INCOME-SHARE AGREEMENTS IN THE FACE OF NEW REGULATION

By: Laura Nguyen

I. INTRODUCTION 203
II. BACKGROUND 204
A. ISA Development, Use, and Agency Authority 204
B. Agencies Assert Regulatory Authority Over ISAs 207
III. THE CASE FOR THE ISA STUDENT PROTECTION ACT OF 2022'S PROPOSALS 208
A. Insufficiency of Agency Regulatory Authority 208
B. ISA Student Protection Act of 2022 210
1. Act Highlights 210
2. Act Shortfalls 213
C. Viability of Federally Regulated ISAs 215
1. Potential Threat to ISA Viability 215
2. How the Act Encourages ISAs 216
3. Stanford's Pilot Program: An Example of Shifting and Experimental ISA Terms 217
IV. SOLUTIONS 218
A. ISA Funding 218
B. Time-Dependent Payment Caps 219
V. CONCLUSION 220

I. INTRODUCTION

Income share agreements (ISAs) are contracts that effectively offer students the opportunity to sell stock in themselves to fund their education.[1] In exchange for money to cover tuition, a student agrees to pay a percentage of their post-graduation income for a predetermined period.[2] While the terms of ISAs may vary, two aspects that are generally universal to them are that (1) a recipient of education funding will begin payment only once their income exceeds a certain level and (2) the recipient's total payment will never exceed a fixed cap.[3]

The theory of ISAs is not new, but it has gained increased popularity and scrutiny in recent years.[4] To that end, while the current federal regulation of ISAs is insufficient, the regulations proposed in the ISA Student Protection Act of 2022, which more clearly regulate ISAs and provide important guardrails — such as the application of existing consumer protections to ISAs and requirements for transparent disclosures — may enable ISAs to serve as a viable, non-predatory option for financing secondary education.

A central idea underlying ISAs is that education should be financed with equity rather than debt.[5] In line with this idea, institutions offering ISAs have marketed the contracts as an alternative to loans and as instruments that do not incur debt.[6] ISAs were further distinguished from loans based on the fact that ISAs were not held to the same standards as loans, were not clearly subject to consumer protection regulations,[7] and were subject to little federal oversight.[8] Yet, in March 2022, following the Consumer Financial Protection Bureau's (CFPB) conclusion that ISAs are private education loans under the Truth in Lending Act (TILA) and Regulation Z, the U.S. Department of Education's Office of Federal Student Aid (FSA) asserted regulatory authority over ISAs for the first time.[9] In addition, though it ultimately failed, the ISA

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1. Claire Boston, *College Grads Sell Stakes in Themselves to Wall Street*, BLOOMBERG L. (Apr. 9, 2022, 5:00 AM), https://www.bloomberglaw.com/product/blaw/document/PPOROL6JTSE9.

2. Dubravka Ritter & Douglas Webber, *Modern Income-Share Agreements in Postsecondary Education: Features, Theory, Applications* 1 (Fed. Rsrv. Bank Phila. ed., 2019).

3. *Id*. at 11-12.

4. Sheila Bair & Preston Cooper, *The Future of Income-Share Agreements*, MANHATTAN INST., 5 (Mar. 2019), https://www.manhattan-institute.org/future-income-share-agreements-to-finance-higher-education; Steven Yoder, *Colleges Are Already Ditching Income-Share Agreements*, WIRED (Aug. 12, 2022, 6:00 AM), https://www.wired.com/story/income-share-agreements-hechinger-report/.

5. Bair & Cooper, *supra* note 4, at 7; *see also* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 10 (Robert A. Solo ed., 1955).

6. Bair & Cooper, *supra* note 4, at 12.

7. Ritter & Webber, *supra* note 2, at 25.

8. Meghan Brink, *Congress Eyes Income-Share Agreement Reform, Again*, INSIDE HIGHER ED. (July 28, 2022), https://www.insidehighered.com/news/2022/07/28/bill-targeting-income-share-agreements-reintroduced.

9. FED. STUDENT AID OFF. OF POSTSECONDARY EDUC., INCOME SHARE AGREEMENTS AND PRIVATE EDUCATION LOAN REQUIREMENTS (Mar. 2, 2022), https://fsapartners.ed.gov/knowledge-

Student Protection Act was introduced to Congress in July 2022 in a renewed attempt to provide a regulatory system specific to ISAs.[10]

With these recent changes, the future of ISAs is uncertain.[11] In particular, it is unclear whether the FSA's current regulatory authority, or protections like those proposed in the ISA Protection Act of 2022, are sufficient to keep ISAs a viable, non-predatory option for financing secondary education.[12] This paper clarifies the current state of federal regulation over ISAs and analyzes the potential effect of the ISA Protection Act's proposals. The first part of this paper discusses the structure of ISAs and the regulatory authority the CFPB and FSA have asserted over ISAs. Next, this paper will review the proposals introduced by the ISA Protection Act, including its highlights and shortcomings. The paper also examines the Act's impact on the viability of ISAs. Finally, this paper proposes ways ISAs can be maintained as a viable, non-predatory source of funding for education.

