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REGULATORY TREATMENT OF EDUCATIONAL ISAs UNDER FEDERAL AND SELECT STATE CONSUMER CREDIT STATUTES

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EXECUTIVE SUMMARY

Post-secondary educational institutions are increasingly offering income share agreements ("**ISAs**") as an alternative to private education loans. Unlike private education loans, the regulatory treatment of ISAs under consumer credit statutes is less certain. This paper considers the likely regulatory treatment for ISAs under federal and select state consumer credit statutes.

ISAs should not be viewed as "credit" for purposes of federal and state laws because "credit" generally involves an unconditional obligation to repay. ISAs only require payments by participating students (each, a "**Participant**") in periods during which the Participant has gross income greater than a specified minimum amount and payment is not otherwise deferred. Moreover, ISAs cap the period of time a Participant can be required to make payments, without regard to whether the Participant has made any payments or to the total amount of any payments made.

While there is no uniform test for distinguishing credit transactions and non-credit transactions, courts generally have considered factors such as whether the capital provider assumes the risk of non-payment and whether the capital provider possesses a right of recourse—i.e., has the ability to compel payment—against the recipient of the funding. In the case of ISAs provided by post-secondary education institutions or an outside entity ("**Provider**"), the Provider bears the risk of nonpayment, and does not retain a right of recourse against a Participant because Participants are not required to make payments during periods in which their income is below a specified amount and are not required to make any efforts to earn more than such specified amount.

As such, educational ISAs should not be viewed as "credit" for purposes of various consumer credit laws and regulations, including the federal Truth in Lending Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and similar state laws. Other consumer protection and anti-discrimination statutes of general applicability, however, may still apply, including federal and state prohibitions on unfair or deceptive trade practices, federal and state financial privacy laws, and federal and state debt collection laws. Furthermore, many post-secondary education institutions are subject to a comprehensive legal and regulatory regime that regulates student interactions, including student disclosures, education financing, and prohibitions against discriminatory conduct.

Education financing also has been a focus of federal and state regulators, particularly with respect to student loan servicing. This focus is based in part on the fact that students are perceived to be at risk with respect to potential predatory actions by student lenders and servicers. Thus, federal and state regulators have used their unfair or deceptive trade practices authority to bring enforcement actions against student lenders and student loan servicers, and such authority likely applies to Providers. Post-secondary education institutions and their service providers should take note of this enforcement activity and should, among other things, ensure that disclosures and other statements to consumers are accurate and clear, that origination and servicing practices are well documented, and that payments are properly processed and applied.

Educational ISAs also are receiving increased attention, including in state legislatures and the U.S. Congress. This attention is likely the result of the growing focus on problems associated with student debt, the potential for ISAs to lessen student debt, and the regulatory uncertainty related to the treatment of ISAs under consumer credit statutes. We expect that policymakers and regulators will seek to address this regulatory uncertainty, and such efforts are coalescing around certain core principles, including clear disclosures and maximum payment commitments by Participants.

INTRODUCTION

We have considered whether ISAs should be subject to the principal federal consumer credit statutes, including the Truth in Lending Act ("**TILA**"), the Equal Credit Opportunity Act ("**ECOA**"), the Fair Credit Reporting Act ("**FCRA**"), and Title V of the Gramm-Leach-Bliley Act ("**GLBA**"), as well as federal rules relating to unfair, deceptive (or abusive) acts or practices ("**UDAP/UDAAP**"). We have also considered ISAs under state licensed lender regimes, usury laws, and credit discrimination statutes in California, Indiana, Illinois and New York.[1]

PRODUCT OVERVIEW

Under a typical educational ISA program, a college, university or other educational institution, or an outside entity, herein described as Provider, funds all or a portion of a student's education 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 participating student, or 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 a specified minimum income threshold. The Participant's obligation ends regardless of whether any payments have been made upon the earliest of (1) the total of the Participant's payments under the ISA reaches a specified amount ("Payments Cap"); (2) the student has made a specified number of monthly payments; or (3) if a time period specified in the ISA agreement ("**Agreement**") has elapsed. Most ISAs do not confer upon the Provider any rights regarding a Participant's educational, training or employment pursuits; the

[1] Our analysis is not a 50-state survey of the treatment of ISAs under state consumer credit laws. Moreover, the laws described in this paper are subject to interpretation by federal and state regulatory agencies. These agencies may take positions that are inconsistent with applicable laws and regulations, and they 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. In addition, our analysis does not consider federal or state education, taxation, or wage and hour laws, or any other body of law beyond those laws discussed herein.

Participant is free to pursue the job of his or her choice, or even to refuse to seek employment in the first place, without regard to the amount of the ISA or any obligations thereunder.[2]

Eligibility

Student eligibility for participation in an ISA 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. In addition, some Providers may condition eligibility on participation in a particular course of study or meeting certain other eligibility criteria, such as not having recently defaulted on student loans and not having filed for bankruptcy.

Agreement and Payments

The Agreement sets forth the terms of the ISA, including the ISA amount (i.e., the dollar amount or value of the educational services that the Participant can finance through the ISA); the income share percentage (i.e., 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 a payment cap, which is the maximum amount a Participant could be obligated to pay under the ISA.[3] Some Providers provide disclosures in a format similar to the Consumer Financial Protection Bureau ("**CFPB**") model private education loan disclosures, on the theory that those disclosures have been determined by consumer financial services regulators to provide material disclosures in a clear and conspicuous manner. The disclosures and terms of the Agreement typically state expressly that the contract is not a loan and is not credit.

The amount that any Participant will pay pursuant to an ISA is not stated in the Agreement because the amount cannot be known at the time that the Participant enters into the ISA. Instead, many Providers disclose payment illustrations showing, for various likely post-attendance income scenarios, the number and amount of required monthly payments, and the total that could be paid.

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

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[2] We note that at least one ISA appears to require that the Participant "make[s] reasonable and good faith efforts to seek employment immediately following completion of the Higher Education or Training and during all times during the Payment Term that you are not employed or that you have Earned Income less than the Minimum Monthly Amount." *See* Sample ISA by Lambda School, https://leif.org/api/products/5b5b8bd0e59b743f9a086ed9/pdf. While we do not address the legal impact of such a requirement in this memorandum, we acknowledge that such a requirement could affect the analysis of whether an ISA with this requirement is truly "without recourse," and could have unfair or deceptive acts or practices implications.

[3] ISA terms of each ISA 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, ISA terms may vary by Program, for example, based on course of study, which may correlate to employability and income potential.

acceptable source documentation). If there is a change in income, monthly payments are typically recalculated.

A Participant's obligations under the ISA are extinguished once the Participant has paid an amount equal to the payment cap; made the maximum number of payments under the Agreement; or the number of months after a Participant's grace period has elapsed exceeds the specified maximum number of months. These concepts are explained further below.

Grace Period and Deferment

Once a Participant's educational program ends, as contemplated under the Participant's Agreement, the Participant has a set grace period during which he or she is not required to make payments. The grace period is determined by the Provider and set forth in the ISA Agreement; a typical grace period might be six months. Payments begin based on income earned in the month following the end of the grace period.

Upon certain triggering events, a Participant may enter into a period of deferment during which he is not required to make monthly payments. Triggering events typically include: (1) earning less than a minimum periodic income, for example, due to unemployment or disability; or (2) enrollment in another educational or training program. If a Participant qualifies for a deferment but has exceeded the maximum of available deferment months, the Participant is not required to make a monthly payment, and the number of remaining monthly payments are reduced by one month for each such month. Thus, ISAs can be viewed as more progressive than loans, as an ISA obligation can end with the Participant paying less than the initial funding amount, or even nothing at all, if a Participant is continually unemployed, underemployed, or earning less than the minimum income threshold. Many ISAs also include a provision forgiving the ISA upon the death or total and permanent disability of the Participant.

Other Key Terms

The Provider will conduct a payment reconciliation process by which it verifies that a Participant has been paying appropriate amounts based on his or her current income. If a Participant is paying more or less than required under the Agreement, the Provider will adjust accordingly subsequent monthly payments to resolve any over- or under-payment. The reconciliation process is also used to estimate future income for the purpose of setting the monthly payment for the coming year, which is adjusted in the event that the student provides updated income information.

A Provider may charge certain fees, including a late fee, a returned payment fee and a service fee for certain optional value-added services requested by the Participant (e.g., overnight mail and expedited payments). Generally, no other fees are charged.

Participants typically can prepay their ISA, although prepayment methodology may vary by Provider or ISA servicer. For example, many Providers allow the Participant to prepay by paying an amount equal to the payment cap less any payments made to date; in which case, the prepayment amount decreases each time the student makes a monthly payment. Other Providers will include a prepayment schedule with prepayment amounts set by reference to, for example, the number of years or payments after the Participant's enrollment period has ended.

