Student Loan Servicing Standards: Should the Government Look to Other Markets to Better Protect Student Borrowers?

Ted Wegner

I. INTRODUCTION 750
II. BACKGROUND 751
A. Student Loan Servicing 752
B. Common Problems with Servicers 753
1. Repayment Options 754
2. Choice of Servicer 754
3. Forbearance 754
4. Servicer Transfers 755
5. Customer Service 755
C. Current Enforcement and Relief 757
III. ANALYSIS 757
A. RESPA and Potential Regulation from the Real Estate Market 758
1. Nipping Problematic Loans in the Bud 758
2. Dealing with Transfer Problems 759
B. Looking to the Credit Card Market 760
IV. RECOMMENDATION 761
A. Lessons from the Mortgage Market 761
B. Applicability of the Credit Card Market to the Student Loan Servicing Marketplace 762
C. Aligning Incentives 763
D. Implementation 764
V. CONCLUSION 764

I. INTRODUCTION

Student loan debt is quickly becoming a problem of great national concern. More than 40 million borrowers owe a collective $1.2 trillion in outstanding debt.[1] Student loan debt is now the second largest consumer debt market in the United States.[2] College graduates saddled with high amounts of debt are putting off major life decisions while they struggle to pay it off.[3] Homeownership by Americans under the age of 35 has gone from 43.3% in the first quarter of 2005 to 34.6% in the first quarter of 2015.[4] The median age for a first birth, rising steadily in the past decade, is now at 26, and the birth rate among women 20 to 29 is at an all-time high.[5] Many students with debt are also feeling the pressure to enter high paying jobs while passing up opportunities in the public interest sector.[6] Recent graduates may also feel pressure to forgo starting their own businesses or working for a start-up company in favor of a safer opportunity elsewhere.[7] Because the government owns or guarantees a large portion of student debt, there is not as high a chance of systematic risk to the economy, but the possibility that the high amount of debt will create economic drag is very real.[8] It seems clear that the student loan crisis shows no signs of being averted anytime soon.

This Note will focus on one specific component of the student loan debt market: student loan servicers. Student loan servicers are the crucial link between the borrower and the lender. Servicers are the ones who manage borrower accounts, process payments, and speak directly with the borrower.[9] Borrowers must turn to their servicers if they are having trouble making payments on their loans.[10] It is easy to see why servicers are a crucial part of the student loan debt market. Unfortunately, many students experience great frustration with their servicers. Worse, some borrowers are not aware of who their servicer is or to what repayment options they might be entitled.[11] These types of problems can lead to missed payments and even default, exacerbating the student loan crisis described above.

In Part II, this Note will detail the many frustrations student borrowers have when

---

1. Kelley Holland, *The high economic and social costs of student loan debt*, CNBC (June 15, 2015, 10:39 AM), http://www.cnbc.com/2015/06/15/the-high-economic-and-social-costs-of-student-loan-debt.html.

2. *CFPB Launches Public Inquiry Into Student Loan Servicing Practices*, CONSUMER FIN. PROT. BUREAU, (May 14, 2015), http://www.consumerfinance.gov/newsroom/cfpb-launches-public-inquiry-into-student-loan-servicing-practices [hereinafter CFPB].

3. *See* Holland, *supra* note 1 (quoting Purdue University President Mitch Daniels saying that students with debt "are postponing marriage, childbearing and home purchases, and . . . pretty evidently limiting the percentage of young people who start a business or try to do something entrepreneurial").

4. *Id.*

5. *Id.*

6. *See id.* (citing a National Bureau of Economic Research working paper finding that high debt made students less likely to enter lower paying, but critical, public interest jobs like those in early childhood education).

7. *See* William J. Cox, *The Student Borrower: Slave to the Servicer?*, 27 LOY. CONSUMER L. REV. 189, 190 (2015) (noting the detrimental effect of high student loan debt on other parts of the economy).

8. *See* Holland, *supra* note 1 (stating that the government has the power to sue and garnish wages and benefits upon loan default, but that there are still economic ramifications).

9. CFPB, *supra* note 2.

10. *See id.* ("When facing unemployment or other financial hardship, borrowers must contact student loan servicers to enroll in alternative repayment plans, obtain deferments or forbearances, or request a modification of loan terms.").

11. *See generally id.* (detailing the roadblocks that many student borrowers face in dealing with their servicer).

dealing with student loan servicers. Part III of this Note will compare the student loan debt market to the mortgage and credit card markets. Both of those markets have pre-existing regulations on servicers. Lastly, in Part IV, this Note will recommend that some of the regulations from the credit card and mortgage market can be successfully adopted in the student loan market.

