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THE CARES ACT: GUIDANCE FOR SERVICING FEDERAL AND PRIVATE STUDENT LOANS IN THE U.S. DURING THE COVID-19 PANDEMIC

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SUMMARY

The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (the "CARES Act") was signed into law on March 27, 2020. Although much has been made of the obligations imposed on student loans and the servicers of such loans, the CARES Act actually highlights the differences between federally and non-federally owned student loans. Approximately 92% of student loans are federally owned, i.e., owned by the Department of Education. The other 8% of loans are owned by private lenders. The CARES Act imposes wide ranging obligations on federally owned student loans for the next six months—payment suspension, interest rate reduction, and collections to name a few. Meanwhile, the CARES Act places no requirements whatsoever on privately owned student loans beyond the credit reporting obligations imposed on all loans. These differences and the significance to student loan servicers (many of which find themselves in the boat of servicing both federal and private student loans) are highlighted in this Alert.

The CARES Act suspends payment obligations on federally owned student loans. Prior to the enactment of the CARES Act, the Department proactively suspended payments for 60 days (see link). Section 3513 of the CARES Act extended that measure by suspending all payments on federally owned student loans through September 30, 2020. *See* § 3513(a). There is no such payment suspension obligation imposed on privately owned student loans.

This places federal and private student loan servicers in uniquely different circumstances. Federal student loan servicers find themselves needing to put measures in place to comply with the CARES Act requirements through September 2020. Conversely, private student loan servicers may continue using their standard policies and procedures, although they have likely already seen a notable increase in accommodation requests in light of the COVID-19 pandemic. Although accommodations can be difficult for many private student loan servicers due to their own payment obligations to the loans' investors (unlike federal student loan servicers), the Student Loan Servicing

Alliance (SLSA), which is a trade association of private student loan servicers, issued a release on March 31, 2020 (see link) advising that "nearly all" private student loan servicers have worked with the loan investors to provide up to three months of suspended payment obligations, which aligns with the direction from the CARES Act. This SLSA guidance confirms that, while different servicers "have different flexibility given different loan programs," servicers see value in taking action that will avoid delinquencies and defaults as long as borrowers are proactively reaching out and obtaining appropriate accommodations.

Interest Rate

Section 3513 of the CARES Act provides that interest shall not accrue during the payment suspension period until September 30, 2020. *See* § 3513(b). Similar to payment suspension, the Department had proactively reduced the interest rate on federal loans to 0% and the CARES Act simply extends this relief (see link). The CARES Act provides no such interest relief for privately owned student loans.

This will require federal student loans servicers to ensure they have adequate measures in place to accurately calculate loan balances once loan payments become due again in October 2020, while private loans servicers, again, can continue to use their standard policies and procedures as it relates to interest rates during forbearances, deferments, or other types of accommodations. Most student loan servicers will be unable to provide interest rate relief to borrowers due to their obligations to investors. This means that private student loan borrowers that obtain an accommodation will see their account balance increase as a result of the COVID-19 pandemic, which may cause downstream impact on servicers of such loans in the future.

Rehabilitation and Forgiveness Programs

Certain federal student loans offer rehabilitation programs (for instance, FFEL and Direct Loan) and forgiveness programs (for instance, PSLF) to borrowers. Section 3513 of the CARES Act imposes additional obligations on federal student loans servicers to account for rehabilitation and forgiveness programs during the payment suspension period that lasts until September 30, 2020. Specifically, for federal loan rehabilitation and forgiveness programs, each month for which a loan payment was suspended under the CARES Act shall be "deemed … as if the borrower of the loan has made a payment." *See* § 3513(c).

This places a significant burden on federal student loan servicers to ensure that loan payments are properly accounted for. The servicer's accounting of payments made under those programs is particularly important because it will impact the date on which borrowers complete such programs. For certain programs, such as the FFEL rehabilitation program which typically requires 9 timely payments, the CARES Act will have the practical consequence of permitting borrowers to complete more than half of the program without making any payments.

The CARES Act has no such obligation for similar programs employed by private student loan servicers. The SLSA guidance instructs, however, that private student loan servicers will continue to offer repayment plans and options to borrowers "after this crisis passes."

Credit Reporting Obligations

We first discussed the credit reporting implications of the CARES Act in a Client Alert on March 26, 2020 (see link). Unlike the obligations discussed above, these credit reporting requirements apply to **both** federally and non-federally owned loans. Section 4021 of the CARES Act modifies Section 1681s-2(a)(1) of the Fair Credit Reporting Act (FCRA) to modify the manner in which furnishers of credit information are instructed to report loan "accommodations," such as forbearances, deferments, or other types of payment modifications. Whereas industry guidelines previously instructed furnishers to report such accommodations using industry specific codes, the CARES Act now requires that furnishers continue to report borrowers using the loan status at the time the borrower and furnisher entered into the accommodation. These obligations will extend to 120 days after the COVID-19 national emergency ends.