II. BACKGROUND

A. ISA Development, Use, and Agency Authority

Economist Milton Friedman developed the idea of ISAs in a 1955 essay.[13] In his essay, Friedman observed that financing education necessarily involves much risk.[14] For instance, due to students' differences in ability or fortune, as well as their potential for death or incapacity, returns for investments in education vary greatly.[15] Moreover, unlike mortgages or auto loans, no physical assets back student loans as collateral.[16]

Friedman noted that similar challenges presented by other risky investments were handled via equity investment and limited liability on the part of shareholders.[17] He analogized equity investments in education financing to lenders buying a share in a student's earning

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center/library/electronic-announcements/2022-03-02/income-share-agreements-and-private-education-loan-requirements.

10. Brink, *supra* note 8, at 2; ISA Student Protection Act of 2022, S. 4551, 117th Cong. (2022).

11. Ethan Pollack, *ISA Bill Would Protect Students and Bring Clarity to the Market*, JOBS FOR THE FUTURE (July 20, 2022), https://www.jff.org/what-we-do/impact-stories/financing-future/isa-bill-would-protect-students-and-bring-clarity-market/.

12. *Id.*

13. Josh Reini, *ISAs: The Friedman Solution to the Student Loan Crisis*, FEE (Sept. 6, 2019), https://fee.org/articles/isas-the-friedman-solution-to-the-student-loan-crisis/. Friedman first mentioned ISAs' underlying concept of financing education as an investment in a footnote in his co-authored 1940s book, *Income from Independent Professional Practice*. Jack Salmon, *Don't Smother Income Share Agreements in their Crib*, JAMES MARTIN CNT. FOR ACAD. RENEWAL (Oct. 21, 2021), https://www.jamesgmartin.center/2022/10/dont-smother-income-share-agreements-in-their-crib/.

14. Friedman, *supra* note 5, at 10.

15. *Id.*

16. Bair & Cooper, *supra* note 4, at 1.

17. Friedman, *supra* note 5, at 10.

prospects.[18] According to this model, Freidman theorized that a lender would get a positive return on their original investment from successful individuals, which could compensate for any losses suffered as a result of investments in unsuccessful individuals.[19] While Friedman's model was slow to catch on, largely because the federal government stepped in to provide student aid,[20] it eventually gained some traction and came to bear the name "income-share agreement."[21]

Since the birth of Freidman's income-share agreement model, ISAs have been employed in a few different contexts.[22] In pop culture, rock star David Bowie used an ISA-like scheme to raise up-front capital for himself, pledging a cut of his future income to investors for ten years.[23] In the realm of education, colleges, vocational training schools (such as coding bootcamps),[24] and municipal workforce programs have offered ISAs.[25] With respect to colleges, ISAs have been introduced with a variety of different motivations.[26]

The University of Utah began an ISA program to combat the effects of student debt aversion, which had been causing students who ran out of money to stop school and go to work instead of taking out loans.[27] Colorado Mountain College launched its ISA program with a different goal—to help undocumented students, who were ineligible for federal financial aid, pay for college.[28] Purdue University established its "Back a Boiler" ISA program, which has been the most prominent ISA offering to date,[29] to fill gaps in funding left after a student exhausted scholarships, grants, and federal loans.[30] That is, the Back a Boiler ISAs acted as a

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18. *Id.* Others have similarly represented ISAs as investments in students akin to investments in startups. John Stossel, *Better Than Student Loans – Here's a Real Solution to the College Debt Crisis*, FOX BUS. (Oct. 26, 2019, 7:00 AM), https://www.foxbusiness.com/money/john-stossel-student-loans-solution-debt-crisis.

19. Friedman, *supra* note 5, at 10.

20. George Leef, *The Feds Should Encourage Income Share Agreements, Not Strangle Them*, NAT'L REV., (Oct. 21, 2022, 7:11 AM), https://www.nationalreview.com/corner/the-feds-should-encourage-income-share-agreements-not-strangle-them/.

21. Bair & Cooper, *supra* note 4, at 7.

22. Bair & Cooper, *supra* note 4, at 10–14.

23. Kenny Malone & Jacob Goldstein, *A New Way to Pay for College (Update)*, PLANET MONEY, at 04:09 (Aug. 5, 2022), https://www.wnyc.org/story/a-new-way-to-pay-for-college-update/.

24. *Id.* at 06:24.

25. Abigail Johnson Hess, *San Diego's New Income-Share Program Wants to Help Students Go Back to School Now, Pay Later*, CNBC (May 17, 2019, 11:08 AM), https://www.cnbc.com/2019/05/17/san-diego-launches-isa-program-with-the-help-of-donors-like-google.html.

