



# SOLVING STUDENT DEBT OR COMPOUNDING THE CRISIS?

Income Share Agreements and Fair Lending Risks

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STUDENT BORROWER  
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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

The mounting student debt problem can't be ignored. As public investments in higher education dropped over the last decade,<sup>1</sup> levels of student loan indebtedness soared.<sup>2</sup> This student debt crisis is a civil rights crisis. Black college students owe, on average, \$7,400 more than white peers upon graduation, and that gap more than triples once those students are four years out.<sup>3</sup> These disparities exist against a backdrop of jaw-dropping wealth, income, homeownership, and debt gaps. To take one example, the net worth of a typical white family is nearly ten times greater than that of a Black family.<sup>4</sup>

**Black college students owe, on average, \$7,400 more than white peers upon graduation, and that gap more than triples once those students are four years out.**

Income share agreements (ISAs) are increasingly being touted as a solution to the student debt problem. ISAs are financial structures in which consumers receive funds and agree to pay a percentage of their income for some number of years to repay those funds. They're advertised as "innovative" alternatives to student loans<sup>5</sup> and have been described by proponents of ISAs as "dramatically more student-friendly than a loan."<sup>6</sup>

However, scratching below the surface reveals serious potential issues that threaten to exacerbate disparities for historically underserved groups

<sup>1</sup> See Robin Nicole Johnson-Ahorlu, Cynthia Lua Alvarez & Sylvia Hurtado, *Undermining the Master Plan: Divestment in Higher Education and Student Experiences*, J. of Coll. Admission (Winter 2013), <https://files.eric.ed.gov/fulltext/EJ1011896.pdf>; Nicholas Johnson, Phil Oliff & Erica Williams, *An Update on State Budget Cuts: At Least 46 States Have Imposed Cuts That Hurt Vulnerable Residents and the Economy*, Ctr. on Budget and Pol'y Priorities (Feb. 9, 2011), <https://www.cbpp.org/research/an-update-on-state-budget-cuts>.

<sup>2</sup> See Anthony Cilluffo, *5 Facts about Student Loans*, Pew Rsch. Ctr. (Aug. 13, 2019), <https://www.pewresearch.org/fact-tank/2019/08/13/facts-about-student-loans/>.

<sup>3</sup> Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More Than Triples after Graduation*, Brookings (Oct. 20, 2016), <https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/> (gap widens as a result of differences in interest accrual and borrowing for graduate school); see also, e.g., Dalié Jimenez & Jonathan D. Glater, *Student Debt is a Civil Rights Issue*, forthcoming 55 Harv. C.R.-C.L. L. Rev. (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3475224](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475224); Monnica Chan et al., *Indebted Over Time: Racial Differences in Student Borrowing*, 48 Educ. Researcher 558 (2019); Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 Soc. Currents 199 (2017); Jason N. Houle & Fenaba R. Addo, *Racial Disparities in Student Debt and the Reproduction of the Fragile Black Middle Class*, 5 Soc. Race & Ethnicity 4 (2019).

<sup>4</sup> Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, Brookings (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>; see also Urban Institute, *Nine Charts about Wealth Inequality in America* (Oct. 5, 2017), <https://apps.urban.org/features/wealth-inequality-charts/>; Dionissi Ailiprantis & Daniel Carroll, *What is Behind the Persistence of the Racial Wealth Gap?*, Fed. Rsrv. Bank of Cleveland (Feb. 28, 2019), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap.aspx>.

<sup>5</sup> See, e.g., Stride Funding, <https://www.stridefunding.com>.

<sup>6</sup> 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](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).

like women and racial and ethnic minorities. Sadly, the story is familiar: a mix of financial and transactional complexities, existing credit gaps, vulnerable consumer populations (and at times profit incentives to exploit those vulnerabilities), and a backdrop of historical and structural disparities can combine to mean purported financial solutions actually entrench inequalities.<sup>7</sup>

This article will explore some of those concerns and address ways in which ISAs could be challenged under civil rights laws. Part II provides a brief overview of ISAs. Part III addresses the primary federal statute prohibiting credit discrimination, the Equal Credit Opportunity Act (ECOA). It maps public allegations about certain existing ISAs onto a legal theory called “reverse redlining,” which prohibits entities from targeting predatory or unfair products to minority communities. Part III then discusses the application of more traditional disparate impact theories to ISAs, including framing how certain ISA features are likely to drive disparities adverse to historically disadvantaged groups, how those disparities could be measured and assessed, and what business defenses should be anticipated. Finally, Part IV provides a brief overview of other laws that might apply to ISAs, including state and local antidiscrimination laws, as well as federal laws beyond ECOA.

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<sup>7</sup> See, e.g., Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crises*, 75 Am. Soc. Rev. 629 (Oct. 2010) (describing the racialized process leading up to the subprime lending and foreclosure crises), <https://www.asanet.org/sites/default/files/savvy/images/journals/docs/pdf/asr/Oct10ASRFeature.pdf>.

# A Primer on Income Share Agreements

ISAs are student debt based around income-driven repayment structures. Some common characteristics are summarized here, but terms, features, and conditions vary among programs; more comprehensive background on ISAs is available elsewhere.<sup>8</sup> As a general matter, students are provided a specified amount of funds to pay for educational expenses. The students are then responsible for paying a percentage of their monthly income during a payment term (often between 1 to 15 years). If their income falls below a specified threshold, the borrowers are not responsible for making a payment that month—although that may also serve to extend the period during which repayment is required.<sup>9</sup> There is also often a maximum amount owed; if a borrower reaches that amount before expiration of the payment term, their obligation is satisfied.<sup>10</sup>

There is variation in who offers and designs these products. First, some ISA products are initiatives of traditional colleges and universities. In these programs, ISAs are typically described as a gap-filler, providing alternative financing options for students who are nearing completion but have exhausted their federal borrowing options, do not qualify for traditional student loans (such as undocumented students), or are reluctant to take on additional traditional student loan debt. Although such programs are often run by the college or university, third-party private investors are frequently involved and typically drive pricing and program decisions.<sup>11</sup> These products often differentiate pricing based on student characteristics such as major. Second, independent providers offer ISAs to students across a number of colleges, universities, or other educational institutions.<sup>12</sup> These arrangements also typically differentiate pricing based on student characteristics such as

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<sup>8</sup> See, e.g., Dubravka Ritter & Douglas Webber, *Modern Income-Share Agreements in Postsecondary Education: Features, Theory, Applications*, Fed. Rsv. Bank of Phila. (Dec. 2019), <https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2019/dp19-06.pdf>.

<sup>9</sup> Joanna Pearl & Brian Shearer, *Credit by Any Other Name: How Federal Consumer Financial Law Governs Income Share Agreements* 12, Student Borrower Prot. Ctr. (July 2020), [https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer\\_Credit-By-Any-Other-Name.pdf](https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer_Credit-By-Any-Other-Name.pdf).

<sup>10</sup> While the maximum amount varies by program, it can be as high as 2.5 or 3 times the original amount borrowed. Some ISAs require borrowers to pay the full maximum amount (minus payments already made) if a borrower wants to end their obligation early, resulting in an effective prepayment penalty. Ritter & Webber, *supra* note 8 at 11, 31.

<sup>11</sup> See, e.g., *Purdue Research Foundation raises \$10.2 million for Back a Boiler Income Share Agreement Fund II*, Purdue Univ. (Dec. 4, 2018), <https://www.purdue.edu/newsroom/releases/2018/Q4/purdue-research-foundation-raises-10.2-million-for-back-a-boiler-income-share-agreement-fund-ii.html>.

<sup>12</sup> See, e.g., Blair, <https://joinblair.com/> (last accessed July 20, 2020); Lumni, <https://www.lumni.net/homeen/> (last accessed July 20, 2020); Stride Funding, <https://www.stridefunding.com/> (last accessed July 20, 2020).

major, but also based on features such as school and school characteristics. Finally, a third category of ISAs are those run by or in partnership with private, for-profit vocational training programs, most notably various “boot camp” programs that purport to teach students coding skills in preparation for tech industry jobs.<sup>13</sup>

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<sup>13</sup> See e.g., Christof Rindlisbacher, *Are ISAs Affordable? Analysis of Lambda School's ISA Shows an Estimated Interest Rate of 87%*, Class Central (Mar. 2, 2020), <https://www.classcentral.com/report/are-isas-affordable/>; Claire Boston, *Investing in a Coding-School Graduate Could Get You 13% a Year*, Bloomberg (Feb. 25, 2020), <https://www.bloomberg.com/news/articles/2020-02-25/investing-in-a-coding-school-graduate-could-get-you-13-a-year>; Leif, *Income Share Agreement*, <https://leif.org/api/products/5b5b8bd0e59b743f9a086ed9/pdf>; Christof Rindlisbacher, *Priyanka Chopra's Favorite Coding Bootcamp Accused of 'Fraud'*, Daily Beast (Jan. 28, 2020), <https://www.thedailybeast.com/priyanka-chopras-favorite-coding-bootcamp-holberton-accused-of-fraud>; Zoe Schiffer & Megan Farokhmanesh, *The High Cost of a Free Coding Camp*, The Verge (Feb. 11, 2020) <https://www.theverge.com/2020/2/11/21131848/lambda-school-coding-bootcamp-isa-tuition-cost-free>; Christof Rindlisbacher, *Bootcamps and ISAs: Economics, Challenges, and Opportunities*, Class Central (Feb. 10, 2020), <https://www.classcentral.com/report/bootcamps-and-isas/>. ISAs are often one of, if not the only, financing option for students who are unable to pay for the programs at unaccredited coding bootcamps.

## ECOA and Discrimination Claims

ECOA is the primary federal statute prohibiting credit discrimination. ECOA makes it unlawful for “any creditor” to “discriminate against any applicant, with respect to any aspect of a credit transaction” on the basis of membership in a protected class: race, color, religion, national origin, sex<sup>14</sup> or marital status, age, receipt of public assistance, or the good faith exercise of any right under the Consumer Credit Protection Act.<sup>15</sup>

For a transaction to be covered by ECOA, it must include involvement of a “creditor,” an “applicant” or “prospective applicant,” and “credit” as defined by ECOA (and Regulation B, the agency rule that implements ECOA). As Pearl and Shearer persuasively explain in their companion piece, ISAs fit neatly within this structure.<sup>16</sup> In short, ECOA defines “credit” to mean “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.”<sup>17</sup> ISA providers grant student borrowers the right to purchase educational services and defer payment for those services. ISAs also create legally enforceable debts that student borrowers are given a right to defer paying. Accordingly, we agree these threshold ECOA questions are likely to be met.

