

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 376 (Mark Stone)
Version: June 20, 2019
Hearing Date: July 9, 2019
Fiscal: Yes
Urgency: No
AM

SUBJECT

Student loan servicing

DIGEST

This bill imposes new requirements on student loan servicers doing business in this state, and requires the Department of Business Oversight (DBO) to oversee these provisions. The bill establishes the position of the Student Borrower Advocate to receive and review complaints from student loan borrowers, as provided. The bill also provides for a consumer enforcement mechanism by allowing a consumer who suffers damage as a result of the failure of a student loan servicer to comply with these provisions or any applicable federal laws relating to student loan servicing to bring an action on the consumer's behalf and on behalf of any similarly situated class of consumers against that student loan borrower.

EXECUTIVE SUMMARY

Student loan debt is a pressing issue of the time, with more than one million Americans defaulting on student loans nationwide in 2017, which is three times the number who lost homes to foreclosure over this period. In California alone, more than 3.7 million borrowers owe nearly \$125 billion in student loan debt. There have been several document reports of systemic abusive practices by student loan borrowers, and yet the federal government seems to be taking deliberate action to undermine protections for student loan borrowers. In response, this bill seeks to bolster existing protections for student loan borrowers by, among other things enacting the Student Loan Borrower Bill of Rights, establishing the position of a Student Borrower Advocate, and provides for a consumer enforcement mechanism.

The bill is sponsored by NextGen California, Consumer Reports, Student Borrower Protection Center, Student Debt Crisis, and Young Invincible. The bill is supported by a broad coalition, including labor organizations, business associations, consumer protection organizations, and human rights organizations. The bill is opposed by various associations representing banks, credit unions, and student loan servicers, as

well as the Civil Justice Association of California. The bill passed out of the Senate Banking and Financial Institutions Committee on a vote of 5-1.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits, pursuant to the Student Loan Servicing Act (SLSA), any person from engaging in student loan servicing in this state, as defined, without first obtaining a license and places oversight of these provisions with the Commissioner of Business Oversight within the DBO. These provisions do not apply to any of the following: (Fin. Code §§ 28100 et. seq.)
 - a) State- or federally-chartered depository institutions or industrial loan companies.
 - b) A public postsecondary educational institution or a private nonprofit postsecondary educational institution servicing a student loan it extended to a borrower.
 - c) A nonprofit community service organization, as specified.
 - d) A state or nonprofit private institution or organization that has an agreement with the United States Secretary of Education, as specified, in connection with its responsibilities as a guaranty agency engaged in default aversion. (Fin. Code § 28102.)

- 2) Imposes requirements on student loan servicers and prohibits certain practices and acts, including the following:
 - a) Licensees must provide, free of charge on their internet web site, information or links to information regarding repayment and loan forgiveness options that may be available to those borrowers and provide this information or these links to borrowers in writing at least once per calendar year. (Fin. Code § 28130(f).)
 - b) Licensees must respond to a qualified written request, as defined, by acknowledging written receipt within 10 business days and provide information relating to the request and, if applicable, the action the licensee will take to correct the account within 30 business days. (Fin. Code § 28130(g).)
 - c) After receiving a qualified written request from a borrower related to a dispute over a borrower's payment, a licensee may not furnish adverse information to any consumer reporting agency for 60 days regarding any payment that is the subject of the qualified written request. (Fin. Code § 28130(g).)
 - d) Licensees must ask borrowers how to apply overpayments, as defined, on outstanding student loans, except as provided in federal law or required by a student loan servicing agreement. (Fin. Code § 28130(h).)

- e) When a sale, assignment, or other transfer of the servicing in a student loan results in a change in the identity of the party to whom the borrower is required to send payments or direct communications, licensees must notify borrowers in writing at least 15 days before the payment is due to the new party, providing specified relevant information about the loan and the new servicer, and must transfer all information regarding a borrower, that borrower's account, and that borrower's student loan to the new licensee servicing the student loan within 45 calendar days of the effective date of the sale, assignment, or transfer. (Fin. Code § 28134.)
- f) Licensees must also retain records of servicing a borrower's student loan for a minimum of three years after the student loan is sold, assigned, transferred, or paid in full, except where prohibited by federal law. (Fin. Code § 28138.)
- g) Licensees are prohibited from defrauding or misleading a borrower, engaging in any unfair or deceptive practice toward any borrower, misapplying payments made by a borrower, failing to accurately report each borrower's payment performance to at least one nationwide consumer reporting agency, refusing to communicate with an authorized representative of the borrower, or making any false statement or omitting any material fact in connection with any information or reports submitted to DBO or another governmental agency. (Fin. Code § 28136.)

