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APPLYING STATE CONSUMER FINANCE AND PROTECTION LAWS TO INCOME SHARE AGREEMENTS

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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

Companies that provide educational Income Share Agreements (ISAs)—consumer financial products in which students promise to pay a percentage of their future, post-graduation income in exchange for money to pay their tuition—seek to sidestep traditional federal and state consumer financial protection statutes by avoiding the use of terms associated with loans, such as "principal" and "interest." However, state laws and federal laws enforceable by state regulators apply to each aspect of an ISA's existence, from marketing through collection.

ISAs require a coordinated response from educational regulators and financial regulators, as well as attorneys general charged with enforcing state consumer protection statutes and empowered to enforce many applicable federal consumer financial laws.

Previous scholarship examines common ISA features and finds that most ISAs constitute "credit" and "debt" as defined by a panoply of federal consumer financial laws.[1] While this paper does not purport to be the definitive statement on the application of all state consumer finance laws to all permutations of ISA, several conclusions can be drawn by examining the interaction of common ISA terms with state consumer finance laws. ISAs generally fall within the meaning of the term "loan" as used in many state consumer financial protection statutes for many of the same reasons no, that they are "credit" under their federal counterparts. As a result, ISA providers, servicers, and collectors are subject to licensing and oversight by state financial regulators, and state fair lending and usury laws apply to protect students from discrimination and unconscionable charges. In addition, even without considering whether ISAs constitute "credit" or "loans," state consumer protection statutes that prohibit unfair and deceptive acts and practices apply to the marketing of ISAs, as well as other aspects of the relationship between the consumer, their school, and the ISA provider, servicer, and collector.

ISAs require a coordinated response from educational regulators overseeing schools and their admissions and financial aid offices, financial regulators who supervise loan originators, servicers, and debt collectors, as well as attorneys general charged with enforcing state consumer protection statutes and empowered to enforce many applicable federal consumer financial laws.

[1] Joanna Pearl & Brian Shearer, *Credit by Any Other Name: How Federal Consumer Financial Law Governs Income Share Agreements*, Student Borrower Prot. Ctr. (July 2020), https://protectborrowers.org/paper-series-consumer-law-and-income-share-agreements/; Stephen Hayes & Alexa Milton, *Solving Student Debt or Compounding the Crisis?: Income Share Agreements and Fair Lending Risk*, Student Borrower Prot. Ctr. (July 2020), https://protectborrowers.org/wp-content/uploads/2020/07/SBPC_Hayes_Milton_Relman_ISA.pdf.

ISAs are "Credit" for Purposes of Federal and Most State Consumer Finance Laws

Background on ISAs

ISAs, in their modern form, are a relatively recent development in the student loan market but they share important common features with well-established loan products.[2] The U.S. Department of Education issues the vast majority of student loans in the country today, with federally issued or guaranteed student loans accounting for more than 90% of outstanding student debt.[3] Borrowers may repay these loans using income-driven repayment plans,[4] under which the borrower's monthly payment amount is calculated as a percentage of their discretionary income.[5] Under these income-driven repayment plans borrowers' payments may be as low as $0, and periods when required payments are zero "will count toward [a borrower's] total repayment period."[6] After the borrower has made a designated number of payments (usually over the course of 20 or 25

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[2] *Id.* Readers should note that while the contemporary incarnation of the Income-Share Agreement has been introduced to the student financing marketplace within the past decade, economist Milton Friedman first proposed an income-contingent financing regime for higher education more than half a century ago. *See* Milton Friedman, The Role of Government in Education, in Economics and the Public Interest (Robert A. Solo ed., 1955), *available at* http://la.utexas.edu/users/hcleaver/330T/350kPEEFriedmanRoleOfGovttable.pdf.

[3] *See, e.g.*, Teddy Nykiel, *2019 Student Loan Debt Statistics*, Nerd Wallet (Dec. 20, 2019), https://www.nerdwallet.com/blog/loans/student-loans/student-loan-debt/.

[4] Income-driven repayment plans for federal student loans include the Income-Contingent Repayment Plan (ICR Plan), the Income-Based Repayment (IBR) plan, the Pay As You Earn (PAYE) repayment plan, and the Revised Pay As You Earn Repayment Plan (REPAYE) plan.

[5] The Department of Education defines "discretionary income" for each plan. For the IBR, PAYE, and REPAYE plans, a borrower's discretionary income is "the difference between their adjusted gross income (AGI) and 150 percent of the U.S. Department of Health and Human Services (HHS) Poverty Guideline amount for [their] family size and state." *Income-Driven Plans Questions and Answers*, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/repayment/plans/income-driven/questions#monthly-payment (last visited July 22, 2020). And for the ICR Plan, "discretionary income is the difference between the borrower's AGI and 100 percent of the HHS Poverty Guideline amount for their family size and state." *Id.*

[6] *Income-Driven Repayment Plans*, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/repayment/plans/income-driven (last visited July 22, 2020).

years), any remaining loan balance is discharged.[7] Even some traditional private student loans include features analogous to IDR.[8]

ISAs are generally made available to undergraduate students at an expanding number of colleges and universities,[9] as well as to students enrolled in coding bootcamps and other vocational education programs that do not confer degrees.[10] ISAs generally share certain characteristics. First, the "Funding Amount" is the sum the provider disburses on the student borrower's behalf, analogous to the principal for a traditional student loan.[11] Second, the "Income Share" is the percentage of the borrower's monthly income that they must pay each month of the payment term.[12] Third, the "Income Threshold" is the monthly income amount below which a borrower will not have to pay the Income Share.[13] Fourth, an ISA's "Payment Term" or "Payment Window" refers to the period during which the borrower will pay the Income Share back to the provider on a monthly basis. Many ISAs provide that this period will be extended while a borrower is out of the workforce by choice, enrolled in another academic program, or earning below the Income Threshold. Finally, "Payment Cap" represents the total fixed amount a student borrower must pay to fulfill the ISA before the end of the Payment Term, similar to an early payoff of a traditional student loan. And if a consumer defaults on the ISA, the ISA is accelerated and the borrower typically owes the Payment Cap (less any payments already made).[14]

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[7] *Id.*

[8] *See* Pearl & Shearer, *supra* note 1 (providing examples of traditional private student loan programs offering income-based-repayment options).

[9] *See, e.g.*, *Higher Education*, Vemo Educ., https://vemoeducation.com/higher-education-income-share-agreements/ (last visited July 22, 2020) (ISA provider identifying partner schools that include Purdue University, the University of Utah, Clarkson University, and Norwich University).

[10] *See, e.g.*, *Best Income Sharing Bootcamps*, Career Karma, https://careerkarma.com/rankings/best-isa-bootcamps/ (last visited July 22, 2020) (purporting to rank coding "bootcamps" offering ISAs); *Catalyst: Learn Now, Pay After You're Hired*, Gen. Assembly, https://generalassemb.ly/financing/catalyst-income-share-agreement (last visited July 22, 2020); *How Does the ISA Work?*, Holberton Sch., https://www.holbertonschool.com/faq/articles/360022564934_how-does-the-isa-work (last visited July 22, 2020).

[11] *ISA Sample Contract (Academic Year)*, Purdue Univ., https://purdue.edu/backaboiler/disclosure/contract.html (last visited July 22, 2020).

[12] *Id.*

[13] *Lewis Income Share Agreement Program*, Clarkson Univ., https://www.clarkson.edu/isa (last visited July 22, 2020).

[14] *Application and Solicitation Disclosure*, Purdue Univ., https://www.purdue.edu/backaboiler/disclosure/application.html (last visited July 22, 2020).

While ISA terms vary between providers, their essential components are:

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

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

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

    b. Making payments, calculated according to a formula in the agreement that is based on the student's income, over a period determined in the agreement.[15]

However, while ISAs generally avoid terminology associated with credit and loans—such as "principal" and "interest"—and claim not to be "credit" or "loans," they fall squarely within the scope of statutes governing credit and loan products.

ISAs are "Credit" under Federal Consumer Finance Statutes

As explained in previous scholarship,[16] ISAs are "credit" as that term is used in federal statutes like the Truth in Lending Act ("TILA"), the Equal Credit Opportunity Act ("ECOA"), the Fair Credit Reporting Act ("FCRA"), and the Consumer Financial Protection Act ("CFPA"). Under ECOA and the FCRA, "the term 'credit' means the right granted by a creditor to a debtor (1) to defer payment of a debt or (2) to incur debts and defer its payment or (3) to purchase property or services and defer payment therefor."[17] While ECOA does not define "debt," ISAs fall within definitions of "debt" under related federal statutes,[18] analogous state laws,[19] and dictionary definitions of

[15] Pearl & Shearer, *supra* note 1 at 15 (providing examples of traditional private student loan programs offering income-based-repayment options).

[16] *Id.* This section briefly summarizes the issues discussed and arguments raised in Ms. Pearl's and Mr. Shearer's paper and should not replace readers' attention to that paper.

[17] Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691a(d); Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681a(r)(5) ("The terms 'credit' and 'creditor' have the same meanings as in section 702 of the Equal Credit Opportunity Act.").

[18] For example, the Fair Debt Collection Practices Act ("FDCPA") defines the term broadly as "any obligation . . . of a consumer to pay money arising out of a transaction in which the . . . services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). *See also* Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322, 1326 (7th Cir. 1997) (holding that "debt" under the FDCPA is not limited to obligations derived from transactions involving the extension of credit). Similarly, the Bankruptcy Code defines "debt" as "liability on a claim," and "claim" as "the right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" (citing 11 U.S.C. § 101)).

[19] *See infra* p. 10.

"debt,"[20] therefore satisfying the first two prongs of ECOA's definition of "credit." The third prong of ECOA's "credit" definition simply requires deferred payment on the purchase of services—such as the educational services purchased with money from an ISA. Indeed, "[t]he hallmark of 'credit' under ECOA is the right of to make deferred payment,"[21] which is the central feature of ISAs.

TILA's definition of "credit" mirrors the first two parts of ECOA's definition,[22] and TILA's implementing Regulation Z defines "consumer credit" as credit offered or extended primarily for personal, family, or household purposes.[23] Educational ISAs are therefore "consumer credit" under TILA for the reasons explained above. ISA providers meet TILA's definition of "creditors" because they regularly extend credit and are the initial party to whom the consumer owes their repayment obligation.[24] If there were any doubt that ISAs constitute "credit" under these statutes, courts liberally construe ECOA and TILA to achieve Congress' goal of eliminating discrimination in credit and protecting consumers.[25]

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[20] Pearl & Shearer, *supra* note 1.

[21] Riethman v. Berry, 287 F.3d 274, 277 (3d Cir. 2002) (a law firm was not subject to ECOA or the Truth in Lending Act (TILA) because its failure to collect payments from clients immediately did not constitute granting the right to defer payment).

[22] It is "the right granted by a creditor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(f).

[23] 12 C.F.R. § 1026.2(a)(12) (2019).

[24] TILA defines "creditor" as a person who both:

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

15 U.S.C. § 1602(g). TILA defines "finance charge" as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended," including most fees and "interest, time price differential, and any amount payable under a point, discount, or other system of additional charges." *Id.* § 1605(a).

[25] *See* Brothers v. First Leasing, 724 F.2d 789, 793 (9th Cir. 1984) ("We must construe the literal language of ECOA in light of the clear, strong purpose evidenced by the Act and adopt an interpretation that will serve to effectuate that purpose."); Miller v. Am. Express Co., 688 F.2d 1235, 1239 (9th Cir. 1982) (rejecting a restrictive interpretation of the regulations in light of ECOA's purpose "to protect woman, among others, from arbitrary denial or termination of credit."); Williams v. AT&T Wireless Servs., Inc., 5 F. Supp. 2d 1142, 1146–47 (W.D. Wash. 1998) (following Ninth Circuit precedent that "the ECOA should be interpreted liberally to achieve its goals."); Curtis v. Propel Prop. Tax Funding, LLC, 915 F.3d 234, 245 (4th Cir. 2019) (holding that an agreement for financing the payment of local taxes was a credit transaction under TILA).

