STATE OF NEW YORK

5136

2021-2022 Regular Sessions

IN SENATE

February 24, 2021

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law and the civil practice law and rules, in relation to protecting private education loan borrowers and cosigners

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The general business law is amended by adding a new article 42 to read as follows:

ARTICLE 42

PRIVATE EDUCATION LOAN PROTECTIONS

Section 1100. Definitions.

1101. Applicability.

1102. Exempt organizations.

1103. Provisions applicable to cosigners.

1104. Prohibition on acceleration of payments on private education loans.

1105. Required communications.

1106. Required information to be provided by creditors and debt collectors.

1107. Enforcement.

1108. Rules and regulations.

1109. Penalties.

§ 1100. Definitions. As used in this article:

1. "Private education loan" means an extension of credit that:

(a) is not made, insured, or guaranteed under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.);

(b) is extended to a consumer expressly, in whole or in part, for higher education expenses, regardless of whether the loan is provided by the educational institution that the student attends;

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(c) does not include open-end credit or any loan that is secured by real property or a dwelling; and

(d) does not include an extension of credit in which the covered educational institution is the creditor if:

(i) the term of the extension of credit is ninety days or less; or

(ii) an interest rate or finance charge will not be applied to the credit balance and the term of the extension of credit is one year or less, even if the credit is payable in more than four installments.

2. "Private education lender", except as exempted under this article, means:

(a) any person or entity engaged in the business of securing, making, or extending private education loans; or

(b) any holder of a private education loan.

3. "Borrower" or "private education loan borrower" means a person who has received or agreed to pay a private education loan for his or her own educational expenses.

4. "Cosigner" (a) means:

(i) any individual who is liable for the obligation of another without compensation, regardless of how designated in the contract or instrument with respect to that obligation, including an obligation under a private education loan extended to consolidate a borrower's pre-existing private education loans; and

(ii) includes any person the signature of which is requested as condition to grant credit or to forbear on collection;

(b) does not include a spouse of an individual described in subparagraph (i) of paragraph (a) of this subdivision, the signature of whom is needed to perfect the security interest in a loan.

5. "Original creditor" means the private education lender identified in a promissory note, loan agreement, or loan contract entered into with a private education loan borrower or cosigner.

6. "Creditor" means:

(a) the original creditor, where ownership of a private education loan debt has not been sold, assigned, or transferred;

(b) the person or entity that owned the private education loan debt at the time the debt became delinquent or defaulted, even if that person or entity did not originate the private education loan, and where such a debt has not subsequently been sold, transferred or assigned; or

(c) a person or entity that purchased a delinquent or defaulted private education loan debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney for collection litigation.

7. "Debt collector" means any person who regularly collects or attempts to collect, directly or indirectly, consumer debts originally owed or due or asserted to be owed or due another. The term does not include any officer or employee of a creditor who, in the name of the creditor, collects debts for such creditor, but it does include any creditor who, in the process of collecting its own debts, uses any name other than its own which would indicate that a third person is collecting or attempting to collect such debts.

8. "Higher education expense" means any expense arising from higher education, as defined in section two of the education law, regardless of whether the higher education institution is accredited within New York state.

§ 1101. Applicability. 1. Any person or entity that enters into a contract or subcontract with a private education lender or servicer to

perform the servicing of a private education loan must fulfill the obligations of the private education lender under this article.

2. Any private education lender as described in subdivision two of section eleven hundred of this article be jointly and severally liable for the actions of the entity or person in fulfilling the obligations of the private educational lender or servicer under this article.

§ 1102. Exempt organizations. The following shall be exempt from the provisions of this article only to the extent that state regulation is preempted by federal law:

1. Any banking organization, foreign banking corporation, national bank, federal savings association, federal credit union, or any bank, trust company, savings bank, savings and loan association, or credit union organized under the laws of any other state; and

2. Any subsidiary of such entities set forth in subdivision one of this section.

§ 1103. Provisions applicable to cosigners. 1. (a) Prior to the origination of a private education loan, the private education lender shall provide to all cosigner applicants information about the rights and responsibilities of the cosigner of the loan, including:

(i) information about how the private education loan obligation will appear on the cosigner's credit;

(ii) information about how the cosigner will be notified if the private education loan becomes delinquent, including how the cosigner can cure the delinquency in order to avoid negative credit furnishing and loss of cosigner release eligibility; and

(iii) information about eligibility for release of the cosigner's obligation on the private education loan, including number of on-time payments and any other criteria required to approve the release of cosigner from the loan obligation.