26. Sydney Johnson, *So You Want to Offer an Income-Share Agreement? Here's How 5 Colleges Are Doing It.*, EDSURGE (Feb. 15, 2019), https://www.edsurge.com/news/2019-02-15-so-you-want-to-offer-an-income-share-agreement-here-s-how-5-colleges-are-doing-it?.

27. *Id.* (The University of Utah's program is a five-year pilot called "Invest In U".).

28. *Id.* (Colorado Mountain College's ISA program is called "Fund Sueños" and targets students enrolled in the Deferred Action for Childhood Arrivals (DACA).).

29. Bair & Cooper, *supra* note 4, at 10; Ritter & Webber, *supra* note 2, at 7.

30. Hess, *supra* note 25.

supplement to low-interest federal loans and served as a replacement for private loans and Parent PLUS loans.[31]

While some providers view ISAs as a vehicle for protecting students in lower-earning fields of study, another interest that seems to have driven the structure of the Back a Boiler program was to encourage students toward more lucrative majors.[32] For instance, the terms of Purdue's ISAs, such as the length of obligation, as well as the percentage of income paid out by the student, depended on the student's major.[33] In operation, students with higher-income majors, such as engineering, paid lower percentages of their income for shorter durations than other majors, such as English.[34] Yet, the differentiation in terms was structured so that students from any major paid roughly $1,500-$1,600 for every $1,000 received.[35]

Despite different motivating factors, ISAs offered by many universities have several features in common.[36] For instance, most ISA programs offered through universities incorporate a cap on total payments.[37] When met, this cap releases a student of the obligation to continue paying, regardless of whether the obligation's duration has lapsed.[38] In addition, these ISA programs include a minimum-income threshold, below which students are not obligated to make payments.[39] The payment cap and minimum-income threshold illustrate how ISAs may offer protection for students who would struggle to pay traditional loans, such as students who do not graduate or cannot secure employment.[40] These ISA terms are also examples of safeguards ISA providers have adopted themselves,[41] as ISAs' unique structure and lack

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31. Bair & Cooper, *supra* note 4, at 8. Parent PLUS loans are federal loans that "parents of dependent undergraduate students" can use to pay for "education expenses not covered by other financial aid." *Parent PLUS* Loans, STUDENT AID, https://studentaid.gov/understand-aid/types/loans/plus/parent.

32. Bair & Cooper, *supra* note 4, at 11. (Students in lower-earning fields of study may be protected from higher interest rates due to a feature of ISAs called cross-subsidization, where high-earning students make up for the losses investors suffer on low-earning students. *See id.* at 7. Purdue University, however, adopted a principle of no cross-subsidization from higher to lower earners. Ritter & Webber, *supra* note 2, at 16 n.25).

33. Bair & Cooper, *supra* note 4, at 10.

34. *Id.*

35. *Id.*

36. *Id.* at 12.

37. *Id.*

38. *Id.*

39. *Id.*

40. MELANIE A. ZABER & ELIZABETH D. STEINER, ARE INCOME SHARE AGREEMENTS FAIR? A CLOSE LOOK AT THE POTENTIAL RISKS AND BENEFITS OF AN EMERGING FINANCIAL AID OPTION 2 (Rand Corp. ed. 2021), https://www.rand.org/pubs/perspectives/PEA1141-12.html.

41. Mitch Daniels, *Here is a Powerful Alternative to Student Loans*, WASH. POST (Nov. 28, 2019, 6:00 AM), https://www.washingtonpost.com/opinions/income-share-agreements-are-a-powerful-alternative-to-student-loans/2019/11/27/5290d0ee-0be3-11ea-97ac-a7ccc8dd1ebc_story.html.

of a traditional interest rate (compared to loans) left ISAs poorly regulated.[42]

B. Agencies Assert Regulatory Authority Over ISAs

ISAs did not previously operate under any explicit federal legal framework.[43] In September 2021, however, the CFPB issued a consent order against Better Future Forward, Inc., an ISA provider.[44] The CFPB has the authority, under the Consumer Financial Protection Act, to take action against institutions that violate federal consumer-financial laws.[45] Using this authority, the CFPB issued the consent order against Better Future Forward for three key violations.[46] First, Better Future Forward falsely represented that ISAs are not loans and do not create debt.[47] Second, Better Future Forward failed to provide disclosures required by federal consumer financial law for private education loans. Third, the ISA provider imposed unlawful early repayment or prepayment penalties.[48]

The CFPB's consent order sent the ISA industry a clear message that federal consumer financial protection laws apply to ISAs.[49] In fact, the acting director of the CFPB commented that, though the ISA industry has attempted to dodge oversight by avoiding labeling its products as loans, "regardless of the name on the label, these products are credit and have to comply with federal consumer protections."[50] Moreover, in January 2022, the CFPB amended its examination procedures to specifically target ISAs.[51] The examination procedures now read, "[p]rivate education loans sometimes take non-traditional forms such as temporary credits and *income share agreements*."[52]

Following the CFPB's lead, the FSA issued an announcement clarifying that ISAs financing expenses for postsecondary education are private education loans under the Higher Education Act of 1965

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42. DIVYAM Goel, Income Share Agreements Are Making More Sense, FORBES (Dec. 7, 2021, 4:00 PM), https://www.forbes.com/sites/sorensonimpact/2021/12/07/income-share-agreements-are-making-more-sense/.

