II. Understanding the Modern Private Student Loan Market

A. Introduction

The United States currently has a $1.4 trillion student loan market.[1] The student loan market is comprised of outstanding federal and private student loans.[2] Outstanding student loans include only those in repayment; not loans which have been discharged or deferred by borrowers.[3] Congress established the first federal student loan program in the 1950s and has continued to expand federal programs for student loans to promote access to higher education.[4] The Higher Education Act (HEA), which was enacted in 1965 and most recently reauthorized in 2008, has been an essential component of building the student loan market in the United States.[5] Federal programs established under the HEA have worked to provide federal student loans to borrowers with financial need and to ensure that borrowers are able to repay the loans taken out to finance their educations.[6] Over recent decades, the increase in enrollment in higher education along with the accompanying increased costs have led to more students obtaining both federal and private student loans in order to finance

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[1] *CFPB Monthly Snapshot Spotlights Student Loan Complaints*, CONSUMER FIN. PROTECTION BUREAU (Apr. 25, 2017) [hereinafter *CFPB Monthly Snapshot*], https://consumerfinance.gov/about-us/newsroom/cfpb-monthly-snapshot-spotlights-student-loan-complaints/ [https://perma.cc/RG8X-H4EA] (explaining the size of the U.S. student loan debt market).

[2] Anya Kamenetz, *Private Student Loans: The Rise and Fall (and Rise Again?)*, NPR (July 18, 2017), http://www.npr.org/sections/ed/2017/07/18/537921324/private-student-loans-the-rise-and-fall-and-rise-again [https://perma.cc/AP9J-4JPS] (stating that the $108 billion private student loans in 2016 was only "a small fraction of the $1.4 trillion . . . student loan market").

[3] C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 81 (2007) ("Outstanding loans are those in repayment and not in default or deferment.").

[4] *Id.* at 80.

[5] *Id.* at 81 (describing the role of the Higher Education Act in establishing the Direct Loan program and the FFELP).

[6] *Id.* (explaining how the FFELP, Federal Direct Loan Program, and Unsubsidized Stafford Program provide loans to students in need); *Federal Versus Private Loans*, FED. STUDENT AID, https://studentaid.ed.gov/sa/types/loans/federal-vs-private [https://perma.cc/QN56-V6LL] (explaining the advantages of Federal Student Loans and the benefits to borrowers).

their education.[7] This article seeks to address the growing number of problems associated with the expanding student loan debt market, specifically the problems caused by private student loans.

Part I of this article provides a background of the current student loan market and introduces some of the key actors that are relevant to this article, including for-profit colleges and the National Collegiate Student Loan Trusts. Part II examines the current issues impacting student loan borrowers and the role of for-profit colleges and the National Collegiate Student Loan Trusts in creating and furthering these issues. Part III discusses the historical regulation of the student loan market and recent regulatory developments. Part IV addresses other proposed solutions and reforms to help borrowers.

B. Background

1. *Private vs. Federal Student Loans*

Private student loans are generally originated by large depository institutions and loan companies specializing in lending to students.[8] Federal student loans are primarily made through the William D. Ford Federal Direct Loan (Direct Loan) Program and, until recently, were made through the Federal Family Education Loan (FFEL) Program.[9] Loans obtained through the Direct Loan Program are funded directly from the Department of Education, and, before 2010, loans obtained through FFEL were funded by private lenders

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[7] CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS REPORT 3 (2012) ("In the past decade [from 2001–2011] private student loan origination rapidly grew and then precipitously declined"); PRIVATE LOANS: FACTS AND TRENDS, THE INST. FOR C. ACCESS & SUCCESS (2016), ticas.org/sites/default/files/pub_files/private_loan_facts_trends.pdf [https://perma.cc/3XC3-9LH7] ("Data show that annual volume peaked at $18.1 billion in 2007-08 before the credit crunch, then decreased to $5.2 billion by 2010-11 before steadily increasing to $7.8 billion in 2014–15.").

[8] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. 29,302, 29,304 (May 21, 2015) (explaining the structure of private student loan origination).