If a Participant's account is delinquent for a certain number of days, as provided under the Provider's Agreement with the Participant, the account may be considered to be in default and the Provider may have the right to pursue monetary damages and other equitable remedies. If a Participant leaves an educational program for which the Participant has secured an ISA prior to completion, the student may be entitled to a refund under the educational institution's refund policy, as determined by applicable law.

LEGAL ANALYSIS

Federal Law

Truth in Lending Act

TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[4] The terms "debtor" and "debt" are not expressly defined in TILA or the CFPB's implementing Regulation Z (12 C.F.R. Part 1026).[5]

Under TILA, the term "creditor" means a person who both "(1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement."[6] A parallel definition of "creditor" exists in Regulation Z.[7] The term "loan" is not expressly defined under the statute, but "has been defined as delivery by one party to and receipt by another party of a sum of money upon agreement, express or implied, to repay it with or without interest.... Anything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use."[8]

The Official Staff Commentary to Regulation Z provides a series of exclusions from the definition of "credit."[9] For example, "investment plans in which the party extending capital to

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[4] 15 U.S.C. § 1602(f); 12 C.F.R. § 1026.2(14) (Regulation Z).

[5] Without express statutory definitions of these terms, courts generally interpret "debtor" and "debt" with reference to state law definitions, if any. *See* 12 C.F.R. § 1026.2(b)(3) ("Unless defined … words used have the meanings given to them by state law or contract."); *see also Billings v. Propel Financial Services, L.L.C.*, 821 F.3d 608, 610 (5th Cir. 2016) (noting that the term "debt" is not defined in TILA and takes on the definition ascribed by state law).

[6] 15 U.S.C. § 1602(g). Under TILA, the term "creditor" also includes a "private educational lender." *Id.* A "private educational lender" generally means any person "engaged in the business of soliciting, making, or extending private education loans." 15 U.S.C. § 1650(a)(7). The term "private education loan," in turn, is defined to mean a "loan provided by a private educational lender that (i) is not made, insured, or guaranteed under…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…." *Id.* § 1650(a)(8). For the reasons discussed herein, a Provider should not be characterized as a private educational lender because it is not engaged in soliciting, making or extending "loans."

[7] 12 C.F.R. § 1026.2(17)(i).

[8] *Capela v. J.G. Wentworth, LLC*, No. CV09–882 SJF/WDW, 2009 WL 3128003, at *9 (E.D.N.Y. Sept. 24, 2009), citing Black's Law Dictionary, 5th Ed. (internal citations omitted).

[9] 12 C.F.R. pt. 1026, Supp. I, cmt. 2(a)(14)–1.

the consumer risks the loss of the capital advanced" are not credit for TILA purposes.[10] Based on this exclusion, one of the key characteristics to determine whether an arrangement is credit for TILA purposes is the allocation of the risk of loss. Specifically, if the party investing capital bears the risk of loss, the arrangement should not be determined to be credit for TILA purposes.

Nonetheless, the U.S. Court of Appeals for the Fifth Circuit has noted that TILA is meant to be "liberally construed in favor of the consumer,"[11] and courts have taken divergent views on whether non-traditional funding transactions are regulated by TILA.[12] While federal courts have not, to our knowledge, specifically analyzed whether ISAs are subject to TILA, courts have identified key characteristics in determining whether a transaction is a loan governed by TILA or a sale. Specifically, courts have found that a transaction is more likely a loan where there exists an unconditional legal obligation to pay, or where a lender has the ability to compel payment from the borrower (i.e., the lender has recourse).[13]

In the case of an ISA, the Participant's obligation to make payment depends entirely on whether the Participant secures employment and whether the Participant's income exceeds the minimum monthly income threshold specified under the terms of the ISA Agreement. Because the Participant's payment obligation is conditioned entirely on the Participant being employed and the Participant's income exceeding a certain threshold, an ISA should not be viewed as

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[10] *Id*., cmt. 2(a)(14)–1.viii.

[11] *Cody v. Community Loan Corp.,* 606 F.2d 499, 505 (5th Cir. 1979), *cert. denied,* 446 U.S. 988 (1980).

[12] For example, a federal district court in Alabama has determined that certain pawn transactions are subject to TILA (*Wiley v. Earl's Pawn & Jewelry Inc.*, 950 F. Supp. 1108, 1112–13 (S.D. Ala. 1997)), while the Fifth Circuit and a federal district court in California have determined that tax lien transfers and tax assessments are not subject to TILA (*Billings*, 821 F.3d 608; *In re Hero Loan Litigation*, 2017 WL 3038250, at *3 (C.D. Cal. 2017)).

[13] *See Capela*, 2009 WL 3128003, at *9–*10 (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"—i.e., "a transaction in which something, often money, is transferred to someone who is obligated to pay it back"—under TILA because the beneficiary had no obligation to pay the settlement installments to the entity if he did not receive the funds). *See also Reed v. Val-Chris Investments, Inc.*, No. 11cv371 BEN WMC, 2011 WL 6028001, at *2 (S.D. Cal. Dec. 5, 2011) (holding that a plaintiff's advance on an inheritance in exchange for assigning a portion of the inheritance to an LLC was not a loan subject to TILA because (1) the transaction did not involve an obligation to repay the LLC if the plaintiff did not in fact receive sufficient funds from the estate to pay back the LLC; and (2) the defendant had no recourse against the plaintiff if the plaintiff did not receive funds. Accordingly, the plaintiff "did not incur any debt or potential debt as a result of the transaction."). Nonetheless, we note that there may be an inclination of courts or regulators to seek out ways to protect vulnerable populations; in this regard, a court or regulator may look to other characteristics of the transaction, beyond recourse, such as conditions of default to recharacterize a transaction as a loan.

credit under TILA.[14] Moreover, because, under most ISA Programs, a Participant cannot be compelled to seek employment, or to seek employment at any particular income level, the risk of non-payment is not only theoretical, but real.

It is worth noting that it is the purpose of TILA to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[15] Accordingly, while Providers should not be subject to TILA's disclosure requirements, Providers nevertheless should endeavor to clearly and conspicuously disclose the ISA terms to mitigate the risk of deceptiveness claims. As discussed further herein, clear disclosure has been a focus of the proposed federal and state regulation of ISAs.

Equal Credit Opportunity Act

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."[16] While the first two prongs of the ECOA definition of "credit" contemplate the existence of debt, the result of which would be similar to the TILA analysis above, the third prong indicates that only a "deferred payment" is required for a transaction to be deemed "credit" for purposes of the ECOA.[17]

If ISAs were determined to be credit for purposes of the ECOA, the Provider would be subject to prohibitions on discrimination on a prohibited basis in the context of a credit application, and on discouragement on a prohibited basis of any applicant or prospective

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[14] This conclusion should be the same as it relates to the applicability of the Military Lending Act ("**MLA**," (10 U.S.C. § 987) and the Department of Defense ("**DOD**") implementing regulations (32 C.F.R. pt. 232). Under DOD's implementing regulations, the MLA applies to "consumer credit," which is defined as "credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is (i) subject to a finance charge; or (ii) payable by a written agreement in more than four installments." 32 C.F.R. § 232.3(f)(1). The regulation's definitions of "credit" and "consumer credit" are intended to align with the scope of Regulation Z. Specifically, it is DOD's intent that the terms as used in the MLA regulation should, wherever possible, be interpreted consistently with Regulation Z. *See, e.g.*, 80 Fed. Reg. 43,560, 43,572 (July 22, 2015) (subject to limited exceptions, "the Department believes that the consumer credit regulated under the MLA generally should track the scope of credit regulated under Regulation Z…."). We further note that educational ISAs should not be subject to Section 3937 of the Servicemembers Civil Relief Act ("**SCRA**"), although we are not aware that this issue has been considered by a court or administrative authority. Generally, the SCRA restricts an "obligation or liability bearing interest" from "bearing interest at a rate in excess of 6 percent" during the period of military service. 50 U.S.C. § 3937(a)(1). As an initial matter, a Participant does not incur interest in for purposes of an ISA, and, therefore, an ISA should not be viewed as an obligation subject to the SCRA. Moreover, if an ISA were determined to be an obligation subject to the SCRA, the fact that the monthly payment is income-based would operate to protect servicemembers in the event their monthly income decreases as a result of being called to active duty. These issues are not considered in further detail in this paper.

[15] 15 U.S.C. § 1601(a).

[16] 15 U.S.C. § 1691a(d); 12 C.F.R. § 1002.2(j) (Regulation B). Under the ECOA, the definition of "credit" is broader than the definition of "credit" in TILA. 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.