II. BACKGROUND

There are about 41 million Americans who owe student loan debt.[12] The student loan market is primarily made up of three types of loans. The first type is federally backed loans made by private lenders through the Federal Family Education Loan Program (FFELP).[13] This program was discontinued in 2010, but there remains over $350 billion still owed from these types of loans.[14] The second category of loans, replacing the FFELP, are loans distributed by the Department of Education's Direct Loan Program.[15] The most common type of loan within this category is the Stafford loan. There are subsidized and unsubsidized Stafford loans. The key difference is that subsidized Stafford loans are awarded on the basis of financial need, and no interest accrues when borrowers are in an authorized deferment period—typically when a borrower is attending school.[16]

Students can also obtain a PLUS loan through the Direct Loan Program.[17] Parents and graduate students can take out PLUS loans to supplement their Stafford loans. Because of this, PLUS borrowers often carry high balances.[18]

The final student loan category is private loans. Because the government has less regulatory power over these types of loans, this Note will primarily focus on FFELP, Stafford, and Direct PLUS loans.[19] Another type of loan to be aware of is the Perkins Loan. The Perkins Loan Program is intended to serve undergraduate and postgraduate students who demonstrate exceptional financial need.[20] Because of its relatively small size, the program has more generous repayment requirements for borrowers.[21] However, the future of the Perkins Loan Program is currently uncertain as legislators debate its financial practicality.[22] In December 2015, the program was extended for two years, but the author of the extension characterized it as a "managed shutdown."[23] Still, supporters of the

12. CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM 8 (Sept. 2015), http://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf [hereinafter CFPB, STUDENT LOAN SERVICING].

13. *Id.* at 16.

14. *Id.*

15. *Id.*; DEANNE LOONIN ET AL., STUDENT LOAN LAW 4–5 (5th ed. 2015).

16. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 16.

17. *See* LOONIN ET AL., *supra* note 15, at 4–5 (describing the layout of the Direct PLUS loan program).

18. *Id.*

19. While the government could regulate the servicing of private loans, the contracting power it retains over the servicing of FFELP, Stafford, and Direct PLUS loans gives it more influence.

20. LOONIN ET AL., *supra* note 15, at 8; 20 U.S.C. §§ 1087aa–1087ii (2015).

21. *See* LOONIN ET AL., *supra* note 15, at 8 (explaining that a Perkins borrower can rehabilitate a past default with consecutive payments).

22. *See* Brian J. Tumulty, *Colleges may have to return Perkins loan program money*, USA TODAY (Oct. 6, 2015, 4:55 PM), http://www.usatoday.com/story/news/politics/2015/10/06/colleges-may-have-return-perkins-loan-program-money/73460936 (updated Oct. 6, 2015, 5:34 PM) (describing the wavering political support for the Perkins Loan Program).

23. *See* Michael Stratford, *Senate Deal Would Revive Perkins*, INSIDE HIGHER ED (Dec. 16. 2015),

Perkins program are hopeful that it can be continued past the recent two-year extension.[24]

A. Student Loan Servicing

From 1994 to 2008, the U.S. Department of Education used only one company to service loans backed by the government: ACS (or Xerox).[25] This model was phased out along with the FFELP starting in 2009 when the Department contracted with four companies to service nearly all federally backed student loans.[26] The four servicers—referred to as Title IV additional servicers (TIVAS)—are: Great Lakes Educational Loan Services, Nelnet, FedLoan Servicing, and Sallie Mae (now Navient).[27] The original contracts were for five years, but the Department of Education has since exercised an option to extend the contract with all four companies for another five years.[28] However, the government retains the right to add additional servicers or terminate any of the contracts at will.[29]

To the frustration of many borrowers, those enrolled in either the Stafford or Direct PLUS program are not allowed to choose or switch their servicer.[30] However, since 2014, a new system was phased in that allows borrowers to choose their servicer when consolidating loans.[31] Still, no mechanism exists for allowing borrowers to choose their servicer before they begin repayment.

Because the borrowers do not choose their servicers, the government uses a metrics based performance evaluation system to assign servicers to borrowers and assess their overall performance.[32] Among the criteria the government considers are: customer satisfaction, percentage of borrowers in default, percentage of borrowers in repayment status, and the percentage of borrowers who are more than 90 days delinquent but less than 271 days delinquent of their loans.[33] When the Department of Education renewed the TIVAS contracts in 2014, it introduced a new metric that more aggressively reduces assignments for servicers when loans under their watch go into delinquency.[34] The new

---

https://www.insidehighered.com/news/2015/12/16/senators-strike-deal-revive-expired-perkins-loan-program-changes (quoting Senate Health, Education, Labor and Pensions (HELP) Committee Chair Lamar Alexander (R-TN) as not in favor of continuing the program past the extension); Melissa Nann Burke, *Federal Perkins student loan program extended*, DETROIT NEWS (Dec. 18, 2015, 6:55 PM), http://www.detroitnews.com/story/news/politics/2015/12/18/federal-perkins-student-loan-program-extended/77593684 (stating that the extension would allow those in the program more certainty in their efforts to achieve their education goals).

24. Burke, *supra* note 23. Senate Democrats on the committee were supportive of continuing the program for more than two years. *Id.* HELP Ranking Member Patty Murray (D-WA) was supportive of the extension but was working with fellow Democrat Tammy Baldwin of Wisconsin to ensure the program continued on well into the future. *Id.*

25. LOONIN ET AL., *supra* note 15, at 63–64.

26. *Id.*

27. *Id.*

28. *See id.* (describing the Department of Education's contract terms with the TIVAS). The contracts are available in full online. *Loan Servicing Contracts*, U.S. DEP'T EDUC., https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing (last visited Mar. 9, 2017).

29. LOONIN ET AL., *supra* note 15, at 63–64.

30. *Id.*

31. *Id.*

32. *Id.* at 64–65 (discussing servicer allocation metrics).

