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TREATMENT OF EDUCATIONAL ISAs UNDER FEDERAL AND SELECT STATE ANTI-DISCRIMINATION STATUTES

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EXECUTIVE SUMMARY

In this paper, we consider whether educational income share agreements ("**ISAs**") are subject to federal and state equal access and anti-discrimination laws. When an ISA provider ("**Provider**") sets the terms of an ISA, the Provider generally will consider the expected earnings of participants ("**Participant**") in the Program ("**Program**") as determined by the Participant's course of study. Based on these considerations, some Providers will vary the income share percentage or the maximum number of monthly payments the Participant may be required to make; however, Providers do not underwrite individual Participants. The maximum payment amount ("**Payment Cap**") also will remain the same for all Participants without regard to the course of study.

Federal fair lending laws, including the Equal Credit Opportunity Act ("**ECOA**"), prohibit discrimination in credit transactions. Courts have not yet considered whether ISAs constitute "credit" for purposes of the ECOA and, therefore, whether a Provider or others involved in an ISA transaction would be "creditors" subject to rules prohibiting discrimination or the procedural safeguards of the ECOA. While we believe that ISAs should not be considered "credit" under the ECOA because there is no unconditional legal obligation to pay any definitive amount under the ISA terms, federal financial regulators have focused more broadly on equitable access in student lending, and education providers are subject to equitable access and anti-discrimination requirements under federal and state laws regulating educational institutions. Accordingly, Providers and Program administrators should take care to ensure that access and eligibility criteria, as well as payment terms and servicing practices, are designed to promote equitable access and to mitigate any potential disparate impact.

Because some Providers may set pricing terms for a Program, but not for individual Participants, based on factors such as field of study and expected income following graduation, in order to recover educational costs extended, and because such factors may correlate to historical demographic trends, there is risk that varying terms based on these factors could have a disparate impact on a protected class. Although Providers can assert that pricing policies are set to promote equity among the Programs, including that the Payment Cap remains the same for all Participants and they are pricing to achieve comparable monthly payment amounts without regard to course of study, Providers or Program administrators still should track and analyze payment behavior as it relates to Participants' monthly payments and as compared to the Payment Cap, to ensure that there is a business justification for varying Agreement terms, and to ensure that there is no less discriminatory way to set such terms.

Equal access has traditionally been a focus of policymakers in education financing, and federal legislation regarding ISAs has included provisions designed to ensure equal access to Programs. Accordingly, promoting equal access and preventing a disparate impact should be a focus of both Providers and Program administrators.

INTRODUCTION

In an earlier paper, we considered whether ISAs should be subject to federal consumer credit statutes, including the Truth in Lending Act ("**TILA**"), state licensed lender regimes, and usury laws in select states. We also considered whether ISAs should be subject to federal and select state credit discrimination statutes.[1] In this paper, we consider the application of federal fair lending laws, select state equal access and credit anti-discriminations statutes, and broader educational anti-discrimination statutes.

PRODUCT OVERVIEW

At a high level, under a typical ISA Program, a Provider funds all or a portion of a student's educational costs in exchange for a fixed percentage of the student's post-attendance income for a specified period of time. Unlike a traditional student loan, an ISA does not have a principal balance and no interest accrues. Instead, a Participant receives a funding amount to be credited to the Participant's tuition obligation in exchange for a promise to pay a specified percentage of the Participant's post-attendance income in months where his or her gross earned income exceeds the applicable minimum income threshold.

The Participant's obligation ends upon the earliest of (1) the Participant's payment of the maximum amount (Payment Cap), specified in the ISA agreement ("**Agreement**"); (2) the Participant's payment of the number of monthly payments specified in the Agreement; or (3) the conclusion of the time period specified in the Agreement. Most ISAs do not confer upon the Provider any rights regarding a Participant's educational, training or employment pursuits; instead, a Participant is typically free to pursue the job of his or her choice, or even elect not to seek employment in the first place, without regard to the amount of the ISA or the Participant's other obligations under the Agreement.