(b) Lenders shall send borrowers and cosigners annual written notices containing information about cosigner release, including criteria the lender requires to approve the release of cosigner from the loan obligation and the process for applying for cosigner release.

(c) Once the borrower has met the applicable consecutive on-time payment requirement to be eligible for cosigner release, the lender shall send the borrower and cosigner a written notification by U.S. mail and by electronic mail, where a borrower has elected to receive electronic communications from the lender, informing the borrower and cosigner that he or she has met the applicable consecutive, on-time payments requirement to be eligible for cosigner release. The notification shall also include information about any additional criteria to qualify for cosigner release, and the procedure to apply for cosigner release.

(d) Lenders shall provide written notice within fifteen days to any borrower who applies for cosigner release, but whose application is incomplete. The written notice must include a description of the information needed to consider the application complete and the date by which the applicant should furnish the missing information.

(e) After a borrower submits a complete application for cosigner release, within thirty days, the lender shall send the borrower and cosigner a written notice that informs the borrower and cosigner whether the cosigner release application has been approved or denied. If the lender denies a request for cosigner release, the lender shall inform the borrower of his or her right to request all documents and information used in the determination, including the credit score threshold used by the lender, the borrower's consumer report, the borrower's credit score, and any other documents specific to the borrower. The lender

must also provide any adverse action notices required under applicable federal law if the denial is based in whole or in part on any information contained in a consumer report.

2. (a) In response to any written or oral request for cosigner release, lenders shall send the information described in paragraph (b) of subdivision one of this section.

(b) Lenders shall not impose any restrictions that may permanently bar a borrower from qualifying for cosigner release, including restricting the number of times a borrower may apply for cosigner release.

(c) Lenders shall not impose any negative consequences on any borrower or cosigner during the sixty days following the issuance of the notice required under paragraph (d) of subdivision one of this section, or until the lender makes a final determination about a borrower's cosigner release application. For the purpose of this paragraph, "negative consequences" includes, but is not limited to, the imposition of additional eligibility criteria, negative credit reporting, lost eligibility for cosigner release, late fees, interest capitalization, or other financial injury.

(d) Lenders shall not require greater than twelve consecutive, on-time payments as criteria to apply for cosigner release. Any borrower who has paid the equivalent of twelve months of principal and interest payments within any twelve-month period will be considered to have satisfied the consecutive, on-time payment requirement, even if the borrower has not made payments monthly during the twelve-month period.

(e) If a borrower or cosigner requests a change that restarts the count of consecutive, on-time payments required for cosigner release, the lender shall notify the borrower and cosigner in writing within ten days of the impact of such an arrangement and provide the borrower or cosigner the right to withdraw or reverse the request to avoid such impact.

(f) The borrower has the right to request an appeal of a lender's determination to deny the cosigner release application within ninety days of receiving the lender's determination, and the lender shall permit such borrower to submit additional documentation evidencing that the borrower has the ability, willingness, and stability to handle his or her payment obligations. The borrower may request review of the cosigner release determination by another employee. The lender shall inform the borrower of this right in a clear and conspicuous manner on the notice denying the cosigner release application.

(g) A lender must establish and maintain a comprehensive record management system reasonably designed to ensure the accuracy, integrity, and completeness of data and other information about cosigner release applications. This system shall include the number of cosigner release applications received, the approval and denial rate, and the primary reasons for any denial.

(h) If a cosigner has a total and permanent disability, as determined by any federal agency, state agency, or physician or doctor of osteopathy legally authorized to practice in this state, the lender shall release the cosigner from the cosigner's obligation to repay the loan upon receiving a notification of the cosigner's total and permanent disability. The lender shall not require a new cosigner to be added to the loan after the original cosigner has been released from the loan.

3. (a) A lender shall provide a cosigner of a private education loan with access to all documents or records related to the cosigned private education loan that are available to the borrower;

(b) If a lender provides electronic access to documents and records for a borrower, it shall provide equivalent electronic access to the cosigner; and

(c) Upon receiving notice from the borrower or cosigner, the lender shall redact the contact information of the other party.

§ 1104. Prohibition on acceleration of payments on private education loans. 1. Except as provided in subdivision two of this section, a private education loan executed after the effective date of this article may not include a provision that permits the private educational lender to accelerate, in whole or in part, payments on the private education loan.