[9] *Glossary*, FED. STUDENT AID (last visited Oct. 7, 2017), https://studentaid.ed.gov/sa/glossary [https://perma.cc/75EX-6C8J] ("Direct Loan: A federal student loan, made through the William D. Ford Federal Direct Loan Program, that eligible students and parents borrow directly from the U.S. Department of Education at participating schools.").

and guaranteed by the federal government.[10] FFEL, first initiated under the Higher Education Act in 1965, was the primary program for federal student lending prior to 2010, but has since been terminated due to the expenses associated with the program.[11] The Obama Administration reformed federal student loan programs in 2010 by removing the FFEL Program and making changes to the Direct Loan Program, which is now the only source of government-backed student loans.[12] Depending on the source of a student loan, either private or federal, borrowers will receive different protections and benefits.[13]

Federal student loans offer deferment options, fixed interest rates, subsidization in some cases, and, in most cases, students will not be required to have a cosigner.[14] These options available with federal student loans are intended to assist borrowers and prevent them from entering into default on their loans. Private loans, on the other hand, do not provide many of these protections and are more expensive for borrowers.[15] Often, private student loans have variable interest rates, require a cosigner, and do not offer forbearance or deferment options.[16] These differences, as advised by the CFPB, make federal loans the better option for most student borrowers.[17] However, some students

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[10] *Id.* ("Federal Family Education Loan (FFEL) Program: Under this program, private lenders made education loans that were guaranteed by the federal government.").

[11] *See* CONG. BUDGET OFFICE, PUB. NO. 4101, COSTS AND POLICY OPTIONS FOR FEDERAL STUDENT LOAN PROGRAMS 9 (2010) ("[The Congressional Budget Office] recently estimated that the President's proposal to eliminate the FFEL program and replace it with additional direct lending would save the government a total of $62 billion . . . .").

[12] *See* Equal Justice Works, *Learn What Obama's Student Loan Plan Means for You*, U.S. NEWS & WORLD REP.: EDUC. BLOG (Nov. 9, 2011), usnews.com/education/blogs/student-loan-ranger/2011/11/09/learn-what-obamas-student-loan-plan-means-for-you [https://perma.cc/3DRN-DAAM] (explaining the changes to the federal student loan programs in 2010 and how these changes were intended to make federal student loans easier to repay).

[13] FED. STUDENT AID*, supra* note 9 (comparing federal and private student loan features).

[14] *Id.* (highlighting the benefits and features of a federal student loan).

[15] *Id.* ("Federal student loans include many benefits . . . not typically offered with private loans. In contrast, private loans are generally more expensive than federal student loans.").

[16] *Id.* (highlighting the features of private student loans).

[17] *Should I Choose Federal Student Loans or Private Student Loans?*, CONSUMER FIN. PROTECTION BUREAU (Aug. 4, 2016), https://consumer finance.gov/ask-cfpb/should-i-choose-federal-student-loans-or-private-

still require private loans to cover additional costs not covered by federal loans, grants, or scholarships, or choose private loans because they are uninformed of the risks.[18]

2. The Role of For-Profit Colleges

For-profit colleges are educational institutions operating as businesses with the intention of making a profit for shareholders through recruitment of students and outside investment.[19] For-profit colleges have existed since the 1970s and have contributed to the increase in student loan debt in the United States since their inception.[20] These institutions rely on federal student aid programs for a majority of their revenues, so for-profit colleges are interested in maximizing the number of student borrowers that attend.[21] For-profit

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student-loans-en-567/ [https://perma.cc/3JPA-DFR5] ("It is best to max out your federal student loan options before you borrow any private student loans. Federal student loans usually carry more flexible protection if you run into difficulty in repaying your loans . . . .").

[18] *What Are the Different Ways to Pay For College or Graduate School?*, CONSUMER FIN. PROTECTION BUREAU (Aug. 4, 2017), https://consumerfinance.gov/ask-cfpb/what-are-the-different-ways-to-pay-for-college-or-graduate-school-en-545/ [https://perma.cc/2UVE-NM7Q] ("You generally should turn to private loans only after you have explored all other grant, scholarship, and federal loan options.").

[19] STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 1 (Comm. Print 2012) ("For-profit colleges are owned and operated by businesses. Like any business, they are ultimately accountable by law for the returns they produce for shareholders.").

[20] Editorial, *States Fight to Protect Students From For-Profit Schools*, N.Y. TIMES (July 13, 2017), https://nytimes.com/2017/07/13/opinion/for-profit-college-debt-lawsuit.html ("The idea of compensating borrowers when schools mislead or defraud them dates back to the 1970s, when federal officials saw that some colleges were looting the federal student aid program while giving students nothing in return.").

[21] Richard North Patterson, Opinion, *Too Many For-Profit Colleges Defraud Students and Taxpayers Alike*, BOS. GLOBE (June 5, 2017), bostonglobe.com/opinion/2017/06/05/too-many-for-profit-colleges-defraud-students-and-taxpayers-alike/6jKnrUaLp9Ue1SPcgU4nUL/story.html ("According to a two-year Senate investigation headed by Tom Harkin, for-profit schools depend on federal student aid programs—ultimately, on taxpayers—for 80 percent of their revenues.").

colleges are significantly more expensive than traditional, non-profit colleges, thereby requiring many students to borrow both federal and private student loans in order to attend.[22] Because tuition at many for-profit colleges is approximately equal to the amount of federal student aid for which students are eligible, students who wish to attend must take private student loans to cover additional costs.[23] In addition to the high tuition charged by these institutions which has led to increased borrowing, many for-profit colleges have been the subject of litigation as a result of deceptive practices and fraud.[24] The high tuition costs at for-profit colleges have been especially harmful because of the colleges' recruitment practices, which have been focused on vulnerable borrowers, including low-income and Veteran students.[25] As a result, the risks of for-profit colleges have been at the center of discussions about how to reform and regulate the student loan market.