The Agreement sets forth the terms of the ISA, including the ISA amount (the dollar amount or value of the educational services that the Participant can finance through the ISA), the income share percentage (the percentage of a Participant's gross monthly earned income that the Participant must pay following any grace period), the maximum number of monthly payments the Participant may be required to make; and the Payment Cap (the maximum amount a Participant is obligated to pay under the Agreement).[2] The amount that a Participant will pay pursuant to an ISA is not specified in the Agreement because the amount is unknown at the time

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[1] Our prior work on the treatment of educational ISA under federal and select state consumer credit laws is available here. The analysis in this paper is not a 50-state survey of the treatment of ISAs under state anti-discrimination laws, and the laws described in this paper are subject to interpretation by federal and state courts and regulatory agencies, which may take positions that are inconsistent with applicable laws and regulations, and may impose requirements, limitations or prohibitions that are otherwise uncodified. Further, Morrison & Foerster LLP attorneys are not licensed in all of the jurisdictions discussed. Accordingly, this document is not a legal opinion as to the application of the laws described, and it should not be relied upon as such. This document is for informational purposes only.

[2] The terms of each Program are determined by the Provider, and generally do not vary by Participant (i.e., Providers generally do not engage in Participant-level "risk-based pricing"). However, as discussed further herein, terms may vary by Program, for example, based on course of study, which may correlate to employability and income potential.

the Participant enters into the Agreement.[3] Instead, many Providers disclose payment illustrations showing, for various post-attendance income scenarios, the number and amount of required monthly payments and the total that could be paid.

At a high level, when a Provider sets the terms of the ISA, the Provider will consider the expected post-attendance earnings of Participants. Providers do not look at the socio-economic characteristics of an individual Participant or of students in a particular field of study.[4] Moreover, Providers do not offer individualized pricing based on whether a given Participant is likely to graduate, make monthly payments, or reach the payment cap. Some Providers do, however, set pricing at a Program level, considering expected graduation rates and potential earnings of graduates with degrees in particular fields of study when setting the terms of the ISA.

Student eligibility for a Program generally depends on the terms set forth in the Agreement with the particular Provider. Generally, Participants must be enrolled in an educational program and must have attained the age of majority under the laws of their current state of residence. Some Providers impose certain requirements on Participants, including, for example, that the Participant be a U.S. citizen or legal resident. Still others may have a minimum grade point average cutoff. If a student does not meet the applicable minimum criteria, they will be ineligible for the Program.[5]

As noted, some Providers may vary the income share percentage and or the maximum number of monthly payments the Participant may be required to make based on the Participant's field of study; however, all Participants would be subject to a consistent Payment Cap, without regard to the field of study. Generally, Providers vary these terms based on expected income following graduation for each particular field of study. The theory is that, by varying the terms of the Agreement, the Provider can improve the likelihood that all Participants who secure employment will end up paying approximately the same amount on a monthly basis and would be subject to a consistent Payment Cap.

Some Providers also set lower income percentages for upper-level students (e.g., seniors as compared to juniors). Providers may take this approach for different reasons, including the fact that the cost of funds will be greater for lower-level students, because it will, on average, take longer for such Participants to begin making monthly payments to the Provider, or the fact that the rate of non-completion may be higher for lower-level students, thus, on average, resulting in lower earnings.

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[3] Monthly payments are set each year based on the income a Participant earns each month, as reasonably documented for the Provider (e.g., a pay stub, letter from the employer, or other acceptable source documentation). If there is a change in income, monthly payments are typically recalculated.

[4] We are aware that some Providers and Program managers have internal policies that broadly prohibit Providers from discriminating on the basis of protected class.

[5] To the extent a student is determined to be ineligible for a Program, we understand that Providers will provide adverse action notices, including Fair Credit Reporting Act compliance notice, to the extent a Provider uses a consumer report in making an eligibility determination.

LEGAL ANALYSIS

Federal Law

Equal Credit Opportunity Act

Federal fair lending laws, including the Equal Credit Opportunity Act ("**ECOA**"), prohibit discrimination in credit transactions. The ECOA, which is implemented by the Consumer Financial Protection Bureau's ("**CFPB**") Regulation B (12 C.F.R. pt. 1002), prohibits discrimination in any aspect of a credit transaction. It applies to any extension of credit, including residential real estate lending and extensions of credit to businesses.