Once ECOA applies, the two classic methods for proving discrimination are **disparate treatment** and **disparate impact**. Disparate treatment occurs when a person or entity explicitly or intentionally treats people differently based on one of the prohibited factors. Disparate impact, in turn, prohibits (1) facially neutral policies and practices that disproportionately harm members of protected classes, if either (2) the policy or practice does not advance a legitimate interest, or (3) is not the least discriminatory way to serve that interest. Finally, **reverse redlining** is a discriminatory practice where an entity targets a predatory product to customers on the basis of a protected class. Reverse redlining can be pursued under the disparate treatment or disparate impact frameworks. The following sections address each theory.

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<sup>14</sup> Although sexual orientation and gender identity are not listed as separate protected classes under ECOA, the Supreme Court recently held that, under Title VII, employment discrimination based on sexual orientation and transgender status is prohibited as a form of sex discrimination. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

<sup>15</sup> 15 U.S.C. § 1691.

<sup>16</sup> See Pearl & Shearer, *supra* note 9 at 16-22.

<sup>17</sup> 15 U.S.C.A. § 1691a(d).



## Traditional Disparate Treatment

Because ISAs fall within ECOA's broad definition of "credit," all aspects of an ISA program are subject to ECOA's antidiscrimination provisions.<sup>18</sup> Accordingly, entities—whether financial services companies, universities, vocational training programs, or investors—that participate in ISA credit decisions may not discriminate based on any of the ECOA protected classes.<sup>19</sup> A common method of proving discrimination is disparate treatment, often thought of as overt or intentional discrimination. While a core antidiscrimination theory, traditional disparate treatment is generally so fact-specific that this article addresses it only in brief.

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Disparate treatment can be proved through either direct or indirect evidence. For example, a creditor imposing a lower FICO score requirement for men than for women would be direct (or "overt") evidence of discrimination. Disparate treatment can also be shown through indirect (or "circumstantial") evidence from which someone could infer that an entity's explanation for its actions are pretextual and the entity in fact meant to discriminate. For example, a creditor that routinely provides better credit terms to white applicants than similarly situated Black applicants is engaged in disparate treatment, even though

the creditor does not have an explicitly discriminatory policy and has not made an overt discriminatory statement. Disparate treatment does not require animus or an intent to treat someone *worse* because of a protected class; differential treatment is enough.

Thus, it would be impermissible for an ISA provider to restrict access to an ISA, or provide different ISA terms, based on an ISA applicant's gender, race, age, or other protected category. For example, an ISA program limited to women or to students from a particular country, without more, would be unlawful.<sup>20</sup> Circumstantial evidence of intentional discrimination may also exist. This type of evidence tends to be fact-specific and variations are

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<sup>18</sup> ISA products are then also covered by ECOA's notice provisions, which require that creditors provide adverse action notices to borrowers whose applications receive an adverse decision. 15 U.S.C. § 1691(d)(2).

<sup>19</sup> For the purposes of ECOA's antidiscrimination and anti-discouragement provisions, an entity is covered as a creditor if it "in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made." 12 C.F.R. § 1002.2(l). Thus, a university which does not itself participate in setting the terms of income share agreements or otherwise participate in the credit decisions made by a third-party provider, but which refers applicants to the third-party provider, or selects providers to whom students can apply, would be covered by ECOA. Where there are multiple creditors involved in a transaction, Regulation B indicates that one creditor can be liable for violations committed by another creditor if it knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction. *Id.*

<sup>20</sup> Limited exceptions exist, including for programs that qualify as Special Purpose Credit Programs under ECOA and Regulation B, 12 C.F.R. § 1002.8; 15 U.S.C. § 1691(c), and programs that favor applicants who are age 62 or older. 12 C.F.R. § pt. 1002, Supp. I, 6(b)(2)-1.

myriad. Examples might include requirements imposed or assistance provided for some groups but not others; discouraging conduct disproportionately aimed at certain groups; steering members of protected classes towards or away from products; pretextual or implausible explanations; and data showing disparities across protected classes. Some potential illustrations specific to reverse redlining are provided in the next section.

## Reverse Redlining

In addition to standard disparate treatment claims, some ISA-related practices may be susceptible to a theory known as “reverse redlining.” In traditional “redlining” cases, a lender constricts access to high-quality credit products because of the prohibited characteristics of potential applicants (e.g., people seeking mortgages in minority communities). Reverse redlining, in contrast, is a practice in which a creditor *targets a predatory* product to customers based on a protected class. Many reverse redlining cases share common characteristics: a relatively complicated financial transaction designed to take advantage of vulnerable consumers’ misunderstanding and, often, misplaced trust. Reverse redlining has been found in a variety of industries including mortgage lending,<sup>21</sup> rent-to-own housing,<sup>22</sup> and for-profit vocational education.<sup>23</sup>

Plaintiffs in reverse redlining suits are generally required to show that: (1) either the lender intentionally targeted a product on the basis of a protected class or that there was a disparate impact on that basis, and (2) the product or lender practices were unfair or predatory.<sup>24</sup>

## Unfair or Predatory Lender Practices

A range of unseemly products or practices can qualify as “unfair” or “predatory” under the reverse redlining case law. Equity-stripping schemes in the mortgage context are a classic example.<sup>25</sup> Other practices include: excessive

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<sup>21</sup> See *e.g.*, *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000), *on reconsideration in part*, 147 F. Supp. 2d 1 (D.D.C. 2001).

<sup>22</sup> See *e.g.*, *Fair Hous. Ctr. of Cent. Ind., Inc. v. Rainbow Realty Grp., Inc.*, No. 1:17-CV-1782 RLM-TAB, 2020 WL 1493021 (S.D. Ind. Mar. 27, 2020).

<sup>23</sup> See *e.g.*, *Settlement Agreement in Morgan v. Richmond Sch. of Health and Tech.*, 857 F. Supp. 2d 104 (D.D.C. 2012) (No.3:12-cv-00373, Dkt 78-1), available at [https://www.relmanlaw.com/media/cases/441\\_Morgan%20v.%20RSHT%20-%20Settlement%20Agreement%20Apr.%2009.%202013\\_.pdf](https://www.relmanlaw.com/media/cases/441_Morgan%20v.%20RSHT%20-%20Settlement%20Agreement%20Apr.%2009.%202013_.pdf).

<sup>24</sup> *Hargraves*, 140 F. Supp. 2d at 20 (“In order to show a claim based on reverse redlining, the plaintiffs must show that the defendants’ lending practices and loan terms were ‘unfair’ and ‘predatory,’ and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race.”); *Steed v. EverHome Mortg. Co.*, 308 F. App’x 364, 368 (11th Cir. 2009) (adopting the *Hargraves* test).

<sup>25</sup> Equity stripping involves a range of predatory practices aimed at extracting the equity from homeowners. See Br. of the United States as Amicus, *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (No. 98-1021 (JHG/AK)) (quoting *Equity Predators: Stripping, Flipping and Packing Their Way to Profits: Hearing Before the S. Special Comm. on Aging*, 105th Cong. (1998)); see also *Horne v. Harbour Portfolio VI, LP*, 304 F. Supp. 3d 1332, 1339 (N.D. Ga. 2018) (“[P]redatory lending practices include exorbitant interest rates, equity stripping, acquiring property through default, repeated foreclosures, and loan servicing procedures that involve excessive fees.” (quoting *Steed*, 308 F. App’x. at 369)).

interest rates or fees,<sup>26</sup> unfair contract terms,<sup>27</sup> misrepresentations or omissions about the terms of the loan or transaction, the fees charged, or the product or property being financed,<sup>28</sup> and fraud, including document falsification and the like.<sup>29</sup>

Particularly salient here are reverse redlining suits against for-profit vocational schools. In those instances, schools allegedly target minority communities with the goal of persuading people to take out loans for deficient and predatory educational programs. These types of cases can involve allegations regarding problems with the educational programs as well as with the loans financing those programs. But the result is exploiting minority communities, often through deceptive practices, by saddling borrowers with immense debts and no viable employment prospects.

One case, *Morgan v. Richmond School of Health and Technology (RSHT)*, resulted in a \$5 million class settlement.<sup>30</sup> There, Plaintiffs alleged that RSHT, a for-profit vocational college, targeted potential students from predominantly African-American neighborhoods to take on tens of thousands of dollars in federal student loans on the basis of false and misleading promises about the terms of the loans and the benefits of the educational programs.

Other cases have included similar allegations. In 2014, for example, the Consumer Financial Protection Bureau (CFPB) brought suit against Corinthian College, Inc., alleging that Corinthian engaged in a variety of unfair and deceptive practices, including misrepresenting student outcomes, misleading prospects regarding loan terms, and using abusive collections tactics.<sup>31</sup> Although this case was brought under the CFPB's UDAAP authority<sup>32</sup>—

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<sup>26</sup> *Hargraves*, 140 F. Supp. 2d. at 20; *Harbour Portfolio*, 304 F. Supp. 3d 1332; see also U.S. *ex rel.* Cooper v. Auto Fare, Inc., No. 3:14-cv-0008-RJC-DSC, 2014 WL 2889993 (W.D.N.C. June 25, 2014); City of L.A. v. Bank of Am. Corp., No. CV 13-9046 PA (AGRx), 2014 WL 2770083 (C.D. Cal. June 12, 2014).

<sup>27</sup> *Harbour Portfolio*, 304 F. Supp. 3d 1332.

<sup>28</sup> *Id.* Various cases include allegations of material misrepresentations about transactions or properties. See, e.g., *Barkley v. Olympia Mortg. Co.*, No. 04-cv-875 (KAM)(RLM), 2010 WL 3709278 (E.D.N.Y. Sept. 13, 2010); *Munoz v. Internat'l Home Capital Corp.*, No. C 03-01099 RS, 2004 WL 3086907 (N.D. Cal. May 4, 2004); *Phillips v. Better Homes Depot, Inc.*, No. 02-CV-1168 (ERK), 2003 WL 25867736 (E.D.N.Y. Nov. 12, 2003).

<sup>29</sup> See, e.g., *McGlawn v. Pennsylvania Human Relations Comm'n*, 891 A.2d 757, 769-70 (Pa. Commw. Ct. 2006); *M&T Mortg. Corp. v. White*, 736 F. Supp. 2d 538 (E.D.N.Y. 2010).