3. National Collegiate Student Loan Trusts

A large portion of private student loans serve as the collateral for student loan asset-backed securities (SLABS), which may also include federal student loans.[26] The process of turning student loans into SLABS is complicated and involves many different actors working to package and sell these loans.[27] SLABS consist of these

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[22] S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, *supra* note 19, at 129 (discussing data from the U.S. Department of Education in 2009 showing 96 percent of students attending for-profit colleges took out student loans).

[23] *Id.* at 45 (finding that tuition at many for-profit colleges was designed to match the federal student loan maximum aid amount).

[24] Patricia Cohen, *For-Profit Colleges Accused of Fraud Still Receive US Funds*, N.Y. TIMES (Oct. 12, 2015), https://www.nytimes.com/2015/10/13/business/for-profit-colleges-accused-of-fraud-still-receive-us-funds.html (explaining that over one hundred for-profit colleges have violated regulations and continue to operate in the United States).

[25] *Id.* ("[T]he for-profit college industry has been accused in recent years of preying on the poor, veterans [sic] and minorities . . . .").

[26] Request for Information Regarding Student Loan Servicing, *supra* note 8, at 29,304.

[27] Stacy Cowley & Jessica Silver-Greenberg, *As Paperwork Goes Missing, Private Student Loan Debts May Be Wiped Away*, N.Y. TIMES (July 17, 2017), https://www.nytimes.com/2017/07/17/business/dealbook/student-loan-debt-collection.html.

packaged student loans and are sold to investors.[28] The process begins with loan origination, then loans are bundled together to be sold to depositors, which in turn sell the bundled loans to trusts like National Collegiate Student Loan Trusts (National Collegiate).[29] These student loan trusts then employ loan servicers to collect the payments made by borrowers and distribute the payments back to the trusts.[30] The market for these SLABS has been growing with a variety of investors involved, including startup companies like SoFi and Lending Club, and traditional investors like hedge funds and pension investments.[31]

National Collegiate, although just one of many investors in the SLABS market, has a significant role in the market, holding over 800,000 private student loans totaling over $12 billion.[32] However, more than $5 billion of the debt held by National Collegiate is in default.[33] National Collegiate's hired loan servicing companies have brought hundreds of lawsuits to collect on these loans in default.[34] While the majority of SLABS are backed by government insured federal loans, which creates a guarantee of repayment to the holders of the SLABS if borrowers enter default, the private loans held by National Collegiate are not insured by the government.[35] Recently, in

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[28] Johnathan Marino, *Startups Are Going to Make Billions Doing A (Safer) Version of What Wall Street Did With Home Loans*, BUS. INSIDER (July 10, 2015), http://www.businessinsider.com/startups-are-securitizing-student-loans-2015-6 [https://perma.cc/EB4W-NUGG] ("[S]LABS consist of student loans that have been refinanced and packaged into a large offering. That offering is then cut into pieces and sold to institutional investors, like hedge funds and pension investments.").

[29] Cowley & Silver-Greenberg, *supra* note 27.

[30] *Id.*

[31] Marino, *supra* note 28 (pointing out that not only large trusts, but new startup companies have invested in the SLABS market).

[32] Cowley & Silver-Greenberg, *supra* note 27 (discussing the size of National Collegiate's student loan holdings).

[33] *Id.* ("The troubled loans, which total at least $5 billion, are at the center of a protracted legal dispute between the student borrowers and a group of creditors who have aggressively pursued them in court after they fell behind on payments.").

[34] *Id.* ("Across the country [National Collegiate] ha[s] brought . . . more than 800 [collection cases] so far this year . . . .").