Under the ECOA, "credit" is defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor."[6] While the first two prongs of the ECOA definition of "credit" contemplate the existence of debt, the result of which would be similar to an analysis under TILA, the third prong provides that only a "deferred payment" is required for a transaction to be deemed "credit" for purposes of the ECOA.[7] If ISAs were determined to be a deferral of payment and, thus, credit for purposes of the ECOA, the Provider, and perhaps others in the ISA ecosystem, may be subject to the general rules prohibiting discrimination and discouragement in the context of a credit application.[8] Certain substantive and procedural safeguards also would attach to the ISA.[9]

To our knowledge, courts have not yet considered whether ISAs constitute "credit" for purposes of the ECOA and, therefore, whether a Provider or others involved in an ISA transaction would be "creditors" subject to the ECOA.[10] Courts have considered whether certain other funding arrangements constitute "credit" under the ECOA, and have reached divergent conclusions. Some courts have interpreted the ECOA definition of "credit" broadly, to include transactions like purchasing cellular telephone services and automobile leasing.[11] Other courts have interpreted the ECOA definition of "credit" more narrowly and have excluded from its

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[6] 15 U.S.C. § 1691a(d); 12 C.F.R. § 1002.2(j). Under the ECOA, the definition of "credit" is broader than the definition of "credit" in TILA. See 12 C.F.R. § 1026.2(a)(14). Unlike the ECOA definition of "credit," the TILA definition does not contain the statement that "credit" includes the right to purchase property or services and defer payment. In addition, the ECOA applies to consumer and commercial transactions, while TILA only applies to consumer credit. *See* 12 C.F.R. pt. 1002, Supp. I, cmt. 1(a)–1.

[7] *See Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1209 (6th Cir. 1997).

[8] 15 U.S.C. § 1691(a), (b).

[9] *See, e.g.*, 15 U.S.C. § 1691(d) (adverse action notices).

[10] A "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." 15 U.S.C. § 1691a(e); 12 C.F.R. § 1002.2(*l*).

[11] *See, e.g.*, *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); *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, noting that "credit transactions" must be given a broad construction "in view of the overriding national policy against discrimination that underlies the Act").

scope an equipment lease, a lease/buyback program, a home improvement contract, a lease-to-own program, and litigation funding arrangements.[12]

A few courts have considered whether factoring arrangements are subject to the ECOA, although we are aware of no court that has concluded that a factoring arrangement constitutes "credit," for purposes of the ECOA.[13] One Massachusetts court held that sales of accounts receivable were not subject to the ECOA because the purchaser did not regularly extend credit in the course of its business; however, the court did not conclude whether the transaction itself was credit for purposes of the ECOA.[14]

While there is no uniform view as to whether ISAs are "credit" for purposes of the ECOA, it is our view that ISAs should not be considered credit because there is no unconditional legal obligation to pay any definitive amount under the ISA terms. Although not defined in the ECOA, a debt generally means an obligation of a consumer to pay money arising out of a transaction.[15] The ISA terms do not create a definite legal obligation to pay the ISA amount—i.e., a Participant is not obligated to make payments if he or she is unable to obtain employment or earns income less than the minimum annual amount specified in the Agreement. Moreover, we do not believe that a Participant is deferring payment of the ISA amount, so as to be considered "credit" under ECOA.[16] In fact, it is possible that a Participant may be discharged from an Agreement without paying the ISA amount (the amount of the educational costs covered by the ISA) or without making any payment whatsoever. Thus, based on the terms of the Agreement, it should not be said that a Participant is deferring payment of educational costs.

Nevertheless, it is important to recognize that federal financial regulators have focused on equal access and anti-discrimination in the context of education financing, and federal ISA

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[12] *See, e.g.*, *Dunn v. American Express Co.*, 529 F. Supp. 633, 634 (D. Colo. 1982) (finding that application for ATM card did not involve a credit transaction); *Liberty Leasing Co. v. Machamer*, 6 F. Supp. 2d 714, 718–719 (S.D. Ohio 1998) (finding that an equipment lease was not a credit transaction under the ECOA because agreement required lessee to make incremental payments as "contemporaneous exchange of consideration for possession of leased goods"); *Robinson v. Veneman*, 124 F. App'x 893, 896 (5th Cir. 2005) (holding that lease/buyback program did not involve a credit transaction because there was no evidence that plaintiff sought or received credit); *Shaumyan v. Sidetex Co.*, Inc., 900 F.2d 16, 18 (2d Cir. 1990) (holding that home improvement contract was not a credit transaction subject to the ECOA); *Laramore v. Ritchie Realty Mgmt. Co.*, 397 F.3d 544, 547 (7th Cir. 2005) (finding that residential lease was not a credit transaction under the ECOA); *Dorton v. KMart Corp.*, 229 F. Supp. 3d 612, 622 (E.D. Mich. 2017) (holding that lease-to-own program did not offer credit and was not subject to the ECOA); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87 (Tx. Ct. of App., March 9, 2006) (concluding that litigation funding agreements are not loans).

