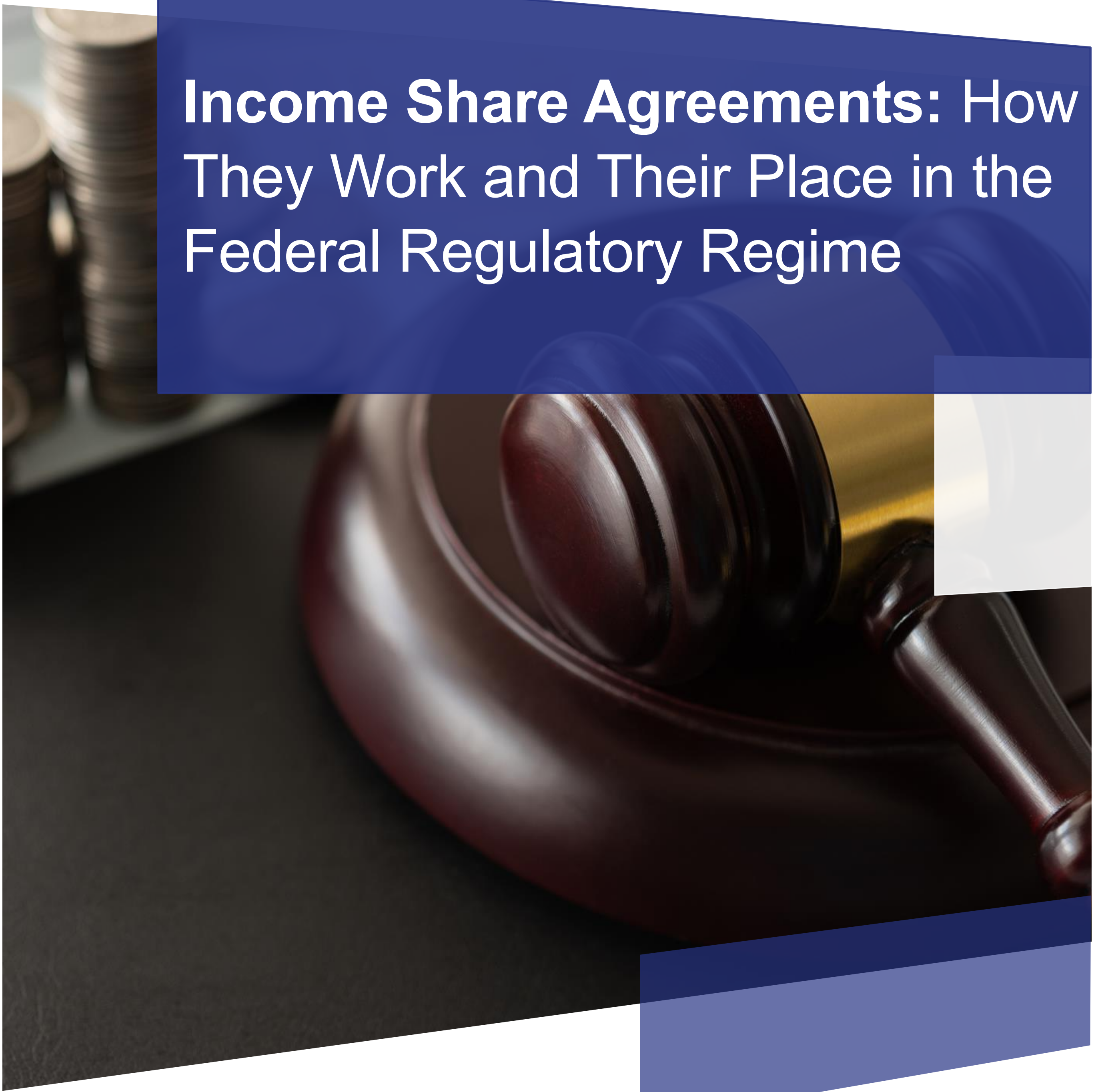
# **Income Share Agreements:** How They Work and Their Place in the Federal Regulatory Regime



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# Executive Summary

Income Share Agreements ("ISAs") are a relatively new type of financing arrangement that is gaining ground in the world of higher education. Under a typical education-focused ISA, a school (the "Provider") extends education financing to students in exchange for a share of the student's future earned income. The education space currently includes a variety of different education financial aid and finance options, including scholarships, grants and government and private student loans; ISAs are a unique, alternative financing source that is distinct from that array of options.

As with any emerging technology or new financial instrument, stakeholders in the education ecosystem are surveying the current legal landscape and its potential impact on ISAs. Certain structural elements of ISAs differ from key characteristics of credit arrangements and prove integral to this analysis. Unlike a loan, where the borrower must repay a principal loan amount with interest, the existence and amount of a student's payment obligations under an ISA are tied directly to the existence and amount of her future income over a predetermined period of time. An ISA Provider must therefore assume the risk that a student may not have sufficient income to trigger a payment obligation under the ISA agreement—a risk lenders do not face.

A review of statutory and regulatory language, as well as interpretive guidance and case law, suggests that certain laws, like the Truth in Lending Act, apply only to traditional credit arrangements and thus do not encompass alternatives like ISAs that lack certain hallmarks of a credit transaction. Other laws, like the Equal Credit Opportunity Act and Fair Credit Reporting Act appear to encompass just credit transactions. However, a deeper analysis reveals that those laws may apply to ISAs in whole or in part for policy or other reasons. Finally, laws concerning privacy, debt collection and certain types of payments have more broad application not predicated on the existence of a credit transaction.

In this paper, we provide a broad overview of ISAs, including key elements of an ISA agreement, and show how a typical ISA might operate. We also highlight certain fundamental distinctions between loans and ISAs to underscore how ISAs compare to the predominant education financing option. We then examine how select existing federal consumer finance laws might apply to ISAs in light of those important differences. Finally, we undertake a high-level analysis of anti-discrimination and fair lending concepts to address recent concerns about potential discriminatory impacts in the ISA context.

# Background

Three types of ISA[1] programs are generally emerging in this rapidly developing market. The first, and most common, of these programs are school-based educational ISAs where the school itself acts as the Provider. Under this arrangement, the school provides educational funding to cover costs such as tuition, books, room and board, etc., to students enrolled at that particular school. In the second type of program, third-party Providers offer direct-to-consumer educational ISAs. Here, an outside Provider unaffiliated with a particular school funds a student's education expenses.[2] Finally, some entities offer direct to consumer non-educational ISAs. These ISAs are completely divorced from any higher education funding and offer, for example, ISAs as a replacement for personal bank loans.[3] This paper will primarily focus on school-based education-related ISAs, as they are the most common in the market today.

Adoption of ISAs by education providers is increasing both in the United States and in other parts of the world.[4] Multiple institutions of higher learning have begun offering students the option to forgo or supplement student loans in favor of an ISA arrangement. For example, Purdue University implemented its "Back a Boiler" program in the fall of 2016, which offered ISAs to junior and senior level students. The university now offers ISAs to qualified sophomores as well.[5] Several other colleges have followed suit,[6] as have non-traditional forms of higher education, such as skills based training providers.[7]

The rise in ISAs, while mostly positive, has drawn pushback from consumer advocates on both sides of the political spectrum. Massachusetts Senator Elizabeth Warren has expressed scepticism about ISAs, stating that "the terms of ISA contracts can be predatory and dangerous for students" while also noting that and ISAs have received little federal oversight to date.[8] Similarly, financial advisor and radio personality Dave Ramsey—famous for his aversion to all types of consumer debt—views ISAs simply as a loan by another name.[9] Much of this criticism appears to arise from analysis of hypothetical ISA contracts without considering how ISAs are structured in practice. In other words, these criticisms overlook certain consumer protections and incentives built-into these types of arrangements. These critics also fail to acknowledge that school based Providers can rely on existing institutions within the school, such as the financial aid and career development offices, to provide oversight on the ISA program and career guidance to students.

Before analyzing how ISAs fit into the current legal regime,[10] it is first necessary to understand how ISAs are designed, how they are different from traditional loans, and how they can work in practice.

## ISA Structure and Key Terms

At its core an ISA is a reciprocal promise between a student and Provider.[11] The Provider, after admitting a student to attend the educational institution, credits the student an amount of money to use for educational expenses. In turn, the student pledges to pay a predetermined percentage of her future income to the Provider over a period of time. Typical ISAs contain many important terms to balance incentives and provide protection to both the student and Provider. The following is a brief outline of an ISA's structure, a summary of key terms and consumer protection features commonly found in ISAs, as well as an example of an ISA to show how Providers can implement such arrangements.[12]

- **ISA Amount**: The amount of initial funding provided to the student by the Provider. The ISA agreement may limit how the ISA Amount is used, and is typically credited to cover specific educational expenses, like tuition.
- **Income Share**: The percentage of income the student will pay the Provider. This amount is typically calculated as a fixed percentage of the student's gross monthly or annual income. Alternatively—although uncommon—Income Share may be calculated using a particularized source of income, such as income derived from working in a specified job field. Thus, Providers may be paid only if students are employed in a predetermined profession, usually the profession for which the student sought the education, certification or license.
- **Grace Period**: The amount of time between the end of student's educational program and the start of student's payment obligations. A typical grace period may last a few months, depending on the field of study, profession, and structure of the particular ISA.

- **Payment Cap**: The maximum amount a student will pay under the ISA. This amount is usually a multiple of the ISA Amount. For example, a student with a Payment Cap of 1.5x of the ISA Amount has a Payment Cap of $15,000 if the ISA Amount is $10,000. The Payment Cap benefits relatively high-income earners, and can be prepaid under many ISAs without any penalty. This is an important consumer protection aspect of many ISAs.

- **Maximum Number of Payments (Payment Term)**:[13] The maximum number of monthly payments a Student must make under the ISA. A student who makes the maximum number of qualifying payments (*i.e.*, payments based on Income Share when a student's income is over the Minimum Income) is discharged from all payment obligations under the ISA, even if the student has not reached the Payment Cap. Payments are not due during periods when the student is in school or within a grace period, as well as in any month during which the students' incomes are below the Monthly Minimum Income (see below).

- **Maximum Payment Term (Payment Window)**:[14] The Maximum Payment term is the maximum number of months during which a monthly payment may be required. After the end of the Maximum Payment Term, no further payments will be required under the ISA regardless of how many payments have been made or how much has been paid. In other words, the student's ISA obligations can end even if the student has paid less than the ISA Amount, or even if the student has paid nothing at all.