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

applicant.[18] Certain substantive and procedural safeguards also would be attached to the transaction.[19]

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.[20] However, courts have considered whether certain other funding arrangements constitute "credit" under the ECOA, and have reached divergent conclusions.[21] For example, a few courts have reviewed 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.[22] 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.[23]

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.[24] The ISA terms do not create a definite legal obligation to pay the ISA amount—

[18] 15 U.S.C. § 1691(a), (b).

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

[20] 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*).

[21] The following courts have found the transactions to be credit: *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"). Other courts have found that certain transactions do not constitute credit: *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 ECOA); *Dorton v. KMart Cor*p., 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).

[22] *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).

[23] *In re Burm*, 554 B.R. 5, at 21.

[24] *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").

i.e., a Participant is not obligated to make payments if he or she is unable to obtain employment or earns income less than a specified minimum annual amount.

Nevertheless, it 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 draft ISA legislation at the federal level.[25] Education providers also may be subject to anti-discrimination requirements under applicable laws regulating education providers.[26] Accordingly, care should be taken to ensure that eligibility criteria, payment terms and servicing practices are designed to minimize potentially discriminatory actions.

Fair Credit Reporting Act

Under the FCRA, a consumer reporting agency ("**CRA**") may furnish a consumer report to a person only if the person has a permissible purpose to receive the consumer report.[27] For example, a CRA has a permissible purpose to furnish a consumer report to a person if the CRA has reason to believe the person to whom it is furnishing the report "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer."[28] Under the FCRA, "credit" is defined by reference to the ECOA,[29] meaning that it 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."[30]

To our knowledge, courts have not analyzed whether an ISA would be viewed as a credit transaction for purposes of the FCRA and, as a general matter, few courts have reviewed whether non-traditional credit-like arrangements constitute "credit transactions" for purposes of the Act. One court found that cell phone contracts were extensions of credit under the FCRA because

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[25] *See* H.R. 3145, 115th Cong. § 601 (2017).

[26] Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c–2000c-9. New York's Human Rights Law prevents 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 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. See N.Y. Exec. Law § 296-a. Indiana's Civil Rights Law states that every discriminatory practice relating to the extension of credit, as defined in the Indiana Uniform Consumer Credit Code ("**IUCCC**"), is considered unlawful. See Ind. Code Ann. § 22-9-1-3(*l*). Illinois maintains several anti-discrimination lending provisions, including the Illinois Human Rights Act, which prohibits a financial institution from denying or varying the terms of a loan. 775 Ill. Comp. Stat. 5/4-101, -103; 815 Ill. Comp. Stat. 140/1a. There are arguments that a Provider should not be determined to meet the definition of "creditor" for purposes of these statutes; however, these arguments are untested in court and, as a practical matter, Providers should employ available practices and procedures that are consistent with state anti-discrimination statutes.

[27] 15 U.S.C. § 1681b(a).

[28] *Id*. § 1681b(a)(3)(A). In its report "40 Years of Experience with the Fair Credit Reporting Act" ("FTC's 40 Years Report"), the FTC stated that the "issue of whether credit … provides a permissible purpose is determined by reference to" 15 U.S.C. § 1681b(3)(A). FTC, 40 Years Report, at 47, https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

[29] 15 U.S.C. § 1681a(r)(5).

[30] *Id*. § 1691a(d).

they involved a deferral of payment where creditors bore the risk that a customer could default on payment, "which is essentially what credit is all about."[31] Similarly, utility service payments are credit under FCRA.[32] However, contemporaneous or advance payments for services negate the existence of a credit transaction.[33]

As with the ECOA analysis above, it may be reasonable to conclude that ISAs are not credit transactions for purposes of the FCRA, because there is no unconditional legal obligation to repay a debt under the ISA terms.[34] Specifically, the terms of the ISA do not unconditionally require payment of an obligation, because a Participant is not bound to make payments if he or she is unable to obtain employment or secures employment with compensation less than a specified minimum annual amount that triggers payment obligations. Moreover, without regard to whether an ISA is viewed as a credit transaction, we understand that Providers will obtain written instructions to obtain a consumer report. Therefore, the Provider should not rely on the credit permissible purpose to obtain a consumer report. In addition, an entity has a permissible purpose to obtain a consumer report if it has a legitimate business need for the information in connection with a business transaction initiated by the consumer.[35]

Gramm-Leach-Bliley Act

Title V of the GLBA governs the use of nonpublic personal consumer information by financial institutions and imposes various notice and disclosure obligations on such institutions.[36] The GLBA also requires the applicable federal regulators to establish standards for financial institutions to ensure the security and confidentiality of customer information, and to protect against threats to the security or accuracy of, or unauthorized access to, such information that could result in substantial harm to consumers.[37]

Although a complete analysis of the requirements of the GLBA is beyond the scope of this paper, it is important to consider the scope of its application. For purposes of the GLBA, a "financial institution" is any person that engages in the business of financial activities, as defined in the Bank Holding Company Act.[38] Such financial activities expressly include lending, exchanging, transferring, investing for others or safeguarding money or securities, and other

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[31] *Murray v. New Cingular Wireless Servs.,* 432 F. Supp. 2d 788, 791 (N.D. Ill. 2006).

[32] *Riddle v. Portfolio Recovery Associated, Inc.,* Civ. A. No. 12–82–DLB–JGW, 2014 WL 1252610, at *5 (E.D. Ky. Mar. 26, 2014).

[33] *Laramore,* 397 F.3d at 546–547.

[34] Although not defined in either the FCRA or the ECOA, a debt generally means an obligation of a consumer to pay money arising out of a transaction. *See, e.g.*, 15 U.S.C. § 1692a(5) (definition of "debt" in the FDCPA); Black's Law Dictionary, 10th Ed. 2014 (defining "debt" as "a specific sum of money due by agreement or otherwise").

[35] 15 U.S.C. § 1681b(a)(3)(F). According to the FTC's 40 Years Report, this purpose relates to the business of the user for a consumer purpose for the individual, which should include ISAs. FTC, 40 Years Report, at 48.

[36] 15 U.S.C. § 6803(a).

[37] *Id*. § 6801(b); *see also, e.g.*, 16 C.F.R. pt. 314 (FTC Safeguards Rule) (setting forth standards for developing, implementing and maintaining reasonable administrative, technical and physical safeguards to protect the security, confidentiality and integrity of customer information).

[38] 15 U.S.C. § 6809(3)

activities that are financial in nature.[39] The scope of the GLBA is broad and, for example, includes entities "providing financial, investment, or economic advisory services,"[40] and entities "providing data processing, data storage and data transmission services … if … [t]he data to be processed, stored are furnished as financial, banking, or economic."[41]

While, as discussed at length above, we believe it is reasonable to conclude that Providers are not engaged in lending activities, given the broad scope of the GLBA and the range of activities a Provider offers to Participants, it is likely that a Provider would be determined to be a "financial institution" for purposes of the GLBA. We understand that at least some Providers have taken this view, and are providing notices consistent with the GLBA and otherwise complying with the GLBA and the agency implementing regulations.[42]

Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act ("**FDCPA**") imposes limitations on the practices in which debt collectors may engage when collecting certain types of debt.[43] A "debt collector" is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," and any "creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts," subject to certain exclusions.[44] However, a Provider collecting in its own name would not be collecting on behalf of a third party, and therefore should be exempt from the FDCPA.[45]

The FDCPA defines "debt" as "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."[46] As noted, TILA and the ECOA do not define "debt," and for purposes of those statutes an ISA should not be deemed "credit" because there is no definitive legal obligation to pay a debt under the terms of the Agreement. However, courts have found that the definition of "debt" under the FDCPA is quite broad and applies to

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[39] *See* 12 U.S.C. § 1843(k)(4).

[40] *See id.*

[41] *See* 12 C.F.R. § 225.28(b)(14)(A).

[42] *See, e.g.*, https://www.purdue.edu/backaboiler/privacy/BaB%20PrivacyNotice%20Final%20Revised%205.30.17.pdf. Note, too, that institutions of higher education that are subject to, and comply with, the Federal Education and Privacy Rights Act (20 U.S.C. § 1232g), are deemed to be in compliance with the GLBA. 16 C.F.R. § 313.1(b).

[43] 15 U.S.C. §§ 1692–1692p.

[44] *Id.* at § 1692a(6).

[45] *See id*. and *id*. § 1692a(6)(F)(ii).

[46] *Id.* at § 1692a(5).