33. *Id.*

34. LOONIN ET AL., *supra* note 15, at 64–65.

contract also specifies that the allocations to new borrowers (based on the metrics system) will be done twice a year instead of once, and that the surveys of schools and number of loans in delinquency will be done four times a year.[35] Despite these changes in the new contracts, there are still concerns that the new terms only address incentives for the servicers and not protections for borrowers.[36] The Department of Education maintains that the performance metrics system is the best way to allocate and evaluate the servicers. Still, questions persist about how reliable the system is—both in gauging borrower satisfaction and assessing optimal servicer performance.[37]

An interesting provision of Perkins loans is that they have special servicing requirements.[38] It is important to note that the TIVAS do not service the Perkins loans.[39] Instead, the participating schools grant and service the loans to students with a contribution from the government.[40] As a result, the government has more latitude in requiring certain due diligence provisions. These include requirements like keeping the borrower aware of any changes to her loan, responding promptly to borrower inquiries, and providing additional information in the event of a dispute over the terms of the loan.[41] There are also billing and collection requirements in addition to mandatory communications to alert the borrower of her repayment plan.[42] In sum, these requirements to the school/servicers represent an interesting contrast to the relatively lax standards the TIVAS are held under.

B. Common Problems with Servicers

In May of 2015, the Consumer Financial Protection Bureau (CFPB) issued a Request for Public Information Regarding Student Loan Servicing in an attempt to survey the current servicing landscape and to study whether additional safeguards need to be put in place.[43] The request yielded over 30,000 responses from borrowers, membership organizations, state attorney generals, servicing companies, trade groups, and others.[44] These responses identified several areas of concern in the student loan servicing market.[45] These areas of concern, both from the lens of the borrower and servicer, will lay the foundation for the analysis and recommendations offered later in this Note.

---

35. *Id.*

36. *Id.*; *see also infra* Part III (detailing this perceived imbalance).

37. *See* LOONIN ET AL., *supra* note 15, at 64–65 (highlighting the sparse amount of actual data produced by this system that might afford better evaluation).

38. *Id.* at 68.

39. *Id.* The TIVAS servicing requirements are minimal in comparison to the Perkins servicers.

40. *Id.* at 65.

41. *Id.* at 68.

42. LOONIN ET AL., *supra* note 15, at 68

43. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 6.

44. *Id.* at 14.

45. *Id.*

1. Repayment Options

It is critical that student borrowers be made aware of the various repayment plans they are entitled to as a result of their federally backed loans. If they are not, they may wrongly think they are locked into an unsustainable repayment plan, increasing the likelihood of default.[46] A servicer noted the increasing complexity and rising number of repayment options that complicate servicers' ability to adequately inform borrowers of their options.[47] Still, many borrowers complain that servicers steer them to repayment options that are more beneficial to the servicer (like higher short-term payments)[48] or that they are not entered into the correct repayment program due to paperwork errors.[49] Some borrowers complained of being told they had successfully entered forbearance on their loans only to later discover the forbearance was not processed when contacted by a debt collector.[50]

2. Choice of Servicer

As noted earlier, borrowers have little choice in selecting their servicer. Since student loans can take many years to repay, it is likely that an individual borrower will have their loan transferred between servicers at some point.[51] When the FFELP program ended and the new servicers were brought on, the transfer of loans became problematic for all parties.[52] Commenters complained of the effects of these transfers, particularly the lack of notice, lost payments, and access to their own information after transfer.[53]

3. Forbearance

Forbearance is a common feature of all types of student loans that allow the borrower to cease making payments for a limited amount of time.[54] Interest continues to accrue during forbearance and may capitalize, causing the borrower's overall balance to grow.[55] Still, the option of forbearance can provide flexibility for a student borrower who may be encountering short-term financial difficulties.[56] But borrowers have complained of hurdles when trying to apply for forbearance.[57] In order to apply for forbearance, many servicers require written application in order to prove financial hardship.[58] Borrowers complain of

---

46. *See* Cox, *supra* note 7, at 189. Student borrowers can be especially intimidated by servicers and complex financial transactions. Cox writes, "[s]tudents' lack of choice in how to pay for college, their overestimation of their ability to repay debt, and their inexperience with large financial transactions leaves them uniquely vulnerable when they first encounter their student loan servicer." *Id.* at 196.

47. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 20 (noting that the amount of repayment options since 1990 has increased from 2 to 15).

48. *Id.* at 25.

49. *Id.* at 27–28.

50. *Id.* at 39. Industry commenters noted the administrative difficulty of entering forbearance due to the complexity. *Id.*

51. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 45.

52. *See id.* at 50 (revealing that one servicer estimated that, out of the 2.5 million accounts they took on, there were problems with 20% of them).

53. *Id.* at 51.

54. *Id.* at 38.

55. *Id*. at 39.

56. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 38.

57. *Id.* at 39.

