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THE NEW TILA PRIVATE LOAN REGULATIONS AND WHAT THEY MEAN TO SCHOOLS

**Presentation to
Coalition of Higher Education Assistance Organizations
(COHEAO)**

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Entities Subject to New Rules

- Rules apply to **creditors** making **private education loans**.
- Schools that extended credit to students more than 25 times in preceding calendar year are **creditors**.
- **Private education loans** defined as loans extended to consumers expressly in whole or in part for post-secondary educational expenses.
- **Postsecondary** educational expenses are expenses listed as part of cost of attendance at **covered educational institutions**.
- Rules Apply to direct-to-consumer private education loans.

Application of Rules to Schools

- Schools that qualify as **creditors** generally must comply with final rules when extending credit to students or graduates for postsecondary educational expenses.
- Examples of credit extensions by schools:
 - Retail Installment Contracts
 - Institutional Loans
 - Payment Plans
- Covers certain credit extensions by unaccredited educational institutions that offer postsecondary educational degrees, certificates or programs.
- Where educational institution extends credit for education purposes it can treat the credit extension as either a credit sale or a loan regardless of whether funds are disbursed. Staff Commentary 2(a)(16)(5).
 - Credit sale vs. loan.
 - Disclosure of total sales price.

Exceptions Applicable to Schools

- Two exceptions based on comments received.
 - Emergency Loans
 - Loans provided for a short term while student waits for other funds to be disbursed.
 - Must have a term less than 90 days.
 - Exception applies even if interest is charged.
 - No Interest Short Term Payment Plans
 - Billing plants with no interest.
 - Term of one year or less.
 - Rules do not apply to Open End Credit
 - Can schools develop line of credit type programs for educational expenses that qualify as open end credit?
 - Disclosure requirements for open-end credit.

Exceptions Applicable to Schools

■ Caveats to Exceptions

- Exceptions only apply when school is creditor not where school affiliated organization is creditor.
- Holding company or affiliate of school as lender.
- Emergency loan still subject to Sections 226.17 and 226.18.
- No interest payment plan may still be extension of credit subject to Sections 226.17 and 226.18.

Issues for Schools that Extend Credit

- Model forms not geared well for schools extending credit.
 - Most schools charge fixed interest rate or no interest.
- Credit extensions by schools do not typically involve disbursement of money.
 - Does 3 day cancellation right in final approval apply if no funds disbursed by school creditor?
- Schools typically do not have extensive underwriting criteria and many times do not have students fill out application.
- Amount of credit extended by schools to students frequently changes after the fact – redisclosure issues.
- If an item included in Final Disclosure becomes inaccurate because of an event that occurs after delivery of Final Disclosure, the inaccuracy is not a violation of Regulation Z.

Issues for Schools that Extend Credit

- 30 day period for consumer to approve credit offer vs. school policies that student has to have arrangements to pay before starting classes.
- Self-certification still required where school is creditor.
 - School can pre-fill self certification form.
 - When does school give student self certification form?
- Is Application Disclosure required if school does not require student borrower to fill out application form?
- How do schools deliver Application/Solicitation Disclosure if no written application for credit extension?
 - Exemption if application taken verbally and approval or rejection within 3 days.

Challenges for Schools that Extend Credit – cont'd

- Timing/Measuring 3-day period (mail vs. electronic).
- Interplay with preferred lender rules; is school that extends credit to its students a “preferred lender.”
- 90/10 Rule compliance – Is “private education loan” always an “institutional loan”?
- Where school extends credit, can student discharge loan in bankruptcy?
- Where students borrow each semester, does student have to sign new prom notes or installment contract for each credit extension?
 - Can school develop master prom note or installment contract?

Practical Tips

- Think through process flow carefully and map it out.
- Consider getting written acknowledgement from borrower that they did not exercise cancellation right at end of 3-day period.
- Consider electronic disclosures –
 - Can deliver approval disclosure electronically if you have E-sign consent.
 - Can require cancellation via electronic means if final disclosure provided electronically based on E-sign consent.
- Consider specifying that student accepts credit offer when he or she signs prom note or installment contract – build that into your note or installment contract.
- Pay attention to state law compliance issues.
- Start planning and working with your information technology groups now – February is not far off.

Civil Liability and Statute of Limitations

■ Statute of Limitations

- HEOA amended TILA statute of limitations regarding private education loans.
- Prior to HEOA – action had to be filed within one year of violation.
- For claims involving private education loans, now 1 year from date on which first regular payment of principal due.
 - Board rejected cap of 5 years from disbursement.
 - Challenges for education lenders.

Civil Liability and Statute of Limitations

■ Civil Liability

- HEOA amends TILA to provide private right of action for some but not all of new disclosure requirements.
- No civil liability for failure to comply with self-certification requirement.
- Liability for failure to provide certain approval and final disclosures.
- Safe harbor for reliance on model forms.
 - What revisions are permissible to retain safe harbor?
 - Inapplicable disclosures.
 - Treatment of model forms vs. sample forms.

State Law Compliance

- Schools that engage in credit sales may be required to file notifications and pay fees to certain states that have passed Uniform Consumer Credit Code.
- Approximately 12 states require entities engaging in credit sales to file notification forms and pay fees.
 - Choice of law issues – What state law governs a credit extension?
 - Schools that engage in credit sales must comply with these laws.
- State licensing laws where school makes consumer loans.
 - Pennsylvania example – Consumer Discount Company Act – licensing required if interest rate exceeds 6% per annum.

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Rob Lavet joined PPSV's Education Practice Group in 2008 as a Principal. Mr. Lavet counsels schools and financial institutions on a wide range of transactions, litigation and regulatory compliance matters, as well as the resolution of audits and government investigations. Prior to joining the firm, he was General Counsel to SLM Corporation (Sallie Mae). At Sallie Mae, Mr. Lavet managed the Legal, Corporate Compliance and Student Loan Servicing Policy functions. He regularly advised board members and senior management on securities disclosures and corporate debt offerings; oversaw significant litigation and regulatory matters; led due diligence on numerous acquisitions and transactions; and integrated legal teams of acquired businesses in multiple locations. He and his team of attorneys took on leadership roles in postsecondary education as they developed strategies to address the emerging array of regulatory, legislative, corporate, and transactional challenges facing the nation's student loan programs. He successfully litigated the only federal court case involving the Department of Education's attempted application of the prohibited inducement section of the Higher Education Act to a lender.

Prior to joining Sallie Mae, Mr. Lavet served as a trial attorney in the Civil Division of the U.S. Department of Justice, and as a partner with the law firm Cole, Corette & Abrutyn, where he specialized in complex commercial litigation, and securities litigation. He is a member of the bar of the District of Columbia. He served as a past President of the Washington Metropolitan Area Corporate Counsel Association and as a member of the Board of Directors of the Association of Corporate Counsel.

Mr. Lavet graduated with honors from the University of Pennsylvania in 1976 and received his law degree with honors, from Georgetown University Law Center in 1979.