"all obligations to pay money which arise out of consensual consumer transactions, regardless of whether credit has been offered or extended."[47]

When considering whether the collection of a dishonored check was subject to the FDCPA, the Seventh Circuit found that the FDCPA definition of "debt" is very broad, and is not limited to a certain set of obligations but applies to "any obligation to pay."[48] The Seventh Circuit rejected the argument that "debt" under the FDCPA only applies to debt arising from credit transactions, indicating that TILA's applicability to credit transactions did not similarly limit the scope of the FDCPA.[49] Accordingly, "debt" under the FDCPA does not require an offer or extension of credit, and is more expansive than the definition utilized in TILA, which contemplates the existence of consumer credit. State debt collection statutes often are analogous to the federal FDCPA, such that "debt" also should be interpreted broadly.[50]

As a result of the FDCPA's expansive definition of "debt," the FDCPA would likely apply to third-party (i.e., non-Provider) collections efforts related to ISAs, and require that those engaging in such efforts comply with various consumer protections, for example by restricting communications with a consumer at unusual times or places or if the collector knows the consumer is represented by an attorney,[51] prohibiting engagement in harassment or abuse in connection with the collection of a debt,[52] prohibiting use of false or misleading representations while attempting to collect a debt,[53] and prohibiting use of unfair practices to attempt to collect a debt.[54] State laws may have a broader scope of applicability and impose additional requirements on debt collectors, including licensing or registration.[55]

Regulatory Scrutiny and UDAP/UDAAP Authority

One final aspect of federal law to consider is the regulatory scrutiny given to student loans, with particular attention to unfair, deceptive or abusive acts or practices by creditor and

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[47] *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 is required for the creation of 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).

[48] *Bass*, 111 F.3d at 1325.

[49] *Id.* at 1328.

[50] *See, e.g.*, Fla. Stat. § 559.55(6) (defining "debt" as it is used in the FDCPA); Conn. Gen. Stat. Ann. § 36a-645(3) (utilizing a definition of "debt" similar to that set forth in the FDCPA).

[51] 15 U.S.C. § 1692c(a).

[52] *Id*. § 1692d.

[53] *Id*. § 1692e.

[54] *Id*. § 1692f.

[55] *See, e.g.*, Cal. Civ. Code § 1788.2(c).

student loan services. UDAP/UDAAP is enforced at the federal level by the consumer financial regulatory agencies, including the Federal Trade Commission ("**FTC**") and the CFPB.[56]

Under its UDAP authority, the FTC has taken enforcement actions against various participants in the education financing market, including student loan debt relief service providers, as part of an initiative "targeting deceptive student loan debt relief scams."[57] For example, in one action, the FTC alleged that a debt relief service provider made deceptive misrepresentations in its advertising, marketing, promotion, or sale of student loan debt relief services, such as alleging that the provider was affiliated with the government or that consumers who purchased the services would have their monthly payments reduced or their loans forgiven.[58] The FTC noted that "misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices" prohibited by the FTC Act.[59]

The CFPB also has focused on the student loan industry, and particularly student loan servicing.[60] For example, the CFPB brought an action in the context of student loan servicing,

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[56] Both the FTC and the CFPB rely on the unfairness and deceptiveness standards articulated under Section 5 of the FTC Act. 15 U.S.C. § 45(a). Unlike any other regulatory agency, the CFPB has authority to regulate "abusive" acts or practices, in addition to those that are unfair or deceptive. 12 U.S.C. § 5531(a). While the CFPB uses its abusiveness authority much less frequently than its unfairness and deceptiveness authorities, the agency has used its abusiveness authority a number of times, including in an action against an entity for engaging in abusive acts or practices in connection with providing pension "advances," which the CFPB claimed were truly disguised loans with interest rates. Complaint, *CFPB v. Pension Funding, LLC*, Case No. 15-cv-1329, at 17–18 (C.D. Cal. Aug. 20, 2015) (alleging that the entity engaged in abusive acts or practices by "obscur[ing] the true nature of the credit transaction by denying that their product was a loan and instead referring to it as a pension advance, pension buyout, pension lump sum, money purchase pension plan, purchase of a cash stream of payments, or purchase," while according to the CFPB, the entity "failed to disclose or denied the existence of an interest rate and fees associated with the loans"). State enforcement authorities' unfair trade practice statutes may also apply; however, our focus for this section is with respect to federal law.

[57] Press Release, "FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams" (Oct. 13, 2017), https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown.

[58] Complaint, *FTC v. American Student Loan Consolidators, LLC*, No. 17-61862, at 9 (S.D. Fla. Sept. 25, 2017).

[59] *Id. See also* Complaint, *FTC v. Student Debt Doctor LLC*, No. 17-61937, at 10–11 (S.D. Fla. Oct. 2, 2017) (alleging that defendants made misrepresentations that their debt relief service would eliminate or reduce consumers' monthly student loan payments, which constituted deceptive practices under the FTC Act); Complaint, *FTC v. M&T Financial Group*, No. CV17-6855-ODW(PLAx), at 12–13 (Sept. 18, 2017) (alleging that defendants engaged in deceptive acts or practices when they misrepresented that they were affiliated with the government, their services would reduce student loan monthly payments, the students had to pay a fee to enroll, the monthly payments would be applied to the students' loans, and the defendants would service the student loans).

[60] The CFPB has maintained a student loan ombudsman for private student loans since its inception, and has received complaints regarding private student loans since March 2012. In March 2016, the CFPB expanded the types of consumer complaints it would receive, to include complaints regarding federal student loans and loans from online marketplace lenders. *See* Press Release, "CFPB Now Accepting Complaints on Consumer Loans from Online Marketplace Lender" (Mar. 7, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-now-accepting-complaints-on-consumer-loans-from-online-marketplace-lender/. While this expansion signaled the CFPB's intent to expand its regulatory efforts beyond private student loans to other types of education financing arrangements, more recent changes, including the CFPB's May 2018 announcement that it would fold its Office of Students and Young Consumers into the Office of Financial Education, could be interpreted to signal that the Bureau is reducing its focus on investigation and enforcement of the student loan industry. It remains to be seen what the CFPB's enforcement posture will be with new leadership as it relates to student loan lenders and servicers.

alleging that one bank's student loan servicing activities were deceptive acts or practices where the servicer sent federal student loan borrowers a notice regarding renewal of income-driven repayment plans that contained false implications that providing a renewal application with incomplete or inaccurate information would result in a processing delay, when in reality submitting inaccurate information was likely to result in more severe consequences.[61] In another action, the CFPB alleged that a large student loan servicer, "systematically and illegally fail[ed] borrowers at every stage of repayment" by "providing bad information, processing payments incorrectly, and failing to act when borrowers complained."[62] The CFPB also brought an action against a student loan servicer for alleged inaccurate and deceptive representations of the minimum monthly payment due on borrower account statements.[63] In another action, a student loan servicer faced allegations of misallocating and misapplying payments by consumers, which the CFPB deemed to be an unfair practice.[64]

Because ISAs likely are not loans or extensions of credit, as described above, it is likely that Providers and their service providers are not subject to the CFPB's UDAAP authority. Specifically, this authority extends to "covered persons," defined in relevant part as "any person that engages in offering or providing a consumer financial product or service," as well as service providers to covered persons.[65] A "financial product or service" includes "extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit (other than solely extending commercial credit to a person who originates consumer credit transactions),"[66] where "credit" 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."[67] As discussed above, it is reasonable to conclude that ISAs do not involve the deferral of payment of a debt or the deferral of payment for services purchased. Nonetheless, because the FTC and CFPB use the same standards for unfairness and deception,

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[61] 15 U.S.C. § 45(a). Complaint, *CFPB v. Navient Corp*., Case 17-cv-00101-RDM, at 55–56 (M.D. Pa. Jan. 18, 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf.

[62] Press Release, "CFPB Sues Nation's Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment" (Jan. 18, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/.

[63] CFPB Consent Order, *In re Discover Bank*, No. 2015-CFPB-0016, at 9 (July 22, 2015), https://files.consumerfinance.gov/f/201507_cfpb_consent-order-in-the-matter-of-discover-bank-student-loan-corporation.pdf.

[64] Complaint, *CFPB v. Navient Corp.*, at 57–59 (alleging that the student loan servicer misallocated payments intended for a specific loan among other loans maintained by the borrower and, in certain cases, the payment was intended to pay off a specific loan but the servicer allocated the payment across all of the student's loans, such that the first loan was not paid off, while in other instances, the servicer ignored borrower instructions as to how to allocate a payment among multiple loans).

[65] 12 U.S.C. § 5481(6).

[66] *Id*. § 5481(15)(A).

[67] *Id*. § 5481(7*); see also supra* n.31.

and because proposed federal legislation considers giving the CFPB authority over eligible ISAs, it is instructive to consider the CFPB's UDAAP precedent.[68]

In particular, Providers and their service providers should consider the UDAP/UDAAP precedent in the student lending and student loan servicing context. Specifically, Providers and their service providers should, among other things, ensure that disclosures and statements to consumers are accurate and clear, that practices are well documented, and that payments are properly processed and applied to a Participant's ISA Amount. Further, we understand that Participants may enter into multiple ISA agreements with a Provider, such as to obtain funds for the junior year of college and then for the senior year of college. Given regulators' attention to misallocation of payments, it is important that Providers maintain clear processes for applying payments toward the amount owed under each Agreement, and ensure that payments are appropriately applied to each ISA, as designated by the Participant.