This bill:

- 1) Establishes the Student Borrower Bill of Rights, which prohibits a person from engaging in abusive acts or practices when servicing a student loan in this state, as provided.
- 2) Prohibits a student loan servicer from engaging in other specified acts, including:
 - a) Directly or indirectly employing a scheme, device, or artifice to defraud or mislead a borrower.
 - b) Engaging in an unfair or deceptive practice toward borrowers or misrepresenting or omitting material information in connection with the servicing of a student loan, as specified.
 - c) Misapplying payments made by a borrower to the outstanding balance of a student loan.
 - d) Failing to accurately report each borrower's payment performance to any consumer reporting agency, as provided.
 - e) Refusing to communicate with an authorized representative of the borrower who provides a written authorization signed by the borrower.
 - f) Negligently or intentionally making a false statement or knowingly and willfully making an omission of a material fact in connection with information or reports filed with the DBO or another governmental agency.

- 3) Requires a student loan servicer to do certain things, except to the extent these provisions are inconsistent with federal law, including:
 - a) Posting, processing, and crediting student loan payments in a timely manner.
 - b) Imposing reasonable and proportional fees for a late payment, as specified.
 - c) Diligently overseeing its service providers.
 - d) Processing paperwork in a timely manner.
 - e) Maintaining accurate records about a borrower's account for the life of the loan.
 - f) Maintain policies and procedures permitting a borrower who is dissatisfied with the outcome of an initial qualified request to escalate the borrower's concern to a supervisor.
 - g) Protecting borrowers from any negative consequences that are directly related to the issue identified in a borrower's qualified request or qualified written request until that request has been resolved.
 - h) Protecting borrowers from any negative consequences stemming from a sale, assignment, transfer, system conversion, or payment made by the borrower to the original student loan servicer consistent with the original student loan servicer's policy.

- 4) Establishes the position of the Student Borrower Advocate to receive and review complaints from student loan borrowers, as provided.

- 5) Authorizes any consumer who suffers damage as a result of the failure of a student loan servicer to comply with these provisions or federal law to bring an action on that consumer's behalf and on behalf of a similarly situated class of consumers against that student loan servicer to recover or obtain any of the following remedies:
 - a) actual damages, but in no case shall the award be less than \$500;
 - b) an order enjoining the methods, acts, or practices;
 - c) punitive damages;
 - d) attorney's fees; and
 - e) any other relief the court deems proper.
 - f) In addition to any other remedies, whenever it is proven by a preponderance of the evidence that a student loan servicer has engaged in conduct that substantially interferes with a borrower's right to an alternative payment arrangement; loan forgiveness, cancellation, or discharge; or any other financial benefit as established under the terms of a borrower's promissory note or under the Higher Education Act of 1965 (20 U.S.C. Sec. 1070a et seq.), as from time to time amended, and the regulations promulgated thereunder, the court is to award treble actual damages to the plaintiff, but in no case should the award be less than \$1,500.

- 6) Requires the DBO to monitor for risks to consumers in the provision of student loan servicing, including developments in the market for those services, and to administer these provisions, as provided.
- 7) Defines various terms for these purposes, as provided.
 - a) Defines student loan servicer to mean any person engaged in the business of servicing student loans in this state.
 - b) Provides a student loan servicer does not include either:
 - i. A debt collector, as defined in subdivision (c) of Section 1788.2 of the Civil Code, whose student loan debt collection business, and business operations, involve collecting, or attempting to collect, on defaulted student loans, that is, federal student loans for which no payment has been received for 270 days or more, or private student loans, in default, according to the terms of the loan documents. However, debt collectors who also service nondefaulted student loans as part of their business and business operations are student loan servicers.
 - ii. In connection with its responsibilities as a guaranty agency engaged in default aversion, a state or nonprofit private institution or organization having an agreement with the U. S. Secretary of Education under the Higher Education Act of 1965 (20 U.S.C. Sec. 1078(b)).
- 8) Makes various legislative findings and declarations.