43. Bair & COOPER, *supra* note 4, at 14.

44. *CFPB Takes Action Against Student Lender for Misleading Borrowers about Income Share Agreements,* CONSUMER FIN. PROT. BUREAU (Sept. 7, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/; *In re* Better Future Forward, et al, Consent Order, No. 2021-CFPB0005 (Sept. 7, 2021), https://files.consumerfinance.gov/f/documents/cfpb_better-future-forward-inc_consent-order_2021-09.pdf.

45. Consumer FIN. PROT. BUREAU, *supra* note 44.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. FED. STUDENT AID OFF. OF POSTSECONDARY EDUC., *supra* note 9.

52. CONSUMER FIN. PROT. BUREAU, EDUCATION LOAN EXAMINATION PROCEDURES (Jan. 2022) (emphasis added).

(HEA).[53] To that end, the announcement broadcast that the FSA has regulatory authority over ISAs as private education loans.[54] Moreover, in a blog post published on the same day, the Department of Education reiterated that it was taking action to remind providers of private education loan products that they must comply with consumer protection requirements under the HEA.[55]

III. THE CASE FOR THE ISA STUDENT PROTECTION ACT OF 2022'S PROPOSALS

A. Insufficiency of Agency Regulatory Authority

While the actions taken by the CFPB and the FSA signal a shift towards federal regulation over ISAs, the form of this regulation remains ill-defined. In fact, the agencies themselves seem to recognize the murkiness still clouding ISA regulation. For instance, while the CFPB took a step towards asserting regulatory authority over ISA providers by issuing the consent order against Better Future Forward, the agency did not exercise its full power in doing so.[56] Instead, the CFPB refrained from imposing financial penalties on Better Future Forward.[57]

The CFPB credited its restraint to Better Future Forward's responsible conduct,[58] but the financial penalty may also have been withheld due to the CFPB's recognition that the regulatory landscape involving ISAs has been unsettled and that ISAs have never been clearly defined as loans.[59] Further, the FSA notably ended its announcement by stating that the Department of Education may provide additional guidance in the future,[60] which could point to lingering uncertainty regarding the regulation of ISAs. Along the same lines, in its blog post, the Department of Education stated that it plans to provide additional information regarding how colleges can improve the accuracy and consistency of reporting for preferred lender arrangement requirements under the HEA.[61]

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53. FED. STUDENT AID OFF. OF POSTSECONDARY EDUC., *supra* note 9.

54. Ayana Brown & Farnaz Thompson, *U.S. Department of Education Officially Asserts Authority over Income Share Agreements*, JD SUPRA (Mar. 7, 2022), https://www.jdsupra.com/legalnews/u-s-department-of-education-officially-5306188/.

55. Rich Williams, What *Colleges Should Know About Income Share Agreements and Private Education Loan Requirements*, U.S. DEP'T OF EDUC.: HOMEROOM BLOG (Mar. 2, 2022), https://blog.ed.gov/2022/03/what-colleges-should-know-about-income-share-agreements-and-private-education-loan-requirements/.

56. CONSUMER FIN. PROT. BUREAU, *supra* note 44.

57. *Id.*

58. *Id.*

59. Farnaz Farkish Thompson et al., *Income Share Agreements—Risks, Rewards, and Regulators*, SUBJECT TO INQUIRY (Sept. 13, 2021), https://www.subjecttoinquiry.com/2021/09/income-share-agreements-risks-rewards-and-regulators/; *see also* Ritter & Webber, *supra* note 2, at 4.

60. FED. STUDENT AID OFF. OF POSTSECONDARY EDUC., *supra* note 9.

61. WILLIAMS, *supra* note 55.

The agencies are not alone in recognizing the uncertainty surrounding ISAs.[62] Prior to the CFPB's consent order, economists acknowledged that laws applicable to traditional student loans were not necessarily structured for application to ISAs.[63] Now, the question of how ISAs should comply with federal protections remains.[64]

As an illustrative example, the Truth in Lending Act requires annual percentage rate (APR) disclosures.[65] Yet, unlike traditional student loans, ISAs do not have an outstanding balance to pay down or an interest rate,[66] and the amount repaid each year on an ISA varies from student to student based on their income.[67] Accordingly, the information ISA providers must disclose in order to comply with required APR disclosures has been ambiguous.[68]

While the CFPB provided no guidance for ISA providers on how they should comply with the law at the time of announcing its consent order against BFF,[69] it has since removed some ambiguity surrounding APR disclosures by working with BFF to develop a compliance plan.[70] More specifically, with what BFF described as consistent input from the CFPB, BFF developed a new disclosure format for its ISAs,[71] including application, approval, and final disclosure documents.[72] Each of these documents declares that "[t]here is no interest rate on an Income Share Agreement",[73] and the application form goes as far as filling the blank

62. *See* Pollack, *supra* note 11.

