The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions.

Since 1969, the nonprofit National Consumer Law Center (NCLC) has worked for consumer justice and economic security for low-income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

The Student Borrower Protection Center is a nonprofit organization focused on alleviating the burden of student debt for millions of Americans. The SBPC engages in advocacy, policymaking, and litigation strategy to rein in industry abuses, protect borrowers' rights, and advance economic opportunity for the next generation of students.

Department of Financial Protection and Innovation, Legal Division

Invitation for Comments on Proposed Rulemaking under the California Consumer Financial Protection Law
FILE NO: PRO 01-21
March 15, 2021
Submitted electronically to regulations@dfpi.ca.gov.

Introduction

On September 25, 2020, Governor Newsom signed AB 1864 (Chapter 157, Statutes of 2020), establishing the California Consumer Financial Protection Law ("CCFPL") under Division 24 of the Financial Code. The undersigned consumer advocates are encouraged to see that the Department of Financial Protection and Innovation ("DFPI" or the "Department") is seeking input from stakeholders in developing regulations to implement the CCFPL.[1]

We write this comment in response to the following questions regarding registration requirements that the DFPI posed in 3(a)-(b):

> For what industries should the DFPI first establish registration requirements under Financial Code section 90009, subdivision (a)? What consumer protection risks do those industries present to consumers that would make it appropriate to prioritize the registration of those industries over others?
>
> For each industry that a stakeholder states should be a priority for registration, what rules should the DFPI establish to facilitate oversight of the industry, what records should the DFPI require those registrants to maintain, and what requirements should the DFPI impose to ensure that covered persons are legitimate? (Fin. Code § 90009, subd. (b).) What data should the DFPI require registrants to submit in annual or special reports to the DFPI? (Fin. Code § 90009, subd. (f)(2)). Why should the DFPI collect this data?[2]

The focus of this comment will be on providers of private financing to students and families when paying for college ("Student Financing Providers"), including lenders providing so-called Income Share Agreements (ISAs). These firms often attempt to evade oversight from state regulators on the basis that their so-called innovative nature renders them unique financial products that, they argue, are not providing credit.

Under 90009(a), the DFPI is authorized "to prescribe rules regarding registration requirements applicable to a covered person engaged in the business of offering or providing a consumer financial product or service[.]"[3]

We urge the DFPI to register Student Financing Providers, including ISA lenders, using DFPI's authority under the CCFPL over credit.[4] Registration would further the stated intent of the DFPI: to promote nondiscriminatory access to responsible, affordable credit that reflect consumers ability to repay; to promote products that are not unfair deceptive, or abusive; and to promote consumer-protective innovation.[5]

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[1] DFPI, Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (Feb. 4, 2021), available: https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/02/2021-02-04-Invitation-for-Comments.pdf.
[2] *Id*.
[3] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1864
[4] Cal. Fin. Code § 90005(g).
[5] Assem. Bill 1864, 2019-2021 Reg. Sess. (Cal. 2020).

I. The Consumer Protection Risks Unique to Student Financing, Particularly ISAs, Render it Appropriate for the DFPI to Prioritize Regulating the Student Financing Marketplace, Including the ISA Industry.

Over the course of the past decade, a class of financing firms has emerged purporting to offer so-called innovative financing options to students and families seeking to pay for higher education. These firms often use alternative underwriting tactics and novel credit features when marketing products to students and families. These Student Financing Providers may offer financing structured to resemble a traditional, amortizing consumer loan. Or they may adopt alternative structures for repayment of the loans, including terms that tie monthly payments to borrowers' post-graduate earnings, known as ISAs.

ISA lenders use alternative criteria, such as a student's major and projected future income, to make private loans to fund a portion of educational costs in exchange for a percentage of the student's earnings over time.[6] Despite industry-touted benefits of innovation, ISAs can be especially dangerous because they allow private investors to put a super lien on a borrower's future income without, in many cases, guardrails against unfair practices.

While about 90% of student loan debt is held by the federal government, the reliance on debt to finance higher education has attracted private investors. ISAs are one emerging and increasingly prevalent form of student financing, marketed as an alternative to federal student loans. For-profit schools may also seek to use student financing, including ISAs, in the coming years to make up for lost revenue due to the federal government's tightening of the 90/10 loophole through the passage of the $1.9 trillion coronavirus relief bill.[7] As a general matter, we urge state governments to exhaust all public and philanthropic funding options to make higher education

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[6] *See*, *e.g*. Rustin IV, Dowse B. (Brad), Grayson, Neil E., & Degroote, Kiersty, M. (2017, February). Pricing Without Discrimination: Alternative Student Loan Pricing, Income-Share Agreements, and the Equal Credit Opportunity Act. American Enterprise Institute. Retrieved from https://www.aei.org/research-products/report/pricing-without-discrimination-alternative-student-loan-pricing-income-share-agreements-and-the-equal-credit-opportunity-act/ (discussing ISA's use of alternative, nontraditional lending factors, such as Alternative Finance (AltFinance), which prices loans based on a student's perceived likelihood of repayment).

[7] The "90/10 rule" or loophole is a constraint that for-profit colleges can receive no more than 90% of their total revenues from Title IV sources; this means that students must turn to other options, such as obtaining other grants or loans or using their own income or savings to pay for at least a portion of their education. The "90/10 rule," was put into place with the rationale that programs of sufficient quality should be able to attract students willing to invest some of their own funds towards their education. However, aid received by recent veterans as part of the new Post-9/11 GI bill does not count towards the 90% limitation on federal aid, since it is not a Title IV program. As a result, for-profit colleges target their recruitment efforts toward current and former members of the military, whose additional grant aid can be counted towards the 10% of funds that are intended to come from private sources. See generally Smith, P. & Parrish, L. (2014, Oct.). Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees' Futures. Center for Responsible Lending. Retrieved from https://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf. On March 6, 2021, Congress passed the 1.9 trillion coronavirus relief bill that tightened the 90/10 loophole by changing how GI Bill dollars are counted such that GI Bill dollars would begin to be counted as federal money. Murakami, K. (2021, Mar. 2). Tightening the 90-10 Rule. Inside Higher Ed. Retrieved from https://www.insidehighered.com/news/2021/03/02/provision-covid-19-relief-bill-would-ease-incentives-profits-target-veterans; Murakami, K. (2021, Mar. 8). $40 Billion for Colleges. Inside Higher Ed. Retrieved from https://www.insidehighered.com/news/2021/03/08/senate-approves-40-billion-colleges.

affordable for their students, and we exercise great skepticism of predatory "novel" student financing products like ISAs to fund higher education, given the heightened consumer protection risks. While there may be some carefully constructed ISA programs that are relatively safe and provide a benefit to students, especially for programs where public funding and financing are unavailable, all programs must be subject to oversight and regulated as credit, and rules must be in place to prevent unfair, deceptive or abusive practices.

In addition to risks generally prevalent in the marketplace for private student loans and other student financing, ISAs present unique risks driven by the practices of existing ISA lenders and by the structure of this form of student financing. Amid the COVID-19 pandemic, ISAs are being touted by industry as a fix for financing education during uncertain economic times, but policymakers and institutions need to beware of the significant potential harm they could involve. During the pandemic, we have observed the following:

- unaccredited schools positing that "[d]uring economic instability, income share agreements can be a great tool to make higher ed more accessible & lower risk" for borrowers;
- traditional schools steering students toward these problematic financial products in an attempt to "future-proof . . . enrollment and revenue strategies" in anticipation of diminished state aid;
- direct-to-consumer ISAs masquerading as low-cost, non-debt alternatives for those who "can't obtain emergency grant funding," when in reality these products can be extremely high-cost with harmful borrower terms; and
- companies that facilitate investment in ISAs promising Wall Street an "attractive monthly cash return" well into the double digits, pointing to job re-training needs caused by the coronavirus pandemic.[8]

It is also important to note that ISAs are not limited to the education space. Companies – including one that has entered into a memorandum of understanding (MOU) with the Department of Business Oversight (DBO), DFPI's predecessor – are offering ISAs to pay for weddings or other types of consumer expenses. ISAs pose similar risks in this context and a similar danger of evasion of the protections of credit laws.

As these companies ramp up to capitalize on a national emergency, the players in the emerging ISA market are poised to repeat many of the higher education finance scandals that followed the 2008 financial crisis. Many ISA lenders echo the worst of these practices by peddling high fees and predatory loan terms under a veneer of so-called "innovation." ISAs can cost borrowers as much as 40 percent[9] of their pre-tax income and frequently include unconscionable contract

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[8] Habash, T. & Kaufman, B. (2020, May 5). As Coronavirus Crisis Rages, ISA Companies Ramp Up to Reap the Rewards. Student Borrower Protection Center. Retrieved from https://protectborrowers.org/coronavirus-isa/.
[9] Morgan, Julia M., Farr, B. & Hornung, D. (2019, Jan. 10). Income Share Agreements: A Student Debt Promise Falling Short of Reality. Roosevelt Institute. Retrieved from https://rooseveltinstitute.org/2019/01/10/income-share-agreements-a-student-debt-promise-falling-short-of-reality/.

terms like mandatory arbitration agreements[10] or unfettered access to borrowers' bank accounts.[11] Moreover, the programs that these ISAs prop up often have a poor track record of student success,[12] including a history of actively misrepresenting students' academic and employment outcomes.[13]

ISA lenders also argue they should be able to operate wholly outside of basic consumer protection laws.[14] Because ISA lenders have asserted that they are not credit, they argue that federal consumer protection laws, such as the Equal Credit Opportunity Act (ECOA), which would protect against lending discrimination,[15]or the Truth in Lending Act (TILA), are inapplicable.[16] By denying that they are not "credit" and not "loans" ISA lenders also seek to evade state usury laws.[17] Despite their baseless claims, these laws are necessary to protect students.

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[10] *See*, *e.g*., Back a Boiler Program ISA Sample Contract (Academic Year), Purdue Univ., Retrieved from https://www.purdue.edu/backaboiler/disclosure/contract.html (stating that the "Arbitration Agreement shall survive the termination of this ISA, your fulfillment or default of your obligations under this ISA and/or your or our bankruptcy or insolvency to the extent permitted by applicable law. In the event of any conflict or inconsistency between this Arbitration Agreement and the administrator's rules or other provisions of this ISA, this Arbitration Agreement will govern) (internal parentheticals omitted)).

[11] *See*, *e.g*., Leif. ISA Agreement. Retrieved from https://leif.org/api/products/5b5b8bd0e59b743f9a086ed9/pdf (stating that as the ISA borrower "you agree that, prior to receiving any Earned Income, you have or will establish a bank account with a financial institution designated in writing with Leif ("Designated Bank Account") and also will permit integration of the Designated Bank Account with Leif's Platform as necessary to permit Leif to track your Earned Income, monitor account activity and balances, perform reconciliations and, if elected by you, process and withdraw your Monthly Payments from your Designated Bank Account. You further agree to provide details of the Designated Bank Account as Leif may reasonably request from time to time.").

[12] Schiffer, Z. & Farokhmaneh, M. (2020, Feb. 11). The High Cost of a Free Coding Bootcamp. The Verge. Retrieved from https://www.theverge.com/2020/2/11/21131848/lambda-school-coding-bootcamp-isa-tuition-cost-free.

[13] Woo, V. (2020, Feb. 19). Lambda School's Misleading Promises. NY Magazine: Intelligencer. Retrieved from: https://nymag.com/intelligencer/2020/02/lambda-schools-job-placement-rate-is-lower-than-claimed.html.

[14] Pearl, J. & Shearer, B. (2020, Jul.). Credit by Any Other Name: How Federal Consumer Financial Law Governs Income Share Agreements. Student Borrower Protection Center. Retrieved from https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer_Credit-By-Any-Other-Name.pdf.

[15] Rustin IV, Dowse B. (Brad), Grayson, Neil E., & Degroote, Kiersty, M. (2017, February). Pricing Without Discrimination: Alternative Student Loan Pricing, Income-Share Agreements, and the Equal Credit Opportunity Act. American Enterprise Institute. Retrieved from https://www.aei.org/research-products/report/pricing-without-discrimination-alternative-student-loan-pricing-income-share-agreements-and-the-equal-credit-opportunity-act/.

[16] *See* AFR Statement on the ISA Student Protection Act: Income-Share Agreements are Just Student Debt with a Fancy Name. (2019, Jul. 17). Americans for Financial Reform. Retrieved from https://ourfinancialsecurity.org/2019/07/statement-income-share-agreements-just-student-debt-fancy-name/ (expressing concern for ISA Student Protection Act by Senators Mark Warner (D-VA), Todd Young (R-IN), Chris Coons (D-DE) and Marco Rubio (R-FL) for, *inter alia*, "preempt[ing] existing state usury laws, and any future usury laws that do not specifically target ISAs."); *see also* Kantrowitz, M. (2019, Dec. 1). History of Income Share Agreements. Saving for College. Retrieved from https://www.savingforcollege.com/article/history-of-income-share-agreements (arguing "[i]ncome-share agreements have been less successful in the U.S., in part because of state usury laws. This has [led] to caps on the total payments under an ISA and limits on the ratio of total payments to the amount originally received. Some proponents of income-share agreements have sought federal legislation to exempt income-share agreements from state usury laws.").

[17] *See* AFR Statement on the ISA Student Protection Act: Income-Share Agreements are Just Student Debt with a Fancy Name. (2019, Jul. 17). Americans for Financial Reform. Retrieved from

The risks posed by ISAs are illustrative of broader risks posed by emerging and incumbent providers of student financing. To the extent that Student Financing Providers, including ISA lenders, are operating in California, we urge the DFPI to regulate these firms and these products like other private financing products on the market.[18]

II. The DFPI Should Establish Registration Requirements under Financial Code section 90009(a) to Achieve the Stated Intent of the DFPI: to Protect Students from Unfair, Deceptive, or Predatory Practices.

The plainly stated intent of the legislature in passing the CCFPL was to expand DFPI's ability to "protect consumers from abusive financial practices, while prioritizing the prevention of unethical businesses from harming the most vulnerable populations including . . . students, low- and moderate-income individuals, and new Californians."[19] By focusing on regulating Student Financing Providers, including ISA lenders, the DFPI will achieve its stated intent.

