Assessment of Public Comments for new Part 409 of 3 NYCRR

The Department of Financial Services ("Department") received a number of comments to the proposed Part 409 of 3 NYCRR implementing Article 14-A of the Banking Law, which empowers the Department to regulate the student loan servicing industry. The commenters included industry members, trade groups, consumer groups, banking institutions, and the Office of the Attorney General. Having considered each of these comments the Department has made a number of small clarifications to the final regulation in response to the comments received, none of which, individually or collectively, materially alter the purpose, meaning, or effect of the regulation.

The comments received included comments applauding the Department's leadership in this space, specific requests for changes to the language, general comments on the practicalities of certain requirements, requests for clarification of the Department's position, and proposals for class-wide exemptions from the regulation.

Comment: A number of commenters sought clarification from the Department about certain activities and whether they would constitute a student loan. Certain commenters suggested a definition of student loan should be added to the regulation. Other commenters sought an exemption for certain activities including payment plans or lending activities of not for profit organizations. Still others sought only clarification or stated their opinions as to whether their activities or the activities of their members would constitute servicing student loans.

Response: The Department has considered whether the regulation would benefit from the inclusion of a rigid definition of student loan. The Department has considered that the Banking Law does not contain a rigid definition of a loan and that the regulation of other banking industries under the supervision of the Department are able to function without the need for a rigid definition. The Department is also cognizant that any rigid definition of student loan provides bad actors with additional means to attempt to avoid regulation by operating

just outside the lines drawn by the definition. Banking industries, private parties, and the courts have all been able to identify when an arrangement constitutes a loan without a rigid textual definition.

The Department has noted the concerns raised by some commenters about no fee no interest arrangements, particularly those offered by not for profit organizations. While the Department interprets the statutory language to be broad, the Department has determined that arrangements which truly have no fees and no interest are not student loans for purposes of the statute or regulations. It is important to note here however, that the determination of whether something is or is not a student loan requires individualized assessment of the arrangement to determine if there are factors or indicia which indicate that an arrangement is in fact a student loan. The Department declines to make a determination about any particular arrangement without having access to all the facts and circumstances surrounding it.

Comment: The Office of the Attorney General submitted a comment in which it urged the reconsideration of a perceived exemption for student loan default management services companies. The Office's Consumer Frauds & Protection Bureau felt that such an exemption would be inconsistent with the statute.

Response: The Department respectfully disagrees with the assessment that there is an exemption in the regulation for student loan default management services. As with any entity the evaluation of whether a student loan default management services company is subject to the requirements of Part 409 will turn on whether the entity is servicing student loans. Far from being inconsistent with the statute, the regulations use of this test is entirely consistent therewith.

Comment: One commenter suggested that definition of borrower was unclear as to its coverage of cosigners who are resident out of New York. The commenter conceded that the language in the regulation is the same as what appears in the statute, however sought clarifying language in the final regulation.

Response: The Department declined to make any changes in response to the regulation. The regulation is clear, for the purposes of determining whether a cosigner is a borrower, the definition checks the residence of the person "who has received a student loan or agreed in writing to pay a student loan[.]" The Department agrees with the commenter that the regulatory definition is the same as the statutory definition, and thus the Department is expressly empowered to protect cosigner borrowers consistent therewith.

Comment: One commenter suggested that the definition of private student loan used in the regulation could produce confusion about whether other loan products incidentally used to pay for post-secondary educational expenses would fall under that definition.

Response: The Department has added some clarifying language to address this comment. The regulation clearly does not apply to products such as home equity loans, a class of product mentioned by the commenter, which the Department has clarified in the definition contained in the final regulation. Further, incidental use of proceeds from a financial product on educational expenses clearly does not bring the product under the regulation's definition of student loan.

Comment: A number of commenters sought the addition of exemptions for various types of entities. These commenters included not for profit entities, trade groups, and a banking institution. Some commenters sought blanket exemptions for 501(c)(3) certified entities or for clarification that their activities would not fall under the definition of student loan servicing. Additional commenters sought the inclusion of a carve out for servicers who service only a small number or *de minimus* value of student loans. Finally, one commenter sought an exemption for a particular class of entity called Credit Union Service Organizations (CUSOs).