State Consumer Credit Regulation

We also have considered the treatment of ISAs under state licensed lender regimes and usury laws in California, New York, Illinois and Indiana. As a general matter, courts and licensed lending authorities have not yet publicly determined whether ISAs are loans or credit for the purposes of state licensing statutes or state usury statutes, or whether they are better characterized as a sale.

When considering alternative financing transactions, courts have been more likely to determine that a transaction is a loan where there exists an obligation to pay an amount in full,[69] but are more likely to determine that a transaction is a sale where the purchaser assumes the credit risk related to the transactions.[70] Other courts have looked at the availability of recourse to determine whether the transaction is more likely a loan than a sale.[71] However, no single factor

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[68] The CFPB's Education Loan Examination Manual also provides insight into the types of practices that may constitute UDAAPs, which may be instructive for purposes of servicing ISAs. *See* CFPB Education Loan Examination Procedures at 20–32 (June 2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Education-Loan-Servicing-Exam-Manual.pdf. The Exam Manual states that the examination process will include an assessment of UDAAPs with respect to servicers' interactions with consumers, including with respect to a servicer's payment processing practices, fees imposed, billing statements and payment histories, borrower communications, payoff, transfer of servicing, deferment, and payment options. Each of these aspects of servicing presents the potential for UDAAP findings. For example, the CFPB instructs examiners to review whether payments received are accurately credited to the appropriate account; whether insufficient payment processing results in late fees; whether consumer online accounts provide accurate, clear and understandable information; whether the servicer offers alternative payment plans or modifications; and whether the plans or modifications are offered consistently to borrowers. *Id.*

[69] *See, e.g.*, *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 763–64 (S.D.N.Y. 2018); *Math Magicians, Inc. v. Capital for Merchants LLC*, No. B241937, 2013 WL 6192559, at *3 (Cal. Ct. App. Nov. 26, 2013).

[70] *Transmedia Rest. Co. v. 33 E. 61st St. Rest. Corp.*, 710 N.Y.S.2d 756, 760 (Sup. Ct. 2000); *but see Wiers Farm, Inc. v. Waverly Farms, Inc.*, No. 09–cv–1742–T–30TBM, 2011 WL 1296867 (M.D. Fla. Mar. 31, 2011).

[71] *See In re Dryden Advisory Group, LLC*, 534 B.R. 612, 620–23 (Bankr. M.D. Pa. 2015); *RD Legal Funding, LLC*, 332 F. Supp. at 764–65.

is dispositive, and "a determination must be made based on the totality of circumstances" and "after analysis of the evidence as to the true nature of the transaction."[72]

Courts have reviewed whether transactions similar to ISAs, including litigation financing and factoring arrangements, constitute a loan or credit.[73] Such arrangements are similar to an ISA because they provide current funding in exchange for an interest in the future receivables (i.e., settlement funds, accounts receivables and potential income, respectively). Accordingly, certain characteristics of these arrangements are instructive for ISAs. In the factoring context, for example, it is whether the factor purchases the receivables as a "true nonrecourse sale."[74]

In each of the four states considered, there are strong arguments that an ISA should not be characterized as a loan because the ISA does not create an unconditional payment obligation, and the Provider assumes the credit risk. That is, a Provider may not be paid the ISA amount if, for example, since the Participant is not obligated to make payments due to unemployment or an annual salary below the ISA Agreement threshold. However, the application of these state statutes are subject to the interpretation of state administrative agencies and courts, and such agencies or courts could come to a different conclusion.

California

The California Financing Law ("**CFL**") establishes a licensing requirement for any person that engages in the business of a finance lender or broker, unless that person is exempt from licensing.[75] A "finance lender" is defined to include "any person who is engaged in the business of making consumer loans or making commercial loans."[76] A "consumer loan" generally is defined to mean "a loan, whether secured by either real or personal property, or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for personal,

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[72] *In re Dryden Advisory Grp., LLC*, 534 B.R. at 620.

[73] *See, e.g.*, *Essex Partners Ltd. v. Merchant Cash and Capital*, No. CV 11–03366 CAS MRW, 2011 WL 13123326 (C.D. Cal. Aug. 1, 2011) (analyzing whether merchant cash advances are sales of future receivables or loans for purposes of California's usury law). Factoring is "the purchase of accounts receivable from a business by a 'factor' who thereby assumes the risk of loss in return for some agreed discount," and may be utilized by companies in the context of future receivables. In a factoring transaction, the factor provides a merchant with upfront capital in exchange for the right to receive future expected income streams. 32 Am. Jur. 2d, Factors and Commission Merchants § 2 (2016). Litigation financing is the practice by which a party agrees to advance funds to an attorney or plaintiff in exchange for a promised sum or percentage of the expected settlement amount or damages from litigation. *See, e.g.*, *Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.,* 950 N.Y.S.2d 723 (Sup. Ct. Suffolk Cty. Mar. 29, 2012) (holding that litigation financing arrangement did not constitute a loan and was not subject to New York usury law).

[74] *See, e.g.*, *In re Dryden Advisory Grp., LLC*, 534 B.R. at 620–21. Other loan-like transactions may be instructive as well, including cash advances on consumers' unearned wages. *See, e.g.*, *RD Legal Funding, LLC*, 332 F. Supp. 3d at 764–65 (citing *Missouri ex rel. Taylor v. Salary Purchasing Co. Inc.*, 218 S.W.2d 571 (Mo. 1949)) (stating that the cash advance constituted a loan because the advances "transferred no right or title in the unearned wages which they purported to assign" and "imposed a repayment obligation on the consumer because the salary advance company did not intend to donate to the applicants the money which it advanced on such void assignments. It intended to create the relationship of debtor and creditor." Further, "[t]he assignment was ... taken as a security for the money advanced, and as something to be held over a customer who did not make prompt settlement.").

[75] *See* Cal. Fin. Code § 22100.

[76] *Id.* § 22009.

family, or household purposes."[77] Neither the CFL nor its implementing regulations expressly defines "loan."[78]

In the absence of an established definition of "loan," for the reasons stated above, including because there is no unconditional legal obligation for the Participant to make payments in the amount of the ISA, unless the Participant is able to secure employment with a salary great enough to trigger the payment provisions of the ISA Agreement, we believe that an ISA should not be determined to be a "consumer loan." In this case, the Provider should not be viewed as in the business of making "loans" for purposes of the CFL, and the Provider should not be subject to a licensing obligation under the CFL.

The California usury law should result in a similar conclusion with respect to ISAs. For example, in the context of a purchase of accounts receivable, California courts have held that the bona fide purchase of receivables is not a "loan" subject to the usury law, whereas a loan disguised as a sale of receivables will be subject to the usury law.[79] For example, California courts have held that a loan was a disguised sale of receivables where the payment on the receivables was required within 60 days and the accounts had to be repurchased in the event of default.[80]

The California Department of Business Oversight ("**DBO**") also has distinguished between accounts receivable/factoring arrangements and loans, although typically with scant analysis.[81] However, in one consent order, the DBO stated that factoring transactions containing recourse provisions that gave the lender the ability to charge back or require a customer to repurchase an account were, in fact, "loans."[82]

In contrast, an ISA Agreement does not require unconditional payment of the ISA amount, and there is no repurchase obligation contemplated. Accordingly, we believe that an ISA should not be treated as a disguised loan for usury purposes.

New York

New York's Licensed Lender Law requires a license to "engage in the business of making loans in the principal amount of twenty-five thousand dollars or less for any loan to an

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[77] *Id.* § 22203. A "consumer loan" also includes, for purposes of the CFL, "a loan of a principal amount of less than five thousand dollars ($5,000), the proceeds of which are intended by the borrower for use primarily for other than personal, family, or household purposes." *Id.* § 22204.

[78] An ISA is not expressly included in the definition of "consumer loan."

[79] *See, e.g.*, *Milana v. Credit Discount Company*, 163 P.2d 869, 871–72 (Cal Sup. Ct. 1945).

[80] *See, e.g.*, *id.*

[81] *See, e.g.*, Settlement Agreement, *In re CVCredit, Inc.*, at 2 (Dec. 17, 2018) (stating that factoring transactions were in fact loans subject to the California Financial Code, without providing analysis), www.dbo.ca.gov/ENF/pdf/2018/CVCredit,Inc-12-17-18.pdf; Decision, *In re Financial Services Enterprises*, OAH No. 2016040551, at 3 n.4 (June 7, 2016) (distinguishing between the respondent's financing arrangements by noting that sometimes the transactions were loans while other times they were factoring arrangements, with no further analysis), http://www.dbo.ca.gov/ENF/pdf/2018/Financial%20Services%20Enterprises-OAH.pdf.

