



CONFERENCE OF STATE BANK SUPERVISORS



**NACARA**  
NORTH AMERICAN COLLECTION AGENCY  
REGULATORY ASSOCIATION

July 6<sup>th</sup>, 2021

Dr. Miguel A. Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

Dear Secretary Cardona,

On behalf of the Conference of State Bank Supervisors (CSBS)<sup>1</sup> and the North American Collection Agency Regulatory Association (NACARA)<sup>2</sup>, we are writing to urge the U.S. Department of Education to rescind the policies adopted by the Department in recent years claiming preemption or otherwise impairing state regulation of federal student loan servicers and debt collectors.

While the Department has recently taken certain steps towards facilitating coordination and collaboration between the Department and state financial regulators, CSBS and NACARA believe additional steps are needed to fully return to the Department's former longstanding policy partnering with state financial regulators in accomplishing our shared mission of protecting student borrowers. We wish to highlight the immediate need to harmonize our work given the expected resumption of most federal student loan repayments in October of this year and the need to ensure servicers and collection agencies are adequately prepared to deal with the uncertain economic pressures on students, graduates, and their families stemming from the COVID-19 pandemic.

**I. Additional actions by the Department are needed to facilitate robust state-federal coordination and collaboration in the oversight of federal student loan servicers.**

In 2016, the Department recognized the applicability of and encouraged state regulation of private companies servicing or collecting on loans originated through the William D. Ford Federal Direct Loan Program (Direct Loan Program), and the Federal Family Education Loan (FFEL) Program (hereinafter, federal student loan servicers).<sup>3</sup> Since that time, and in addition to existing authority over debt collectors collecting on student loan debt, 11 states and the District of Columbia have enacted laws to regulate

<sup>1</sup> CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking and financial regulatory agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.

<sup>2</sup> NACARA is an association comprised of state and municipal governmental agencies that regulate the debt collection industry and administer and enforce laws and regulations. NACARA's member agencies regulate debt collectors through such methods as licensing or registration, compliance and consumer protection examinations, responses to consumer complaints, and administrative or civil enforcement actions.

<sup>3</sup> See Memorandum from Ted Mitchell, Under Secretary, U.S. Department of Education, *Policy Direction on Federal Student Loan Servicing* (July 20, 2016) available at <https://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf>.

federal student loan servicers and protect borrowers residing in their states from harmful and substandard servicing practices.<sup>4</sup>

Nevertheless, in 2017, the Department reversed course and began taking actions to prevent states from continuing to regulate student loan servicers. First, in December 2017, the Department issued a memorandum to federal student loan servicers asserting, for the first time, that the Privacy Act of 1974 prevents these firms from producing any documentation to state financial regulators unless they first obtain express approval from the Department.<sup>5</sup> Since its issuance, servicers have relied on this Privacy Act memorandum to refuse to produce records and documents requested by state financial regulators. This has significantly obstructed state oversight efforts.

Subsequently, in March 2018, the Department issued a notice adopting the unprecedented position that state regulation of federal student loan servicers is preempted under Title IV of the Higher Education Act of 1965 (HEA) and its implementing regulations.<sup>6</sup> Although many states had already enacted student loan servicing laws to protect student borrowers, through the notice, the Department asserted broad, sweeping preemption to render such laws inapplicable and insulate federal student loan servicers from state regulation. Through the 2018 preemption notice and the earlier Privacy Act memorandum, the Department sought to occupy the field of student loan servicing regulation.

However, more recently, in May 2021, the Department issued revised vendor guidance to establish a streamlined and expedited process for reviewing records and data requests from state financial regulators which superseded the Privacy Act memorandum.<sup>7</sup> While CSBS and NACARA are certainly pleased that the revised guidance contemplates state regulatory oversight of federal student loan servicers and debt collectors, we believe that additional steps must be taken to enable robust collaboration and coordination between the Department and state financial regulators as regulatory partners. In particular, CSBS and NACARA request that the Department rescind the 2018 preemption notice and formally recognize that state police powers and regulatory oversight authority independently authorize state officials to access records in the possession of federal student loan servicers and collectors.

## **II. The Department should formally recognize that state regulation and oversight is fully applicable to federal student loan servicers and that state financial regulators are independently authorized to access records possessed by servicers.**

The Department should rescind the 2018 preemption notice because it sets forth baseless assertions of preemption to obstruct and discourage state regulation of federal student loan servicers and collectors. As CSBS explained in 2018, the preemption notice is contrary to law for it is without basis in the HEA, its implementing regulations, and any relevant legal precedent or legislative history.<sup>8</sup> Indeed, as one court found, the notice is merely “a retroactive, ex-post rationalization for DOED’s policy changes” that “does

<sup>4</sup> States that have enacted student loan servicing laws include California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey, New York, Rhode Island, and Washington.