Companies across the student financing industry, including ISA lenders, have been accused of a shocking range of abuses over the past two years alone. For example, these firms have faced credible allegations of:

- **Deceptive marketing by ISA lenders to students at large public universities.** In 2020, NCLC and SBPC filed a complaint with the Federal Trade Commission alleging that ISA provider Vemo undertook an illegal marketing scheme that made Vemo-backed ISAs appear cheaper than certain federal student loans, deceiving students at University of Utah and Purdue University about the cost of its products.[20]

- **Illegal lending by unlicensed coding bootcamps providing ISAs.** In October 2020, the California Bureau of Private Postsecondary Education issued the unaccredited coding bootcamp Lambda School a $50,000 fine for operating in California without a license, despite a prior warning by the state regulator about Lambda's noncompliance.[21] As part of this action, the state regulator uncovered that Lambda

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https://ourfinancialsecurity.org/2019/07/statement-income-share-agreements-just-student-debt-fancy-name/ (expressing concern for ISA Student Protection Act by Senators Mark Warner (D-VA), Todd Young (R-IN), Chris Coons (D-DE) and Marco Rubio (R-FL) for, *inter alia*, "preempt[ing] existing state usury laws, and any future usury laws that do not specifically target ISAs."); *see also* Kantrowitz, M. (2019, Dec. 1). History of Income Share Agreements. Saving for College. Retrieved from https://www.savingforcollege.com/article/history-of-income-share-agreements (arguing "[i]ncome-share agreements have been less successful in the U.S., in part because of state usury laws. This has [led] to caps on the total payments under an ISA and limits on the ratio of total payments to the amount originally received. Some proponents of income-share agreements have sought federal legislation to exempt income-share agreements from state usury laws.").

[18] The undersigned organizations do not endorse or support legislation enabling predatory ISAs. We believe state and federal consumer protection laws are strong and broad enough to regulate ISAs. However, we do believe consumer protections can be considered in the form of limiting which schools can offer ISAs, specifying prohibited acts, and establishing state reporting, licensing and/or registration requirements

[19] Cal. Fin. Code § 90000(a)(4).

[20] National Consumer Law Center and Student Borrower Protection Center, *In re: Vemo Education* (2020), https://www.nclc.org/media-center/advocates-file-complaint-with-ftc-urge-enforcement-action-against-vemo-education-for-its-deceptive-marketing-of-income-share-agreements-to-students.html

[21] California Bureau of Private Postsecondary Education, MODIFIED CITATION: ASSESSMENT OF FINE AND ORDER OF ABATEMENT (October 30, 2020); https://www.bppe.ca.gov/enforcement/actions/lambda_mod.pdf

misrepresented its authorization to operate in California to students taking Lambda-backed ISAs.

- **Educational redlining by Student Financing Providers.** February 2020, an SBPC investigation into fintech and banking products uncovered cases where a prospective borrower may be hit with thousands of dollars in additional credit costs if he or she attended a community college, an Historically Black College or University (HBCU), or a Hispanic-Serving Institution (HSI).[22] A subsequent investigation by members of the U.S. Senate exposed evidence of these practices at a wider range of student financing providers.[23]

- **Financing predatory schools by FinTech Student Financing Providers.** In August 2020, SBPC, Allied Progress, Americans for Financial Reform Education Fund, and Student Debt Crisis petitioned federal consumer protection and banking regulators to take action against PayPal Credit for online lending to students attending hundreds of for-profit schools, programs that are almost exclusively unaccredited, unproven, and lightly or wholly unsupervised.[24]

- **Deceptive marketing by third-party Student Financing Providers.** In October 2020, SBPC petitioned the CFPB to take action against Climb Credit, a fintech lender that offers loans students can use to finance attendance at job training programs ranging from coding bootcamps to teacher training courses.[25] As part of its underwriting model, Climb purports to have carefully vetted—and lends in part based on—the institution and program the borrower is looking to attend. SBPC warned that Climb's advertising appears to deceive borrowers, tricking them into taking out loans that are more expensive than represented for programs that may be of lower quality than Climb assures.[26]

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[22] Student Borrower Protection Center, *Educational Redlining* (2020); https://protectborrowers.org/new-report-finds-educational-redlining-penalizes-borrowers-who-attended-community-colleges-and-minority-serving-institutions-perpetuates-systemic-disparities/

[23] Senate Committee on Banking, Housing, and Urban Affairs, *Use of Educational Data to Make Credit Determinations* (2020); https://www.banking.senate.gov/imo/media/doc/Review%20-%20Use%20of%20Educational%20Data.pdf.

[24] Student Borrower Protection Center, Allied Progress, Americans for Financial Reform Education Fund, and Student Debt Crisis, *Advocates Sound Alarm on PayPal's Education Financing Partnerships with Over 150 For-Profit Schools* (2020); https://protectborrowers.org/advocates-sound-alarm-on-paypals-education-financing-partnerships-with-over-150-for-profit-schools/.

[25] Student Borrower Protection Center, *Advocates Warn Specialty Student Lender Climb Credit May be Deceiving Borrowers and Engaging in Pervasive Consumer Protection Violations* (2020), https://protectborrowers.org/advocates-warn-specialty-student-lender-climb-credit-may-be-deceiving-borrowers-and-engaging-in-pervasive-consumer-protection-violations/

[26] Student Borrower Protection Center, *The CFPB Must Investigate Climb Credit and Protect Borrowers Across the Dangerous, High-Cost Shadow Student Debt Market* (2020); https://protectborrowers.org/the-cfpb-must-investigate-climb-credit-and-protect-borrowers-across-the-dangerous-high-cost-shadow-student-debt-market/

Other documented and potential problems specific to ISAs include:

- **Unaffordable payments**. The payments required by ISAs may be far higher than under federal income-based repayment programs. The percentage of income to repaid may not include additional student loan payments on top of the ISAs**.**

- **Onerous terms and mechanisms that may make early repayment costly**. Though not styled as prepayment penalties, the structure of ISA loan repayment may effectively front-load high interest that could be avoided with early repayment of a traditional loan, resulting in extremely high effective APRs.

- **Inability to compare cost to traditional loans**. The lack of APR and total cost of credit disclosures make comparisons difficult.

- **Long loan terms that may be extended for years**.

- **Potential liability for breach of representations about finding work**. Disputes may arise about why a student is unemployed or underemployed.

- **Loan stacking**. ISA loans are usually not offered as a replacement for traditional education financing, like federal student loans, but are offered on top of other student financing sources, compounding student debt even further.

Furthermore, at least one ISA lender has created an ISA fund aimed at undocumented students, who are ineligible to receive financial aid, including Dreamers who are eligible for the Deferred Action for Childhood Arrivals program.[27] Given the potential for unfair practices, particularly against vulnerable populations, we urge the DFPI to regulate ISA lenders in a way that does not exacerbate the existing, deep racial wealth gap.

Student loan debt disproportionately impacts students of color. The results of historic and current segregation in higher education, as well as the existing racial wealth gap, makes the burden of student loan debt particularly heavy for Black and Latino communities, and ISAs are positioned to make this burden worse, particularly without proper regulation.[28] ISA lenders are likewise exploiting the failures of our state-funded education system for their own gain, and without adequate guardrails, the debt load will fare worse for our students of color.

Families of color are likely to have less income and family wealth to pay for college, are more likely to borrow for higher education, and typically have less of a cushion to withstand future financial shocks, thus contributing to a higher likelihood of delinquency and default on student loan debt. Black graduates are more than three times as likely to default on their student loans

[27] https://www.insidehighered.com/quicktakes/2018/09/20/income-share-agreements-undocumented-students
[28] Center for Responsible Lending and the National Association for the Advancement of Colored People. (2019, July). Quicksand: Borrowers of Color and the Student Debt Crisis. Retrieved from https://www.responsiblelending.org/research-publication/quicksand-borrowers-color-student-debt-crisis.

within four years as white borrowers, and Latino graduates are more than twice as likely to default as white graduates.[29] In California, for-profit college enrollees with far worse educational outcomes, are 15% African American compared to 5.4% African American in all nonprofit undergraduate institutions in the state.[30] Black students, and Black women especially, are targeted and recruited by schools that "exploit the failures of the non-profit higher education system—from the byzantine financial aid processes to recruitment practices that rarely reach high schools where the majority of students are people of color—for their own gain."[31]

Without critical rules to protect borrowers, ISAs targeted at this population will result in the same problems. Indeed, they will likely make those problems worse, as students may take out ISAs on top of other student debt. For-profit colleges, for example, target low-income students, women students, and students of color, who are already disproportionately enrolled in for-profit schools as nontraditional students struggling to manage family and work obligations to make better lives for their families. Such students are targeted with aggressive marketing, persuading them to invest heavily in the future with promises of successful careers and financial stability that ultimately do not materialize.[32] Often, these same students borrow more for college and struggle more with debt, and ISAs may exacerbate their debt burden.[33]

Thus, unless bold, regulatory action is taken by the DFPI with respect to Student Financing Providers, including ISA lenders, a generation of low-income students and students of color will be further ensnared in debt undertaken in an effort to advance their lives.

III. The DFPI Should Establish Registration Requirements for Student Financing Providers, including ISA lenders, under Financial Code section 90009(a).

i. The DFPI should establish registration requirements for Student Financing Providers, including ISA lenders, because they are engaged in the business of offering or providing a consumer financial product by extending credit and collecting debt under the CCFPL.

The CCFPL applies to all "covered persons," who are engaged in "offering or providing a consumer financial product or service to a resident of this state."[34] A "[c]onsumer financial product

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[29] Scott-Clayton, J. & Li, J. (2016). Black-white disparity in student loan debt more than triples after graduation. Brookings Institution. Retrieved from https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/.

[30] https://www.responsiblelending.org/map/pdf/ca.pdf

[31] Jen Mishory, Mark Huelsman, and Suzanne Kahn, "How Student Debt and the Racial Wealth Gap Reinforce Each Other, The Century Foundation, September 2019, https://tcf.org/content/report/bridging-progressive-policy-debatesstudent-debt-racial-wealth-gap-reinforce/?session=1.

[32] In California, for-profit students are more likely to be low-income (54.3%), African-American (15%), and women (63%) compared to enrollment at California's public and private nonprofit four-year institutions. *See* Center for Responsible Lending, State of For-Profit Colleges: California. Retrieved from https://www.responsiblelending.org/map/pdf/ca.pdf.

[33] Morgan, Julia M., Farr, B. & Hornung, D. (2019, Jan. 10). Income Share Agreements: A Student Debt Promise Falling Short of Reality. Roosevelt Institute. Retrieved from https://rooseveltinstitute.org/2019/01/10/income-share-agreements-a-student-debt-promise-falling-short-of-reality/ ("ISAs like Back a Boiler exist *on top of* federal student loan debt often after students have exhausted their federal student loan eligibility, rather than as a replacement for it. ISAs that are stacked on top of existing debt can lead to excessively burdensome education financing payments after graduation.") (internal punctuation omitted).

[34] Cal. Fin. Code. §§ 90002(d); 90005(f).

or service" is defined as a "financial product or service that is delivered, offered, or provided for use by consumers primarily for personal, family, or household purposes."[35] The term "financial product or service" is further defined as including:

> Extending credit and servicing extensions of credit, including acquiring, purchasing, selling, brokering extensions of credit, other than solely extending commercial credit to a person who originates consumer credit transactions[;] [and]
>
> Collecting debt related to any consumer financial product or service.[36]

And, "credit" and "debt" are again further defined under the CCFPL as follows:

> "Credit" means the right granted by a person to another person to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for those purchases.
>
> "Debt" means any obligation of a person to pay another person money regardless of whether the obligation is absolute or contingent, has been reduced to judgment, is fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured and includes any obligation that gives rise to right of an equitable remedy for breach of performance if the breach gives rise to a right to payment

Many so-called "innovators" in the marketplace for student financing provide traditional, amortizing consumer loans that may have some exotic features (e.g. alternative underwriting). Typically, the providers of this student financing acknowledge that their offerings are credit and a "consumer financial product," as defined in the CCFPL. However, as described above, other participants in the student financing market, particularly ISA lenders, may seek to sidestep regulation by disputing their classification as "credit" or "loans" or whether the collection of an ISA constitutes the servicing or collection of a debt.

By breaking ISAs down into their essential components, it becomes clear that ISA lenders are extending credit and collecting debt, such that they are covered by the CCFPL and should fall squarely within the purview of the DFPI.[37]

A growing body of research and analysis supports application of credit laws to ISAs.[38] We have appended this letter with a copy of one such analysis, *Credit By Any Other Name: How Federal Consumer Financial Law Governs Income Share Agreements*,

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[35] Cal. Fin. Code. § 90005(e).

[36] Cal. Fin. Code. §§ 90005(k)(1), (k)(10).

[37] Below we discuss the impact of the Consumer Financing Law (CFL) on ISAs.

[38] *See* Pearl, J. & Shearer, B. (2020, Jul.). Credit by Any Other Name: How Federal Consumer Financial Law Governs Income Share Agreements. Student Borrower Protection Center. Retrieved from https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer_Credit-By-Any-Other-Name.pdf; Hayes, S. & Milton, A. (2020, Jul.). Solving Student Debt or Compounding the Crisis?: Income Share Agreements and Fair Lending Risks. Student Borrower Protection Center. Retrieved from https://protectborrowers.org/solving-student-debt-or-compounding-the-crisis-income-share-agreements-fair-lending-risks/; Roesch, B. (2020, Aug.). Applying State Consumer Finance and Protection Laws to Income Share Agreements. Student Borrower Protection Center. Retrieved from https://protectborrowers.org/applying-state-consumer-finance-laws-to-income-share-agreements/.

authored by two former senior regulators at the Consumer Financial Protection Bureau. In this analysis, the authors demonstrate that an ISA is an agreement in which:

- A lender promises to pay a sum to a student (usually distributed to a third party, the school);

- In exchange for the student's promise to repay the lender at a later time, by either:
    - i. Paying a fixed Payment Cap that is higher than the sum the student received (in cases of early payoff or default); or

    - ii. Making payments, calculated according to a formula in the agreement that is based on the student's income, over a period determined in the agreement.[39]

To this end, the authors argue:

> ISAs are functionally equivalent to student loans with income-driven repayment options. Both ISAs and student loans provide financing for higher education. They both require the borrower to repay with a set number of payments calculated as a percentage of income. In both circumstances, the monthly payments can be as low as $0. And student loans with income-driven repayment options are subject to federal consumer financial law governing credit, unless explicitly exempted. The fact that ISA lenders claim they do not extend credit to student borrowers does not change this analysis. In the consumer law context, courts consistently look to the substance of agreements over conclusory claims of the parties to determine whether an arrangement is an extension of credit. When faced with contracts that purport not to be "credit," courts will interpret the nature of the parties' agreement "after peeling away . . . labels from these transactions."