- **Monthly Minimum Income**: The amount of income necessary to trigger a student's payment obligations. If a student earns less than a certain amount of money during each month of the Payment Term, the student is not obligated to make ISA payments for that month. Months in which payments are not required due to low earnings do not extend the Maximum Payment Term, but also do not qualify as a monthly payment for purposes of the Maximum Number of Payments.

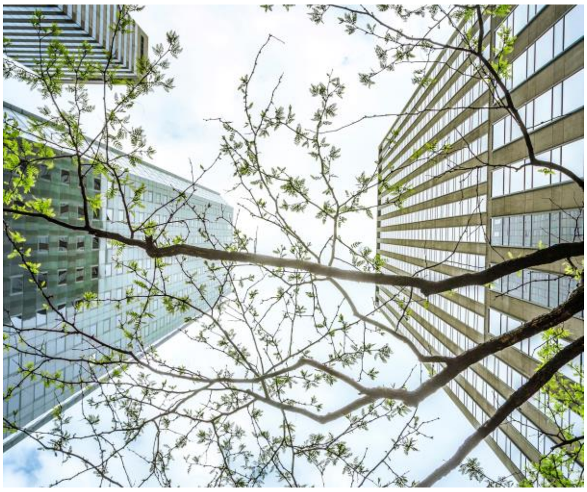
- **Annual Reconciliation**: Providers require students to verify their income both at the end of the Grace Period (so that monthly payment amounts can be determined) and at various points thereafter, often yearly. Students are typically required to submit copies of documents (pay-stubs, IRS Forms W-2, 1099 or 4506T, and other forms of income documentation, etc.) evidencing their date of employment and actual income.

- **Default**: Unlike a loan, non-payment under an ISA may not be an event of Default if, among other things, the student's income is less than the Monthly Minimum Income. Examples of events of default in a typical ISA may include consistent and prolonged non-payment when the student's income exceeds the Monthly Minimum Income, failure to provide sufficient documents to verify the student's income, or providing false, misleading or deceptive information to the Provider.

## Example of a Typical ISA

The following is a hypothetical ISA arrangement in a traditional higher education setting. In this example, the Provider provides a student $15,000 for educational services (the ISA Amount).[15] The student's payment obligations begin at the expiration of a grace period (similar to the grace periods afforded in student loans) and are only triggered if the student's gross income is greater than $25,000 per year ($2,083.33/month) (the Minimum Income). In return, the student pledges to pay the Provider 5.00 percent of her future gross income (the Income Share).[16]

The maximum amount the student could pay is 150 percent of the ISA Amount, or $22,500 (the Payment Cap). Alternatively, the student could make up to 60 monthly payments under the ISA (the Maximum Number of Payments), unless she reaches the Payment Cap. In any event, the student's payment obligations will end at the *earliest* of (i) making the Maximum Number of Payments, (ii) reaching the Payment Cap, or (iii) at the end of the Payment Term, when more than 100 months have elapsed after the grace period ends.



Under this arrangement, whether a student is required to make any payments, and the amount of money a student will pay, is tied to the income the student is able to earn. The following chart illustrates how variations in income impact payment rates and a Provider's return on investment:

| ISA Payment Example | $15,000 Funded, 5% Income Share[1] | | | | | |
|---|---|---|---|---|---|---|
| **Income** | **$20,000** | **$40,000** | **$60,000** | **$80,000** | **$100,000** | **$120,000** |
| Monthly Payment Amount | $0 | $166.66 | $250 | $333.33 | $416.66 | $500 |
| Number of Monthly Payments | 0* | 60 | 60 | 36 | 54** | 45** |
| Payment Term Used (100 Months Maximum) | 100 | 60 | 60 | 100*** | 54 | 45 |
| Income Share | 5% | 5% | 5% | 5% | 5% | 5% |
| ISA Amount | $15,000 | $15,000 | $15,000 | $15,000 | $15,000 | $15,000 |
| **Total Amount Paid** | **$0** | **$10,000** | **$15,000** | **$12,000** | **$22,500** | **$22,500** |

* No payments for 100 months because Income never exceeded the Minimum Income.

** Payment Cap reached.

*** Indicates student's income did not exceed the Monthly Minimum Income for 64 out of 100 months of the Maximum Payment Term. Student was unemployed, underemployed, or otherwise did not work during this period.

As is evident from the model, income earners at the extreme ends of the spectrum are protected in different ways. If a student only manages to earn $20,000 in gross income over a 100-month period, she will owe $0 and her ISA obligations terminate. In contrast, a high earner making $120,000 per year will discharge her ISA in only 3.75 years after reaching the payment cap of $22,500.[17]

Further, the amounts paid by income earners in the middle are analogous, if not lower, to those paid under both Federal and private student loans. For example, a student who takes out a private student loan for $15,000 at 10.00 percent interest (a typical rate for private loans with no cosigner) would pay $23,786.84 in principal and interest over 10 years ($198.23/month) and $19,122.24 over 5 years ($318.71/month).[18] Similarly, a graduate student or parent with a Direct PLUS Loan at 7.08 percent interest would pay $20,973.82 in principal and interest over 10 years ($174.78/month) or $17,855.07 over 5 years ($ 297.58/month). These examples assume that the student timely meets his payment obligations for the life of the loan, although failure to do so could lead to a much higher repayment amount due to accruing interest, late fees, etc.

## Comparing Loans and ISAs

Most people are familiar with the structure of student or personal loans. An institution, typically a bank or the United States Department of Education, loans money to a borrower to cover education related expenses. These expenses include tuition, books, housing, food and other living expenses. Repayment is typically deferred until after the student graduates or stops attending school full time. At present, federal student loan rates vary from 4.53% to 7.08 percent, and personal loans may be much higher.[19] Unless forgiven through death—or, in the case of income driven repayment plans, the passage of 20 years (undergraduate loan) or 25 years (graduate loan)—the loan principal and all accrued interest must be repaid in order for the loan to be discharged. Additionally, repayment periods for loans are typically much longer than those for ISAs. This can substantially increase the amount a student will ultimately pay a loan provider.

Moreover, interest on a student loan accrues while the student is in forbearance (or in delinquency), or during periods when an individual is making income-driven repayments, and is capitalized into the principal when the repayment period restarts. Because there is no cap on the amount of interest that may accrue, a student's loan balance can theoretically grow forever.[20] Certain federal student loans are eligible for forgiveness—although the number of loans actually forgiven under this policy suggests this promise may be illusory.[21] Student loans are virtually non-dischargeable in bankruptcy,[22] although there is some political movement to provide bankruptcy relief for the roughly 25 percent of borrowers who are in delinquency or default of their student loan obligations.[23]

Students have several options in structuring their student loan repayment schedule with respect to Federal loans. The student may repay under the Standard Plan of equal monthly payments in repayment periods up to 10 years (up to 25 years if under the Extended Repayment Plan),[24] or between 10 years and 30 years for consolidation loans.[25] The Department of Education also permits students to repay loans on a graduated basis,[26] where payments increase every two years under the assumption that a borrower's income will increase over time,[27] as well as "income driven" or "income-sensitive" plans.[28] Income driven repayment plans vary, but will generally require a borrower to make payments based on between 10 and 20 percent of her "discretionary" income.[29] For income-sensitive plans, monthly payment obligations increase or decrease based on the borrower's annual income over a 10 year term.[30]

ISAs differ from student loans in three primary ways. First, a student's payment obligations under an ISA are dependent entirely on the existence and amount of a student's gross earned income. Second, a student's payment obligations are subject to a maximum Payment Cap, which is typically a multiple of the ISA Amount. Finally, students are only bound to make payments under the ISA for a specific number of payments over a predetermined amount of time. As discussed below, this three legged structure can protect students from adverse outcomes that many students may face when bound to a student loan.

### The Income Share

Perhaps the most notable feature of an ISA is the basis of the student's payment obligations—income. Payment obligations under an ISA are tied directly to the existence and amount of a student's gross earned income at the time of payment to the Provider, on a percentage basis, and are suspended if the student does not make sufficient income.

Although similar to an income-driven or sensitive plan, an ISA does not charge interest or calculate a principal that must be repaid. An income based repayment loan will accrue interest over the repayment term and monthly payments are first applied to the loan's accrued interest, and then to the principal balance. Income based loans also typically have much longer repayment terms than ISAs, ranging from 10 years under income-sensitive to 25 years under income driven plans.[31] Unlike an ISA, a borrower under an income based repayment plan is obligated to repay the entire initial loan amount (plus interest) unless and until the borrower makes timely payments for the duration of the repayment period.

### The Maximum Payment Cap

ISAs typically include a maximum payment cap, usually calculated as a multiple of the ISA Amount, which provides a student whose gross income is relatively high protection against payments to the Provider far exceeding the ISA Amount. In other words, an ISA provides a student both downside and upside protection depending on her range in income. If her income is relatively low, a student will pay less than a comparable loan payment and discharge of the ISA obligation is not tied to repayment of principal and accrued interest. Further, a student's payment obligations are suspended during periods where her monthly gross income does not meet a predetermined minimum. On the other hand, a Student with relatively high income will discharge her obligations when she satisfies the maximum payment cap, preventing burdensome and potentially disproportionate recovery by the

Provider. As demonstrated in Table 1, income earners on either end of the bell curve are protected from onerous payment obligations.

### ISA Obligations are Time Bound

Finally, ISAs are limited temporally in two significant ways. First, ISAs typically mandate a Maximum Number of Payments that the student is obligated to make to the Provider. Second, a student is only bound to make payments under the ISA within a predetermined period. Upon expiration of the grace period after leaving school, a student must make payments under the ISA if her monthly gross income exceeds a predetermined minimum threshold. If her income is above this minimum amount, the student is only obligated to make a certain number of monthly payments before the ISA is discharged. On the other hand, if her income does not reach this minimum threshold, payment obligations are suspended until her income increases. If it never exceeds the minimum threshold, the payment obligation is excused after a period of time.

### Built-In Consumer Protections

Time-based limitations, in conjunction with the payment cap and income based payment structure, creates a three-pronged structure that limits a student’s exposure in the amount it will pay to a Provider. This arrangement simultaneously provides students downside protection in the case of a loss of employment, reduction in salary, and the various hazards associated with federal student loans, such as capitalization of unpaid interest following forbearance periods or negative amortization when making income-driven payments.

