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Mr. Eamon Rock
New York State Department of Financial Services
One State Street
New York, NY 10004

Dear Mr. Rock:

The New York Bankers Association ("NYBA") submits this comment letter in response to the New York State Department of Financial Services' ("DFS" or the "Department") Proposed Regulation Part 409 (the "Proposed Regulation") entitled "Student Loan Servicers" published on July 31, 2019. NYBA is comprised of banks of all sizes across every region of New York State. Together NYBA members employ nearly 200,000 New Yorkers, safeguard $2 trillion in deposits, and extend nearly $70 billion in home and small business loans. We thank you for the opportunity to provide our views.

While NYBA shares in the Department's goals of protecting consumers, we believe such protection must take a balanced approach so as not to impose unnecessary and prohibitive burdens on both small and large financial institutions in their roles as student loan servicers. While the law provides a path for banks to claim an exemption from the licensing requirement, servicer banks are not exempt from some of the substantive requirements. It is important to note that banks generally only service private student loans that they own and hold on their respective balance sheets, creating a difference from that of non-bank servicers, whose regulatory regime is quite different from the requirements of a bank.

As such, NYBA provides the following general and specific comments to the Department's proposal:

General Comments

1. Timing of Implementation

At the outset, NYBA notes that the publication in the State Register on July 31, 2019 included the following note regarding an immediate implementation of the final rule:

Compliance Schedule.

The requirements of Article 14-A become effective October 9, 2019, it is anticipated that this regulation will be in place and effective by that date. The regulation will be effective upon publication of the notice of adoption.

NYBA respectfully urges the Department to provide ample time for comment and implementation, as the final rule is setting forth a novel set of regulations for entities servicing student loans. Although student loan servicers are in many cases already in compliance with the principles that would be established under this rule, the process of resolving ambiguities and fully implementing every provision should not be rushed – and new processes and controls will need to be implemented for any new requirements. Historically, the Department has spent considerable time reviewing comments and considering potential effects on industries when examining new sets of regulations and rules to be implemented. We urge the same caution here. We therefore encourage the Department to strongly consider further revisions and comment periods after reviewing the feedback received during this period, pursuant to the State Administrative Procedures Act ("SAPA"). We respectfully request ample implementation time for any new rules, allowing at least six months between the adoption of new rules and their effective date.

2. State Regulations Should be Consistent With Similar Federal Rules to Promote Efficiency and Reduce Consumer Confusion

By way of background, financial institutions are governed by an array of rules at the federal level covering student loans and student loan servicing. Currently, student loan servicers are subject to federal and state laws prohibiting fraudulent conduct including federal UDAP and UDAAP laws, Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a)) and Consumer Financial Protection Bureau ("CFPB") UDAAP rules. In addition, the CFPB engages in regular supervisory examination of national banks for compliance with Dodd-Frank UDAAP provisions, as well as other federal laws impacting student lending such as FCRA/Reg. V. ECOA/Reg. B compliance, and TILA/Reg. Z. The Office of the Comptroller of the Currency ("OCC") and FDIC enforce Section 5 of the FTC Act against Banks/Bank-Servicers: Section 5 of the Federal Trade Commission Act (FTC Act), Ch. 311, §5, 38 Stat. 719, codified at 15 U.S.C. §45(a) prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce.

In addition, the Fair Debt Collections Practices Act requires that after a debt collector knows the consumer is represented by an attorney with regard to the loan and has knowledge of, or can readily ascertain, such attorney's name and address, the debt collector cannot communicate with any person other than that that attorney. (15 USC 1692b; 15 USC 1692c). The CFPB uses its UDAAP authority to enforce FDCPA provisions against banks with student loan servicer divisions.

These rules represent a studied approach to balancing consumer protection needs with regulatory costs burdens, and therefore NYBA urges the Department to remain consistent with federal regulations including those promulgated by the CFPB. In addition, federal law may preempt certain provisions of Part 409 for some institutions which fall under this Proposed Regulation. Servicers already have processes, procedures, and controls in place for complying with federal and State consumer protection rules.