58. *Id.*

numerous processing problems upon application.[59] Some servicers only placed certain loans into forbearance despite the borrower requesting that all of her loans be placed into forbearance.[60] Other borrowers complained that weeks later their application was denied.[61] These communication errors can lead to missed payments and sometimes default as some borrowers were contacted by debt collectors despite thinking their loans had successfully been placed into forbearance.[62] Servicing industry commenters noted to the CFPB that some of these problems are attributable to the complexity involved with forbearances and the time it takes to train their personnel.[63]

4. Servicer Transfers

Problems with notice of transfer range from the basic—borrowers not being aware that their loan had been transferred due to lack of communication—to the more nuanced—borrowers not being informed of the requirements and opportunities from their new servicers and thus missing payments or missing out on chances to lower their payments.[64] Many borrowers complained that payments that had been accepted and processed by their old servicer were not credited to the servicer upon transfer.[65] Many times, user settings like auto-pay were not transferred, and there were no prompts telling them to alter their preferences.[66] Lastly, many borrowers noted that their personal and account information did not always transfer to the new servicer.[67] Compounding the problem, a recurring theme from commenters was an inability to find a customer service representative who could identify documents from their account (such as an original contract) or confirm their payment history.[68] More broadly, the CFPB report details borrower complaints regarding slow error corrections, payment misallocations, and confusing or misleading applications for alternate repayment plans.[69]

5. Customer Service

Good customer service is key to the success of any well-functioning operation, and student loan servicers are no different. As public-facing departments, customer service representatives are often the first personal encounter a customer will have. Servicer customer representatives are tasked with responding to many borrower inquiries, including basic account information, payment processing, application to alternative repayment

---

59. *Id.* at 38–39.

60. *Id.*

61. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 38–39.

62. *Id.* at 39.

63. *See id.* at 39–40 (quoting one servicer as saying their "personnel 'must be fully versed on the complete range of repayment options associated with each student loan, including income dependent repayment plans, and be able to explain the positives and negatives associated with repayment alternatives, including deferments and forbearances . . . . These are specialized areas of knowledge that require a thorough understanding of the applicable rules and regulations'").

64. *Id.* at 52–54.

65. *Id.* at 55.

66. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 56.

67. *Id.* at 61.

68. *See id.* at 64–65 (detailing borrower frustration in attempting to contact customer service representatives).

69. *Id.* at 67–77 (quoting various borrower comments regarding servicer inefficiency).

programs, and much more.[70] Borrowers rely on these customer service representatives to provide clear and correct information and to resolve errors in a timely fashion. When this does not happen, many of the problems detailed above are compounded. It should be noted that servicers who handle borrowers with FFELP loans have to follow a set of due diligence requirements that mandate written disclosures that provide borrowers with up-to-date information about their loans.[71] There is no analogous disclosure requirement for the servicing of private or Direct Loans.[72]

Most servicers provide payment history to the borrowers through an online portal.[73] But many borrowers complain that this information is incomplete or hard to access.[74] This information is crucial for borrowers who want to qualify for certain benefits like the Public Service Loan Forgiveness Program.[75] Other borrowers complain that their servicers failed to provide certain documents upon request like original promissory notes or disclosures.[76] Making this more difficult is the fact that borrowers are not sure where to turn when their customer service representative fails to provide them with the information they need.[77]

Because many borrowers will need to make decisions about the best repayment plan given their situation, they rely on customer service representatives to provide accurate and actionable information.[78] But many borrowers complain that they received conflicting information upon contacting different customer service representatives and that the information is often less than clear.[79]

Other borrowers complain that some customer service representatives simply are not responsive to borrower requests or inquiries about errors that were made.[80] Some commenters to the CFPB inquiry felt that servicing personnel were more concerned with minimizing contact with customers than they were with actually resolving the error.[81] Many commenters noted frustration in finding someone who could actually provide information.[82]

In some cases, borrowers who run into dead ends with customer service

---

70. *Id.* at 63.

71. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 64.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 65.

76. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 65.

77. *Id.* at 66.

78. *Id.*

79. *See id.* at 66–67 (quoting one frustrated borrower's struggle to enter an income-based repayment plan: "Although I am finally making payments (and happy to do so), the process took about 6 months for [my current servicer] to sort out my paperwork and follow up with me about next steps. On several occasions, I received bad information from the phone representatives and at one point I called three different representatives and was given very different explanations about what documentation was needed").

80. *Id.* at 68–69.

81. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 68 (quoting a description of one borrower's experience with a servicer after the servicer lost a payment: "From there I was instructed to send a copy of the original check in reference to the letter. I received no confirmation and my account went into default. The people who handled my phone call transferred me from department to department and still after 4 years have not been able to remedy the situation because my loan has been transferred to 2 different loan services since my initial complaint").

82. *Id.* at 69. One borrower wrote: "Most of the time the representatives don't have answers to my questions and they just transfer me to different departments and no one can help. Not even the supervisors." *Id.*

representatives do not know where to turn next.[83] Some borrowers feel forced to turn to law enforcement and other regulatory agencies.[84] While law enforcement and regulatory agencies may provide for eventual relief, many of these borrowers are already facing significant financial distress, and the time spent petitioning outside help only leads to further delay.[85]

C. Current Enforcement and Relief

There are not many laws specifically governing the conduct of student loan servicers. Some protections are built into the servicer contracts with the Department of Education, but borrowers rarely know about them and would have trouble enforcing them if they tried.[86] The Department has the authority to modify or terminate their contracts with the TIVAS but has proven reluctant to do so.[87] Individual borrowers wishing to assert a private right of action have faced a tough road. The Higher Education Act has some built in requirements for servicers that can potentially lead to a private right of action.[88] However, not only do these claims often lead to preemption issues, they are only applicable to loans made through the FFELP.[89] In short, borrowers must rely on industry regulations or litigation[90] for the greatest degree of protection.