These unique benefits are available to students across the income spectrum. For low earners, ISAs have built in protection in case of un-employment or under-employment; unlike a standard payment on a federal student loan, a student’s payment obligations under an ISA fluctuate based on the students ability to pay, do not accrue interest when payments are not required, and terminate on a date certain. High-income earners also benefit from the ISAs structure, in that they have certainty in their maximum payment obligations, protection against loss of employment or a reduction in income, and are not handcuffed to jobs they dislike simply because the high income allows them to make their loan payments. Middle-income earners get both downside and upside protection for payments roughly equal to those due under a federal student loan.

# Federal Law Analysis

The distinctions between loans and ISAs play an important role in the potential coverage of select federal consumer financial laws.[32] In particular, the definitions of "credit" and related terms contained in those laws are often key to determining their applicability to ISAs.[33] In light of that, our analysis is presented in two broad categories: laws where coverage depends on the scope of what constitutes "credit" and laws that may apply regardless of whether ISAs are deemed credit transactions.

### Federal Consumer Financial Laws That Involve "Credit"

Unlike traditional forms of credit, an ISA obligation does not guarantee payment to the ISA provider. Rather, an ISA provider's right to receive payments pursuant to an ISA agreement is entirely contingent upon the level of employment of the student during the ISA payment period. If the student has no earned income, or an earned income that is below the minimum income threshold, the ISA provider is not entitled to a payment. A student lender, by contrast, maintains the right to collect the outstanding principal loan amount and interest set forth in the loan documents without regard to the student's earnings status or ability to repay.[34]

The balance of risk and absence of an absolute right to collect advanced funds are what distinguish traditional credit, such as loans, from an ISA. These key distinctions directly affect the application of certain federal consumer financial laws. We review a handful of such laws where coverage depends, at least in part, on whether the relevant financial product constitutes credit or a loan.

As discussed in more detail below, following our analysis of relevant statutory and regulatory language, caselaw and interpretive guidance, we conclude that ISAs fall outside of the meaning and scope of traditional forms of credit. As a result, some of those federal consumer financial laws may not apply in the ISA context.

## The Truth in Lending Act

The Truth in Lending Act ("TILA")[35], implemented by Regulation Z ("Reg. Z")[36], was enacted in 1968 as part of the Consumer Credit Protection Act. TILA requires entities that extend credit to consumers to make certain written disclosures concerning finance charges and related aspects of credit transactions.[37] TILA has been amended on numerous occasions, adding requirements for credit cards, certain mortgage transactions and a host of other products and services.

The scope and application of TILA turns on statutory language that is either broadly defined or undefined, and presupposes the existence of a loan and a lender. Thus TILA and Reg. Z provide little guidance on whether non-traditional financing vehicles like an ISA are covered by their provisions.

For example, the definition of "credit" under TILA is defined as "the right granted by a creditor to a debtor to defer payment of a debt or to incur debt and defer its payment."[38] The statute does not define the terms "debt" or "debtor." While the term "creditor" is defined, the definition ties back to "credit":

> The term "creditor" refers only to 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 instalments 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 or, if there is no such evidence of indebtedness, by agreement.[39]

The defined term "creditor" also includes a "private education lender"[40] which incorporates the concepts of a loan and lender.[41] Here again, however, the definition of lender involves the extension of a "loan", another undefined term under TILA and Reg. Z.

The official commentary to Reg. Z provides some clarity concerning TILA's intended scope. In particular, the commentary to the definition of "creditor" sets forth several exclusions to the definition of "credit"; for example, layaway plans, borrowing against the accrued cash value of an insurance policy, or a pension account "if there is no independent obligation to repay."[42] The concept of "credit" requiring an obligation to repay is more pronounced in yet another exclusion for investment plans in which the entity providing that capital to the consumer bears the risk of loss of that capital.[43] Read together, these exclusions suggest that an extension of credit under TILA exempts financing arrangements, like ISAs, where the obligor is not required to repay or where the obligee bears the risk of loss.

To date the most clarity on what constitutes "credit" or a "loan" under TILA may be found in caselaw. Although case law is not extensive, courts that have considered this issue generally have expanded on the exclusions found in the commentary and generally construe the extension of credit to be an arrangement where the obligor has an unconditional legal obligation to pay.[44]

Applied here, those principles place ISAs outside the scope of TILA's provisions. ISA providers enable students to fund their education on the condition that students will share a modest percentage of their post-graduation income when their income exceeds the minimum monthly income threshold. These attributes support the distinction between an ISA and traditional lending.

While the overall goal of TILA is to make the risks and costs of borrowing transparent for consumers before they obtain a loan, it proscribes very specific standards of disclosure that do not always make sense for ISAs. For example, a TILA disclosure for closed-end credit must include a payment schedule, which may be unknowable at the time a student obtains an ISA.[45] TILA also requires disclosure of finance charges, yet another term that does not align with the structure of ISAs where no specific interest rate, or finance charge of any kind, applies or could even be determined when an ISA is consummated because payments are based solely on future income.

Notwithstanding the foregoing, ISA Providers generally appear to have adopted a similar or enhanced disclosure regime. For example, we understand that some Providers use a modified version of the TILA disclosure in connection with their respective ISA programs modeled after the TILA disclosures for private education loans, including a 30-day acceptance period and a three-day right to cancel. Other Providers provide a side-by-side comparison of an ISA to an average private education loan. At least one Provider requires students to learn about ISAs and take a comprehension quiz prior to obtaining an ISA. As such, ISA Providers generally appear to be complying with the intent and spirit of TILA—ensuring that consumers receive a clear and understandable layout of certain costs and terms to allow for easy comparison of financing costs among different products—despite falling outside of TILA's scope.

## The Equal Credit Opportunity Act

The Equal Credit Opportunity Act ("ECOA")[46], as implemented by Regulation B ("Reg. B") prohibits discriminatory practices in connection with the extension of credit. The analysis of what constitutes "credit" under ECOA is similar to, though not the same as, TILA. Like the definition pursuant to TILA, "credit" is defined under ECOA as "the right granted by a creditor to applicant debtor to defer payment of debt or to, incur debts and defer its payment or to purchase property or services and defer payment therefor."[47] A "creditor" means a person who regularly extends, renews or continues credit.[48]

While both the TILA and ECOA statutory schemes incorporate similar definitions of credit and creditor, ECOA and Reg B. are intended to have broader coverage than TILA. The definition of credit under ECOA includes "deferment of payment for services", an additional prong not included in TILA.[49] The official commentary to Reg. B expressly states that "credit" is defined more broadly under ECOA than TILA, and includes "a right to defer payment of a debt - regardless of whether the credit is for personal or commercial purposes, the number of installments required for repayment, or whether the transaction is subject to a finance charge."[50] This deferment of payment, without qualification, provides a greater scope of what constitutes credit under ECOA.[51]

A review of caselaw, however, reveals that, similar to TILA, application of the statute turns on whether the transaction involves credit. Courts have been more active in interpreting the definition of "credit" under ECOA than under other statutory schemes although the body of caselaw is by no means extensive. The vast majority of courts have found that ECOA applies to traditional credit transactions, such as most loans and automobile leases.[52] At least one court found that a cellular services contract constitutes credit under ECOA because it involves the deferral of payment for the services.[53] Another court held that a credit arrangement does not exist where the plaintiff was not permitted to defer payment for work for a substantial amount of time.[54]

Against that backdrop, it can be surmised that court interpretations of what constitutes credit under ECOA, while not uniform, involve some form of credit that is intended to be repaid. However, courts appear more inclined towards an expansive view of ECOA's scope which tendency seems driven, in part, by the strong anti-discrimination policy that underpins ECOA.[55] In light of that, we further analyze ISAs through an anti-discrimination lens later in this paper.

## The Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA") governs the collection, dissemination, use and accuracy of information in consumer credit files.[56] It sets forth specific requirements for entities that use credit file information in consumer credit decisions and requires a permissible purpose to do so.[57] The FCRA defines "credit" and "creditor" by cross-referencing those definitions in ECOA.[58]

Like ECOA, courts have taken a more expansive view of what constitutes credit under the FCRA.[59] However, their approach has not been uniform and we were unable to identify any caselaw or other guidance that examines the FCRA's application to non-traditional financial arrangements like ISAs. Given the overlap in key definitions with TILA and ECOA, the same underlying analysis should apply; the fact that an ISA, by its structure, does not create an absolute payment obligation likely places the ISA outside the definition of credit under the FCRA.

Notwithstanding that ISAs may not be not considered "credit" pursuant to the FCRA, however, ISA Providers should still examine the potential scope and application of the FCRA to their respective ISA programs. For example, the FCRA sets forth specific requirements for a host of consumer credit report-related activities that are not necessarily dependent on the definitions of credit or creditor, including the permissible purpose provisions for obtaining reports[60] and accuracy and dispute procedures related to reported trade lines.[61] Thus, ISA Providers may be subject to certain provisions of the FCRA—even if they are not deemed "creditors"—to the extent their activities fall within the purview of those provisions.[62]

## Unfair, Deceptive and Abusive Acts and Practices

Perhaps the most widely used and broadly construed federal consumer finance law is the prohibition against unfair, deceptive and abusive acts and practices ("UDAAP").[63] Since its inception in 2011, the Consumer Financial Protection Bureau ("CFPB") has brought a variety of public enforcement actions against a wide range of entities using its UDAAP authority.[64]

In particular, the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank Act") gives the CFPB authority to bring UDAAP and other claims against "covered persons" and their service providers who offer or provide a consumer financial product or service.[65] The Dodd-Frank Act expressly sets forth several specific but varied categories of financial product and services, such as real estate settlement services[66], deposit-taking activities[67], and debt collection.[68]

