Regulatory Update

Federal and state developments & practical steps to manage risk

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ED

They've been busy with:

- FAFSA delays
- loan forgiveness and repayment plans
- borrower defense to repayment regulations
- gainful employment regulations
- "Framework for Student Loan Servicer Accountability"

CFPB

How its going

AMERICAN BANKER

CFPB's Chopra says bureau will 'be firing on all cylinders' after SCOTUS win

By Kate Berry May 17, 2024, 1:55 p.m. EDT 5 Min Read



The Washington Post

CFPB readies crackdown on predatory lending after Supreme Court win

CFPB

Enforcement

- PHEAA/NCSLT settlement.
  - Failing to respond responses to borrower requests
  - Misrepresenting to consumers that certain requests would be answered when, in fact, they would not.
  - Failing to inform borrowers that forbearance requests submitted to the National Collegiate Student Loan Trusts would not be appropriately processed, and that other payment relief options were available.
  - Incorrectly denying forbearance requests.
  - $3 million in redress to borrowers + $2.15 million fine
- Bloomtech settlement.
  - For-profit coding school made aggressive marketing and job-placement statements, aggressively pushed income share agreements.
  - My sense is that the settlement was a halfhearted effort by the CFPB to put ISAs out of their misery and to "punish" a school for hyperbolic marketing.

CFPB

Policy

- Bankruptcy treatment of student loans.
  - Requiring documentary evidence that loans are non-dischargeable
  - Note, too, that there's potential risk from the fact that TILA disclosures must state if the loan is dischargeable.
  - Creates risk because can sometimes be a fact-dependent analysis, e.g., is the student more or less than half-time, is the school Title IV eligible, what were the funds used for, etc.
- CFPB report on tuition payment plans concludes that they "Can Put Student Borrowers at Risk." Was not a scientific study of the market, but found that some payment plans had:
  - high fees
  - "Coercive" collection practices, such as transcript withholding
  - Stacking of late and returned payment fees
  - Poor and inconsistent terminology and disclosures
- The CFPB Student Loan Ombudsman's 2023 Report
  - [H]olders of private student loan contracts are not engaging with borrowers' claims of deception and abuse at schools, even where other law enforcement actors reached conclusive findings on their claims.
  - Complaints . . . have indicated that various private loan servicers provide misleading information about borrowers' rights, either dissuading the borrower from pursuing these claims or functionally limiting their ability to do so. These complaints raise questions about whether private student loan servicers are operating in compliance with loan promissory notes, and they suggest that borrowers who have the right to exercise defense to collection efforts are being forced to continue to pay on their loans.

CFPB

Related initiatives

- Ongoing focus on disparate impact of "algorithms" via expanded definition of "AI"
- CFPB amicus briefs
  - Borrower disputes relating to legal liability; "mistake of law" under FCRA and FDCPA.
  - But see recent 11th circuit decision holding:

    "Whether the alleged inaccuracy is factual or legal is beside the point. Instead, what matters is whether the alleged inaccuracy was objectively and readily verifiable. Here it was not."
  - Reverse redlining lawsuit (Roberson v. Health Career Institute LLC)
    - Walden University reverse redlining lawsuit settlement following court's rejection of defendant's motion to dismiss the lawsuit.
- "Junk Fees" initiative
  - Fees for student meal accounts
  - Pay to pay fees in debt collection

States

Expanding License Requirements

Since January of 2023:

- Nevada
  - student loan law passed, regulations pending.
- Illinois
  - Both houses recently passed legislation that will impose cosigner and disability protections, awaiting governor's action.
  - Some portions of the legislation are effective immediately.
- Colorado
  - Changes to student loan servicing requirements to cover cosigners.
  - Adopted regulations relating to income share agreements, but not specific to student loans.
- Oklahoma - student loan bill of rights.
- Maryland - requires student loan creditors to register.
- Minnesota – 2 bills just passed both legislative houses, waiting for governor's signature:
  - Amended student loan servicing requirements
  - Requires student loan creditors to register

States

Pending or abandoned (but interesting)

- NY – Governor Hochul vetoed legislation that would require registration for anyone to whom a higher education debt is owed.
- Delaware, New Mexico, NJ legislation to regulate student loan servicing apparently died in committee.
- California - Pending legislation limiting collecting institutional balances – in committee.
- California - proposed student loan creditor registration requirements for originating institutional loans, payment plans, and ISAs.
  - Rejected by office of administrative law on technical grounds, will likely be adopted without major changes
  - Allowed registration instead of licensure as a CFL lender if complied with the requirements.
  - Made some technical regulatory changes to enable ISAs and institutional loans under the California Finance Law. For instance:
    - allowed providers to comply with the requirement that the first payment must be due within 15-45 days of origination by not imposing any penalty for allowing in-school deferments and grace periods.
    - Allowed ISAs to comply with requirement that the monthly payment must be fixed by a payment where the only unknown element at the time of origination is the borrower's income.
  - Note the expanded definition of postsecondary education, which expands the definition of a student loan the servicing of which requires registration.