<sup>30</sup> Settlement Agreement in *Morgan v. Richmond Sch. of Health and Tech.*, *supra* note 23.

<sup>31</sup> Complaint, Consumer Fin. Prot. Bureau v. Corinthian Colls., 2015 WL 10854390 (N.D. Ill. 2016) (No. 1:14-cv-07194), [https://files.consumerfinance.gov/f/201409\\_cfpb\\_complaint\\_corinthian.pdf](https://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf).

<sup>32</sup> Dodd-Frank Act, Pub. L. No. 111-203, § 1031, 124 Stat 1376, 1383 (2010).

not as a reverse redlining case—the types of practices involved would likely qualify as unfair or predatory under reverse redlining case law.<sup>33</sup>

Public criticisms of certain unaccredited coding boot camps that offer ISAs are reminiscent of these reverse redlining allegations, providing a useful illustration for application of the theory to ISAs. The following analysis relies on public reports and information about two schools that offer ISA products, Lambda School and Holberton Coding School, without taking any position about the veracity of the public information.

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### Poor Quality of Education

Some reports allege poor quality of education at Lambda and Holberton.

Claims include that class materials are copied from free, publicly available internet courses; that the instructors are contractors paid roughly \$13-\$15/hour and have no programming backgrounds themselves; that promised mentors did not materialize; and that assignments were graded by algorithms with no personalized feedback or direction from teachers.<sup>34</sup> Former Lambda students have called the curriculum “garbage.”<sup>35</sup> The State of California’s Bureau for Private Postsecondary Education (BPPE) has fined Lambda for operating without the proper licenses<sup>36</sup> and has sought to revoke Holberton’s approval to operate for allegedly engaging in various fraudulent or misleading practices, such as hiring unqualified instruction staff including its own students who had not even completed the program and requiring students to pay the full ISA charges despite failing to provide them with the full promised course of study.<sup>37</sup>

<sup>33</sup> See *also* Complaint & Demand for Jury Trial, United States *ex rel.* Boyd v. Corinthian Colleges, No. 1:14-cv-06620 (N.D. Ill. Aug. 27, 2014), <https://predatorystudentlending.org/wp-content/uploads/2018/03/2-U.S.-ex-rel.-Boyd-v.-Corinthian-Coll.-Complaint-N.D.-Ill.-2014-4830-0354-7231-v.1.pdf> (False Claims Act case alleging reverse redlining by targeting African American students for enrollment while providing utterly inadequate education).

<sup>34</sup> Schiffer & Farokhmanesh, *supra* note 13.

<sup>35</sup> Vincent Woo, *Lambda School’s Misleading Promises*, N.Y. Mag. (Feb. 19, 2020), available at <https://nymag.com/intelligencer/2020/02/lambda-schools-job-placement-rate-is-lower-than-claimed.html>.

<sup>36</sup> See California Department of Consumer Affairs, Bureau for Private Postsecondary Education, Appeal of Citation Informal Conference Decision: Citation Affirmed (July 24, 2019), [https://www.bppe.ca.gov/enforcement/actions/lambda\\_appealaffirm.pdf](https://www.bppe.ca.gov/enforcement/actions/lambda_appealaffirm.pdf).

<sup>37</sup> *In re: Holberton School*, No. 1004073, Cal. Dept. of Consumer Affairs 9, 11 (2020) (First Amended Accusation), available at [https://www.bppe.ca.gov/enforcement/actions/holbertonschool\\_1stamendacc.pdf](https://www.bppe.ca.gov/enforcement/actions/holbertonschool_1stamendacc.pdf).

These concerns about seriously deficient educational programs echo those in *RSHT* and *Corinthian*, where students alleged, among other things, that the programs: lacked proper equipment,<sup>38</sup> had curricula that were untethered to the requirements of relevant professional certifications,<sup>39</sup> and provided wholly inadequate instruction.<sup>40</sup>

### Inflated Job Placement Rates

Students have also complained that Lambda self-reports misleading job placement statistics. On Twitter, Lambda's CEO boasted that the school had achieved a 100 percent job placement rate in one of the graduating cohorts. In a subsequent private message, he indicated that the sample size was one student.<sup>41</sup> Lambda's website claimed that 86 percent of graduates are hired within six months. But according to reporting, job placement was no higher than 50 percent.<sup>42</sup> Holberton's website, in turn, claims that the school has a 78 percent job placement rate within six months of graduation, and on some sites it has claimed a job placement rating of 100 percent.<sup>43</sup> However, the BPPE's complaint against Holberton alleges that it has misrepresented its employment rates by claiming that all graduates obtained employment opportunities within three months, when in fact it encouraged students to leave the program after nine months to seek employment, and giving them credit for the remaining fifteen months of the program—and counting them as graduates for the purposes of job placement rates—if and only if they had found and maintained employment.<sup>44</sup>

Again, these claims mirror allegations in both *RSHT* and *Corinthian* of falsified and inflated job placement rates. There, complaints alleged that the schools invented fake employers,<sup>45</sup> falsified employment status reports,<sup>46</sup> and

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<sup>38</sup> Second Amended Class Action Complaint at 74, *Morgan v. Richmond Sch. of Health and Techn.*, 857 F. Supp. 2d 104 (D.D.C. 2012) (No. 1:11-cv-01066), [https://www.relmanlaw.com/media/cases/351\\_RSHT%20-%20Second%20Amended%20Complaint%2012.7.11.pdf](https://www.relmanlaw.com/media/cases/351_RSHT%20-%20Second%20Amended%20Complaint%2012.7.11.pdf) [hereinafter *RSHT Complaint*].

<sup>39</sup> *Id.* at 79-80.

<sup>40</sup> *Id.* at 74.

<sup>41</sup> Schiffer & Farokhmanesh, *supra* note 13.

<sup>42</sup> Woo, *supra* note 35.

<sup>43</sup> Imogen Crispe, *Holberton School's Income Share Agreement: What You Need to Know*, Course Rep. (Oct. 4, 2019), <https://www.coursereport.com/blog/holberton-school-income-share-agreement>.

<sup>44</sup> *In re: Holberton School*, No. 1004073, Cal. Dept. of Consumer Affairs 9, 11 (2020) (First Amended Accusation), available at [https://www.bppe.ca.gov/enforcement/actions/holbertonschool\\_1stamendacc.pdf](https://www.bppe.ca.gov/enforcement/actions/holbertonschool_1stamendacc.pdf).

<sup>45</sup> Complaint, *Consumer Fin. Prot. Bureau v. Corinthian Colleges*, *supra* note 31 at 14.

<sup>46</sup> *RSHT Complaint*, *supra* note 38, at 83.

recorded graduates working administrative or janitorial jobs at healthcare facilities as being employed within their field of study.<sup>47</sup>

## High Cost

One purported draw of ISA programs is that lower-earning borrowers can avoid unsustainable loan payments. But ISAs can result in recipients paying significantly higher costs for a subpar product. The complex structures of ISA repayment requirements can make it difficult for students to assess that risk. Coding boot camps vary widely, but sources estimate their average true cost—the amount a similar program with a standard financing structure would charge—to be somewhere between \$10,000 and \$15,000.<sup>48</sup> Many students taking out an ISA to finance such programs may end up paying much more under the ISA than they would have paid attending an equivalent program with a private student loan, without understanding those consequences. To illustrate:

**Lambda:** Lambda’s ISA caps total payments at \$30,000. Recipients who earn more than \$50,000 annually pay 17 percent of their monthly income for up to 24 months. A recipient who earns less than \$50,000 is released from further obligation after 60 months. The longest possible window of obligation is 83 months, indicating that if a graduate does not make payments for 59 months and then gets a job with a salary above the minimum income threshold, they will have to make 24 months of payments.<sup>49</sup>

**Holberton:** Holberton’s ISA caps total payments at \$85,000. Recipients who earn more than \$40,000 annually pay 17 percent of their monthly income for a maximum of 42 months.<sup>50</sup>

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<sup>47</sup> *Id.* at 89.

<sup>48</sup> Jordan Friedman, *5 Things to Know About Online Coding Bootcamps*, U.S. News and World Rep. (Apr. 15, 2020), <https://www.usnews.com/education/online-education/articles/2016-08-11/4-things-to-know-about-online-coding-boot-camps>; Anna Helhoski, *What is a Coding Bootcamp?*, NerdWallet (July 1, 2019), <https://www.nerdwallet.com/blog/loans/student-loans/what-is-a-coding-bootcamp/>.

<sup>49</sup> *What is an ISA?*, Lambda School, <https://lambdaschool.com/isa>.

<sup>50</sup> Yannis Peyret, *What is an Income Share Agreement?*, Holberton (Sept. 30, 2019), <https://blog.holbertonschool.com/what-is-an-income-share-agreement/>.

The table below illustrates how those terms might stack up against financing a hypothetical boot camp with private loans:

	LOAN AMOUNT	PERCENT OF INCOME	ASSUMED SALARY	TERM	TOTAL PAYMENTS
<b>Lambda ISA \$70,000 income</b>	\$30,000	17%	\$70,000	24 months	\$23,800
<b>Lambda ISA \$90,000 income</b>	\$30,000	17%	\$90,000	24 months	\$30,000
<b>Holberton ISA \$70,000 income</b>	\$85,000	17%	\$70,000	42 months	\$41,650
<b>Holberton ISA \$90,000 income</b>	\$85,000	17%	\$90,000	42 months	\$53,550

	LOAN AMOUNT	INTEREST RATE <sup>51</sup>	ASSUMED SALARY	TERM	TOTAL PAYMENTS
<b>Boot Camp with Private Loan A</b>	\$15,000	8.5%	\$70,000	120 months	\$22,317
<b>Boot Camp with Private Loan B</b>	\$15,000	10.0%	\$90,000	120 months	\$23,787

Under these scenarios, the total cost of attending either of these schools would exceed the cost of financing a hypothetical \$15,000 boot camp, a tuition level more in line with most coding bootcamps.<sup>52</sup> In the case of the higher-salaried student at Lambda and both students at Holberton, the cost of the ISA would exceed by \$8,000-\$33,000 the hypothetical cost of a \$15,000 boot camp financed by a private student loan.<sup>53</sup> And a very high-income Holberton graduate would pay nearly four times the cost of the program before hitting the payment cap. Given the complexities, it's reasonable to expect that many students will fail to understand these potential cost differentials.

<sup>51</sup> Note that while ISAs do not have a disclosed note rate, they may still have an effective rate or APR.