[35] Raul Carillo, *How Wall Street Profits From Student Debt*, ROLLING STONE (Apr. 14, 2016), http://www.rollingstone.com/politics/news/how-wall-street-profits-from-student-debt-20160414 [https://perma.cc/4TZ4-9THJ] ("Of the outstanding volume of SLABS, $160 billion worth (roughly 80 percent) are backed by these government-insured loans.").

the course of National Collegiate's collection actions against borrowers in default, a new documentation problem was revealed when collection lawsuits were dismissed because documents proving that National Collegiate owns the loans were missing.[36] National Collegiate's missing paperwork has raised concerns for thousands of borrowers and revealed a possibly more significant problem with the SLABs market record keeping procedures.[37]

C. Current Issues

1. $108 Billion Private Student Loan Debt Market

There is currently $108 billion in outstanding private student loans in the United States.[38] As discussed above, borrowers of private student loans are not provided with the same protections and benefits as borrowers of federal student loans, and many borrowers of private loans are vulnerable, poor students taken advantage of by deceptive lending practices at for-profit colleges.[39] Regardless of whether private student loans are issued through honest or deceptive practices, private student loans are risky for borrowers due to variable interest rates, cosigning requirements, and limited repayment options.[40]

In the CFPB's 2012 report on private student loans, the CFPB found that variable interest rates were a primary characteristic making

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[36] Cowley & Silver-Greenberg, *supra* note 27 ("Judges have already dismissed dozens of lawsuits against former students, essentially wiping out their debt, because documents proving who owns the loans are missing.").

[37] *Id.* ("Some of the problems playing out now in the $108 billion private student loan market are reminiscent of those that arose from the subprime mortgage crisis a decade ago, when billions of dollars in subprime mortgage loans were ruled uncollectible by courts because of missing or fake documentation.").

[38] *Id.* (mentioning that the private student loan market is worth $108 billion).

[39] Patricia Cohen & Emily S. Rueb, *U.S. To Help Remove Debt Burden for Students Defrauded by For-Profit Chain*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/2017/08/09/business/wilfred-student-debt.html?rref=collection%2Ftimestopic%2FFor-Profit%20Schools ("The case underscores how long the federal government has been wrestling with the issue of corrupt for-profit vocational schools that deceive vulnerable and poor students about the costs of training programs and the prospect of landing jobs.").

[40] *See* PRIVATE STUDENT LOANS REPORT, *supra* note 7, at 12 (discussing the most significant differences between federal and private student loans).

private loans riskier for borrowers than federal loans.[41] Typically, private student loans have a variable interest rate, which is determined based on the creditworthiness of the borrower.[42] In comparison, federal student loans have fixed rates or, in some instances, rates are determined by the financial need of the student.[43] These higher rates, combined with the lack of subsidization options, mean borrowers of private student loans are subject to significant debt accrual while still enrolled in school and increased difficulty in subsequent repayment.[44]

The CFPB also found that co-signing was required for the majority of private student loans, which leads to concerns for direct borrowers and their co-borrowers.[45] Often, parents or grandparents will cosign borrowers' loans because they are the only ones available to do so, and hope that higher education will result in better opportunities and borrowers being able to repay their loans.[46] As a consequence of being a cosigner, a borrower's failure to pay affects not only the borrower, but also the cosigner, resulting in a lower credit score for both parties.[47] Because private student loans spread the penalties and risk between borrower and cosigner, both parties are harmed in the event lenders engage in deceptive or fraudulent

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[41] *Id.* (explaining the significance of variable interest rates in private student loans to distinguish from federal student loans).

[42] *Id.* ("Most private student loans are variable-rate loans with risk-based pricing, where pricing varies from consumer to consumer based upon an assessment of the creditworthiness of the borrower.").

[43] *Id.* ("[A]ll Stafford borrowers are entitled to a single rate that may be reduced based on financial need . . . .").

[44] FED. STUDENT AID, *supra* note 6 (explaining that private student loans often have variable interest rates and are not subsidized by the federal government so debt accrues while in school).

[45] *CFPB Finds 90 Percent of Private Student Loan Borrowers who Applied for Co-Signer Release were Rejected*, CONSUMER FIN. PROTECTION BUREAU (June 18, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-90-percent-of-private-student-loan-borrowers-who-applied-for-co-signer-release-were-rejected/ [https://perma.cc/VT8J-JMJY] ("[B]y 2011, more than 90 percent of new private student loans were co-signed, often by a parent or grand-parent.").

[46] *Id.* ("Parents and grandparents put their financial futures on the line by co-signing private student loans to help family members achieve the dream of higher education.").

[47] *Id.* ("[Student loans] will appear on the co-signer's credit record which will count towards the co-signer's total debt level and can affect the co-signer's credit score if the loan is not repaid.").

practices.[48] In particular, a lack of loan servicer transparency has prevented many borrowers from taking advantage of options such as cosigner releases, which would allow co-signers to be cleared of the borrowers' debt when the borrower has demonstrated that they can repay the student loan alone.[49] While lack of transparency in the private student loan market has been the source of many issues for borrowers, such practices have also presented issues for regulators.