Previous scholarship also systemically dismantles ISA advocates' arguments that ISAs are not credit under these statutes.[26] While ISAs themselves purport not to be "credit" or a "loan," federal courts examine the substance of a transaction when determining whether an arrangement is an extension of credit.[27] Arguments that an ISA is not credit because the amount ultimately due is uncertain at the time of origination (and could be as low as $0) are unsupported by case law and would improperly exclude variable interest loans with a rate based on an index or federal student loans for which income-driven repayment plans and total loan forgiveness are available.[28]

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ISA advocates also suggest that TILA does not apply because ISAs should be treated like investment plans, which are excluded from the definition of credit in the Official Commentary to Regulation Z. However, the commentary is a specific exclusion that by its own terms does not apply to ISAs and does not establish an interpretive principle.[29] In the absence of an exclusion that does apply to ISAs, they remain "credit" under TILA. Moreover, the investment envisioned in TILA's Official Commentary envisions one party providing capital in exchange for an ownership interest in real property—a model that does not translate well to investments in people.[30]

ISAs are "Loans" Subject to State Consumer Finance Statutes

ISAs fall squarely within the scope of state laws that apply to consumer loans, both for the reasons discussed above and pursuant to state law definitions and interpretations.

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[26] Pearl & Shearer, *supra* note 1; Hayes & Milton, *supra* note 1.

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

[28] Pearl & Shearer, *supra* note 1.

[29] *Id.*

[30] *See* U.S. Const. amend. XIII (prohibiting slavery and involuntary servitude); Peonage Act of 1867, 42 U.S.C. § 1994 (abolishing both involuntary and voluntary peonage in liquidation of any debt or obligation). Legal scholars have raised serious questions about the legitimacy of such contracts. *See* Diane M. Ring & Shu-Yi Oei, *Human Equity? Regulating the New Income Share Agreements*, 68 Vand. L. Rev. 681 (2015).

ISAs Fall Within the Meanings of "Loan" and "Debt" Under Most States' Consumer Finance Laws

Many states' consumer finance laws define the term "loan" in a manner that explicitly includes ISAs. For example, Virginia law states that providing credit or money "as consideration for any sale or assignment of, or order for, the payment of wages, salary, commission, or other compensation for services, whether earned or to be earned, shall for the purposes of this chapter be deemed a loan of money secured by the sale, assignment or order."[31] This language is echoed in the statutes of numerous other states from California to Florida,[32] and apply to ISAs, which purport to be the student's sale of their future wages.[33] These laws were enacted in response to attempts by payday and other short-term lenders to make an end-run around state usury laws and statutes regulating short-term credit. Indeed, Maryland law explicitly states that its purpose "is to prevent evasion" of consumer loan regulations "by means of a purchase or assignment of wages."[34] Thus, Florida law states that "[e]ach such transaction shall be governed by and subject in all respects to all provisions of law relating to loans, interest, charges, usury, and to the same extent as if it had been in form a loan of the sum paid for the assignment."[35] And other states, such as New York, had identical statutes before deciding to ban payday lending outright.[36] Just like payday lenders, ISA providers cannot sidestep state laws that define "loans" in this manner. Nor can ISA providers downplay these statutes on the basis that their ISAs finance amounts in excess of the caps established by some of these statutes, because the characterization of small-to-medium income "sales" or

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[31] Va. Code Ann. § 6.2-1525 (2020).

[32] *See, e.g.*, Alaska Stat. § 06.20.290 (2020); Fla. Stat. Ann. § 516.26 (West 2020); Md. Code Ann., Com. Law § 12-303(c)(2)(i) (West 2020); Mo. Rev. Stat. § 408.210 (2020); Neb. Rev. Stat. Ann. § 45-1021 (West 2020); Nev. Rev. Stat. Ann. § 675.330 (West 2020); N.M. Stat. Ann. § 58-15-21 (West 2020); 7 Pa. Stat. and Cons. Stat. Ann. § 6218 (West 2020); 19 R.I. Gen. Laws § 19-14.2-6 (2020); Vt. Stat. Ann. tit. 8, § 2234 (West 2020).

[33] *See Income Share Agreement*, Rithm Sch., https://www.rithmschool.com/isa_agreement.pdf (characterizing ISA as "the 'sale' by you of part of the income stream you will earn in the future") (last visited July 22, 2020).

[34] Md. Code Ann., Com. Law § 12-303(c)(1).

[35] Fla. Stat. Ann. § 516.26.

[36] N.Y. Banking Law § 355 (1949) ("[t]he payment of five hundred dollars or less in money, credit, goods, or things in action, as consideration for any sale, assignment, or order for the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, shall for the purposes of this article be deemed a loan secured by such assignment, and the amount by which such assigned compensation exceeds the amount of such consideration actually paid shall be deemed interest or charges upon such loan from the date of such payment to the date such compensation is payable." *See* 1990 N.Y. Sess. Law Serv. 22 (McKinney) ("Payday loans are illegal in New York State."); *Payday Lending in New York*, N.Y. State Dep't of Fin. Servs., https://www.dfs.ny.gov/consumers/banking_money/payday_lending. New York's decision to do away with payday lending and corresponding rescission of former Banking Law § 355 should not be viewed as an abandonment of the principle that the sale of future earnings and wages is a loan but rather as an indication that such loans are sufficiently predatory that they should be banned in many circumstances. Accordingly, the policy set forth in former Banking Law § 355 should continue to inform New York courts' analysis of whether ISAs are "loans" under the state's consumer finance laws.

assignments as loans necessarily informs and influences the treatment of larger sales and assignments under those states' laws. Moreover, the principle animating these statutes—that the purveyors of consumer finance products should not be permitted to evade regulation through creative drafting that seeks to recharacterize their products—must inform the interpretation of consumer finance statutes of states that dealt with payday loans in a different fashion.

Other states' consumer lending statutes define "loan" in a manner that includes ISAs but less explicitly. For example, Washington's Consumer Loan Act defines "loan" as "a sum of money lent at interest or for a fee or other charge."[37] As explained above, ISAs provide students with a sum of money for use to purchase educational services—i.e., to pay tuition. In exchange, ISAs impose a "charge" in the form of variable monthly payments over a period of time and calculated using a percentage of the student's earned income. Just like in the wage assignment/sale statutes discussed above, the "charge" may be calculated as the difference between the principal financed and the amount ultimately repaid under the ISA. Similarly, Wisconsin law regulating consumer credit transactions also defines a "loan" to include "[t]he creation of debt by the lender's payment of or agreement to pay money to the customer or to a 3rd party for the account of the customer."[38] Wisconsin law also defines "credit" much like the federal ECOA, as "the right granted by a creditor to a customer to defer payment of debt, to incur debt and defer its payment or to purchase goods, services or interests in land on a time price basis."[39] This definition is not meaningfully distinguishable from the definition of "credit" under federal statutes discussed above. ISAs therefore constitute "credit" under Wisconsin law. In addition, ISA repayment obligations fall squarely within common and well-understood definitions of "debt." For example, the Federal Trade Commission's credit practices regulations defined "debt" as "[m]oney that is due or alleged to be due from one to another."[40] Black's Law Dictionary defines "debt" to mean "[l]iability on a claim; a specific sum of money due by agreement or otherwise," while noting that some debt is "contingent debt"—i.e., "debt that is not presently fixed but that may become fixed in the future with the occurrence of some event."[41] ISA debt is not "contingent," but even if it were, ISAs are still covered by these statutes as "contingent debt," because the "specific sum of money due" becomes fixed throughout the ISA's term as the borrower earns and reports their post-graduation income. Under most ISAs, the "specific sum of money due" may also become fixed upon an event of default—such as the refusal to make monthly payments or to provide required income information—in which event most ISAs permit

[37] Wash. Rev. Code § 31.04.035(1) (2019).

[38] Wis. Stat. § 421.301(23)(a) (2020).

[39] Wis. Stat. § 421.301(14).

[40] 16 C.F.R. § 444.1(g) (2020).

[41] *Debt*, Black's Law Dictionary (7th ed. 1999).

the immediate collection of their full repayment caps. If there were any doubt, Wisconsin's legislature directed that these statutes be construed liberally to promote purposes including the protection of consumers from unfair, deceptive, false, misleading, and unconscionable practices.[42]

ISAs also qualify as "loans" under the consumer finance statutes of states that do not define the term. Undefined statutory terms are generally given their common and ordinary meanings.[43] The fact that ISAs are "credit" under federal consumer finance statutes discussed above strongly indicates that common and popular meanings of that term, as well as dictionary definitions, confirm that those laws encompass ISAs.

One prominent personal finance expert cautioned against viewing ISAs as an "alternative" to student loans because "if you have to 'borrow' money from anyone, by definition, you're in debt and that's a loan."[44] Another student loan advisor explains that "an ISA is a loan, in that the recipient of funds makes payments for a period of time to satisfy a contractual obligation. A borrower of an ISA pays a fixed percentage of income instead of a fixed dollar amount each month. But, the borrower of an ISA still has an obligation to make payments for a specified number of years. Thus, an ISA is just a different form of debt.[45] As one personal finance columnist put it,

> You might ask, how is this not a loan if students are borrowing money each year? Terminology on ISAs sounds more favorable than it is. First, let's be clear—an ISA is basically a loan. You have to pay it back. If you take an ISA, you are going into debt.[46]

These experts' conclusions comport with popular meanings of the terms "loan" and "debt" and reflect the reality of ISA repayment obligations for borrowers.

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[42] Wis. Stat. 421.102(1).

[43] *See, e.g.*, Miller v. Fortune Com. Corp., 223 Cal. Rptr. 3d 133, 137 (Cal. Ct. App. 2017) ("[W]e first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction."); People v. Gonzalez, 394 P.3d 1074, 1077 (Cal. 2017) (looking to dictionary definitions to ascertain meaning of words used in statute); Desrosiers v. Perry Ellis Menswear, LLC, 90 N.E.3d 1262 (N.Y. 2017) ("The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning"); Yaniveth R. *ex rel.* Ramona S. v. LTD Realty Co., 51 N.E.3d 521 (N.Y. 2016) ("In the absence of a statutory definition, 'we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase.'").

[44] *Income Share Agreements: A Crazy Alternative to Student Loans*, Dave Ramsey, https://www.daveramsey.com/blog/income-share-agreements (last visited July 22, 2020).

[45] Mark Kantrowitz, *Income Share Agreements*, Saving for Coll. (Aug. 27, 2018), https://www.savingforcollege.com/article/income-share-agreements.

[46] Robert Farrington, *Be Careful with Income Sharing Agreements (ISAs) to Pay for College*, Forbes (Apr. 12, 2019, 7:48 AM), https://www.forbes.com/sites/robertfarrington/2019/04/12/income-sharing-agreements-to-pay-for-college/#68497e7452e0.

Relevant dictionary definitions also confirm that ISAs are loans as used in state laws regulating consumer finance transactions. In addition to the definitions of "debt" discussed above, that term is sometimes defined as "an amount owed by one person or entity to another."[47] Black's Law Dictionary defines "loan" as "a thing lent for the borrower's temporary use; esp. a sum of money lent at interest,"[48] while noting that interest is not a necessary component of the definition. For example, no interest is charged in an "accommodation loan"—one "for which the lender receives no consideration in return."[49]

It would be anomalous if ISA borrowers were entitled to protection under state anti-discrimination in credit transactions while being denied the protection of that same state's consumer finance laws due to a restrictive interpretation of the term "loan."

State consumer finance statutes' use of the term "loan" (and similar terms) should also be construed in light of other state statutes applicable to ISA transactions. As discussed in more detail below, ISAs fall within the ambit of state fair lending and public accommodation laws that prohibit discrimination in credit transactions.[50] It would be anomalous if ISA borrowers were entitled to protection under state anti-discrimination in credit transactions while being denied the protection of that same state's consumer finance laws due to a restrictive interpretation of the term "loan."

Arguments that ISAs are Not Subject to Traditional State Consumer Finance are Unpersuasive

The ISA industry argues that ISAs are not "loans" under these state laws because there is no unconditional right to repayment of the amount advanced—that is, if the student's post-graduation income is too low and their required monthly payments do not equal the tuition advanced to them, the student is not required to repay the difference. The ISA industry relies primarily upon cases examining whether a merchant's sale of accounts receivable, sometimes known as "factoring,"[51] constitutes a "loan" for purposes of state usury laws. For example, some factoring contracts may be termed "investments" or "purchases" of accounts receivable, rather than

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[47] *Debt*, Nolo's Plain English Law Dictionary, https://www.law.cornell.edu/wex/debt.