63. Ritter & Webber, *supra* note 2, at 4.

64. Pollack, *supra* note 11.

65. *Id.*

66. Nora Delaney, *The APR-based Protection No Borrower Should Go Without*, OUTCOME (June 21, 2021), https://outcomegroup.org/2021/06/21/the-apr-based-protection-no-borrower-should-go-without/.

67. Pollack, *supra* note 11.

68. *Id.*

69. Ethan Pollack, *The Regulatory Treatment of ISAs Just Got a Lot Clearer,* JOBS FOR THE FUTURE (Nov. 17, 2022), https://www.jff.org/the-regulatory-treatment-of-isas-just-got-a-lot-clearer/.

70. Rick Seltzer, *ISA Provider Better Future Forward Strikes Compliance Plan with Regulators at CFPB*, HIGHER ED DIVE (Sept. 8, 2022), https://www.highereddive.com/news/isa-provider-better-future-forward-strikes-compliance-plan-with-regulators/631478/.

71. Kevin James, *Better Future Forward finalizes compliance plan with the Consumer* Financial *Protection Bureau (CFPB) that has resulted in an updated disclosure format for its ISA*, BETTER FUTURE FORWARD (Sept. 7, 2022), https://www.betterfutureforward.org/bff-updated-disclosure-format-isa?rq=cfpb.

72. Pollack, *supra* note 69; *e.g.*, SAMPLE APPLICATION AND SOLICITATION DISCLOSURE, Better FUTURE FORWARD, https://static1.squarespace.com/static/6109747eac138122e5b8603e/t/662815d677b1d1442ae6395c/1713903063010/4-23-2024-Example-AS.pdf; SAMPLE APPROVAL DISCLOSURE, BETTER FUTURE FORWARD, https://static1.squarespace.com/static/6109747eac138122e5b8603e/t/66281621c3705e1b1aef92f3/1713903138071/4-23-2024-Example-Approval.pdf; SAMPLE FINAL DISCLOSURE, BETTER FUTURE FORWARD, https://static1.squarespace.com/static/6109747eac138122e5b8603e/t/66281628fd0676333d043f8b/1713903145051/4-23-2024-Example-Final.pdf.

73. SAMPLE APPLICATION AND SOLICITATION DISCLOSURE, *supra* note 72; *e.g.*, SAMPLE APPROVAL DISCLOSURE, *supra* note 72 ; SAMPLE FINAL DISCLOSURE, *supra* note 72.

for a starting interest rate with "N/A%".[74] The compliance plan thus reveals that while the CFPB understands that ISAs are unique instruments to which some required disclosures do not apply, the agency and ISA providers are still constrained by existing federal laws designed for the structure of traditional loans.[75] Checking a legal compliance box by entering "N/A" may satisfy existing rules, but this form of disclosure is clearly not optimized to meet the needs of borrowers considering an ISA, strengthening the call for more thoughtful regulation.[76]

The fact that the CFPB's conclusion that federal consumer financial protection laws apply to ISAs could be reversed by a future administration further heightens the unpredictability of the regulation of ISAs.[77] For instance, the CFPB could administer a future order that may effectively change its policy on the application of federal consumer protection laws to ISAs.[78] Thus, there is a serious need for Congress to set out clear regulations over ISAs.

B. ISA Student Protection Act of 2022

1. Act Highlights

In an attempt to address some of the above, as well as additional concerns, a bipartisan group of senators reintroduced the ISA Student Protection Act of 2022 ("the Act")[79] as a successor to The Investing in Student Success Act of 2015, The ISA Act of 2017, and The ISA Student Protection Act of 2019.[80] The Act introduces new consumer protections specific to ISAs, directs the application of existing consumer protections to ISAs, clarifies disclosure requirements for ISAs, creates a reporting scheme to gather information on ISAs.[81], and explicitly authorizes agencies to enforce compliance with the Act.[82]

Among the new consumer protections for ISAs, the Act sets the maximum duration of an ISA and sets a threshold income level at which ISA providers can require repayment from recipients.[83] In terms of

74. SAMPLE APPLICATION AND SOLICITATION DISCLOSURE, *supra* note 72.

75. Pollack, *supra* note 69.

76. *Id.*

77. Pollack, *supra* note 11.

78. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 517 (2009).

79. S. 4551 (Senators Todd Young (R-IN), Mark Warner (D-VA), Marco Rubio (R-FL), and Christopher Coons (D-DE) introduced the bill "[t]o provide a consumer protection framework necessary to support the growth of accessible, affordable, and accountable financing options for postsecondary education, and for other purposes.").

80. *See* Pollack, *supra* note 11; *see also* H.R. 3432, 114th Cong. (2015); H.R. 3145, 115th Cong. (2017); S. 2114, 116th Cong. (2019).