Repayment options have also been identified by the CFPB as one of the most significant differences impacting student borrowers between private and federal student loans.[50] Federal student loans offer deferment options while students are in school, forbearance options when students are temporarily unable to keep up with payments, and several payment plans, including income-based repayment.[51] Some private student loans offer short-term forbearance periods but none offer deferment or income-based repayment plans, which may mitigate risk for borrowers and provide a safety mechanism for borrowers faced with unemployment after graduation.[52] The federal student loan system provides for adjustments to repayment after separation from school, but private student loan borrowers are assessed by their ability to pay at the time of loan origination, thereby creating a lack of needed flexibility.[53]

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[48] *Id.* ("[T]he CFPB reported that private student loan servicers were putting borrowers in default [through auto-default clauses] when a co-signer died or filed for bankruptcy, even when their loans were otherwise in good standing.").

[49] *Id.* (The CFPB found that "companies rejected 90 percent of consumers who applied for co-signer release . . . [and] that consumers have little information on the specific borrower criteria needed to obtain a co-signer release.").

[50] PRIVATE STUDENT LOANS REPORT, *supra* note 7, at 12 (stating that a critical difference "between [Private Student Loan]s and the Stafford loans . . . is the risk associated with future employment and the ability to repay.").

[51] *Id.* ("Income-based repayment and income-contingent repayment allow payments to be reduced, based on current income levels. Forbearance allows for a temporary reduction or cessation of payments, potentially for many months at a time.").

[52] *Id.* at 13 ("With the exception of short-term forbearance periods, [Private Student Loan]s generally lack similar risk mitigation tools.").

[53] *Id.* ("[S]tafford loans . . . . provide[] for the adjustments for those who cannot pay after separation from school. In contrast, a [private student loan] lender has already tested for the ability to replay . . . .").

2. *For-Profit Colleges Continue to Harm Borrowers*

For-profit colleges contribute significantly to the private student loan debt market through high tuition costs, deceptive recruitment practices, and promotion of fraudulent lending. For-profit colleges appeal to students who are seeking an education but do not believe that they can afford to attend a traditional non-profit college, when in reality, for-profit colleges are more expensive and offer less valuable degrees.[54] Many of these institutions have taken advantage of students who wish to enroll and pursue higher education, which has resulted in a system that continues to leave students with student loan debt and useless degrees.[55] Many schools have been closed after state and federal lawsuits exposed deceptive lending practices and misrepresentations of the opportunities afforded to students after graduation.[56] Such deceptive practices include misrepresenting post-graduation hiring rates, concurrent work opportunities, and school accreditation status.[57]

For-profit colleges have been accused of exploiting vulnerable populations who do not understand the terms of the loans they are accepting and are desperate to attend college in pursuit of an eventual career.[58] In the early 1990s, Congress created a loan forgiveness

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[54] *How For-Profit Colleges Sell 'Risky Education' to the Most Vulnerable*, NPR (Mar. 27, 2017), http://www.npr.org/2017/03/27/521371034/how-for-profit-colleges-sell-risky-education-to-the-most-vulnerable [https://perma.cc/2PXU-YMTH] ("Though for-profit colleges hold out the promise of a better future . . . the credentials they offer tend to be 30 to 40 percent more expensive than the same credentials from a nonprofit public institution.").

[55] Editorial, *supra* note 20 ("[F]or-profit colleges . . . saddle students with crushing debt in exchange for degrees that are essentially useless.").

[56] Cohen & Rueb, *supra* note 39 (demonstrating how for-profit colleges have abused students through a case study of Wilfred Academy, and also discussing past school closings as a result of federal investigations).

[57] Jessica Mendoza, *Students Caught in the Middle of For-Profit College Debate Ask, 'What Now?,'* CS MONITOR (July 13, 2017), https://www.csmonitor.com/EqualEd/2017/0719/Students-caught-in-the-middle-of-for-profit-college-debate-ask-What-now [https://perma.cc/K8N7-CP6W] ("[W]ooed by the promise of an easy payment plan and post-graduation job placement . . . ." many students attended Everest College which "closed in 2015 in the face of a $30 million government fine for misrepresenting job placement data and altering student records.").

[58] *Id.* ("Veterans are one target of the for-profit schools, observers say, because of a loophole in the 1998 Higher Education Act[,]" and "[i]n the

program that permits students to apply for loan forgiveness if the schools they attended falsely certified them as eligible for loans.[59] Unfortunately, this program has become unworkable in recent years as more for-profit colleges have closed and claims have increased.[60] For-profit colleges' predatory practices have been known for decades, but there has yet to be a system which can effectively monitor these institutions and prevent these practices from continuing.