COMMENTS

1. Stated need for the bill:

The author writes:

AB 376 establishes the Student Borrower Bill of Rights, ensuring that individuals with student loan debt are given reliable information, quality customer service, and meaningful access to repayment and forgiveness programs. This groundbreaking legislation will make California the first in the nation to offer student loan borrowers the same comprehensive protections that consumers with mortgages and credit cards take for granted.

After a student loan is taken out, loan servicing companies are the ones that communicate with borrowers about payments, account information, refinancing options, and other issues surrounding their loans. Despite a mountain of evidence that demonstrates rampant predatory actors, it is very clear that the federal government has deliberately stepped back from its duties to protect student borrowers and in order to protect its consumers, California must take

action.

With 3,780,000 student loan borrowers across California owing \$134.3 billion, it is imperative that California take a strong stance to protect borrowers against bad actors. AB 376 will ensure that California borrowers are protected and can take action if servicers violate these basic protections.

2. Protections for student loan borrowers

a. Evidence of abuse and misleading practices

There have been several documented instances of systemic abuse and misleading practices regarding student loan servicers. In 2017, the Consumer Financial Protection Bureau (CFPB) sued Navient for “systematically and illegally failing borrowers at every stage of repayment”¹ and reported that as of April 1, 2017, the CFPB had received roughly 1.1 million complaints regarding student loan servicers.² In 2018, the California Attorney General filed a lawsuit against Navient for unlawful business practices.³

b. Federal actions undermine protection for student borrowers

Unfortunately, the federal government has taken several actions that undermine and thwart protections for student borrowers. For example, Education Secretary Betsy DeVos reversed course on Obama Administration policies that were designed to create new federal protections for student loan borrowers by withdrawing “a series of policy memos issued by the Obama Administration to strengthen consumer protections for student loan borrowers” in 2017.⁴ Other reports indicated that the Department of Education was preventing the CFPB from regulating student loan servicers by issuing guidance to them to not comply with requests from the CFPB for information.⁵ In May

¹ CFPB Sues Nation’s Largest Student Loan Company Navient for failing Borrowers at Every State of Repayment, CFPB (Jan. 18, 2017), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/> (as of Jun. 30, 2019).

² CFPB Monthly Snapshot Spotlights Student Loan Complaints, CFPB (Apr. 25, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-monthly-snapshot-spotlights-student-loan-complaints/> (as of Jun. 30, 2019).

³ Friedman, *What This Navient Lawsuit Means For Your Student Loans*, Forbes (Jul. 9, 2018), available at <https://www.forbes.com/sites/zackfriedman/2018/07/09/student-loans-navient-lawsuit/#4e280b3d2777>

⁴ Douglas-Gabriel, *Betsy DeVos undoes Obama’s student loan protections*, Chicago Tribune (Apr. 11, 2017), available at <https://www.chicagotribune.com/business/ct-betsy-devos-student-loan-protections-20170411-story.html> (as of Jun. 30, 2019).

⁵ CFPB Chief Says Education Department Is Blocking Student Loan Oversight, NPR (May 16, 2019), available at <https://www.npr.org/2019/05/16/723568597/cfpb-chief-says-education-department-is-blocking-student-loan-oversight> (as of Jun. 30, 2019).

of 2018, the CFPB shut down the only unit solely dedicated to overseeing student loan borrowers and was instead folded in to the CFPB's consumer information unit.⁶

c. Enhanced protection for student borrowers

This bill seeks to bolster existing provisions of state law for student borrowers by placing new requirements on student loan servicers and establishing the position of the Student Borrower Advocate within the DBO. There are specific protection for borrowers who are military borrowers, older borrowers, borrowers with disabilities, and borrowers working in public service to ensure these borrowers are able to take advantage of specific programs they may qualify for under federal law. A key component of the bill is prohibiting abusive acts or practices when a person is servicing a student loan. These provisions emulate the same protections contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank; Public Law 111-203). The recent actions of the federal government demonstrate why these protections need to be enacted into state law. If California does not protect student borrowers, no one will.