81. S. 4551, Titles I, III, V, VII.

82. S. 4551, Titles I, III, V, VII.

83. S. 4551 § 102(a)(4),(c)(2) (setting the income threshold at 200 percent of the poverty line after the subtraction of any ISA obligation and setting the maximum duration of an educational ISA at 360 months).

consumer protections, the Act details how ISAs may not discriminate against applicants and how ISAs will be handled under the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and various other protections.[84] The Act also tasks the CFPB with creating a model form that would aid ISA providers in meeting disclosure requirements.[85] These disclosures include some requirements that mirror those specified by the TILA;[86] though, the Act grants the CFPB discretion to decide whether to require reporting of an ISA's APR.[87] The Act further provides the CFPB with explicit regulatory authority over ISAs and requires the CFPB to report on the use and prevalence of ISAs in education at least every five years.[88]

The above features of the Act contribute to consumer safeguards and better prevent ISAs from being employed predatorily than the current scheme. For instance, the Act ensures affordability for students by regulating the threshold income level and maximum ISA duration .[89] The threshold income level will make payments manageable on a month-to-month basis, as graduates will only pay when their income exceeds 200% of the federal poverty line.[90] The maximum ISA duration will contribute to the total affordability of an ISA because it sets a maximum number of monthly payments, regardless of the amount repaid under the contract.[91] These two measures are especially notable because there are no similar protections guaranteeing the affordability of traditional private student loans.[92]

Moreover, the Act's application of existing consumer protections to ISAs explicitly provides consumers with the benefit of those protections.[93] For instance, by applying the Fair Debt Collection Practices Act to ISAs,[94] the Act guards students against abusive collections,[95] especially in light of the fact that the Act also prohibits ISA providers from converting an ISA into a debt balance in the case of default.[96] In addition, the Act requires ISA contracts to include Holder Rule[97] disclosures that notify students that they may have legal grounds

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84. Christopher D. Warren, *New Laws & Challenges in the ISA Market: How to Stay in Legal Compliance*, LEXOLOGY (Sept. 1, 2022), https://www.lexology.com/library/detail.aspx?g=ad2dc054-7626-4b7c-9e3a-13c381173669; *see also* S. 4551 §§ 501–507.

85. Brink, *supra* note 8; *see also* S. 4551 § 301(4).

86. Brink, *supra* note 8 (the Act, like the TILA, requires comparisons of an ISA to other loan options); *see also* S. 4551 §§ 301-302.

87. Pollack, *supra note* 11; *see also* S. 4551 § 301(3).

88. Pollack, *supra note* 11; *see also* S. 4551 §§ 701(a)(6),(b)–(c), 702.

89. Pollack, *supra* note 11.

90. *Id.*

91. *Id.*

92. *Id.*

93. *See* S. 4551 §§ 501–507.

94. S. 4551 § 504.

95. Pollack, *supra* note 11.

96. *Id.*; *see also* S. 4551 § 101 (prohibiting acceleration mechanisms).

97. FTC Holder in Due Course Rule, 16 C.F.R. § 433.22 (1975).

to decline repayment on the ISA if the education funded by the ISA was defective or fraudulent.[98] Such disclosure requirements should better align ISA provider and student interests, as both parties will benefit from avoiding costly litigation by engaging with quality education practices. By applying existing consumer protection laws to ISAs, the Act will better close off the Wild West-like opportunity for ISA providers to take advantage of any lack of guidance regarding existing federal regulations.[99]

The question of what an ISA really is has been the source of significant worries for students considering their financial implications.[100] In this regard, the key concern for those wary of ISAs' potential to be used predatorily is that ISAs traditionally have had little transparency and have been marketed deceptively.[101] The Act addresses these fears with the standardized form to be created by the CFPB, as well as by explicitly listing required disclosures and restrictions on advertising.[102]

Notably, the Act requires ISA providers to use a table listing comparisons between ISA payments required at a range of different future income levels.[103] This table will be helpful for students in understanding ISA commitments because it will illustrate how the amount a student is expected to pay back will change over a variety of potential income levels, increasing as they become more successful. The table must also include comparisons between payments on an ISA and other comparable traditional student loans.[104] These clearer disclosures should reduce ISA providers' ability to prey on students' financial naivete, especially when other financing options are more favorable than ISAs.[105]

Further, the Act's delegation of regulatory authority to the CFPB and specifically targeting ISAs will likely improve regulation over ISAs, even taking the CFPB's recent attempts at regulation (e.g., the issuance of a consent order[106]) into account. In this regard, the Act could broaden the CFPB's compliance structure beyond its current bounds of the traditionally structured loan concept.[107] As a result, the CFPB may have

98. Pollack, *supra* note 11; *see also* S. 4551 § 507.

99. *See* Warren, *supra* note 83.

100. Goel, *supra* note 42.

101. Letter from Elizabeth Warren, U.S. Senator, et al. to Betsy DeVos, Secretary of Education (June 4, 2019) (on file with author).