<sup>52</sup> See *supra* note 48.

<sup>53</sup> Monthly payment terms matter: 17 percent of monthly income especially in a high-cost city like San Francisco or Seattle where many technology jobs are located might lead to late fees and other costs tacked onto the ISA, as well as general hardship meeting necessary expenses generally.

## Other Potentially Problematic Features

Other features of the Lambda and Holberton ISAs appear to compound costs in ways that may be confusing to potential borrowers. For example, Lambda ISAs permit the school to charge \$100 for each late payment (which does not count towards the \$30,000 cap).<sup>54</sup> Holberton's ISA FAQ section on its website advertises that "if you don't pay the full tuition amount by the 42nd month of payments, Holberton will forgive the rest of the tuition."<sup>55</sup> But reports claim that Holberton will actually place the ISA in deferment for each month where the student's income is below \$40,000, for up to 24 months, thereby extending the 42-month time period for up to 24 additional months.<sup>56</sup>

As noted, the descriptions here are based on public materials; we take no position on their accuracy. However, these types of allegations—poor education quality, misleading statements about job placement rates, high costs, and other potentially problematic features—mirror many of the characteristics that define products and services as unfair or predatory under reverse redlining case law.

## Discriminatory Targeting

The other element of a reverse redlining claim is that the predatory product is targeted to members of protected classes or has a disparate impact on that basis. As an initial matter, it's important to note that advertising to and designing programs focused on diverse communities is laudable when the services offered are beneficial and the programs are designed to foster success; those actions are discriminatory when the products and services are predatory.

Courts have relied on a wide variety of evidence to demonstrate this type of discriminatory targeting, for example: selecting and grouping advertising based on the racial make-up of likely audiences,<sup>57</sup> or other race-conscious outreach strategies;<sup>58</sup> employing advertising models exclusively featuring people of certain races and national

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<sup>54</sup> *Frequently Asked Questions*, Lambda School, <https://lambdaschool.com/faq#isa> (last accessed July 22, 2020).

<sup>55</sup> *How Does the ISA Work?*, Holberton School, [https://www.holbertonschool.com/faq/articles/360022564934\\_how-does-the-isa-work](https://www.holbertonschool.com/faq/articles/360022564934_how-does-the-isa-work) (last accessed July 22, 2020).

<sup>56</sup> Christof Rindlisbacher, *Priyanka Chopra's Favorite Coding Bootcamp Accused of 'Fraud'*, Daily Beast (Jan. 28, 2020), <https://www.thedailybeast.com/priyanka-chopras-favorite-coding-bootcamp-holberton-accused-of-fraud>.

<sup>57</sup> See *Saint-Jean v. Emigrant Mortg. Co.*, 50 F.Supp.3d 300 (E.D.N.Y. 2014); *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000), *on reconsideration in part*, 147 F. Supp. 2d 1 (D.D.C. 2001).

<sup>58</sup> See *Barkley v. Olympia Mortg. Co.*, No. 04-cv-875 (KAM)(RLM), 2010 WL 3709278 (E.D.N.Y. Sept. 13, 2010).



origins;<sup>59</sup> targeting geographic areas that contain high percentages of minority applicants;<sup>60</sup> and racist, sexist, or other comments on a prohibited basis that might reveal groups are targeted because of a belief that they're vulnerable.<sup>61</sup> In addition, a plaintiff can prevail by demonstrating that the predatory product has a disparate impact on a protected class separate from or in the absence of evidence of discriminatory intent.<sup>62</sup>

In *RSHT*, for example, former employees of the school filed declarations indicating that enrollment agents "deliberately targeted African-American neighborhoods because the school thought that African Americans would agree to take out loans and come to the RSHT without asking any questions or inquiring about terms, costs, price, or what they would get from their education"<sup>63</sup> and that "RSHT recruiters and administrators knew that they could make a lot of money in the African-American community because they could find underprivileged students in this community who would qualify for the government financial aid that RSHT needed to be profitable."<sup>64</sup> Targeting a protected class based on the belief that it's vulnerable to the predatory scheme "adequately states a discriminatory motivation."<sup>65</sup>

Thorough pre-litigation investigation often uncovers this type of evidence in viable cases, which can be paired with supportive publicly available sources. Such materials might include:

- **Programs that are targeted on a prohibited basis.** Lambda's Africa Pilot Program, which is open to citizens of certain African countries, is advertised as free, but many participants will nonetheless have to pay back a percentage via the school's ISA.<sup>66</sup> Lambda also offers a women-only summer coding program.<sup>67</sup>

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<sup>59</sup> *Id.*; *McGlawn v. Pennsylvania Human Relations Comm'n*, 891 A.2d 757, 769-70 (Pa. Commw. Ct. 2006).

<sup>60</sup> See *Barkley*, 2010 WL 3709278; *Phillips v. Better Homes Depot, Inc.*, No. 02-CV-1168 (ERK), 2003 WL 25867736 (E.D.N.Y. Nov. 12, 2003); *Hargraves*, 140 F. Supp. 2d 7.

<sup>61</sup> U.S. *ex rel.* *Cooper v. Auto Fare, Inc.*, No. 3:14-cv-0008-RJC-DSC, 2014 WL 2889993 (W.D.N.C. June 25, 2014).

<sup>62</sup> See *Harbour Portfolio VI, LP*, 304 F. Supp. 3d 1332, 1339 (N.D. Ga. 2018) (facially neutral policies of advertising through lawn signs on properties and purchasing Fannie Mae properties supported disparate impact claim).

<sup>63</sup> RSHT Complaint, *supra* note 38, at 79.

<sup>64</sup> *Id.* at 81.

<sup>65</sup> *Diaz v. Bank of Am. Home Loan Servicing*, No. CV 09-9286 PSG (MANx), 2010 WL 5313417, at \*5 (C.D. Cal. Dec. 16, 2010).

<sup>66</sup> Lambda School is partnering with Paystack, a Nigerian fintech firm to offer the pilot. Program participants who are hired by Paystack will actually receive their Lambda School education for free, but anyone who Paystack does not hire will have to pay back 10 percent of their income over 5 years if they make over \$15,000/year.

<sup>67</sup> This program is free, but there are only 40 spots available. If unsuccessful applicants are encouraged to enroll in Lambda's regular program that includes the ISA as means of payment, it might be used to lure women in to be interested. See Cait Etherington, *Y-Combinator Founder Is Paying 40 Women to Train as Coders With New Summer Hackers Scholarship*, *Elearning Inside* (March 22, 2019), <https://news.elearninginside.com/y-combinator-founder-is-paying-40-women-to-train-as-coders-with-new-summer-hackers-scholarship/>.

- **Advertising disproportionately to minority communities and women.** A prominent investor in Holberton has noted that it is devoted to recruiting underrepresented groups such as women and people of color.<sup>68</sup>
- **Targeting vulnerable people.** One former student described Lambda School's strategy of "specifically targeting people who are vulnerable in hard-life situations," and Lambda CEO Allred has expressed his belief that the target population for the school is lower-income individuals without other opportunities.<sup>69</sup>
- **Other allegations of racism.** Lambda School students have complained about racist comments and memes on the internal Slack messaging app, and media have reported that a former Lambda career services employee alleged she was referred to using racially derisive language.<sup>70</sup>

Again, we take no position on the accuracy of this public information. That said, it does echo allegations of discriminatory targeting in reverse redlining case law. If true, rather than serving as a solution to the student debt problem, ISAs used to facilitate these types of programs could be another chapter in a long history of predatory practices designed to exploit vulnerable populations.

## Traditional Disparate Impact

Even in the absence of intentional discrimination—and even if not paired with the types of predatory practices and targeting that characterize reverse redlining cases—features of ISAs could raise risks under traditional disparate impact analysis.

Like several other major antidiscrimination statutes, ECOA provides for disparate impact liability.<sup>71</sup> Thus any lending program covered by ECOA that has an unjustified disparate impact on protected classes would be

<sup>68</sup> Yola Robert, *Priyanka Chopra-Jonas Joins The Holberton School As An Investor*, Forbes (July 2, 2019), <https://www.forbes.com/sites/yolarobert1/2019/07/02/priyanka-chopra-jonas-joins-the-holberton-school-as-an-investor/#aad218043410>; Katie Benner, *Holberton, a Two-Year Tech School, Emphasizes Diversity*, N.Y. Times (June 7, 2017), <https://www.nytimes.com/2017/06/07/education/holberton-a-two-year-tech-school-emphasizes-diversity.html>.

<sup>69</sup> Rosalie Chan, *Students Say Lambda School is a "Cult" and the Curriculum is "Garbage"*, Bus. Insider (Oct. 11, 2019), <https://google.ml.blogspot.com/2019/10/students-say-lambda-school-is-and.html>. Many of the alleged practices of targeting vulnerable students in difficult life circumstances mirror some of the worst techniques by for-profit schools during the last financial crisis, such as the "pain funnel" technique. See, e.g., Mike Konczal, *The "Pain Funnel" and the Harkin Report on For-Profit Schools*, Roosevelt Inst. (Aug. 1, 2012), <https://rooseveltinstitute.org/pain-funnel-and-harkin-report-profit-schools/>; Miami Herald, *What is a "Pain Funnel"? Former Everest Recruiter Explains*, YouTube (Apr. 21, 2015), <https://www.youtube.com/watch?v=OhN5U94BepA>.

<sup>70</sup> Zoe Schiffer, *Lambda School Threatens Ex-Employee for Coming Forward About Conditions at the Coding Bootcamp*, The Verge (Mar. 9, 2020), <https://www.theverge.com/2020/3/9/21166640/lambda-school-former-employee-threat-coding-bootcamp-nondisclosure>.

<sup>71</sup> See, e.g., 12 C.F.R. § 1002.6(a) (current regulatory codification of the Griggs and Albemarle Paper "effects test"); Official Staff Commentary, 12 C.F.R. § pt. 1002, Supp. I, 6(a)-2 (explaining that the "effects test" is a "judicial doctrine" that Congress intended to "apply to the credit area"); Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266-01 (Apr. 15, 1994); *Barrett v. H&R Block, Inc.*, 652 F. Supp. 2d 104, 108 (D. Mass. 2009) (disparate impact cognizable under ECOA); *Coleman v. Gen. Motors Acceptance Corp.*, 196 F.R.D. 315, 325-26 (M.D. Tenn. 2000), *vacated on other grounds*, 296 F.3d 443 (6th Cir. 2002); *accord Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005); *Haynes v. Bank of*

unlawful. Disparate impact doesn't require evidence of intent and it doesn't require any showing that a protected characteristic was considered. Instead, disparate impact claims are analyzed under a three-step analysis:

**Step one:** The plaintiff must identify a facially neutral practice—meaning a practice that does not explicitly or overtly rely on a prohibited basis—that nonetheless causes an adverse effect on a protected class.