2. A private education loan may include a provision that permits acceleration of the loan in cases of payment default.

3. A lender shall not place any loan or account into default or accelerate a loan for any reason, other than for failure to pay.

4. (a) In the event of the death of a cosigner, a lender shall not attempt to collect against the cosigner's estate, other than for failure to pay.

(b) Upon receiving notification of the death or bankruptcy of a cosigner, when the loan is not more than sixty days delinquent at the time of the notification, a lender shall not change any terms or benefits under the promissory note, repayment schedule, repayment terms, or monthly payment amount or any other provision associated with the loan.

(c) A lender shall not place any loan or account into default or accelerate a loan for any reason, other than for failure to pay.

§ 1105. Required communications. In addition to any other information required under applicable federal or state law, a debt collector shall provide in the first debt collection communication with the private education loan borrower or cosigner and at any other time the borrower or cosigner requests such documentation:

1. The name of the owner of the private education loan debt;

2. The original creditor's name at the time of sale of the loan, if applicable;

3. The original creditor's account number used to identify the private education loan debt at the time of sale, if the original creditor used an account number to identify the private education loan debt at the time of sale;

4. The amount due at the time of default or the amount due to bring the loan current if the loan is delinquent;

5. A schedule of all transactions credited or debited to the private education loan account;

6. A copy of all pages of the contract, application or other documents evidencing the private education loan borrower's or cosigner's liability for the private education loan, stating all terms and conditions applicable to the private education loan; and

7. A clear and conspicuous statement disclosing that the borrower or cosigner has a right to request all information possessed by the creditor related to the private education loan debt, including, but not limited to the required information described in section eleven hundred six of this article.

§ 1106. Required information to be provided by creditors and debt collectors. A creditor may not collect or attempt to collect a private education loan debt unless the creditor or debt collector possesses the following:

1. The name of the owner of the private education loan;

2. The original creditor's name at the time of sale of the loan or default, if applicable;

3. The original creditor's account number used to identify the private education loan at the time of sale or default, if the original creditor used an account number to identify the private education loan at the time of sale or default;

4. The amount due at the time of sale, or at default, or, if the loan is delinquent, to bring the loan current;

5. A schedule of all transactions credited or debited to the private education loan account;

6. An itemization of interest and fees, if any, claimed to be owed and whether those were imposed by the original creditor or any subsequent owners of the private education loan;

7. The date that the private education loan was incurred;

8. A billing statement or other account record indicating the date of the first partial payment and/or the first day that a payment was missed, whichever is earlier;

9. A billing statement or other account record indicating the date of the last payment made by the borrower or cosigner, if applicable;

10. Any payments, settlement, or financial remuneration of any kind paid to the creditor by a guarantor, cosigner, or surety, and the amount of payment received;

11. A copy of the self-certification form and any other "needs analysis" conducted by the original creditor prior to origination of the loan;

12. The names of all persons or entities that owned the private education loan after it became delinquent or went into default, if applicable, and the date of each sale or transfer;

13. A log of all collection attempts made in the last twelve months including date and time of all calls and letters;

14. Copies of all settlement letters made in the last twelve months, or, in the alternative, a statement that the creditor has not attempted to settle or otherwise renegotiate the debt prior to suit;

15. Copies of all collection letters sent to the borrower and cosigner since inception of the loan;

16. Documentation establishing that the creditor is the owner of the specific individual private education loan at issue. If the private education loan was assigned more than once, the creditor must possess each assignment or other writing evidencing the transfer of ownership of the specific individual private education loan to establish an unbroken chain of ownership, beginning with the original creditor to the first subsequent creditor and each additional creditor. Each assignment or other writing evidencing transfer of ownership or the right to collect must contain the original creditor's account number (redacted for security purposes to show only the last four digits) of the private education loan purchased or otherwise assigned, the date of purchase and assignment, and must clearly show the borrower's, and if applicable, cosigner's correct name associated with the original account number. The assignment or other writing attached shall be that by which the creditor or other assignee acquired the private education loan, not a document prepared for litigation or collection purposes;

17. A copy of all pages of the contract, application or other documents evidencing the private education loan borrower's, and if applicable, cosigner's liability for the private education loan, stating all terms and conditions applicable to the private education loan; and

18. A signed affidavit or affidavits from each of the previous owners of the private education loan regarding when the previous owner accelerated the loan from delinquency status to default status, or if applicable, a statement that no such acceleration occurred.

§ 1107. Enforcement. 1. All private education lenders, creditors and debt collectors shall comply with the provisions of this article.