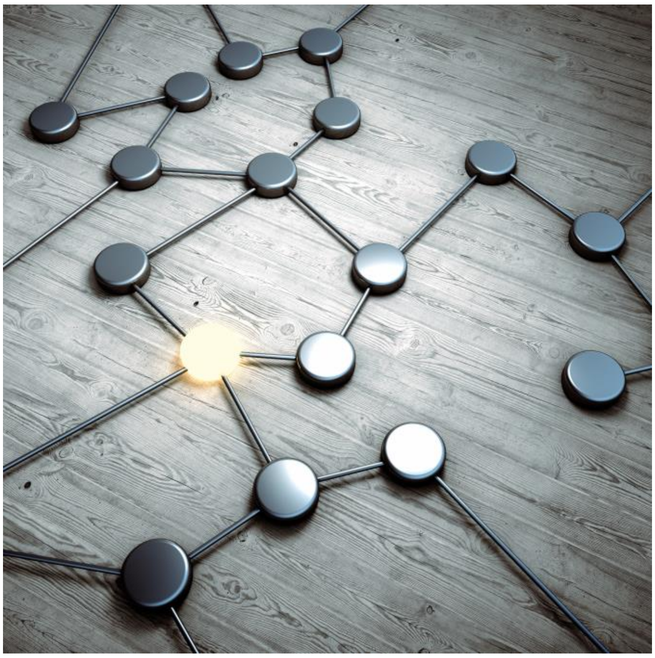
Only one of the enumerated categories appears applicable to ISA transactions: "extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit."[69] The definition of credit, in turn, "means the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase."[70] This definition mirrors the same definitions of "credit" that appear in TILA, ECOA and the FCRA and thus ties the CFPB's UDAAP authority to extensions of credit.[71]

For the reasons discussed above, ISAs should not be deemed credit. As a result, the CFPB would seem to lack the authority to pursue a UDAAP claim against an ISA Provider (or service provider).[72]

Despite that apparent jurisdictional limitation, CFPB enforcement activity has shown that the boundaries of UDAAP authority, and what constitutes an unfair, deceptive or abusive act or practice, are often broadly construed. Furthermore, the CFPB has demonstrated a keen interest in pursuing entities in the education space, including several for-profit schools[73], an accrediting body[74], a private student loan provider[75] and student loan servicers.[76] It also has supervisory authority over larger participants in the student loan servicing market.[77]

In addition, the Federal Trade Commission ("FTC") has authority to bring enforcement actions related to "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[78] This authority—commonly known as UDAP—is closely linked to the CFPB's UDAAP authority but enjoys broader application.[79] The FTC has actively used its UDAP authority to bring enforcement actions against entities under its jurisdiction, which include a wide variety of companies with the exception of banks, credit unions and common carriers (in certain instances).[80] Given this broad mandate, ISA Providers and service providers would be subject to the FTC's UDAP authority and could face enforcement actions for ISA-related activity.[81]

Against that backdrop, ISA Providers and service providers should be mindful of existing UDAP and UDAAP precedent and endeavor to meet the spirit of that guidance when engaging in ISA-related activities.



### Application of Other Federal Consumer Financial Laws

There are a handful of consumer finance laws that likely apply to ISAs without regard to whether they constitute credit, including the Fair Debt Collection Practices Act ("FDCPA")[82], Gramm-Leach-Bliley Act ("GLBA")[83] and the Electronic Fund Transfer Act ("EFTA").[84] In the case of the FDCPA and the EFTA, coverage is activity-based. GLBA likely applies generally, both as a matter of statutory and regulatory language and best practices due to heightened sensitivity concerning privacy.

We briefly discuss each law and how it may apply in the ISA context.

## Fair Debt Collection Practices Act

The FDCPA sets forth the rules that third-party debt collectors must follow when attempting to collect consumer-related debt.[85] It applies only to third-party collection efforts; entities that engage in collection activity related to their own accounts are not covered.[86] Thus, Providers that originate and service their own ISAs are not encompassed by the provisions of the FDCPA.[87] Similarly, entities that service for others from the time of ISA origination are not likely to be subject to the FDCPA.

Debt is defined broadly under the FDCPA as any consumer obligation to pay money arising from a transaction primarily for personal, family or household purposes.[88] Courts have consistently found that the scope of the FDCPA is expansive and thus applies to any obligation to pay, regardless of whether the debt is connected to a loan or similar extension of credit.[89] As such, while Providers are not covered, service providers who engage in collection efforts on their behalf will likely be subject to the FDCPA's provisions. Those requirements include limitations on the time, manner and method of communication with consumers[90] and prohibitions on (i) engaging in harassment or abuse[91], (ii) making false or misleading representations[92] and (iii) unfair practices.[93] The FDCPA also requires a debt collector to validate a debt via written notice to the consumer.[94]

## Electronic Fund Transfer Act

ISA Providers and their service providers should also be mindful of EFTA and Regulation E ("Reg. E"), which encompass certain electronic fund transfers ("EFTs").[95] Application of Reg. E generally is not predicated on the definition of credit.[96] Instead, it applies more broadly to consumer deposit accounts and establishes the rights, liabilities and responsibilities of parties involved in EFTs to or from those accounts.

EFTA and Reg. E will only apply if an ISA contemplates recurring payments from a student's bank account. In those instances, Reg E. sets forth strict timing and authorization provisions,[97] including the student's right to stop payments up to three days prior to the next scheduled transfer.[98] Reg. E also requires a 10-day advance notice if the amount of a recurring transfer varies from the previous transfer amount.[99] Finally, Reg. E prohibits entities from conditioning an extension of credit on the consumer's repayment by preauthorized EFTs.[100] While this provision likely will not apply to ISAs, Providers and service providers should consider adopting as a best practice a prohibition on making recurring transfers a mandatory method of payment under an ISA.

## Gramm-Leach-Bliley Act

Privacy has emerged as a paramount concern for consumers and businesses over the past decade. GLBA generally governs how financial institutions protect and share nonpublic personal information such as social security numbers and bank account numbers.[101] It requires a financial institution to provide notice to consumers about its privacy policies and practices, describe the conditions under which it shares consumer information with nonaffiliated third parties and provides a method for consumers to "opt out" of information sharing in certain instances.[102]

Financial institutions are also required to establish a program to ensure the security, accuracy and confidentiality of customer information.[103] Various regulators enforce the security safeguards requirements of GLBA, including the FTC.[104] The Safeguards Rule requires financial institutions to develop a written information security program that is appropriate given its size as well as the complexity, nature and scope of its activities.[105] The program must also take into account the sensitivity of the customer information at issue with an overall goal of protecting customer's non-public personal information.

The term “financial institution” has a broad meaning under GLBA. It includes many companies not traditionally considered to be financial institutions, regardless of size, that are “significantly engaged” in providing financial products or services to consumers.[106] Given that broad definition, ISA Providers may be covered by GLBA’s privacy notice and opt-out provisions[107] as well as the requirement to implement security safeguards for customer information. ISA Providers should also ensure that their vendors likewise maintain robust information security programs.

# Anti-Discrimination / “Fair Lending” Analysis Under ECOA

As discussed in detail above, the structure and alternative nature of ISAs likely place them outside the reach of several federal consumer financial laws, including ECOA. However, as a new and innovative entrant in the education finance space, industry participants, courts, regulatory agencies, state legislatures and Congress are still debating how to regulate ISAs. Not surprisingly, some in Congress have expressed misgivings about ISAs.

To that end, Senator Elizabeth Warren (D-Mass.) and Representatives Ayanna Pressley (D-Mass.) and Katie Porter (D-Calif.) sent letters to the Department of Education and to the presidents of seven colleges and universities that have ISA programs and participate in the federal student aid program (“Congressional Letters”). In addition to requesting certain information relating to ISAs, the Congressional Letters reflect concerns that ISAs could “create significant opportunities for discriminatory practices.”[108]

The chief concerns expressed in the Congressional Letters relate to the potential for discrimination in violation of ECOA and other federal anti-discrimination laws because ISAs are structured and rely, in part, on a student’s expected post-graduate income stream. According to the authors of the Letters, the existence of discrimination against protected classes in the U.S. labor market may thus lead to disparate impacts on protected classes in the ISA context.[109] In particular, the authors take aim at ISAs that differentiate terms based upon a student’s chosen field of study because certain fields may correlate with gender or race and lead to higher or lower expected average earnings following graduation.[110]

While it is unlikely—or at least unclear—whether ECOA would even apply to ISAs, we provide the following high-level analysis of fair lending liability under ECOA in light of concerns that ISAs may run afoul of ECOA and other federal anti-discrimination laws.[111] In our analysis, we examined relevant caselaw against the typical structure of an ISA and, for the reasons below, conclude that a plaintiff would likely struggle to satisfy the requirements needed to mount a successful ECOA disparate impact claim against an ISA Provider under current legal standards.[112]

### ISAs and Field of Study

As noted throughout this paper, ISA Providers use a student’s post-graduate expected income stream as a significant factor in structuring the applicable ISA. This factor, among others, will inform both the ISA Amount and Income Share figures.

ECOA concerns involving ISAs flow directly from this structural feature—if members of a protected class will not earn as much as non-protected class members due to discrimination in the labor market, use of a student’s expected income stream may lead to disparate impacts on protected classes. For example, this would likely be the case when a program such as early childhood education, which is dominated by female students and provides relatively low post-graduate earnings, is compared to other fields of study like engineering, which is dominated by male students and provides relatively high post-graduate earnings.

These concerns appear misplaced for a few reasons. First, even assuming such a result were to occur, this result could be better than existing repayment obligations under student loans. While income-based or income-driven repayment plans are available for most federal loans programs, a student must apply and qualify to be eligible.[113] Private loans offer less flexibility for repayment, often providing only forbearance or deferment during times of hardship.[114] Under an ISA, if terms are set based on field-of-study, students with lower levels of post-graduate income will pay less than students with higher levels of post-graduate income. These lower payments will be automatic, will not depend on qualification criteria, and will make ISA payments more affordable for the students with lower expected income who need it the most. We believe this to be an improvement over the status quo.[115]

Second, the concerns are grounded in the premise that, for disparate impact purposes, the relevant population is all students who obtain ISAs, such that providing terms based upon the field of study within that population may result in disparate impact to protected classes.

This premise, however, may not be accurate or appropriate. As the authors of the Congressional Letters recognize, discrimination against protected class members currently exists in the labor market. Indeed, equal pay for women has been an area of heightened focus in the United States and elsewhere. The wage gap between white and minority workers has also been well-documented and persists despite decades of efforts to bridge those disparities.

Against that backdrop, and knowing that certain fields may be dominated by members of specific protected classes, the relevant population for disparate impact purposes should be ISAs provided to students within a certain focus area. ISA Providers—like others who offer financing arrangements—must work within an ecosystem where wage disparities are deeply embedded. Using a field of study comparison group accounts for those longstanding differences and would likely be a better indicator of disparate impact. For example, for ISAs provided to early childhood education majors, there would be no expected disparity between ISA terms offered to female and male students. The same result would be expected for ISAs provided to engineering majors. Any disparity would therefore be a strong indicator that the ISA structure, and not existing societal factors, is the cause.