A major difference in this bill from the existing provisions of the SLSA is that these provisions also apply to state- and federally-chartered banks and credit unions, which the SLSA does not. The provisions of the bill do not apply to a debt collector whose student loan debt collection business, and business operations, involve collecting, or attempting to collect, on defaulted student loans, however, the bill does apply its provisions to debt collectors who also service nondefaulted student loans as part of their business and business operations. The other entities exempted from the bill's provisions are state or nonprofit private institutions or organizations having an agreement with the United States Secretary of Education under the Higher Education Act of 1965 (HEA) (20 U.S.C. Sec. 1078(b)) in connection with its responsibilities as a guaranty agency engaged in default aversion. According to FinAid:

Guarantee agencies insure student loans against default. The 1% default fee (previously "guarantee fee") that is collected from each disbursement on a federal education loan is paid to the designated guarantee agency to cover the costs of insuring the loan. (Some guarantee agencies have built up enough of a reserve that they are able to waive or reduce the default fee.) If the borrower defaults, dies or becomes totally and permanently disabled, the guarantee agency reimburses the lender for the balance remaining on the loan [...] The Health Care and Education Reconciliation Act of 2010 ended the federally-guaranteed student loan program — the Federal Family Education Loan Program (FFELP) — effective June 30, 2010. All new federal education loans since July 1, 2010 have been made through the Direct

⁶ Thursh & Cowley, *Mulvaney Downgrades Student Loan Unit in Consumer Bureau Reshuffle*, New York Times (May 9, 2018), available at <https://www.nytimes.com/2018/05/09/us/student-loans-consumer-financial-protection-bureau-cfpb.html> (as of Jun. 30, 2019).

Loan program. Despite the end of FFELP, the 35 guarantee agencies are still involved in guaranteeing the existing FFELP loan portfolios against default and will continue in this role until the last FFELP loan is paid in full. *Nevertheless, many of the state guarantee agencies are diversifying into other areas, such as managing state grant and non-federal student loan programs, developing financial literacy training programs, and servicing federal education loans made through the Direct Loan program.*⁷ [emphasis added]

The author may wish to explore amending the bill to apply these provisions to guaranty agencies to the extent they are servicing student loan debt not in default in a similar manner to a debt collector.

3. Protecting student borrowers' rights

a. Enforcement

This bill strengthens protections for student borrowers by providing a strong enforcement mechanism that empowers student borrowers to hold student loan servicers accountable for their abusive practices or acts and violations of state and federal law. As documented above, the federal government has been actively undermining protections for student borrowers leaving the states to fill the vacuum. The bill provides any consumer who suffers damage as a result of the failure of a student loan servicer to comply with these provisions or any applicable federal laws relating to student loan servicing to bring an action on the consumer's behalf and on behalf of any similarly situated class of consumers against that student loan borrower. Remedies authorized under this action include actual damages; an order enjoining the methods, acts, or practices; restitution of property; punitive damages; attorney's fees; or any other relief the court deems proper. In addition, whenever it is proven by a preponderance of the evidence that a student loan servicer engaged in conduct that substantially interferes with a student borrower's right to an alternative payment arrangement; loan forgiveness, cancellation, or discharge; or any other financial benefit as established under the terms of a borrower's promissory note or under the HEA (20 U.S.C. §§ 1070 et. seq.), the court is to award treble actual damages to the plaintiff, but not less than \$1,500 per plaintiff.

b. Federal preemption

Some opponents of the bill have argued that its provisions are preempted by federal law, specifically the HEA. Recently, on June 27, 2018, the United States Court of Appeals for the Seventh Circuit held that the HEA contains several express provisions of exemption, such as lenders and loan servicers are not subject to disclosure requirements imposed by state law. (20 U.S.C. § 1098g.) However, the court held in that

⁷ *Guarantee Agencies*, FinAid, available at <http://www.finaid.org/loans/guaranteeagencies.phtml> (as of Jun. 20, 2019).

the express preemption of Section 1098g of Title 20 of the United States Code does not entirely bar attempts to assert consumer protection or tort law claims against a student loan servicer, and that field preemption does not apply, stating:

Field preemption is confined to only a few areas of the law, such as the National Labor Relations Act [...] Courts have consistently held that field preemption does not apply to the HEA, and we do as well.⁸

4. Statements in support

This bill is sponsored by NextGen California, Consumer Reports, Student Borrower Protection Center, Student Debt Crisis, and Young Invincibles. The bill is supported by numerous labor organizations, business associations, and consumer protection organizations, and California Insurance Commissioner Ricardo Lara.

Student Debt Crisis, a co-sponsor of the bill, writes:

California would lead the nation by becoming the first state to create a comprehensive set of rights for people holding student debt. This bill requires student loan companies to treat borrowers fairly and gives borrowers the right to hold these companies accountable when they fail to meet basic servicing standards, mislead borrowers, or commit illegal business practices.