[13] *See, e.g., Philadelphia Factors Inc. v. Gordon*, No. CIV. A. 98–3578, 1999 WL 225866, at *9 (E.D. Pa. Apr. 16, 1999) (rejecting argument that plaintiff faced discrimination the basis of marital status under the ECOA with respect to an accounts receivable transaction without analyzing whether transaction was "credit").]; *In re Burm*, 554 B.R. 5, at 21 (Bankr. D. Mass. July 12, 2016) (holding sales of accounts receivable were not subject to the ECOA because the purchaser did not regularly extend credit in the course of its business such that the ECOA would apply).

[14] *In re Burm*, 554 B.R. at 21.

[15] *See* 15 U.S.C. § 1692a(5) (definition of "debt" in the Fair Debt Collection Practices Act ("**FDCPA**")); Black's Law Dictionary, 10th Ed. 2014 (defining "debt" as "a specific sum of money due by agreement or otherwise").

[16] The monthly payment amount is not directly tied to the ISA amount, and is determined in any non-deferral month based on the Participant's expected monthly income and the income share percentage. Therefore, it should not be determined that the Participant is deferring payment of the ISA amount.

legislation has included anti-discrimination provisions.[17] Moreover, education providers often are subject to equal access and anti-discrimination requirements under federal and state laws regulating education.[18] Accordingly, care should be taken to ensure that access and eligibility criteria, as well as payment terms and servicing practices, are designed to promote equitable access and mitigate any potentially discriminatory impact.

ECOA Prohibitions

The ECOA prohibits creditors from discrimination and discouragement on a prohibited basis in the context of an application for credit.[19] Specifically, a creditor may not express, orally or in writing, a preference that is based on a prohibited factor or indicate that it will treat applicants differently on a prohibited basis.[20] Moreover, a creditor may not discriminate on a prohibited basis, including because of the characteristics of an applicant, prospective applicant, borrower, or a person associated with an applicant, prospective applicant, or borrower (such as a co-applicant or spouse).[21]

Courts have recognized three theories of discrimination under the ECOA: (1) overt discrimination; (2) disparate treatment; and (3) disparate impact.[22] Overt discrimination may be established when a creditor openly discriminates on a prohibited basis or the creditor expresses, but does not act on, a discriminatory preference.[23] Disparate treatment occurs when a creditor treats a credit applicant differently on a prohibited basis, which can be established by direct or circumstantial evidence.[24] If a creditor has apparently treated similar applicants differently on a prohibited basis, it must explain the difference.[25]

A disparate impact occurs when a creditor applies a facially neutral policy or practice equally to all credit applicants, but the policy or practice disproportionately excludes or burdens

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[17] *See, e.g.*, S. 2114, 116th Cong. § 501 (as introduced, July 15, 2019) (subjecting certain ISAs to the ECOA and other federal consumer protection statutes).

[18] *See e.g.*, Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c–2000c-9. Discussed *infra* notes 30–34 and associated text.

[19] 15 U.S.C. § 1691(a); 12 C.F.R. § 1002.4. *See also* 12 C.F.R. § 1002.2(z) (defining prohibited basis to include race or color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), the applicant's receipt of income derived from any public assistance program, the applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act).

[20] 12 C.F.R. § 1002.4(a).

[21] *Id*.

[22] *See generally* 59 Fed. Reg. 18,266 (Apr. 15, 1994) (Interagency Task Force on Fair Lending, Policy Statement on Discrimination in Lending).

[23] *Id*. at 18,269.

[24] *See, e.g., Moore v. U.S. Dep't of Agric.*, 55 F.3d 991 (5th Cir. 1995) (citing a letter from a government lender as direct evidence of racial discrimination in a farming loan); *Whitley v. Taylor Bean & Whitacker Mortg. Corp*., 607 F. Supp. 2d 885, 900–901 (N.D. Ill. 2009) (denying motion to dismiss ECOA claims against mortgage lender where plaintiff produced sufficient evidence of direct discrimination).

