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Via Email to [Regulations@dbo.ca.gov](mailto:Regulations@dbo.ca.gov)

California Department of Financial Protection and Innovation  
Attn: Sandra Navarro  
2101 Arena Blvd.  
Sacramento, California 95834

RE: PRO 06-21  
*Notice of Rulemaking Action—Student Loan Servicing Act and the Student Loans: Borrower Rights Law*

Dear Ms. Navarro,

On behalf of certain clients<sup>1</sup> representing income share agreement<sup>2</sup> providers (the "Providers"), we appreciate the opportunity to submit written comments in response to the *Notice of Rulemaking Action—Student Loan Servicing Act* and the *Student Loans: Borrower Rights Law*. These clients fully support efforts by the California Department of Financial Protection and Innovation ("DFPI" or the "Department") to provide additional legal clarity for those groups providing funding to students utilizing income-contingent, income-indexed forms of financing, such as ISAs. We are confident that the DFPI is well suited to balance student protection concerns with the need for innovative financial tools to assist students in financing post-secondary education.

As the Department considers the scope of its rulemaking under the *Student Loan Servicing Act* and the *Student Loans: Borrower Rights* law (together, the "Student Loan Servicing Laws"), we encourage the Department to consider the unique structure of ISAs and how such products would fit within the framework proposed by the Department. The Providers believe that, like most financial products, there are "good" ISAs and "bad" ISAs. The Providers support the efforts of the Department to regulate the servicing of ISAs, ensuring student protection while encouraging innovative program designs.

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<sup>1</sup> These clients include Better Future Forward, Inc. and Stride Funding, Inc.

<sup>2</sup> The term "ISA" will be used throughout this letter. However, we use this term to collectively mean all of those income-contingent, income-indexed (or determined) forms of financing, including those offered by the provider of the educational services (*e.g.*, an income-contingent, income-indexed retail financing contract).

***Background on ISAs:***

ISAs are a unique financial product. Unlike a traditional student loan, students who pay for their education using ISAs will not pay a fixed monthly loan payment every month. Unlike a traditional loan, there is no principal balance that must be repaid. There is no interest that will apply.<sup>3</sup> The ISA may have a negative annual percentage rate—depending on the student’s future payments. Rather, students obtaining an ISA will make payments based upon their income when they leave the school or program. In addition, ISAs are subject to time limitations. In ISAs, as we propose to define them, a student’s obligations to the provider are discharged when the student reaches the required number of income-based payments or upon the expiration of a certain time period. Similarly, under the proposed definition, the student owes nothing further to provider regardless of whether the amount paid by the student in total exceeds the tuition advancement in full or in part. In many instances, a student can pay nothing under the term of an ISA and still have “*paid as agreed.*” At the end of this term, the student owes nothing further and the provider received nothing. In this way, it allows a provider to share in the risks associated with a student’s future earnings. The student’s payments can be calculated on a number of variables including: (i) as a percentage of income, (ii) as a set amount subject to income thresholds,<sup>4</sup> or (iii) as a fixed payment or percentage that may change as the student’s income rises.

Unlike a traditional loan, where the student has an absolute obligation to repay the funds advanced, an ISA is an *income-contingent, income-indexed* financial product. Until the student satisfies the precondition—that the student earns above the income threshold—the payment obligation is not triggered. This is materially different than a traditional student loan with a debt forgiveness feature. With an ISA, the obligation is contingent (a pre-condition). With a traditional student loan, the obligation is not contingent, but may be excused (as is the case with a loan forgiveness program). This distinction fundamentally separates an ISA from a traditional student installment loan and may have differing tax implications for the student.

***Treatment of ISAs Under Existing Law:***

Consistent with existing interpretations that have been issued by the Consumer Financial Protection

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<sup>3</sup> As noted during discussions between the Department and Better Future Forward, Inc. (“BFF”) and in disclosures implemented by BFF as part of its *Compliance Plan* with the Consumer Financial Protection Bureau, ISAs present many unique challenges when subjected to a traditional loan regime. For example, under these new disclosures, BFF will disclose that there is no interest rate associated with an ISA. In addition, after consultation with the CFPB, BFF has developed a mechanism for calculating a negative annual percentage rate.

<sup>4</sup> Many providers use the term “income threshold” to describe an earnings level below which the provider is due nothing from the student. This may be set in the contract or may be based upon various factors such as inflation rates or a multiple of the federal poverty index.