Viewing ISAs and any disparate impact analysis through a field-of-study-based lens is consistent with other real-world applications in the lending space. Banks and other financial institutions routinely distinguish between loan products within the same class for a variety of analyses, including for fair lending purposes. For example, home equity loans and 30-year fixed mortgage loans are analyzed independently despite both being mortgage loan products. Making a similar distinction for various fields of study ISAs would seem appropriate.

Finally, to the extent ISA Providers set Income Share figures such that the monthly payment amounts will be, on average, equal regardless of the field of study pursued by the student, then such a practice would not be expected to result in a disparate impact. Indeed, in the loan context, a loan bearing the same interest rate extended on identical terms to a medical doctor and a pre-school teacher is not considered discriminatory simply because the debt service for such loan accounts for a greater percentage of the pre-school teacher's income than of the medical doctor's income.

### Disparate Impact under ECOA

Putting those considerations aside and assuming, *arguendo*, that the Congressional Letters authors' concerns warrant further analysis, establishing a viable ECOA disparate impact claim against an ISA Provider will likely be an uphill climb.

ECOA prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, because an applicant receives income from a public assistance program or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[116] ECOA has two theories of liability: disparate treatment and disparate impact.[117] In a disparate treatment case, a plaintiff must establish that the defendant had a discriminatory intent or motive and treated an applicant differently based upon a prohibited basis.[118] In a disparate impact case, a plaintiff must establish that the defendant employs facially neutral policies or practices that have a disproportionately adverse effect on a protected class that are otherwise unjustified by a legitimate rationale.[119]

Given that ISA Providers do not structure ISAs with a discriminatory intent or motive or treat applicants differently based upon an applicant's membership in a protected class, we focus our attention on an analysis of ISAs through a disparate impact lens.[120]

In order to establish a prima facie case for disparate impact under ECOA, a plaintiff must identify: 1) a specific neutral policy or practice of the defendant; and 2) a significant adverse or disproportionate impact on a protected class caused by the defendant's neutral policy or practice.[121] Further, assuming that a plaintiff could make such a demonstration, plaintiff would need to defeat the defendant's "business necessity" and "manifest relationship" defenses, each of which are discussed further below.

### Identification of Specific Neutral Policy or Practice

The first prong of any disparate impact analysis requires the plaintiff to identify the specific neutral policy or practice being challenged and demonstrate how that policy or practice led to the alleged disparate impact result. Under this prong, an element of causation must be established. The Supreme Court has made clear that a plaintiff cannot just point to an overall alleged process or procedure.[122] A plaintiff must instead identify the specific practice that allegedly caused the disparate impact. The Court emphasized this requirement in *Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, when it stated:

> "[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance … does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create."[123]

Application of these principles in the ISA context would be expected to result in a plaintiff likely being unable to make the required correlation between the specific practice of using projected income to structure an ISA and any purported disparate impact for the following reasons.

First, it is our understanding that in structuring ISAs, Providers generally use earnings data furnished by the applicable college or university, which is broken out by field of study. This data is then adjusted for earnings growth over time by field of study, often by utilizing market-driven governmental national earnings growth data by field of study and occupation. Use of this data provides a more realistic picture of a student's potential earnings by accounting for a graduate's time in her career and likely location of employment. This inherently school-based, market-driven approach incorporates several objective, reasonable factors that may make it more difficult for a potential plaintiff to mount a successful disparate impact claim.

*AFSCME v. State of Washington*,[124] lends support for the proposition that an ISA Provider's use of market-driven employment data does not give rise to disparate impact liability under ECOA. In *AFSCME*, the plaintiffs challenged the State of Washington's compensation practices alleging that the defendant had discriminated on the basis of sex in violation of Title VII of the Civil Rights Act of 1964. Specifically, the plaintiffs alleged that the defendant compensated employees in jobs where females predominate at lower rates than employees in jobs where males predominate—an impermissible practice for jobs of comparable worth.

The court rejected the plaintiffs' disparate impact claims. The court reasoned that plaintiffs' arguments were "based on the contention that the [defendant's] practice of taking prevailing market rates into account in setting wages has an adverse impact on women, who, historically, have received lower wages than men in the labor market."[125] The court held that the defendant's compensation practices were "responsive to supply and demand and other market forces."[126] According to the court, the existence of such complex and dynamic market forces "[did] not constitute a single practice that suffices to support a claim under disparate impact theory."[127] The principles of AFSCME, when applied to ISAs, demonstrate the difficulty a plaintiff will likely face when attempting to establish a disparate impact claim.

Second, it is also possible that the myriad of factors that are either unknowable or could vary once an ISA is in the payment phase will make it difficult to prove a causal connection between one of the ISA underwriting inputs relating to the use of projected income and the alleged disparate impact. In other words, the complex and constantly varying nature of ISAs will make it difficult to isolate a specific factor, or set of factors that establish the required causal link. Unlike a loan with a fixed principal amount, interest amount and payment terms, an ISA's inherently variable nature should be expected to make it more difficult to identify the alleged cause of a particular result, if one is shown to exist at all.

Third, the use of a statistical methodology in an ECOA disparate impact case will be quite difficult for a plaintiff because ECOA specifically prohibits inquiry by the creditor into the race, sex, or marital status of a credit applicant, except in limited circumstances.[128] Direct statistical evidence therefore will not be readily available to a plaintiff, and a prima facie case of discrimination will need to be proved by other means.[129]

To date, there is simply not enough data with respect to overall ISA performance over time to analyze the cause of any alleged disparate impact. Nonetheless, the courts have set a high burden for establishing such a claim, including a requirement that a baseline level of causation be demonstrated. We expect that the variable nature and other structural protected-class-neutral elements of ISAs will make this requirement very difficult for a plaintiff to meet.[130]

## Policy Concerns / Business Necessity

Even if a plaintiff could satisfy the first prong, overcoming the second prong would likely prove to be more difficult. After such a showing, the burden shifts to the defendant to prove that the practice is necessary to achieve "one or more substantial, legitimate, non-discriminatory interests."[131] After such proof the burden shifts back to the plaintiff to prove that the "substantial, legitimate, non-discriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[132] A plaintiff may not be able to surmount that final requirement given the structure and nature of an ISA.

The Inclusive Communities decision provides critical guidance on this burden shifting analysis.[133] In Inclusive Communities the Court focused beyond causation to policy concerns associated with disparate impact liability. In this regard, the Court instructed that "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[134]

In so noting, the Court recognized that the so-called "business necessity" defense is met if a defendant can prove that the allegedly discriminatory policy or practice is "necessary to achieve a valid interest" and the plaintiff fails to prove the existence of an alternative practice that has a less disparate impact and serves the defendant's legitimate needs.[135] To prevail under the business necessity defense, the "justification must be manifest and may not be hypothetical or speculative. Factors that may be relevant to the justification include cost and profitability."[136]

Another potentially applicable defense in the credit context is known as the "manifest relationship to creditworthiness" defense. This defense permits the use of certain credit criteria in underwriting that may have a disparate impact if such criteria have a "manifest relationship to the creditworthiness of the applicant."[137]

With ISAs, the Provider[138] assumes the risk that the student, post-graduation, may not earn a sufficient income to make payments under the ISA. In light of this fact, which is much more pronounced in the ISA context than it is with a student loan, it is paramount that the Provider properly assess the student's expected post-graduate earnings potential. This is a feature of ISAs that benefits both the Provider and the student, for the reasons discussed at length above. It is a core element of an ISA that defines the ISA as a viable, true alternative to a student loan. Given that the proper assessment of a student's expected post-graduate earnings potential is at the heart of the ISA product's viability, ISA Providers should have a strong basis to assert either the business necessity defense or the manifest relationship defense (or both) in order to defend against a disparate impact challenge to their practices.[139]

However, in order to properly mount such defenses, the Providers will need to have data at their disposal demonstrating that their expected income modeling accurately predicts (and bears a manifest relationship to) a student's performance under an ISA post-graduation. To that end, ISA Providers should collect, track and analyze student post-graduate income, ISA performance and profitability to compare to their expected income modeling methodologies. In doing so the Providers should compare the terms of ISAs offered to members of protected classes versus non-members and ensure that any discrepancies between the two populations are objectively explainable with supporting data.

Moreover, ISA Providers should consider conducting "fair lending" testing of their ISA program design parameters and assumptions used to structure their ISA programs (including the taking of corrective action when appropriate) and maintaining compliance programs designed to ensure compliance with ECOA and Reg. B.[140] We note, however, that before any probative "fair lending" testing may be conducted, ISA Providers will need to have sufficient data comprising a statistically significant population of performing ISAs. Given the nascent nature of ISAs, such data will likely not be available until ISAs achieve broader adoption in the education finance space.

### Impact of Proposed Congressional Legislation

On July 15, 2019 Senators Todd Young (R-Ind.), Marco Rubio (R-Fla.), Mark Warner (D-Va.) and Chris Coons (D-Del.) introduced a bipartisan bill titled the "ISA Student Protection Act of 2019" that would create a framework and provide student protections for ISAs.[141] Of particular note, the bill specifically addresses the potential exposure for ISA Providers under ECOA by excluding from activities constituting discrimination the setting of an ISA's terms based on earnings reasonably anticipated with respect to any program of study or institutions of higher education (among others).[142]

To the extent that provisions of the introduced bill should become law, ISA Providers should consider whether collecting, tracking and analyzing student post-graduate income as well as ISA performance and profitability for "fair lending" testing of their underwriting methodologies may still be a worthwhile exercise. Given the many variables associated with an ISA, tracking data and outcomes may nevertheless ultimately be necessary to defend against anti-discrimination claims predicated on bases other than use of expected income to craft the terms of an ISA agreement.

# Conclusion

Income Share Agreements are an innovative tool for financing an education. As we demonstrate in this paper, the existing federal consumer financial laws are generally not well-suited to the unique nature of ISAs. Many of those laws focus on traditional forms of repaying an obligation, such as a loan or extension of credit. Those laws are outdated and simply did not contemplate when drafted the myriad of emerging consumer finance products—like ISAs—that are ubiquitous in society today.

