August 11, 2021

VIA ELECTRONIC SUBMISSION

Massachusetts Division of Banks
1000 Washington Street,10th Floor
Boston, MA 02118-6400
dob.comments@mass.gov

Re: Comment on Proposed Amendments to 209 CMR 18.00 (Conduct of the Business of Debt Collectors, Student Loan Servicers, and Third Party Loan Servicers) and 209 CMR 48.00 (Licensee Record Keeping)

Dear Commissioner:

The undersigned organizations representing Massachusetts consumers, students, student loan borrowers, and educators submit this comment in response to the Division of Banks' (the "DOB") request for comments on the above-referenced proposed regulations, which implement the recently-enacted Student Loan Borrower Bill of Rights.

For the over 871,000 Massachusetts student loan borrowers, the new Student Loan Borrower Bill of Rights provides critical consumer protections and addresses known abuses by the student loan servicer industry, which the Commonwealth has repeatedly investigated through the Office of the Attorney General. The undersigned urge the DOB to use its new authority to maximize the Commonwealth's oversight of this industry.

We applaud the DOB's proposed regulations and the steps that its staff have already taken to implement these new protections and to solicit input from stakeholders, including holding a public hearing on August 4, 2021. This comment builds on many of the themes conveyed during the hearing, including those raised by Senator Eric Lesser, one of the primary sponsors for the Student Loan Borrower Bill of Rights.

Specifically, below we offer four ways to both ensure the DOB licenses the entire market that the legislature intended to cover and to maximize the law's protective power for borrowers. As detailed below, we urge the DOB to clarify that Guaranty Agencies' activities require licensure as a loan servicer, but that the activities of the many hard-working loan counselors, attorneys, and non-profit employees who support student loan borrowers throughout the Commonwealth do not meet the statutory definition of "servicing" and therefore do not require licensure. We also propose revising the separate references to automatic federal student loan servicers and other student loan servicers in order to clarify the extent to which the regulations apply to both groups, and propose revising the *mens rea* standard applied for violations of the regulations. Finally, we stress the importance of cooperation and information sharing between the DOB and the new Student Loan Ombudsperson at the Office of the Attorney General, and suggest codifying means of communications between your offices.

1. **The DOB Should Clarify That "Servicing" Covers Only Traditional Industry Actors That Interact With Borrowers.**

The definition of "servicing" in M.G.L. c. 93L applies only to financial services companies that interact with borrowers regarding their payments and accounts. This is in line with broadly-held interpretations of what "servicing" includes with respect to student loans, and should be applied accordingly in the Commonwealth. Specifically, Guaranty Agencies' activities meet this definition, and so these companies should be required to obtain a license from the DOB, whereas the work of consumer-facing professionals with no connection to loan holders or the servicing industry does not. However, to address concerns that this latter group would be improperly required to obtain a license, we urge the DOB to clarify the scope of c. 93L.

a. The law only requires licensure for actors engaged in the business of servicing.

The proposed regulations adopt the same definition for student loan "servicing" as provided in section 1 of c. 93L. Specifically, the proposed regulations define student loan servicing as:

a) Receiving or soliciting a scheduled periodic payment from a student loan borrower pursuant to the terms of a student loan and making the principal, interest and other payments to the owner of the loan or other third party with respect to the amounts received from the student loan borrower as may be required pursuant to the terms of the servicing loan document or servicing contract;
b) Maintaining account records for a loan and communicating with the student loan borrower regarding the loan on behalf of the owner of the loan during a period in which no payment is required on the loan; or
c) Interacting with a student loan borrower, including activities to help prevent default on obligations arising from a loan, to facilitate the activities described in clause (a) or clause (b); provided, however, that the actions of the student loan ombudsman under section 25 of chapter 12 and the actions of the Division of Banks consumer assistance unit under section 3A of chapter 26 shall not constitute servicing.[1]

This definition covers the business of managing student loans, and activities done by or on behalf of industry. Activities that do not meet this specific definition should not require licensure with the DOB.

Parsing the statute's text makes clear that the covered activities should be viewed through an industry lens. Paragraphs (a) and (b) clearly refer to financial services industry actors only. The former uses language that reflects activity taken by industry, not consumers and their representatives: "receiving or soliciting . . . payment . . . and making the principal, interest and other payments to the owner of the loan"—essentially, companies that are asking borrowers to submit payments to the loan holder and then applying those payments to their accounts—and the latter is explicit that it applies to actors operating "on behalf of the owner of the loan[.]" Paragraph (c) covers activities that "facilitate" the first two categories, and must be read in the context of the entire definition and of the DOB's jurisdiction. "Facilitate" here refers to helping financial services companies as they collect and apply payments and maintain records. It does

[1] Proposed 209 CMR 18.02 ("Student loan servicing").

not refer to any activity taken by any actor that remotely touches payments or record maintenance. Such an overly broad interpretation would lead to absurd outcomes and would exceed the DOB's authority. For example, does a U.S.P.S. mail carrier, or even a private courier, "facilitate" the receipt of payments when she delivers a borrower's check? In a literal sense, yes, but that could not have been the intent of the legislature, nor would it be reasonable for the DOB, as a financial regulator, to require licensure by such actors who so clearly are not engaged in a financial service.