102. *See* S. 4551 §§ 301-304.

103. S. 4551 § 302(d)(9)(A).

104. S. 4551 § 302(d)(9)(C).

105. *See* Boston, *supra* note 1.

106. CONSUMER FIN. PROT. BUREAU, *supra* note 44.

107. Brink, *supra* note 8.

more latitude over, and may work more creatively on, ISA regulation to better protect consumers.[108]

Moreover, the data on ISAs needed for any form of regulation is currently lacking.[109] For instance, there is no available data on the number of students in the U.S. participating in an ISA program.[110] Most universities employing ISA programs do not collect, or do not have access to, high-quality data on past participants.[111] The federal government also does not evaluate student outcomes.[112]

As a result, regulators and ISA providers have not been able to assess the impact of ISA terms on key student outcomes,[113] making predictions of whether an ISA is better or worse for a student nearly impossible,[114] especially when small changes in ISA terms risk big differences to the cost and operation of an ISA program.[115] Accordingly, the reporting requirement of the Act may be hugely beneficial for better understanding the effect of regulations on ISAs, as well as for determining when and how to adopt particular regulations. The reporting should also help answer questions such as whether ISAs make economic sense for students and what impact ISAs have on students' academic outcomes.

2. Act Shortfalls

While critics of the Act currently view ISAs as one of the best versions of the bill, they still believe it is insufficient to protect consumers from predatory practices.[116] This skepticism is fueled by the fact that the current version of the Act fails to sufficiently address many of the critics' core concerns. For instance, student advocates have argued that ISA payment caps, which offer an option to satisfy an ISA by paying some multiple of the amount of funding initially provided,[117] constitute a forbidden prepayment penalty.[118] While the Department of Education has not decided whether ISA payment caps violate federal rules prohibiting prepayment penalties on student loans,[119] the Act

108. *Id.*
109. *Id.*
110. *Id.*
111. Ritter & Webber, *supra* note 2, at 28.
112. Brink, *supra* note 8.
113. Eli Bildner & Ben Castleman, *To Cut Through the Noise of the ISA Debate, We Need the Facts*, JOBS FOR THE FUTURE (June 4, 2021), https://www.jff.org/points-of-view/cut-through-noise-isa-debate-we-need-facts/.
114. Boston, *supra* note 1.
115. *See* Bair & Cooper, *supra* note 4, at 9.
116. *See* Brink, *supra* note 8.
117. Ritter & Webber, *supra* note 2, at 3, 11.
118. Yoder, *supra* note 4.
119. *Id.*

signals that they will not.[120] Consequently, students may not be released early from an ISA obligation without satisfying their contracted payment cap.[121]

Payment caps typically range from one to three times the initial funding.[122] In line with this scheme, a recipient of $39,864 of ISA funding through the Back a Boiler program was told he would have to pay a distressing $99,660.50 to prepay his obligation.[123] The fact that the Act is silent regarding limits on payment caps[124] may compound student advocates' concerns regarding the lack of protection for students from predatory penalties under ISAs. As discussed in greater detail below, however, there may be additional safeguards available for policymakers to implement to reduce the shocking sticker price of an ISA terminated early.

Further, the Act likely inadequately addresses deep apprehensions that ISAs create "significant opportunities for discriminatory practices."[125] In this regard, after listing a number of activities constituting discrimination,[126] the Act notes that the use of an empirically derived system considering the expected future income of an applicant to determine the terms or whether to approve an ISA agreement is *not discrimination*.[127] Therefore, under the Act, Purdue's differentiation of ISA terms based on students' majors is likely not discrimination.

Yet, student advocates caution that ISAs with unequal terms based on students' majors have a clear discriminatory effect because degree programs can be highly correlated with race or gender.[128] In this regard, the Act's categorization of activities that are not discrimination could result in disparate outcomes that compound systemic inequities in the U.S.[129]

In addition, the provisions of the Act intended to provide consumer protections may be ineffective. With respect to provisions aimed at ISA affordability, for example, Senator Elizabeth Warren finds that "there is

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120. S. 4551 §§ 101(b), 601(b) ("Any right that an ISA recipient may have to pay an amount greater than the amount financed under an income share agreement in order to extinguish the income share agreement earlier than the ISA duration or ISA maximum number of payments *shall not be subject to any Federal or State law with respect to prepayment penalties. . . .*") (emphasis added).

121. *See* Yoder, *supra* note 4.

122. Ritter & Webber, *supra* note 2, at 11.

123. Aarthi Swaminathan, *Student Loans: Mom Slams Purdue ISA Offering as Son Deals with* Nearly *$100,000 in Debt*, YAHOO FIN. (Apr. 2, 2022), https://finance.yahoo.com/news/purdue-income-share-agreement-scrutiny-student-loan-153057798.html. (A payment cap of $99,660.50 on a lend of $39,864 reflects a 2.5 times multiplier on the initial funding.)