That leaves an opportunity for stakeholders, legislators and regulators to craft a bespoke regulatory regime to govern ISAs specifically. Congress has made a few efforts to do so, with a recent bill taking fresh aim at crafting an appropriate set of consumer protections. Passing this legislation, or something substantially similar, would put important guardrails in place to provide clarity for industry players and would implement key protections to benefit the young and arguably less-sophisticated group of consumers who are likely to obtain ISAs.

Those protections include ensuring that unintended results, such as disparate impact on protected classes, are addressed. ISAs focus solely on expected income without regard to a student's status in a protected class; this core feature of ISAs includes inherent protections for all students, including low-income students who may be more likely to be members of a protected class. In that sense, ISAs are structured to prevent, or at least mitigate, potential adverse results are thus not likely to lead to disparate impact under ECOA as we discuss at length above and the recently-introduced federal legislation appears to recognize. Despite that, Providers should continue to monitor and make appropriate adjustments to their respective programs to ensure disparate impact issues are properly mitigated.

Other important consumer protections, such as the content and enforceability of ISAs, program disclosures, payment terms, servicing and collection should be considered in any regulatory scheme. Many ISA Providers and service providers already consider those issues and numerous others when structuring their respective programs. Providers incorporate core consumer protection principles that underpin existing federal consumer financial laws, at times surpassing what is currently required. A regulatory framework tailored specifically for ISAs can build on those efforts to develop a set of rules and guidance that adequately protects consumers and sets forth clear guardrails for incorporating ISAs into the education ecosystem.

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# Endnotes

[1] Also referred to as Human Capital Contracts. *See, e.g.*, Miguel Palacios, *Human Capital Contracts: "Equity-like" Instruments for Financing Higher Education*, CATO INSTITUTE, Policy Analysis No. 402 (Dec. 16, 2002), https://www.cato.org/publications/policy-analysis/human-capital-contracts-equity-instruments-financing-higher-education.
[2] *See* Brodie Thomas, *Treating students like startups: How a Calgary prof created an alternative to student loans*, CALGARY HERALD, (Aug. 2, 2019), https://calgaryherald.com/news/local-news/treating-students-like-startups-how-a-calgary-prof-created-an-alternative-to-student-loans.
[3] For instance, a company called Align Income Share Funding ("Align") offers individuals up to $12,500 in financing in exchange for a share of an individual's future income. Align styles this arrangement as "more flexible" than traditional private loans, with terms ranging from 2-6 years. ALIGN INCOME SHARE FUNDING, https://www.helloalign.com/products/income-share-agreement (last visited Aug. 15, 2019).
[4] *See* LUMINI INC., https://www.lumni.net/about/#dondetrabajamos (last visited Aug. 15, 2019) (providing education funding using an ISA model in Colombia, Chile and Peru, as well as Canada and the United States.
[5] PURDUE UNIVERSITY, https://www.purdue.edu/purduemoves/initiatives/affordability/income-share-agreements.php (last visited Aug. 15, 2019).
[6] For instance, the University of Utah launched a pilot program called "Invest in U" where eligible students may receive up to $10,000 per fall, spring and summer academic semesters. Payments may be paused for students pursuing graduate degrees, engaged in voluntary service or working full time but earning less than $20,000 per year. Students who receive an ISA under this program agree to repay 2.85% of their earned income for three to 10.5 years, depending on the students major and ISA Amount received. THE UNIVERSITY OF UTAH, https://unews.utah.edu/u-announces-innovative-financing-program-to-help-students-finish-degrees/ (last visited Aug. 15, 2019).
[7] *See* Lindsay Gellman, *Code Now. Pay Tuition Later*., THE ATLANTIC (June 30, 2018), https://www.theatlantic.com/education/archive/2018/06/an-alternative-to-student-loan-debt/563093/.
[8] Letter from Senator Elizabeth Warren, Representative Ayanna Pressley and Representative Katie Porter to Secretary Betsey Devos (June 4, 2019), available at https://www.warren.senate.gov/newsroom/press-releases/senator-warren-reps-pressley-and-porter-investigate-reports-that-education-department-seeks-to-develop-income-share-agreements-in-risky-new-student-debt-experiments.
[9] *Income Share Agreements: A Crazy Alternative to Student Loans*, LAMPO LICENSING, LLC, https://www.daveramsey.com/blog/income-share-agreements (last visited Aug. 15, 2019).
[10] A bipartisan group of Senators with positive views on ISAs have recently proposed legislation (the "ISA Student Protection Act of 2019") which would create a legal framework for ISAs nationally. *See*, S.2114, 116th Cong. (1st Sess. 2019), available at https://www.congress.gov/bill/116th-congress/senate-bill/2114 (last visited July 30, 2019).
[11] Providers can be third party entities or the schools themselves. Where the school is acting as the Provider, there is no payment to the student and the ISA Amount is applied to tuition, books, room and board, etc.
[12] All discussion and examples in this Paper are to school-based educational ISAs unless otherwise specified.
[13] This is commonly referred to as the "Payment Term."
[14] This is also referred to as the "Payment Window."
[15] Where the school is acting as the Provider, the ISA Amount is applied directly to the educational expenses provided by the school, such as tuition, books, room and board, etc.
[16] References to "income" throughout this paper are to earned income and do not count other sources of income such as income derived from investments, dividends, etc.
[17] In comparison to a student loan, the Maximum Payment Amount under the Example ISA is roughly equivalent to a 10-year Standard Plan repayment at 8.69% interest on a $15,000 loan.
[18] These amounts does not include loan origination or other fees that are frequently levied under federal student or private loan arrangements, and late or non-payments could result in substantial interest and late payment fees that would protract the life of the loan and the total amount due.
[19] *See* Dave Rathmanner, *Current Student Loan Interest Rates*, SHOP TUTORS, INC. (Aug. 5, 2019), https://lendedu.com/blog/student-loan-interest-rates.
[20] Even when students are making payments, the amount a student may owe can increase if her payments are less than the accrued interest during that period—a financial scenario called "negative amortization."
[21] As of September 23, 2018, only ninety-six students have qualified for the Public Service Loan Forgiveness Program. Jillian Berman, *This government loan forgiveness program has rejected 99% of borrowers so far*, MARKET WATCH (Sept. 23, 2018, 8:55 AM), https://www.marketwatch.com/story/this-government-loan-forgiveness-program-has-rejected-99-of-borrowers-so-far-2018-09-20.
[22] *History of the Bankruptcy Discharge for Student Loans*, CAPPEX, https://www.cappex.com/articles/money/history-of-bankrupty-dischange-for-student-loans (last visited Aug. 15, 2019). The proposed ISA Student Protection Act of 2019 would make ISAs dischargeable in bankruptcy. *See* S.2114 at § 102(b)(1)(B).
[23] Annie Nova, *It could become easier for people with student debt to file for bankruptcy*, CNBC LLC (May 11, 2019, 9:00 AM) https://www.cnbc.com/2019/05/10/it-could-become-easier-for-student-loan-borrowers-to-file-bankruptcy.html.
[24] *Extended Plan*, FEDERAL STUDENT AID: AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION [hereinafter, "FSA"], https://studentaid.ed.gov/sa/repay-loans/understand/plans/extended (last visited Aug. 15, 2019).
[25] *Standard Plan*, FSA, https://studentaid.ed.gov/sa/repay-loans/understand/plans/standard (last visited Aug. 15, 2019).
[26] *Graduated Plan*, FSA, https://studentaid.ed.gov/sa/repay-loans/understand/plans/graduated (last visited Aug. 15, 2019).
[27] Kali Hawlk, *Is a Graduated Repayment Plan the Best Choice for You?*, STUDENT LOAN HERO (Apr. 30, 2019), https://studentloanhero.com/featured/graduated-repayment-plan-pro-con/.
[28] Andrew Pentis, *Your Guide to Understanding Every Type of Student Loan Available Today*, STUDENT LOAN HERO (June 19, 2017), https://studentloanhero.com/featured/types-of-student-loans-every-option-explained/.
[29] *Income-Driven Plans*, FSA, https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven (last visited Aug. 15, 2019).
[30] *Income-Sensitive Plan*, FSA https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-sensitive (last visited Aug. 15, 2019).

