

## All Student Loan Players Great And Small

*Law360, New York (February 25, 2016, 4:40 PM ET) --*



Jonice Gray Tucker



Aaron C. Mahler

From presidential town halls to the local college dining hall, issues related to student lending have become the talk of the nation. According to recent estimates, over 41 million Americans owe more than \$1.2 trillion in student loan debt, second only to mortgage loan debt. A quarter of these borrowers are estimated to be in default or delinquency, representing over \$175 billion in student loan debt. Some industry observers have even asserted that issues associated with student loans present parallels to the last financial crisis, and may even trigger the next one. As a result of these and other developments, federal and state regulators have intensified efforts to monitor and regulate entities that provide consumer financial services to students.

What types of companies are impacted by this ever-expanding government oversight? Major industry participants such as originators and servicers come to mind immediately, but less prominent industry players and vendors for major participants may have greater reason to pay attention. Regulatory scrutiny is now expanding to companies that may not have faced such oversight in the past, including smaller companies and companies with more circumscribed roles in connection with lending and servicing — companies understandably less familiar with what appear to be increasingly more stringent compliance management expectations. Small student loan debt relief service providers, companies providing assistance with financial aid, for-profit schools, and college-accrediting agencies, to name a few, have all been subject to government enforcement activity recently. Substantively, regulators seem to be taking an interest in nearly every aspect of a loan's life cycle, from marketing to the extinguishment of debt. And looking beyond education finance, regulatory focus extends to other types of financial products and services offered to students, including deposit and revolving credit products.

The current environment brings to mind the popular series of novels: "All Creatures Great and Small." As modified for our present circumstance: All laws circumscribed and expansive, all companies tiny and gargantuan, all risks obvious and obscure, student loan regulators reach them all. In today's world, all

players, great and small, in the student consumer financial services industry should take proactive steps to assess and mitigate regulatory risk. The monetary and business impacts of an investigation and enforcement or other action can be steep, particularly for smaller or less prominent companies that may not have been on the regulatory radar before. Being prepared and proactive is more important than ever.

### **All Laws Circumscribed and Expansive: The Long Arm of Regulation**

Consumer financial services provided to students are governed by a wide range of statutes and regulations that are enforced by numerous federal and state regulators. Many of these statutes are highly technical and apply to specific activities such as loan origination or certain aspects of servicing. Federal agencies involved in enforcing these and other statutes include the Consumer Financial Protection Bureau, the Federal Trade Commission, the U.S. Department of Justice, the U.S. Department of Education and prudential banking regulators, among others. Each state also has relevant consumer protection laws enforced by state regulators, including state attorneys general and agencies that regulate matters relating to consumer products and services.

The absence of a law specifically governing a particular service or practice, however, is not an impediment to regulation as broad, catchall federal and state laws that prohibit unfair, deceptive, or abusive acts or practices may be deemed by the enforcement agencies to apply. Under these laws — commonly referred to as “UDAAP” or “UDAP” provisions — an entity might be fully compliant with the technical requirements of a specific consumer protection statute, or Department of Education guidelines or requirements, but still be found to have violated UDAAP laws. Similarly, an entity may be operating outside of any specific statutory framework, but nonetheless fall under UDAAP laws in the regulators’ eyes. The CFPB, FTC, prudential banking regulators, all 50 states, and the District of Columbia may enforce variations of these laws. In addition, some state laws further allow for a private right of action, making companies the possible target of civil class actions. The shared authority with other federal and state regulators and potential private right of action creates the possibility of joint or parallel government investigations and civil lawsuits.

### **All Companies Tiny and Gargantuan: No Player Too Small or Remote for Regulation**

Over the last two years, regulators have exhibited increasing interest in small or less prominent participants in the student consumer financial services industry. By way of example, in 2015, the CFPB entered into consent orders with a bank that serviced private student loans, a Florida-based student loan debt relief provider, and a California-based company that provided fee-based assistance to students filling out loan applications. The CFPB has also been investigating other entities tangentially connected to student lending, including an agency that accredits colleges — a matter that has triggered a court challenge to the CFPB’s investigatory jurisdiction.

Other federal agencies also have jumped into the mix. The Federal Deposit Insurance Corp. and the Federal Reserve Board announced separate settlements with an entity providing financial aid disbursement services for students, including debit card-based accounts to disburse unused financial aid amounts. The FTC filed suit against one for-profit college and settled with another in the past year regarding allegedly inaccurate advertising and marketing. The Department of Education issued new rules regarding marketing agreements between schools and financial institutions and rules giving students more options on how to receive their federal student aid refunds. The Department of Education also announced its intent to create a student aid enforcement unit to respond more quickly to allegations of misconduct by institutions of higher education. These actions, which are significant on their own,

represent only a small fraction of the activities federal and state regulators have taken in the recent past.

State regulators are also playing a significant role on the regulatory front. For example, the New York Department of Financial Services announced the formation of a student protection unit in January 2014 and has been accepting complaints about student-related financial products and services. Massachusetts has taken a similar initiative. In the past year, a number of state attorneys general, including those for Minnesota, Massachusetts and Illinois, have filed suit against or entered into settlements with small student loan debt relief companies. State attorneys general, including those for California and Illinois, have also investigated or taken action against several for-profit schools.

In sum, regulators have been reaching an expanding universe of smaller and less prominent participants, from student loan debt relief service providers to college-accrediting agencies. Moreover, if past is prologue, regulators will expand that reach further, in particular to vendors and service providers for larger players, as they have done in other industries.