The authors conclude, and our undersigned organizations agree, that these components are sufficient to render ISAs "credit" under the CCFPL and to provide the DFPI with sufficient authority to regulate ISA lenders as part of any comprehensive effort to oversee the student financing market.[40]

It is worth noting that the definition of "credit" under the CCFPL is similar to – but even broader than – the ECOA definition. Under Regulation B implementing ECOA,, the term "credit" means "the right granted by a creditor to an applicant to defer payment of a debt, to incur debt and defer

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[39] Pearl, J. & Shearer, B. (2020, Jul.). Credit by Any Other Name: How Federal Consumer Financial Law Governs Income Share Agreements. Student Borrower Protection Center. Retrieved from https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer_Credit-By-Any-Other-Name.pdf.

[40] *Id*. (The authors further explain that "[w]ith this framing in mind, we turn to the analysis of why Income Share Agreements are "credit" under federal consumer financial law. ISAs typically claim, in the agreement, that they are not loans or extensions of credit. ISA lenders market these products as alternatives to traditional education loans55 and debt.56 The first words in the sample ISA contract Purdue makes available on its website are: "THIS IS NOT A LOAN OR CREDIT." Lenders contend that, even though students will have to later repay the money they have borrowed, ISAs present an opportunity to complete school "without worrying about interest rates or decades of student loan payments." The compliance bar has similarly taken the position that ISAs do not constitute extensions of credit and should not be subject to federal consumer protection regulation.")

its payment, or purchase property or services and defer payment therefor."[41] The CCFPL definition is similar with two important differences: It applies to the right granted by "a person to another person" – not just the right granted by a "creditor" – and CCFPL has a broad definition of "debt" that is lacking in ECOA (or TILA). Courts liberally construe the ECOA to achieve the statute's goal of eradicating credit discrimination – also a large part of the stated intent of the CCFPL.[42] Thus, the persuasive analysis that ISAs are credit under ECOA provide compelling reasons to view them as credit under the CCFPL.

The broader aspects of the CCFPL definition make it especially compelling to view ISAs as credit under California law. In particular, the CCFPL definition of "credit" incorporates the term "debt," and CCFPL gives "debt" a broad interpretation:

> "'Debt' means any obligation of a person to pay another person money regardless of whether the obligation is absolute or contingent, has been reduced to judgment, is fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured and includes any obligation that gives rise to right of an equitable remedy for breach of performance if the breach gives rise to a right to payment."[43]

Importantly, this definition extends to debt that is contingent, not fixed, or unsecured. ISAs certainly create an obligation to pay another person money, even though that obligation may be contingent, not fixed, or unsecured. Thus, ISA lender arguments touting that their agreements do not create debt or that they are nonrecourse fail in light of this broad California definition.

Moreover, the CCFPL definition of "debt" is essentially the same as the definition of "debt" under the federal Bankruptcy Code.[44] Congress intended the terms "debt" and "claim," which are coextensive,[45] to have "the broadest available definition,"[46] and they reach even to rights to payment that are unenforceable.[47]

Separate comments submitted by the National Consumer Law Center and Center for Responsible Lending regarding earned wage access programs ("EWAs") discuss additional reasons, also applicable to ISAs, as to why claims that products are not "credit" or "loans" under California law should be rejected.

As the DFPI is considering how to interpret the definitions of "credit" and "debt" as they apply to ISA lenders, it should also heed the advice of consumer legal experts who have rightly raised the alarm on ISA lender claims that their agreements are not subject to existing federal consumer

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[41] 12 C.F.R. § 1002.2(j).
[42] Cal. Fin. Code. §§ 90000(b); 90019(a).
[43] Cal. Fin. Code § 90005(h).
[44] The Bankruptcy Code defines "debt" as a "liability on a claim." 11 U.S.C.§ 101(12). The Code defines a "claim" to mean "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C. § 101(5). The Supreme Court has noted that Congress intended "that the meanings of 'debt' and 'claim' be coextensive." Pennsylvania Dep't of Public Welfare v. Davenport, 110 S.Ct 2126, 2130 (1990).
[45] Pennsylvania Dep't of Public Welfare v. Davenport, 110 S.Ct 2126, 2130 (1990).
[46] Johnson v. Midland Funding, LLC, 137 S. Ct. 1407, 1412 (2017).
[47] *Id.*

protection law because they— unlike private student lenders—do not extend credit. Accepting industry's arguments would leave ISA borrowers without the critical protections of ECOA, the FCRA, and TILA, among other laws.

ii. ISAs are consumer loans under the CFL, although this licensing regime would not be suited to ISAs.

If another California statutory scheme does not apply, such as one regulating retail installment sales or mortgage loans applies, credit then generally falls under the California Financing Law (CFL).

The CFL covers "finance lenders," defined as "any person engaged in the business of making consumer loans."[48] It is important to note, that in the definition of "finance lenders," the statute further defines "the business of making consumer loans," in relevant part:

> The business of making consumer loans . . . may include lending money and taking, in the name of the lender, or in any other name, in whole or in part, as security for a loan…any lien on . . . salary, earnings, income, or commission.[49]

Another provision of the CFL makes clear that a sale or assignment of a consumer's unearned, future salary in exchange for any payment is a loan:

> The payment by any person in money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, **whether earned or to be earned**, is, for the purposes of regulation under this division, a loan secured by the assignment. The amount by which the assigned compensation exceeds the amount of the consideration actually paid is interest and charges upon or for the loan, calculated from the date of payment to the date the compensation is payable.[50]

ISA lenders are lending money, and taking a lien on salary, earnings and income. In addition to basic elements of ISAs, as discussed in the preceding section III(i) above, it is worth noting also, that in the case of some ISAs, including many coding "bootcamp" ISAs, students are also required to pay an initial deposit as consideration for the loan, in addition to the student's promise to repay the lender at a later time.[51]

Thus, the Department may determine that ISAs are providing consumer loans within the meaning of the CFL. The undersigned organizations support the analysis provided and conclusion stated in the comments regarding EWAs discussing that, for debits above $300, as well as all employer-based advances that do not debit bank accounts and thus are outside the California Deferred Deposit Transaction Law ("CDDTL") governing payday lenders, the CFL applies. And, that

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[48] Cal. Fin. Code § 22009.
[49] Cal. Fin. Code § 22009.
[50] Cal. Fin. Code § 22335 (emphasis added).
[51] Crispe, I. (2021, Feb. 13), All About ISAs: Income Share Agreements and Deferred Tuition at Coding Bootcamps. Course Report. Retrieved from https://www.coursereport.com/blog/all-about-isas-income-share-agreements-and-deferred-tuition-at-coding-bootcamps.

EWAs should be required to obtain finance lender licenses and to comply with the CFL usury caps.

However, ISAs are typically large loans, over $10,000. For these larger loans, the CFL lacks any meaningful protection within its regime applicable to regulate Student Financing Providers, including ISA lenders that largely provide education financing to student borrowers.

Consumer loans subject to the CFL must comply with CFL's usury provisions. For small loans of the size typical of payday advances, CFL caps the rate at 2.5% per month (30% APR) for loans up to $225 and 2% per month (24% APR) for amounts over $225 up to $900. Larger installment loans between $2,500 and $10,000 are now capped at 36% plus the federal funds rate thanks to the passage of AB 539 in 2019. Loans above $10,000 made by licensed consumer finance lenders remain uncapped by CFL.[52]

Given that ISAs are intended to cover the cost of tuition and living expenses, those comparing the cost of ISAs measured against the cost of other higher education financing options assume a repayment amount that is comparable to the amount borrowed through either federal or private student loans to cover such costs.[53] This amount will very typically be much greater than $10,000, rendering the CFL—with no usury caps above $10,000—inappropriate to cover ISA lending.[54]

To the extent that loans are protected by the CFL's usury limits, DFPI does not have the authority to authorize lenders to evade those limits by giving them an alternative registration regime under the CCFPL without similar limits. For that reason, NCLC and CRL have explained in the comments on earned wage access products that the smaller loans offered by EWA providers must comply with the CFL usury limits (or, in the alternative, the constitutional 10% usury limit).

But for loans unprotected by CFL, CCFPL registration would not facilitate usury evasions. Therefore, DFPI should register them under CCFPL and adopt protections to prevent unfair, deceptive or abusive practices and address the risks of ISAs.

[52] The 38% to 40% rate permitted by CFL is also quite high for loans at the upper $10,000 range, especially for student loans that may be outstanding for a number of years. These rates are simply too high for higher education financing, and out of step for even the most costly private financing options. We believe that the 10% constitutional usury limit is the more appropriate one for ISAs. If, however, DFPI rejects that view, it must apply the CFL limits to the extent that they apply. Otherwise, CFPI will be sanctioning usury evasions.

[53] *See*, *e.g*., Helhoski, A. & Lane, R. (2020, May 5). Income Share Agreements vs. Student Loans: Which Costs Less? NerdWallet. Retrieved from https://www.nerdwallet.com/article/loans/student-loans/how-income-share-agreements-stack-up-against-college-loans (comparing the cost of a $20,000 ISA at 10% of income over a 10-year term with a $20,000 PLUS loan with an APR of 7%, repaid over 10 years and a private loan of $20,000 with an APR of 9% with that same repayment period.)

[54] *See generally* Helhoski, A. & Lane, R. (2020, May 5). Income Share Agreements vs. Student Loans: Which Costs Less? NerdWallet. Retrieved from https://www.nerdwallet.com/article/loans/student-loans/how-income-share-agreements-stack-up-against-college-loans (comparing the cost of a $20,000 ISA at 10% of income over a 10-year term with a $20,000 PLUS loan with an APR of 7%, repaid over 10 years and a private loan of $20,000 with an APR of 9% with that same repayment period).

We additionally argue that the State's constitutional usury cap will apply and that while DFPI does not have the authority to adopt a usury cap, it also does not have the authority to exempt providers from a usury cap, as discussed below.

iii. ISA lenders should not be exempt from the California Constitution's usury limit.

In its request for comments, the DFPI asks whether it should issue regulations clarifying the applicability of state credit cost limitations, including rate and fee caps, to consumer financial products and services offered by covered persons.[55] If DFPI decides to register ISA lenders as covered persons CCFPL, it should clarify that the constitutional usury limit of 10% applies to them.

ISAs are a "loans … of money" under the California Constitution for similar reasons to their coverage under the other credit laws discussed in these comments. Further discussion of the meaning of "loan" under the Constitution can be found in the earned wage access comments of NCLC and CRL.[56]

We are cognizant that section 90009(a)(3) of the CCFPL shall not "be construed to give the department authority to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, except as otherwise provided for by statute." However, neither does the CCFPL exempt lenders from our state constitutional usury limit of 10%. Our Constitution provides a number of specific exemptions and authority for the legislature to exempt "any other class of persons authorized by statute."[57] But, DFPI does not have authority to create new exemptions by regulation.

The California Constitution renders any amount that an ISA lender charges that goes beyond a 10% interest rate be void and uncollectable. Any more is simply too high for higher education financing.

In addition, the history of the regulation of payday loans and high-cost installment loans illustrates the dangers of viewing ISAs as something different from traditional credit. Historically, usury and small loan laws helped rein in abusive lending. Within the past several decades, many states granted payday lenders exemptions from usury and small loan laws. Since then, payday lenders have used these exemptions to gouge borrowers with triple-digit interest

[55] Cal. Fin. Code § 90009(f)(3).
[56] The CFL does not include a definition for the term "loan," but in DBO's legal opinion letter issued on December 30, 2019, the DBO concluded that the definition of a "loan of money" found in Civil Code § 1912 should be used in defining the term "loan" for purposes of the CFL. See OP 7667 – Deferred payment products subject to CFL. (2019, Dec. 20). Department of Financial Protection and Innovation. Retrieved from https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/12/Deferred-Payment-Products-cfl.pdf. While ISA lenders may claim that ISA borrowers do not agree to return an equivalent sum, their underwriting methods and the terms of the ISA contracts make it highly unlikely that the borrower will not be obligated to return at least as much as, and likely far more than, they borrow. Certainly, ISA lenders would not make loans to students on terms that they did not expect would be handsomely repaid. Thus, theoretical claims that the borrower is not committing to return the sum borrowed should be met with a high degree of skepticism.
[57] Cal. Const., art. XV. § 1.

rates.[58] Once abusive financial product lenders convince regulators that that products are different from traditional credit and deserve a different statutory scheme with different price limits, the Constitution exempts them from its usury cap through the exemption for any "class of persons authorized by statute." That exemption covers payday lenders licensed under the CDDTL that put people in a well-documented, unaffordable cycle of debt. That exemption also covers lenders licensed under the CFL even though the California Supreme Court deemed their rates "unconscionable" until the passage of AB 539 that capped rates on loans between $2,500 and $10,000.

ISA lenders are not licensed by CFL. There are no other constitutional or statutory exemptions from the constitutional usury cap that would be applicable to ISAs. Only the legislature "by statute" can authorize additional exemptions, not DFPI by regulation. Thus, the Constitutional usury cap of 10% should apply to ISA lenders. Indeed, capping the rates of ISAs at 10% makes public policy sense.

Among all households with student debt, the average interest rate is 5.8%, which includes both federal loans that make up 90% of all student loans, and private student loans.[59] Given that the Federal Reserve has cut rates to near-zero in response to the COVID-19 crisis, student loan rates are lower now than they have ever been to help students reeling from the economic devastation the pandemic has caused. Today, the "interest rate for all new federal direct undergraduate student loans decreased to 2.75%, down from 4.53% in 2019-20. Unsubsidized direct graduate student loan rates decreased to 4.30%, down from 6.08%. Rates for PLUS loans, which are for graduate students and parents, dropped to 5.30%, down from 7.08%."[60]

The Consumer Financial Protection Bureau (CFPB) has also long recommended that "public policy should emphasize the choice of a federal student loan" over a private student loan given that they are often more expensive, because rates are often variable, and repayment options are limited.[61] Publicly available data on private student loan interest rates is hard to find. But, at least one source states that among the sixteen best private student loans of March 2021, even variable rates—across all lenders, including those that did not disclose the minimum credit score required to qualify—ranged between 1.02% at the low end to 12.37%. Ascent, for example, provides a variable rate of 2.14%-12.37% for those with minimum credit scores of 540.[62]

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[58] https://www.responsiblelending.org/sites/default/files/uploads/modern-day-usury-the-payday-loan-trap.pdf

[59] Dancy, K. & Holt, A. (2017, Jun. 20). In the Interest of Few: The Regressive Benefits of Federal Student Loan Refinancing. New America. Retrieved from https://www.newamerica.org/education-policy/policy-papers/interest-of-few/.