Response: The Department has determined that no additional exemption or carve out is necessary at this time. As discussed above, arrangements which are truly without fees or interest are not student loans, and the Department feels confident that such interpretation will provide comfort for not for profit entities operating in this space. The Department considered adding a threshold number or value of loans under which the

Department would not consider the entity to be engaged in the business of servicing student loans, however determined it would be inappropriate at this time. The Department weighed the clear intent of the legislature to protect student borrowers to the greatest extent possible, with the assertions of commenters related to burdens which would be imposed by the regulation. The Department will continue to monitor the ability of smaller student loan servicers, handling a small portfolio of student loans, to work in the benefit of their borrowers without the strictures of the regulation, to determine whether any changes may be made to ease burdens on those with smaller portfolios while ensuring consumer protection. However, given current information before the Department, it has determined that the regulation is appropriately tailored. The issue of CUSOs also did not require any change to the proposed regulation. CUSOs are not exempt organizations under the statute; to the extent they are servicing student loans as defined under the regulation they are subject to the requirements of Article 14-A and the regulation.

Comment: One commenter sought the extension of an existing exemption for not for profit institutions of higher education to include for profit institutions as well. This entity asserted it was historical common practice in New York law to provide for parity between for profit and not for profit institutions.

Response: The Legislature chose to exempt not for profit institutions and chose not to extend that exemption for those institutions which are profit seeking entities. Therefore, the statute not the regulation makes the distinction to which the commenter objects. Even if the Department could ignore the distinction made by the Legislature, the information presently available to the Department, including that contained in the comments received, would provide strong reason not to extend any exemption to this class of entity. A for profit educational institution which is servicing student loans is therefore required to comply with the licensing requirements of the statute and the regulation.

Comment: One commenter suggested that the provision in the proposed regulation which provided that entities that service only federal student loans need not seek or obtain a license from the Department was in some way inconsistent with the statute which provided that those entities were deemed licensed.

Response: There is no inconsistency between those provisions. As the commenter points out the statute deems these servicers to be licensed which would render the need to seek or obtain a license completely unnecessary.

Comment: Some commenters expressed concerns that educational activities undertaken by educational institutions or not for profit entities could fall under the definition of servicing contained in 409.1(k)(1)(iv). These commenters suggested that an entity who is not the servicer of a student loan that merely provides a borrower with counseling on avoiding default or assisting them with communicating with their servicer, should not be deemed servicing that loan.

Response: The Department agrees that the activities listed in 409.1(k)(1)(iv) alone do not form the basis of a determination that an entity is servicing. That is why the introductory language of that subparagraph, as proposed, reads "**in conjunction with** the activities described in subparagraphs (i), (ii), and (iii) of this paragraph" (emphasis added). Therefore no change is necessary to respond to these comments as it is clear that unless an entity which is providing counseling is doing so "in conjunction with," for example, receiving payment pursuant to the terms of a student loan (409.1(k)(1)(i)), such interaction with a borrower with respect to their student loan would not meet the definition of servicing under the regulation.

Comment: One commenter requested that subparagraph 409.1(k)(1)(iv) be amended to add the word "performing" consistent with the relevant statutory provisions from which that subparagraph stems.

Response: The Department has made this change. Upon review the addition of the word "performing" further clarifies the meaning of servicing consistent with the intent of the Department in drafting the regulation and consistent with the statute.

Comment: One commenter requested the definition of overpayment contained in the regulation be amended to include only amounts in excess of the "total monthly amount due". The commenter stated that this would ensure that a payment in excess of the monthly payment amount but under the total due, inclusive of any past due amount, could be applied to any past due amount before being subjected to overpayment rules.

Response: The suggested change was made, as it clarifies the intent of the Department. The Department agrees that an overpayment results when the amount exceeds all amounts due or past due as of the payment date. As the suggested change clarifies what could have been ambiguous, the Department accepted it.

Comment: One commenter requested that the Department clarify the Department's position as to federally chartered exempt organizations.

Response: The Department intends the provisions of the regulation to apply to all student loan servicers to the greatest extent permitted by law. See e.g., Cuomo v. Clearing House Association, LLC, 557 U.S. 519 (2009).