3. *National Collegiate Collection Lawsuits*

The lawsuits surrounding the SLABS owned by National Collegiate have brought many different issues with the private student loan market to the foreground. The cases have revealed problems in the ways that student loans are serviced and the way records are kept by student loan holders, as well as concerns about the way that the secondary market for private student loans is regulated.[61] Private student loans that have gone into default after missed payments by borrowers are pursued by the debt collection company employed by National Collegiate, Transworld Systems, who collects outstanding debt for the servicing company, Pennsylvania Higher Education Assistance Agency (PHEAA).[62] However, over the course of these collection actions, it has become clear that PHEAA is often unable to produce the necessary documentation required to collect on the

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2012-13 academic year alone, for-profit colleges received $1.7 billion through GI Bill benefits, according to the report of a two-year Senate investigation released in 2014.").

[59] Cohen & Rueb, *supra* note 39 ("Congress passed the statute in 1992 after a Senate panel concluded that 'a virtually complete breakdown in effective regulation and oversight had opened the door for fraud, abuse, and other serious problems at every level.'").

[60] *Id.* ("The discharge system was overwhelmed by applicants after a wave of for-profit failures that included Corinthian Colleges (which closed in 2015) and ITT Technical Institute (closed in 2016).").

[61] Cowley & Silver-Greenberg, *supra* note 27 (discussing recent problems arising from loan servicers collecting on loans without appropriate paperwork and the complex system of securitizing student loans).

[62] *Id.* ("Transworld Systems, a debt collector, brings most of the lawsuits for National Collegiate against delinquent borrowers. And in legal filings, it is usually a Transworld representative who swears to the accuracy of the records backing up the loan.").

loans.[63] Transworld Systems has been involved in aggressive litigation in pursuit of borrowers of the private student loans which are supposed to be owned by National Collegiate, but an audit conducted by National Collegiate found that PHEAA could not produce a single document verifying the ownership chain of loans owned by the trust.[64] National Collegiate is currently pursuing litigation against PHEAA based upon the servicer's inability to produce documentation necessary for collection, but borrowers effected by the mix up currently have no remedy.[65] PHEAA and Transworld Systems' actions have revealed a record keeping system that is not properly keeping track of the ownership of student loans, which has created uncertainty for borrowers who wish to know which company is servicing their loans.[66] Borrowers who cannot accurately determine who is servicing their loans may be unable to pursue relief options or be sure that their payments are being sent to the proper company. Many borrowers are unaware when their loans have been transferred from one loan servicer to another, thereby creating additional confusion for borrowers who seek relief or are curious about their options for repayment.[67]

The missing paperwork in the National Collegiate cases may lead to "[t]ens of thousands of people who took out private loans to pay for college but have not been able to keep up payments" having their loans forgiven.[68] The CFPB has recently taken action against

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[63] *Id.* ("Hundreds of cases have been dismissed when borrowers challenge them, according to lawyers, often because the trusts do not provide the paperwork needed to proceed.").

[64] *Id.* ("A random sample of nearly 400 National Collegiate loans found not a single one had assignment paperwork documenting the chain of ownership . . . .").

[65] *Id.* ("The legal wrangling—now playing out in three separate court cases in Pennsylvania and Delaware—has dragged on for more than a year, with no imminent resolution in sight.").

[66] *Id.* (discussing the massive amount of missing or incorrect loan documents for loans serviced by PHEAA and Transworld, and the complicated system of passing ownership of loans between various companies that borrowers are usually unaware of).

[67] *CFPB Monthly Snapshot*, *supra* note 1 ("'Student loan servicers play an important role in helping millions of people manage the loans they take out to pursue an education,' said CFPB Director Richard Cordray. 'Unfortunately, borrowers continue to report difficulties and setbacks as they try to work with their servicers to manage their loan debt.'").

[68] Cowley & Silver-Greenberg, *supra* note 27 ("[National Collegiate] is struggling to prove in court that it has the legal paperwork showing ownership

National Collegiate and Transworld Systems for illegal student loan collection debt lawsuits, and this investigation into the conduct of these institutions may provide insight into the SLABS market.[69]

Current regulation of the private student loan market in connection to loan servicers at the CFPB has relied on consumer complaints filed since 2016,[70] but this CFPB lawsuit will allow auditors to review the emerging SLABS process which has been unmonitored by regulators.[71] The CFPB's past work seeking relief for student loan borrowers in dealing with their servicing companies has focused upon repayment obstacles,[72] but the current action against National Collegiate might cause the CFPB to further investigate the ways student loans are transmitted between servicers in the SLABS market. This lawsuit may pave the way for future regulation of the

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of its loans, which were originally made by banks and then sold to investors.").