[48] *Loan*, Black's Law Dictionary (7th ed. 1999).

[49] *Id.*

[50] *See infra* p. 27

[51] Factoring is the "buying of accounts receivable at a discount" due to "the risk of delay in collection or loss on the accounts receivable." *Factoring*, Black's Law Dictionary (7th ed. 1999).

"loans," if the party advancing funds is not "entitled to repayment under all circumstances."[52] This approach to determining whether ISAs are "loans" under state laws is misguided for several reasons.

Educational ISAs are Not Comparable to Contingency-Based Business-to-Business Financing Transactions

It makes little sense to apply a single criterion (an unconditional right to repayment) used to determine whether a single law (the prohibition on usury) applies to a business-to-business transaction to determine whether an entire panoply of laws applies to the sale and financing of educational services to consumers. Because consumers are generally less financially sophisticated and enjoy less bargaining power than businesses, states have traditionally provided different and heightened protections for consumer financial transactions and regulated consumer finance transactions much more closely than business-to-business financial arrangements. Businesses generally have significant knowledge about the accounts receivable they are selling in a factoring transaction—for example, because the accounts receivable already exist or may be predicted based on that business's historic and recent performance. Conversely, students considering whether to finance their education through an ISA have no experience by which to judge likely repayment costs or other important financial considerations.[53] Educational ISAs are different from factoring transactions in another important respect: ISAs are fundamentally a seller-financed (or seller-affiliate-financed) sale of educational services to the student, unlike factoring transactions in which the party receiving the financing sells some or all of its accounts receivable to the party providing funds.

Since the Roaring Twenties, policymakers have rejected the notion that an individual's "sale" of wages should be regulated in the same manner as a business-to-business factoring transaction and concluded that wage sales and assignments should be regulated as loans.[54] At that time, "[t]he practice of wage buyers was to go through the motions of purchasing a portion of the earned wages at a discount, usually 10%, which presumably was compensation for waiting until pay day."[55] While "[t]hese transactions usually could be proved to be loans and hence amenable to the small loan law," piecemeal litigation was an ineffective remedy for victimized borrowers,

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[52] *See* Morrison Foerster, *Regulatory Treatment of Educational ISAs Under Federal and Select State Consumer Credit Statutes* (Mar. 2019), https://media2.mofo.com/documents/190408-regulatory-educational-consumer-credit-statutes.pdf; K9 Bytes, Inc. v. Arch Capital Funding, LLC, 57 N.Y.S.3d 625, 632 (N.Y. Sup. Ct. 2017).

[53] As discussed below, the information presented to students about ISA repayment costs is sometimes deceptive in violation of state consumer protection laws.

[54] *See* F.B. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 L. & Contemp. Probs. 108 (1941) (discussing development and history of Uniform Small Loan Law).

[55] *Id.* at 121.

and policymakers responded by characterizing these transactions as loans.[56] In accordance with this policy consensus, many state statutes explicitly state that loans in the form of wage purchases or assignments are loans subject to traditional consumer finance laws "regardless of . . . [w]hether the transaction is or purports to be nonrecourse or contingent" or "purports to be the purchase of wages, pensions, governmental benefits, or other similar future payment streams."[57] The same is true where lenders contract to pay consumers an immediate sum of money in return for a partial assignment of other earned income, such as future federal or state tax refunds, even if the refund (and therefore the consumer's obligation to pay) is contingent.[58] Comparison with other forms of consumer financing, such as litigation funding, fares no better.[59] In light of the long-standing policy choice to characterize individual wage sales and business factoring transactions differently—and treat the former as loans—the ISA industry's reliance on case law involving factoring transactions is misplaced.

Applying ISA Advocates' Proposed Contingency Rule to Exempt Educational ISAs from Statutory Definitions of "Loan" Would Absurdly Sweep Up Most Traditional Student Loans

Under the ISA industry's definitional rules, many education and other loans issued by both the federal government and private lenders would not be considered loans. Under the William D. Ford Direct Loan Program, borrowers may repay under a variety of income-driven repayment plans (under which the borrower's monthly payment is calculated based as a percentage of their monthly income), with the balance, if any, discharged at the end of a 20-25 year repayment period.[60] Thus, there is no unconditional right of full repayment of the principal for these loans. Any

Any definition of "loan" that would exclude the largest education loan program in the country should be discarded out of hand.

[56] *Id.*

[57] *E.g.*, Md. Code Ann., Com. Law § 12-303(a)(2)(iv) and (v) (West 2020).

[58] *See* State ex rel. Salazar v. Cash Now Store, Inc., 31 P.3d 161 (Colo. 2001) (rejecting "narrow interpretation [of the term "loan"], which requires an unconditional obligation to repay not mentioned in the statute" and holding that such contracts were loans).

[59] For example, in litigation financing arrangements, the funder provides an immediate payment to a plaintiff in litigation in exchange for a partial assignment of any eventual recovery. For example, in *Cherokee Funding LLC v. Ruth*, 342 Ga. App. 404, 408, 802 S.E.2d 865, 869 (2017), *aff'd* 304 Ga. 574, 820 S.E.2d 704 (2018) the Georgia Court of Appeals held that a litigation funding agreement was an "investment contract" rather than a "loan," explaining that the test for an "investment contract" is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." But the "enterprise" funded by an educational ISA depends upon the quality of the education provided by the school, the value of the credential conferred, and the school's career counseling and job placement efforts, as well as the borrower's efforts. *Id.* at 408-09 (quoting Securities & Exchange Comm. v. Edwards, 540 U.S. 389, 393 (2004)). Moreover, the Colorado Supreme Court has thoroughly and persuasively rejected the argument that litigation financing agreements are not "loans" under Colorado's enactment of the Uniform Commercial Code because the repayment obligation was contingent upon the outcome of the litigation. *See* Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400, 408 (Colo. 2015).

[60] *See generally Income-Driven Repayment Plans*, U.S. Dep't of Educ., *supra* note 6. The ISA industry may attempt to distinguish federal Direct Student Loans by pointing out that in the event of default, the federal government is entitled to collect the entire principal balance plus accrued interest. However, ISA contracts also generally provide that the ISA owner is entitled to collect the full "repayment cap" upon an event of default.

definition of "loan" that would exclude the largest education loan program in the country should be discarded out of hand. The absurdity of this position is only heightened in those states that have adopted statutes regulating student loan servicing, because those statutes universally define "education loans" in a broad manner that encompasses federal student loans.[61]

The tax consequences for federal student loan borrowers whose loans are discharged at the end of their income-driven repayment plans' repayment terms and ISA borrowers who finish their repayment terms without fully repaying the amount financed also appear to be the same. When a federal student loan borrower receives discharge at the end of their income-driven repayment plan, the amount discharged must be reported as income.[62] Similarly, ISA providers—while disclaiming any tax advice and cautioning that the proper tax treatment of ISAs is uncertain—counsel borrowers that if they do not repay the full amount financed, they will likely have to report the difference as income.[63] ISA borrowers who fail to repay the full amount financed—the group of borrowers whose existence the ISA industry points to as evidence that ISAs are not "loans"—experience the same tax consequences as federal student loan borrowers whose balances are discharged, further supporting the notion that ISAs are loans.

More broadly, both federal and private student loans have long included conditions under which the borrower (or their estate) was not obligated to repay the loan. For example, if the student dies, their estate does not remain liable for the remaining balance on federal[64] and some private[65] student loans used to finance their education. Similarly, federal Parent PLUS loans issued to parents to fund their child's education are discharged in the event

[61] *See, e.g.*, Cal. Fin. Code § 28104 ("'Student loan' means *any* loan made solely for use to finance a postsecondary education and costs of attendance at a postsecondary institution, including, but not limited to, tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses. . . .") (emphasis added); Wash. Rev. Code § 31.04.015(32) (2019) ("'Student education loan' means *any* loan solely for personal use to finance postsecondary education and costs of attendance at an educational institution.") (emphasis added).

[62] *See Income-Driven Repayment Plans*, U.S. Dep't of Educ., *supra* note 6. Borrowers whose loans are forgiven under the Public Service Loan Forgiveness program are not required to report the forgiven sums as income. *Are Loan Amounts Forgiven Under Public Service Loan Forgiveness (PSLF) Considered Taxable by the Internal Revenue Service (IRS)?*, U.S. Dep't of Educ., https://studentaid.gov/help-center/answers/article/loan-amounts-forgiven-under-pslf-taxable (last visited July 22, 2020). Lawmakers and student loan advocates have been working to address the adverse tax consequences of non-PSLF IDR forgiveness.

[63] *See, e.g.*, *Income Share Agreement*, Rithm Sch., *supra* note 33 ("Upon the maturity or termination of this Agreement, if the aggregate amount of funding is greater than the aggregate sum of payments you made to us during your payment obligation, then you will likely recognize the difference as ordinary income equal to the difference between the amount of funding and the sum of payments you made to us."); *ISA Sample Contract (Academic Year)*, Purdue Univ., *supra* note 11 ("Upon the maturity or termination of this ISA, if the aggregate amount of cash you received from us is greater than the aggregate sum of the payments you made to us during your Payment Term, then you will likely recognize ordinary income equal to the difference between the amount of cash received from us and the sum of the payments you made to us.").

[64] *See Discharge Due to Death*, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/forgiveness-cancellation/death (last visited July 22, 2020) ("If you die, then your federal student loans will be discharged after the required proof of death is submitted.").

[65] *See* Paul Sisolak, *What Happens to Student and Parent Loans if the Borrower Dies?*, Saving for Coll. (Jan. 15, 2019), https://www.savingforcollege.com/article/what-happens-to-student-and-parent-loans-if-the-borrower-dies ("About half of private student loan programs offer death discharges that are similar to the discharges on federal student loans.").

of the student's death, regardless of the parent's ability to repay the loan.[66] Similarly, borrowers who become totally and permanently disabled are entitled to a discharge of their repayment obligation on federal[67] and many private student loans.[68]

The characterization of "loans" as including arrangements in which the lender or guarantor does not have an absolute right to repayment extends beyond the education financing sector. The Paycheck Protection Program ("PPP"), which was established by the CARES Act as part of the federal government's response to the COVID-19 pandemic and its economic fallout, provides for loans made by private lenders and guaranteed by the federal government. As the Small Business Administration explains, the PPP "is a loan designed to provide a direct incentive for small businesses to keep their workers on the payroll."[69] PPP Loans were always intended to be forgiven as long as the borrowers met certain criteria, including requirements for spending the loan proceeds on payroll and designated nonpayroll costs[70] but are nonetheless characterized as "loans." The ISA industry's contention that an unconditional right to repayment is the *sine qua non* of loans is untrue.

Most Educational ISA Providers Cannot Demonstrate a Substantial Contingency Relating to Repayment of the Amount Financed

Even if the existence of circumstances under which an ISA borrower may not be required to repay the full amount financed could theoretically exempt ISAs from state regulation of loans, long-standing case law casts a skeptical eye on attempts to contract around such regulations, and many ISAs cannot withstand such scrutiny.

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[66] *See Discharge Due to Death*, U.S. Dep't of Educ., *supra* note 64 ("Your parent's PLUS loan will be discharged if your parent dies or if you (the student on whose behalf your parent obtained the loan) die.").

[67] *See Total and Permanent Disability Discharge*, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/forgiveness-cancellation/disability-discharge (last visited July 22, 2020).

[68] *See* Meghan Lustig, *Student Loan Disability Discharge: What to Know*, U.S. News & World Rep. (July 8, 2020, 11:02 AM), https://www.usnews.com/education/blogs/student-loan-ranger/articles/student-loan-disability-discharge-what-to-know ("Many private student loans provide a similar option.").

[69] *Paycheck Protection Program*, U.S. Small Bus. Admin., https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program#:~:text=The%20Paycheck%20Protection%20Program%20is,%2C%20mortgage%20interest%2C%20or%20utilities (last visited July 22, 2020).

[70] *See generally* Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, 85 Fed. Reg. 38,304 (June 26, 2020) (to be codified at 13 C.F.R. pt. 120).

Dating back to the Great Depression, courts have refused to allow lenders to evade regulations on loans—usually usury—by pointing to a relatively unlikely "contingency" under which the principal would not be repaid.