Specific Comments

1. Definitions

Several proposed definitions found within Section 409.1 ("Definitions") present questions for entities that service student loans. Clarification and/or specific guidance is requested regarding the following definitions, with suggestions incorporated below:

i. 409.1(b) Borrower: The proposed definition of borrower includes "any person who shares a legal obligation with such resident for repaying a student loan." While it is understood that resident in the section refers to a resident of New York State, it is unclear whether the definition intends that the person who shares in the legal obligation must also be a resident of New York State, as New York cannot regulate the activities of banks related to individuals who are not residents of the state of New York. Within student lending, it is not uncommon for a student borrower and cosigner to be residents of two different states. Though this definition is the same as the statutory description, we respectfully request that the Department expand the definition to address this issue.

ii. 409.1(g) Overpayment: A payment may be submitted for an amount that exceeds the monthly scheduled amount but is less than the total monthly amount due, which occurs when there is a past due amount on the account. Under the proposed definition of overpayment, the past due amount is not taken into consideration, leading to uncertainty for servicers that would not consider a payment in excess of the monthly amount to be an overpayment/prepayment within their system. One possible solution is to include within the definition that overpayment includes the past due amount in the "*total* monthly amount due", thereby allowing servicers to apply the overpayment to the past due amount. Further, the definition should make it clear that an overpayment does not result from a payment made in excess of the total current amount due, if that payment results in paying the loan in full.

iii. 409.1(k)(2) Servicing: The proposed definition includes reference to an exclusion based on the federal loan definition of default but does not provide the counterpart applicable to the default of private student loans, found under the Federal Financial Institution Examination Council's retail credit classification rules. To alleviate any misinterpretation, a revision to distinguish the different default period of 270 days or more applicable to federal student loans and the default period of 120 days or more applicable to private student loans may be useful in the final rule.

iv. 409.1(q) Private student loan: The proposed wording creates uncertainty as to additional types of loans that may be unintentionally covered under the current proposed definition of private student loan. The proposed definition may be interpreted to apply to traditional home equity loans and other products that are not marketed as private education loans but are incidentally used to pay for post-secondary educational expenses. Guidance or clarification to indicate that the definition of private student loans does not include real-estate backed loans and open-ended credit would address this uncertainty.

2. Servicing Standards

Proposed regulation Section 409.8, entitled "Servicing Standards," addresses several areas for student loan servicers. One area addressed is 409.8(b), governing nonconforming payments. Under the proposed regulation, a duty to inquire arises even if the payment is nonconforming by 1 cent (e.g., a $100 payment is due and the servicer receives either $99.99 or $100.01). The fairly high incidence of immaterial amounts under/over the total monthly amount due does not support the burden of an ongoing duty to inquire. Servicers should be permitted to allocate immaterial under/over amounts among multiple loans in a single account using the servicer's prominently and conspicuously disclosed standard payment procedures. The ongoing duty to inquire (i.e. in response to each nonconforming payment) is problematic in other contexts as well, including in situations where borrowers regularly make a series of underpayments each month to satisfy their payment obligation. If a borrower regularly or periodically makes multiple underpayments each month, servicers should not have to ask how each underpayment should be allocated. Nor should servicers be required to sort out the complexities of either holding multiple payments in suspense each month or handle the operational burden of making multiple retroactive adjustments—i.e., allocating and then reallocating underpayments—each month.

Under 409.8(b), it is also unclear as to how long a servicer must wait for borrower instructions before applying the nonconforming payment to the account. For example, the proposed rule does not provide a clear approach in instances where a borrower's failure to respond to the servicer's inquiry persists for over 30 days. This creates credit reporting ambiguity for servicers who ordinarily would report a 30-day delinquency to the credit reporting agencies when no payment is applied to an account for that period of time. While a servicer cannot withhold credit bureau reporting under the Fair Credit Reporting Act ("FCRA"), the servicer cannot report an account paid current if the payment is being held in suspension. Even if the final rule would permit a servicer to immediately apply the nonconforming payment and to make a retroactive adjustment based on borrower instructions received after the payment is initially applied to the account, that would still create risk of significant operational complexity and unnecessary cost for servicers, including:

- having to retroactively adjust more than one payment (e.g., if a borrower makes 6 conforming payments after the nonconforming payment, and after the 6th conforming payment provides instructions on how apply the nonconforming payment, servicers shouldn't have the extra complexity/operational burden of having to retroactively adjust 7 payments) which introduces risks to the integrity of the system of record, and
- the unnecessary burden of updating credit bureau reporting if a retroactive adjustment based on borrower instructions would change such credit reporting.