[69] *CFPB Takes Action Against National Collegiate Student Loan Trusts, Transworld Systems for Illegal Student Loan Debt Collection Lawsuits*, CONSUMER FIN. PROTECTION BUREAU (Sep. 18, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-national-collegiate-student-loan-trusts-transworld-systems-illegal-student-loan-debt-collection-lawsuits/ [https://perma.cc/9WTG-7AVF] ("All 800,000 Loans Will Be Independently Audited, Companies Will Pay at Least $21.6 Million and Stop Suing for Invalid or Unverified Debts.").

[70] *CFPB Report Finds Consumer Complaints Spurred Actions That Brought More Than $750 Million in Relief for Student Loan Borrowers*, CONSUMER FIN. PROTECTION BUREAU (Oct. 16, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-consumer-complaints-spurred-actions-brought-more-750-million-relief-student-loan-borrowers/ [https://perma.cc/6L4D-NPAN] ("[T]he CFPB update[ed] its student loan complaint form to accept complaints about federal student loan servicing, starting in late February 2016," and based on these complaints the CFPB has taken increased action for student loan borrower relief.)

[71] Jay Fleischman, *National Collegiate Student Loan Trust: What You Need to Know*, CONSUMER HELP CENT. (Jan. 28, 2017), http://www.consumerhelpcentral.com/national-collegiate-student-loan-trust/ [https://perma.cc/AE7G-LXKY] (indicating there is very sparse paper trail involved in the private student loan market transfer of SLABS, and no disclosure of the master list held by National Collegiate).

[72] *CFPB Report Finds Consumer Complaints Spurred Actions That Brought More Than $750 Million in Relief for Student Loan Borrowers*, *supra* note 70 (explaining relief efforts by the CFPB assisting consumers with interest-rate reductions, improper denial of repayment relief, and auto-default provisions).

SLABS market and the enactment of federal standards for loan servicing which are currently lacking.[73]

However, the action taken by the CFPB against National Collegiate and the settlement reached with Vantage Capital Group LLC (Vantage), which controls National Collegiate, has been opposed by many financial institutions.[74] The settlement offered by Vantage requires a third-party audit of the more than 800,000 loans and $19 million in fines and restitution for thousands of borrowers sued by Transworld Systems, but Vantage will not bear these costs alone.[75] Wall Street warns that this settlement will lead to harmful consequences for future borrowers because fines paid will cause servicers to "demand higher interest rates on future loans to compensate for the risk of unilateral government action."[76] The primary opposition from Wall Street seems to be aimed at the way that the CFPB allocated control of the settlement to Vantage when many other financial institutions were implicated by the ordered audit and fines assessed.[77] Perhaps the settlement reached between the CFPB and Vantage was not properly arranged, but this settlement and action taken against National Collegiate may nevertheless have a positive impact on the market by encouraging these institutions to investigate their own actions that led to this lawsuit.

D. Regulation: History and Developments

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[73] CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM 3 (2015) ("There are no consistent, market-wide federal standards for student loan servicing and servicers generally have discretion to determine policies related to many aspects of servicing operations.").

[74] Shahien Nasiripour, *Wall Street Is Fighting a CFPB Deal over Billions in Defaulted Student Loans*, BLOOMBERG (Nov. 8, 2017), https://www.bloomberg.com/news/articles/2017-11-08/wall-street-is-fighting-a-cfpb-deal-over-billions-in-defaulted-student-loans [https://perma.cc/W9CT-SFEV].

[75] *Id.*

[76] *Id.* ("The threat of a government agency setting aside securities contracts based on student loan payments could lead hedge funds to devalue their holdings, and cause them to demand higher interest rates on future loans to compensate for the risk of unilateral government action.").

[77] *Id.* The opponents to the deal have said "the settlement is part of a long-running effort by Vantage to enrich itself at everyone else's expense," but Donald Uderitz, who owns Vantage, has argued that "the settlement would help [Vantage] recover losses he blames on 'systemic malfeasance, gross negligence and willful misconduct.'" *Id.*

1. *Regulation of Student Loans*

The federal government has involved itself in the student loan market in the United States since the 1950s when Congress established the first federal student loan program.[78] One of the first efforts by Congress, the HEA, continues to regulate federal student lending through origination pursuant to Title IV of the act, which sets requirements for providing federal loans to students and protections afforded to borrowers.[79] In addition to the HEA, the student loan market has been regulated by the Truth In Lending Act (TILA), which creates protection for borrowers of private student loans by focusing regulation on the origination of the private loans; protecting borrowers by requiring further disclosures by lenders and preventing deceptive practices.[80] During the Obama Administration, the Borrower Defense to Repayment (BDR) and Gainful Employment (GE) regulations were implemented to protect borrowers specifically from for-profit institutions and deceptive lending practices.[81]