Bureau (“CFPB”)<sup>5</sup> and Department of Education (“DOE”),<sup>6</sup> ISAs are a form of financial product that meet the definition of a “*private education loan*” under the Truth in Lending Act and the Higher Education Act. Similarly, these Providers support efforts by the Department to clarify, under California law, that ISAs are subject to the requirements of the Student Loan Servicing Laws. In addition, bringing these products within the regime established for a “*private student loan*” would aid in clarifying that ISAs (whether offered by a third party or by the educational institution, directly) are subject to the requirements of the *California Code of Regulation*, Tit. 10, Chapter 3, Sub. 15 (the “Regulations”) and are not a form of variable-price tuition or other product outside the oversight regime of the Department.

In addition, the Providers fully support the efforts of the Department to specifically address the unique features of ISAs that materially differ from consumer loans. In particular, the Providers support the efforts of the Department to create reporting regimes that are unique to ISAs and that recognize the distinctions between ISA features and those of traditional consumer loans.

**Comments to Proposed Regulatory Text:**

The following are suggestions related to the proposed statutory text:<sup>7</sup>

- **Definition of *Income*:** Many ISA providers more narrowly define “income” under the ISA. Thus, a provider may not know a student’s *income* as referenced in the regulation and would be unable to meet the reporting requirement in proposed § 2042.65(c)(4).
  - *Section 2032(a)(12)—Proposed Language:* “Income” means a borrower’s earnings, wages, and gross compensation from all sources, including but not limited to salary, bonuses, commissions, vacation pay, gratuities, and self-employed earnings.
  - *Section 2042.65(c)(4)—Proposed Language:* Borrower’s income (or that portion of the borrower’s income that is less than the full income) that is used by the licensee in calculating the borrower’s obligations under the income share agreement.
- **Definition of *Income Share Agreement*:** Though many ISAs still calculate a student’s obligations using a percentage of income, many providers have developed innovative payment calculation mechanisms such as “stepped” percentages that vary by income, fixed payment amounts that are triggered in different income scenarios, and multiple-threshold programs that offer a more income-progressive payment obligation.
  - *Section 2032(a)(13)—Proposed Language:* “Income share agreement” or “ISA” means an agreement between a student and a school or a student and an income share provider under

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<sup>5</sup> Consumer Fin. Protection Bureau, *In re: Better Future Forward, Inc.*, <https://www.consumerfinance.gov/enforcement/actions/better-future-forward-inc/>.

<sup>6</sup> Dept. of Educ., *Income Share Agreements and Private Education Loan Requirements*, GENERAL-22-12, <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-02/income-share-agreements-and-private-education-loan-requirements>.

<sup>7</sup> Addressed in the order appearing in the proposed text (blackline) of the Regulation.

~~which the student agrees to pay a fixed percentage of the student's future income for the payment term, in exchange for waiving or covering the cost of some or all of the student's tuition: (i) a school or income share provider credits or advances funding to the student (or to the school, on the student's behalf) to finance a postsecondary education and costs of attendance at a postsecondary institution; (ii) the student is obligated to make payments to the school or income share agreement provider in the future calculated based upon and determined by the student's income; and (iii) there is maximum payment duration after which the student's obligation is complete regardless of the amount paid by student to the income share provider or school (as long as the student has paid any prior amounts due).~~<sup>8</sup>

- ~~Section 2032(a)(14)—Proposed Language: “Payment calculation method” percentage,” “income share calculation,” or “contractual payment percentage” means the percentage of a borrower's income payable during the term of the income share agreement, subject to the floor and the cap—means the mechanism, formula, percentage, dollar figure, or other means of calculating a student's payment obligations to a school or income share agreement provider under the terms of the income share agreement that is based on the student's income.~~
- ~~Section 2032(a)(15)—Proposed Language: “Installment contract” means a private student loan from a postsecondary institution to a student in which the student agrees to repay the amount advanced in a fixed number of payments of a fixed amount (or based upon a principal repayment schedule with a variable interest), including an education installment contract and a retail installment contract. For the avoidance of doubt, when a postsecondary institution offers an income share agreement to finance the student's attendance at the postsecondary institution, such contract will be subject to those provisions applicable to an income share agreement, as opposed to those applicable to an installment contract.~~
- ~~Section 2032(a)(16)—Proposed Language: “Minimum income threshold,” “minimum threshold,” “payment floor” or “floor” means the amount of annual income specified in an income share agreement below which a borrower is not required to make payments a fixed dollar amount that is the minimum income per period that is established in the contract that a student is required to earn before the student is required to make a payment on an income share agreement for such payment period.~~<sup>9</sup>
- ~~Section 2032(a)(18)—Proposed Language: “Payment cap,” “payment ceiling,” “ceiling” or “cap” means the maximum amount payable under an income share agreement which, for example, may be expressed as a dollar value, a multiple of the amount funded to the student or on the student's behalf, or as a maximum effective annual percentage rate, excluding~~

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<sup>8</sup> This language is written to mirror that language introduced by Senators Young (R-IN), Warner (D-VA), Rubio (R-FL), and Coons (D-DE) in the *ISA Student Protection Act of 2022*, <https://www.warner.senate.gov/public/cache/files/6/a/6a86ee31-1260-4e6a-9879-f24b9d7b1584/8E7094C184BA185ADB593E0B3FD17FBE.student-protection-act-of-2022---final-version.pdf>.