[82] Consent Order, *In re BAM Capital, LLC,* CFL FILE NO.: 60DBO-67944, at 2–3 (Feb. 12, 2019), http://www.dbo.ca.gov/ENF/pdf/2019/BAM-Capital,LLC-2-12.pdf.

individual for personal, family, household, or investment purposes … and charge, contract for, or receive a greater rate of interest than the lender would be permitted by law to charge if he were not a licensee hereunder."[83] An entity is "engaging in the business of making loans in New York" if it solicits loans of $25,000 or less and, in connection with the solicitation, makes loans to individuals who reside in New York.[84]

A "loan" is not defined under the New York Licensed Lender statute or regulation. However, numerous New York courts have considered whether certain transactions are properly characterized as "loans" for the purpose of the usury statute.[85] In this regard, courts have held that, for a transaction to be deemed a loan for purposes of the usury law, "there must be a borrower and a lender; and it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender."[86]

In determining whether a transaction constitutes a loan, courts have examined whether a party is "absolutely entitled to repayment under all circumstances."[87] Several courts have found that transactions involving cash advances and future receivables, in which one party agrees to give the other an upfront lump sum in exchange for future receivables, did not constitute a loan because there was no absolute obligation of repayment.[88] In the context of a receivables purchase, New York courts analyzed whether a repayment obligation is absolute, whether there is a "reconciliation provision" in the agreement, whether the agreement has a finite term, and whether an entity has recourse against a recipient of the funding.[89] The lack of a reconciliation provision, a finite term, and recourse suggest that a transaction is a loan because the element of risk in the transaction is removed.

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[83] N.Y. Banking Law § 340.

[84] *Id.* A person is not deemed to "engage in the business of making loans" on the basis of isolated, incidental or occasional transactions. *Id.*

[85] *See, e.g.*, *Funding Grp., Inc. v. Water Chef, Inc.*, 852 N.Y.S.2d 736, 742 (N.Y. Sup. Ct. 2008), *judgment entered*, (N.Y. Sup. Ct. 2008) (noting that usury laws only apply to loans and forbearances and not to investments); *Colonial Funding Network, Inc. v. Epazz, Inc*., 252 F. Supp. 3d 274 (S.D.N.Y. 2017) (internal citations omitted) (analyzing whether receipts purchased amounts are loans as a matter of law); *Orvis v. Curtiss*, 52 N.E. 690 (1899) (considering whether an agreement between two parties to enter into a joint venture in the purchase or sale of stocks under which one party provided capital was a loan).

[86] *Colonial Funding Network*, 252 F. Supp. 3d at 280 (internal citations omitted); *Orvis*, 52 N.E. at 691.

[87] *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 57 N.Y.S.3d 625, 632 (N.Y. Sup. Ct. 2017); *see also Rubenstein v. Small,* 75 N.Y.S.2d 483, 485 (1st Dept. 1947).

[88] *Transmedia Rest. Co.*, 710 N.Y.S.2d at 760 (holding that an arrangement under which a food service network makes cash advances to a corporation in exchange for food and beverage credits was not a loan of money under the usury statute). *See also Merchant Cash and Capital, LLC v. Yehowa Medical Services, Inc.,* No. 602039–16, 2016 WL 4478805, at *5 (Sup. Ct. Nassau Cty. July 29, 2016); *Professional Merchant Advance Capital, LLC v. Your Trading Room, LLC,* No. 174692012, 2012 WL 12284924, at *5 (Sup. Ct. Suff. Cty. Nov. 28, 2012).

[89] *See, e.g.*, *K9 Bytes, Inc.*, 57 N.Y.S.3d at 632.

New York courts also have reviewed whether litigation financing constitutes a loan such that these arrangements are subject to usury law.[90] Generally, New York courts have found that these arrangements are not loans because of the contingent nature of the payment,[91] and the non-recourse feature of the transaction.[92] Instead, the transactions are better characterized as investments.[93]

As discussed above, an ISA is not an unconditional payment obligation, and there is inherent risk in the transaction for the Provider because it may not receive any funds from a Participant, if the Participant is unable to secure employment or does not have income that exceeds the specified minimum threshold that triggers the payment obligations under the ISA Agreement. Accordingly, we believe that a court should conclude that an ISA is not subject to the New York usury cap because an ISA is not a "loan" for purposes of the New York usury law. By extension, and in the absence of a definition of "loan" under the New York Licensed Lender Law, it also should be reasonable to conclude that a Provider should not be subject to the licensing requirement under New York's Licensed Lender Law.

Illinois

Under the Illinois Consumer Installment Loan Act ("**CILA**"), a license is required to engage in the business of making loans of money in a principal amount not exceeding $40,000, and charge, contract for, or receive on any such loan a greater rate of interest, discount, or consideration therefor than the lender would be permitted by law to charge if he were not a licensee under the Act.[94] Neither the CILA nor the associated regulations or case law defines "loan" or "engaging in the business of making loans."

In the absence of a broader definition of "loan" or "the business of making loans," for the reasons stated above, including because there is no unconditional obligation for the Participant to

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[90] *See Lawsuit Funding, LLC v Lessoff*, No. 650757/2012, 2013 WL 6409971 (N.Y. Sup. Ct. Dec. 4, 2013) (holding that an arrangement in which defendants agreed to advance funds based on legal fees it expected to receive from lawsuits was not a loan but an investment and, therefore, not subject to usury laws). The New York Department of Financial Services ("**DFS**") was asked to provide an interpretation regarding whether an entity would require a Licensed Lender license to advance filing fees in existing arbitration or litigation collection proceedings, but declined to provide a firm answer due to insufficient information. DFS Banking Interpretations, NYSBL 340 (Apr. 29, 2005), https://www.dfs.ny.gov/legal/interpret/lo050429.htm.

[91] *Lynx Strategies, LLC v. Ferreira,* 957 N.Y.S.2d 636 (Sup. Ct. N.Y. Cty. July 6, 2010) (holding that an advance of money to fund a lawsuit, which was contingent on proceeds arising from a settlement or judgment, was not loan subject to New York usury laws).

[92] *See Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.,* 950 N.Y.S.2d 723 (Sup. Ct. Suffolk Cty. Mar. 29, 2012) (holding that litigation financing arrangement in which "defendants were always at risk of no recourse" did not constitute a loan subject to New York usury law). DFS was asked to provide an interpretation as to whether loans made to law firms and attorneys for paying expenses in connection with certain lawsuits would require licensure; however, DFS was not asked to opine as to whether the amounts provided constituted a loan, and both the entity and DFS referred to the funds as "loans" without question. DFS noted that the loans required repayment, and the entity would require security for the repayment of the loans. DFS Banking Interpretations, NYSBL 340 (July 26, 2005), https://www.dfs.ny.gov/legal/interpret/lo050726b.htm.

[93] *See Lawsuit Funding, LLC*, 2013 WL 6409971, at *4–*5.

[94] 205 Ill. Comp. Stat. Ann. 670/1.

pay the ISA amount, an ISA should not be determined to be a "loan," and a Provider should not be determined to be in the business of making loans under the Illinois CILA.[95]

Illinois courts have considered whether a transaction constitutes a loan for purposes of the state's usury limitations. Usury requires "(1) a loan or forbearance; (2) a loan of money or something circulating as money; (3) the loan must be repayable absolutely; and (4) something in addition to lawful interest must be required."[96] Further, the usury statute only applies to "those contracts which in substance involve a loan of money or forbearance to collect money due,"[97] and a sale does not constitute a loan.[98] As discussed above, ISAs do not constitute an unconditional obligation to make payment. Therefore, ISAs should not be determined to satisfy the elements of usury as set forth in Illinois case law, and should not be subject to the usury law.

Indiana

The IUCCC requires a license to make a consumer loan, take assignments of consumer loans, or undertake the direct collection of payments from or the enforcement of rights against debtors arising from consumer loans.[99] The IUCCC applies to sales, leases and loans made in Indiana and to modifications, including refinancings, consolidations and deferrals, made in Indiana.[100] It does not apply to federally related student loans.[101]

Under the IUCCC, "consumer loan" means a loan made by a person regularly engaged in the business of making loans in which: (a) the debtor is a person other than an organization; (b) the debt is primarily for a personal, family or household purpose; (c) either the debt is payable in installments or a loan finance charge is made; and (d) either: (i) the amount of credit extended, the written credit limit, or the initial advance does not exceed the exempt threshold amount, or (ii) the debt is secured by an interest in land or by personal property used or expected to be used as the principal dwelling of the debtor.[102]

"Loan" includes: (1) the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor; (2) the creation of debt by a credit to an account with the lender upon which the debtor is entitled to draw immediately; (3) the creation of debt pursuant to a lender credit card or similar arrangement; and (4) the

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[95] Further, since the CILA only applies to loans not greater than $40,000, any ISA with a payment cap in excess of $40,000 also should also be exempt from the Act.