Nor, generally, should the text be read broadly in an attempt to capture all activity related to student loans. That was not the intent of the legislature. The Student Loan Borrower Bill of Rights requires the licensure of *servicers*. It does not, nor should it be used to, address all potential harms to student loan borrowers, such as predatory debt settlement companies or any other type of fraudulent practice. Massachusetts has other protections, such as M.G.L. c. 93A, for such actors or problems. This is evident from the fact that c. 93L empowers the DOB, which oversees banks and non-bank financial services companies. Loan servicing is a traditional financial service within the DOB's jurisdiction, but activities that fall outside this traditional regulatory jurisdiction, such as counseling and legal representation, should not be read into c. 93L simply because in the course of that work those non-financial service providers may from time to time interact with regulated actors or products.

b. Guaranty Agencies engage in "servicing" and must be licensed.

The definition of "servicing" found in section 1 of c. 93L—which focuses on traditional industry actors—certainly covers the Guaranty Agencies that regularly interact with borrowers about their student loans.

These companies engage in a specific subset of student loan servicing known as "default aversion"--the practice of contacting borrowers who are delinquent on their loans to advise them about repayment options. Default aversion, when successful, helps borrowers get out of delinquency and avoid default; it also helps these Guaranty Agencies avoid having to pay an insurance claim to the loan holder in the event of a loan default by the borrower, giving the Guaranty Agency a financial stake in the borrower's repayment success. Critically, to the borrower, communications from Guaranty Agencies engaged in default aversion appear no different from other servicer communications: they are soliciting payments from the borrower to be applied to the loan. These companies may act on their own accord or on behalf of the primary servicer. For these reasons, Guaranty Agencies' activities meet both the letter and the spirit of the c. 93L definition, which is why default aversion is specifically highlighted in paragraph (c) of the definition.

The Consumer Financial Protection Bureau came to the same conclusion when it defined "student loan servicing" and chose to categorize Guaranty Agencies as servicers. During the rulemaking process for its definition, the CFPB explicitly rejected industry requests to exclude Guaranty Agencies' activities from "servicing." In justifying this decision, specifically with respect to default aversion, the CFPB explained that a "guaranty agency may contact a borrower and urge the borrower to bring the loan current," and that the "Bureau believes borrowers perceive these communications no differently from communications that the borrower has

received from the servicer of the borrower's loan."[2] Importantly, c. 93L's definition of servicing is essentially identical to that of the CFPB's, which is found at 12 C.F.R. § 1090.106, and so the federal agency's analysis is directly applicable to the DOB's.

Nor does it matter whether the Guaranty Agency holds a contract to "service" a student loan directly with the loan holder. Guaranty Agencies explicitly raised this issue with the CFPB, hoping to use the form of business-to-business relationships as a shield against oversight of its conduct. Again, the Bureau considered this industry claim and rejected it, finding that:

> servicing another servicer's account should be considered an activity that is within the market [of student loan servicing] and that limiting the market definition to activities performed at the direction of and under contract with the loan holder and owner could be read to exclude these activities. Under certain circumstances, a servicer performs much or all of the activity described by the proposed definition, but it does so under contract with another servicer, which in turn is under contract to the loan's holders. The focus of the Bureau's supervision program is on servicing as it is provided to consumers. Therefore, for purposes of this rule, the Bureau believes the activities described above should be considered part of the market to the same extent as though the subservicer were under contract directly with the loan holder. The Bureau therefore has decided not to adopt the definition of "student loan servicer" suggested by the commenter.[3]

Again, the CFPB was clear that when interpreting whether a company is engaged in student loan servicing, it looks to how that company's activities are perceived by the consumer, not the specifics of any contracts it may hold and how those agreements define their activities.

Additionally, in his testimony during the August 4, 2021, public hearing on the DOB's proposed regulations, Senator Eric Lesser, one of the primary sponsors for the Student Loan Borrower Bill of Rights, was explicit on this point: Guaranty Agencies interact with borrowers about making payments on their loans, like other servicers, and so it was the intent of the legislature that they be licensed under c. 93L.