2. *New Regulations*

The Obama Administration enacted laws intended to prevent abuse by fraudulent for-profit colleges.[82] The Borrower Defense to Repayment (BDR) and Gainful Employment (GE) regulations were enacted to specifically combat deceptive lending and recruitment practices at for-profit colleges.[83] However, these new regulations only targeted federal loans issued by for-profit colleges.[84] These regulations

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[78] LeMay & Cloud, *supra* note 3, at 80.
[79] Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. 29,302, 29,306 (May 21, 2015).
[80] *Id.*
[81] *See* Maria Danilova, *Betsy DeVos Is Rolling Back 2 Rules Aimed at For-Profit Colleges*, BUS. INSIDER (June 14, 2017), http://www.businessinsider.com/betsy-devos-is-rolling-back-2-rules-aimed-at-for-profit-colleges-2017-6 [https://perma.cc/2BWS-P5WM] (describing the BDR and GE rules as "governing student loan forgiveness in cases involving fraud and misconduct by universities.").
[82] *Id.* ("These rules were introduced last year as the department [of Education] was processing claims from thousands of students who say they were defrauded by for-profit colleges.").
[83] *Id.*
[84] *Id.*

were frozen by the current head of the Department of Education, Betsy DeVos, and their future is unclear.[85] Many states have rallied in support of the frozen regulations, and there are currently lawsuits pending with the Attorneys General from 19 states and the District of Columbia against the Department of Education for suspending these regulations and other rules.[86]

E. Other Proposed Reform and Solutions to Further Issues

1. Private Loan Relief Program

The BDR and GE regulations are aimed at students who have been taken advantage of by for-profit colleges, but the current freeze has left borrowers with debt that cannot be discharged.[87] A system that could expedite the process for certain borrowers who have been taken advantage of by lenders which the government has already punished may clear some of the hundreds of pending discharge requests. The BDR and GE regulations are also aimed specifically at loans issued by the federal government, so a separate or amended regulation providing for private student loan relief would be required to help private loan borrowers.[88]

2. Bankruptcy Reform

One of the reasons for the rise in the growth of the secondary student loan market is the perceived security of the loans in light of the fact that it is very difficult to have student loans discharged even after filing for bankruptcy.[89] Students who have filed for bankruptcy will

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[85] *Id.* ("Secretary of Education Betsy DeVos said in a statement . . . that the regulations were 'overly burdensome and confusing' and need to be streamlined.").

[86] Editorial, *supra* note 20 ("The suit asks the court to declare the action illegal and to order the department to implement the rule without delay.").

[87] Cohen & Rueb, *supra* note 39 ("The Obama administration . . . revised and enlarged what is known as the borrower-defense process, but the new rules, scheduled to take effect July 1, were delayed by the Trump administration's education secretary, Betsy DeVos.").

[88] Danilova, *supra* note 81 (discussing the scope of the BDR and GE rules).

[89] Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL'Y REV. 175, 178 (2017) ("After BAPCPA became effective, in October 2005, all private loans (no

most likely be unable to escape their student loans, and this inability to discharge is what leads to further investment in the SLABS comprised of these loans.[90] A reform of the bankruptcy regulations which currently prevent, or make very difficult, the process of discharging the loans may lead to a fairer system for borrowers.[91] The current perceived security in these investments relies on these strict discharge standards set by current bankruptcy law, and may lead to a false sense of security with regards to the investors who believe that payments made on loans underlying SLABS are guaranteed.[92]

F. Conclusion

Private student loans continue to cause problems for borrowers, and there is not yet a regulatory scheme which has been developed to solve these problems. Regulators have attempted to make the student loan market a safer place for borrowers, but innovations in the ways that student loans are packaged and sold have created new problems to be addressed. The framework of the market is made up of many interconnected institutions which are not currently regulated or monitored, so further investigation into each institution should be required so that regulators can enact rules that will effectively protect borrowers in the current student loan market.

Wyndham Hubbard[93]

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matter when issued) became presumptively and effectively nondischargeable in bankruptcy.").

[90] Carillo, *supra* note 35 ("Student debt is special, as borrowers shoulder most consequences of non-payment. As such, SLABS players gain from an increasing supply of student debtors saddled with heavy, almost inescapable burdens.").

[91] Alexandrov & Jiménez, *supra* note 89, at 182 (discussing possible reforms to the treatment of student loans in bankruptcy, such as treating student loans like credit card debt or instituting an ability-to-repay rule, to create a better borrowing system).

[92] Carillo, *supra* note 35 ("As one corporate attorney explained in the *Wall Street Journal* last year, SLABS are attractive primarily because of harsh bankruptcy legislation.").

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