**Step two:** The defendant must show that the practice advances a legitimate interest.

**Step three:** The plaintiff may show that the defendant can achieve that legitimate interest with a different practice that has a less discriminatory effect.<sup>72</sup>

Here, we focus on features common to ISAs—school- and major-based distinctions for determining product pricing or terms. The next section discusses various possible methods for measuring whether these criteria cause disparities, but the bottom line is straightforward: because disparities exist in the underlying criteria (i.e., education-related characteristics), ISA distinctions based on those same criteria are likely to replicate the same disparities.

## Measuring Disparities

The first step of the disparate impact claim requires identifying a specific policy or practice causing a statistical disparity—i.e., members of a protected class (or classes) disproportionately receive worse outcomes as compared to the majority or control group (e.g., non-Hispanic white males).

Answering whether a policy or practice drives disparities can be complicated. It requires some understanding of how criteria are used and how relevant populations are affected. It also requires identifying an outcome of interest to be measured (e.g., approval or pricing differences). That said, publicly available data suggests school-

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Wedowee, 634 F.2d 266 (5th Cir. 1981); M&T Mortg. Corp. v. White, 736 F. Supp. 2d 538, 574 (E.D.N.Y. 2010); Palmer v. Homecomings Fin. LLC, 677 F. Supp. 2d 233, 240 (D.D.C. 2010); Shiplet v. Veneman, 620 F. Supp. 2d 1203, 1223 (D. Mont. 2009); NAACP v. Ameriquest Mortg. Co., 635 F. Supp. 2d 1096, 1105 (C.D. Cal. 2009); Hoffman v. Option One Mortg. Corp., 589 F. Supp. 2d 1009, 1011 (N.D. Ill. 2008); Taylor v. Accredited Home Lenders, Inc., 580 F. Supp. 2d 1062, 1067 (S.D. Cal. 2008); Ramirez v. GreenPoint Mortg. Funding, Inc., 633 F. Supp. 2d 922, 927 (N.D. Cal. 2008); Powell v. Am. Gen. Fin., Inc., 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004); Osborne v. Bank of Am., Nat'l Ass'n, 234 F. Supp. 2d 804, 812 (M.D. Tenn. 2002); Faulkner v. Glickman, 172 F. Supp. 2d 732, 737 (D. Md. 2001); Latimore v. Citibank, F.S.B., 979 F. Supp. 662 (N.D. Ill. 1997); A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi., 962 F. Supp. 1056 (N.D. Ill. 1997); Gross v. U.S. Small Bus. Admin., 669 F. Supp. 50 (N.D.N.Y. 1987); Sayers v. Gen. Motors Acceptance Corp., 522 F. Supp. 835 (W.D. Mo. 1981); Cherry v. Amoco Oil Co., 490 F. Supp. 1026 (N.D. Ga. 1980).

<sup>72</sup> See, e.g., Official Staff Commentary, 12 C.F.R. § pt. 1002, Supp. I, 6(a)-2.

based and major-based distinctions have a significant likelihood of resulting in disparities along protected class lines, particularly based on gender, race, and national origin.<sup>73</sup>

Student lending practices that distinguish between consumers based on their school have a history of drawing controversy because of the high likelihood that these distinctions will drive discriminatory disparities. A prime example are cohort default rates (CDRs), which measure the average loan default rate of students at a given school. In 2007, Andrew Cuomo—then the New York Attorney General—analyzed the use of cohort default rates in loan underwriting to redlining:

Just as lenders in the mortgage industry once made judgments about credit lending in entire neighborhoods as a whole, so too are lenders making generalized judgments about student and parent credit risk based on a student's 'school neighborhood.'<sup>74</sup>

The CFPB has raised similar concerns, explaining that:

[S]tudent lenders' use of CDR at very low default levels may present fair lending concerns because . . . racial and ethnic minority students are disproportionately concentrated in schools with higher CDRs. Accordingly, use of CDR to determine loan eligibility, underwriting, and pricing may have a disparate impact on minority students.<sup>75</sup>

In 2014 the FDIC took action against Sallie Mae based in part on its use of CDRs to price private student loans, finding that this practice violated ECOA and entering into a consent order prohibiting the practice.<sup>76</sup>

Like CDRs, other school-level characteristics such as selectivity metrics are likely to drive a disparate impact if used for credit decisions. As illustrated in the table below, it's common for campuses with lower admission rates to have lower percentages of African-American and Hispanic students. Accordingly, using school selectivity as a pricing metric may be likely to drive impact based on race and ethnicity.

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<sup>73</sup> See, e.g., Anthony P. Carnevale, Jeff Strohl & Michelle Melton, *What's It Worth: The Economic Value of College Majors*, Geo. U. Ctr. on Educ. and the Workforce (2011), <https://cew.georgetown.edu/wp-content/uploads/2014/11/whatsitworth-complete.pdf>; Lisa Dickson, *Race and Gender Differences in College Major Choice* (2010) (unpublished manuscript), [https://theop.princeton.edu/reports/forthcoming/ANNALS\\_07\\_Dickson\\_Manuscript\\_June2009.pdf](https://theop.princeton.edu/reports/forthcoming/ANNALS_07_Dickson_Manuscript_June2009.pdf).

<sup>74</sup> George M. Walsh, *Cuomo: Lenders 'Redlining' Student Loans*, Assoc. Press (June 19, 2007), [http://archive.boston.com/news/education/higher/articles/2007/06/19/cuomo\\_lenders\\_redlining\\_student\\_loans/](http://archive.boston.com/news/education/higher/articles/2007/06/19/cuomo_lenders_redlining_student_loans/).

<sup>75</sup> Consumer Fin. Prot. Bureau, *Private Student Loans Report* (2012), <https://www.consumerfinance.gov/data-research/research-reports/private-student-loans-report/>; see also Consumer Fin. Prot. Bureau, *Fair Lending Report* (Dec. 2012), [https://files.consumerfinance.gov/f/201212\\_cfpb\\_fair-lending-report.pdf](https://files.consumerfinance.gov/f/201212_cfpb_fair-lending-report.pdf).

<sup>76</sup> Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty at 19, Sallie Mae Bank, Nos. FDIC-13-0366b, FDIC-13-0367k (Fed. Deposit Ins. Corp., May 13, 2014), <https://www.fdic.gov/news/news/press/2014/salliemae.pdf>.

### School Selectivity and Race Among American Colleges<sup>77</sup>

ADMISSIONS RATE	AVERAGE % OF UNDERGRADUATES WHITE	AVERAGE % OF UNDERGRADUATES BLACK	AVERAGE % OF UNDERGRADUATES LATINX
< 20%	47.3%	7.7%	13.4%
20% - 40%	47.0%	16.2%	15.5%
20% - 40%	52.6%	16.6%	13.4%
20% - 40%	60.3%	11.8%	12.4%
> 80%	47.2%	19.3%	19.8%

As illustrated in the table below, Black and Hispanic students are disproportionately represented at high-admission public 2-year and private for-profit colleges:

### Student Demographics and Institution<sup>78</sup>

PERCENT OF STUDENTS IN EACH DEMOGRAPHIC GROUP ATTENDING A:	PUBLIC 4-YEAR COLLEGE	PRIVATE NONPROFIT 4-YEAR COLLEGE	PUBLIC 2-YEAR COLLEGE	PRIVATE FOR-PROFIT COLLEGE
White	34%	16%	34%	7%
Black or African American	27%	12%	34%	15%
Hispanic or Latino	28%	10%	41%	11%

<sup>77</sup> Coll. Scorecard Data, *Most Recent Cohort*, U.S. Dep't of Educ. (June 1, 2020), <https://collegescorecard.ed.gov/data/>; see also Dowse B. (Brad) Rustin IV, Neil E. Grayson & Kiersty M. Degroote, *Pricing Without Discrimination: Alternative Student Loan Pricing, Income Share Agreements, and the Equal Credit Opportunity Act*, Am. Enterprise Inst. at 10, <https://www.aei.org/wp-content/uploads/2017/02/Pricing-Without-Discrimination.pdf> (noting that school selectivity is generally a poor predictor of student future earnings, outside graduates of the very top tier pursuing careers in high-status professions such as medicine or law).

<sup>78</sup> U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *2015-16 National Postsecondary Student Aid Study (NPSAS:16)*, [https://nces.ed.gov/datalab/index.aspx?ps\\_x=cgcakb8](https://nces.ed.gov/datalab/index.aspx?ps_x=cgcakb8) (last accessed July 22, 2020).

Decisions based on variables associated with academic majors pose similar risks of driving disparities, as different fields of study often reflect different demographic characteristics. For example, bachelor's degree holders who majored in a STEM (science, technology, engineering, and mathematics) field are disproportionately men—in 2009 data, degree holders with an engineering group major were 84 percent men, and those with a computer science or math group major were 69 percent men.<sup>79</sup> Bachelor's degree holders as a whole, however, were 57 percent women.<sup>80</sup>

Even non-cohort level education-related data risk driving disparities. For example, differences in average SAT scores on the basis of race and ethnicity mean that the use of personal SAT scores to determine ISA terms are also likely drive a disparate impact.<sup>81</sup>

Assuming underlying disparities exist in education-related criteria, a key part of understanding whether ISA distinctions based on these metrics will translate to disparities for ISA borrowers is defining what outcomes to measure. Although there are a variety of potential outcome measures, disparate impact fair lending claims typically challenge: (1) underwriting outcomes (i.e., whether an applicant is approved or denied); and/or (2) pricing outcomes (i.e., the fees, interest rates, or total cost of the loans an approved applicant receives).

Assessing *underwriting* in an ISA program could mirror underwriting claims in other types of lending claims: a plaintiff would present a statistical analysis showing that members of the protected class are statistically less likely to be approved for an ISA than members of the control group (e.g., non-Hispanic white applicants). The analysis could be controlled to isolate whether the practice at issue—for example, a major-based distinction—is driving disparities and if so, whether less discriminatory alternatives exist, such as removing or replacing the distinction. This type of analysis requires access to applicants' demographic data sufficient to proxy for protected class information. In many instances, agencies can acquire this type of information through supervision or pre-litigation demands, and it should be available in discovery to private plaintiffs that survived a motion to dismiss. That said, assuming all (or nearly all) applicants are approved under an ISA program, an underwriting challenge may be less pivotal than a pricing challenge.