Dating back to the Great Depression, courts have refused to allow lenders to evade regulations on loans—usually usury—by pointing to a relatively unlikely "contingency" under which the principal would not be repaid. Thus, courts found that an agreement was made to evade the usury statute when "[t]he risk assumed was so unsubstantial as to bear no reasonable relation to the amount charged."[71] This presents a question of fact, and ISAs would need to be evaluated individually based on their repayment terms and the interest rates paid by consumers based on payments anticipated and payments made. However, a few observations can be made.

First, it would be anomalous for schools—or the ISA providers who finance their students—to argue that there was a substantial probability that students' post-graduation careers would not support repayment of the amount financed. Claims that schools and ISA providers are taking on significant risk are fundamentally inconsistent with the graduation rate, job placement rate, and post-graduation income representations made by schools in the recruitment process. Representations of salaries in excess of $100,000 and 100% job placement rates are common.[72] For example, the Rithm School claims to have a median salary of $115,000 for graduates, a 100% graduation rate, and represents that more than 86% of

Schools and their ISA partners cannot induce consumers to enroll and finance their education through an ISA by painting a rosy picture of post-graduation employment prospects and income and then argue that those transactions should not be regulated as loans because there is a substantial risk that their students will not experience levels of success.

[71] Stuback v. Sussman, 8 N.Y.S.2d 141, 143 (Sup. Ct. 1938), *aff'd*, 256 A.D. 903 (N.Y. 1939).

[72] *See, e.g.*, Imogen Crispe, *Holberton School's Income Share Agreement: What You Need to Know*, Course Report (Oct. 4, 2019), https://www.coursereport.com/blog/holberton-school-income-share-agreement ("The average full-time starting salary for Holberton School students is $105,000 per year. We are confident that all of our students will meet the $40,000 per year threshold. Our curriculum team works closely with industry leaders to make sure that our curriculum is training students to be job-ready. So far, 100% of our graduates have found a job within 6 months of graduating."); *The Proof Is in the Results*, Launch School, https://launchschool.com/results (last visited July 29, 2020) (representing that "[t]he average starting salary for 2019 Capstone graduates is $115,339 within 12 weeks of graduation" and "[f]or the past 3 years, 100% of Capstone graduates have accepted job offers within 180 days of graduation, with an average of under 70 days").

graduates find employment within 180 days.[73] Hack Reactor also advertises a median salary of $115,000,[74] while the Galvanize bootcamp represents a median annual base salary of $92,254.[75] Schools and their ISA partners cannot induce consumers to enroll and finance their education through an ISA by painting a rosy picture of post-graduation employment prospects and income and then argue that those transactions should not be regulated as loans because there is a substantial risk that their students will not experience levels of success that, as demonstrated below, result in borrowers reaching the ISA's repayment cap well before the maximum number of monthly payments.

Arguments that the ISA provider accepts a substantial risk and that this risk justifies repayment terms that amount to usury are also inconsistent with ISA providers' promotion of their products as a way for schools and investors to signal the "value" of the education being financed. For example, Vemo's website explains that schools should use ISAs to "Signal Value and Commitment to Outcomes."[76] The "signal" works as follows: with conventional federal and private student loans, the university or vocational training school receives its tuition money up front and therefore has no direct, continuing financial interest in graduates' financial success. Conversely, ISAs theoretically link the school's financial interests more directly to the student's post-graduation financial success. By funding a portion of students' educations through an ISA, schools are therefore (implicitly) representing to students that the school believes the student will achieve financial success during the repayment term. But if the borrower's payments under an ISA contract do not equal the amount financed, the most likely explanation is that the school did not provide the skills and credentials necessary for the student to achieve even minimal economic success. Thus, most situations in which an ISA borrower does not repay the full amount financed are because the ISA signaled an inflated value of or deficiency in the education being financed. This is not a reason to exempt ISAs from the protections afforded by traditional consumer finance laws and regulations applicable to loans and credit.

Second, ISA providers have designed their products to minimize the chances that a borrower will repay less the amount financed—the possibility of which purportedly exempts them from regulation—and in most cases will repay an amount significantly in excess of the principal. For example, the Rithm School's ISA option allows

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[73] *Outcomes*, Rithm Sch., https://www.rithmschool.com/outcomes (last accessed July 28, 2020). These figures are published on the Rithm School's website with no additional context or details concerning their accuracy or reliability. The Student Borrower Protection Center has not verified these numbers, and makes no representation concerning their accuracy.

[74] *Outcomes*, Hack Reactor, https://www.hackreactor.com/outcomes (last accessed July 28, 2020).

[75] *Income Share Agreements*, Galvanize, https://www.galvanize.com/income-share-agreements?_ga=2.211167253.164899724.1594933374-1447966430.1591556411#isa-calculator (last accessed July 28, 2020).

[76] *Skills Training,* Vemo, https://vemoeducation.com/for-skills-training-income-share-agreements/ (last visited July 29, 2020).

students to borrow $23,000 in exchange for an agreement to repay 17% of earned income for 24 monthly payments.[77] However, since payments are paused (and the ISA repayment term extended) while the borrower makes less than $5,000 per month, borrowers will repay the full principal as long as they make approximately $68,000 in any two of the five years after leaving the program. The Rithm School trains students to "[b]ecome a Software Engineer,"[78] and operates physically in California, where the median household income is $71,228.[79] Median income in San Francisco, where the Rhythm School operates, is $104,552,[80] and median income for a software engineer in San Francisco is over $115,000.[81] Moreover, the Rithm School claims to have a median salary of $115,000 for graduates and a 100% graduation rate.[82] Thus, assuming the Rithm School's figures are accurate, even assuming no income growth the median borrower will pay $1,630 per month until reaching the repayment cap after 22 payments (paying only $288 in the final month) for an effective APR of 27.86%.[83]

In *Oasis Legal Fin. Grp., LLC v. Coffman*, the Colorado Supreme Court explained that in evaluating purportedly "contingent" financial arrangements, courts should "focus on how they are designed to work and how they actually work most of the time."[84] Thus, where an agreement creates a repayment obligation—i.e., debt—at the outset, where the finance company recovered at least the amount advanced 85% of the time, the transactions were deemed loans.[85] The possibility that a small number of ISA borrowers may complete their repayment period without fully repaying the principle merely confirms that the vast majority of ISA borrowers will repay far more than the amount financed, just like traditional loan borrowers. Under these circumstances, there is no

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[77] *Frequently Asked Questions: Income Share Agreements*, Rithm Sch., https://www.rithmschool.com/faq#isa (last visited July 29, 2020).

[78] Rithm School, https://www.rithmschool.com/ (last visited July 29, 2020).

[79] U.S. Census Bureau, *QuickFacts, California, United States, V2019* (July 1, 2019), https://www.census.gov/quickfacts/fact/table/CA,US/RHI125219.

[80] U.S. Census Bureau, *QuickFacts, San Francisco City, California, United States, V2019* (July 1, 2019), https://www.census.gov/quickfacts/fact/table/sanfranciscocitycalifornia,US/RHI125219.

[81] *Software Engineer Salaries in San Francisco, CA Area*, Glassdoor, Inc., https://www.glassdoor.com/Salaries/san-francisco-software-engineer-salary-SRCH_IL.0,13_IM759_KO14,31.htm (last visited July 30, 2020).

[82] *Outcomes*, Rithm Sch., *supra* note 73. These figures are published on the Rithm School's website with no additional context or details concerning their accuracy or reliability. The Student Borrower Protection Center has not verified these numbers and makes no representation concerning their accuracy.

[83] *See Frequently Asked Questions: Income Share Agreements*, Rithm Sch., *supra* note 77. The annual percentage rate is calculated in the manner described below in Section III.A.2.

[84] 361 P.3d 400, 408 (Colo. 2015).

[85] *Id.*

significant contingency that justifies the ISA's usurious interest rate, and ISA providers should not be permitted to evade usury or other state laws applicable to loans.

Most Educational ISAs Include an Absolute Right to Repayment Arising from Factors Independent of Repayment

Even if an absolute repayment obligation were a defining feature of "loans," most ISAs *do* include a right to unconditional repayment of the full repayment cap, an amount well in excess of the initially financed amount,[86] upon the consumer's default. Default can consist of the borrower's failure to make monthly payments, to provide tax information (so that the lender can reconcile the account and collect additional amounts owed over the previous year), to update addresses, or to inform the lender of changes to income.[87] Thus, an ISA borrower who breaches their agreement is in the same situation as a traditional student loan borrower.[88]

Ultimately, ISA providers' decision to forego an automatic right to legal recourse against those graduates whose incomes are insufficient to repay the amount financed within the ISA repayment period is a marketing decision. That decision—to attract borrowers by building in a level of protection against downside risk—makes sense in light of a stark reality for lenders: exercising that right of legal recourse against borrowers whose incomes did not support ISA repayment in the amount of the principal lent for tuition is often not economical in light of the legal fees necessary to obtain a judgment and uncertain prospects of collection. After all, a lender without legal recourse is in substantially the same economic position as a lender with a court order against a judgment-proof debtor. In light of this reality, the lack of an absolute payment obligation merely reflects a calculation by ISA providers that the value of potential judgments against low-earning students is outweighed by the competitive marketing advantage—and purported freedom from federal and state regulation—gained by agreeing to forego such a right. These strategic marketing and resource-allocation decisions provide no basis to deprive students of the protections of state laws governing loans.

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[86] A small number of schools' ISAs set the repayment cap at what it represents as the full cost of the program. For example, the Holberton School represents that "[I]f you pay upfront, tuition is $85,000." *Admissions*, Holberton School, https://www.holbertonschool.com/admissions (last accessed July 29, 2020). However, $85,000 is also the repayment cap for its ISA. *Id.* ($85,000 is the maximum resulting "Estimated Total Tuition Payment" generated by the school's "ISA Estimator for San Francisco). This pricing model raises significant questions relating to the true cost and value of the program, as well as whether the advertisement of a $85,000 program cost is deceptive. *See* 16 C.F.R. § 233.2 (2020) (deceptive to advertise discount from full price that appreciably exceeds price at which sales of the good or service are actually being made in the area).

[87] *E.g.*, *Income Share Agreement*, Rithm Sch., *supra* note 33; *ISA Sample Contract (Academic Year)*, Purdue Univ., *supra* note 11.

[88] Indeed, a defaulted ISA borrower may be in a worse position than their defaulted traditional student loan counterparts, since most ISAs do not include a right to rehabilitate a defaulted obligation.

ISAs are both “credit” for the purposes of federal consumer finance laws and “loans” for the purposes of most state consumer finance laws. As such, they are subject to a constellation of state laws governing the marketing, origination, servicing, and collection of student loans.

ISA Providers and Servicers Must Comply with State Consumer Protection, Consumer Lending, Student Loan Servicing, and Collection Laws

State law applies to each aspect of an ISA's existence. As explained below, state consumer protection statutes—which prohibit unfair or deceptive acts and practices in trade or commerce—apply to all aspects of ISA providers' operations; application of these statutes does not depend on whether ISAs are classified as "credit" or "loans." In addition, because ISAs *do* constitute "credit" and "loans" under many federal and state consumer finance laws, specific licensing and substantive conduct requirements apply at various points in the ISA's life cycle as discussed below.

ISA providers who work with schools offering online instruction must be particularly careful, since extending credit to students across the country exposes them to risk under the consumer protection and consumer finance statutes in all states. For example, Washington's Consumer Protection Act applies to "any commerce directly or indirectly affecting the people of the state of Washington."[89]

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ISA Providers May Violate State Laws—and Federal Laws Enforceable by State Officials—in Originating ISAs

In addition to state laws and federal regulations governing the manner in which ISAs may be marketed, state laws regulating the origination of loans apply to ISAs.

[89] Wash. Rev. Code § 19.86.010(2) (2019).

ISA Providers Appear to be Systematically Violating State Licensing Requirements for Consumer Lenders

Many states require companies and other entities who make consumer loans to be licensed with their relevant regulator. For example, Virginia provides "[n]o person shall engage in the business of making loans to individuals for personal, family, household, or other nonbusiness purposes" and receive interest and fees in excess of 12% APR "without first having obtained a license."[90] Other states from Minnesota to Washington require lenders to obtain licenses in order to extend consumer loans to their constituents.[91] However, it appears that ISA providers have generally not obtained licenses to originate loans in most states.