    "Postsecondary education" means an educational program that primarily serves or whose instruction is designed for students who have completed or terminated their secondary education or are beyond the compulsory age of secondary education, including a program whose purpose is academic, vocational, or continuing professional education. Postsecondary education is not limited to programs where a student receives a degree or certificate upon completion of the program.

Policy

You're already using AI

- It's "AI" all the way down. Fair lending risk will follow.
  - Biden administration using definition of AI that includes pretty much any algorithmic decision

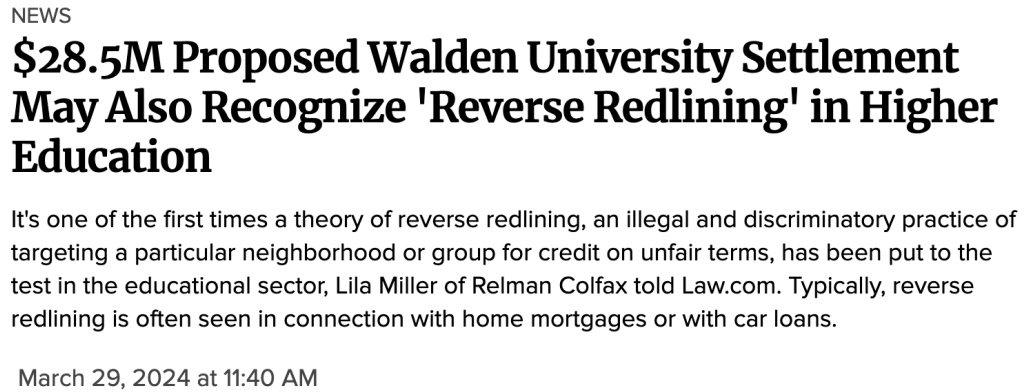
    > "[A] machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action."

  - Regulatory guidance about fair lending risks from "AI" should be applied across the board.
  - Regulatory concerns about disparate impact from AI in all aspects of a credit transaction, including marketing and servicing.
- Note the final monitor report re Upstart, which got into political "hot-water" for using school earnings to underwrite student loan refis.
  - The monitor's reports provide perhaps the best window into the mechanics and tradeoffs of fair lending analysis of big-data and complex algorithms.
  - Monitorship ended at an impasse.

Policy

Reverse Redlining

- The CFPB remains focused on for-profit schools, and they seem to think they have a winning argument with "Reverse Redlining"
  - Recall that they filed an amicus brief supporting this theory.
  - The defendant for-profit school allegedly directed generic marketing on a prohibited class basis and that their institutional loan products were allegedly not as good as some other loan products.
- Plaintiffs don't need to prove intent and can use statistical evidence to prove discrimination.
- See also Walden University class action lawsuit and recent settlement



NEWS

$28.5M Proposed Walden University Settlement May Also Recognize 'Reverse Redlining' in Higher Education

It's one of the first times a theory of reverse redlining, an illegal and discriminatory practice of targeting a particular neighborhood or group for credit on unfair terms, has been put to the test in the educational sector, Lila Miller of Relman Colfax told Law.com. Typically, reverse redlining is often seen in connection with home mortgages or with car loans.

March 29, 2024 at 11:40 AM

Risk Trends

- I listed a bunch of seemingly distinct student loan servicing issues.
- I think the themes are:
  - Continued focus on the blocking and tackling of servicing and dispute handling
  - Continued CFPB focus on "fairness" - Reverse Redlining & AI, "junk fees", attempts to expand obligation to investigate and resolving borrower disputes
  - Expansion of state license requirements and creditor registration/reporting

Mitigating Risk

What to do?

- Enhance dispute investigation process regarding disputes over legal liability, and stay on top of legal developments
- Monitor ever-expanding licensure requirements, including of schools/creditors/assignees
- Test for disparate impact, particularly from automated processes.
  - It's gotten easier to run automated tests via various algorithmic fairness vendors