*Pricing* outcomes will vary depending on how the target features discussed above (e.g., school-based distinctions) are incorporated into the pricing methodology. Nevertheless, given the stark background disparities

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<sup>79</sup> Carnevale et al., *supra* note 73.

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., Richard v. Reeves; Dimitrios Halikias, *Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, Brookings (Feb. 1, 2017), <https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/>.

explained above, there is a significant inherent risk that any ISA pricing scheme that incorporates education-based variables would perpetuate disparities based on protected class.

To illustrate, imagine that a General Communication major and a Computer Science major both graduate in May 2021 and go on to careers in secondary education, teaching at the same high school and making the same salary. Based on Purdue University's publicly available comparison tool, if they each took out an ISA for \$10,000, the General Communication major would be required to pay **3.85** percent of her income for a maximum of **112** monthly payments, while the Computer Science major would pay only **2.32** percent of his income for a maximum of only **88** monthly payments.<sup>82</sup> In 2017, only 12.5 percent of Computer Science graduates at Purdue were female, while 72 percent of General Communication majors were female.<sup>83</sup> In such a scenario, the General Communication major would end up paying significantly more over the length of the agreement. If you assume that both make \$45,000 per year (ignoring raises, for simplicity's sake) the General Communication major would pay a total of \$16,170, while the Computer Science major would pay just \$7,656.

Similar disparities in cost can be seen in some ISA programs even when you assume starting salaries that reflect differences in pay across industries. For example, the University of Utah's publicly available comparison tool shows that a Social Work major (86 percent of whom are women, and 33 percent of whom are domestic students of color) taking out a \$10,000 ISA and earning the average income trajectory the school projects for Social Work majors, resulting in a starting salary of \$34,808, would end up paying a total of \$18,183 over the course of their agreement. Meanwhile, it shows that a Mechanical Engineering major (only 11 percent of whom are women, and 19 percent of whom are domestic students of color) also taking out a \$10,000 ISA and earning the projected income for Mechanical Engineering majors, resulting in a starting salary of \$54,750, would pay just \$15,528.<sup>84</sup>

These examples assume that the actual post-graduation salary histories of the comparators are known. But because of the contingent nature of ISA pricing, this will not always be the case, introducing some wrinkles in assessing outcomes that don't exist in standard lending scenarios. For a standard student loan, a disparate impact pricing analysis might look at a combination of upfront fees and costs and the projected interest costs over the life of the loan, given a standard repayment period. Since those features can be calculated at the time of

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<sup>82</sup> Figures based on Purdue's ISA Comparison Tool. *Comparison Tool*, Purdue Univ., <https://www.purdue.edu/backaboiler/comparison/index.html> (last accessed May 14, 2020).

<sup>83</sup> *Data USA: Purdue University-Main Campus: Graduates*, Data USA, <https://datausa.io/profile/university/purdue-university-main-campus#graduates> (last accessed July 22, 2020).

<sup>84</sup> *ISA Comparison Tool*, Univ. Utah, <https://isa.utah.edu/comparison-tool/> (last accessed July 22, 2020); *Undergraduate Major Profile*, Univ. Utah, <https://www.obia.utah.edu/data/student-data/undergraduate-major-profile/> (last accessed July 22, 2020).

origination, it's possible to compare pricing across borrowers to assess disparities in pricing.<sup>85</sup> For ISAs, in contrast, the actual cost to the borrower cannot be known in advance, since it will vary based on the borrower's income. In addition, a number of ISA terms interact to determine the actual cost, including, for example, the income share required, the payment cap, the payment term, and the minimum income threshold. As a result, it may be difficult to assess in advance how these terms will interact for different groups.

Another possibility for assessing disparities, therefore, would be to assess differences in the terms and projected costs provided to the ISA recipient at the time the agreement is made. A statistical analysis could compare, for example, predominantly female majors such as Elementary Education to predominantly male majors such as Computer Engineering and look at the differences in income share required along with the ISA provider's total payment projections. For example, the University of Utah's ISA products set different income share percentages based on college major. In exchange for a \$10,000 ISA, the University of Utah's online calculator advertises the following overall payment amounts for various majors at the University of Utah:

#### Majors and Advertised ISA Cost at the University of Utah<sup>86</sup>

MAJOR	LATIN AMERICAN STUDIES	SOCIOLOGY	FINANCE	MINING ENGINEERING
Major: Percent Female	63%	66%	15%	15%
Major: Percent Domestic Students of Color	50%	43%	17%	18%
ISA: Percent of Income to be Paid	4.90%	4.63%	3.49%	3.27%
ISA: Required Number of Payments	112	106	80	74
ISA: Advertised Total Cost	\$18,426	\$18,183	\$15,528	\$15,383

<sup>85</sup> Of course, even in the traditional student loan context, the actual amount of interest paid by two different borrowers with the same note rate may vary well differ, based on the speed at which they pay down the loan.

<sup>86</sup> *Supra* note 84.



Another alternative would be to assess outcome disparities based on actual payment obligations incurred at the end of the obligation period or at a certain point in time post-origination. This method would require allowing sufficient time to pass to collect data on actual payment obligations, meaning one could not evaluate the disparate impact of an ISA program until some period of time after implementation.

These variations in outcome measurements may lead to different results in different scenarios. Still, it's important to not lose sight of the forest for the trees: given underlying demographic differences, the use of major and school-based distinctions is highly likely to result in disparities under one or more of these measurements.

### Anticipating Justifications and Less Discriminatory Alternatives

The fact that a policy drives a disparity does not necessarily make it impermissible. Rather, it is impermissible if the policy does not advance a legitimate interest, or business justification, or if there is a less discriminatory way to achieve that interest. Litigants evaluating a claim would be wise to anticipate an ISA provider's likely business justification for the practice and the potential for less discriminatory alternatives. And any entity offering ISAs would be wise to analyze whether their policies are driving disparities and whether less discriminatory alternatives exist.

An ISA provider—particularly a for-profit ISA provider—may argue that challenged distinctions are necessary to limit eligibility. Uniform rates could result in adverse selection, preventing the program from being viable.<sup>87</sup> If, for example, only students expecting to have very low post-graduation incomes were to sign up for the product, a program would need to charge increasingly high repayment percentages and could potentially fail to take in enough revenue to sustain costs.

There would be strong rebuttals to business justifications for the distinction criteria discussed above. Use of individualized SAT scores, for example, would support a business interest in maintaining a viable program only if they accurately predicted post-graduation income. But SAT scores are not designed to predict students' future income. Rather, any predictive power they have is based on predicting future academic performance—and even there, some research indicates that SAT scores not only have a disparate impact but are actually racially biased.<sup>88</sup>

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<sup>87</sup> Maria Claudia Soler, *International Evidence on Income Share Agreements: Perceptions and Characteristics of ISAs Recipients* (Sept. 25, 2019) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3452929](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452929).

<sup>88</sup> Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California* (Dec. 2017) (unpublished manuscript), [https://escholarship.org/content/qt9fw4623g/qt9fw4623g\\_noSplash\\_d96bda757e00b490353984bb34a96503.pdf](https://escholarship.org/content/qt9fw4623g/qt9fw4623g_noSplash_d96bda757e00b490353984bb34a96503.pdf); Maria Veronica Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 Harv. Educ. Rev. 106 (2010), <https://bearcenter.berkeley.edu/sites/default/files/Wilson%20%2322.pdf>.

That type of differential predictive power across protected classes would seriously undermine a defense that the criteria is business justified.

Use of school-level or major-level variables may also not be business justified, in part because a substantial variation in income levels—which is obscured by median measurements—significantly undermines the predictive power of these variables. Consider a school-based distinction: while graduates of some schools may have higher earnings than graduates of other schools on average, *within-school* variation in earnings tends to be high.

The University of Chicago and the University of Illinois at Chicago (UIC) are good examples: the former is much more selective (admissions rates are 8.8 percent and 74.5 percent, respectively), and its graduates typically have higher earnings (median earnings are \$64,000 and \$51,100, respectively).<sup>89</sup> On the other hand, as shown in the following table, the median earnings for UIC are above the 25<sup>th</sup> percentile earnings for the University of Chicago and the 75<sup>th</sup> percentile earnings for UIC are above the University of Chicago median.

**Earnings by School<sup>90</sup>**

SCHOOL	EARNINGS: 25TH PERCENTILE	EARNINGS: MEDIAN	EARNINGS: 75TH PERCENTILE
Princeton	\$52,000	\$74,700	\$132,100
Rutgers	\$36,900	\$57,900	\$84,700
University of Chicago	\$43,900	\$68,100	\$120,800
University of Illinois at Chicago	\$33,900	\$54,300	\$77,000

In other words, the top half of UIC grads earn more than University of Chicago grads in the bottom quarter of earnings. Furthermore, the top quarter of UIC grads out-earn half of University of Chicago grads. This suggests that even if University of Chicago grads earn more than UIC grads on average, that difference has limited value

<sup>89</sup> College Scorecard Data, *Most Recent Cohort*, U.S. Dep't of Educ., <https://collegescorecard.ed.gov/data/> (last accessed July 21, 2020).

<sup>90</sup> *Id.*

for assessing the circumstances of an individual student because of the amount of variation, casting doubt on the strength of the business justification for relying on school-level characteristics.

Similar concerns apply to major-based distinctions. As the following table shows, while on average Computer Science and Math majors show higher earnings than English Language and Literature majors, the top quarter of English Language and Literature graduates earn more than the lower half of the Computer Science and Math grads:

**Earnings by Major<sup>91</sup>**

MAJOR OR GROUP	EARNINGS: 25TH PERCENTILE	EARNINGS: MEDIAN	EARNINGS: 75TH PERCENTILE
Computer Science & Math	\$48,000	\$70,000	\$100,000
English Language & Literature	\$34,000	\$48,000	\$71,100

These differences substantially undermine the business justification case that using cohort-level data such as major or institution would meaningfully predict future income for a given individual.

