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STUDENT LOAN SERVICING ALLIANCE

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August 7, 2018

Via Electronic Mail – sara.rietcheck@dfi.wa.gov

Ms. Sara Rietcheck
P.O. Box 41200
Olympia, WA 98504-1200

Re: Comments on proposed rules implementing SB 6029, c 62, Laws of 2018

Dear Mr. Dyer:

On behalf of the Student Loan Servicing Alliance (SLSA), I am transmitting comments on the recently published proposed regulations to implement SB 6029, c 62, Laws of 2018, relating to establishing a student loan bill of rights (the "Act"). SLSA is a non-profit, membership organization consisting of student loan servicers in the two principal federal education loan programs: the Federal Direct Loan Program ("FDLP") and the Federal Family Education Loan Program ("FFELP"), as well as private education loan servicers. Our approximately 20 servicer members work diligently to provide the full range of servicing operations for student loans, including conversion from in-school status to repayment, payment processing, collections, claims processing, and customer service. Together, SLSA members service approximately 95 percent of all outstanding student loans in the United States.

SLSA primarily focuses on the operational and technical issues that impact customer service and program administration. We develop industry positions and promote best practices, which help our members provide a high level of quality customer service. We also work with other organizations to support the continuing enhancement and streamlining of student loan programs to improve efficiency, reduce complexity, and promote both a better customer experience and the successful repayment of a customer's student loans. It is in that context that I submit these comments to the modified proposed regulations, acknowledging that all of the key stakeholders -- regulators, legislators, servicers, and, most importantly, student loan borrowers -- benefit from a cohesive regulatory scheme focused upon practices most likely to reduce borrower confusion and promote borrower success.

Our chief concern with the regulations is the fact that federal law expressly preempts provisions of the Washington statute and these proposed regulations. Specifically, 20 U.S.C. § 1098g provides that "[l]oans 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." All three of the main types of federal student loans (loans made under the FDLP, FFELP, and the Federal Perkins Loan (Perkins) Program) are made, insured or guaranteed pursuant to a program authorized by title IV of the Higher Education Act ("HEA"), and therefore subject to express federal preemption with respect to any state-required disclosures.

Federal courts have long acknowledged that state law regulating student loan servicers is subject to both express preemption and conflict preemption in the context of the federal loan programs. For example, the Ninth Circuit in *Chae v. SLM Corp.* held that the HEA expressly preempted inadequate disclosure claims under California's Unfair Competition Law and Consumer Remedies Act against student loan servicers for fraudulent misrepresentations in billing statements and coupon books, and that "conflict preemption prohibits the Plaintiffs from bringing their [claims regarding interest calculation, late fees, and repayment start dates] because, if successful, they would create an obstacle to the achievement of congressional purposes."[1] The Court elaborated that "subjecting the federal regulatory standards to the potentially conflicting standards of fifty states on contract and consumer protection principles would stand as a severe obstacle to the effective promotion of the funding of student loans. Such an obstacle, which we consider hostile to the purposes of Congress in this program, must bow to the overriding principles of conflict preemption and federal law supremacy."[2]

The *Chae* court was very clear that state-required disclosures are expressly preempted: "[a] properly-disclosed FFELP practice cannot simultaneously be misleading under state law, for state disclosure law is preempted by the federal statutory and regulatory scheme. We conclude that the plaintiffs' claims challenging the language in [the servicer's] billing statements and coupon books are restyled improper-disclosure claims, and are therefore subject to express preemption under 20 U.S.C. § 1098g."[3]

There have also been several developments recently in the law pointing toward federal preemption of state attempts to licence and regulate student loan servicers. Just this past December, the United States District Court for the Southern District of Illinois issued a similar decision in *Nelson v. Great Lakes Educational Loan Services, Inc, et al.* (Case No. 3:17-CV-00183-NJR-SCW). In a Memorandum and Order dismissing a putative class action lawsuit against a SLSA-member servicer, the Court held that claims based on Illinois' Consumer Fraud and Deceptive Practices Act and on state common law theories of constructive fraud and negligent misrepresentation were preempted. The court held that preemption was required because these claims were predicated on the imposition of additional state law disclosure requirements onto student loan servicers over and above those imposed by federal law. This case is currently on appeal to the United States Court of Appeals for the Seventh Circuit (Seventh Circuit Case No. 18-1531).

The federal government has also taken several steps to assert preemption in connection with state attempts to license and regulate student loan servicers. In January of this year the Department of Justice filed a Statement of Interest in a case brought by Massachusetts against one of the federal

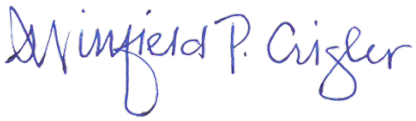
[1] *Chae v. SLM Corp.*, 593 F.3d 936, 950 (9th Cir. 2010)
[2] *Id.*
[3] *Chae,* at 943.

servicers.[4] The Department of Justice, in its Statement, maintained that the Commonwealth's claims are preempted because (1) PHEAA cannot comply with both the Commonwealth's interpretation of the relevant statutes and the actual requirements of federal law, (2) the Commonwealth's claims "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the Higher Education Act; and (3) the Commonwealth's requested relief would likely "require PHEAA to violate its contract with the Department."[5] In March the U.S. Department of Education issued a Notice in the Federal Register asserting federal preemption over state attempts to license and regulate student loan servicers.[6]

In addition, also in March, SLSA brought a lawsuit against the District of Columbia's Department of Insurance, Securities and Banking, alleging that federal law preempts the Department's attempt to regulate student loan servicers.[7] And finally, in April, a large student loan servicer sued both the U.S. Department of Education and the State of Connecticut over conflicting record keeping and document production requirements.[8] The federal preemption issues that we are concerned about are very real, and are being litigated.

Thank you for permitting us to comment on the proposed regulations. I would be happy to answer any questions you may have concerning our comments, or to discuss them further at your convenience.

Sincerely,



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[4] Statement of Interest by the United States, Massachusetts v. Pennsylvania Higher Education Assistance Agency, d/b/a FedLoan Servicing, No. 1784–CV–02682 (Mass. Super. Ct., filed Jan. 8, 2018), available at https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2018/01/Statement-of-Interest.pdf

[5] *Id.*

[6] Federal Register, Vol. 83, No. 48, page 10619 (March 12, 2018), available at https://www.gpo.gov/fdsys/pkg/FR-2018-03-12/pdf/2018-04924.pdf

[7] SLSA v. Taylor et al., Civil Action No. 18-640 (U.S. District Court for the District of Columbia, filed March 20, 2018), available at https://www.slsa.net/complaint-slsa-v-taylor/

[8] PHEAA v. Perez et al., Civil Action No. 18-___ (U.S. District Court for the District of Columbia, filed April 4, 2018), available at https://buckleysandler.com/sites/default/files/Buckley%20Sandler%20InfoBytes%20-%20PHEAA%20v.%20Perez%2C%20et%20al%20-%20Complaint%20for%20Declaratory%20and%20Injunctive%20Relief%202018.04.04.pdf