III. ANALYSIS

This Part will analyze the applicability of various regulations utilized in the mortgage and credit card markets. Several commenters have suggested that a practical place to look for guidance in the student loan market is the mortgage market.[91] In particular, several servicing regulations are laid out in the Real Estate Settlement Procedures Act (RESPA).[92] This Part will also explore possible avenues of regulation that can be gleaned from the credit card market.[93] Lastly, this Part will analyze the various provisions that have potential crossover appeal from the perspective of borrowers and servicers.

---

83. *Id.* at 70.

84. *Id.*

85. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 70.

86. LOONIN ET AL., *supra* note 15, at 68.

87. *Id.* at 69–70.

88. *Id.* at 68–69; 34 C.F.R. § 682.208(a) (2009).

89. LOONIN ET AL., *supra* note 15, at 70–71.

90. In January 2017, the CFPB sued Navient over its servicing practices, notably alleging violations of the Dodd–Frank Wall Street Reform and Consumer Protection Act, the Fair Credit Reporting Act, and the Fair Debt Collections Practices Act. CFPB Director Richard Corday characterized Navient's practices in a press release: "At every stage of repayment, Navient chose to shortcut and deceive consumers to save on operating costs. Too many borrowers paid more for their loans because Navient illegally cheated them and today's action seeks to hold them accountable." *See CFPB Sues Nation's largest Student Loan Compay for Failing Borrowers at Every Stage of Repayment*, CONSUMER FIN. PROT. BUREAU (Jan. 18, 2017), http://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment (describing the CFPB's suit against Navient).

91. LOONIN ET AL., *supra* note 15, at 68.

92. Real Estate Settlement Proc. Act (Reg. X), 12 C.F.R. §§ 1024.30–41 (2015).

93. *See* 15 U.S.C. §§ 1601–1666 (2015) (pertaining to credit protections, credit transactions, and credit advertising).

A. RESPA and Potential Regulation from the Real Estate Market

In responding to the CFPB's call for comments on student loan servicing, almost two dozen law professors urged the agency to took toward the mortgage market and RESPA in particular.[94] The professors noted:

> There is every reason to believe that student loan servicing, which represents a dramatically increasing share of overall consumer debt, would benefit from similar consumer protections. In crafting any regulations governing servicing of student loans, we urge [policymakers] to examine the effectiveness of federal agency guidelines and contract terms in inducing meaningful mortgage loan servicing.[95]

In general terms, some in the servicing industry object to the mortgage market comparison on the grounds that "loss mitigation" is simply not a consideration for student loan servicers.[96] Still, it is useful to look to specific provisions of RESPA to test their applicability to the student loan market.

1. Nipping Problematic Loans in the Bud

RESPA and its subsequent regulations require mortgage servicers to attempt to communicate with borrowers when a loan becomes delinquent.[97] They must make a good faith effort to make live contact with the borrower within 36 days of delinquency and then must provide a written notice within 45 days.[98] There is an exemption from these provisions if a borrower is in bankruptcy.[99]

As noted previously, many student borrowers have complained about a lack of communication from their servicers and of not knowing that their loans are in jeopardy of default.[100] In contrast to the mortgage market, there are no provisions (either in the law or by contract) that require student loan servicers to contact private or Direct Loan borrowers when their loans enter delinquency.[101] The most noteworthy provision in the mortgage servicing regulations is the "live" contact requirement. Borrowers may benefit from talking to a real person as opposed to an email or pre-recorded phone call.[102] Additionally, the

---

94. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 106.

95. *Id.*

96. *Id.* at 107. Loss mitigation generally refers to the practice of a third party stepping in to avoid a default. *See Ask CFPB*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/askcfpb/1807/i-got-letter-my-mortgage-servicer-about-my-application-help-prevent-foreclosure-my-mortgage-can-you-help-me-understand-some-terms.html (last visited Mar. 9, 2017); *see also* CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 114 (quoting servicing industry commenters who "highlight the unique aspects of student loans in comparison to mortgages, especially the fact that student loan servicing does not involve the recovery of property, such as a home").

97. 12 C.F.R. § 1024.39 (2013).

98. *Id.* § 1024.39(b)(1). The written notice must provide, among other things, a statement encouraging the borrower to contact the servicer, a contact number for the servicer, loss mitigation options if any are available, and information regarding counselors at the Department of Housing and Urban Development. *Id.* § 1024.39(b)(2)

99. *Id.* § 1024.39(d)(1).

100. *See supra* Part II (describing borrower frustration upon learning of trouble with their loans).

101. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 109. However, borrowers with FFELP loans are required to receive written notice with alternate repayment plans upon entering delinquency.