State licensing and regulatory supervision of lenders—and financial services providers more generally—are critical to protecting consumers from unfair, deceptive, and otherwise abusive practices.[92] Penalties for violating these licensing requirements are therefore harsh.

In addition to regulatory actions that may include prohibitions on making loans and the imposition of penalties, some states mandate the practice of making consumer loans without a license is a *per se* violation of consumer protection statutes that may be enforced by the attorney general or private litigants.[93] In many states it is a crime to issue loans without receiving the requisite license,[94] and unlicensed lenders are subject to civil penalties.[95] Some states also provide that loans issued without appropriate licenses are void, and lenders are prohibited from collecting, receiving, or retaining "any principal, interest, or charges whatsoever with respect to the loan, and any principal or interest paid on the loan shall be recoverable by the person by or for whom payment was made."[96]

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[90] Va. Code Ann. § 6.2-1501.A (2020); *see also* Va. Code Ann. § 6.2-303A (establishing applicable interest rate).

[91] *See, e.g.*, Fla. Stat. Ann. § 516.02 (2020) ("A person must not engage in the business of making consumer finance loans unless she or he is authorized to do so under this chapter or other statutes and unless the person first obtains a license from the office."); Minn. Stat. Ann. § 56.01(a) (2020); Wash. Rev. Code § 31.04.035(1) (2019).

[92] *See generally* Brian Shearer, *Federalism to the Rescue: State Regulators Can and Should Examine for Violations of Federal Consumer Financial Law*, Student Borrower Prot. Ctr. (May 2020), https://protectborrowers.org/wp-content/uploads/2020/05/State-Powers-Report.pdf.

[93] For example, Washington's state legislature proclaimed that "the practices governed by [the state's Consumer Loan Act] are matters vitally affecting the public interest for the purpose of applying" the state's Consumer Protection Act, such that "any violation" of the Consumer Loan Act is not reasonable in relation to the development and preservation of business and is an unfair and deceptive act or practice and unfair method of competition in the conduct of trade or commerce in violation of" the Consumer Protection Act. Wash. Rev. Code § 31.04.208 (2019).

[94] For example, Virginia provides that "[a]ny person, including the members, officers, directors, agents, and employees of an entity, who violates or participates in the violation of any provision of § 6.2-1501 is guilty of a Class 2 misdemeanor." Va. Code Ann. § 6.2-1540 (2020); *see also* Minn. Stat. Ann. § 56.19.1 (listing unlicensed lending as a gross misdemeanor).

[95] Va. Code Ann. § 6.2-1543.

[96] Va. Code Ann. § 6.2-1541. See also Minn. Stat. Ann. § 56.19.4 ("If a person has violated this chapter by not obtaining a license when required to make loans subject to this chapter, the loan is void and the debtor is not obligated to pay any amounts owing. The debtor may recover from such

Because ISAs are generally "credit" and "loans" as used by these statutes, ISA providers that have chosen not to seek licenses under these and similar state licensing requirements are systematically violating state licensing laws and thereby evading the supervisory systems set up by states to maintain sound lending practices and safeguard borrowers from abuse.

Some ISAs Violate State Usury Laws

States generally establish maximum interest rates that may be charged on consumer loans through usury laws. To the extent that ISAs are "loans" or "credit" subject to state usury laws, many are in violation.

To illustrate, we consider the annual percentage rate ("APR") for an ISA offered to students at Hack Reactor, a coding bootcamp that offers courses both in person and online.[97] The school charges an up-front fee of $17,980 for students who do not participate in the ISA, and allows students who do participate in the ISA to finance $15,980 of tuition after a $2,000 down payment. [98] This example will use $15,980 as the amount financed. Other assumptions include (1) a starting income of $115,000, which Hack Reactor represents is its "Median Graduate Salary;[99] (2) income growth of 2% per year; and (3) repayment commencing six months after enrollment.[100]

Hack Reactor's ISA requires payments of 10% of the borrower's income for 48 months or until its repayment cap of $22,372 is reached.[101] Thus, a borrower who earns Hack Reactor's represented median income and experiences modest 2% income growth year-over-year will pay $958.33 per month during their first year and $977.50 per month for the next eleven months before making a single payment of $119.50 to reach the repayment cap in 24 monthly payments. We use the Office of the Comptroller of the Currency's Annual

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persons all amounts paid. No action may be brought under this subdivision more than one year after the date of the last scheduled payment on the loan.").

[97] *Tuition & Financial Options*, Hack Reactor, https://www.hackreactor.com/online-coding-bootcamp#Tuition%20&%20Financial (last visited July 28, 2020).

[98] *Id; see also Income Share Agreements*, Galvanize, *supra* note 75.

[99] *Id.*

[100] Hack Reactor has a three-month full-time program, which is followed by a three-month "grace" period for the ISA. This example assumes that the student makes no payments during the cumulative six months in school and in the grace period before entering repayment.

[101] *See Income Share Agreements*, Galvanize, *supra* note 75. Hack Reactor represents that its payment cap is 1.4 times the deferred portion of the tuition, which appears to be $15,980 after the borrower makes their $2,000 down payment on tuition of $17,980. *Id.*

Percentage Rate Calculation Program for Windows ("APRWIN")[102] to calculate the APR associated with the Hack Reactor ISA for its represented "median" graduate. Accounting for six months with no payments while the student was in school and then their grace period, and then inputting the monthly payments described above, APRWIN calculates a "finance charge" of $6,391.96 and an APR of 23.0327%.

This amount is significantly in excess of most states' usury laws. For example, recall that Virginia law states that "[t]he payment of any amount in money, credit, goods or things in action, as consideration for any sale or assignment of, or order for, the payment of wages, salary, commission, or other compensation for services" is treated as a loan.[103] Virginia law further provides that the difference between the amount credited to the borrower's account ($15,980 in the example above) and the amount ultimately paid by the borrower (the payment cap of $22,372 in the example above) "shall be deemed for the purpose of this chapter to be interest upon the loan from the date of the payment to the date the compensation is payable."[104] Finally, Virginia law provides that this interest ($6,391.96 in the example above) "shall not, in any case, be more than is sufficient to yield, to the person making the loan, interest on his investment at the annual rate of 10 percent."[105] Virginia imposes an obligation on lenders to refund amounts received in excess of that rate[106] and provides that lenders may be liable to the borrower for a penalty twice the amount of the unauthorized charge.[107] Similar consequences result under usury laws in Minnesota,[108] New York,[109] and other states. Many ISAs will prove to be usurious for borrowers who experience economic success after leaving school and violate state law in the process.

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[102] *See Annual Percentage Rate Calculation Program for Windows (APRWIN)*, Office of the Comptroller of the Currency, https://www.occ.treas.gov/publications-and-resources/tools/aprwin/index-aprwin.html (last visited July 28, 2020).

[103] Va. Code Ann. § 6.2-1525.

[104] *Id.*

[105] *Id.* This amount also exceeds Virginia's general 12% usury limit. See Va. Code Ann. § 6.2-303.A.

[106] Va. Code Ann. § 6.2-1542.A.

[107] Va. Code Ann. § 6.2-1542.B (2020) ("Except for excess charges charged and received as the result of a bona fide error of computation that was not made pursuant to a regular course of dealing, the licensee shall be liable to the borrower for a penalty of twice the amount of any unauthorized or excess charge actually received by the licensee and for any court costs and reasonable attorney fees incurred by the borrower.").

[108] Minnesota provides a 6% usury limit for most loans, Minn. Stat. Ann. § 334.01, and 15% for "credit sale contracts." Minn. Stat. Ann. § 47.59.4(b)(1)(iii) (for amounts financed in excess of $1,000). Usurious contracts are generally void except as to a holder in due course. Minn. Stat. Ann. § 334.03.

[109] New York generally prohibits interest rates in excess of 16% per annum. *See* N.Y. Gen. Oblig. Law § 5-501.1; N.Y. Banking Law § 14-a.1. With the exception of certain financial institutions, "[a]ll bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever . . . whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than [16% APR] shall be void." N.Y. Gen. Oblig. Law § 5-511.1. Consumers may bring actions to recover excess interest paid. N.Y. Gen. Oblig. Law § 5-513.

ISAs are Subject to State Fair Lending Laws

As explained in the prior scholarship,[110] ISAs are subject to the federal Equal Credit Opportunity Act ("ECOA"), which prohibits discrimination in any aspect of a credit transaction on the basis of membership in a protected class: race, color, religion, national origin, sex or marital status, age, receipt of public assistance, or the good faith exercise of any right under the Consumer Credit Protection Act.[111] To prove discrimination under an ECOA claim, the person or entity must show either disparate treatment or disparate impact. Disparate treatment can be shown through direct or indirect evidence of explicit or intentional discrimination against a person or entity.[112] Under disparate impact theory, a defendant may be held liable even without an intent to discriminate if its facially-neutral practice had a disproportionate adverse effect on a protected class.[113] The burden then shifts to the defendants to show that the despite the potentially negative effects, a legitimate business rationale justified their practices.[114]

Mr. Hayes and Ms. Milton also explained that many states have enacted their own statutes prohibiting discrimination in credit transactions on the basis of the federally protected categories, as well as familial status, creed, gender identity or expression, military or veteran status, source of income, or disability. For example, the New York State Human Rights Law (NYSHRL)[115] is analyzed in the same way as ECOA.[116] Claims brought under the NYSHRL may therefore be prosecuted on the basis of disparate treatment or disparate impact.[117] District courts in the Second Circuit have used a classic four-part requirement of plaintiffs to establish a prima facie case under ECOA, which includes that the (1) plaintiff was a member of a protected class; (2) plaintiff was an applicant for credit from the defendant; (3) plaintiff qualified for credit but was denied credit; and (4) defendant continued

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[110] Hayes & Milton, *supra* note 1.

[111] 15 U.S.C. § 1691.

[112] Hayes & Milton, *supra* note 1 at 3.

[113] *Id*. at 4; Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J. L. & Pol'y 575, 577 (2018), *available at* https://brooklynworks.brooklaw.edu/jlp/vol26/iss2/3.

[114] Hayes & Milton, *supra* note 1 at 4; Taylor, *The ECOA and Disparate Impact Theory*, *supra* note 113 at 578.

[115] N.Y. Exec. Law § 296-a.

[116] Germain v. M & T Bank Corp., 111 F.Supp.3d 506, 525-26 (S.D.N.Y. 2015).

[117] *Id*. at 525.

to engage in the type of transaction in question with other parties with similar qualifications.[118] This standard would likely carry through to claims about discrimination arising from ISA programs.

Mr. Hayes and Ms. Milton have outlined various ways in which ISA providers may run afoul of the ECOA and its state law counterparts.[119]

ISA Providers, Servicers, and Collectors Must Comply with State Consumer Protection Statutes from Marketing through Final Discharge of the Borrower's ISA Repayment Obligation

All states have adopted generally applicable consumer protection statutes that prohibit unfair or deceptive acts and practices in trade or commerce. Most of these statutes fall into two categories. Many state consumer protection statutes, such as Washington's Consumer Protection Act, broadly prohibit "unfair or deceptive acts or practices in the conduct of any trade or commerce."[120] Generally, a practice is "deceptive" if it has "the capacity to deceive a substantial portion of the public,"[121] or conduct that tends to mislead or could reasonable be found to influence a consumer's behavior.[122] A practice is considered to be "unfair" if it is likely to cause substantial injury to consumers that cannot be avoided and is not outweighed by countervailing benefits, or which offends public policy or is otherwise immoral, unethical, oppressive, or unscrupulous.[123] These state consumer protection statutes are often referred to as "Mini-FTC Acts," since they are modeled on Section 5 of the Federal Trade Commission Act.[124]

[118] *Id*. at 526 (citing *Griffin v. Santander Bank*, No. 12-CV-1249, 2014 WL 204229).

[119] Hayes & Milton, *supra* note 1.

[120] Wash. Rev. Code § 19.86.020 (2019).

[121] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 534–35 (Wash. 1986).

[122] City of Beverly v. Bass River Golf Mgmt., Inc., 93 N.E.3d 852, 863 (Mass. App. Ct. 2018); *see also* Hungate v. Law Office of David B. Rosen, 391 P.3d 1, 18 (Haw. 2017) ("A deceptive act or practice is '(1) a representation, omission, or practice[ ] that (2) is likely to mislead consumers acting reasonably under the circumstances [where] (3) [ ] the representation, omission, or practice is material.'").