Finally, as with any credit model or policy that causes an adverse disparate impact on a protected class, establishing a legitimate business need is not a complete defense. Liability can still exist if less discriminatory alternatives are available. While the potential for less discriminatory alternatives will be fact-specific, there may be viable alternatives to using cohort-level data.<sup>92</sup> When complete data is available, a comprehensive statistical analysis of the existing models can often reveal surprising ways to make adjustments to lessen disparate impact. In some cases, incorporating certain individualized data may allow for a result that is at least as effective from a business standpoint while reducing impact. ISA providers who believe in the potential of these products should be engaging in these types of analyses to monitor for disparities and to search for, and adopt, less discriminatory alternatives.

<sup>91</sup> See Carnevale, *supra* note 73.

<sup>92</sup> See also Rustin et al, *supra* note 77 (discussing the likelihood that use of college major in pricing would lead to disparate impact based on, inter alia, race, sex, and religion, and noting the difficulty ISA finance providers would have demonstrating that such factors are more predictive of repayment success than factors already accepted as non-discriminatory, such as credit history).

In short, certain common features of existing ISA programs appear likely to drive disparities adverse to protected classes. The key, then, is assessing whether those criteria are necessary—here, there is reason to be skeptical—and evaluating whether less discriminatory alternatives exist.

## State and Local Antidiscrimination Laws

In addition to ECOA, various other statutory vehicles exist for challenging discrimination in ISA programs, some of which allow for additional flexibility in certain respects. This section does not provide an exhaustive list but highlights some possibilities under state and local fair lending laws, state and local public accommodations statutes, and federal funding and education antidiscrimination laws—demonstrating that even if ECOA coverage were somehow precluded, ISA programs would likely be covered by other existing antidiscrimination statutes.

### State and Local Fair Lending Laws

State and local fair lending statutes tend to mirror the protections provided by ECOA, but often cover more protected classes than ECOA. The most common additional protected classes include familial status,<sup>93</sup> explicit coverage of sexual orientation,<sup>94</sup> creed,<sup>95</sup> explicit coverage of gender identity or gender expression,<sup>96</sup> military/veteran status,<sup>97</sup> source of income,<sup>98</sup> disability,<sup>99</sup> and pregnancy.<sup>100</sup> Many, but not all, state credit discrimination statutes will cover ISAs to the same extent as ECOA. And some, but not all, state fair lending laws permit disparate impact claims.<sup>101</sup>

<sup>93</sup> See, e.g., Alaska Stat. § 18.80.250; Iowa Code § 216.10; N.J. Stat. Ann. § 10:5-12; N.Y. Exec. Law § 296-a; R.I. Gen. Laws § 34-37-4.3.

<sup>94</sup> See, e.g., Colo. Rev. Stat. Ann. § 5-3-210; Conn. Gen. Stat. Ann. § 46a-81f; 775 Ill. Comp. Stat. Ann. § 5/4-102; Iowa Code § 216.10; Me. Rev. Stat. tit. 5 § 4596; Mass. Gen. Laws ch. 151B § 4; Minn. Stat. § 363A.16; Nev. Rev. Stat. § 598B.100; N.J. Stat. Ann. § 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296-a; R.I. Gen. Laws § 34-37-4.3; Wash. Rev. Code § 49.60.175-176.

<sup>95</sup> See, e.g., Colo. Rev. Stat. Ann. § 5-3-210; Conn. Gen. Stat. Ann. § 46a-66; Iowa Code § 216.10; La. Rev. Stat. § 51:2255; Minn. Stat. § 363A.16; Mont. Code Ann. § 49-2-306; Nev. Rev. Stat. § 598B.100; N.J. Stat. Ann. § 10:5-12; N.Y. Exec. Law § 296-a; Wash. Rev. Code § 49.60.175-176.

<sup>96</sup> See Conn. Gen. Stat. Ann. § 46a-81f; Iowa Code § 216.10; Mass. Gen. Laws ch. 151B § 4; Nev. Rev. Stat. § 598B.100; N.J. Stat. Ann. § 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296-a; R.I. Gen. Laws § 34-37-4.3; Wash. Rev. Code § 49.60.175-176.

<sup>97</sup> See Cal. Mil. & Vet. Code § 394; Conn. Gen. Stat. Ann. § 46a-66; 775 Ill. Comp. Stat. Ann. § 5/4-102; N.Y. Exec. Law § 296-a; Ohio Rev. Code § 4112.021; R.I. Gen. Laws § 34-37-4.3; Wash. Rev. Code § 49.60.175-176.

<sup>98</sup> See 775 Ill. Comp. Stat. Ann. § 5/4-102; Minn. Stat. § 363A.16; N.J. Stat. Ann. § 10:5-12; N.D. Cent. Code § 14-02.4-17; Tex. Fin. Code § 341.401.

<sup>99</sup> See Alaska Stat. § 18.80.250; Colo. Rev. Stat. Ann. § 5-3-210; 775 Ill. Comp. Stat. Ann. § 5/4-102; Iowa Code § 216.10; La. Rev. Stat. § 51:2255; Mich. Comp. Laws 750 § 147a; Minn. Stat. § 363A.16; Mont. Code Ann. § 49-2-306; Nev. Rev. Stat. § 598B.100; N.J. Stat. Ann. § 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296-a; N.D. Cent. Code § 14-02.4-17; Ohio Rev. Code Ann. § 4112.021; R.I. Gen. Laws § 34-37-4.3; Wash. Rev. Code § 49.60.175-176; Wis. Stat. Ann. § 138.20.

<sup>100</sup> See Alaska Stat. § 18.80.250; 775 Ill. Comp. Stat. Ann. § 5/4-102; N.J. Stat. Ann. § 10:5-12.

<sup>101</sup> Compare *Hunter v. Ford Motor Co.*, No. 08-4980 (PJS/JSM), 2010 WL 3385225, at \*9 (D. Minn. July 28, 2010) (applying ECOA standards to Minnesota state fair lending law) and *Mont. Admin. R. 24.9.612* (providing standards of proof for disparate impact allegations under Montana's fair lending statute) with *Vance v. Speakman*, 409 A.2d 1307, 1310 (Me. 1979) (holding that the word "solely" in analogous state housing statute indicates that liability is only established if the prohibited status is the "only determining factor in the defendant's action").

## State and Local Public Accommodation Laws

In addition to state fair lending laws, ISA products—and their associated educational institutions—are covered by many state public accommodation antidiscrimination statutes. The advantage of these laws, from a plaintiff's perspective, is that they avoid having to litigate ECOA threshold inquiries, such as whether ISAs count as "credit." Operation of disparate treatment and reverse redlining are generally applicable across antidiscrimination statutes and would likely apply similarly under these state laws. Disparate impact is available under some, but not all, of these laws. In fact, in some cases establishing disparate impact may be easier for plaintiffs under state and local laws because some jurisdictions have codified more plaintiff-friendly standards than federal law.<sup>102</sup>

California's Unruh Act is particularly broad reaching, declaring that all persons are "entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."<sup>103</sup> Notably, an entity does not need to be a physical establishment such as a store to fall within the provisions of the Unruh Act—courts interpreting the statute have held that, in keeping with the broad sweep of "all business establishments of every kind whatsoever", it applies to virtual establishments such as web- or app-based entities.<sup>104</sup>

An ISA provider entering into ISAs in California would very likely be covered. Although the Unruh Act does not provide for disparate impact liability other than for disability discrimination,<sup>105</sup> it is a powerful tool because of its incorporation of protected classes not covered by many other antidiscrimination statutes such as citizenship, primary language, and immigration status.<sup>106</sup> And reverse redlining pled as a disparate treatment claim would be cognizable under the Unruh Act.

The District of Columbia's public accommodation statute combines broad coverage with the ability to bring disparate impact claims.<sup>107</sup> The District's statute provides (in relevant part) that it is unlawful to "deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations" "wholly or partially for a discriminatory reason based

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<sup>102</sup> See, e.g., D.C. Code §§ 2-1401.3, 2-1402.68; N.Y.C. Admin. Code § 8-107.17.

<sup>103</sup> Cal. Civ. Code § 51(b).

<sup>104</sup> See e.g., *Candelore v. Tinder, Inc.*, 228 Cal. Rptr. 3d 336, 351 (Cal. Ct. App. 2018), review denied (May 9, 2018).

<sup>105</sup> See *Mackey v. Bd. of Trs. of Cal. State Univ.*, 242 Cal. Rptr. 3d 757, 774 (Cal Ct. App. 2019).

<sup>106</sup> Cal. Civ. Code § 51(b).

<sup>107</sup> D.C. Code Ann. § 2-1402.68.

on [protected class].”<sup>108</sup> Further, its definition of a public accommodation includes, among a long list of other entities, “establishments dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof: banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions.”<sup>109</sup>

Massachusetts likewise boasts a strong public accommodations statute, covering a broad range of entities and providing for disparate impact claims.<sup>110</sup> Massachusetts’ statute defines “public accommodation” to include “any place which accepts or solicits the patronage of the general public.”<sup>111</sup> As such, it would likely cover, at a minimum, ISA programs that are run by or through schools or vocational institutions that are based in a physical place.<sup>112</sup>

## Title VI and Title IX

Schools and lenders offering ISAs could also violate the antidiscrimination prohibitions in Titles VI of the Civil Rights Act of 1964 and IX of the Education Amendments of 1972. Title VI prohibits discrimination on the basis of race, color, or national origin in programs or activities that receive federal funds.<sup>113</sup> All public colleges and universities, and virtually all accredited private colleges and universities, are covered by Title VI because they participate in federal student aid programs.<sup>114</sup> All programs in a school are covered by Title VI if any part of the school receives federal financial assistance.<sup>115</sup> Agencies responsible for extending federal financial assistance can enforce Title VI by terminating or refusing to provide that assistance to an institution or program.<sup>116</sup> The U.S. Attorney General is also authorized to bring civil actions against recipients to enforce compliance with Title VI,<sup>117</sup> as are private parties.<sup>118</sup>

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<sup>108</sup> D.C. Code Ann. § 2-1402.31(a)(1).

<sup>109</sup> D.C. Code Ann. § 2-1401.02(24).

<sup>110</sup> See *Griffiths v. Town of Hanover*, No. 1:11-cv-12115-JLT, 2012 WL 3637791, at \*4 (D. Mass. 2012); *Currier v. Nat'l Bd. of Med. Exam'rs*, 965 N.E.2d 829, 843 (Mass. 2012).

<sup>111</sup> Mass. Gen. Laws ch. 272, § 92A.

<sup>112</sup> See *Currier*, 965 N.E.2d at 842.

<sup>113</sup> 42 U.S.C. § 2000d.