[96] *Gen. Motors Acceptance Corp. v. Kettelson*, 580 N.E.2d 187, 189–90 (1991); *see also Computer Sales Corp. v. Rousonelos Farms, Inc.*, 546 N.E.2d 761, 763 (1989).

[97] *Computer Sales Corp.*, 546 N.E.2d at 763.

[98] *Id.* For loans not subject to the CILA, Illinois maintains a 9 percent cap on interest rates if the parties agree to the terms by contract (815 Ill. Comp. Stat. Ann. 205/4); while loans subject to the CILA may have an APR of up to 36 percent (205 Ill. Comp. Stat. Ann. 670/15(a)).

[99] Ind. Code Ann. § 24-4.5-3-502.

[100] *Id.* § 24-4.5-1-201.

[101] *Id.* § 24-4.5-1-202(9).

[102] *Id.* § 24-4.5-1-301.5(9).

forbearance of debt arising from a loan.[103] "Debt" and "debtor" are not defined under the statute or regulations, but as noted above, "debt" generally means an obligation of a consumer to pay money arising out of a transaction.[104]

Indiana courts have found that the definition of "loan" "implies that a debt must be created in order for a loan to exist."[105] One court held that advances of wages did not meet the definition of "loan" because the advances did not constitute debts that must be repaid; instead, "the advances constitute[d] early payments of wages either earned or to be earned … for … services rendered."[106]

To our knowledge, Indiana courts have not expressly considered whether ISAs or other similar receivables purchase transactions (e.g., litigation financing or factoring) constitute a loan, whether in the context of the IUCCC or in the context of the state usury statute.[107] As discussed, we believe that ISAs should not be interpreted to create a debt because there is not an unconditional obligation to make a payment if the Participant is unable to secure employment with a salary high enough to trigger payment obligations under the ISA Agreement. It follows then that ISAs should not be deemed loans under Indiana law, and Providers should not be subject to licensure.

POLICYMAKING INITIATIVES

In light of the scant regulatory treatment of ISAs, policymakers at the federal and state levels have considered whether and how to regulate ISAs. Such considerations include the proposed federal legislation and numerous state bills.

Young-Rubio Legislation

In 2017, Senators Todd Young (R-Ind.) and Marco Rubio (R-Fla.) introduced S. 268, the Investing in Student Success Act of 2017. The Investing in Student Success Act was designed to provide the legal framework necessary for the growth of ISAs.[108] Specifically, the bill would have authorized a student and an investor to enter into an ISA, under which the student agrees to

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[103] *Id.* § 24-4.5-3-106. A "lender" means a person regularly engaged in making consumer loans. Ind. Code Ann. § 24-4.5-3-107. "Credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment. *Id.* § 24-4.5-1-301.5(10). A "creditor" is a person who regularly engages in the extension of consumer credit that is subject to a credit service charge or loan finance charge, as applicable, or is payable by written agreement in more than four installments and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is not a note or contract. Ind. Code Ann. § 24-4.5-1-301.5(11).

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

[105] *See, e.g.*, *Blakley v. Celadon Grp., Inc.*, No. 16–cv–00351–LJM–TAB, 2017 WL 2403189, at *3 (S.D. Ind. June 2, 2017).

[106] *Id.*

[107] Indiana's IUCCC imposes a loan finance charge cap of 25 percent per year for all consumer loans by contract, except for supervised loans. Ind. Code Ann. § 24-4.5-3-201. A supervised loan is a consumer loan with a loan finance charge in excess of 25 percent per year. *Id.* § 24-4.5-3-501.

[108] S. 268, 115th Cong. (1st Sess. 2017), https://www.congress.gov/115/bills/s268/BILLS-115s268is.pdf. S. 268 was not acted upon prior to the adjournment of the 115th Congress.

pay the investor a specified percentage of future income, for a specified period of time, in exchange for funds to pay for post-secondary education. Under S. 268, which is not currently active, an ISA that complied with the terms and conditions set forth in the bill and met the bill's disclosure requirements would have been a valid, binding and enforceable contract.

Under the bill, the ISA would have needed to specify the percentage of future income that the individual subject to the agreement would be obligated to pay. However, the agreement must provide that for any year covered by the agreement in which the individual has an income of less than $15,000 (adjusted for inflation each year), the individual would not be required to pay any portion of the income for that year.[109] The percentage of income required to be paid annually by the individual subject to the ISA could not exceed a percentage such that, when multiplied by $15,000, the product would exceed the aggregate amount of periodic payments of principal and interest that would be required to be paid over a 12-month period under a comparable loan with a fixed annual interest rate of 20 percent.[110] No eligible individual could enter into an ISA if the total percentage of the future income that the individual agrees to pay under that contract, in combination with any other ISAs, exceeds 15 percent of the future income.[111] The ISA may not provide for the individual to assume a commitment to pay future income having a "commitment factor" that, when added to the commitment factors for any other ISAs to which the individual is subject, exceeds the "maximum commitment factor."[112]

Under the proposed legislation, prior to entry into the ISA, an individual who is committing to pay future income would need to be provided a disclosure document that "clearly and simply" makes certain required disclosures.[113] In addition, the disclosure must provide a comparison of (a) the amounts an individual would be required to pay under the ISA at a range of annual income levels, which must correspond to the levels the individual might reasonably be expected to make given the intended use of the funds provided under the agreement; and (b) the

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[109] S. 268, 115th Cong. § 103(a)(1) (2017). The ISA would have to specify the definition of income to be used for purposes of calculating the obligation of the individual under the contract. *Id.* § 103(a)(2).

[110] *Id.* § 103(a)(3).

[111] *Id.* § 103(a)(4).

[112] *Id.* § 103(a)(5). The "commitment factor" would have been the product of (i) the percentage, in decimal form, of the future income required to be paid during the period covered by the ISA; and (ii) the remaining number of years under the agreement that future income is required to be paid at such percentage. The "maximum commitment factor" would have been 2.25, which is the product of 7.5 percent and the number of years in the longest allowable contract. *Id.*

[113] *Id.* § 103(b). The disclosures would have needed to specify (i) that the agreement is not a debt instrument, and that the amount the individual will be required to pay may be more or less than the amount provided to the individual, and will vary in proportion to the future income of the individual; (ii) that the obligations of the individual are not dischargeable under bankruptcy law, except in a case that would impose an undue hardship on the debtor and the dependents of the debtor; (iii) whether the obligations of the individual may be extinguished by accelerating payments, and, if so, under what terms; (iv) the duration of the obligations of the individual (absent accelerating payments), including any circumstances under which the contract would be extended; (v) the percentage of income the individual is committing to pay and the minimum amount of annual income that triggers the obligation of the individual to make payments for a given year; and (vi) the definition of income to be used for purposes of calculating the obligation of the individual. *Id.* § 103(b)(1).

amounts required to be paid under a comparable loan that bears interest at a fixed annual rate of 10 percent.[114]

Under the bill, the Secretary of the U.S. Department of the Treasury would have been authorized to issue regulations necessary to carry out the provisions regarding terms and conditions and required disclosures. In addition, the Secretary of the Treasury would have been required to promulgate a model disclosure form for the disclosures required, which would serve as a safe harbor.[115] The bill also contained provisions related to the tax treatment of ISAs.[116]

A companion bipartisan bill, H.R. 3145, the Investing in Student Achievement Act of 2017, was introduced by former Representative Luke Messer (R-Ind.).[117] This bill, which was co-sponsored by ten Democrats and nine Republicans, was also not acted upon before the adjournment of the 115th Congress. The bill contained provisions similar to those in S. 268, as well as provisions addressing treatment of ISAs under federal consumer finance laws. S. 268 is virtually identical to legislation introduced in 2015, S. 2186 (Rubio) and H.R. 3432 (Young, prior to becoming a Senator), although it does not include any references to a maximum "commitment factor."

Although the above-listed Senate and House legislation no longer remains active, a bipartisan House bill was recently introduced in the 116th Congress. On March 18, 2019, Representatives Mark Green (R-TN) and Vicente Gonzalez (D-TX) introduced the "Kids to College Act," H.R. 1810, which reportedly would authorize ISAs as an alternative to student loans.[118] We understand that additional efforts are also underway to consider other ISA legislation in the 116th Congress.