[123] *See* 15 U.S.C. § 45(n) (current FTC definition); *see also* Moran v. Prime Healthcare Mgmt., Inc., 208 Cal. Rptr. 3d 303, 317 (Cal. App. Ct. 2016) ("'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers"); Fat Bullies Farm, LLC v. Devenport, 164 A.3d 990, 996 (N.H. 2017) (applying same standard); *Bass River Golf Mgmt., Inc.*, 93 N.E.3d at 863 (applying same standard).

[124] Rush v. Blackburn, 361 P.3d 217, 224–25 (Wash. Ct. App. 2015) (quoting Magney v. Lincoln Mut. Sav. Bank, 659 P.2d 537, 544 (Wash. Ct. App. 1983)).

Other states' consumer protection statutes, such as those in Oregon and Wisconsin, prohibit more targeted categories of practices.[125] For example, Oregon's Unlawful Trade Practices Act prohibits the misrepresentation of a good or service's characteristics, benefits, quantities or qualities,[126] misrepresentations concerning the nature of or obligations incurred in a credit transaction,[127] misrepresentations about the cost of goods or services,[128] or "any other unfair or deceptive conduct in trade or commerce."[129]

Both types of state consumer protection statutes apply to the marketing, origination, servicing, collection, and terms of ISAs. Notably, the ISA industry agrees that these consumer protection statutes apply to ISAs regardless of whether ISAs constitute "credit," "debt," or "loans" under state consumer financial regulations.

Violation of these statutes carry stiff penalties. Upon an action by the attorney general, violators are subject to injunctions, restitution orders,[130] civil penalties ranging up to $50,000 per violation,[131] and other consequences.[132] In addition, many state consumer protection statutes create private rights of actions in which consumers may recover treble and other multiples of their actual damages, as well as attorney's fees.[133]

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[125] *See* Or. Rev. Stat. § 646.607-.607; Wis. Stat. § 100.20 (2020)

[126] Or. Rev. Stat. § 646.608(e).

[127] *Id.* § 646.608(k).

[128] *Id.* § 646.608(s).

[129] *Id.* § 646.608(u).

[130] *E.g.*, 815 Ill. Comp. Stat. Ann. 505/7(a); Wash. Rev. Code § 19.86.080.

[131] *E.g.*, 815 Ill. Comp. Stat. Ann. 505/7(a) ($50,000); Or. Rev. Stat. Ann. § 646.642 ($25,000 for willful use of deceptive and unfair practices); Wash. Rev. Code § 19.86.140 ($2,000).

[132] *E.g.*, 815 Ill. Comp. Stat. Ann. 505/7(a) ("The Court, in its discretion, may exercise all powers necessary, including but not limited to: injunction; revocation, forfeiture or suspension of any license, charter, franchise, certificate or other evidence of authority of any person to do business in this State; appointment of a receiver; dissolution of domestic corporations or association suspension or termination of the right of foreign corporations or associations to do business in this State; and restitution.").

[133] For a comprehensive review of state consumer protection statutes and the remedies available to consumers, see Carolyn Carter, *Consumer Protection In The States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, Nat'l Consumer Law Ctr. (2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf.

[133] *Application and Solicitation Disclosure*, Purdue Univ., *supra* note 14.

ISA Providers and Schools May Violate State Consumer Protection Laws in the Marketing of ISAs

Many ISAs are Deceptively Marketed Using Misrepresentations that They are Not a "Credit" or a "Loan"

As discussed above, ISAs are "credit" and "loans" as those terms are used in applicable law. However, many schools and ISA providers promote ISAs by stating that they are not "credit" or "loans." For example, Purdue University posts an "Application and Solicitation Disclosure" on its website which states that "*** THIS IS NOT A LOAN OR CREDIT***"[134] Other schools' websites include "Frequently Asked Questions" websites that contain similar representations.[135]

Often the ISA documents themselves represent that they are "not a loan."[136] A sample ISA agreement posted by the Rithm School contains the same representation, and also states that "[a]n ISA is not a loan or other credit instrument," even though it identifies the ISA amount as "[t]he cost of the services you will receive through this ISA" and "[a]mount credited to others on your behalf."[137] Because ISAs generally are "loans" and "credit," these statements misrepresent the essence of the parties' contract, and are therefore deceptive in violation of state consumer protection laws. ISA providers, and the schools who promote ISAs through representations that they are not "loans" or "credit," therefore face significant exposure to enforcement actions under state law, including

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[134] *Id.*

[135] *See, e.g.*, *Frequently Asked Questions*, University of Utah, https://isa.utah.edu/frequently-asked-questions/ ("An income share agreement (ISA) is a financial obligation in which a student receives funding for education-related expenses in exchange for paying an agreed upon percentage of income over a defined number of months. It is not a traditional loan or grant"); *Tuition & Income Share Agreement (ISA) Questions*, Lambda School, https://lambdaschool.com/faq#ISA-FAQ ("ISAs are not loans. . . .").

[136] *See, e.g.*, *Sample Disclosure: Income Share Agreement (ISA) Final Disclosure*, https://static1.squarespace.com/static/593afa6e8419c2e12196e424/t/5a08b8a9e4966b7f02ad5855/1510521002550/FinalDisclosure-SampleDisclosure-11-12-2017.pdf. This document was linked by Better Future Forward in response to the frequently asked question "Can I see a copy of BFF's ISA contract." *Frequently Asked Questions (FAQ)*, Better Future Forward, https://www.betterfutureforward.org/frequently-asked-questions (last accessed July 29, 2020).

[137] *Income Share Agreement*, Rithm Sch., *supra* note 33; Austen Allred, *How Income Share Agreements Work*, Lambda Sch. (June 8, 2018), https://lambdaschool.com/the-commons/how-income-share-agreements-work (last accessed July 28, 2020) (discussing "the differences between a loan and an income share agreement"); *Frequently Asked Questions*, Outcome Grp., https://outcomegroup.org/faq/#1570114879036-088a391b-8de3 (last accessed July 28, 2020) (representing that although "Income Share Agreements resemble income-driven loan repayment plans such as those used by the U.S. Department of Education . . . an Income Share Agreement is not a loan"); *About the ISA*, Microverse, https://support.microverse.org/en/articles/2504869-are-there-any-interest-rates-for-the-income-share-agreement (last accessed July 28, 2020) ("The Income Share Agreement is not a loan. . . ."); *Frequently Asked Questions*, GreyAtom, https://greyatom.com/isa-faqs (last accessed July 28, 2020) ("The income share agreement is not a loan.").

the imposition of civil penalties for each and every potential borrower who was exposed to the marketing misrepresentations, as well as each borrower who signed an ISA.[138]

Schools and ISA Providers May Market ISAs through Deceptive Comparisons with Other Financial Products

Because ISAs providers present ISAs as a new and novel financial product, few consumers understand intrinsically how they work, how much they are likely to cost, and how their risks and potential benefits compare with other education financing options. Against this backdrop, ISA providers and school admissions and financial aid offices often provide information for students to compare their option. Unfortunately, some of these marketing materials promote ISAs by skewing their costs and those of competitor products like federal Parent PLUS loans and private student loans.

One example of this deceptive marketing is the "Comparison Tool" created by ISA provider Vemo Education and used by the financial aid offices of schools like Purdue and the University of Utah. For example, Purdue's Frequently Asked Questions webpage for its ISA encourages students to "[c]lick Comparison Tool to see how the Back a Boiler - ISA Fund compares with private student loans and Parent PLUS Loans."[139] This "Comparison Tool" purports to allow students to weigh the forecasted costs of an ISA with those of a Parent PLUS Loan or a traditional private student loan by entering the amount of the ISA or loan, their major, and their expected graduation date. But as detailed in a complaint submitted to the Federal Trade Commission by the Student Borrower Protection Center and National Consumer Law Center,[140] the Comparison Tool systemically overstated the amount of the comparison products and underestimates the cost of ISAs.

First, the Comparison Tool uses false assumptions about the commencement of repayment for Parent PLUS Loans and inaccurately capitalizes interest, which inflates the cost of borrowing for Parent PLUS Loans and makes them seem less desirable in comparison to ISAs. The Comparison Tool provides a repayment cost of $15,727 for a $10,000 Parent PLUS Loan, but using the standard repayment terms would result in repayment costs of $14,603—a difference of $1,324. Second, Vemo's Comparison Tools use outdated and generalized salary data that reflect lower starting incomes than more updated and specific information for graduates of the schools

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[138] *See, e.g.*, State v. Mandatory Poster Agency, Inc., 199 Wash. App. 506, 525–26, 398 P.3d 1271, 1280 (2017) ("[B]ecause each of [the defendant's] 79,354 solicitations had the capacity to deceive, each mailing was a violation, whether or not the recipient purchased its product.").

[139] *FAQ About Back a Boiler—ISA Fund*, Purdue Univ., https://www.purdue.edu/backaboiler/FAQ/index.html (last visited July 22, 2020).

[140] *See Advocates File Complaint with Federal Trade Commission Urge Enforcement Action Against Vemo Education for Its Deceptive Marketing of Income-Share Agreements to Students*, Student Borrower Prot. Ctr. (June 1, 2020), https://protectborrowers.org/vemo-release/.

at which its ISAs are offered. By using lower starting income data,[141] Vemo's Comparison Tools systematically understate the repayment costs of an ISA. Third, Vemo's Comparison Tools have misrepresented the manner in which they calculate the participant's estimated income growth over the repayment term. This sleight-of-hand made the ISA appear to be less expensive than it would be if the Comparison Tool calculated income growth as it represented.[142]

Vemo changed the Comparison Tools' methods for estimating income growth (and its representations about those methods) in the spring of 2020. These changes altered, but did not eliminate, the problem of underestimated ISA repayment costs. Ultimately, consumers' lack of familiarity with ISAs, combined with the stressful nature of educational financing, leaves them vulnerable to deceptive marketing practices.

Some ISAs Contain Unfair and Deceptive Definitions of "Earned Income"

Most ISAs calculate the borrower's monthly repayment obligation as a portion of the borrower's "earned income." While most consumers would understand this as the salary, hourly wages, tips, and bonuses received from their employment, some ISAs surreptitiously expand the sums encompassed within "earned income" by defining that term with reference to specific lines in IRS tax forms. In doing so, particularly where this practice contrasts with statements made in the marketing of these loans, these ISAs generally engage in misrepresentations about the borrower's obligation and impose unfair terms on borrowers that require payment while denying the borrower progress toward satisfying their repayment obligation.

The Rithm School's current sample ISA defines "earned income" as "your total wage and self-employment income. On an annual basis, this amount is currently the sum of Line 7 ("Wages, salaries, tips, etc.") and Line 12

[141] For example, the Comparison Tool that Vemo built for Purdue automatically assigns a "default" starting income for students in specific majors. It does not identify the source for its self-populating, "default" starting incomes and those figures are systemically less than income data published by the U.S. Department of Education and elsewhere on Purdue's own website. Vemo's Comparison Tool for Purdue stated that an accounting major graduating in February of 2020 would have an "expected starting income" of $49,000. However, The U.S. Department of Education's most recent College Scorecard represents that one year after graduation Accounting majors earning a bachelor's degree at Purdue's main campus reported a median annual income of $56,300. Purdue's own website for accounting majors touts an "average starting salary" for undergraduate accounting majors and Certificate of Advanced Accountancy students of $54,492, with an "average bonus" of $3,448 for those receiving a bonus. *Careers in Accounting*, Purdue Univ., https://krannert.purdue.edu/undergraduate/majors/accounting/careers.php (last visited July 22, 2020). These figures are roughly in line with the $55,000 median income that Purdue's Center for Career Opportunities reported for accounting graduates in its May 2018 graduating class. *See Purdue University Salary Survey May 2018 Bachelor and Professional Degrees*, Purdue Univ., https://www.cco.purdue.edu/Files/Uploaded/May2018_salary%20report_new.pdf. Additional data available for download at *First Destination Data*, Purdue Univ., https://www.cco.purdue.edu/Alumni/AlumniStartingSalaries (last visited July 22, 2020).