Guaranty Agencies engaged in servicing in the Commonwealth, whether default aversion activities or otherwise, meet the statutory definition of "servicing" and must therefore be licensed by the DOB.

c. <u>Persons not engaged in "servicing" are not required to be licensed.</u>

Although Guaranty Agencies' specific activities meet the definition of "servicing" under c. 93L, that is not the case for everyone who interacts with a borrower. Consumer-facing loan counselors or attorneys, who have no stake in the underlying loan and no business relationship with the loan holder, do not meet the statutory definition under c. 93L. They do not solicit, receive, or apply payments, and so do not fall under paragraph (a). Nor do they act on behalf of the loan owner, and so are not covered by paragraph (b). Although they may advise borrowers on their

[2] Consumer Fin. Prot. Bureau, *Final Rule: Defining Larger Participants of the Student Loan Servicing Market* 38 (Dec. 3, 2013), https://files.consumerfinance.gov/f/201312_cfpb_student-servicing-rule.pdf.
[3] *Id*. at 36.

repayment options, this cannot be read as "facilitating" the activities in paragraphs (a) or (b) for the reasons discussed above and the absurd outcomes that would result.

Nor does the fact that the Commonwealth's new Student Loan Ombudsperson and the DOB's consumer assistance unit are exempted from the definition of servicing suggest that these other non-servicers should be read into the definition. This exemption is best understood to clarify that, should the Ombudsperson's or the consumer assistance unit staff's activities ever extend into those covered by the statutory definition of "servicing," they would not be required to obtain a license, whereas other actors, such as non-profit loan counselors or private attorneys, could conceivably have to obtain a license if at some point their work included working on behalf of a loan holder to solicit and apply payments or maintain records.

d. The DOB should clarify the scope of c. 93L's coverage to reduce uncertainty.

It is in the best interest of all parties for the DOB to clarify the scope of activities that require student loan servicing licensure in the Commonwealth. This is to ensure that covered industry actors file a timely application for a license, and assure that non-covered parties who assist borrowers can continue with their important work without expending valuable resources to determine whether they are covered or even to file an unnecessary application. For some smaller organizations, the possibility of being licensed for their non-servicing work could represent an existential threat, which the DOB could easily allay by clarifying that they do not meet the statutory requirements for licensure.

Two possibilities for such clarity are either the inclusion of a preamble in the official regulations that specifically delineate covered activity and known covered industries, such as Guaranty Agencies, from non-covered activities and persons, or an official opinion letter by the DOB's General Counsel to that effect. We recommend, however, that whatever the form, the DOB proactively issue this clarifying statement and not require individual organizations to inquire on an ad hoc basis. Finally, we encourage the DOB to review and draw from the CFPB's analysis of this same issue, discussed above.

2. The Regulations Should Include Uniform References to Student Loan Servicers Whenever Possible.

The licensure under c. 93L applies to both servicers of federal and private student loans, with the important distinction that the DOB shall automatically issue a license to federal student loan servicers. Otherwise, however, the statute's oversight authority and consumer protections should apply equally to both types of servicers. Although, in addition to the mechanics of licensure, there may be additional instances where these two groups of servicers should be distinguished, those instances should be the exception and not the rule.

Currently, however, the proposed regulations for 209 C.M.R. 18.00 and 209 C.M.R. 48.00 separately define these two groups as "automatic federal student loan servicer" and as "student loan servicer," respectively. The proposed regulations also, from time to time, refer to each together, or to one but not to the other. For example, proposed 209 C.M.R. 18.12(1)(b) ("Books and Records") refers to both types of servicers explicitly, whereas proposed 209 C.M.R. 18.25

("Student Loan Servicing Practices") only refers to a "student loan servicer." It is unclear whether this latter section applies only to non-automatically licensed servicers, or if it is intended to refer to both groups. Especially since 209 C.M.R. 18.25 contains the prohibited practices and consumer protections that make the Commonwealth's Student Loan Borrower Bill of Rights so strong, the DOB must clarify that that section, among others, applies to federal student loan servicers.

The legislature did not mean to distinguish between federal student loan servicers and other student loan servicers where not required to do so by federal law, such as with the automatic licensing. To faithfully implement lawmakers' intent, the DOB should revise the proposed regulations to adopt a single definition of student loan servicer that encompasses both those who service federal and private student loans, and should apply that definition throughout the regulations, except where delineating between the two is specifically required, as with licensing. Not only would this maximize the protective power of c. 93L, it would also make reading and applying the regulations to different servicers more linear. To the extent that the DOB is concerned about inadvertently including federal student loan servicers in a federally preempted requirement, proposed 209 C.M.R. 18.28 already includes a provision to clarify that federal law should govern in the case of inconsistency.