[31] *Income-Driven Plans*, FSA, *supra* note 28.
[32] This paper analyzes select Federal Consumer Financial Laws as defined in the Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 5481(14).
[33] While this paper focuses solely on federal consumer financial laws, states also have specific statutory schemes that may apply to ISAs. Those statutes are typically predicated on whether a "loan" or "extension of credit" is involved; thus it can be argued that the same general analysis of what constitutes a loan under certain federal laws applies equally to state laws. However, each state has different statutory schemes with varying requirements and state regulators and courts are free to interpret their own laws in a manner they deem appropriate to protect consumers. Against that backdrop, we recommend that ISA Providers and Service Providers carefully examine applicable laws and guidance in the states in which they operate.
[34] In this way, there is an important and substantial difference between an ISA provider and a student loan lender; the ISA provider has self-interest in ensuring that the student achieves full employment post-graduation. As such, the ISA provider's interests and the student's interests are typically aligned.
[35] 15 U.S.C. §§ 1601 *et seq*.
[36] 12 C.F.R. Part 1026.
[37] Put plainly the purpose TILA is to promote "the informed use of credit" by assuring "meaningful disclosure of credit terms [to consumers] so that the consumer will be able to ... avoid the uninformed use of credit." 15 U.S.C. § 1601(a); *see also Floyd v. Security Finance Corp. of Nevada*, 181 F. Supp. 2d 1137, 1139 (D. Nev. 2001).
[38] 15 U.S.C. § 1602(f); *see also* 12 C.F.R. § 1026.2(a)(14).
[39] 15 U.S.C. § 1602(g).
[40] *Id*.; A "private education lender" includes an entity "engaged in the business of soliciting, making, or extending private education loans." 15 U.S.C. § 1650(a)(7).
[41] Similarly, a "private education loan" is "a loan provided by a private educational lender that—(i) is not made, insured, or guaranteed under 1 title IV of the Higher Education Act of 1965 (20 U.S.C. § 1070 *et seq*.); and (ii) is issued expressly for postsecondary educational expenses to a borrower, regardless of whether the loan is provided through the educational institution that the subject student attends or directly to the borrower from the private educational lender. 15 U.S.C. § 1650(a)(8).
[42] 12 C.F.R. Part 1026, Supp. I, cmt. 2(a)(14)-1.i and 1.v.
[43] 12 C.F.R. Part 1026, Supp. I, cmt. 2(a)(14)-1.viii.(This exclusion covers, for example, "an arrangement with a home purchaser in which the investor pays a portion of the down payment and of the periodic mortgage payments in return for an ownership interest in the property, and shares in any gain or loss of property value".)
[44] *See e.g., Capela v. J.G. Wentworth, LLC*, No. CV09–882, 2009 WL 3128003, at *10 (E.D.N .Y. Sept. 24, 2009) (holding that an arrangement in which beneficiaries to a settlement received a lump sum of money upfront from an entity that purchased the rights to the structured settlement payments was not a loan under TILA because the beneficiary had no obligation to pay the settlement installments to that entity if it ultimately did not receive the structured settlement payments); *Reed v. Val-Chris Investments, Inc*., No. 11cv371 BEN WMC, 2011 WL 6028001, at *2 (S.D. Cal. Dec. 5, 2011)(holding Plaintiff's advance on his inheritance in exchange for assigning a portion of the inheritance to an LLC was not a loan because, under the terms of the assignment, the LLC could not recover any unpaid portion of the assigned amount if the Estate did not ultimately satisfy the amount assigned.) The courts found in both cases that Plaintiff did not incur any debt or potential debt as a result of the transaction and it was not a loan or credit transaction governed by TILA.
In contrast, the Fourth Circuit recently held that "whether an agreement is a credit transaction is not determined by how closely it resembles a bank loan." *Curtis v. Propel Property Tax Funding, LLC*. 915 F.3d 234 (4th Cir. 2019) (a company hired to finance a tax obligation for a homeowner participated in a "credit transaction" subject to TILA. In dissenting opinion, the judge found that a "new debt" was not created, only a payment plan between the debtor and the third party to pay an existing debt. However, this case is distinguishable from ISA because there is no question that the homeowner was under an obligation to pay the tax debt regardless of whether he paid directly or via an agreement with a third party.
[45] TILA requires that the following 'material disclosures' be provided: the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2). 12 C.F.R. § 226.23 fn. 48.
[46] 15 U.S.C. §§ 1691 *et seq*.
[47] 15 U.S.C. § 1691a(d); *see also* 12 C.F.R. § 1002.2(j).
[48] 15 U.S.C. § 1691a(e) (The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.) *see also* 12 C.F.R. § 1002.2(l) (A creditor means "a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates.").
[49] 15 U.S.C. § 1691a(d); *see also* 12 C.F.R. § 1002.2(j); *Shaumyan v. Sidetex Co*., 900 F.2d 16, 18 (2d Cir. 1990)("…it is apparent that the ECOA extends only to instances in which the right to defer payment of an obligation is granted. Absent a right to defer payment for a monetary debt, property or services, the ECOA is inapplicable (*citing Dunn v. American Express Co*., 529 F. Supp. 633, 634 (D.Colo. 1982)).")
[50] 12 C.F.R. Part 1002, Supp. I, cmt. 2(j).
[51] *Williams v. AT&T Wireless Servs., Inc*., 5 F. Supp. 2d 1142, 1144-45 (W.D. Wash. 1998) (holding that AT & T Wireless' services was in fact a public utilities credit transaction under ECOA. Further, held that key elements of ECOA were implicated by the transaction and thus there is no basis that Congress wanted to exclude such transactions from cover of the ECOA)). *See also Barney v. Holzer Clinic, Ltd*., 110 F.3d 1207, 1211 (6th Cir. 1997) (holding medical services under Medicaid were not "credit" under ECOA because it did not defer a payment by the patients—but instead by the State of Ohio recognizing that the ECOA applies to deferral of payment for services unrelated to debt, but here there was no deferral of payment here).
[52] *Brothers v. First Leasing*, 724 F.2d 789, 793 (9th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984) (holding that the ECOA applies to automobile leases").
[53] *Gunter v. Long Island Power Auth*., 2012 US Dist. LEXIS 131667, at *27 (E.D.N.Y. Aug. 8, 2012) ("[h]ere since plaintiff's request involved the purchase of electrical service and deferral of payment for that service, the transaction is regulated by the ECOA"). *See Williams v. AT&T Wireless Services, Inc*., 5 F. Supp. 2d 1142, 1145 (W.D. Wash. 1998) (holding that an application to purchase cellular telephone service was "credit" under the ECOA because it involved the purchase of services and the deferral of payment for the services).
[54] For example, in *Shaumyan v. Sidetex*, a homeowner entered into a home improvement contract with a contractor. Although the payments were not simultaneous with performance of work, the court found the payments were substantially contemporaneous with the

contractor's performance and thus did not amount to a *deferral* of payment. *Shaumyan v. Sidetex Co., Inc*., 900 F.2d 16, 18 (2d Cir. 1990) ("Absent a right to defer payment for monetary debt, property or services, the ECOA is inapplicable.").
[55] *Brothers v. First Leasing*, 724 F.2d 789, 793 (9th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984) (noting that "credit transactions" must be given a broad construction "in view of the overriding national policy against discrimination that underlies the Act").
[56] 15 U.S.C. §§ 1681 *et seq*.
[57] 15 U.S.C. § 1681b.
[58] 15 U.S.C. § 1681a(r)(5); *Riddle v. Portfolio Recovery Associated, Inc*., Civ. A. No. 12–82–DLB–JGW, 2014 WL 1252610, at *13–14 (E.D. Ky. Mar. 26, 2014) ("The FCRA defines 'credit' as 'the right . . . to purchase property or services and defer payment therefore.' 15 U.S.C. § 1691a(d). That is the exact nature of any utility service provider's business: services are provided throughout the course of billing cycle, and the consumer defers payment on the services until the end of the billing cycle.").
[59] 15 U.S.C. § 1681b(a)(3)(A).
[60] 15 U.S.C. § 1681b.
[61] 15 U.S.C. § 1681s-2.
[62] The FCRA contemplates use cases for consumer credit files beyond credit transactions. *See, e.g*., U.S.C. §§ 1681b(b) (employment), and 1681b(c) (insurance). An entity that obtains a consumer's credit information outside of a lending context should consider whether it must obtain the individual's permission before requesting a copy of their credit report. *See* U.S.C. § 1681a(f).
[63] 12 U.S.C. § 5531.
[64] The Federal Trade Commission (FTC) also has authority to bring enforcement actions pursuant to the Federal Trade Commission Act related to "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a). The CFPB's UDAAP authority builds upon FTC precedent and applies it specifically to the consumer finance space. In light of this, this paper focuses on the scope of the CFPB's authority as it relates to potential UDAAP violations.
[65] 12 U.S.C. § 5481(6) ("The term 'covered person' means—(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.").
[66] 12 U.S.C. § 5481(15)(A)(iii).
[67] 12 U.S.C. § 5481(15)(A)(iv).
[68] 12 U.S.C. § 5481(15)(A)(x).
[69] 12 U.S.C. § 5481(15)(A)(i).
[70] 12 U.S.C. § 5481(7).
[71] The term "loan" is undefined but should not apply to ISAs because of the key differences between the elements of an ISA and a loan as described above.
[72] There is no private right of action for UDAAP claims. *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001); *see also Levine v. Entrust Group, Inc*., No. C 12-03959 WHA, 2013 U.S. Dist. LEXIS 47132, at *18-20 (N.D. Cal. Apr. 1, 2013) (finding that there was no private right of action under Dodd-Frank's "unfair, deceptive or abusive acts or practices" sections). However, the Dodd-Frank Act gave state attorneys general authority to pursue UDAAP claims, which supplements their authority to pursue UDAP claims under state law.
[73] *In re Bridgepoint Education, Inc*., 2016-CFPB-0016 (Sept. 12, 2016), *available at* https://www.consumerfinance.gov/documents/943/092016_cfpb_BridgepointConsentOrder.pdf; *CFPB v. Corinthian Colleges, Inc*., 1:14-cv-07194 (N.D. Ill. Sept. 16, 2014); *CFPB v. ITT Educational Servs., Inc*., 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014).
[74] *In re Accrediting Council for Independent Colleges and Schools*, 2015-MISC-ACICS-0001 (Oct. 8, 2015), available at http://files.consumerfinance.gov/f/201510_cfpb_decision-on-petition-by-selling-ACICS-to-set-aside-civil-investigative.pdf
[75] *CFPB v. Aequitas Capital Mgmt., Inc*., 3:17-cv-01278 (D. Ore. Aug. 17, 2017).
[76] *In re Citibank, N.A*., 2017-CFPB-0021 (Nov. 21, 2017), *available at* https://www.consumerfinance.gov/documents/5898/cfpb_citibank-n.a._consent-order_112017.pdf; *CFPB v. Navient Corp*., 3:17-cv-00101 (M.D. Pa. Jan. 18. 2017); *In re Wells Fargo Bank, N.A*., 2016-CFPB-0013 (Aug. 22, 2016), *available at* https://www.consumerfinance.gov/documents/871/2016-CFPB-0013Wells_Fargo_Bank_N.A.--_Consent_Order.pdf; *In re Discover Bank*, 2015-CFPB -0016 (July 22, 2015), *available at* https://www.consumerfinance.gov/documents/3148/201507_cfpb_consent-order-in-the-matter-of-discover-bank-student-loan-corporation.pdf.
[77] 12 C.F.R. § 1090.106.
[78] 15 U.S.C. § 45(a).
[79] The CFPB's UDAAP authority builds upon FTC precedent and authority to prevent unfair and deceptive conduct affecting commerce and applies it specifically to the consumer finance space. It also adds a third prong for alleged abusive conduct whereas the FTC's authority cover only unfair and deceptive practices.
[80] 15 U.S.C. § 45(a)(2). In contrast, the CFPB may assert its UDAAP authority over certain banks and credit unions.
[81] Like the CFPB, the FTC has also brought a number of enforcement actions in the education finance space. *See FTC v. Social Finance, Inc.*, FTC-162-3197 (Oct. 29, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/162_3197_sofi_complaint_02-22-19.pdf; *FTC v. American Student Loan Consolidators LLC*, 0:17-cv-61862 (S.D. Fla. Nov. 30, 2018); *FTC v. American Financial Benefits Center*, 4:18-cv-00806 (N.D. Cal. Dec. 21, 2018).
[82] 15 U.S.C. § 1692 *et seq*.
[83] 15 U.S.C. § 6801 *et seq*.
[84] 15 U.S.C. § 1693 *et seq*.
[85] 15 U.S.C. § 1692 *et seq*.
[86] 15 U.S.C. § 1692a(6).
[87] The FDCPA defines a "debt collector" as "any person who…regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. §1692(a)(6). However, a creditor that collect its own debts may be subject to the FDCPA if it "uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." Id. In other words, if a creditor collects its own debts but uses a different name that suggests it's a third-party debt collector, it will fall within the purview of the FDCPA.
[88] 15 U.S.C. § 1692a(5) (debt means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.").
[89] *Pollice v. Nat'l Tax Funding, L.P*., 225 F.3d 379, 401 (3d Cir. 2000). *See also Oppenheim v. I.C. Sys., Inc*., 627 F.3d 833, 837–838 (11th Cir. 2010) (noting the "broad scope of 'debt' in the FDCPA" such that only an obligation to pay undoubtedly creates a debt); *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C*., 111 F.3d 1322, 1326 (7th Cir. 1997) (holding that "debt" did not require an offer or