[60] Helhoski, A. (2020, Sep. 3). Current Student Loan Interest Rates and How They Work. NerdWallet. Retrieved from https://www.nerdwallet.com/article/loans/student-loans/student-loan-interest-rates.

[61] Consumer Financial Protection Bureau. Private Student Loans: Report to the Senate Committee on Banking, Housing, and Urban Affairs, the Senate Committee on Health, Education, Labor, and Pensions, the House of Representatives Committee on Financial Services, and the House of Representatives Committee on Education and the Workforce. (2012, Aug. 29). Retrieved from https://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf#page=16; Consumer Financial Protection Bureau. Student Loans: Choosing a Loan That's Right for You. Retrieved from https://www.consumerfinance.gov/paying-for-college/choose-a-student-loan/#o1.

[62] Helhoski, A., Clark, C. & Lane, R. 16 Best Private Student Loans of March 2021. NerdWallet. Retrieved from https://www.nerdwallet.com/best/loans/student-loans/private-student-loans.

As such, the constitutional usury cap of 10% that applies to ISA lenders in the absence of an exemption, is more in line with average interest rates for student financing.[63] The DFPI has an opportunity to act decisively to ensure that the regulation of ISA lenders does not follow the same pattern of oversight evasion that leaves the industry without any meaningful rate cap guardrails, and which leave consumer advocates playing whack-a-mole to curb their predatory practices.

IV. We Urge the DFPI to Impose the Following Minimum Requirements for Student Financing Providers, including ISA lenders, to operate in California to ensure their Legitimacy.

In DFPI's consideration of whether it should register Student Financing Providers, including ISA lenders, under CCFPL, and to prevent unfair, deceptive or abusive practices against students, we urge the Department to render void and unenforceable any student financing, including a student loan or an ISA, under the following non-exclusive conditions:

- The borrower's work authorizations changes (i.e. the borrower loses deferred action for childhood arrival authorization);
- The borrower dies;
- The borrower suffers from total and permanent disability;
- The school closes; or
- The university misled them or engaged in misconduct (i.e. UDAAP violations).

Moreover, we urge the following requirements to prevent unfair, deceptive or abusive practices against students specifically with respect to student financing that has an income-contingent repayment structure, including ISAs:

- Earnings disclosures in marketing should be based off actual earnings of graduates' starting median salary or, if it is a new degree program, based off of historical state workforce statistics or similar location specific data; disclosures should not be based on salaries that differ from the lender's internal assessments for business planning or accounting purposes or from those use to estimate profits for investors or potential investors.

- Impose reasonable initial term limits for repayment. Students should not be signing up for extended periods of indentured servitude. Disclosures should conspicuously warn students of the potential longer extended time period.[64]

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[63] *See generally* Helhoski, A. & Lane, R. (2020, May 5). Income Share Agreements vs. Student Loans: Which Costs Less? NerdWallet. Retrieved from https://www.nerdwallet.com/article/loans/student-loans/how-income-share-agreements-stack-up-against-college-loans (comparing the cost of a $20,000 ISA at 10% of income over a 10-year term with a $20,000 PLUS loan with an APR of 7%, repaid over 10 years and a private loan of $20,000 with an APR of 9% with that same repayment period).

[64] Banard, J., Darcus, Joanna K., Harrington, A., Howarth, R., Shafroth, A., Taylor, K., Yu, P. Road to Relief: Supporting Federal Student Loan Borrowers During the COVID-19 Crisis and Beyond. CRL & NCLC. Retrieved from https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/nclc-crl-road-to-relief-23nov2020.pdf (finding "CFPB research using credit reporting data for a large sample of student loan borrowers

- Deferments for financial distress or other specified events should be allowed as long as there is a reasonable hard cap on term that is not extended due to these paused payments. Deferments should not result in negative reports to credit bureaus.

- DFPI's supervision of the servicing of any student financing with an income-contingent repayment structure, including ISAs, should include close oversight of the process for asserting claims that a borrower has violated the agreement by failing to seek work. Financing agreements that give lenders too much discretion to claim breach of contract for those who cannot find work or are unable to work for various reasons post risks to borrowers.

- The cost of repaying any student financing with an income-contingent repayment structure, including an ISA early should be capped to prevent an inappropriate prepayment penalty or a usurious loan. That cost should be calculated to ensure that the student does not pay an effective interest rate of more than the constitutional 10% limit and that the loan does not violate the prohibition on prepayment penalties under TILA.

V. Required Disclosures Should be Required and Should at a Minimum Require APR Disclosures per DBO's Align MOU and Mirror California's Private Student Loan Disclosures.

On February 9, 2018, Department of Business Oversight (DBO) entered into a Memorandum of Understanding (MOU) with Align Income Share Funding ("Align"). Align states that while "other companies offer ISAs as a way to pay for education, Align offers ISAs to use for any cash need, whether it's consolidating debt, paying a medical bill, or planning your wedding."[65]

The MOU does not resolve competing arguments about whether the ISAs are loans or whether Align is covered by CFL. But, as part of the MOU, the DBO required that Align modify its ISA agreement to require that on the first page, and before offering its product to California consumers, Align disclose the effective APR "assuming funds were provided to the consumer as a loan rather than pursuant to an ISA."[66] The DBO also required the APR disclosure to be based on a calculation of the Federal Reserve Board's APR method as set forth in Regulation Z, and delineated scenarios for when the APR should be calculated.

We urge DFPI to require APR disclosures for all student financing, including ISAs, as well as disclosures of the finance charge and total of payments in a similar fashion as required to be disclosed under TILA. However, we urge that the DFPI seek input from the public prior to determining a calculation method. We urge that the disclosures for Student Financing Providers, and ISA lenders specially, must include an APR calculated based on the assumptions currently in Regulation Z for fixed and variable rate credit for private student loans and based on

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shows that for the longest-studied cohort, the proportion of borrowers fully paying off their loans begins to flatten out after 8 years in repayment. At 14 years, 20% of borrowers have an outstanding balance on their loans, and additional years of repayment appear to yield little to nothing towards the achievement of full repayment.").

[65] Align. Income Share Agreements. Retrieved from https://www.helloalign.com/products/income-share-agreement.
[66] Align also argued that its ISA product was not a "loan" under California law, such that it triggered a requirement to be licensed under the CFL. DBO did not make a determination as to whether its ISA product was a loan, and whether it would trigger an obligation to get a license under the CFL.

assumptions established by the DFPI for ISAs' variable payment and other features. ISA lenders must provide consumers with the cost of comparable federal and private student loans at the time of application.

Furthermore, we urge that additional disclosures for any student financing with an income-contingent repayment structure, including ISAs, must be required. These disclosures should largely mirror what is at minimum required for private student loans in California, and should also include:

- a statement that the transaction creates debt and is a loan;
- the loan term;
- the interest rate;
- whether the interest rate is variable or fixed;
- the minimum salary level required for repayment to begin;
- under what conditions the ISA will be terminated;
- information communicating that if a graduate anticipates working at a Public Service Loan Forgiveness program-qualifying job, and/or anticipates that their debt-to-income ratio will be high, then subject to underwriting and other considerations, federal student loans may be a much better option due to loan forgiveness and other flexible repayment options; and
- a warning that any ISA loan will stack upon any outstanding federal student loan and private loan obligations, and that this should be considered by the student prior to taking out an ISA loan.

VI. The DFPI Should Require Registrants to Submit Annual Reports to Prevent against Student Financing Provider Abuse and to Promote the Intent of the CCFPL.

Student Financing Providers, including ISA lenders, should adhere to comprehensive reporting requirements, especially as new forms of student financing, including ISAs, are emerging and there is not enough data to fully understand the harm these loans could bring to borrowers. At a minimum, we urge the following to be provided to the Commissioner at the time of registration and not less than once per year thereafter:

- a list of all schools at which the student financing company or lender has provided loans to a borrower residing in this State;
- the volume of loans made annually to borrowers residing in California;
- the volume of loans made annually at each school;
- the default rate for borrowers obtaining loans from the student financing company or lender;
- the rate of borrowers that have payment terms extended and the extent by which they have been extended;
- actual borrower salaries and how they compare to the estimates and disclosures at time of origination;

- any debt collection or other activities in which the ISA lender or its agents engage to collect payments;
- any complaints received;
- a copy of each model promissory note, agreement, contract or other instrument used by the student financing company during the previous year to substantiate that a private education loan has been extended to a borrower or that a borrower owes a debt to the student financing company; and
- the name and address of the student financing provider and any officer, director, partner or owner of a controlling interest of the student financing provider.

We also encourage the Commissioner to create a publicly accessible website that includes the following minimum information about Student Financing Providers registered in California to promote transparency for borrowers:

- the name, address, telephone number and website for all registered Student Financing Providers, including ISA lenders;
- a summary of the information as discussed in the reporting requirements above; and
- copies of all model promissory notes, agreements, contracts, or other instruments provided to the Commissioner as described above.

Finally, DFPI should create a publicly available complaints database for all consumer financial products and services, similar to the database published and maintained by the CFPB. That database should include publicly available complaint narratives, appropriately redacted to protect the complainant's privacy.

VII. Conclusion.

Thank you for the invitation to comment and for your thoughtful consideration of our collective feedback on the regulation of ISAs herein. If you have questions, please contact Marisabel Torres marisabel.torres@responsiblelending.org; Mike Pierce mike@protectborrowers.org; or Lauren Saunders at lsaunders@nclc.org.

Sincerely,

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PROTECTBORROWERS.ORG

CREDIT BY ANY OTHER NAME

How Federal Consumer Financial Law Governs Income Share Agreements

July 2020

Joanna Pearl &
Brian Shearer

STUDENT BORROWER PROTECTION CENTER

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The views expressed in this article are the authors' alone.

The following report was authored as part of the Student Borrower Protection Center's ongoing effort to highlight emerging risks to students and consumers in the marketplace for student financing. This publication is the first in a series of papers authored by legal experts at the forefront of consumer law, exploring how Income Share Agreements fit into existing consumer financial protection framework.

Protect Borrowers

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Introduction

When industry created modern Income Share Agreements (ISAs) as a way to finance higher education, its advocates contorted themselves trying to circumvent the federal consumer laws that govern credit.[1] ISA advocates avoided terminology typically used for loans, like "interest" and "principal," and instead developed "agreements" that purportedly disassociate repayment obligations from the amount borrowed: student borrowers must pay back either a share of their monthly income or a fixed sum that is typically higher than the cost of the education. ISA lenders represent their product to students and policymakers alike as a new alternative to traditional student lending.[2]

But ISAs are just another type of student loan. To obtain an ISA, as with a student loan, students apply to a company to obtain money for their education in exchange for a promise to repay the company in the future. The common understanding of a loan is the familiar opportunity to "gladly pay you Tuesday for a hamburger today." With ISAs, students are getting a hamburger today (education) in exchange for a promise to pay for it on the proverbial Tuesday. The fact that borrowers can pay back their ISAs as a percentage of their post-graduate income is nothing special—in fact, payment plans based on a percentage of income are available to the vast majority of students repaying federal student loans and a growing number with private student loans. The thing an ISA most resembles in the world is a student *loan*.

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[1] *See* Michael Stratford, *Income-Share Agreement Supporters Lobby Congress*, Politico (June 26, 2019, 10:00 AM), https://www.politico.com/newsletters/morning-education/2019/06/26/income-share-agreement-supporters-lobby-congress-450909; Tariq Habash et al., *Will Income-Share Become the Next Payday Loans?*, Am. Prospect (July 2, 2019), https://prospect.org/education/will-income-share-agreements-next-payday-loans/ ("[Advocates of ISAs] are using a familiar playbook: Just like payday loans, auto title loans, and other 'alternative debt products' unveiled before them, ISA lenders are creating debt instruments and then convincing policymakers to roll back the rules that keep consumers safe from exploitation, based on immaterial or specious distinctions between their product and traditional loans.").

[2] *See, e.g.*, Mitch Daniels, *Here Is a Powerful Alternative to Student Loans*, Wash. Post (Nov. 28, 2019), https://www.washingtonpost.com/opinions/income-share-agreements-are-a-powerful-alternative-to-student-loans/2019/11/27/5290d0ee-0be3-11ea-97ac-a7ccc8dd1ebc_story.html

ISA lenders tout their service as a desirable and low-risk option for students who purportedly will be required to pay only what their incomes support.[3] Their claims, which are themselves subject to criticism from consumer advocates for being deceptive,[4] elide the myriad ways ISAs can harm student borrowers. ISAs typically establish harsh collections practices, including allowing lenders to collect multiples of the amount borrowed in the event of default, permitting them to seek an offset of a defaulted borrower's state tax refund, and making defaulted borrowers responsible for expenses associated with collections.[5] The income share a student must pay under an ISA often depends on the student's major, so these arrangements create the potential for discrimination based on characteristics that often track particular fields of study—like race, gender, and national origin.[6] And because ISAs often do not replace other student debt, but rather provide additional funding above and beyond a borrower's federal student loans, a student may leave school with an overall repayment obligation that is higher than if the student had simply financed their entire education with traditional federal and private student loans.[7]

ISA lenders contend their agreements are not subject to existing federal consumer protection law because they—unlike private student lenders—do not extend credit.[8] That claim alone should raise red flags for policymakers

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[3] *See, e.g.*, *Back a Boiler Program Overview*, Purdue Univ., https://www.purdue.edu/backaboiler/overview/index.html (last visited July 12, 2020) (describing Purdue University's ISA as "an alternative to private or Parent PLUS Loans to fund a Purdue education which can be paid back with greater flexibility and freedom"); Better Future Forward, *Better Future Forward Launches Income Share Agreements Fund for Low-Income Chicago Students Pursuing a College Degree*, Educ. Credit Mgmt. Corp. (Nov. 15, 2018), https://www.ecmcfoundation.org/informed/2019/better-future-forward-launches-income-share-agreements-fund-for-low-income-chicago-students-pursuing-a-college-degree (explaining that ISAs are a "low-risk, broadly-accessible, income-based college financing").

[4] *See* Complaint, Request for Investigation, Injunction and Other Relief, *In re* Vemo Educ., Inc., F.T.C. (May 31, 2020), https://protectborrowers.org/wp-content/uploads/2020/05/Vemo-Complaint.pdf.

[5] *See* Julie Margetta Morgan et al., *Income Share Agreements: A Student Debt Promise Falling Short of Reality*, Roosevelt Inst. (Jan. 10, 2019), https://rooseveltinstitute.org/income-share-agreements-student-debt-promise-falling-short-reality/; *see also ISA Sample Contract (Academic Year)*, Purdue Univ., https://www.purdue.edu/backaboiler/disclosure/contract.html (last visited July 12, 2020) [hereinafter Purdue ISA].