3. **The Regulations Should Not Impose Higher Standards for Enforcement Than Required By Law.**

The DOB's proposed regulations adopt "knowingly or recklessly" and "knowingly and willfully" standards for several of the enumerated unfair, deceptive, or unconscionable means of servicing provided in 209 C.M.R. 18.25. The same is true for section 18.23, which applies to both third party and student loan servicers. There is no such standard found in c. 93L itself, and imposing such a heightened standard will serve only to thwart investigatory efforts by the Office of the Attorney General and to dilute the protective power of the law.

"Knowingly, "recklessly," and "willfully" are all higher standards than the Commonwealth should apply to financial services companies as they execute the core functions of their businesses. For example, sections 18.23(1)(a) and 18.25(1)(d) impose this heightened standard in the course of servicers applying payments to loan accounts. This means that for a licensee to violate the protections against misapplication of payments to loan accounts, the Office of the Attorney General will have to show that such misapplications were done knowingly or recklessly. Payment application is at the core of loan servicing. Companies should have specific policies and procedures in place to ensure their employees properly apply payments, and the lack of such policies or procedures or failure to follow them should be actionable, regardless of whether such failure was done knowingly. Additionally, 18.25(1)(n)'s prohibition against failing to respond to borrower complaints in a timely manner includes a "knowingly or willfully" standard. That means that a borrower who does not receive a response to their complaint may be left without recourse if the failure to respond was simply due to poor quality servicing.

These heightened *mens rea* standards dilute the effect of the law's protections against unfair, deceptive, and unconscionable business practices, and are clearly not the intent of c. 93L. They also greatly increase the burden on the Office of the Attorney General to investigate potential

violations, by requiring the investigators to determine servicers' employees' state of mind in addition to their actions.

We urge the DOB to remove these standards from the proposed regulations, and either replace them with a simple negligence standard or with no standard at all, to allow the Office of the Attorney General attorneys flexibility in making their case against harmful servicers. The DOB should incentivize its licensees to adopt reasonable and protective policies and procedures against violating its regulations, rather than tacitly allowing them to only protect against the most egregious and intentional of violations.

4. **The DOB Should Specify the Mechanisms for Information Sharing Between the DOB and the new Student Loan Ombudsperson.**

In passing the Student Loan Borrower Bill of Rights, the legislature placed licensing and regulatory oversight with the DOB, and installed a new Student Loan Ombudsperson with the Office of the Attorney General. This Ombudsperson is charged with assisting borrowers by resolving their servicer complaints, counseling them on their loans, and educating borrowers about student loans. The Ombudsperson is also required to provide an annual report to the legislature, which must include information from both her own work and from the DOB. Section 25(d) of M.G.L. c. 12 specifically provides that the Ombudsperson "shall receive information from the division of banks to assist [her] in fulfilling" such reporting requirements.

Although the DOB's proposed regulations specifically allow for the Ombudsperson to review otherwise confidential records from the DOB to fulfill this reporting mandate, the regulations are otherwise silent on information sharing between the two offices.

For the Ombudsperson to fully execute her role and responsibility and to serve best Massachusetts borrowers' needs, she must have access to important complaint and oversight information held by the DOB. This goal can be accomplished by, *inter alia*, providing the Ombudsperson with credentials to safely and securely access complaints received by the DOB's consumer assistance unit, specifying dates by which the Ombudsperson should request information for the annual and response timeframes for providing such information, and instituting regular check-in meetings between the Ombudsperson and the consumer assistance unit.

Although such information sharing may currently be easy to facilitate between the Ombudsperson and the DOB without implementing parameters, changes in administration could result in future disagreements between offices that chill cooperation and the flow of information. By codifying terms of cooperation, whether in regulations or by memorandum of understanding, the DOB can ensure that future Massachusetts borrowers do not bear the brunt of any political disagreements.

Conclusion

Thank you for the opportunity to comment on the DOB's proposed regulations. The undersigned applaud the DOB for its contributions to making the Commonwealth a safer market for residents

by overseeing student loan borrowers. We urge the DOB to consider the recommendations discussed in detail above. Please contact Winston Berkman-Breen with the Student Borrower Protection Center at winston@protectborrowers.org if you have any questions or would like to discuss our comments further.

Sincerely,

Student Borrower Protection Center
Consumer Reports
Greenfield Community College
Hildreth Institute
Inversant
Isaac Bears, Medford City Councilor
La Vida Scholars
Law Office of Adam S. Minsky
MASSPIRG
National Consumer Law Center (on behalf of its low-income clients)
PHENOM (Public Higher Education Network of Massachusetts)
Rian Immigrant Center
Student Debt Crisis
The Institute of Student Loan Advisors
uAspire
Zero Debt Massachusetts