<sup>9</sup> *Id.*

charges related to default or other charges and fees that due and owing under the income share agreement.

- *Section 2032(a)(28)—Proposed Language:* “Traditional student loan” means federal student loans and private student loans ~~offered by traditional lenders such as banks and credit unions~~ in which a student’s payment obligation is based upon the repayment of a principal balance with a fixed or variable interest rate. A traditional student loan may have a debt forgiveness feature (or excused payment mechanism) that is based upon a student’s income without the traditional student loan being treated as an income share agreement.
- **Definition of *Payment Term*:** Within the ISA industry, providers generally draw a distinction between an ISA’s “duration,” the “maximum income-based payments,” and the “payment window.” These unique distinctions are reflected in the federal legislation.
  - *Section 2032(a)(19)—Proposed Language:* “~~Maximum Payment Duration term, “payment window, “maximum payment term” or “repayment term”~~ means the maximum period of time during which a student remains obligated on the income share agreement (other than periods when an income share provider is attempting to collect past-due amounts and absent periods of payment relief pauses, forbearance, military service suspension, or other suspension of obligations at the request of the student) regardless of whether the student’s income is greater than the minimum income threshold. ~~repayment obligations under an income share agreement or other written agreement evidencing an education financing product.~~<sup>10</sup>
  - *New Section—Proposed Language:* “Maximum income-based payments” means (if applicable to the income share agreement) the maximum number of payments (during periods where the student’s income is greater than the minimum income threshold) that a student could be required to make under the income share agreement contract.<sup>11</sup>
  - *Section 2032(a)(22)—Proposed Language:* “Qualifying payment” means, with respect to income share agreements, a monthly payment of greater than \$0.00 that counts toward the ~~payment cap or payment window~~ maximum income-based payments under the income share agreement.
  - *Section 2042.65(c)(8)—Proposed Language:* Maximum payment duration and/or payment window, each as they may apply to the income share agreement; ~~Payment window or maximum payment term;~~
  - *Section 2042.65(c)(9)—Proposed Language:* Maximum income-based payments; ~~Number of required payments;~~
- **Payment Application:** Many providers receive electronic payments from students via automated

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

clearinghouse (“ACH”) transactions or through the use a card payment network. In these circumstances, the provider is often unaware of the location in which the online payment is made. Consistent with the student protection intent of this section, we would propose as follows:

- *Section 2040(d)—Proposed Language:* Notwithstanding the previous sentence, for purposes of Civil Code section 1788.102, subdivision (a)(1), a payment received on or before 11:59 p.m., ~~in the time zone in which the on-line payment is made~~ Pacific Time (daylight or standard, as applicable), on the date on which that payment is due, shall be credited as received on such due date and treated as an on-time payment.
- **Payoff Amount:** Many providers within the ISA industry include within their income share agreements various early completion mechanisms, for example Annual Percentage Rate caps, “multipliers,”<sup>12</sup> or maximum periodic payment amounts. In addition, it is important that a distinction be drawn between the concept of a “payoff” on a loan and the obligations under an ISA. Under an ISA, the amount the student will owe to the provider in the future is unknowable. As such, there is not “payoff” under an ISA. However, in the interests of student protection, nearly every ISA provider includes a voluntary early termination mechanism that allows the student to cancel all future obligations, regardless of the student’s current income, future income, or past payment history. The suggested language, below, is based upon provisions in the proposed federal legislation.
  - *Section 2042.65(b)(6)—Proposed Language:* Payoff amount or, in the case of an income share agreement, a description of the early completion provision that allows student to voluntarily terminate the income share agreement prior to any contractual trigger terminating further obligations under the income share agreement (such as a payment cap);
- **APR Calculations:** Providers do not object to providing, in tabular format, the payment obligations of students under different income scenarios and including disclosure of the Annual Percentage Rate in such a scenario.<sup>13</sup> At issue is the language requiring the annual percentage rate calculation “at \$10,000 income increments thereafter up to the annual income where the maximum number of monthly payments results in the maximum amount payable.” In an ISA, this “up to” point may not exist. For example, for most ISAs, the maximum number of monthly payments will result in a lower amount paid by the student—lower income would lead to lower payments over a longer duration. Conversely, the most “expensive” ISA could be the contract for a student that makes significant income after graduation and makes the fewest number of payments. In addition, the Providers are concerned that other income share agreement providers may try to manipulate this “up to” calculation. The suggested language, below, is based upon provisions in the proposed federal legislation and the form disclosures agreed to in the BFF *Compliance Plan* with the Consumer Financial Protection Bureau.