Comment: A number of commenters suggested adding additional disclosure requirements on student loan servicers. One commenter suggested the proposed regulation required too much information to be disclosed claiming that it was information that 99% of borrowers do not ask for. Another suggested leaving some of the information undisclosed unless requested by the borrower. Multiple commenters suggested additional disclosures to cosigners about the effects of a forbearance on their ability to be excused. One suggested that servicers be required to inform borrowers of the Department's resources for complaints. Another suggested additional disclosures when servicing is transferred to a new servicer.

Response: The Department has determined that the proposed regulation does not require too much information to be disclosed. Rather than supporting the reduction in disclosure advanced by the commenter which suggested 99% of borrowers do not seek certain of the information required to be disclosed under the regulation, such a statistic would only further assure the Department of the need to compel their disclosure.

One important role of the Department is to ensure that servicers are providing borrowers with critical information necessary to make informed decisions. If borrowers are not currently seeking vital information the Department must conclude that they are not yet aware of it, thus the disclosure requirements are appropriate.

As to the additional disclosures advanced by other commenters, the Department has concluded that at this point no further disclosures are necessary. With that said, as the law and regulation become effective and the Department begins to actively regulate the market, the Department will evaluate whether additional disclosures are necessary in the interest of protecting student borrowers. Further, the Department notes that even if a specific disclosure is not outlined in the regulation, that does not excuse a servicer from failing to provide all "material information in connection with the servicing of a student loan." Particularly in the context of a cosigner, who would be defined as a borrower under the regulation, the impacts of a forbearance on their ability to be release would constitute material information.

Comment: A number of commenters suggested more detailed areas where servicers should be specifically barred from providing incomplete or inaccurate information. In particular, areas such as information about repayment options and the avoidance of customer service representatives steering only toward forbearance; incomplete information being supplied to credit reporting agencies; and information relating to discharge resulting from school closures, were all noted.

Response: The Department shares the concerns of commenters with misrepresentations or, importantly, omissions in these areas. The Department points the commenters to 409.8(a) which bars a servicer from misrepresentation or omission of "any material information in connection with the servicing of a student loan[.]" The Department concludes that the omissions described in the comments would be related to material information and thus are already covered by the regulation. No student loan servicer should provide information only about forbearance to the exclusion of other options, and the Department has in the past taken

enforcement action in this space. Further, failing to provide accurate detailed remarks to a credit reporting agency would constitute a material omission.

Comment: A number of commenters suggested that the definition of servicing as it relates to student loans in default be clarified to take into account differing rules on federal and private loan default standards.

Response: The Department has made a change to the final regulation which will address this comment. The Department did not use the language suggested by one commenter to avoid using, what the Department perceived to be, ambiguous terms, but nonetheless made the clarification requested.

Comment: Two commenters suggested that the servicing standards and prohibited practices should be amended to limit violations of those sections to circumstances where the servicer "knowingly and willfully" misrepresents or omits material information or "knowingly and willfully" undertakes an unlawful action.

Response: The Department did not make the suggested change. The statute does not contain a *mens rea* limitation and such a limitation would severely weaken the consumer protection offered by the provisions. The student loan servicer has an obligation to ensure it is not providing false information or omitting critical facts and to ensure it is not undertaking unlawful activities. The suggested change would have the effect of providing servicers cover for negligent or even reckless activities that may have drastic impacts on the borrowers impacted. The Department cannot countenance such a result. With this regulation servicers are on notice that they must avoid misrepresentations or omissions of material information and if further notice is necessary that they should not engage in unlawful activities, it provides that too.

Comment: Two commenters suggested that the proposed regulation be amended to align with another state's rule related to nonconforming payments.

Response: The Department did not make the requested changes. The regulation provides clear and appropriate actions to be taken by servicers in applying nonconforming payments. The effect of the proposed

change would have been to lend less clarity about what is permitted. The Department determined that greater clarity provided greater protection of the borrower.

Comment: One commenter suggested that the regulation acknowledge that the requirements for nonconforming payments apply only in circumstances where a borrower has multiple loans with a servicer.

Response: The Department believes the proposed regulation was clear that paragraph 409.8(b)(2) applies only in circumstances where a borrower has multiple loans with a servicer, while the requirements of paragraph 409.8(b)(1) apply regardless of the number of loans being serviced. However, the Department has added language to paragraph 409.8(b)(2) to address this comment.

