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CFPB v. National Collegiate Student Loan Trusts

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CFPB Suing Securitization Trusts, and thereby the underlying Investors, for Alleged Wrongdoings of a Third Party

In Sept. 2017, the CFPB filed a lawsuit, along with a proposed consent order, against 15 securitization trusts that would abrogate the Trusts' governing documents and seeks to penalize the Trusts Investors for alleged actions of the servicer(s)

- National Collegiate Student Loan Trusts are 15 separate student loan securitization trusts that hold more than 800,000 private student loans, totaling $12 billion
- Trusts were created to provide financing for student loans via selling notes to investors secured by the loans

A Primary Industry Concern is the Inviolability of Contractual Agreements

The CFPB's proposed consent order effectively rewrites the contractual provisions that parties agreed to

- The Proposed Consent Judgment appears to have been negotiated without the involvement of any of the other parties to the securitization transactions including the Trusts, the Investors/Noteholders, the Indenture Trustees, etc.
  - All of whom would be materially adversely impacted by the entry of the Proposed Consent Judgment because their contractual rights and obligations would be altered
  - As evidence, since the proposed consent judgment was filed various transactions parties have filed motions seeking to intervene in the case, including: U.S. Bank, Transworld, Ambac, GSS, Wilmington Trust Company, PHEAA and a various institutional investors/noteholders

Securitization Trusts are not "Covered Persons" within the Consumer Financial Protection Act

The Bureau has mistakenly treated the Trusts as Covered Persons and Debt Collectors

- Congress carefully crafted the supervisory and enforcement authority of the Bureau to "Covered Persons" who have violated Federal Consumer Financial Protection laws
- Inaccurately treating Securitization Trusts as such has severe adverse public policy consequences

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Negative Precedent in RMBS Market

One of the many-cited contributors to the failure of the private label RMBS market to rebound from its crisis-driven lows is contractual ambiguity, concern around the inviolability of the contract and a general lack of trust that trust cash flows will be allocated as dictated by the transaction documents

- We would counsel against running the risk that a similar lack of confidence might extend to all other asset classes (credit cards, student loans, auto, small business, etc.)
- While neither appropriate nor acceptable, the extra-legal re-ordering of legacy RMBS contracts, in retrospect, can at least be attributed to a crisis situation (i.e. The Great Financial Crisis)
  - That is not the case in NCSLT
  - Accordingly, investors' rational expectation will be that the bureau believes it appropriate to use trust assets to pursue policy goals; doing so will minimize, if not eliminate, the potentially vast ABS balance sheet from the economy
  - This will both artificially limit growth and also increase the cost of consumer credit

The CFPB's Treatment of the Trusts in the Proposed Consent Order would likely Destabilize Market Expectations

The resulting uncertainty will undoubtedly lead to a reduction in the availability of and/or an increase in the cost of credit for individuals and businesses across the United States

- All market participants and especially investors need to trust that well-meaning government actors and regulators will not abrogate their contractual rights and hold them responsible for the alleged acts of unrelated third parties
- If market participants cannot trust that transaction documents, it calls into question the validity of those contracts and, consequently, the existence of the market itself

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