Sources

- FAFSA delays. https://www.npr.org/2024/03/24/1240371076/ed-department-error-may-delay-student-financial-aid-further
- New ED Repayment plans. https://www.nerdwallet.com/article/loans/student-loans/the-new-idr-plan
- New forgiveness plans. https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/08/president-joe-biden-outlines-new-plans-to-deliver-student-debt-relief-to-over-30-million-americans-under-the-biden-harris-administration/
- Borrower defense to repayment. https://www.insidehighered.com/news/government/student-aid-policy/2023/08/08/federal-appeals-court-blocks-new-borrower-defense
- Gainful employment regulation. https://www.ed.gov/news/press-releases/biden-harris-administration-announces-landmark-final-rules-protect-consumers-unaffordable-student-debt-and-increase-transparency
- Framework for student loan accountability. https://www.ed.gov/news/press-releases/biden-harris-administration-announces-framework-student-loan-servicer-accountability-protect-borrowers-nationwide
- CFPB/PHEAA & NCSLT settlement. https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-require-national-collegiate-student-loan-trusts-and-pennsylvania-higher-education-assistance-agency-to-pay-more-than-5-million-for-student-loan-servicing-failures/
- CFPB/Bloomtech settlement. https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-coding-boot-camp-bloomtech-and-ceo-austen-allred-for-deceiving-students-and-hiding-loan-costs/
- CFPB on student loan bankruptcy. https://www.consumerfinance.gov/compliance/supervisory-guidance/cfpb-bulletin-2023-01-unfair-billing-and-collection-practices-after-bankruptcy-discharges-of-certain-student-loan-debts/
- CFPB report on Tuition Payment Plans. https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-college-tuition-payment-plans-can-put-student-borrowers-at-risk/
- CFPB student loan ombudsman's report. https://www.consumerfinance.gov/data-research/research-reports/report-of-the-cfpb-education-loan-ombudsman/

Sources

Sources

- CFPB on bias in AI systems. https://www.consumerfinance.gov/about-us/newsroom/cfpb-federal-partners-confirm-automated-systems-advanced-technology-not-an-excuse-for-lawbreaking-behavior/
- CFPB Amicus Briefs.
  - https://www.consumerfinance.gov/compliance/amicus/briefs/nelson-v-experian-information-solutions-inc/
  - https://www.consumerfinance.gov/compliance/amicus/briefs/ritz-v-nissan-infiniti-lt/
  - https://www.consumerfinance.gov/compliance/amicus/briefs/carrasquillo-v-cica-collection-agency/
  - https://www.consumerfinance.gov/compliance/amicus/briefs/roberson-v-health-career-institute-llc/
- CFPB on "junk fees." https://www.consumerfinance.gov/rules-policy/junk-fees/
  - Pay to pay fees. https://www.consumerfinance.gov/compliance/amicus/briefs/glover-and-booze-v-ocwen-loan-servicing-llc
  - Student meal plan fees. https://files.consumerfinance.gov/f/documents/cfpb_supervisory_highlights_junk_fees-update-special-ed_2023-09.pdf

Sources

- State licensing laws
  - Nevada
    - statute. https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10207/Text
    - Proposed regulation. https://fid.nv.gov/Opinion/Proposed_Regulations/
  - Illinois. https://ilga.gov/legislation/BillStatus.asp?DocNum=86&GAID=17&DocTypeID=SB&LegId=143370&SessionID=112&GA=103
  - Colorado.
    - Student loan law https://leg.colorado.gov/bills/sb23-248
    - ISA regulations. https://coag.gov/app/uploads/2023/07/Draft-ISA-Rule.pdf
  - Oklahoma. http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1443&Session=2300
  - Maryland. https://legiscan.com/MD/bill/HB913/2023
  - Minnesota
    - https://www.revisor.mn.gov/bills/text.php?number=SF4097&version=latest&session=ls93&session_year=2024&session_number=0
    - https://www.revisor.mn.gov/bills/text.php?number=HF4757&type=bill&version=4&session=ls93&session_year=2024&session_number=0

Sources

- State laws
  - NY's vetoed legislation. https://www.nysenate.gov/legislation/bills/2023/S5056/amendment/A
  - Delaware. https://legis.delaware.gov/BillDetail?legislationId=141169
  - New Mexico. https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=71&Year=24
  - New Jersey. https://www.njleg.state.nj.us/bill-search/2024/S2612
  - California.
    - https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1160
    - https://dfpi.ca.gov/california-consumer-financial-protection-law-regulations-legislation-opinions-and-releases/#prop
- Biden Executive Order on AI. https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/
- Upstart monitor's final report. https://ir.upstart.com/news-releases/news-release-details/ldf-sbpc-and-upstart-announce-final-monitorship-report-ai-fair-lending
- CFPB on reverse redlining.
  - https://www.consumerfinance.gov/compliance/amicus/briefs/roberson-v-health-career-institute-llc/
  - https://www.consumerfinance.gov/about-us/blog/protecting-people-from-discriminatory-targeting/
  - https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-justice-department-interagency-event-combat-modern-day-redlining/
- Walden University reverse redlining lawsuit. https://www.morningstar.com/news/marketwatch/20240416148/they-thought-a-degree-would-change-their-life-instead-it-left-them-trapped-in-school-and-in-debt-for-years