[6] *See* Dowse B. Rustin IV et al., Am. Enter. Inst., *Pricing Without Discrimination* 14–15 (2017), *available at* https://www.aei.org/wp-content/uploads/2017/02/Pricing-Without-Discrimination.pdf.

[7] *See* Morgan et al., *supra* note 5 ("Our research shows that when accounting for both federal student loans and an ISA, these monthly payments could be as high as 40 percent of pre-tax income for some students, further threatening their economic security."); James Gallagher, *State of the Coding Bootcamp Market Report 2020*, Career Karma (Apr. 29, 2020), https://careerkarma.com/blog/bootcamp-market-report-2020 ("The majority of coding bootcamps continue to offer upfront or installment payment plans, in addition to ISAs. This suggests that ISAs are not being seen as a replacement for other models of financing, rather an additional option for students. This is important because, for students who already have savings, or who are averse to the prospect of paying back multiples more than the cost of tuition, ISAs are not a good option.").

[8] *See* Morrison Foerster, *Regulatory Treatment of Educational ISAs under Federal and Select State Consumer Credit Statutes* (Mar. 2019), *available at* https://media2.mofo.com/documents/190408-regulatory-educational-consumer-credit-statutes.pdf; Reed Smith, *Income Share Agreements: How They Work and Their Place in the Federal Regulatory Regime* (Sept. 5, 2019), *available at* https://www.reedsmith.com/en/perspectives/2019/09/income-share-agreements-how-they-work-and-their-place.

and enforcers alike, particularly when made in a market historically fraught with peril for borrowers.[9] But existing law does not support industry's position that it does not reach them, and we believe the federal consumer protection statutes, as-written, provide an effective framework to regulate ISAs now.[10] This paper examines why ISAs constitute "credit" within the meaning of the relevant federal consumer protection statutes and therefore are already subject to federal regulation and enforcement.[11]

In Part II, we provide an overview of ISAs and their place in the student lending market. And in Part III, we explain why ISAs constitute credit under and therefore must comply with the Equal Credit Opportunity Act (ECOA), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), the Truth in Lending Act (TILA), and the Consumer Financial Protection Act of 2010 (CFPA). Although we consider this question to be straightforward under existing law, we provide a step-by-step analysis that we hope will be useful to those with the authority and tools to protect student borrowers.

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[9] *See, e.g.*, *A $1.5 Trillion Crisis: Protecting Student Borrowers and Holding Student Loan Servicers Accountable: Hearing before the H. Fin. Servs. Comm.*, 116th Cong. (2019) (statement of Seth Frotman, Exec. Dir., Student Borrower Prot. Ctr.) (outlining the scope and severity of the student debt crisis and the critical role of consumer protection for student borrowers), *available at* https://protectborrowers.org/wp-content/uploads/2019/09/Testimony-of-Seth-Frotman-before-HFSC_September-2019.pdf.

[10] Industry is no doubt already aware that ISAs are likely to be "credit," which is why it has been seeking (unsuccessfully, so far) explicit exemptions from federal consumer financial laws in Congress. *See, e.g.*, Press Release, Mark R. Warner, Senate, *Young, Warner, Rubio, Coons Introduce Innovative Higher Ed Financing Proposal* (July 16, 2019), https://www.warner.senate.gov/public/index.cfm/2019/7/young-warner-rubio-coons-introduce-innovative-higher-ed-financing-proposal; H.R. 1810, 116th Cong. § 105 (2019), *available at* https://www.congress.gov/116/bills/hr1810/BILLS-116hr1810ih.pdf.

[11] This analysis does not, and is not intended to, constitute legal advice.

Context for Income Share Agreements

ISAs are neither a new nor unique form of lending. They should be understood within the broader historical context of income-driven repayment plans and among the other options that exist today for students to limit loan repayment obligations to a percentage of their incomes. Modern ISAs, which have emerged in certain segments of the student lending market in recent years, exhibit certain key features, discussed below, that are important to the determination that ISAs are credit under federal law.

Student Loan Market

The student loan market is the second largest consumer credit market in the United States (second only to mortgages), consisting of 45 million borrowers who have nearly $1.7 trillion in outstanding student debt.[12] Student loans are unsecured loans taken out to pay for tuition and other costs of higher education. The vast majority of student loans today are originated by the U.S. Department of Education and are generally subject to few underwriting requirements. In addition, there is a $140 billion private student loan market.[13] Banks and other lenders underwrite private student loans, and thus, because many student loan borrowers are young and have a thin credit file, as many as 93% of private student loans include a cosigner.[14]

As a practical matter, students apply for loans directly from the government or private student lenders. Lenders will usually distribute principal funds directly to the school. A student borrower's repayment obligation is often deferred until the student leaves school, at which point the borrower must repay each loan according to its terms. As noted below, those terms include several repayment options, including, for federal loans and some private loans, income-driven repayment options.

Borrowers usually take out multiple student loans, not just one.[15] There are multiple federal loan programs and types of loans with different borrowing caps, interest subsidies, and benefits. The Department of Education caps

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[12] *See* Fed. Rsrv. Bank of N.Y., Microsoft Excel Spreadsheet, *2018 Student Loan Update*, *available at* https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/sl_update_2018.xlsx (number of borrowers); *Consumer Credit – May 2020*, Bd. of Governors of the Fed. Rsrv. Sys. (July 8, 2020), https://www.federalreserve.gov/releases/g19/current/g19.pdf (amount of debt).

[13] The private student loan market size can be calculated as the overall value of U.S. student debt less the overall balance of federal student debt. *See Consumer Credit – May 2020*, *supra* note 12; U.S. Dep't of Educ., *Federal Student Aid Portfolio Summary*, https://studentaid.ed.gov/sa/sites/default/files/ fsawg/datacenter/library/PortfolioSummary.xls; *see also* Student Borrower Prot. Ctr., *Private Student Lending* (2020), *available at* https://protectborrowers.org/wp-content/uploads/2020/04/PSL-Report_042020.pdf.

[14] *See* Student Borrower Prot. Ctr., *supra* note 13 at 12.

[15] Borrowers, on average, owe 3.7 student loans. *The State of Student Loan Debt in 2017*, Experian (Aug. 23, 2017), https://www.experian.com/innovation/thought-leadership/state-of-student-lending-in-2017.jsp.

the amount a borrower can obtain from each loan program or loan type,[16] so it is not unusual for some students to graduate with more than 10 loans from a combination of federal and private lenders.

Student borrowers are struggling to repay their loans. As of the first quarter of 2020, 10.8% of student debt was 90 or more days delinquent.[17] That is a higher delinquency rate than credit cards, mortgages, auto loans, or any other class of loan tracked by the New York Federal Reserve. For a sense of gravity, a 10.8% delinquency rate is higher than the delinquency rate for mortgages during the 2008 financial crisis. It is also higher than the delinquency rates for *student loans* during the financial crisis—meaning the Student Loan Crisis is worse now than it was during the Great Recession.[18]

Income-Driven Repayment Options for Student Loans

The concept of having students borrow to pay for education and later repay with a percentage of their post-completion salaries originated in the 1940s and 50s in a series of papers written by economists Milton Friedman and Simon Kuznets.[19] Several prominent universities experimented with this concept in the 1970s, but these programs were discontinued and generally considered failures.[20] Federal policy discussions surrounding income-contingent lending continued throughout the 1980s and 90s.[21]

The federal government first introduced an income-driven repayment plan for federal loans during the Clinton administration.[22] The Department of Education currently offers several income-driven repayment options, including the Income-Contingent Repayment Plan (ICR Plan), the Income-Based Repayment Plan (IBR Plan), the

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[16] PLUS Loans are an exception. Parents and graduate students borrowing through the federal PLUS program are not subject to a loan limit; rather, annual borrowing may be used to finance the entire gap remaining between financial support provided through other forms of Federal Student Aid and the full cost of attendance. There are no lifetime limits in the PLUS program. *See PLUS Loans*, U.S. Dep't of Educ., https://studentaid.gov/understand-aid/types/loans/plus/ (last visited July 16, 2020).

[17] *See* Fed. Rsrv. Bank of N.Y., *Quarterly Report on Household Debt and Credit 2020:Q1* (May 2020), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2020q1.pdf.

[18] *See id.*

[19] *See* Milton Friedman & Simon Smith Kuznets, *Income from Independent Professional Practice* (Nat. Bureau Econ. Rsch.1945), *available at* https://www.nber.org/books/frie54-1; Milton Friedman, *The Role of Government in Education*, *in* Economics and the Public Interest (Robert A. Solo ed., 1955), *available at* http://la.utexas.edu/users/hcleaver/330T/350kPEEFriedmanRoleOfGovttable.pdf.

[20] *See, e.g.*, Bret Ladine, *'70s Debt Program Finally Ending*, Yale Daily News (Mar. 27, 2001, 12:00 AM), https://yaledailynews.com/blog/2001/03/27/70s-debt-program-finally-ending/; *see also* Robert Shireman, *Learn Now, Pay Later: A History of Income-Contingent Student Loans in the United States*, 671 Annals Am. Acad. Pol. & Soc. Sci. 188 (2017).

[21] *See* Shireman, *supra* note 20, at 188, 192–94.

[22] *See* Antoinette Flores, *Proposed Student Loan Repayment Plan Would Extend the Same Income-Based Terms to All Federal Loan Borrowers*, Ctr. for Am. Progress (Aug. 18, 2015, 4:19 PM), https://www.americanprogress.org/issues/education-postsecondary/news/2015/08/18/119574/proposed-student-loan-repayment-plan-would-extend-the-same-income-based-terms-to-all-federal-loan-borrowers/.

Pay As You Earn Repayment Plan (PAYE plan), and the Revised Pay As You Earn Repayment Plan (REPAYE plan).[23] These income-driven repayment plans are available to both borrowers of federally-owned Direct loans and borrowers of privately-owned loans made under the Federal Family Education Loan (FFEL) Program. Under each of the income-driven repayment plans, a student's payment amount is established as a percentage of their discretionary income.[24] Each plan has a defined repayment period (usually 20 or 25 years), after which any remaining loan balance is forgiven.[25] The Department of Education's website explains that, depending on a borrower's income and family size, they may make no payments and that periods when required payments are zero "will count toward [a borrower's] total repayment period."[26]

A growing number of private student loan programs also feature income-driven repayment options. These range from loan modifications limited to distressed borrowers under extremely limited circumstances, to publicly advertised repayment options available to any borrower that elects the option.[27] Lenders offering income-driven repayment options for private student loans include state-backed lending authorities responding to state legislative mandates, as well as private lenders who recognize that payment flexibility may improve borrower repayment success over the long-term.[28]

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[23] *Income-Driven Repayment Plans*, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/repayment/plans/income-driven (last visited July 12, 2020).

[24] The Department of Education defines "discretionary income" for each plan. For the IBR, PAYE, and REPAYE plans, a borrower's discretionary income is "the difference between [their] adjusted gross income (AGI) and 150 percent of the U.S. Department of Health and Human Services (HHS) Poverty Guideline amount for [their] family size and state." *Id*. And for the ICR Plan, "discretionary income is the difference between [the borrower's] AGI and 100 percent of the HHS Poverty Guideline amount for [their] family size and state." *Id*.

[25] *See id*.

[26] If a borrower's discretionary income is less than 150 percent of the federal poverty guidelines, then they will be eligible for $0 payments. *See id*. ("If your income is low enough, your payment could be as low as $0 per month.").

[27] *See, e.g.*, *Income-Based Repayment*, R.I. Student Loan Auth., https://www.risla.com/ibr (last visited July 13, 2020) ("Income-Based Repayment (IBR) is designed to reduce monthly payments to help borrowers make student loan debt manageable. To qualify for IBR, borrowers and cosigners must demonstrate financial hardship based on current wages and family size. Financial hardship can be demonstrated when the monthly payment amount required to pay RISLA's non-federal loans under a standard repayment plan is higher than the monthly amount under IBR. IBR payment amounts may increase or decrease each year based on the income, family size, and location of the borrower and cosigner."); *FAQs*, Chi. Student Loans by A.M. Money, https://chicagostudentloans.com/faqs (last visited July 13, 2020) ("Yes! We are the first private student lender to offer an income-based repayment option to our borrowers. If you cannot afford your standard monthly payment, you may be eligible to adjust your payment based on your income."); *Private Student Loans*, Navient, https://navient.com/in-repayment/private-student-loans (last visited July 13, 2020) ("If you and your cosigner (if applicable) are experiencing difficulty, options may be available to you depending on your circumstances. Your lender, loan program, or promissory note may provide repayment options. Some plans may require a review of the borrower's and any cosigner's financial situation and ability to pay.").

[28] *See, e.g.*, State of N.J. Governor Phil Murphy, *Governor Murphy Signs Legislation to Make Student Loans More Affordable* (Apr. 25, 2019), https://www.nj.gov/governor/news/news/562019/20190425b.shtml.

Income-driven repayment is popular among student borrowers. A Consumer Financial Protection Bureau report issued in 2017 noted that "the share of all federal Direct loan borrowers on income-driven repayment plans or payment plans lasting longer than ten years has increased by about 50 percent" in recent years.[29] In 2019, over 8 million borrowers of federal loans were enrolled in one of the available income-based repayment plans for their loans.[30]

Against this backdrop of active and growing participation in income-driven repayment plans, new ISAs have emerged in recent years, providing similar repayment options in the private student lending space. Industry experts and scholars credit the rise of these new ISAs to a variety of factors: the cost of higher education continues to rise while college degrees and certain vocational certificates remain prerequisites to many careers.[31] The downside risk of taking on student debt, however, is higher than ever for individual borrowers.[32]

Today's ISA Market

ISAs are a type of loan with income-driven repayment options, not unlike the other income-driven plans described above. ISAs are primarily available to undergraduate students at a growing number of colleges and universities and students enrolling in coding bootcamps and vocational education programs that do not confer degrees. Purdue University was one of the first four-year programs to launch an ISA option for students in 2016. Purdue's program has grown since then,[33] and similar programs are now available to undergraduates at a number of schools, including the University of Utah, Clarkson University, Colorado Mountain College, Lackawanna College, Messiah College, Berry College, and Southern New Hampshire University.[34] In 2019,

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[29] Christa Gibbs, *CFPB Data Point: Student Loan Repayment* 11, Consumer Fin. Prot. Bureau (2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_student-loan-repayment.pdf.