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<sup>12</sup> For example, a mechanism that would never require a student to pay more than 125% (1.25x) of the amount initially funded by the income share agreement provider.

<sup>13</sup> Though not of significant concern to the Providers, we would ask the Department to consider the viability of such a report for small servicers. In particular, Providers believe that a small, representative group of scenarios could provide the Department with an accurate “view” of the cost of the product in different income scenarios without overburdening smaller servicers when generating these tables.



○ Section 2042.65(c)(5)—Proposed Language: Maximum annual percentage rate and income share agreement cost table:

- Maximum annual percentage rate: the maximum annual percentage rate that could result under the income share agreement, taking into account those assumptions permitted under 12 C.F.R. § 1026.47(a)(4) and 12 C.F.R. § 1026.47(b)(3) (and the official commentaries thereto).
- Maximum annual percentage rate scenario: the assumed annual student income, the number of periodic payments, the start date for payments, and the amount of such payments in the maximum annual percentage rate scenario. For example: “[XX] payments of [\$XX.XX] beginning on [XX/XX/XXXX] with a final payment of [XX.XX] on [XX/XX/XXXX].”
- Income share agreement cost table: a table in substantially the following form:

Amount Provided to Student	Annual Income Assumption	Monthly Income	Monthly Payment Amount	Duration of Contract (in months)	Total Paid Over Life of Contract
[\$X.XX]	Less than income threshold	[threshold/12]	[\$X.XX]	[XX]	[\$XXX.XX]
[\$X.XX]	\$20,000	\$1,666.67	[\$X.XX]	[XX]	[\$XXX.XX]
[\$X.XX]	\$40,000	\$3,333.33	[\$X.XX]	[XX]	[\$XXX.XX]
[\$X.XX]	\$60,000	\$5,000.00	[\$X.XX]	[XX]	[\$XXX.XX]
[\$X.XX]	\$80,000	\$6,666.67	[\$X.XX]	[XX]	[\$XXX.XX]
[\$X.XX]	\$100,000	\$8,333.33	[\$X.XX]	[XX]	[\$XXX.XX]
[\$X.XX]	\$150,000	\$12,500.00	[\$X.XX]	[XX]	[\$XXX.XX]
[\$X.XX]	\$200,000	\$16,666.67	[\$X.XX]	[XX]	[\$XXX.XX]

The figures shown for “Annual Income Assumption” and “Monthly Income” may be adjusted by the Department, in the future. In addition, if the income threshold is higher than any figure shown in “Annual Income Assumption,” those rows may be omitted.

The figures in this table shall be calculated at the time of origination of the income share agreement and will assume (for each row) that the student has the same income over the entire duration of the income share agreement, without variation. Consistent with 12 C.F.R. § 1026.47(a)(4) and 12 C.F.R. § 1026.47(b)(3) (and the official commentaries thereto), the income share provider may generate these cost estimates using the methods permitted in those sections (such as assuming periods of non-payment during an in-school or post-graduation grace period).

- **Out-of-State Providers:** The Providers support the Department’s ease of access to all records required under the Regulation. However, the Providers would seek clarity as to the requirements

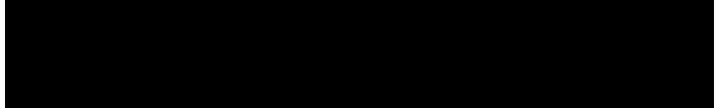
regarding the maintenance of records for out-of-state income share agreement providers.

- *Section 2042.75(a)—Proposed Language:* A student loan servicer must maintain its books, records, and accounts at one or more of its licensed locations. The licensee must designate the licensed location(s) at which its books, records, and accounts are maintained. The designated licensed location(s) and books, records and accounts there at must be accessible to the Department. Such books, records, and accounts may be provided to the Department electronically or through production of such at a location designated by the Department. Any remote maintenance of the books, records, and accounts is within the reasonable discretion of the Department.

Thank you again for this opportunity to comment. We welcome any questions you may have regarding this submission. We look forward to working with you.

With kind regards, I remain,

Very truly yours,



Dowse B. "Brad" Rustin IV