extension of credit under the FDCPA). In *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987), the court held that the type of transaction that may give rise to a "debt" as defined in the FDCPA is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, i.e., one involving the offer or extension of credit to a consumer.
[90] 15 U.S.C. §§ 1692b & 1692c.
[91] 15 U.S.C. § 1692d.
[92] 15 U.S.C. § 1692e.
[93] 15 U.S.C. § 1692f.
[94] 15 U.S.C. § 1692g.
[95] 12 U.S.C. § 1005.
[96] Reg. E defines credit as "the right granted by a financial institution to a consumer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor." 12 C.F.R. § 1005.2(f).
[97] 12 C.F.R. § 1005.10(b).
[98] 12 C.F.R. § 1005.10(c).
[99] 12 C.F.R. § 1005.10(d).
[100] 12 C.F.R. § 1005.10(e)(1).
[101] 15 U.S.C. § 6809(4)(A).
[102] 12 C.F.R. § 1016.1(a) (Regulation P, GLBA's implementing regulation). GLBA sets forth a number of exceptions to a consumer's right to opt out. Financial institutions need not comply with opt-out requirements if they limit disclosure of nonpublic personal information in accordance with those exceptions. *See* 12 C.F.R. §§ 1016.13-15.
[103] 15 U.S.C. § 6801(b).
[104] FTC Safeguards Rule (16 C.F.R. § 314 *et seq*.). The federal banking agencies (Fed, FDIC, OCC, OTS, and NCUA) promulgated the Interagency Guidelines Establishing Information Security Standards (66 Fed. Reg. 861) and the SEC implemented its Procedures to Safeguard Customer Records and Information (17 C.F.R. § 248.30). If ISA Providers are subject to GLBA, they will be required to follow the FTC's Safeguards Rule.
[105] The Safeguards Rule sets forth a number of elements that must be included in nay security program, such as a designated person to coordinate the program, a process for identifying risks to customer information, and oversight of service providers (among other things). *See* 16 C.F.R. § 314.4.
[106] 15 U.S.C. § 6809(3)(A); *see also* 12 C.F.R. § 1016.1(l) ("financial institution" encompasses institutions that are engaged in lending, investment advisory services and check cashing (among other things)).
[107] Providers who comply with Federal Educational Rights and Privacy Act ("FERPA") are exempt from these provisions of GLBA. *See* FTC Financial Privacy Rule, 16 C.F.R. § 313.1(b) ("Any institution of higher education that complies with [FERPA]…and that is also a financial institution subject to the requirements of this part, shall be deemed to be in compliance with this part if it is in compliance with FERPA.").
[108] Congressional letter to the Department of Education, dated June 4, 2019 at 2.
[109] *Id*. at 2-3.
[110] *Id*. at 3.
[111] Other bases for discrimination claims exist which may potentially be applicable to ISAs such as under Titles IV and VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 and the Americans with Disabilities Act of 1990. Such laws are beyond the scope of this paper.
[112] This analysis is only relevant to the extent that a court finds that ECOA applies to ISAs or if future legislation or amendments are passed that apply ECOA and Reg. B to expressly cover ISAs.
[113] *See* https://www.consumerfinance.gov/ask-cfpb/what-is-income-based-repayment-ibr-en-633/
[114] *See* https://www.consumerfinance.gov/ask-cfpb/what-are-the-different-ways-to-pay-for-college-or-graduate-school-en-545/
[115] Indeed, ISAs are most often used as a supplement or alternative to private student loans, where income-based repayment plans are rarely, if ever, available to students.
[116] 15 U.S.C. § 1691(a).
[117] *See* CFPB Supervision and Examination Manual, Consumer Laws and Regulations (ECOA), June 2013, at 1 ("CFPB Exam Manual").
[118] *Id; see also, Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project, Inc*. (hereinafter, "*Inclusive Communities*"), 135 S. Ct. 2507, 2513 (2015); 12 C.F.R. Part 1002 Supp. I Section 1002.4(a)-1. Notably, disparate treatment claims do not need to show that "the treatment was motivated by prejudice or a conscious intention to discriminate against a person beyond the difference in treatment itself." Policy Statement on Discrimination in Lending, 59 Fed. Reg. 73 (April 15, 1994)
[119] *Inclusive Communities*, 135 S. Ct. at 2513; CFPB Exam Manual at 1.
[120] Although the United States Supreme Court has not addressed the issue of whether or not disparate-impact claims are cognizable under ECOA, regulators and federal circuit courts of appeal deciding the issue have universally recognized the existence of disparate-impact liability under ECOA. *See, e.g*., CFPB Exam Manual; *Barrett v. H&R Block, Inc*., 652 F. Supp. 2d 104, 108 (D. Mass. 2009) (citing *Miller v. Am. Express Co*., 688 F.2d 1235, 1239-40 (9th Cir. 1982), *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1101 (5th Cir. 1987), *vacated and remanded on other grounds*, 492 U.S. 901, 109 S. Ct. 3207, 106 L. Ed. 2d 558 (1989); *Golden v. City of Columbus*, 404 F.3d 950, 963 n. 11 (6th Cir. 2005) (dictum); *Miller v. Countrywide Bank, N.A*., 571 F. Supp. 2d 251 (D. Mass. 2008)).
[121] *See, e.g., Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008); *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997).
[122] *See Smith v. City of Jackson*, 544 U.S. 228 (2005). In Smith, the plaintiffs challenged the defendant's pay plan that granted proportionately greater pay raises to employees with less than five years tenure claiming that the plan had a disparate impact on older employees in violation of the Age Discrimination in Employment Act. *Id*. at 231. The Court dismissed the disparate impact claim finding that plaintiffs failed to isolate and identify the specific employment practices that are allegedly responsible for any statistical disparities. *Id*. at 241. The Court went on to note that the plaintiff's failure to do so "is the sort of omission that could 'result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances….'" *Id*. (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).
[123] *Inclusive Communities*, 135 S. Ct. at 2523 (quoting *Wards Cove*, 490 U.S. at 653).
[124] 770 F.2d 1401 (9th Cir. 1985)
[125] *Id*. at 1405.
[126] *Id*. at 1406.
[127] *Id*.
[128] *See Cherry v. Amoco Oil Co*., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980).

[129] *See, e.g., Sayers v. General Motors Acceptance Corp*., 522 F. Supp. 835, 839 (W.D. Mo. 1981).
[130] While the use of expected income and certain other data may give rise to potential disparate impact liability exposure, the inherent structure of ISAs and the presence of safeguards such as Minimum Income, Maximum Number of Payments and Payment Term, may also lead to members of a protected class paying less (in the aggregate) under ISAs than would non-members of a protected class. Again, the variability of an ISA makes it difficult to determine whether and how a potential disparate impact may arise.
[131] *Inclusive Communities*, 135 S. Ct. at 2515.
[132] *Id*.
[133] While *Inclusive Communities* involved a disparate impact claim under the Fair Housing Act, the same burden shifting framework has also been applied in the ECOA fair lending context (*see, e.g., Sayers, supra* at 839-840).
[134] *Inclusive Communities*, 135 S. Ct. at 2518. The Court continued to note that "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid … policies." *Id*.at 2522.
[135] *Id*. at 2518 and 2523; see also, 12 C.F.R. Part 1002 Supp. I Section 1002.6(a)-2.
[136] Federal Reserve Board, *Federal Fair Lending Regulations and Statutes: Overview*, Consumer Compliance Handbook (Jan. 2006).
[137] *A.B. & S. Auto Serv., Inc. v. South Shore Bank of Chicago*, 962 F. Supp. 1056, 1061 (N.D. Ill. 1997).
[138] In this paper we presume that the ISA Provider is the higher-educational institution itself and that such institution is the entity setting the terms of its ISA program. Given this presumption, there will not be a situation where an ISA Provider offers ISAs across multiple institutions of higher education. Consequently any "fair lending" analysis will be conducted in the context of a single post-secondary institution and not across multiple post-secondary institutions.
[139] Of course, for such defense(s) to prevail, the plaintiff must not be able to demonstrate that other means exist to achieve the "substantial, legitimate, non-discriminatory interests supporting the challenged practice" that have a less disparate impact. See supra footnote 119.
[140] In order to undertake such "fair lending" testing, ISA Providers will need to compile data for review by collecting information on the race, color, religion, national origin, and sex of an ISA applicant for the purpose of conducting a self-test that meets the requirements of Regulation B (including providing the associated required disclosures). 12 C.F.R. § 1002.5(b)(1). If such analysis meets the requirements of a "self-test" under Regulation B, the report or results of such a self-test will be privileged and may not be obtained or used by the government or private litigant in an examination, investigation or civil proceeding relating to compliance with ECOA. 12 C.F.R Section 1002.15.
[141] S.2114, 116th Cong. (1st Sess. 2019), available at https://www.congress.gov/bill/116th-congress/senate-bill/2114 (last visited July 30, 2019). Senators Young and Rubio introduced a similar bill in 2017 called the "Investing in Student Success Act of 2017", S.268, 115th Cong. (1st Sess. 2017), available at https://www.congress.gov/bill/115th-congress/senate-bill/268 (last visited July 30, 2019). Congress took no action on the 2017 bill.
[142] *See*, S.2114 at § 501.