[142] For example, the University of Utah's Comparison Tool represented that its "Income Expectations" are calculated "[a]ssuming that income grows at 4.2% per year on average. . . ." In fact, the Comparison Tool did not apply an average 4.2% average annual income growth rate. Instead, Vemo multiplied the student's projected first-year income in their first year after graduation (that is, when their income is smallest), and then added the same constant dollar amount each year thereafter. But because that constant dollar amount represents a decreasing percentage of annual income as time goes by, the student's average income growth rate, based on the data generated by the Comparison Tool, was 3.57%, not the 4.2% as represented. *See* Complaint, Request for Investigation, Injunction and Other Relief, *In re* Vemo Educ., Inc., F.T.C. (May 31, 2020), https://protectborrowers.org/wp-content/uploads/2020/05/Vemo-Complaint.pdf.

("Business income or (loss).") of IRS Form 1040. . . ."[143] Purdue's "Sample ISA," when viewed in HTML form, also references Line 7 of IRS Form 1040.[144] However, Line 1 of IRS Form 1040 for the 2019 tax year is for "Wages, salaries, tips, etc." and instructs taxpayers to attach their W-2 forms.[145] For the 2019 tax year, Line 7 of IRS Form 1040, used to define "earned income" by some ISAs, includes two entries. Line 7a requires the taxpayer to input income from Schedule 1, line 9,[146] which in turn constitutes the sum of the taxpayer's "[a]limony received," income from "[r]ental real estate, royalties, partnerships, S Corporations, trusts," and most importantly "[u]nemployment compensation."[147] Line 7b of IRS Form 1040 requires the borrower to add income from these sources to their "Wages, salaries, tips, etc." as well as any taxable interest, taxable social security benefits, and other sources to determine their "total income."[148] Similarly, Line 7 of IRS Form 1040 for the 2018 tax year was the taxpayer's "gross adjusted income,"[149] and included sources such as unemployment compensation.[150]

As an initial matter, the ISA provider's representation that IRS Form 1040 was for "Wages, salaries, tips, etc." is a material misrepresentation for the reasons explained above and because the income basis upon which the borrower's ISA repayment obligation is calculated is an important consideration for students in deciding how to finance their educations. Moreover, the fact that the borrower must pay the income share on unemployment compensation and other sources of income is not even buried in the ISA's fine print—a prospective borrower must first consult IRS Form 1040, and then Schedule 1 to which IRS Form 1040 refers. Prospective borrowers cannot be realistically expected to protect themselves from this deception. More broadly, the inclusion of unemployment benefits and other income sources (such as alimony, interest, and capital gains) unrelated to the education or skills training financed through the ISA is contrary to the basis upon which schools and ISA

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[143] *Income Share Agreement*, Rithm Sch., *supra* note 33.

[144]*ISA Sample Contract (Academic Year)*, Purdue Univ., *supra* note 11. "Sample ISA" in .pdf form refers to Line 1 of IRS Form 1040. *Income Share Agreement (Academic Year 2019-20)*, Purdue Univ., https://www.purdue.edu/backaboiler/disclosure/BaB%20-%202019-20%20-%20Contract%20Standardized%20-Web%20Sample.pdf (last accessed July 29,2 2020). The reason for the discrepancy is unclear. Both the Rithm School's and Purdue's ISA programs are administered by Vemo Education, Inc., making it highly likely that other Vemo-run programs pose the same problems discussed below.

[145] Internal Revenue Service, *Form 1040: U.S. Individual Income Tax Return* (2019), https://www.irs.gov/pub/irs-pdf/f1040.pdf.

[146] *Id.*

[147] Internal Revenue Service, *Form 1040: Schedule 1* (2019), https://www.irs.gov/pub/irs-pdf/f1040s1.pdf. While income-driven repayment plans for federal student loans include unemployment compensation in determining discretionary income upon which the borrower's monthly payment is based, this inclusion does not present the same consumer protection problems discussed below because (a) federal student loans and income-driven repayment plans are not "marketed" in the same manner as ISAs, and (b) borrowers enrolled in federal income-driven repayment plans receive credit toward discharge of their remaining loan balances for payments made during months in which their payment is calculated using unemployment benefits.

[148] Internal Revenue Service, *supra* note 145.

[149] Internal Revenue Service, *Form 1040: U.S. Individual Income Tax Return* (2018), https://www.irs.gov/pub/irs-prior/f1040--2018.pdf.

[150] Internal Revenue Service, *Form 1040: Schedule 1* (2018), https://www.irs.gov/pub/irs-prior/f1040s1--2018.pdf.

providers market the ISAs to students. For example, Rithm School represents that it "is committed to your success. We want to get paid only if you're succeeding after graduation."[151] Particularly since ISA payment obligations are deferred while the borrower is unemployed, borrowers therefore have no reason to believe that their obligation to pay the income share includes sums received as unemployment compensation. This misrepresentation violates state consumer protection laws that prohibit unfair and deceptive acts and practices, discussed below.

The apparent inclusion of unemployment compensation as "earned income" upon which the borrower must make ISA repayment raises several substantive problems with the ISAs themselves. The Rhythm School's ISA provides that "Your account will be placed into a paused status, and you will not make payments if you: . . . Are unemployed (not working but actively seeking employment)."[152] The borrower's account may be placed into deferment for up to 36 months, and during those months the borrower makes no progress toward their obligation to make up to 24 monthly payments.[153] However, the ISA also provides for an "Annual Reconciliation," during which the ISA servicer obtains the borrower's tax records and determines whether the borrower over- or under-paid during the previous year, and bills the borrower for any underpayment.[154] Because "unemployment compensation" is included in the ISA's definition of "earned income" and reflected in Line 7 of IRS Form 1040, the borrower may be required to pay the 17% income share on those benefits during the reconciliation process without receiving corresponding credit toward the maximum monthly payment total for the month(s) in which those unemployment benefits were received. It is fundamentally unfair and injurious to borrowers to require that they pay the income share on amounts received during months in which they are not credited with progress toward the maximum number of monthly payments to satisfy their repayment obligation.[155]

[151] *Frequently Asked Questions: Income Share Agreements*, Rithm Sch., *supra* note 77.

[152] *Income Share Agreement*, Rithm Sch., *supra* note 33.

[153] *Id.*

[154] *Id.*

[155] In the best-case scenarios relating to these sample ISAs, they either (a) typographical errors and the ISAs issued to students refer to the correct line of IRS Form 1040, or (b) notwithstanding the reference to Lines 7 and 12 borrowers' repayment obligations are actually calculated with reference to Line 1. But either one of these circumstances calls into question the ISA provider's ability to manage the origination and servicing of these loans, as well as the ability of the schools' admissions and/or financial aid offices to oversee their ISA programs and counsel students adequately.

Schools that Receive Federal Student Financial Aid Must Abide by the U.S. Department of Education's "Preferred Lender" Regulations when Recommending, Promoting, or Endorsing ISAs

When promoting ISAs or referring students to ISA providers, schools must be cognizant of and comply with applicable regulations concerning "preferred lender" lists. To understand the importance of these regulations and their application to ISA providers at covered institutions, a brief discussion of their background is necessary.

Prior to 2007, many school admissions and financial aid offices maintained "preferred lender" lists, which steered students toward certain lenders to provide loans under the Federal Family Education Loan Program ("FFELP") and private student loans. Being featured on a school's "preferred lender" list was highly lucrative, and two investigative reports by the Senate Health, Education, Labor and Pensions Committee found that private lenders competed for inclusion not by offering the best rates to students, but by agreeing to fund low-quality, default-prone private loans as a "loss leader," and in some cases by literal bribes.[156] The result was disastrous for students, many of whom were saddled with life-altering debt and an education that did not advance their career prospects. In order to ameliorate these problems, Congress passed the Student Loan Sunshine Act[157] as part of the Higher Education Opportunity Act in 2008,[158] and the U.S. Department of Education promulgated regulations for schools (and their affiliates)[159] that receive federal student aid and that "recommend, promote, endorse, or provide information relating to education loans," including "private student loans."[160]

The Department of Education's regulations defined a "preferred lender arrangement" as an agreement under which "a lender provides or otherwise issues education loans to the students" at the school, and the school or school-affiliated organization recommends, promotes, or endorses the lender's education loan products.[161] These

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[156] S. Comm. on Health, Education, Labor and Pensions, Report on Marketing Practices in the Federal Family Education Loan Program (2007); S. Comm. on Health, Education, Labor and Pensions, Second Report on Marketing Practices in the Federal Family Education Loan Program (2007) (reports on file with the author).

[157] H.R. 890, 110th Congress (2007-08).

[158] Pub. Law 110-315 (Aug. 14, 2008).

[159] An "institution-affiliated organization" is one that is directly or indirectly related to the institution, and which recommends, promotes, or endorses education loan products for students at the institution—for example, "an alumni organization, athletic organization, foundation, or social, academic, or professional organization, of a covered institution"—but does not include the "lender" with respect to any education loan issued by that lender. 34 C.F.R. § 601.2(b) (2020).

[160] 34 C.F.R. § 601.1.

[161] 34 C.F.R. § 601.2(b). Private education loans are exempt from the definition of preferred lender arrangement if they are both (a) made by the school or a school-affiliated organization, and (b) funded by the school (or affiliated organization) or donor-directed contributions. 34 C.F.R. § 601.2(b)(3).

regulations define "private education loan" by reference to TILA's implementing regulations" as "an extension of credit" other than a federal student loan that is "extended to a consumer expressly, in whole or in part, for postsecondary educational expenses."[162] "Credit" is defined to mean "the right to defer payment of debt or to incur debt and defer its payment."[163] As previous scholarship explains, ISAs are "credit,"[164] and their providers are "lenders" within the meaning of these regulations.[165] Accordingly, schools that receive federal student aid and promote ISAs must comply with the Department's Preferred Lender regulations.

The Department of Education's regulations require that schools that maintain preferred lender lists must ensure that there are no fewer than two private education loan lenders[166] and disclose the method and criteria that the institution used to select lenders for the list.[167]

Schools that do Not Receive Federal Student Aid Must Abide by Applicable State "Preferred Lender" Regulations when Recommending, Promoting, or Endorsing ISAs

States have also passed regulations for preferred lender arrangements, most of which reach beyond the institutions covered by the Department of Education's regulations—i.e., those that receive federal student aid. For example, Iowa's preferred lender statute applies to schools that offer degrees, certificates, or programs of study that receive either federal student aid or "state funding or assistance."[168] Preferred lender lists at these institutions must include at least three non-affiliated lenders, and disclose to students the criteria for inclusion.[169] Non-compliance may result in civil penalties, and the attorney general may ban offending lenders appearing on any preferred lending list.[170]

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[162] 12 C.F.R. § 226.46(b)(5).

[163] 12 C.F.R. § 226.2(b)(14).

[164] Pearl & Shearer, *supra* note 1.

[165] For private student loans, "lender" is defined with reference to the Truth in Lending Act and "[a]ny other person engaged in the business of securing, making, or extending education loans on behalf of the lender." 34 C.F.R. 601.2(b).

[166] 34 C.F.R. § 601.10(d)(2)(i).

[167] 34 C.F.R. § 601.10(d)(3).

[168] Iowa Code Ann. § 261F.1.1.

[169] Iowa Code Ann. § 261F.6.

[170] Iowa Code Ann. § 261F.8.

The Massachusetts Attorney General has promulgated regulations that apply to for-profit and occupational schools "advertising or doing business within Massachusetts, including schools that provide programs, services, courses, and/or instruction, in whole or in part, through electronic means or on the Internet to students residing in Massachusetts."[171] Those regulations govern "preferred lenders" and "preferred lender lists," defined as "[a]ny Lending Institution or selection of Lending Institutions that a school endorses, promotes, chooses, or assigns preferential status to. . . ."[172] Schools are required to disclose any affiliation between the lender, as well as whether the lender has provided anything of value in exchange for any "advantage or consideration" from the school, such as inclusion on the preferred lending list.[173]

New York's preferred lending regulations apply to colleges, vocational institutions, and other approved programs.[174] New York requires schools who maintain preferred lender lists to select lenders for inclusion based solely upon "the best interests of the borrowers who may use such preferred lender list without regard to the pecuniary interests of the covered institution" and identify the process and criteria by which the lender(s) were selected.[175]

ISA Servicers and Collectors Must Comply with State Servicing and Collection Laws

After an ISA borrower has left school and any applicable grace period has expired, their repayment obligation begins, and they begin to interact more regularly with their "servicer," the company charged with maintaining and communicating about their account and sending billing statements and receiving payments.