Comment: One commenter suggested that the rules surrounding borrower's instructions as to nonconforming payments were unclear as to how long a servicer must wait for those instructions. This commenter also argued that a borrower's instructions for one nonconforming payment may not be amenable to being followed for future nonconforming payments, and that a duty to continually seek more instructions is burdensome.

Response: The Department intended servicers to wait a reasonable time to receive borrower instructions. The Department has added clarifying language that the sets forth that a reasonable time would be not less than ten business days. The Department considered and rejected the alternate approaches suggested by the commenter to address the issues it raised. Further, the Department determined that the regulation is clear that if a borrower's instructions cannot be applied to a future nonconforming payment the servicer is obliged to seek new instructions. The Department also considered the burden of regularly seeking instructions, but the regulation is clear that once a servicer obtains instructions it may continue to apply those instructions until the borrower provides different instructions. Thus, the concern about having to continually seek new instructions does not hold weight, and no changes were needed in response. It should further be noted that this requirement flows directly from the statute, see Banking Law § 721(2)(a).

Comment: One commenter suggested that subsection 409.8(e) be amended to reflect payments made before a due date. Another commenter suggested that the regulation be amended to allow for a cut-off time if such time is prominently and conspicuously displayed.

Response: The Department has made a clarification to reflect that payments received on or before a due date must be treated as timely payments. The text of the regulation now more clearly reflects the Department's intention that this provision apply to any payment made on or before the due date. The Department did not make any change to allow servicers to impose arbitrary cut-off times on payments. It is the intent of the Department that a payment received on the date on which that payment is due be treated as timely, regardless of the time of day the payment is received.

Comment: One commenter suggested that the Department limit its examination authority to information and records about New York residents.

Response: The statutory authority is not so limited and therefore the Department has declined to exercise less authority than the Legislature entrusted to it.

Comment: Some commenters suggest that the Department should delay the effectiveness of the requirements on student loan servicers.

Response: The Department cannot delay the effectiveness of the statute, nor would it seek to. This is an area in which consumer protection is critically necessary and it is imperative that the Department exercises the regulatory authority entrusted to it by the Legislature.

Comment: Some comments were received that asked the Department to ensure that the standards imposed aligned as closely with existing standards as possible in order to avoid imposition of additional burdens on servicers.

Response: The Department carefully considered both existing federal and state law, and carefully tailored the regulations to provide as much consumer protection as possible without undue regulatory burden.

Many provisions of the rule are restatements of existing federal, New York, and other states' laws. Thus no changes were made in response to these comments.

Comment: One commenter suggested, with minimal detail, that the requirement to have information maintained on the servicer's website would require servicers to duplicate and re-engineer online account access. The commenter suggested, again without explaining, that this would produce great costs and significant security issues.

Response: The Department understands this commenter to have read the regulation to require customer information to be maintained within the website itself. This is clearly not the intent of the regulation. Clarifying language that the information must be accessible through a website maintained by the servicer, irrespective of where the data is held, has been added to ensure no further confusion.

Comment: One commenter suggested that certain words in paragraph 409.10(f)(5) of the proposed regulation seemed inappropriate for student loan servicers as they referenced the transmission of money and suggested they be deleted.

Response: The Department takes the commenter's point and has instead clarified the paragraph to clearly apply to student loan servicing rather than the transmission of money.

Comment: One commenter suggested language to clarify that servicers who engage in collecting defaulted loans are still subject to the requirements of sections 409.8 and 409.9 when they are engaged in that activity. Another commenter questioned whether an institution of higher education which is servicing student loans would be required to meet the requirements of sections 409.8 and 409.9.

Response: The Department does not believe that the changes to the text of the regulation suggested are necessary. It is clear from the text of the regulation that those sections would apply to a student loan servicer even when that servicer is engaging in collecting defaulted student loans. It is also clear that where a school is engaged in servicing student loans that sections 409.8 and 409.9 are applicable.

Comment: One commenter suggest provisions should be added to allow those without access to the internet the ability to request hard copies of the information that servicer must make available on their websites. This commenter further requested that in addition to written complaints oral complaints be treated with equal weight.