[30] *See* U.S. Dep't of Educ., Microsoft Excel Spreadsheet, *Portfolio by Repayment Plan (DL, FFEL, ED-Held FFEL, ED-Owned)* (Mar. 31, 2020), *available at* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/DLPortfoliobyRepaymentPlan.xls.

[31] *See, e.g.*, Julie Margetta Morgan & Marshall Steinbaum, *The Student Debt Crisis, Labor Market Credentialization, and Racial Inequality* 4, 8 Roosevelt Inst. (2018), https://rooseveltinstitute.org/wp-content/uploads/2018/10/The-Student-Debt-Crisis-and-Labor-Market-Credentialization-final-1.pdf.

[32] *See* Mark Huelsman, *Debt to Society*, Dēmos (2019), https://www.demos.org/sites/default/files/2019-06/Debt%20to%20Society.pdf.

[33] *See Back a Boiler Program Tops 1,000th Contract for Student Funding*, Purdue Univ. (Nov. 22, 2019), https://www.purdue.edu/newsroom/releases/2019/Q4/back-a-boiler-program-tops-1,000th-contract-for-student-funding.html.

[34] *See Income Share Agreement*, Utah Univ., https://isa.utah.edu/ (last visited July 12, 2020) [hereinafter Utah ISA]; *Lewis Income Share Agreement Program*, Clarkson Univ., https://www.clarkson.edu/isa (last visited July 12, 2020) [hereinafter Clarkson ISA]; *Fund Sueños: Today for Me, Tomorrow for You*, Colo. Mountain Coll., https://coloradomtn.edu/suenos/ (last visited July 12, 2020); *Income Share Agreement*, Lackawanna Coll., https://www.lackawanna.edu/admissions/financial-aid/income-share-agreement/ (last visited July 12, 2020); *Navigating a New Enrollment*

twenty-seven US-based coding bootcamps offered ISAs to their students.[35] One industry estimate suggests that by the end of 2020, 175 institutions will offer ISAs collectively lending over $500 million.[36] Some ISAs are funded and serviced directly by schools, while others are provided by third parties, often in collaboration with a school.[37]

Key Features of ISAs

ISAs vary across institutions, but they share certain key features. Each agreement specifies an amount the borrower will receive and the amount they will be responsible for paying back, described as a percentage of their post-graduation income. Agreements also identify the period during which the borrower will be responsible for repaying, the maximum amount the borrower can expect to repay, and the monthly salary below which the borrower's payment obligations will be suspended. Many contracts also identify a maximum number of payments a borrower will make. And all ISA lenders appear to take the position that they do not provide loans or extend credit. ISA lenders use different defined terms to describe the same concepts. For ease of reference, this paper uses and describes the definitions in Purdue's agreements except where otherwise noted.

The "Funding Amount" of an ISA is the sum the lender disburses on the student borrower's behalf, analogous to the principal for a traditional student loan.[38]

The "Income Share" for an ISA is the percentage of borrowers' monthly income that they will owe during each month of the payment term.[39] ISAs also typically include an "Income Threshold," a monthly income amount below which a borrower will not have to pay the Income Share.[40] Income Shares for undergraduate ISAs tend to range from approximately 2% to 5% of gross income and may vary based on a student's degree level, year in school,

Landscape, Vemo Educ.: Webinars, http://vemoeducation.com/resource/webinars/navigating-a-new-enrollment-landscape/ (last visited July 12, 2020).

[35] *See* James Gallagher, *Income Share Agreements (ISAs)—State of the Market 2019*, Career Karma (Nov. 12, 2019), https://careerkarma.com/blog/income-share-agreement-market-report-2019/.

[36] *Id.*

[37] *See id.*

[38] *Purdue ISA*, *supra* note 5.

[39] *Id.*

[40] *See e.g.*, *Clarkson ISA*, *supra* note 34.

and major.[41] For bootcamps, the percentage is generally much higher, ranging from 10% to 20% of a borrower's post-graduation income.[42] In 2019, the average Income Share for the 27 bootcamps then offering ISAs was 13.8%.[43] Notably, this is higher than the PAYE or REPAYE income-driven repayment plans, which limit payments to 10% of *discretionary* income.[44]

The "Payment Term" refers to the period during which the borrower will pay the Income Share back to the lender on a monthly basis.[45] ISA lenders use the finite nature of the Payment Term—7 to 15 years for most undergraduate programs and 1 to 4 years for most bootcamps[46]—to promote their programs. University of Utah's website explains: "If your ISA is in good standing, the obligation ends when the payment window is over even if you've paid less than the initial funding amount."[47] Part of the appeal of these programs to student borrowers is that the Payment Term, in the words of one school, "effectively sets a maximum time limit on your obligation:" no matter how much or how little you have paid back, you are only required to pay during the period agreed upon in your agreement.[48] The Payment Term is analogous to the 20- or 25-year payment term on an income-driven repayment plan for a federal loan.

But Payment Terms, according to most ISA contracts, can be extended.[49] At Purdue, for example, if a borrower is out of the workforce by choice, enrolled in another academic program, or making below the Income Threshold, they are not required to make monthly payments, but their Payment Term is extended. In other words, borrowers

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[41] A Purdue PharmD major borrowing $10,000 and graduating in December 2020 has a 1.73% income share, while art majors at the University of Utah borrowing $10,000 and graduating in December 2020 have an income share of 4.90%. Compare *Back a Boiler Comparison Tool*, Purdue Univ., https://www.purdue.edu/backaboiler/comparison/index.html (last visited July 13, 2020), with *ISA Comparison Tool*, Utah Univ., https://isa.utah.edu/comparison-tool/ (last visited July 13, 2020).

[42] *See* Gallagher, *supra* note 7. Lambda School and Holberton School require a 17% income share, a common rate among coding bootcamps. *See What is an ISA?*, Lambda, https://lambdaschool.com/isa (last visited July 13, 2020); *How does the ISA work?*, Holberton, https://www.holbertonschool.com/faq/articles/360022564934_how-does-the-isa-work (last visited July 13, 2020).

[43] *See* Gallagher, *supra* note 7.

[44] 34 C.F.R. § 685.209 (2013).

[45] Some providers refer to this period as the Payment Window and use "Payment Term" to refer to the maximum number of payments a borrower may be required to pay. *See, e.g.*, Utah ISA, *supra* note 34.

[46] *See, e.g.*, Audrey Peek et al., *The Income Share Agreement Landscape: 2017 and Beyond* 3, Am. Insts. for Rsch. (2017), https://www.air.org/sites/default/files/downloads/report/Income-Share-Agreements-ISAs-Income-Share-Agreement-Landscape-April-2017.pdf (undergraduate programs); Gallagher, *supra* note 7 (bootcamps).

[47] *Income Share Agreement: Frequently Asked Questions*, Utah Univ., https://isa.utah.edu/frequently-asked-questions/ (last visited July 12, 2020); *see also FAQ About Back A Boiler—ISA Fund*, Purdue Univ., https://www.purdue.edu/backaboiler/FAQ/index.html (last visited July 12, 2020) ("An ISA recipient is simply required to pay the agreed upon percentage of post-graduation income for the prescribed term of the contract. After making successful payments over that term, no additional payments are required even if they have paid less than the amount of funding they received.").

[48] Clarkson ISA, *supra* note 34.

[49] *See* Peek, *supra* note 46 ("All respondents said students who earn below a certain threshold can skip or pause payments, but nearly all must extend the payment period.").

are not making $0 payments, as they could in a federal income-driven repayment plan. Instead, they are effectively in forbearance.[50] Payment Terms can be extended by one month for each month of deferment, up to an additional 5 years.[51]

The "Payment Cap" is the maximum amount the borrower can be required to repay under the ISA and is typically presented as a multiple of—in some cases up to 3 times—the Funding Amount.[52] If a borrower meets the Payment Cap before the end of the Payment Term, their obligation to repay is satisfied. Conversely, if the borrower does not meet the Payment Cap, they will continue paying monthly until the conclusion of the Payment Term.[53]

The Payment Cap is also the total fixed amount a student borrower must pay if they wish to fulfill the ISA before the end of the Payment Term, similar to an early payoff of a traditional student loan. And if a student borrower defaults on the ISA by missing payments, the ISA is accelerated, and the borrower typically owes the Payment Cap (accounting for payments already made).[54]

To demonstrate how harmful this default acceleration feature can be, consider a borrower who has $10,000 of traditional student debt. If that borrower is never able to pay, the principal might accrue $500 to $1,000 in interest, and after a year, the borrower will owe $10,500 to $11,000, which the creditor might send to a debt collector or sue to collect. If it is a federal loan, perhaps the borrower has loan rehabilitation or consolidation options to exit default. But if that same borrower obtained an ISA with a Payment Cap 2.5 times the Funding Amount (the Payment Cap at Purdue), the ISA lender could accelerate the contract, and the borrower would owe $25,000. In other words, a borrower could take out a $10,000 loan and have to repay a total of $25,000 after one year, which is a 150% APR.

[50] A forbearance is a technical term under the federal student loan system where a borrower is not obligated to pay on their loans, but interest continues to accrue. *See* 34 C.F.R. § 685.205 (2014). Months in forbearance do not count towards the 20- or 25-year forgiveness under income-driven plans. In other words, under the federal system, a borrower can be paying $0 a month, but if they are paying $0 per month in an income-driven plan, that month counts towards forgiveness. If a borrower is paying $0 on forbearance, it does not.

[51] *See, e.g.*, Purdue ISA, *supra* note 5; Lambda, Inc., *Income Share Agreement*, Wayback Machine (Mar. 14, 2019), https://web.archive.org/web/20190314175133/https://leif.org/api/products/5b5b8bd0e59b743f9a086ed9/pdf.

[52] *See, e.g.*, *Your Income Sharing Agreement Questions Answered!*, Sollers Coll. (Oct. 2, 2018), https://www.sollers.edu/your-income-sharing-agreement-questions-answered/.

[53] Some ISAs also specify a number of payments after which a borrower's obligation will be satisfied. In these agreements, the borrower's obligation ends whenever the first of three events occurs: the borrower makes the required number of payments, they reach the end of the Payment Term, or they hit the Payment Cap. *See, e.g.*, Utah ISA, *supra* note 34.

[54] *See, e.g.*, Purdue ISA, *supra* note 5.

The Claim That the ISA is Not a Loan

ISAs typically claim, in the agreement, that they are not loans or extensions of credit. ISA lenders market these products as alternatives to traditional education loans[55] and debt.[56] The first words in the sample ISA contract Purdue makes available on its website are: "THIS IS NOT A LOAN OR CREDIT."[57] Lenders contend that, even though students will have to later repay the money they have borrowed, ISAs present an opportunity to complete school "without worrying about interest rates or decades of student loan payments."[58]

The compliance bar has similarly taken the position that ISAs do not constitute extensions of credit and should not be subject to federal consumer protection regulation.[59]

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[55] *See, e.g.*, Utah ISA, *supra* note 34.

[56] Clarkson ISA, *supra* note 34.

[57] Purdue ISA, *supra* note 5.

[58] *Income Share Agreement*, Lackawanna Coll., https://www.lackawanna.edu/admissions/financial-aid/income-share-agreement/ (last visited July 12, 2020).

[59] See Morrison Foerster, *supra* note 8; Reed Smith, *supra* note 8.

ISAs are Credit Under All Applicable Federal Consumer Financial Laws

Consumer financial protection under federal law centers around a collection of statutes and regulations monitored and enforced by several government agencies, including the Consumer Financial Protection Bureau and the Federal Trade Commission. Many of the requirements in these statutes only apply to "credit," and thus, this paper will focus on whether ISAs are "credit." In particular, we analyze this question as it pertains to the Equal Credit Opportunity Act (ECOA), the Fair Credit Reporting Act (FCRA), the Truth in Lending Act (TILA), and the Consumer Financial Protection Act of 2010 (CFPA). We will also consider the Fair Debt Collection Practices Act (FDCPA), as its definitions are instructive to the analysis of these other consumer laws. Violations of the CFPA and, through it, the ECOA, FCRA, FDCPA, and TILA, can be addressed by government enforcers with a wide array of consumer-facing remedies—including rescission or reformation of contracts and restitution—and, where warranted, met with civil money penalties of up to $5,883 to $1,176,638 *for each day* during which a violation continues.[60]

Distilled to its essential components, an ISA is an agreement in which:

A. A lender promises to pay a sum to a student (usually distributed to a third party, the school);

B. In exchange for the student's promise to repay the lender at a later time, by either:

   1. Paying a fixed Payment Cap that is higher than the sum the student received (in cases of early payoff or default), or

   2. Making payments, calculated according to a formula in the agreement that is based on the student's income, over a period determined in the agreement.

As we will discuss, these components are sufficient to satisfy the various definitions of credit under the applicable laws.

Before we turn to a statute-by-statute analysis, it is worth noting that ISAs are functionally equivalent to student loans with income-driven repayment options. Both ISAs and student loans provide financing for higher

[60] *See* 12 U.S.C. §§ 5481(12), (14), 5565(a)(1)–(2), (c); Civil Penalty Inflation Adjustments, 85 Fed. Reg. 2012 (Jan. 15, 2020) (to be codified at 12 C.F.R. pt. 1083).

education. They both require the borrower to repay with a set number of payments calculated as a percentage of income. In both circumstances, the monthly payments can be as low as $0. And student loans with income-driven repayment options are subject to federal consumer financial law governing credit, unless explicitly exempted.[61]

The fact that ISA lenders claim they do not extend credit to student borrowers does not change this analysis. In the consumer law context, courts consistently look to the substance of agreements over conclusory claims of the parties to determine whether an arrangement is an extension of credit.[62] When faced with contracts that purport not to be "credit," courts will interpret the nature of the parties' agreement "after peeling away . . . labels from these transactions."[63]

With this framing in mind, we turn to the analysis of why Income Share Agreements are "credit" under federal consumer financial law.

ISAs Are Credit Under the Equal Credit Opportunity Act and Fair Credit Reporting Act

The ECOA prohibits discrimination and requires certain disclosures relating to adverse actions, while the FCRA governs accuracy and fairness in the credit reporting ecosystem. The ECOA only applies to "credit," a defined

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[61] *See* Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1123 (11th Cir. 2004) ("While the HEA, standing alone, does not expressly or impliedly authorize a private right of action, the Secretary of Education has expressed the belief that third-party debt collectors acting on behalf of guaranty agencies to collect federal student loans must comply with the FDCPA. And both parties here agree that a debtor may pursue an action under the FDCPA when a third-party debt collector, by violating a provision of the HEA, also violates the FDCPA."); Minner v. Navient Corp., No. 18-CV-1086S, 2020 WL 906628 (W.D.N.Y. Feb. 25, 2020) (denying a motion to dismiss on a FCRA claim relating to federal student loans); Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529 (M.D. Pa. 2018) (denying a motion to dismiss for a CFPA claim relating to federal student loans); Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017) (denying a motion to dismiss relating to CFPA, FCRA, and FDCPA claims against a federal student loan servicer).

