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Legal Department

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NELNET, INC.

June 28, 2018

By Email: StudentLoanServicing@dbo.ca.gov

Department of Business Oversight
Division of Financial Institutions
Attn: Jan Lynn Owen, Commissioner of Business Oversight
1515 K Street, Suite 200
Sacramento, California 95814-4052

Dear Ms. Owen,

We received your June 22, 2018 letter requesting clarification on our position that federal law preempts the California Student Loan Servicing Act "the California Act" and its proposed implementing regulation. This letter provides a summary of our position with respect to attempted state regulation of federal student loan servicers. Our position is aligned with the U.S. Department of Education's recent preemption Notice published in the Federal Register (83 FR 10619) ("Notice")[1] and comments submitted by the Student Loan Servicing Alliance ("SLSA") in response to the California Act and proposed regulation.

Federal student loans, which include Federal Direct, Federal Family Education, and Perkins loans, are each made, insured, or guaranteed under a federal program, as authorized by Title IV of the Higher Education Act ("HEA"). Federal student loan servicers are contracted by the Department of Education ("the Department") to conduct loan servicing activities, including all interactions with borrowers. These contracts include specific rules and requirements federal servicers must follow. In its Notice, the Department indicates that state regulations surrounding the licensing of federal student loan servicers impede federal interests.[2] Citing *Gartrell Construction Inc., vs. Aubry* (940 F. 2d 437 (9th Cir. 1991)), the Department's position is that such licensing requirements interfere with the government's selection of contractors, and that state-imposed registration and licensure requirements conflict with and add to federal requirements. Therefore, these state requirements are preempted by federal law[3]. As the Department notes, federal student loan servicers "are acting pursuant to a contract with the Federal government, and the servicers stand in the shoes of the Federal government in performing required actions under the Direct Loan Program."[4] It is the Department's belief that "the statutory and regulatory provisions and contracts governing the Direct Loan Program preclude State regulation, either of borrowers or servicers."[5]

The Department's Notice also discusses preemption of state laws which seek to regulate borrower communications. State laws requiring federal loan servicers to respond to borrowers or provide disclosures within a certain time period are preempted by federal regulations. The HEA provides a uniform set of requirements for federal student loans that are applicable to borrower communications in all states. The HEA grants the federal government authority to regulate federal student loan activity, and explicitly states, "[l]oans

[1] The Department's Notice can be found here in full.
[2] Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 FR 10619, 10620
[3] *Id.*
[4] *Id.* at 10621
[5] *Id.*

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made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.) shall not be subject to any disclosure requirements of any State law." (20 U.S.C. § 1098(g)) As discussed within the Notice, the Ninth Circuit in *Chae v. SLM Corp*. ruled in favor of both express and conflict preemption with respect to federal student loan programs, specifically finding that disclosures are subject to express preemption under § 1098(g), stating "state disclosure law is preempted by the federal statutory and regulatory scheme"[6]. Similarly, the U.S. District Court for the Southern District of Illinois found state-level regulation of borrower-facing disclosures was preempted by the federal law. With respect to § 1098(g), the court in *Nelson v. Great Lakes Education Loan Services, Inc.* noted Congress' intent for § 1098(g) was "to preempt any state law requiring lenders to reveal facts or information not required by federal law".[7]

Given this federal statutory, regulatory, and judicial framework, we believe it is clear that Chapter 3 of the California Act and Section 2049 of the proposed regulation are preempted with respect to federally-owned and guaranteed loans. Requirements surrounding servicing transfers are already regulated under 34 C.F.R § 682.208. In addition, requirements focusing on repayment plans, deferments, forbearances, and due diligence are already regulated under 34 C.F.R. § 682 and § 685. Other disclosure requirements in Section 2051 and Section 2052 of the proposed regulation are also preempted by 20 U.S.C. 1098(g), and borrowers are able to access complete loan information via the Department's National Student Loan Data System, which is the Department's central database for federal student aid.

If you have any questions or would like to discuss further, please contact:

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Sincerely,

Hiruth Haile
Senior Compliance Officer

Cc: Department of Business Oversight
Division of Financial Institutions
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[6] *Chae v. SLM Corp.*, 593 F.3d 936, 943 (9th Cir. 2010)
[7] Nelson v. Great Lakes Education Loan Services, Inc., No. 3:17-CV-183, 2017 WL 6501919, 10 (S.D. Ill. 2017)