NextGen, a co-sponsor of the bill, writes:

The current statutory environment surrounding student loans does not provide much in the way of consumer protections, subjecting borrowers to an unregulated world of private lenders, debt collectors, and student loan servicers who are more focused on the bottom line than assisting borrowers. This leads to high default and delinquency rates. When student loan borrowers become delinquent or default, they can have their professional licenses revoked, their wages garnished, and their Social Security payments seized, causing these individuals to struggle with everyday financial choices while billion-dollar companies increase their profit margins.

5. Statements in opposition

The bill is opposed by the California Bankers Association, California Credit Union League, Civil Justice Association of California, Consumer Bankers Association, and the Student Loan Servicing Alliance.

⁸ *Nelson v. Great Lakes Educational Loan Services, Inc.* (7th Cir. Jun. 27, 2019, No. 18-1831) pp. 3, 22, 24.

Opposition raises several concerns with the bill. Many opponents dislike the consumer enforcement mechanism and want it removed from the bill or at least changed to mirror existing class action requirements under California law. Opponent believe that certain provisions of the bill as the bill are preempted under the National Bank Act or Higher Education Act. In addition, opponents believe the affirmative duty to act in the best interest of the student borrower is unworkable and is an attempt to create a fiduciary duty that does not existing under current law.

The Civil Justice Association of California, an association of businesses including Dow Chemical Company, PG&E, Monsanto, and Shell Oil Company, writes in opposition to the bill stating:

While CJAC does not take a position on the merits of the regulatory provisions laid out in AB 376, we fear that allowing enforcement by individual lawsuit with quasi-class action feature, liquidated damages of \$500 or \$1,500, and attorney's fees, could lead to unjustified lawsuits that are more about attorney's fees than about justice.

SUPPORT

NexGen California (co-sponsor)
Consumer Reports (co-sponsor)
Student Borrower Protection Center (co-sponsor)
Student Debt Crisis (co-sponsor)
Young Invincibles (co-sponsor)
AARP California
American Federation of State, County and Municipal Employees, AFL-CIO
Americans for Financial Reform
Asian Americans Advancing Justice
Association of Young Americans
California Attorney General Xavier Becerra
Beneficial State Foundation
California Asset Building Coalition
California Association of Nonprofits
California Association of Realtors
California Association of Veteran Service Agencies
California Dental Association
California Federation of Teachers
California Insurance Commissioner Ricardo Lara
California Labor Federation
California Low-Income Consumer Coalition
California LULAC
California Reinvestment Coalition
California Secretary of State Alex Padilla

California Women's Law Center
Californians for Economic Justice
CalPIRG
City and County of San Francisco
Coalition for Humane Immigrant Rights
Common Sense Kids Action
Consumer Action
Consumer Attorneys of California
Consumer Federation of California
County Welfare Directors Association of California
Courage Campaign
East Bay Community Law Center
Friends Committee on Legislation of California
Generation Progress
Hildreth Institute
Housing & Economic Rights Advocates
Improve Your Tomorrow
National Student Loan Defense Network
New Economics for Women
Public Law Center
PolicyLink
San Francisco Treasurer & Tax Collector Jose Cisneros
Service Employees International Union California
State Building and Construction Trades Council of California
Student Borrower Protection Center
Student Senate for California Community Colleges
The Institute for College Access & Success
UnidosUS
University of California Student Association
Veterans Education Success

OPPOSITION

California Bankers Association
California Credit Union League
Civil Justice Association of California
Consumer Bankers Association
Student Loan Servicing Alliance

RELATED LEGISLATION

Pending Legislation: None known

Prior Legislation:

AB 38 (Stone, Ch. 379, Stats. 2018) was a clean-up bill to AB 2251, which made several technical changes and added exemptions from the SLSA for guaranty agencies and debt collectors, as specified.

AB 2251 (Stone, Ch. 824, Stats. 2016), enacted the SLSA, operative July 1, 2018, which requires persons servicing student loans in this state, as defined, to become licensed by DBO, comply with specified requirements, and refrain from engaging in specified prohibited acts.

PRIOR VOTES:

Senate Banking and Financial Institutions Committee (Ayes 4, Noes 1)

Assembly Floor (Ayes 59, Noes 15)

Assembly Appropriations Committee (Ayes 13, Noes 4)

Assembly Banking and Finance Committee (Ayes 9, Noes 0)