2. Any borrower or cosigner who suffers damage as a result of the failure of a private education lender, creditor, or debt collector covered by the provision of this article may bring an action on their own behalf and on behalf of a similarly situated class of consumers against that person to recover or obtain any of the following:

(a) Actual damages, but in no case shall the total award of damages be less than five hundred dollars per person, per violation.

(b) Punitive damages.

(c) Correction of that person's credit report.

(d) Injunctive relief.

(e) Any other relief that the court deems proper.

3. In the case of any successful action to enforce the foregoing liability, a private education lender, creditor, or debt collector is liable for the costs of the action, together with reasonable attorneys' fees as determined by the court.

4. The attorney general or the district attorney of any county may bring an action in the name of the people of the state to restrain or prevent any violation of this article or any continuance of any such violation.

5. Nothing in this article shall limit any statutory or common law right of any person to bring any action in any court for any act, or the right of the state to punish any person for any violation of any law.

§ 1108. Rules and regulations. 1. In addition to such powers as may otherwise be prescribed by this chapter, the superintendent of financial services is hereby authorized and empowered to promulgate such rules and regulations as may in the judgment of the superintendent be consistent with the purposes of this article, or appropriate for the effective administration of this article, including, but not limited to:

(a) such rules and regulations in connection with the activities of private education lenders, creditors, and debt collectors as may be necessary and appropriate for the protection of borrowers in this state;

(b) such rules and regulations as may be necessary and appropriate to define unfair, deceptive or abusive acts or practices in connection with the activities of private education lenders, creditors, and debt collectors;

(c) such rules and regulations as may define the terms used in this article and as may be necessary and appropriate to interpret and implement the provisions of this article; and

(d) such rules and regulations as may be necessary for the enforcement of this article.

2. The superintendent is hereby authorized and empowered to make such specific rulings, demands and findings as the superintendent may deem necessary for the proper conduct of the private education loan industry.

§ 1109. Penalties. In addition to such penalties as may otherwise be applicable by law, including but not limited to the penalties available under section forty-four of the banking law, the superintendent of financial services or the attorney general may, after notice and hearing, require any person found violating the provisions of this article or the rules or regulations promulgated hereunder to pay to the people of this state a penalty for each violation of the article or any regu-

lation or policy promulgated hereunder a sum not to exceed the greater of (i) ten thousand dollars for each offense; (ii) a multiple of two times the aggregate damages attributable to the violation; or (iii) a multiple of two times the aggregate economic gain attributable to the violation.

§ 2. The civil practice law and rules is amended by adding a new section 3012-c to read as follows:

§ 3012-c. Requirements relating to judgments against private education loan borrowers or cosigners. (a) In addition to any other papers and documents required by this chapter, an attorney representing a creditor seeking a judgment arising from a private education loan debt, shall submit a sworn affidavit attesting that:

(1) The creditor has in its possession the following information:

(i) The name of the owner of the private education loan;

(ii) The original creditor's name at the time the loan was purchased, and/or the loan went into default, if applicable;

(iii) The original creditor's account number used to identify the private education loan when the loan was sold and/or at the time of default, if the original creditor used an account number to identify the private education loan at the time of sale and/or default;

(iv) The amount due at the time the loan was sold by the original creditor and/or at the time of default;

(v) A schedule of all transactions credited or debited to the private education loan account;

(vi) An itemization of interest and fees, if any, claimed to be owed and whether those were imposed by the original creditor or any subsequent owners of the private education loan;

(vii) The date that the private education loan was incurred;

(viii) The date of the first partial payment and/or the first day that a payment was missed, whichever is earlier;

(ix) The date and amount of the last payment, if applicable;

(x) Any payments, settlement, or financial remuneration of any kind paid to the creditor by a guarantor, cosigner, or surety, and the amount of payment received;

(xi) A copy of the self-certification form and any other "needs analysis" conducted by the original creditor prior to origination of the loan;

(xii) The names of all persons or entities that owned the private education loan, if applicable, and the date of each sale or transfer;

(xiii) A log of all collection attempts made in the last twelve months including date and time of all calls and letters;

(xiv) A statement as to whether the creditor is willing to re-negotiate the terms of the debt;

(xv) Copies of all settlement letters made in the last twelve months, or, in the alternative, a statement that the creditor has not attempted to settle or otherwise renegotiate the debt prior to suit;

(xvi) Copies of all collection letters sent to the borrower and cosigner since inception of the loan;