[25] *See, e.g., Saldana v. Citibank*, 1996 U.S. Dist. LEXIS 8327 (N.D. Ill. June 13, 1996) (buyer interpreted an account executive's statements as being hostile, but such an interpretation did not constitute direct evidence, and the buyer did not establish discrimination based upon disparate treatment because the buyer did not prove that the bank continued to approve loans for applicants with qualifications similar to those of the buyer).

certain persons on a prohibited basis.[26] Although the law on disparate impact as it applies to equal access to credit continues to develop, it has been established that a facially neutral policy or practice that creates a disparity on a prohibited basis is not, by itself, proof of a violation. If a creditor's policy or practice is determined to have a disparate impact, the next step is to determine whether the policy or practice is justified by "business necessity."[27] Factors that may be relevant to the justification include cost and profitability, but even if a policy or practice that has a disparate impact on a prohibited basis can be justified by business necessity, it still may be found to be in violation if an alternative policy or practice could serve the same business purpose with less discriminatory effect.[28]

As discussed above, Providers use various criteria, including course of study, to set the terms applicable to the ISAs. Providers set these terms based on the Participants' expected income following graduation. We are not aware of any such terms that overtly discriminate on a prohibited basis or treat protected classes differently. However, there is risk that, because of historical trends in certain fields of study, varying terms based on field of study could have a disparate impact on protected classes of individuals. For example, a Program offered to students studying early childhood education, which is a field in which women have historically been over-represented and pays comparatively less than other fields upon graduation, may require a higher monthly income share percentage than a Program offered to students studying engineering, which is a field in which men have historically been over-represented and pays comparatively more upon graduation.

To the extent that applying different ISA terms is intended to achieve, and actually achieves, roughly equivalent monthly payment amounts, it is reasonable to assert that such programs are equitable. In addition, it is possible to assert that these Programs are equitable insofar as they have consistent Payment Caps. There are also arguments that ISAs increase equity within a particular Program, because Participants within a given field of study who earn more will pay more (up to the Payment Cap), while those who earn less will pay less.

As is the case for private student loans, the fact that a chosen field of study, on balance, results in lower post-graduation income should not affect the equity of the Program terms. In addition, the Payment Cap remains the same for all Participants (namely, an amount based on the educational costs covered) without regard to course of study. Nonetheless, Providers and Program administrators should track and analyze Participants' payment behavior based on field of study and protected class status, as it relates to monthly payments and as compared to the

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[26] *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2513 (2015) (stating, "In contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale.")

[27] *Id*. at 2,322.

[28] *See, e.g.*, 12 C.F.R. pt. 1002, supp. I, cmt. 6(a)–2 ("For example, requiring that applicants have incomes in excess of a certain amount to qualify for an overdraft line of credit could mean that women and minority applicants will be rejected at a higher rate than men and non-minority applicants. If there is a demonstrable relationship between the income requirement and creditworthiness for the level of credit involved, however, use of the income standard would likely be permissible").

Payment Cap, to determine whether there is a business justification for varying Agreement terms, and to determine whether there is a less discriminatory way to set such terms.

It also is important to recognize that federal financial regulators have been active in the arena of student loans, and anti-discrimination provisions have been included in ISA legislation at the federal level.[29] In addition, education providers may be subject to anti-discrimination requirements under laws regulating educational institutions.[30] Accordingly, care should be taken to ensure that eligibility criteria, payment terms and servicing practices are designed to minimize potentially discriminatory results.

Title IV of the Civil Rights Act of 1964

While it may be reasonable to conclude that federal fair lending principles should not apply to ISAs, other federal and state equal access and anti-discrimination statutes have a broader application, and would protect students in the context of ISAs, even if fair lending provisions do not. Title IV of the Civil Rights Act of 1964 ("**Title IV**") prohibits discrimination against any person on the basis of race, color, or national origin under any program or activity receiving federal financial assistance.[31] "Program or activity" includes the operations of entities, including a college, university, or post-secondary institution or a public system of higher education, that receive Federal financial assistance.[32] Accordingly, Providers that receive Federal financial assistance would be subject to the Title IV prohibitions.

Under Title IV, an entity receiving Federal financial aid may not, among other things, deny a person any available financial aid or other benefit, or provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others.[33] Further, a recipient of Federal financial assistance, in determining the types of services, financial aid, or other benefits to be provided, or the class of individuals to be afforded an opportunity to participate in any such program, may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin."[34] Other federal statutes also protect students from discriminatory conduct.[35]

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[29] *See, e.g.*, S. 2114, 116th Cong. § 501 (as introduced, July 15, 2019).

[30] Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c–2000c-9.

[31] 42 U.S.C. §§ 2000c–2000c-9 and §§ 2000d *et seq.*

[32] 42 U.S.C. § 2000d-4a.