State Initiatives

Numerous states also have demonstrated an interest in ISAs, although we are aware of no state to date that has taken formal action in this area. Thus far in 2019, legislation regarding ISAs has been introduced in several states. In Washington, a proposal to create an income share agreement pilot program, which would allow for the creation of income share arrangements through 2029, is pending.[119] A California assembly member has introduced legislation that would require the California State University and the University of California to select a campus of their respective systems to establish an ISA pilot program for the 2021-22 school year.[120] Bills have been introduced in both the Illinois House and Senate that would create the Illinois Student Loan Investment Act, which would provide for the establishment, operation and

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[114] *Id.* § 103(b)(2).

[115] *Id.* § 105.

[116] *Id.* §§ 201, 301.

[117] H.R. 3145, 115th Cong. (1st Sess. 2017).

[118] Press Release, "Reps. Mark Green and Vicente Gonzalez Introduce "Kids to College Act"" (Mar. 18, 2019), https://markgreen.house.gov/news/documentsingle.aspx?DocumentID=63. The text of the legislation (H.R. 1810) is not yet publicly available.

[119] Substitute S.B. 5774, 66th Legislature, Reg. Sess. (Wash. 2019).

[120] A.B. 154, 2019–20 Reg. Sess. (Cal. 2019).

administration of the Student Investment Account.[121] The Student Investment Account would allow the State Treasurer to originate and service student loans and to enter into ISAs with students.[122]

Certain states have also indicated interest in establishing a regulatory scheme for ISAs. For example, the California Department of Consumer Affairs' Bureau for Private Postsecondary Education requested a legal opinion as to whether ISAs are "compatible with" the current statutes and regulations of the Department.[123] In a memorandum to the Bureau Advisory Committee, the Legal Affairs Division stated that TILA and California's loan disclosure laws would apply to an ISA "to the extent … [the ISA] could be characterized as a consumer loan." However, the Division further suggested that it was "unclear" how an ISA could comply with the current California Private Postsecondary Education Act, which indicates that California could need new legislation specific to ISAs if it chooses to condone the use of ISAs within the state.

In December 2017, the New York State Education Department's Adult Career and Continuing Ed Services ("**Department**") issued a Policy Guideline entitled "Deferred Tuition Arrangements in Enrollment Agreements" ("**Policy Guideline**") in which the Department described minimum standards for enrollment agreements that propose to include an ISA or deferred tuition arrangement in the context of student tuition for licensed private career schools or private schools.[124] While the precise requirements imposed by the Policy Guideline are somewhat unclear, it appears that the Policy Guideline contemplates that New York's Bureau of Proprietary School Supervision will review these arrangements for approval as methods of payment under the Commissioner of Education's rules governing licensed private career schools or licensed private schools, and would further determine whether the arrangements include criteria, such as information on conditions or restrictions imposed under the arrangement, and address what happens when a student's employment becomes interrupted for a length of time.[125]

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[121] S.B. 1524, 101st Gen. Assemb. (Ill. 2019); H.B. 2685, 101st Gen. Assemb. (Ill. 2019).

[122] *Id.*

[123] Memorandum from Mina Hamilton, Legal Affairs Division, to Bureau Advisory Committee Members regarding ISA agreements (Feb. 13, 2019).

[124] New York State Education Dept. Deferred Tuition Arrangements in Enrollment Agreements (Dec. 12, 2017), http://www.acces.nysed.gov/bpss/schools/deferred-tuition-arrangements-enrollment-agreements. "Deferred tuition arrangements" are defined as "a method of payment … whereby a student agrees to enroll in a course of instruction at a licensed private career school and to pay tuition only upon graduation (generally speaking) after finding a job, instead of paying tuition more traditionally in advance of instruction or in increments, by loan or otherwise, while the student's education is in progress." *Id*.

[125] The Policy Guideline also notes the importance of disclosure such that a prospective student understands the arrangement.

In addition, in June 2017, a Petition for Declaratory Statement in Florida presented an opportunity for Florida to comment on whether ISAs should be regulated as loans.[126] Ultimately, however, the Petition was denied due to insufficient information from the company.

This state activity demonstrates an interest in enabling ISAs as an alternative to student loans, with safeguards for Participants, but has yet to materialize into concrete guidance for Providers. Nonetheless, these states appear to recognize educational ISAs as a legitimate alternative by which students can finance their educations.

CONCLUSION

While there is risk that a court or regulator may conclude otherwise, educational ISAs should not be viewed as "credit" for purposes of federal and state consumer lending laws because ISAs do not create an unconditional payment obligation. Instead, ISAs require monthly payment only if the Participant obtains employment and exceeds a minimum income threshold set forth in the ISA Agreement, and payment is not otherwise deferred. As a result, Providers are subject to material risk of non-payment, including in cases where the Participant chooses employment below the minimum income threshold or refuses to seek employment.

Nonetheless, Providers likely would be subject to generally applicable federal and state anti-discrimination requirements, debt collection requirements, and unfair or deceptive trade practices prohibitions. Providers and their service providers also should consider policies and procedures to ensure that disclosures and statements to consumers are clear and correct, that practices are well documented, and that payments are appropriately processed and applied.

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[126] Declaratory Statement and Final Order, *In re Petition for Declaratory Statement, Cumulus Funding, Inc.*, at 4 (June 9, 2017) (petitioner sought a determination of whether its ISA constituted a loan under Florida law, whether the agreement was subject to Florida's usury limits, and whether petitioner was exempt from licensure under the Florida Consumer Finance Act; the Florida Office of Financial Regulation noted in its Order that the main question was "whether the activity is truly an investment, or whether it is a debt … characterized as an investment").

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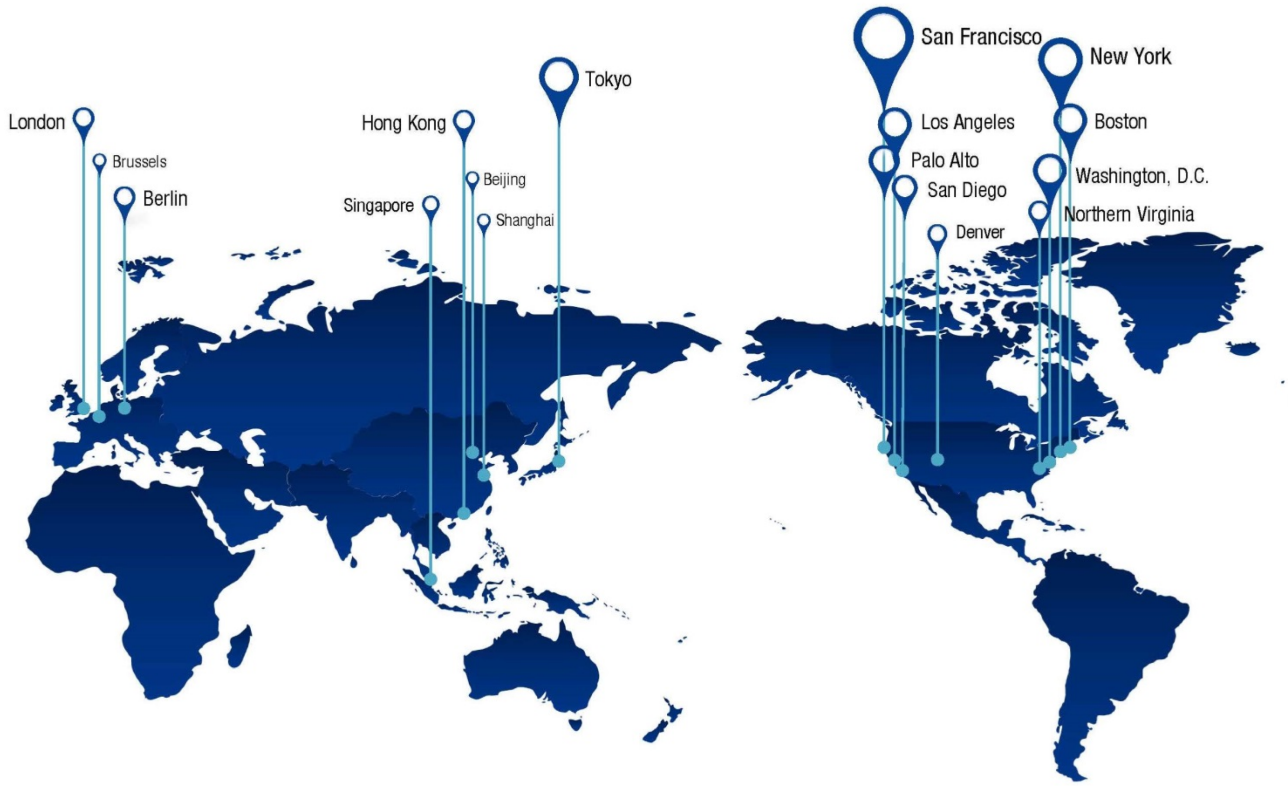
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