TILA explicitly exempts loans made, insured, or guaranteed pursuant to Title IV of the Higher Education Act regardless of the repayment plan. 15 U.S.C. § 1603(7) (2018).

[62] *See* Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 (1981) ("We agree with the Court of Appeals that it would be elevating form over substance to conclude that FMCC is not a creditor within the meaning of the Act."); Edwards v. Your Credit Inc., 148 F.3d 427, 436 (5th Cir. 1998) ("The Supreme Court and many other courts, including this one, have applied the substance-over-form doctrine to consumer finance law."); Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261, 1262 (9th Cir. 1993) ("Because the Truth in Lending Act is liberally construed to protect consumers . . . the court [will look] past the form of the transactions to their economic substance in deciding whether the Act applied."); Thompson v. 10,000 RV Sales, Inc., 31 Cal. Rptr. 3d 18, 27 (Cal. Ct. App. 2005) ("[I]n determining whether consumer protection laws . . . apply to a particular transaction, we look to the substance of the transaction and do not allow mere form to dictate the result.").

[63] Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 763 (S.D.N.Y. 2018) (holding that a company offering advances to consumers entitled to payouts from victim compensation funds or lawsuit settlements was extending credit within the meaning of the Consumer Financial Protection Act of 2010, despite its claim to the contrary).

term, and certain requirements of the FCRA similarly attach to "credit." Because the FCRA defines credit to have "the same meaning as in . . . the Equal Credit Opportunity Act,"[64] ECOA and FCRA case law and analysis are interchangeable on this question. Our analysis shows ISAs are covered by both the ECOA and the FCRA.

Under the ECOA and the FCRA, "the term 'credit' means the right granted by a creditor to a debtor (1) to defer payment of a debt or (2) to incur debts and defer its payment or (3) to purchase property or services and defer payment therefor."[65] As a general rule, courts liberally construe the ECOA to achieve the statute's goal of eradicating credit discrimination.[66] And the ECOA definition of credit is intended to be broader than that in the Truth in Lending Act, discussed below.[67]

A "creditor" under the ECOA is "any person who regularly extends, renews, or continues credit" or anyone who regularly arranges or participates in decisions regarding the same.[68] So, whether the ISA is provided by a school, by a school in partnership with a private company, or by a private company that simply distributes funds to the school or student, all parties that fund, extend, arrange, or participate in decisions regarding ISAs would be creditors, if ISAs themselves are credit.

ISAs Grant Student Borrowers the Right to Purchase Services and Defer Payment

The fact that student borrowers purchase education services and are given the right to pay for those services later under an ISA is sufficient to meet the ECOA definition of credit. The third prong of the definition simply requires deferred payment. Indeed, "[t]he hallmark of 'credit' under the ECOA is the right of one party to make

[64] 15 U.S.C. § 1681a(r)(5) (2018).

[65] *Id.*; 15 U.S.C. § 1691a(d) (2018) ("The terms 'credit' and 'creditor' have the same meanings as in section 702 of the Equal Credit Opportunity Act."). The CFPB's rule interpreting the ECOA, Regulation B, similarly defines credit as "the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor." 12 C.F.R. § 1002.2(i).

[66] Brothers v. First Leasing, 724 F.2d 789, 793 (9th Cir. 1984) ("We must construe the literal language of the ECOA in light of the clear, strong purpose evidenced by the Act and adopt an interpretation that will serve to effectuate that purpose."); Miller v. American Express Co., 688 F.2d 1235, 1239 (9th Cir. 1982) (rejecting a restrictive interpretation of the regulations in light of the ECOA's purpose "to protect woman, among others, from arbitrary denial or termination of credit."); Williams v. AT&T Wireless Servs., Inc., 5 F. Supp. 2d 1142, 1146–47 (W.D. Wash. 1998) (following Ninth Circuit precedent that "the ECOA should be interpreted liberally to achieve its goals.").

[67] Regulation B makes clear that the ECOA "covers a wider range of credit transactions than Regulation Z (Truth in Lending). Under Regulation B, a transaction is credit if there is a right to defer payment of a debt – regardless of whether the credit is for personal or commercial purposes, the number of installments required for repayment, or whether the transaction is subject to a finance charge." 12 C.F.R. § 1002.2, Supp. I, cmt. 2(j) (2016), available at https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/Interp-2/#2-j-Interp (last visited July 12, 2020).

[68] 15 U.S.C. § 1691a(e) (2018).

deferred payment,"[69] and the payment obligation under the ECOA can result from "a debt *or other obligation*."[70] For example, CFPB commentary on the ECOA's implementing regulation, Regulation B, makes clear that utility bills are generally considered "credit," though they may be eligible for certain exemptions.[71] And courts have found that the ECOA applied because deferred payment satisfied the statute's definition of credit in the context of an application for cellular telephone service,[72] the provision of propane gas,[73] and a request to purchase electrical service.[74]

Neither the amount the consumer is paying for a service, nor whether it is ascertainable or fixed when an agreement is signed, matters for the third definition. Obligations to pay utility bills, for example, which are "credit" under the regulations, are not for an amount ascertainable at the time of the execution of the contract between the consumer and the lender. As with ISAs, consumers agree to pay based on a prescribed formula (in the case of utilities, a rate based on the amount of energy consumed).

ISA lenders clearly grant students the right to purchase services—their education—and defer payment.[75] ISAs allow students to avoid having to pay for school until after they complete it, and that is all the ECOA requires.

ISAs Permit Borrowers to Defer Payment on a Debt

ISAs also meet the statute's first two definitions of credit because they create debts that student borrowers are given a right to defer paying.

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[69] Riethman v. Berry, 287 F.3d 274, 277 (3d Cir. 2002).

[70] Capitol Indem. Corp. v. Aulakh, 313 F.3d 200, 203 (4th Cir. 2002) (emphasis added).

[71] *Official Interpretation*, 12 C.F.R. § 1002.3(a), Consumer Fin. Prot. Bureau, https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/2/ (last visited July 12, 2020).

[72] Williams v. AT&T, *supra* note 66 (an application for a cell phone service agreement was an application for credit because it gave the consumer the right to use phone services and pay for them later).

[73] Mick v. Level Propane Gases, Inc., 183 F. Supp. 2d 1014, 1019 (S.D. Ohio 2000) (plaintiffs enjoyed deferred payment for propane services brought the service under the ECOA's definition of credit even though plaintiffs did not explicitly request credit from the defendant).

[74] Gunter v. Long Island Power Auth./Keyspan, No. 08 CV 498 (RRM)(LB), 2012 U.S. Dist. LEXIS 131667, at *27 (E.D.N.Y. Aug. 8, 2012) (a request to purchase electrical service and defer payment for that service was a request for credit within the meaning of the ECOA).

[75] 12 U.S.C. § 5481(7) (2018).

The ECOA does not define debt, and there is a dearth of case law on the meaning of debt under the statute. In assessing whether transactions are credit under the ECOA, courts instead focus on the right to defer payment.[76] For the purposes of this analysis, though, we consider various possible definitions of debt that a court might apply in considering the ECOA's application to an ISA.

The only federal consumer protection statute to define debt is the Fair Debt Collection Practices Act (FDCPA), which defines the term "quite broadly"[77] as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes."[78] Thus, to constitute a debt under the FDCPA, an obligation to pay must have arisen from a transaction[79] and have been incurred for personal purposes.[80] The statute does not require an obligation to pay to be for a particular amount or that the amount be ascertainable at the time of the transaction.[81] Nor does it require the obligation to be reduced to a judgment.[82]

Bankruptcy law similarly embraces a broad definition of debt. The Bankruptcy Code defines "debt" as "liability on a claim," where a "claim" is "the right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[83] Courts have determined that "'debt' is to be given a broad and expansive reading for purposes of the Bankruptcy Code, and that when a creditor has a claim against a debtor—*even if the claim is unliquidated, unfixed, or contingent*—the debtor has incurred a debt to the creditor."[84]

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[76] Riethman v. Berry, 113 F. Supp. 2d 765, 768 (E.D. Pa. 2000) ("[t]he *sine qua non* of 'credit' under ECOA is a right held by the debtor to defer payment of existing debt or to incur future debt and defer its payment.").

[77] Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322, 1326 (7th Cir. 1997) (holding that "debt" under the FDCPA is not limited to obligations derived from transactions involving the extension of credit).

[78] 15 U.S.C. § 1692a(5) (2018).

[79] Franklin v. Parking Revenue Recovery Servs., 832 F.3d 741, 744 (7th Cir. 2016) ("First, although the statute does not define 'transaction,' we have held that the term is a broad reference to many different types of business dealings between parties. Next, the 'arising out of' language limits the FDCPA's reach to only those obligations that are created by the contracts the parties used to give legal force to their transaction.") (citations omitted) (quoting Bass, 111 F.3d at 1325).

[80] 15 U.S.C. § 1692a(5) (2018); Yelin v. Swartz, 790 F. Supp. 2d 331 (E.D. Pa. 2011) (money allegedly owed under a rental car agreement was "debt" under 15 U.S.C. § 1692a(5) because the use of the rental car was primarily for personal purposes.)

[81] Such a reading would remove from coverage debts that are clearly covered by the FDCPA, like debt arising from medical bills and mortgages with variable interest rates. *See Debt Collection FAQs*, F.T.C., https://www.consumer.ftc.gov/articles/debt-collection-faqs (last updated Mar. 2018).

[82] 15 U.S.C. § 1692a(5) (2018).

[83] 11 U.S.C. § 101 (2018).

[84] *In re* Chase & Sanborn Corp., 904 F.2d 588, 595 (11th Cir. 1990) (citing *In re* Energy Cooperative, Inc., 832 F.2d 997, 1001 (7th Cir. 1987)) (rejecting the argument that a contingent obligation was not a debt).

One can alternatively look to definitions of debt in various law dictionaries. Nolo's Plain-English Law Dictionary defines a debt as "an amount owed by one person or entity to another."[85] One edition of Black's Law Dictionary defines "debt" as "a sum of money due by contract" and notes that "it is not essential that the contract should be express, or that it should fix the precise amount to be paid."[86] Another defines it as "a specific sum of money due by agreement or otherwise."[87]

A borrower's obligations under an ISA clearly meet the FDCPA definition of debt: they arise from a transaction between the borrower and the ISA lender—the signing of an ISA—and they are for the personal purpose of funding an individual borrower's education. Courts have applied a similar analysis to find that traditional student loan obligations are debt under the FDCPA.[88] Even ISA proponents appear to agree that the FDCPA applies to ISAs.[89] If an ISA lender sends an account to a third-party for collection, and the other conditions of coverage are met, the collection activity would be subject to the FDCPA. So applying the FDCPA definition of debt to ISAs brings them within the meaning of credit under the ECOA.

More broadly, under any plausible definition of the term, an ISA creates a debt, the payment of which is deferred. An ISA is an agreement creating a right to payment of an amount, pursuant to specified formulas and terms in the agreement. ISA lenders have a right to receive an agreed-upon portion of a borrower's income. If the borrower refuses to pay or otherwise defaults, the lender has a right to collect a specific sum of money, the amount of the Payment Cap. Any borrower wishing to pay early, a very common occurrence with student loans, similarly would be required to pay the specific Payment Cap amount. It is perhaps true that, at the time a student borrower signs an ISA, neither the student nor the lender knows precisely how much the student will end up repaying. But that is typical of many loans—those with variable interest rates set using a formula or even fixed interest rates because a consumer may pay the loan off early. It is certainly true of federal student loans where student borrowers could end up paying less than the principal balance through the combination of income-driven repayment and forgiveness programs.

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[85] *Debt*, Wex, https://www.law.cornell.edu/wex/debt (last visited July 12, 2020).

[86] *What is Debt?*, Law Dictionary, https://thelawdictionary.org/debt/ (last visited July 12, 2020); *see also* United States v. Colt, 25 F. Cas. 581, 582 (C.C.D. Pa. 1818) (No. 14,839).

[87] *Debt*, Black's Law Dictionary (10th Ed. 2014).

[88] Courts have determined that federal student loans are debt. *See, e.g.*, Carrigan v. Central Adjustment Bureau, Inc., 494 F. Supp. 824, 826 (N.D. Ga. 1980) ("A 'debt' so defined is clearly involved in the present case. Plaintiff, while a student, incurred an indebtedness to the University of Florida in the form of a federal loan for tuition. As a student, Plaintiff acted as a 'consumer' of educational services in securing an obligation to pay money arising out of a transaction in which the subject thereof was a 'service,' education, intended for Plaintiff's 'personal' use.").

[89] *See* Morrison Foerster, *supra* note 8, at 12.

Arguments Seeking to Avoid ECOA Regulation Fail

In seeking to avoid consumer protection regulation, ISA lenders argue that because the amount due under an ISA is not certain and could be as low as zero, ISA obligations are not debts under federal law.[90] Because borrowers are not required to repay during months when their income is low enough to result in a $0 payment, they argue, it is conceivable that a borrower may never make a payment. As a result, the argument goes, the obligation to pay under an ISA is conditional. And because they posit that "debt" is an unconditional obligation to pay a specific amount, they conclude that ISAs do not create debt and are not credit.

This argument fails. First, it is only applicable to the first two prongs of the ECOA definition of "credit," which require a debt. Even if a court were to conclude that ISAs do not create debts under ECOA, the statute would still apply because ISAs permit borrowers to defer payment for services.

Second, there simply is no case law stating that, under federal law or the ECOA specifically, a "debt" must be a specific sum ascertainable upon the execution of an agreement. Such a reading would exclude, for example, all credit card debt because whether and how much a credit card holder will owe depends on how much they spend. It would also exclude every variable-interest loan with a rate based on an index, or federal student loans for which, as described above, income-based payments of $0 and total loan forgiveness are also available. Loans with payment amounts that are not fixed, but rather, based on a formula, are common.

Third, just because a payment formula could result in a $0 payment does not mean the obligation to repay is conditional. Rather, the obligation to pay whatever the formula would require is unconditional. Notably, if a borrower making more than the Income Threshold were to simply refuse to pay anything at all, that borrower would default and legally owe a specific amount: the Payment Cap.