[33] 34 C.F.R. § 100.3(b)(1).

[34] 34 C.F.R. § 100.3(b)(2).

[35] *See, e.g.*, 20 U.S.C. §§ 1070 *et seq*. (Higher Education Act of 1965) (providing that "Institutions of higher education receiving Federal financial assistance may not use such financial assistance, directly or indirectly, to undertake any study or project or fulfill the terms of any contract containing an express or implied provision that any person or persons [on a prohibited basis] be barred from performing such study, project, or contract…." (20 U.S.C. § 1011); and "[n]o loan may be made to an institution under this part if the institution discriminates on account of [a prohibited basis]" (20 U.S.C. § 1066c)).

We are not aware that any court has considered Title IV, or any other federal anti-discrimination statutes, in the context of ISAs. Nonetheless, it is likely that any Program eligibility condition that was determined to discriminate on the basis of race, color, or national origin under any program or activity receiving Federal financial assistance would be determined to violate Title IV. Providers and administrators of ISA Programs should carefully consider eligibility requirements and the administration of ISAs to ensure equal access.

State Law

We have considered the treatment of ISAs under state equal access and anti-discrimination laws in California, New York, Illinois and Indiana. As a general matter, to our knowledge, courts and regulatory authorities have not yet publicly determined whether ISAs are subject to state equal credit opportunity statutes or are expressly subject to other state anti-discrimination statutes.[36]

California law provides that "[n]o person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is [a prohibited basis], in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid."[37] For the reasons discussed above under Title IV, ISA Programs likely would be considered a "program or activity" and, thus, would be subject to the anti-discrimination protections of these state statutes.

New York law generally provides that "[t]he opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability… is hereby recognized as and declared to be a civil right."[38] New York law further provides that "[i]t shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, gender identity or expression, military status, sex, age or marital status…."[39] While we are not

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[36] For a deeper discussion of the treatment of educational ISAs under state consumer credit laws, see our prior analysis at page 15.

[37] Cal. Educ. Code § 220. *See also* Cal. Educ. Code § 66270 (providing that "[n]o person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any characteristic [that is a prohibited basis], in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid").

[38] N.Y. Exec. Law § 291(2). *See also* N.Y. Educ. Law § 12(1) (stating that no student shall "be subjected to discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex by school employees or students on school property or at a school function").

[39] N.Y. Exec. Law § 296(4). *See also* N.Y. Exec. Law § 296-a (preventing any "creditor" from discriminating in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any "form of

aware of any case law on point, a Program may be determined to be a "facility" for purposes of the New York equal access statute.

Illinois maintains several anti-discrimination lending provisions, including the Illinois Human Rights Act, which is designed "[t]o secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with…access to financial credit, and the availability of public accommodations."[40] While the anti-discrimination provisions in the educational context are narrower in scope,[41] a court in Illinois likely would have little difficulty concluding that Participants are protected from discrimination under the Illinois Human Rights Act.

Indiana law provides that "[i]t is the public policy of the state to provide all of its citizens equal opportunity for education…," and that "[e]qual education [among other things]…are hereby declared to be civil rights."[42] Like the Illinois law cited above, we expect a court in Indiana likely would have little difficulty concluding that Participants are protected from discrimination under Indiana law.

We believe that all of these state equal access and anti-discrimination provisions would be interpreted broadly, and likely would be determined to apply to a Program offered by a post-secondary educational institution. Moreover, while states generally recognize a business justification or business necessity defense in the equal credit opportunity context for conduct determined to be discriminatory based on a disparate or adverse impact,[43] such defenses may be more difficult to assert or untested in the education context. Accordingly, Providers and others involved in the administration of ISAs should carefully consider eligibility requirements and the administration of ISAs in the context of equal access.

POLICYMAKING INITIATIVES

Equitable access and anti-discrimination have been a focus of policymakers that have considered ISAs. For example, a recent letter signed by Senator Elizabeth Warren (D-Mass.)

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credit," on a prohibited basis or using any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to a prohibited basis).

[40] 775 Ill. Comp. Stat. 5/1-102.

[41] *See* 775 Ill. Comp. Stat. 5/5A-102 (focusing on sexual harassment).