### **All Risks Obvious and Obscure: An Ounce of Prevention Is Worth a Pound of Cure**

In view of the current and foreseeable regulatory and enforcement environment, companies operating in the student consumer financial services industry may consider taking several additional steps to identify and mitigate risk. What makes sense for each institution will depend on structure, size, business functions and other factors, but companies both small and large would do well to consider how these practices may apply to them and implement appropriate elements of each.

Across products and industries, inadequate compliance management systems (CMS) consistently have been a gateway to enforcement actions, as fundamental deficiencies may lead to consumer harm. Accordingly, it should come as no surprise that establishing a robust CMS is among the most important steps that any company can take in the current regulatory environment. The CFPB's guidance on an effective CMS includes: (1) establishing compliance responsibilities; (2) communicating those responsibilities to employees; (3) incorporating compliance into the business processes; (4) reviewing operations to ensure legal requirements are met; and (5) taking corrective actions as necessary. The CFPB also stresses the importance of board and management oversight, responsive and responsible handling of consumer complaints and inquiries, and an independent audit function to review compliance.

Within this framework, establishing an effective consumer complaint management program is particularly pivotal as the complaints are often triggers for regulatory scrutiny, including investigations. Key elements of robust complaint management programs include: (1) centralized handling; (2) written policies and procedures; (3) application of root cause analysis; (4) monitoring and tracking of complaints and issue escalation; (5) back-end testing of corrective actions; (6) internal communications and training; and (7) making it easy for consumers to submit complaints or inquiries through email, telephone or other means.

Does CMS sound like an easy project to tackle? Not so fast. Establishing a proper CMS is not a one-size-fits-all endeavor. The specific contours of an effective CMS program will vary depending on the needs of the institution and must be tailored to each entity's specific circumstances.

Gap assessments can also be valuable in helping to identify areas of potential risk in compliance management generally, and in other business functions that may impact consumers. These reviews

should be comprehensive, informed by the areas of regulatory focus, and cover the entire product or service lifecycle. Key areas of focus in gap assessments often include the following:

- **Board Management and Oversight.** Regulators expect boards to be trained on key legal and compliance principles, such as UDAAP. They also expect the board to be aware of and oversee consumer compliance functions. Routine reporting by management to the board about issues that arise is part of this oversight.
- **Robust Policies and Procedures.** Written policies and procedures are another important part of effective board and management oversight of compliance functions. Policies and procedures serve as a guide to employees and demonstrate to regulators during examinations or investigations that consumer compliance is organized and a priority. Ex post facto explanations of how things are typically done are often not good enough in today's regulatory environment.
- **Effective Training.** Educating employees about policies and procedures and consumer compliance issues is critical. New-hire and ongoing training are both important.
- **Monitoring and Corrective Action.** Once policies and procedures and training are in place, continuous monitoring and, as necessary, corrective action will ensure that the company's actual practices are in line with its consumer compliance objectives.
- **Employee Incentives.** In addition to the above, regulators often focus on whether employee incentives are aligned with and promote consumer compliance objectives. Incentives, including bonuses, which are misaligned with consumers' best interests create additional regulatory risk.
- **Marketing and Advertising.** Marketing or advertising disclosures should be prominent, accurate, and clearly reflect the actual products or services provided and the cost of those services to consumers. Consistency and transparency with consumers about the costs and benefits of products or services so that they can make educated decisions about how to proceed is an important element of satisfying regulatory expectations.
- **Consumer Contact.** Regulators frequently examine: (1) the content of written or verbal communications to consumers, including website content; and (2) the frequency and timing of those communications. Among other things, the goal is to provide the right level of contact with consumers to serve their needs efficiently and effectively when they proactively reach out to companies and when companies initiate contact to deliver products and services.
- **Pricing and Value.** Ensuring that the benefits received by the consumer are commensurate with the pricing is also significant. It may raise red flags for a regulator if consumers pay for a benefit for which they are not qualified or which they do not receive or if the value to the consumer is not aligned with the pricing.

- **Vulnerable Populations and Protected Classes.** When assessing risks in the areas above, particular attention should be given to groups of consumers regulators perceive as more vulnerable. This concern is particularly acute in the student consumer financial services space as students, in general, may have less experience with financial services. Other vulnerable populations may include those who are otherwise lacking in financial sophistication, members of protected classes, service members and consumers who are not native English speakers.
- **Vendor Management.** Regulators often analyze the relationships between companies and vendors, and seek to hold companies accountable when the practices of a vendor are perceived as off the mark. Oversight of a vendor's consumer compliance function and whether contract incentives are aligned with consumers' best interests are two areas of specific interest. The recent regulatory focus on vendor management is also significant for companies functioning as vendors to other institutions, as it means that the activities of those companies may no longer fly under the radar and can become subject to investigation by regulators.

When conducting gap analyses, legal counsel can help identify potential compliance gaps and legal issues, assist in developing corrective action plans where problems are identified, and communicate with regulators if necessary.

### **Student Loan Regulators Reach Them All**

Federal and state regulatory scrutiny of consumer financial services offered to students is likely to intensify in the future. The broad enforcement tools available to regulators extend not only to major players in the industry but also to smaller or less prominent participants. Certain steps, including establishing a robust CMS and proactively assessing and mitigating risks, can go a long way in ensuring that consumers are being best served and that company conduct is consistent with current and emerging regulatory expectations.

—By Jonice Gray Tucker, Aaron C. Mahler and Ignacio Hiraldo, BuckleySandler LLP

*Jonice Gray Tucker and Aaron Mahler are partners and Ignacio Hiraldo is an associate in the Washington, D.C., office of BuckleySandler. Tucker is also vice-chairwoman of the banking law committee of the American Bar Association.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

---