Further, borrower instructions for a particular nonconforming payment may be unworkable for future nonconforming payments under proposed rule 409.8(b). To avoid interpretive ambiguities and unintended compliance risks, it would be better for servicers to be allowed to require that instructions be provided as a percentage of over/under payments so that there is clarity on how to effectuate those instructions for future non-conforming payments.

For all of the above reasons, NYBA respectfully recommends an alternative approach under proposed rule 409.8(b) for allocating non-conforming payments that a borrower makes on an account containing multiple student loans. First, the proposed rule could require an annual inquiry of a student borrower with such accounts, asking as to how to apply any of the student

borrower's nonconforming payments to the loans in the account. This inquiry would be made to every student loan borrower, not just to borrowers at the point in time when a nonconforming payment is made. Second, the proposed rule could allow a servicer to require that a borrower's instructions (in response to the inquiry) direct the allocation of each nonconforming payment as a percentage of such payment to each loan in the account. A servicer would be required to follow such instructions from the borrower on how to apply nonconforming payments, if any, received after such instructions are received until the student borrower provides different instructions. NYBA believes this alternative would square within the intent of the statute, which appears to require that servicers follow borrower intention for non-conforming payments.

Under proposed rule 409.8(e), relating to the crediting of payments, there does not appear to be any discretion afforded to the servicer in order to ensure the payment can be processed by a certain time in order to be considered on time. For example, the cut-off time for processing payments and deposits is prominently and conspicuously displayed and made clear by the servicer. As such, payments submitted after such disclosed payment processing cut-off times are deemed received as of the next calendar day. This may be addressed by including into the final regulation some recognition that in circumstances where the student loan servicer has prominently and conspicuously displayed or disclosed a deadline by which payment must be received, such deadline will determine the "on time" treatment of any payment.

Proposed rule 409.8(f), which governs customer service telephone and representative training requirements, poses concerns for student loan servicers that appoint a dedicated customer service representative for each customer who continues to serve the customer throughout his/her borrowing experience. The requirement under 409.8(f) may frustrate this personalized customer service process by steering customers away from his or her dedicated personalized support to a general number. This may force servicers to implement a process that consumes financial and operational resources that run counter to a more efficient and customer-friendly service model. In addition, the requirement in subsection (2) to discuss all repayment plans/options, loan forgiveness, cancellation, and discharge benefits in response to every borrower repayment inquiry may create customer confusion and undermine a servicer's ability to provide targeted guidance customized to meet the needs of the borrower. For example, a borrower who calls with a request for a forbearance to suspend her payments until she begins receiving a pay-check for a new job 2 months later may be more confused to hear the servicer discuss options that have not been requested or are inapplicable to the borrower's circumstances. Further, servicers that only service private student loans should not be required to train customer service representatives or be required to discuss with borrowers options unavailable to private loan borrowers, such as deferments. Private loans do not offer deferments, as deferments involve taxpayer subsidies covering interest that accrues on federal loans.

Proposed rule 409.8(g), addressing notices and information made available to borrowers regarding loan repayment options and loan forgiveness benefits, imposes responsibilities related exclusively to federal student loans on servicers who only service private student loans. Servicers of only private student loans should not be required to amend their servicing operations/systems and policies/procedures to address inapplicable servicing requirements. Further, servicers should have latitude and flexibility in the manner in which they provide the information under section (g)(2) to borrowers. For example, some borrowers have access to notices, disclosures, and documents electronically through online banking services and it is a long-standing, customary process for customers to receive important information/documents concerning financial accounts through such online banking services.

Finally, proposed rule 409.8(h), governing borrower information and statements of account, requires servicers to duplicate and re-engineer how they currently provide customers online

account access at a great cost, without incremental customer service improvement, and with significant risk to the security of customer information. Due to information security concerns, customer information is not maintained on an Internet Website. Many servicers already provide the information described in section (h) through robust and innovative customer online account access services and tools. Servicers should be given flexibility in the means in which they provide such information to borrowers, based on a risk assessment of customer information protection and without disruption to valuable online customer service tools that already provide borrowers access to clear and complete account records and loan repayment information and options.

We appreciate the opportunity to comment on the Proposed Regulation. Given the significant changes proposed, we hope the Department will consider further comment periods and an appropriate amount of time for implementation of the new rules. We welcome the opportunity to meet with you to discuss this further. Thank you.

Sincerely,

Michael P. Smith