<sup>114</sup> *Race and National Origin Discrimination: FAQs*, U.S. Dep't of Educ., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html> (last accessed July 22, 2020).

<sup>115</sup> *Id.*

<sup>116</sup> 42 U.S.C. § 2000d-1.

<sup>117</sup> *Id.*

<sup>118</sup> *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001).

Title IX, in turn, prohibits discrimination on the basis of sex, in “any education program or activity receiving federal financial assistance.”<sup>119</sup> Title IX is often interpreted similarly to Title VI.<sup>120</sup>

Private parties seeking judicial enforcement of Title VI’s nondiscrimination protections must prove intentional discrimination.<sup>121</sup> Courts have generally applied similar burdens and allocations of proof as are applied in other disparate treatment contexts.<sup>122</sup> However, many agencies (including the Department of Education) have issued rules and guidance prohibiting disparate impact discrimination by entities receiving federal funds.<sup>123</sup>

Accordingly, if a school receives federal financial assistance and its involvement with ISAs could be characterized as a program, service, financial aid, or other benefit provided by that school, it could face liability or other consequences under antidiscrimination theories similar to those described above.

Coverage of private student lenders could be more complicated. The lender must “receive” federal financial assistance. Under Title VI, the term “recipient” includes any entity to “whom Federal financial assistance is extended, directly or through another recipient . . . but such term does not include any ultimate beneficiary.”<sup>124</sup> If the private student lender receives federal financial assistance directly, it would be covered. Even if it does not receive funds directly, it might still be covered if it receives federal funds via an arrangement with a partnering educational institution. The viability of such an argument would likely turn in part on whether factual evidence indicated that the lender received such funds—e.g., if the lender could be characterized as an agent or subcontractor of the school or if federal funds are specifically directed to further the relationship—as opposed to simply benefitting indirectly from federal assistance afforded to a covered school.<sup>125</sup>

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<sup>119</sup> 20 U.S.C. § 1681, et seq.

<sup>120</sup> See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694-98 (1979) (Congress intended that Title XI would be interpreted and applied similarly to Title VI).

<sup>121</sup> *Sandoval*, 532 U.S. at 280-81.

<sup>122</sup> See *Title VI Legal Manual: Section VI: Proving Discrimination—Intentional Discrimination*, Dep’t of Justice, Civil Rights Div., [https://www.prrac.org/title\\_vi\\_repository/doj/2017\\_title\\_vi\\_manual/title\\_vi\\_manual\\_sec\\_6\\_intent\\_final1.pdf](https://www.prrac.org/title_vi_repository/doj/2017_title_vi_manual/title_vi_manual_sec_6_intent_final1.pdf); see also, e.g., *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014) (applying Title VII standards in Title VI case).

<sup>123</sup> See 32 C.F.R. § 100.3(b)(2); see also *Title VI Legal Manual: Section VII: Proving Discrimination—Disparate Impact*, Dep’t of Just., Civil Rights Div., [https://www.prrac.org/title\\_vi\\_repository/doj/2017\\_title\\_vi\\_manual/title\\_vi\\_legal\\_manual\\_sec\\_7\\_impact\\_final1.pdf](https://www.prrac.org/title_vi_repository/doj/2017_title_vi_manual/title_vi_legal_manual_sec_7_impact_final1.pdf).

<sup>124</sup> 32 C.F.R. § 100.13(i) (implementing Title VI); 34 C.F.R. § 106.2(i) (implementing Title IX) (Recipient means any entity “to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance.”).

<sup>125</sup> See, e.g., *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 468 (1999).



## Conclusion

Although touted as a solution to the serious student debt crises, features of existing ISAs risk exacerbating existing protected class disparities in serious ways. Evidence suggests certain ISAs may be recent iterations of the types of predatory financial practices that have exploited minority communities for years. Even if not designed to further such schemes, distinctions within more benign programs may nonetheless perpetuate historic disparities. Advocates and regulatory agencies should take note.

# Appendix

The following is a preliminary list of materials that could assist regulators or private plaintiffs in evaluating the civil rights implications of Income Share Agreements.

## Information Requests to ISA Investors and Funders

1. Marketing to Schools and Educational Institutions
  - a. All documents relating to actual or potential expansion to additional schools or educational programs, including any communications with schools or educational programs.
  - b. All documents describing the financial relationship between the investor and an actual or potential participating educational institution.
2. Marketing to Students
  - a. All documents related to the marketing of ISAs to students or potential students. This includes, but is not limited to, documents related to: internet, social media, television, radio, and print advertising; the placement of advertising (including but not limited to geography, medium, and outlet); strategy; techniques; target demographics; target locations; target audiences for social medial advertising; call lists and the use of such lists; door to door canvassing; in-person solicitations; flyers; open houses; job fairs; following up on leads; generating new leads; and employee responsibilities with respect to marketing.
3. ISA Contract Terms and Pricing
  - a. A copy of all blank/template applications, ISA contracts, other written agreements, and any other forms used in connection with the ISA program.
  - b. All documents relating to ISA underwriting and pricing, including but not limited to income share percentages, length of repayment, projected repayment, and other contract terms.
  - c. All policies and models used to determine ISA underwriting, pricing or other contract terms, including documents sufficient to identify and describe all variables incorporated.

- d. All documents relating to the development of or modifications or adjustments to any model used to determine ISA underwriting, pricing, or other contract terms.

#### 4. Finances of ISA Programs

- a. All documents describing the repayment of existing ISAs, including but not limited to the income of ISA recipients, the amount of repayment obligated, and the amount repaid. This should include documents describing the income and repayment obligations and payments of ISA recipients categorized by educational institution, major, race, ethnicity, and gender.
- b. All documents describing or reflecting payments made to partner educational institutions.

#### 5. Demographics and Impact

- a. Documents sufficient to identify the following information for each ISA recipient and/or applicant:
  - i. First, middle, and surname(s);
  - ii. All addresses of residence associated with the ISA recipient and/or applicant, including current and prior addresses;
  - iii. Major and degree sought;
  - iv. Educational institution attended;
  - v. Month and year of graduation;
  - vi. Race, ethnicity, and gender;
  - vii. Whether the ISA application was approved or denied;
  - viii. The terms of the ISA offered and/or accepted, including but not limited to the income share percentage and length of repayment period.
- b. All documents relating to the race, ethnicity, and gender of ISA recipients and/or applicants.

- c. All documents relating to ISA pricing by the race, ethnicity, and/or gender of the ISA recipients and/or applicants.
- d. All documents relating to repayment by the race, ethnicity, and/or gender of the ISA recipient.
- e. All documents relating to any evaluation of racial, ethnic, or gender differences or disparities in pricing, repayment, or approval, including but not limited to any communications regarding such evaluation.

## Information Requests to Participating or Sponsoring Colleges, Universities, and Educational Institutions

1. Marketing the ISA Product
  - a. All documents relating to the marketing or promotion of the ISA product to students or potential students.
  - b. All documents given to prospective ISA applicants or used by the educational institution to persuade prospective ISA applicants to enter into or educate prospective ISA applicants about an ISA.
2. Marketing the Educational Product or Service
  - a. All documents related to the marketing of the educational institution to potential students. This includes, but is not limited to, documents related to: internet, social media, television, radio, and print advertising; the placement of advertising (including but not limited to geography, medium, and outlet); strategy; techniques; target demographics; target locations; target audiences for social medial advertising; call lists and the use of such lists; door to door canvassing; in-person solicitations; flyers; open houses; job fairs; following up on leads; generating new leads; and employee responsibilities with respect to marketing.
  - b. All documents related to policies, procedures, practices, or agreements for compensating any individual employee or group of employees with any responsibilities related to the recruitment of students, admissions, or financial aid, including but not limited to documents related to commissions or other incentives.

- c. All documents related to any analysis or description of the educational institution's policies, practices, or strategies with respect to marketing, admissions, or recruiting, including but not limited to documents that analyze or describe how information about academic programs, career development, or job placement is used in marketing, admissions, and recruiting.
- d. All documents given to prospective students or used by the educational program to persuade prospective students to enroll or to educate prospective students about the program.
- e. All documents that describe the educational institution's programs or the benefits of attendance.
- f. All communications or other postings by or on behalf of the educational institution on or through Facebook, Twitter, LinkedIn, or any other social media website.

### 3. Demographics of ISA Recipients

- a. Documents sufficient to identify the following information for each ISA recipient and/or applicant:
  - i. First, middle, and surname(s);
  - ii. All addresses of residence associated with the ISA recipient and/or applicant, including current and prior addresses;
  - iii. Major and degree sought;
  - iv. Month and year of graduation;
  - v. Race, ethnicity, and gender;
  - vi. Whether the ISA application was approved or denied;
  - vii. The terms of the ISA offered and/or accepted, including but not limited to the income share percentage and length of repayment period.
- b. All documents relating to the race, ethnicity, and gender of applicants, enrolled students, and graduates, including by major or course of study.
- c. All documents relating to the race, ethnicity, and gender of ISA applicants and/or recipients.

- d. All documents relating to ISA pricing by the race, ethnicity, and/or gender of the ISA applicants and/or recipients.
- e. All documents relating to repayment by the race, ethnicity, and/or gender of the ISA recipient.
- f. All documents relating to any evaluation of racial, ethnic, or gender differences or disparities in pricing, repayment, or approval, including but not limited to any communications regarding such evaluation.

4. ISA Contract Terms

- a. A copy of all blank/template applications, ISA contracts, other written agreements, and any other forms used in connection with the ISA program.
- b. All documents relating to ISA underwriting or pricing, including but not limited to income share percentages, length of repayment, projected repayment, and other contract terms.

5. Relationship with ISA Investor or Funder

- a. All documents describing the financial and legal relationships between the educational institution and any ISA investor or funder, including but not limited to contracts, financial reports, and records of payments.

6. Cost of Providing Educational Product or Service

- a. All documents describing the cost to the institution of providing the educational program(s) offered.

7. Student Outcomes

- a. All documents containing information about former students' employment and earnings since concluding their studies, their assessment of the educational institution, or their success on certification or licensing examinations, including but not limited to information obtained from "Graduate Employment and Evaluation Questionnaires," "Graduate Status Forms," "Student Evaluation Forms," "Student Surveys," or similar documents.

8. ISA Program Outcomes

- a. All documents describing the repayment status of ISAs for which the recipient has graduated or otherwise terminated their studies at the educational institution, including but not limited to describing the number of ISAs in repayment and the payments made.
- b. All documents relating to payments made to and/or received from ISA program partners or investors.