Response: The Department has added a provision which clarifies that a borrower may obtain the information required to be disclosed by the servicer in a hard copy format. This provision clarifies the intent of the Department in promulgating the regulation, namely that all borrowers, including those without access to the internet, have access to accurate and complete student loan information. As to the need to permit and treat oral complaints equivalent to written ones, as the statute and regulation come into effect and the Department engages in the active regulation of this industry, the Department will continue to look into the issue but has determined at this time not to amend the regulation in this manner.

Comment: One commenter suggested that documents about a student loan in the possession of the servicer be required to be preserved for the life of the loan.

Response: The Department notes that under subdivision 409.13(c) a servicer is required to preserve the records for the life of the loan. To the extent that loan was transferred to another servicer, that transfer must include all of the relevant documentation as required by subdivision 409.8(d).

Comment: One commenter, a large nationwide servicer, objected to the Department's requirement, in the application process through NMLS, that its control persons complete an Authority to Release Information form.

Response: The contents of the application for a license are left to the sound discretion of the Superintendent. The use of this form is particularly appropriate given the Department uses it for nearly every entity that it licenses. Its use is agency-wide and is used in the context of entities large and small, public and private. No change to the regulation nor to the application requirements in response to this comment.

Comment: One commenter suggested the regulation's rules requiring a centralized tollfree number may "frustrate . . . personalized customer service" provided by servicers who assign a dedicated representative to an account.

Response: The Department does not see how a requirement to maintain a general tollfree number would prevent a servicer from directing a call to a dedicated representative upon receipt of the call. Thus, the Department made no changes in response to this comment.

Comment: One commenter suggested that the regulation requires servicers who only service private student loans to train customer service representatives and/or provide information about repayment options that relate exclusively to federal student loans.

Response: The intent of subdivisions 409.8(f) and 409.8(g) is that servicers must train customer service representatives and provide information about "any available" repayment options. If a servicer only services private student loans, the servicer does not need to train customer service representatives or provide information relevant only to federal student loans. The Department has added language to subdivision 409.8(g) to clarify that only servicers that service Direct or FFELP loans must provide links to web pages of the Student Aid Office of the United States Department of Education concerning repayment options for federal student loans.

Comment: One commenter noted three items outside the scope of the regulation itself. Specifically, the commenter made recommendations for what to include in servicer annual reports, while specifically stating that such a list should not appear in the regulation, it also noted problems in the student debt collection space and made recommendations about automating the process for annual income recertification.

Response: The Department notes that these items are outside of the scope of this regulation. That said, the Department appreciates the suggested list of documents to include in the annual report and will consider it when determining the appropriate contents for that report each year. Further, the Department notes that while outside of this regulation, debt collecting in the student loan space must still comply with the existing regulatory

regime applicable to the debt collecting industry. Finally, the Department hopes that the federal government will take seriously the suggested changes to the income recertification rules of the IRS.

Comment: Several commenters had questions about the treatment of Perkins loans. In particular, questions were raised whether servicing Perkins loans, or hiring a third party to service student loans would constitute servicing so as to require licensure.

Response: The Department made no changes to the regulation in response to these comments. The regulation is clear that servicing a Perkins loan is servicing a student loan. Therefore, if an entity is servicing a Perkins loan that entity is a student loan servicer and must comply with the provisions of the regulation applicable to it. However, an entity which merely hires a third party to service student loans is not itself a student loan servicer based on the retention of that third party. While an entity that hires a third party servicer is not, on that fact alone, subject to the provisions of the regulation, the Department reminds those entities that the servicer they hire would be subject to the regulation and encourages any entity hiring a servicer to ensure that servicer is properly licensed and otherwise in compliance with Article 14-A and Part 409.

Comment: One commenter suggested that student loan servicers who only service federal student loans should be exempt from the requirements of 23 NYCRR Part 500, the Department's cybersecurity regulation.

Response: As Article 14-A deems such a servicer to be licensed by the Department, the definition of Covered Entity in Part 500 would capture these entities absent any language in this regulation. This regulation provides appropriate transitional periods for student loan servicers to come into compliance with Part 500, and it is expected that all student loan servicers will comply with its requirements. Therefore, the Department declined to make the requested change.