102. *Id.* Live contact through a telephone call may help the borrower realize the seriousness of default and can reassure the borrower that steps can still be taken to avoid severe financial penalties.

provisions that require servicers to contact delinquent borrowers early on after missed payments may well reduce long-term defaults.[103] As with many of these proposed additional requirements, some servicers complain about the additional administrative costs that they would incur.[104]

2. Dealing with Transfer Problems

Under RESPA, mortgage servicers must follow certain procedures upon the transfer of a loan.[105] If a servicer transfers a loan to a new servicer, they must provide notice to the borrower no less than 15 days before the transfer, and the new servicer must contact the borrower within 15 days of the transfer.[106] Within 60 days of a transfer, the new servicer cannot treat a borrower's payment as late if a payment was made to the prior servicer.[107] Additionally, both the old and new servicer are required to maintain policies that allow the borrower to access loan documents and information in a timely fashion.[108]

Perhaps the single biggest cause for frustration among student loan borrowers is when their loan is transferred between servicers.[109] As such, the transfer provisions of RESPA offer obvious crossover appeal. Currently, there are no specific notice requirements that must take place before the transfer of a student loan.[110] One student loan servicer voluntarily provides notice to borrowers pre- and post-transfer and would endorse implementing the requirements from RESPA.[111]

Borrowers who are not given credit for payments to prior servicers wind up feeling confused and frustrated. Instituting the 60-day waiting period from RESPA has the advantage of giving both servicer and borrower sufficient time to ensure payments and information are current.[112] One servicing industry commentator noted that regulations geared towards enabling smooth transfers are in the best interest of servicers and also noted the importance of the new and old servicer working together in the months preceding the transfer.[113] Student borrowers also claim that they would benefit from the RESPA provisions requiring clear policies on obtaining loan information, especially upon transfer.[114] Servicers generally find these provisions unobjectionable, but one notes that "[a]n important step in adding transparency, clarity, and simplicity to student loans would be to align certain policies across the three loan types."[115]

Lastly, RESPA requires that servicers establish policies and procedures to ensure that

---

103. *Id.* Borrowers may benefit even further from learning about alternative repayment options.

104. *Id.* at 123.

105. 12 C.F.R. § 1024.33 (2015).

106. *Id.* § 1024.33(b)(3). There are exceptions for when a loan is transferred to an affiliate or when a merger creates sub-servicers.

107. *Id.* § 1024.33(c)(1). This includes not charging a late fee to the borrower.

108. *Id.* § 1024.33(b)(4). This requirement is applicable to affiliates and sub-servicers.

109. *See supra* Part II (detailing problems like lack of notice, payments to old servicers that were not credited to their new ones, and the inability to obtain loan documents).

110. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 116. Some FFELP loans are subject to a joint notice from the old and new servicer within 45 days of a transfer.

111. *Id.* at 116–17.

112. *See id.* at 117 (noting that this period usually covers two billing cycles).

113. *Id.* at 118.

114. *Id.*

115. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 119, n.450 (referencing FFELP, Direct, and private loans).

servicers investigate and respond to borrowers and complaints as well as keeping records to facilitate periodic servicer review for compliance with applicable laws.[116] Calls for better customer service is a common refrain among student loan borrowers. Many who responded to the CFPB's call for comments suggested that RESPA investigative requirements would be very helpful in the student loan servicing context.[117] At the least, they suggested that student loan servicers be required to respond to complaints within a specified time frame.[118] One consumer group advocated modeling a new system after other federal loan programs that establish an informal review process that also includes a formal adjudicatory hearing before an administrative law judge.[119] Some servicers respond that they have already improved their customer service operations and have improved their response time when processing borrower requests.[120]

B. Looking to the Credit Card Market

In 2009, Congress passed the Credit CARD Act (CARD Act) to prohibit unfair practices like rate hiking.[121] Another goal was to increase transparency so consumers could better understand their credit card rates and fees.[122] Prior to the passage of the CARD Act, credit card companies could charge late fees for a variety of reasons, many of which consumers did not understand.[123] Accordingly, the CARD Act only allows credit card companies to issue penalty fees that are "reasonable and proportional" to the cardholder's actions.[124]

Credit card companies are required to accept a payment as on time if it is received by 5:00 PM on the payment due date.[125] Credit card companies are also required to have reasonable processes in place so that billing statements are delivered to the consumer within 21 days of the due date.[126] There are also provisions that require the companies to disclose to the consumer how long it would take to pay off their full balance by only making minimum payments[127] and what monthly payment would be required to pay off the full balance within three years.[128]

Late fees, especially excessively high ones, can make it hard for a student borrower to get back on track with his payments.[129] The CARD Act has had success in driving down

116. 12 C.F.R. §§ 1024.33(b)(4)(ii), (3)(ii) (2015). These provisions come from the "[g]eneral servicing policies, procedures, requirements" section of RESPA. Except for some FFELP requirements, no general requirements exist for student loan servicers. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 119.

117. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 120–21.

118. *Id.*

119. *Id.*

120. *See id.* (emphasizing improvements in customer response within established time frames).

121. *The Credit Card Act*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/credit-cards/credit-card-act (last visited Mar. 9, 2017). The CFPB has since taken over responsibility for administering the CARD Act.

122. *Id.*

123. *CARD Act factsheet*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/credit-cards/credit-card-act/feb2011-factsheet (last visited Mar. 9, 2017).

124. 15 U.S.C. § 1665d(a) (2015).

125. *Id.* § 1666c(a).

126. *Id.* § 1666b(a).

127. *Id.* § 1637(b)(11)(B)(i).

128. *Id.* § 1637(b)(11)(B)(iii).

129. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 130.

some of the larger fees charged by credit card companies and could also gain traction in the student loan market.[130] It is possible that a fee regulation like the one in the CARD Act could alleviate concerns that servicers are seeking to profit off of such charges. Some consumer groups representing student borrowers also advocate for adopting the timely crediting provision of the CARD Act.[131] However, a group representing the depository systems that most servicers use argues that such a regulation would be unnecessary.[132] They claim that servicers are easily able to retroactively credit payments, and such payment delays are rare.[133]

Another issue is students not receiving timely information on the status of their loan or accurate billing information. When borrowers learn of payments due very near to the payment date, they may be unable to arrange for the funds to make the payment.[134] The CARD Act requirement of billing statements at least 21 days before the due date may help to lessen that burden.[135] Likewise, if borrowers are informed of how long it will take them to repay their loan in full at a given rate, they may decide to investigate alternate repayment plans.[136] This not only increases transparency between borrower and servicer, but also facilitates a more seamless repayment plan.[137] Still, since credit card companies are not directly analogous to student loan servicers (at least not to the degree that mortgage servicers are), it is unclear if the regulations could be as easily tailored as the RESPA requirements.

IV. RECOMMENDATION

As it stands, there are insufficient protections for student loan borrowers against their loan servicers. The CFPB report illustrates the myriad of ways in which borrowers experience hardships due to the questionable behavior of their servicers.[138] Policymakers have chosen to protect consumers from debt servicers in the past, and it is time to do so again. This can be done through implementing sufficient equitable consumer protections and by re-aligning servicer contracts to provide better economic incentives for the servicers. This Part will propose servicing regulations that can be adopted from the mortgage and credit card markets and implemented in the student loan markets.

A. Lessons from the Mortgage Market

The servicers that handle mortgage loans are most analogous to student loan servicers.[139] Unsurprisingly, the servicer regulations flowing from the Real Estate Settlement Procedures Act are most readily adaptable to the student loan market, the first

130. *Id.* at 125. For instance, credit card companies are only allowed to asses late and penalty fees that are "reasonable and proportional" to the customer's action when they violate the terms of the credit card agreement. *Id.*

131. *Id.* at 126.

132. *Id.*

133. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 126.

134. *Id.* at 127.

135. 15 U.S.C. § 1666b(a) (2009).

136. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 131.

137. *Id.*

138. *See generally id.* (listing borrower complaints regarding servicer transfer practices, customer service, and late fees, among others).

139. *See supra* Part III.A (discussing regulations in the mortgage servicing industry).

of which is the "live contact" requirement when a loan becomes delinquent.[140] Early intervention for a delinquent borrower can mean the difference between a few missed payments and a full default. Whether because of complications from a transferred loan, changing life circumstances, or otherwise, many student borrowers may not be aware they are missing payments. Policymakers should adopt provisions similar to RESPA that require student loan servicers to make a reasonable effort to make live contact with a borrower within 30 days of delinquency and to discuss loss mitigation options or alternative payment options if available.[141]

The CFPB report makes clear that many student loan borrowers experience problems when their loans are transferred between servicers.[142] The main problems result from a lack of notice of the transfer and missed or un-credited payments.[143] Due to these common problems, even basic notice requirements would be helpful to many student borrowers. Policy makers would be wise to implement a system by which the old servicer must alert the borrower that their relationship is ending, and the new servicer must provide notice that the loan has been officially transferred.[144] Ideally, the new servicer would also present to the borrower important information about auto-pay and other features that may differ from other servicers. It is also important to give borrowers a grace period upon transfer of their loan whereby they cannot be charged for a late payment if they made a final timely payment to their previous servicer.[145]

The CFPB report shows borrowers' general dissatisfaction with servicers' customer service.[146] A requirement that servicers respond to borrower complaints within a given time frame would go a long way toward instilling more trust and better communication between the parties (even if the response is one notifying the borrower that their complaint is being reviewed). The carryover effect of such a requirement would likely result in smoother transfers to new servicers and easier error resolution for both parties.

B. Applicability of the Credit Card Market to the Student Loan Servicing Marketplace

Regulations from the credit card market may not be as applicable in the student loan-servicing context. As an initial distinction, the regulations found in RESPA are more robust and well established. The CARD Act was only passed in 2009 and recently given to the CFPB to administer, so it is unclear how the regulatory change might affect enforcement. As an additional distinction, credit card companies do not act as a servicer in the way the mortgage and student loan servicers do.[147] Despite these differences, student loan

140. 12 C.F.R. § 1024.39(b)(2) (2016). The written notice must provide, among other things, a statement encouraging the borrower to contact the servicer, a contact number for the servicer, loss mitigation options if any are available, and information regarding counselors at the Department of Housing and Urban Development. *Id.*

141. *See supra* Section III.A.1 (discussing the importance of communication with delinquent borrowers).

142. *See supra* Part II (detailing the problems that ensue when borrowers do not receive sufficient notice of their transfer).

143. *Id.*

144. A similar requirement can be found in RESPA. *See* 12 C.F.R. § 1024.33(b)(3) (2015) (laying out notice requirements for the transferee and transferor servicer). It should be noted that some servicers voluntarily provide such notice.

145. *See id.* § 1024.33(c)(1) (requiring a 60-day grace period). This period gives a borrower sufficient time to get their documents in order and to adjust to the new payment system.

146. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 63.

147. That is, they are not a middleman between a lender and a borrower.

borrowers could benefit from some of the advance notice requirements of the CARD Act. In particular, policymakers should establish billing standards that require borrowers to get a statement at least 15 days before the due date and to have access to information about how long they will be paying off their loan at the current rate.[148] While these requirements do not address the core structural problems detailed in the CFPB report, they may nonetheless lead to fewer missed payments.

C. Aligning Incentives

There is a real concern that third-party servicers are not adequately incentivized to provide good customer service and help borrowers avoid defaults. This is because the compensation model used in most third-party servicing contracts is a flat monthly fee per account serviced, and these fees do not fluctuate based on the level of service provided.[149] All of the recommendations listed above create a reason for servicers to increase their efforts to avoid defaults: the law would require they do so.

But the Department of Education could also build better performance metrics into their contracts with servicers. At its most basic level, the servicers who do best on a comprehensive evaluation should receive more borrower accounts. The evaluation should include metrics such as number of accounts in default to ensure that servicers are doing everything possible to help borrowers avoid defaults that so often carry devastating financial consequences. Another evaluation criteria should be number of accounts that have missed payments for three or more pay periods. This would be an intermediate step that would help ensure that servicers are making reasonable efforts to be in contact with borrowers when they are missing payments.

Another crucial evaluation metric should be servicer performance on customer service surveys. The Department of Education would be wise to continue to distribute comprehensive surveys to borrowers that ask them to evaluate their servicers on all facets of performance, including payment processing, accessibility of online resources, error resolution, and overall satisfaction with customer service. When the Department of Education gives great weight to these customer surveys, those servicers who value quality of service and customer responsiveness are rewarded with more business, and those who do not are incentivized to re-evaluate their operations.

Servicers should also be rewarded when they can show that their customer service representatives are knowledgeable and responsive to borrower requests. This is especially important when borrowers have complex questions about how to enter into forbearance or how to enter a repayment program like the Public Service Loan Forgiveness program. Part of this can be done through the previously mentioned borrower surveys. But servicers who can prove to the Department of Education that they have a large quantity of customer service representatives who have been trained to handle the complex facets of student loans should be rewarded with more accounts.

Finally, borrowers would also benefit from a return to the "due diligence" standards that were in place for FFELP and Perkins loans. The Department of Education should require that, at a minimum, servicers provide borrowers all of their past payment information and original loan documents. This standard should be in place regardless of

---

148. *See* 15 U.S.C. §§ 1666b(a), 1637(b)(11)(B)(iii) (2015) (detailing notice requirements in the CARD Act).

149. CFPB, STUDENT LOAN SERVICING, *supra* note 12, at 134.

whether the loan has been transferred from another servicer. Servicers who fail to meet these basic customer service requirements should not be given new contracts until their policies come into compliance. All of these would be a vast improvement over the relatively unhelpful metrics currently being used by the Department of Education to assess servicer performance.[150]

D. Implementation

It is one thing to discuss potential changes to the student borrower-servicer relationship, but it is another thing entirely to implement the recommended changes. The aligning incentives approach discussed above can largely be done through agency rulemaking. The servicing contracts are negotiated and overseen by the Department of Education through various federal loan programs.[151] This gives the Department considerable leeway to include the enhanced performance metrics and better incentives into future contracts through the rulemaking process.

But the most effective consumer protections in the mortgage and credit card markets have come through legislation. Both RESPA and the CARD Act were legislative undertakings aimed at better protecting consumers.[152] If the recommendations offered in this Part are to be effective, they should be implemented through an act of Congress. Given that the CPFB has already studied these issues through its report and was in fact established to be a watchdog for consumers, it is logical that any legislation regulating student loan servicers should be overseen by the CFPB. Although the current legislative climate is precarious and the appetite for further regulation is low, the high economic costs of ballooning student debt should give lawmakers plenty to think about before they reject proposals to regulate the conduct of student loan servicers.[153]

V. CONCLUSION

It is clear that the student debt crisis is not going to be solved overnight and, while student loan servicers represent but one segment of the student loan market, the segment they represent is an important one. By implementing reforms to the student loan servicing industry that increase transparency and responsiveness to borrower inquiries, student borrowers can better plan their financial future. When borrowers can avoid defaults and enter repayment programs that offer financial stability, they can make positive contributions to the economy. It has become increasingly important for the United States economy as a whole to have recent graduates who are financially stable and not saddled with ballooning debt that could make the collective bubble burst. So, while better servicing cannot solve the entire student debt problem alone, it would be a positive step in the right direction.

---

150. As of late October 2016, the Department of Education has announced several new servicing requirements, some of which address the recommendations found in this Section. *See U.S. Department of Education Announces Requirements for New Federal Loan Servicing System*, U.S. DEP'T OF EDUC. (Oct. 26, 2016), https://www.ed.gov/news/press-releases/us-department-education-announces-requirements-new-federal-loan-servicing-system.

151. *See supra* Part II (describing the various federal loan programs).

152. *See supra* Parts III.A–B (discussing the provisions of RESPA, mortgage servicers, the CARD Act, and credit card companies).

153. *See* Holland, *supra* note 1 (citing the $1.2 trillion currently owed by student borrowers).