[42] Ind. Code Ann. § 22-9-1-2. *See also* Ind. Code Ann. § 22-9-1-3 ("Every discriminatory practice relating to… education, public accommodations…or the extending of credit…shall be considered unlawful unless it is specifically exempted by this chapter."); and Ind. Code Ann. § 22-9-1-3(*l*) (Indiana's Civil Rights Law stating that every discriminatory practice relating to the extension of credit, as defined in the Indiana Uniform Consumer Credit Code, is considered unlawful).

[43] *See, e.g.*, *Smith v. Xerox Corp*., 196 F.3d 358 (recognizing a business necessity defense under the New York Human Rights Act in the employment context); Industry Letter from R. Ehli, Deputy Superintendent of Banks, New York Department of Banking, dated August 26, 1998 ("[a] lender will have to provide a defense, based on business necessity, against the claim that the neutral application of its policy has adversely affected a group on the prohibited basis of race in violation of Section 296-a…."; *and Indiana Bell Tel. Co. v. Boyd*, 421 N.E.2d 660 (recognizing a business necessity defense under the Indiana Civil Rights Law in the employment context).

and other members of Congress stated that "[a]lthough both state and federal laws contain protections meant to prevent discrimination and grossly unfair terms, we are still deeply concerned that ISAs create significant opportunities for discriminatory practices." The letter continued "ISAs will inherently have a discriminatory impact on students of color, both in terms of students' reliance on them and their difficulty paying their monthly obligations," and "[c]ompounding this baseline opportunity for discrimination is the fact that ISA funders may flout existing federal consumer protection and anti-discrimination laws," including the ECOA.[44]

With respect to alleged unequal terms based on program of study, this Congressional letter uses, as an example, "[a]n ISA that offers unfavorable terms to students enrolled in an early childhood education program…would likely have a discriminatory impact because students in these programs tend to be overwhelmingly female. In contrast, ISAs that offer terms that are more generous for programs like engineering, which tend to graduate students in fields dominated by white men, would again produce disparate outcomes that contribute to our country's structural inequalities."[45] Nevertheless, it is our view that Programs are equitable insofar as they have consistent Payment Caps and similar monthly payment amounts. The fact that a chosen field of study results, on balance, in a lower level of post-graduation income should not render the Program terms inequitable. Moreover, to the extent any inequity exists, the Payment Caps, which are consistent across field of study, are based on actual educational expenses and, therefore, any inequity would exist without regard to the way in which the Participant financed such expenses (e.g., by opting for a private student loan rather than an ISA).

Notwithstanding these contentions, federal ISA legislation has proposed applying the ECOA to ISAs.[46] The legislation would, however, expressly provide that it would not constitute discrimination for a Provider or a successor in interest "to set the terms of an income share agreement (as defined in [the relevant] section [] of the Investing in Student Achievement Act of 2019), based on the earnings reasonably anticipated by the creditor with respect to any program of study, certificate program, degree program, or institutions of higher education where an ISA is offered."[47] While such a legislative outcome would enable Providers to continue to consider expected post-graduation income in setting the terms of the Agreement, Providers still would need to manage risks related to a disparate impact on Participants. It will be important for Providers and Program administrators to collect data that would enable testing of the Providers' eligibility criteria and conditions.

At the state level, proposed legislation relevant to ISAs has not focused on equal access or anti-discrimination. Nonetheless, the state equal access and anti-discrimination laws of broad applicability would likely apply.

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[44] Letter from Senator Elizabeth Warren to Secretary Betsy De Vos, June 4, 2019, https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DeVos%20re%20ISAs.pdf.

[45] *Id.*

[46] *See, e.g.*, S. 2114, the Investing in Student Achievement Act of 2019, 116th Cong. § 501 (as introduced, July 15, 2019).

[47] *Id.*

CONCLUSION

Providers generally consider the expected earnings of Participants in setting Program terms. These terms will not, however, vary by Participant or consider the demographics of Participants, or whether the Participants are in a protected class. Because the ISA terms are set to ensure consistent Payment Caps and to promote consistency of the monthly payments and the educational costs to be recovered, ISAs should not present significant risks of unequal access or disparate impact.

Nonetheless, Providers and Program administrators should track participation and payment behavior to ensure that there is a business justification for varying pricing terms, and to ensure that there is no policy or practice that could serve the same business purpose with less discriminatory effect. Moreover, equitable access has been a focus of policymakers and legislation at the federal level has included provisions designed to ensure equal access to Programs. Accordingly, promoting equal access and preventing unlawful disparate impact should be a focus of Providers and Program administrators.

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