<sup>5</sup> See Memorandum from Patrick A. Bradfield, Director, Federal Student Aid Acquisition, U.S. Department of Education, *Ownership of and Access to U.S. Department of Education Records and Data* (December 27, 2017).

<sup>6</sup> See *Federal Preemption and State Regulation of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers*, 83 Fed. Reg. 10619 (March 12, 2018).

<sup>7</sup> See Memorandum from Richard Cordray, Chief Operating Officer, Federal Student Aid, U.S. Department of Education, *Revised guidance to FSA vendors on outside requests for Department records and data* (May 28, 2021) available at <https://www2.ed.gov/policy/fund/guid/revised-vendor-guidance-fsa.pdf>.

<sup>8</sup> See, e.g., CSBS, *CSBS Opposes Department of Education Plan to Preempt State Authority on Student Loans* (Mar. 2, 2018) available at <https://www.csbs.org/policy/csbs-opposes-department-education-plan-preempt-state-authority-student-loans>.

not analyze in any real way the regulation it cites”, and thus, the broad, anticipatory assertions of preemption therein are not worthy of deference.<sup>9</sup>

In addition to misconstruing the law, precluding states from regulating federal student loan servicers is unwise and misguided as a policy matter. In fact, the Department’s stated rationale for preempting state law—namely, that state regulation would conflict with the intent of Congress to save taxpayer dollars and to ensure uniform administration of the federal student loan programs—actually counsel against preemption. For instance, as independent reviews have shown, it is the deficiencies in the Department’s oversight and management of federal student loan servicers, rather than the intervention of States to fill this regulatory gap, that threatens harm to the federal fiscal position.<sup>10</sup>

While CSBS and NACARA certainly encourage the Department to enhance and improve its contract management functions, it is entirely inappropriate for the Department to prevent states from fulfilling their traditional role of establishing regulatory regimes to protect student borrowers in their states. One of the hallmarks of our federalist system is that it enables states “to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times, without having to rely solely upon the political processes that control a remote central power.”<sup>11</sup>

The proliferation of state student loan servicer regulation in recent years is a manifestation of the rights afforded student borrowers as citizens in our federalist system to exercise control over their economic destiny and, as such, should be welcomed by the Department. Therefore, CSBS and NACARA urge the Department to rescind the 2018 preemption notice and formally recognize that state oversight and regulation is fully applicable to federal student loan servicers and debt collectors, entirely appropriate, and not in conflict with the purpose of the HEA.

For the same reason, the Department should also formally recognize that state financial regulators are authorized to access records and data directly from federal student loan servicers and debt collectors independent of federal law. Although, again, CSBS and NACARA appreciate the Department’s intent to establish an expedited process to provide state financial regulators access to records through the revised vendor guidance, that guidance operates on the same false premise as the Privacy Act memorandum, namely, that state financial regulators cannot independently access documents and records in the possession of servicers and collectors.

Access to records is an indispensable aspect of the police and regulatory authority; encumbering this power with artificial procedural hurdles can chill effective supervision to the detriment of student loan borrowers. Federal student loan servicers are federal contractors, but they are not federal instrumentalities. As private businesses they remain subject to visitation by state officials, including the power to request books and records. Therefore, CSBS and NACARA urge the Department to recognize that state financial regulators are independently authorized to access records in possession of the federal student loan servicers and debt collectors subject to state regulation and take other steps necessary to enable efficient and effective coordination and collaboration between the Department and state financial regulators, such as establishing information sharing arrangements with state regulators.

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<sup>9</sup> *Student Loan Servicing Alliance v. District of Columbia, et al.*, 351 F. Supp. 3d 25 (D.D.C. 2018) (Civil Action No. 18-0604 (PLF)).

<sup>10</sup> See, e.g., GAO, FEDERAL STUDENT LOANS: Education Could Improve Direct Loan Program Customer Service and Oversight, GAO-16-523, 27 (May 2016).

<sup>11</sup> *Bond v. United States*, 564 U.S. 211, 221 (2011).

### III. Conclusion

We are pleased that the Department has indicated a desire to coordinate and collaborate with state financial regulators in supervising and overseeing federal student loan servicers and debt collectors. CSBS and NACARA have written this letter to request that the Department take certain actions to cease obstructing or discouraging state regulation. Such actions include formally recognizing states' independent authority to fully regulate and supervise federal student loan servicers and to access records and information directly from federal servicers. State financial regulators look forward to partnering with the Department to accomplish their shared goal of protecting student borrowers.

Sincerely,

John Ryan  
President & CEO  
Conference of State Bank Supervisors

Jedd Bellman  
President  
North American Collection Agency  
Regulatory Association

Cc: Richard Cordray, Chief Operating Officer, Federal Student Aid, U.S. Department of Education