Fourth, *even if* the obligation arising out of an ISA could be considered conditional, consumer laws have long considered conditional loans to be debts and credit.[91] For example, many auto loans made by car dealers are

[90] *See, e.g.*, Morrison Foerster, *supra* note 8.

[91] *See, e.g.*, Copley v. Rona Enters., 423 F. Supp. 979 (S.D. Ohio 1976) (an agreement to purchase a mobile home was an extension of credit under the Truth in Lending Act where the purchasers were committed to the terms of the agreement even though the seller's obligation was conditioned upon financing).

conditional on a finance company purchasing the loan from a dealership. That fact has never been used to conclude that indirect auto loans are not credit under the ECOA.[92]

Finally, the notion that ISAs do not create debts because an agreement to pay a percentage of income is conditional is at odds with accepted business practices in the commercial context where the notion that a contract for a percentage of revenue creates a debt is widely accepted.[93] Consider, for example, the common revenue-sharing agreement in which profits and losses are split among parties. Holding that all agreements with this form of promise fail to create valid "debts" would create ripple effects across the entire economy.[94]

ISAs Are Credit Under the Truth in Lending Act

TILA protects consumers by requiring lenders to provide particular information to borrowers before extending credit.[95] Like the ECOA, TILA is a remedial statute that courts read liberally to achieve its goals of protecting consumers.[96] TILA applies to ISAs because ISAs create debts that student borrowers may defer paying and because ISA lenders meet TILA's definition of "creditor."

The definition of "credit" under TILA mirrors the first two parts of the ECOA definition discussed above; it is "the right granted by a creditor to defer payment of debt or to incur debt and defer its payment."[97] The meaning of "creditor" under TILA, however, provides additional boundaries on the

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[92] *See, e.g.*, *In re* Ally Financial Inc., 2013-CFPB-0010 (Dec. 20, 2013). The same applies for the definition of "credit" under TILA. *See* Madewell v. Marietta Dodge, Inc., 506 F. Supp. 286 (concluding that a retail installment contract for purchase of an automobile was subject to TILA even though it was contingent on the seller's ability to arrange financing).

[93] *See, e.g.*, University of Tennessee v. Professional Food Serv. Mgmt., Inc., Shelby Cty. No. 70, 1986 WL 645 (Ct. App. Tenn. Jan. 6, 1986) (adjudicating a dispute over "debts" arising from a contract that gave the University of Tennessee a right to receive a percentage of profits from vending machines).

[94] It appears at least one litigant tried this argument. In *In re* Jones, No. 16-41283-ELM-7, 2019 WL 1167812 (N.D. Tex. Mar. 11, 2019), the plaintiff argued that "no value was realized at all [and thus there was no consideration to create a contract] because the Investment Note did not constitute a valid antecedent debt. In this regard, Plaintiff reasons that because 'the Revenue Sharing Agreement only contained a contingent obligation on the part of Aquaphex to pay the Sherwoods, if and when a plant was up and running and generating a profit, Jones' later promise to reimburse the Sherwoods' investment in Aquaphex was an unenforceable promise.'" *Id*. at *9. The court ruled that the Revenue Sharing Agreement created a "valid antecedent debt," and thus, there was a contract.

[95] *See Truth in Lending*, Office of the Comptroller of the Currency, https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/truth-in-lending/index-truth-in-lending.html (last visited July 17, 2020).

[96] Curtis v. Propel Prop. Tax Funding, LLC, 915 F.3d 234, 245 (4th Cir. 2019) (holding that an agreement for financing the payment of local taxes was a credit transaction under TILA).

[97] 15 U.S.C. § 1602(f) (2018).

statute's applicability. A creditor is a person who both "(1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness."[98]

TILA's implementing regulation, Regulation Z, defines "consumer credit" as credit offered or extended to a consumer primarily for personal, family, or household purposes.[99] It specifies that, to regularly extend credit, a person must extend credit more than 25 times in a calendar year.[100] Regulation Z also states that the requirement to pay in more than four installments must be by written (rather than oral) agreement.[101] And TILA defines "finance charge" as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended," including most fees charged by a creditor and "interest, time price differential, and any amount payable under a point, discount, or other system of additional charges."[102]

In summary, to be covered by TILA, an ISA must (1) create a debt that a student borrower is granted the right to defer paying, and (2) their repayment must be made in more than four installments by written agreement or be subject to a finance charge. Further, the transaction (3) must be for personal, family, or household purposes, and (4) the ISA lender must make more than 25 ISAs a year. ISAs and their lenders meet all these criteria, and therefore their agreements constitute credit under TILA.

ISAs Permit Borrowers to Defer Payment on a Debt

Like the ECOA, neither TILA nor Regulation Z define debt. So, for all the reasons discussed above that ISAs should be considered debt under the ECOA, they should be treated as debt under TILA as well. In particular, at least one federal court of appeals has ruled that the definition of "debt" in the FDCPA applies to TILA, and as discussed above, ISAs plainly create debt as that term is defined by the FDCPA.[103] Also discussed above, ISA

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[98] *Id.* § 1602(g).

[99] 12 C.F.R. § 1026.2(a)(12) (2016).

[100] *Id.* § 1026.2(a)(17)(v).

[101] *Id.* § 1026.2(a)(17)(i).

[102] 15 U.S.C. § 1605(a).

[103] Pollice v. National Tax Funding, Ltd. P'ship, 225 F.3d 379, 410 (3d Cir. 2000) ("[A]lthough [TILA] does not contain a definition of the term 'debt,' we believe the term as used in [TILA] should be construed as it is defined in the FDCPA.").

lenders clearly grant student borrowers the right to defer payment on these debts. Accordingly, ISAs are extensions of credit under TILA if ISA lenders meet the statute's definition of creditor.

ISA Lenders Are Creditors Under TILA

ISA lenders are creditors under TILA because they "regularly extend consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required."[104]

ISA lenders make ISAs for the personal purpose of funding students' education and therefore are extending "consumer credit."

Whether a particular ISA lender satisfies Regulation Z's numerical test for regular extensions of credit will be a factual question worthy of investigation by regulators. But for the purpose of this analysis, we assume ISA lenders issue more than 25 ISAs per calendar year, as we know some programs issue many multiples of that.[105]

ISAs are also either subject to a finance charge or payable in more than four installments under a written agreement, depending on how a borrower chooses to repay their ISA. If a borrower prepays or defaults on their ISA and therefore owes the amount of their ISA's Payment Cap, they will be paying an amount higher than the original Funding Amount. This constitutes a "time price differential," which TILA recognizes as a finance charge.[106] If instead the borrower pays back the ISA by making payments according to the income-based payment option, they would be responsible for making more than four installments in accordance with their written agreement (and in many cases will also end up paying more than the Funding Amount).[107] Therefore, ISA lenders are creditors extending credit under TILA when they enter into ISAs with student borrowers.

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[104] 15 U.S.C. § 1602(g).

[105] *See Back a Boiler*, Purdue Univ., supra note 33 ("Since its inception [in 2016], Back a Boiler has issued just over 1,200 funding contracts to 760 unique students representing more than 150 majors at Purdue. The program has disbursed $13.9 million in funding.").

[106] 15 U.S.C. § 1605(a)(i).

[107] All ISAs we are aware of involve more than four installments. While theoretically possible, it seems unlikely that an ISA would ever involve fewer than four installments, so we will not analyze how an ISA with fewer than four installments might implicate TILA applicability.

Treating ISAs as Exempt from TILA is Wrong and Would Lead to Absurd Results

Proponents of ISAs assert that TILA does not apply because ISAs should be treated like investment plans, which are excluded from the definition of credit in the Official Commentary to Regulation Z.[108] Specifically, that commentary says:

> Investment plans in which the party extending capital to the consumer risks the loss of the capital advanced [are excluded from the definition of credit]. This includes, for example, an arrangement with a home purchase in which the investor pays a portion of the downpayment and of the periodic mortgage payments in return for an ownership interest in the property, and shares in any gain or loss of property value.[109]

These proponents argue that this creates a broader interpretive principle that a transaction is not credit if the financing company and not the borrower retains the risk of loss.[110] There are several ways in which this argument is troubling and wrong. First, the commentary is framed as an exclusion, not an interpretive principle, meaning that these investment plans would be credit if not for the exclusion. Therefore, something that is like an investment plan, but is not actually an investment plan, would be credit and would be covered by TILA unless it was covered by another specific exclusion. The Commentary in Regulation Z does not exempt ISAs.

Second, the fact that the lender retains *some* risk of loss cannot be the governing principal for whether something is credit because all creditors retain some risk that borrowers will fail to repay. Risk of nonpayment is a major factor in pricing credit in the United States. Either this interpretive principle would be an exclusion that swallows the rule, or a new and unworkable principle would be born in which a judge would have to weigh *how much* risk of loss the finance company holds. Such inquiries are best left to the underwriters. The suggestion that ISAs cannot be credit because the lenders retain some risk of loss would also lead to the perverse conclusion that some subprime loans could be so risky that consumer protections do not apply.

Third, the troubling implication of this argument is that it imagines a world in which financiers are making investments in people, and thus, treats people as property. The commentary to Regulation Z excludes investment plans, where financiers invest in real estate. If ISAs are investment plans, then the property that finance companies are investing in is *people*. Indeed, proponents of ISAs explicitly describe them as "bet[s] on the future

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[108] *See* Morrison Foerster, *supra* note 8 at 5-6.

[109] 12 C.F.R. § 1026.2, Supp. I, cmt. 2(a)(14)–1(viii) (2016), *available at* https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/2/#a-14 (last visited July 12, 2020).

[110] *See* Morrison Foerster, *supra* note 8.

earning power of students."[111] ISA investment platform Edly actually encourages investors to "select pools of students coming from your favorite schools."[112] At the most basic level, this concept seems to run afoul of the constitutional prohibition against taking property rights in people.[113] And scholars have noted the challenges associated with these so-called "human capital contracts."[114] The very fact that ISA proponents have to argue that their service is an investment or bet in people to show that it is not credit covered by federal consumer law shows just how much one has to strain to look at an ISA and not see credit.

Additionally, taking the ISAs-as-investment-plans framing to its logical conclusion would likely run into other legal challenges. For example, Utah has strict gambling laws prohibiting "risking anything of value for a return . . . when the return or outcome . . . is based on an element of chance."[115] The law includes an exemption for "lawful business transactions," which surely exempts typical stock market investments, loans, and the like, but it is not clear the exemption would extend to an "investment in people." ISA lenders like the University of Utah and its partner Vemo give student borrowers a thing of value (education funding) and bet on the chance of making a profit if the student obtains a high-earning job. There is certainly an element of chance associated with whether a person will get a good job and thus how much they will pay under their ISA. If ISA lenders were to embrace the position that their products are extensions of credit, they likely would be eligible for the "lawful business transaction" exemption. But it is unlikely a court would give the same treatment to "an investment in people."

For all these reasons, ISAs are extensions of credit by creditors under TILA and subject to the statute's protections and disclosure requirements.

ISAs Are Credit Under the Consumer Financial Protection Act of 2010

The CFPA and its prohibitions against unfair, deceptive, and abusive acts and practices apply to "covered persons," a term the statute defines as those providing consumer financial products or services and their affiliate

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[111] Sydney Johnson, *Wall Street Wants In on Income-Share Agreements*, EdSurge (Apr. 5, 2019), https://www.edsurge.com/news/2019-04-05-wall-street-wants-in-on-income-share-agreements.

[112] *Webinar: How to Invest in the Lambda School ISA Pool*, Edly (Dec. 11, 2019).

[113] *See* U.S. Const. amend XIII (prohibiting slavery and involuntary servitude); Peonage Act of 1867, 42 U.S.C. 1994 (2018) (abolishing both involuntary and voluntary peonage in liquidation of any debt or obligation).

[114] Diane M. Ring & Shu-Yi Oei, *Human Equity? Regulating the New Income Share Agreements*, 68 Vanderbilt L. Rev. 681 (2015).

[115] Utah Code Ann. § 76-10-1101(8)(a) (West 2020).

service providers.[116] Consumer financial products and services include "extending credit and servicing loans," if they are "offered or provided for use by consumers primarily for personal, family, or household purposes."[117]

ISA lenders plainly offer a product or service primarily for personal, family, or household purposes. The only question requiring analysis is whether an ISA meets the CFPA's definition of credit. ISA lenders—whether they are schools, third parties affiliated with schools, or independent third parties—are all covered persons under the CFPA because they extend credit to student borrowers.

The definition of credit under the CFPA is broad and quite similar to the ECOA definition. Credit means "the right granted by a person to a consumer to (1) defer payment of a debt, (2) incur debt and defer its payment, or (3) purchase property or services and defer payment for such purchase."[118]

As with the ECOA, the simplest reading of the statute focuses on the third definition. Although this portion of the CFPA has not yet been considered by courts or opined upon by the CFPB through regulation, courts' treatment of the similar language in the ECOA is instructive. As discussed above, courts have held that the ECOA "only requires deferral of payment, not the existence of debt."[119] And ISA lenders clearly grant students the right to purchase services and defer payment for such purchase.

ISAs also satisfy the other components of the CFPA credit definition. Through ISAs, lenders grant students the right to "defer payment of a debt" and "incur a debt and defer its payment."[120] For all the reasons discussed in our consideration of the ECOA above, the obligations arising from ISAs are debt under federal law, bringing ISAs and their lenders within the ambit of the CFPA.

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[116] 12 U.S.C. § 5481(6) (2018).

[117] 12 U.S.C. § 5481(15)(A)(i), (5)(A). Courts have read the term "extending credit and servicing loans" in § 5481(15) in the disjunctive, noting that it is sufficient to extend credit to fall within the meaning of providing a financial product or service. *See* Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, *supra* note 63 at 766–67 (citing Peacock v. Lubbock Compress Co., 252 F.2d 892, 894 (5th Cir. 1958)).

[118] 12 U.S.C. § 5481(7).

[119] Gunter v. Long Island Power Auth, supra note 74 (quoting Williams v. AT&T Wireless Servs., Inc. 5 F. Supp. 2d 1142, 1144-1145 (W.D. Wash. 1998)).

[120] 12 U.S.C. § 5481(6).

Conclusion

ISA lenders and their advocates seek to present their services as a new and innovative disruption to the troubled student lending market. ISAs, however, are not an innovation requiring a new regulatory framework. Rather, ISAs are a form of credit, just like traditional student loans. Accordingly, despite their fervent claims to the contrary, unless ISA lenders offer these products in compliance with federal consumer financial law, they expose themselves—and their investors—to liability.