or in part by an algorithm that uses personal data to offer different prices to different customers for the same goods or services . .."
  - Limits offering discounts to prevent evasion.
- Laws relating to AI and "chatbots"
- According to the National Conference of State Legislators, so far, in 2026, 43 states have enacted 257 laws relating in some way to AI. See: https://www.ncsl.org/financial-services/artificial-intelligence-legislation-database

Other Regulatory Developments

- Coerced Debts
- Several states have adopted laws prohibiting creditors from enforcing debts that were entered into due to "coercion."
  - California, Connecticut, Delaware, Illinois, Maine, Minnesota, New York, Nevada, and Texas.
- The laws generally require the victim to submit documentation supporting their claim of coercion, but doesn't have to be from law enforcement.

Other Regulatory Developments

- New York
- "Coerced debt" means a debt arising out of a transaction primarily for personal, family or household purposes that was incurred because of duress, intimidation, threat, force, coercion, manipulation, or undue influence within the context of intimate relationships or relationships between family or household members . . ., relationships between victims of human trafficking and traffickers . . ., relationships between children and their parents or caretakers . . ., the elderly or individuals eligible for protective services . . . and their caregivers.
- "adequate documentation of coerced debt" means documentation that identifies a particular debt, or a portion thereof, as coerced debt, describes the circumstances under which such coerced debt was incurred, and takes the form of any of the following:

  (a) a police report;

  (b) a federal trade commission identity theft report that identifies a particular debt, or portion thereof, as a coerced debt;

  (c) an order from a court of competent jurisdiction setting forth findings of coerced debt; or a written verification, from a qualified third party to whom the debtor reported the coerced debt, which shall be satisfied by any sworn or notarized statement including the required information as well as the name, mailing address, and email address or telephone number, as applicable, of such qualified third party's employer or, if self-employed, of such qualified third party.

  (d) a written verification, from a qualified third party to whom the debtor reported the coerced debt, which shall be satisfied by any sworn or notarized statement including the required information as well as the name, mailing address, and email address or telephone number, as applicable, of such qualified third party's employer or, if self-employed, of such qualified third party.
- N.Y. Gen. Bus. Law § 604-aa

Market Developments

- Schools are struggling to figure out how to deal with the OBBBA's student loan limits.
  - Institutional loan programs
    - Open-end student loans
  - Preferred lender list (rumors that ED may review their regulations)
    - Heavy reliance on vendors (ELM Select and FASTChoice)
  - Employer-sponsored loan programs
    - But beware of employment-related issues and risks
  - Regulators are approving a lot of new banks and bank models

About me

- Founder of Joshua Law Firm LLC to provide cost-effective regulatory compliance guidance to schools, student loan lenders and servicers, and other fintech and consumer financial services companies.
- 25+ years of experience:
  - Special Counsel, Manatt, Phelps & Phillips, LLP
  - 2x Fintech Startup GC
  - Sallie Mae, Managing Director and Associate General Counsel. Regulatory counsel for privacy student loan origination, servicing, and collection. Lead counsel for Business Office Solutions division supporting college and university clients.
  - Citizens Bank, VP & Senior Counsel. Regulatory counsel for private student lending, auto finance, personal loans, fair lending, privacy, loan servicing, dispute investigation and resolution, and debt collection functions.
- Council of Higher Education Assistance Organizations ("COHEAO"). www.coheao.org.
  - Legislative Chair, COHEAO Board of Directors.
  - Chair of COHEAO's grass-roots committee, which tracks pending federal and state legislative and regulatory developments that may impact campus-based loan and receivables.
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