(xvii) Documentation establishing that the creditor is the owner of the specific individual private education loan at issue. If the private education loan was assigned more than once, the creditor must possess each assignment or other writing evidencing the transfer of ownership of the specific individual private education loan to establish an unbroken chain of ownership, beginning with the original creditor to the first subsequent creditor and each additional creditor. Each assignment or other writing evidencing transfer of ownership or the right to collect

must contain the original creditor's account number (redacted for security purposes to show only the last four digits) of the private education loan purchased or otherwise assigned, the date of purchase and assignment, and must clearly show the borrower's, and if applicable, cosigner's correct name associated with the original account number. The assignment or other writing attached shall be that by which the creditor or other assignee acquired the private education loan, not a document prepared for litigation;

(xviii) A copy of all pages of the contract, application or other documents evidencing the private education loan borrower's or cosigner's liability for the private education loan, stating all terms and conditions applicable to the private education loan;

(xix) An affidavit stating that the communication required in section eleven hundred five of the general business law has been complied with;

(xx) A statement as to whether the debt is eligible for an income-based repayment plan free of charge to the borrower or cosigner, equivalent to the repayment arrangement established for federal student loans under Article IV of the Higher Education Act (20 USC 1078 et. seq.);

(xxi) A statement as to whether the debt is a qualified education loan as defined in 26 U.S.C. § 221; and

(xxii) A signed affidavit or affidavits from each of the previous owners of the private education loan stating when the previous owner accelerated the loan from delinquency status to default status, or if applicable, that the loan had not been accelerated at the time of the sale; and

(2) A representative of the creditor personally reviewed the information set forth in paragraph one of this subdivision for factual accuracy and confirmed the factual accuracy of the allegations set forth in the complaint and any supporting affidavits or affirmations filed with the court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.

(b) Copies of the documentation identified in subparagraphs (xvii), (xviii) and (xxii) of paragraph one of subdivision (a) of this section shall be attached to the application seeking a judgment arising from a private education loan debt.

(c) An attorney representing a creditor seeking a judgment arising from a private education loan debt shall also submit a sworn affidavit containing the following information:

(1) The applicable statute or statutes of limitations for the cause or causes of action asserted by the creditor for the private education loan debt; and

(2) A statement that based upon counsel's reasonable inquiry, the applicable statute or statutes of limitations for the cause or causes of action asserted by the creditor has not expired.

(d) A judge or clerk shall not grant or enter a judgment arising from a private education loan debt that does not comply with the requirements described in subdivisions (a), (b), and (c) of this section.

(e) (1) Upon receipt of written notice provided by a borrower or cosigner, or upon notice from the attorney general or superintendent of financial services on behalf of a group of borrowers, to a creditor or debt collector stating that the creditor or debt collector has failed to comply with this section, the creditor or debt collector shall:

(i) Provide proof of compliance with the provisions of this section; or

(ii) Take the following actions:

1. move to vacate the judgment;

2. refund all monies paid by the borrower or cosigner after the judgment was entered; and

3. take all actions necessary to remove all negative credit history furnished after default.

(2) If a creditor or debt collector fails to comply with paragraph one of this subdivision, the borrower or cosigner may bring an action on his or her own behalf or on behalf of a similarly situated class of persons against that creditor to recover or obtain any of the following:

(i) An order setting aside or vacating any judgment entered against the borrower or cosigner;

(ii) A judgment in favor of the borrower or cosigner;

(iii) Actual damages, but in no case shall the total award of damages be less than five hundred dollars per person, per violation;

(iv) Restitution of all moneys taken from or paid by the borrower or cosigner after a judgment was obtained by a creditor;

(v) Punitive damages;

(vi) Correction of the borrower's or cosigner's credit report;

(vii) Injunctive relief; and

(viii) Any other relief that the court deems proper.

(3) In the case of any successful action to enforce the foregoing liability, a private education lender, creditor, or debt collector is liable for the costs of the action, together with reasonable attorneys' fees as determined by the court.

(4) In addition to any other remedies provided by this subdivision or otherwise provided by law, whenever it is proven by a preponderance of the evidence that a creditor or attorney representing a creditor filed an affidavit required under this section containing false information, the court shall award treble actual damages to the borrower or cosigner, but in no case shall the award of damages be less than one thousand five hundred dollars, per person, per violation.

(f) The definitions of terms set forth in section eleven hundred of the general business law shall apply to the provisions of this section.

§ 3. This act shall take effect immediately.