In addition, Section 3513 of the CARES Act also impacts credit reporting of federally owned loans by requiring student loan servicers to report student loans through September 30, 2020 "as if it were a regularly scheduled payment made by a borrower." Practically speaking, however, Section 3513 does not place any meaningful credit reporting obligations on servicers beyond Section 4021 because both sections require student loans servicers to report loans through the COVID-19 pandemic as if payments had been timely made.

The Consumer Data Industry Association (CDIA), which sets credit reporting industry guidelines for credit reporting in its annual Metro-2 Credit Reporting Manual, has weighed in as well (see link and link). The CDIA clarified that, even to the extent that such "accommodations" are reported (which they should not be for the time period relevant under the CARES Act), such reporting will not impact credit scores under either the FICO or VantageScore systems. Additionally, the CDIA further clarified that use of the appropriate natural disaster codes will ensure that consumer credit scores will not be impacted by reporting a forbearance, deferment, or other accommodation.

In light of the CARES Act, the CDIA guidance referenced above is largely superfluous because servicers should be reporting student loan using their pre-pandemic account status through September 2020. That said, the CDIA remains the industry standard for credit reporting and is a highly relevant consideration for student loan servicers moving forward through the COVID-19 pandemic. Both federal and private student loan servicers should lean on the CDIA and advise from their regulatory and compliance counsel to ensure that their credit reporting is in compliance with industry and FCRA standards.

Collections

The CARES Act also suspends involuntary collections—including wage garnishment, tax refund reductions, and administration offsets—on federal student loans through September 2020. There is no such suspension of collections for private student loans in the CARES Act. *See* § 3513(e). This will require federal student loan servicers to put measures in place to ensure that prior policies and procedures as to collections are stayed for the next six months in order to comply with the new law. Private student loan servicers need not do this, and certain states are reporting an increase in private student loan collections actions. This means that private student loans servicers will need to make a business decision as to whether to enforce their rights on defaulted loans or work with borrowers in the hope that they will continue making timely payments after the effects of the COVID-19 pandemic have subsided.

Communications with Borrowers

The CARES Act also imposes additional correspondence requirements on federal loans that do not exist for private loans. Under Section 3513, the Department is required to provide notice to borrowers of the CARES Act measures and then, starting August 1, 2020, provide no less than 6 notices of when each borrower's payment obligations will resume and options to enroll in income-driver repayment plans. *See* § 3513(g). These obligations are likely to fall on the servicers of student loans, which could prove challenging, particularly if the servicer's workforce remains remote due to the COVID-19 pandemic towards the end of the payment suspension period. There is no corresponding requirement for private student loan servicers, but most servicers' pattern and practice is to provide notice to borrowers when payments are scheduled to restart following an accommodation. Regardless, however, maintaining direct and clear communications with borrowers would be best practices for both federal and private student loan servicers regardless of the CARES Act in order to ensure that borrowers timely pick up their payments again in October 2020.

Conclusion

All student loans servicers find themselves affected by the CARES Act and the COVID-19 pandemic as borrowers increasingly require various levels of accommodations. The CARES Act, however, deals with federal and private loans very differently. Federal student loan servicers face hurdles and other challenges associated with effectuating the CARES Act requirements, while private student loan servicers are largely unaffected by the CARES Act beyond the extensive credit reporting requirements.

At the end of the day, however, both federal and private student loan servicers face similar challenges as it relates to finding business solutions that enable them to meet their own obligations to the loan owners and investors, while maximizing loan performance moving forward and mitigating litigation risk as much as possible. Maximizing loan performance and mitigating litigation in the present context of the COVID-19 pandemic will be aided by focusing on the payment suspension, interest rate, rehabilitation and forgiveness, credit reporting, collections, communications requirements discussed herein.

We at Bryan Cave Leighton Paisner LLP have extensive experience helping clients with all student loan issues from regulatory compliance to major class action litigation. We will continue to monitor student loan developments amid the COVID-19 pandemic and are happy to address your questions and concerns. Please reach out to your regular BCLP contact, a member of BCLP's Regulatory & Compliance, Commercial Disputes or Class Actions practices, or the authors of this Client Alert.

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MEET THE TEAM

Matthew M. Petersen

Denver / Chicago

matt.petersen@bclplaw.com
+1 303 866 0634

Christopher J. Schmidt

St. Louis

christopher.schmidt@bclplaw.com
+1 314 259 2616