State Student Loan Servicing Laws

A growing number of states have implemented laws requiring that student loan servicers be licensed by state regulatory agencies, imposing affirmative duties on those servicers, and prohibiting a variety of practices that

[171] 940 Mass. Code Regs. 31.02.

[172] 940 Mass. Code Regs. 31.03.

[173] 940 Mass. Code Regs. 31.07(3). In addition, schools may not discourage students from using another lender or allow the lender to identify its employees as agents of the school. 940 Mass. Code Regs. 31.07(4), (5).

[174] N.Y. Educ. Law § 620(2) (McKinney 2020) (incorporating N.Y. Educ. Law § 601).

[175] N.Y. Educ. Law § 627(1), (3).

harm borrowers.[176] These laws were prompted by widespread problems in the student loan servicing industry, which resulted in borrower complaints of improperly applied payments, misrepresentations and poor communication from servicers, administrative problems when servicing on a loan was transferred between companies, abusive collection practices, and other issues.[177]

ISAs used to finance a student's education fall within states' definitions of "student loan." For example, Washington's Consumer Loan Act, as amended by the State's 2018 Student Loan Bill of Rights, defines "student education loan" in relevant part as "any loan solely for personal use to finance postsecondary education and costs of attendance at an educational institution."[178] Similarly, California's Student Loan Servicing Act defines "student loan" as "any loan made solely for use to finance a postsecondary education and costs of attendance at a postsecondary institution, including, but not limited to, tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses."[179] Meanwhile, New York's banking law defines "student loan" as "any loan to a borrower to finance postsecondary education or expenses related to postsecondary education."[180] These definitions share two elements. First, the transaction must be a "loan." Second, the loan must be for educational expenses, including room and board.

The ISAs offered by companies like Vemo Education, Inc. to students from Purdue, the University of Utah, General Assembly, and other schools meet this definition. First, these ISAs are "loans" for the reasons explained above. Second, these ISAs are marketed as a way for students to pay for educational expenses. For example, one ISA provider explains that "[w]ith an ISA program, schools offer students up-front education funding."[181] Schools also emphasize that the ISAs offer through their admissions and financial aid offices emphasize that ISAs are used to pay student tuition. For example, General Assembly describes its "Catalyst" ISA as "a contract in which a

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[176] *See, e.g.*, Andrew Kreighnbaum, *States Put Stamp on Student Loan Oversight*, Insight Higher Ed (July 19, 2019) https://www.insidehighered.com/news/2019/07/19/states-pass-flurry-bills-targeting-loan-servicers.

[177] These problems have been described in detail in a series of lawsuits brought by state attorneys general against student loan servicers. *See, e.g.*, California v. Navient Corp. et al., Case No. CGC-18-567732 in the Superior Court of the State of California for the County of San Francisco; Illinois v. Navient Corp. et al., Case No. 17 CH 761 in the Circuit Court of Cook County, Illinois; Mississippi v. Navient Corp., No. 25CHI:18-cv-982 in the Hinds County Chancery Court; New York v. Pennsylvania Higher Education Assistance Agency, Case No. 19-cv-09155 in the U.S. District Court for the Southern District of New York; Pennsylvania v. Navient Corp. and Navient Solutions, LLC, Case No. 3:17-cv-01814-RDM in the U.S. District Court for the Middle District of Pennsylvania; Washington v. Navient Corp. et al., Case No. 17-2-01115-1 SEA in the Superior Court of Washington in and for King County.

[178] Wash. Rev. Code § 31.04.015(32) (2019).

[179] Cal. Fin. Code § 28104(m)(1) (West 2020).

[180] N.Y. Banking Law § 710(8) (McKinney 2020).

[181] Vemo Educ., https://vemoeducation.com/ (last visited July 22, 2020).

student receives educational funding."[182] Purdue's financial aid offices explains that its "Back a Boiler" ISA is "is a contractual agreement in which a student receives education funding."[183] ISAs issued through or in connection with universities, skill-based training programs, and other educational institutions are therefore "student loans" for the purposes of state student loan servicing laws.

State student loan servicing laws generally define "servicing" to include receiving and applying payments to the borrower's account while the account is in repayment, and maintaining the account and communicating with the borrower while the account is not in repayment, as well as communicating with borrowers to facilitate these activities.[184] ISA providers like Vemo promote "Turnkey Servicing," which involves "[h]igh-quality, onshore servicing of student accounts along with sharing best practices."[185] Moreover, ISA requirements of borrowers mean that their interactions with companies before and during repayment involve "servicing" by those companies. For example, borrowers must make monthly payments; the servicers must receive and apply them to the borrowers' accounts. Borrowers must communicate changes in income and provide end-of-year tax information; servicers must adjust monthly payment amounts and reconcile borrowers' obligations. These activities all involve "servicing" as defined by the state laws discussed above.

Because ISAs are "student loans" and "student education loans" under the terms of these state statutes, companies that service them must obtain licenses in the growing number of states that have passed such laws. For example, California law provides that "[n]o person shall engage in the business of servicing a student loan in this state without first obtaining a license."[186] ISA servicers that have chosen not to seek licenses under these and similar state licensing requirements are systematically violating state licensing laws, and seeking to avoid regulatory oversight. This lack of supervision creates a danger that ISA borrowers will experience the same servicing failures and attendant harm that caused state legislatures to pass student loan servicing statutes in the first place.

ISA servicers' decisions not to become licensed as student loan servicers indicates that they do not intend to comply with the substantive requirements of state student loan servicing laws, which provide important

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[182] *Catalyst: Learn Now, Pay After You're Hired*, Gen. Assembly, *supra* note 10.

[183] *FAQ About Back a Boiler—ISA Fund*, Purdue Univ., *supra* note 139.

[184] *See, e.g.*, Cal. Fin. Code § 28104(l).

[185] *Skills Training*, Vemo, *supra* note 76.

[186] Cal. Fin. Code § 28102(a); *see also, e.g.*, N.Y. Banking Law § 711 ("no person shall engage in the business of servicing student loans owed by one or more borrowers residing in this state without first being licensed"); Wash. Rev. Code § 31.04.035 ("No person may . . . service or modify student education loans, without first obtaining and maintaining a license in accordance with this chapter . . . .").

protections for student loan borrowers. For example, states such as California and Colorado set deadlines for servicer responses to written inquiries,[187] establish notices and procedures where servicing is transferred,[188] and prohibit misstatements, misapplication of payments, and certain credit reporting practices.[189] States should therefore act to ensure that ISA servicers become licensed and that borrowers receive the same important protections as their peers who take out traditional student loans. The consequences for failure to become licensed are significant. For example, violation of the licensing requirements of California's Student Loan Servicing Act may result a cease and desist order and the imposition of civil penalties,[190] as well as a twelve-month bar on servicing student loans in the state.[191] Other states with student loan servicing statutes also provide for injunctions and civil penalties in actions by the relevant financial regulator.[192]

State Debt Collection Laws

In addition to compliance with licensing and conduct standards for student loan servicers, companies who collect defaulted ISAs on behalf of others must comply with state fair debt collection practices law. As detailed in a contemporaneous paper, ISA collections are subject to the requirements of the federal Fair Debt Collection Practices Act.[193] State laws protecting consumers from unfair, deceptive, and abusive debt collection practices also apply to those attempting to collect on defaulted ISA. Many of these state laws apply regardless of whether ISAs are deemed to be "loans" or "credit" under the statutes discussed above. For example, Washington's Collection

Because the consequence for ISA borrowers of these process-based defaults may be the acceleration of the full repayment cap, consumer advocates are justifiably concerned about the methods that may be used to collect those sums.

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[187] Cal. Fin. Code § 28130(g); Colo. Rev. Stat. Ann. § 5-20-108(2); N.Y. Banking Law § 721(6).

[188] Cal. Fin. Code § 28134; Colo. Rev. Stat. Ann. § 5-20-108(5); N.Y. Banking Law § 721(3).

[189] Cal. Fin. Code § 28136; Colo. Rev. Stat. Ann. § 5-20-109; N.Y. Banking Law §§ 719, 721(1).

[190] Cal. Fin. Code § 28170(a).

[191] Cal. Fin. Code § 28156(a)(1). In addition, conviction of a crime or the imposition of civil liability involving an offense "reasonably related to the qualifications, functions, or duties of a person engaged in" student loan servicing may also result in a prohibition on participating in servicing activities. Cal. Fin. Code § 28156(a)(2). ISA servicers who are also involved in the marketing and origination of ISAs should therefore consider carefully the risks of not obtaining a consumer lending and student loan servicing license in each state that has enacted such laws, and ensuring that its marketing is not deceptive.

[192] *E.g.*, N.J. Stat. Ann. § 17:16ZZ-11.

[193] Pearl & Shearer, *supra* note 1.

Agency Act applies to the collection of "claims," which are defined as "any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied."[194]

At this time, educational ISAs are a relatively recent development, and many have not yet entered the repayment stage and likely even fewer have defaulted. Accordingly, while we have not yet had the opportunity to observe the behavior of companies collecting on defaulted ISAs, there are reasons for concern. As noted above, most ISAs provide that a borrower is in default when they fail to provide required information or documents in a timely fashion, in addition to failure to make payments. Based on the experiences of borrowers enrolled in income-driven repayment programs on federal student loans, defaults may occur as the result of servicers' failure to communicate adequately or processing errors,[195] and predominantly affect borrowers in vulnerable populations. Because the consequence for ISA borrowers of these process-based defaults may be the acceleration of the full repayment cap, consumer advocates are justifiably concerned about the methods that may be used to collect those sums.

[194] Wash. Rev. Code § 19.16.100(2) (2019).

[195] *See supra* note 177 (listing lawsuits).

State Regulators and Attorneys General Should Act Diligently to Ensure Compliance with State Law and Prevent Consumer Harm

The growth of ISAs as a financing tool for education requires a comprehensive response from state higher education and financial regulators, as well as attorneys general. State regulators overseeing the schools offing or promoting ISAs—be they public universities, non- or for-profit colleges, or non-degree-granting institutions like vocational schools or coding "bootcamps"—should carefully examine the ways in which ISAs are presented and promoted by admissions and financial aid offices. As described above, even sophisticated financial aid offices in large public research institutions using information supplied by a leading ISA provider have promoted ISAs in misleading ways. Financial regulators should also require licensing for any educational ISAs providers and servicers allowed to operate in their states. These regulators should supervise providers and servicers carefully to ensure compliance with all applicable statutes and regulations.

Even sophisticated financial aid offices in large public research institutions using information supplied by a leading ISA provider have promoted ISAs in misleading ways.

In addition to employing the full panoply of applicable state law to protect students, because ISAs generally constitute "credit" under federal consumer finance statutes, state regulators and state attorneys general should include in their comprehensive approach to ISAs the robust exercise of their authority under the federal Consumer Financial Protection Act, or "Dodd-Frank," to investigate violations of and enforce certain critical federal consumer financial laws.[196] These laws include Dodd-Frank's prohibition on "unfair," "deceptive" and "abusive" acts or practices,[197] as well as enumerated federal laws[198] that include the Electronic Fund Transfer

[196] *See* 12 U.S.C. § 5552(a)(1). For a discussion of state regulators' role in enforcing these statutes, see Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd–Frank*, 99 Iowa L. Rev. 115 (2013).

[197] *See id.* § 5531(a).

[198] *See id.* § 5481(12) (defining "enumerated consumer laws").

Act;[199] ECOA;[200] the Fair Credit Reporting Act;[201] FDCPA;[202] and TILA.[203] Commentators and case law establish that state officials have expansive interpretation to enforce these laws pursuant to their Dodd-Frank authority.[204] Only by invoking all applicable legal tools can state officials protect their constituents from potential harms arising from the modern iteration of educational ISAs.

199 15 U.S.C. § 1693.

200 *Id.* § 1691.

201 *Id.* § 1681.

202 *Id.* § 1692.

203 *Id.* § 1601.

204 Shearer, *supra* note 92 at 18 (citing Totten, *supra* note 196).