124. *See* S. 4551 § 503(a)(i)(2).

125. Letter from Elizabeth Warren, *supra* note 100, at 2.

126. S. 4551 § 501(a).

127. S. 4551 § 501(b)(4) (emphasis added).

128. Letter from Elizabeth Warren, *supra* note 100, at 3.

129. *Id.*

no evidence . . . that . . . income thresholds actually shield borrowers from making payments they cannot afford."[130] Senator Warren's statement reflects a concern that the Act's (as well as current ISA contracts') income threshold provision acts as a precarious cliff—where students earning just below the threshold pay nothing, and students earning just above the threshold are on the hook for the entire payment.[131] The worries over income thresholds reflect critics' broader apprehension that, regardless of the exact laws enacted for ISAs, ISA providers will always go right up to whatever regulatory lines are set,[132] taking as much advantage of students as possible.

While the above concerns have merit, the benefits gained by passing proposals similar to those included in the Act outweigh the risks. In this regard, the protections against predatory practices afforded by the Act's proposals should be granted considerable weight because keeping ISAs in a poorly regulated middle ground will not make them safer for students.[133] The Act is a promising initial framework for federal ISA regulation that, though it may be subject to changes, will bring greater predictability to both students and ISA providers alike. As a result, students who have difficulty paying for school will be in a better position to take advantage of one of the biggest benefits of an ISA—increased access to postsecondary education.[134]

C. Viability of Federally Regulated ISAs

1. Potential Threat to ISA Viability

The question of whether ISAs are predatory towards students is only relevant if ISAs remain viable to both students and providers. In this regard, an ISA only works if it simultaneously satisfies target returns on a funder's investment and remains attractive to prospective student enrollees.[135] The future viability of ISAs may be in question, as following the CFPB's consent order, several colleges (including Purdue) paused or terminated their ISA programs.[136] While Purdue reported the temporary interruption was caused entirely by the need to switch ISA vendors,[137] other schools cited a lack of interest, and still others

130. *Id.* at 2.

131. Bair & Cooper, *supra* note 4, at 16.

132. Jillian Berman, *Wealth Management (A Special Report): Students Get Tuition Aid for a Piece of Their Future: Income Share Agreements Seem Poised to Take off, as Costs and Debt Loads* Rise, WALL ST. J. (Sept. 11, 2017), https://www.wsj.com/articles/students-get-tuition-aid-for-a-piece-of-their-future-1505096100.

133. Goel, *supra* note 42.

134. Zaber & Steiner, *supra* note 40, at 2.

135. Ritter & Webber, *supra* note 2, at 9.

136. Yoder, *supra* note 4.

137. Malone & Goldstein, *supra* note 23, at 22:15. The change in ISA vendors is likely *motivated* by the shutdown of ISA program servicer Vemo Education, which was sued by students

admitted they were worried about federal scrutiny.[138] In this regard, whether proposals similar to those in the Act are adopted or not, if investors do not believe there is sufficient clarity in the market, they will not provide ISA funding for students.[139]

2. How the Act Encourages ISAs

From both students' and investors' perspectives, the CFPB's actions and enactment of proposals from the Act should increase the viability of ISAs. For instance, enacting legislation similar to the Act would encourage greater investment in ISAs by providing clearer regulations, which should reduce the deterrent effect caused by the current lack of clarity in the field.[140] Such legislation should thus make ISA providers that have halted or paused their ISA offerings amid the current changes in federal guidelines more confident that there is a path for resuming their programs in compliance with regulations,[141] and the resulting more widespread adoption and increased investment in the ISA market will provide students with greater access to educational funding.[142]

Students should also be encouraged that legislation that incorporating the Act's proposals will make ISAs more attractive to them. In particular, students will benefit from the Act's proposed protections, such as the requirement of a table of comparisons between ISA payments and traditional student loans described above.[143] For instance, requiring such comparisons may pressure ISA providers into offering ISAs that are more affordable to students in order to compete with other loan offerings. In fact, Stanford Law's recent announcement that the school will be offering ISAs to fund law students' education serves as an excellent model of how the ISA market is beginning to shift during this time of regulatory changes.[144]

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alleging that Vemo ran a high-cost ISA program that violated state and federal laws. Yoder, *supra* note 4.

138. Yoder, *supra* note 4.

139. *See* Warren, *supra* note 83.

140. *See* Goel, *supra* note 42.

141. *See* Yoder, *supra* note 4.

142. Richard Price, *Unlocking the Potential of Income Share Agreements (ISAs) to Tackle the Student Debt Crisis*, CHRISTENSEN INST. 16 (Aug. 15, 2019), https://www.christenseninstitute.org/publications/isas/.

143. S. 4551 § 302(d)(9)(C).

144. Josh Moody, *Stanford Law Introduces Income-Share Agreements*, INSIDE HIGHER ED (Sept. 19, 2022), https://www.insidehighered.com/quicktakes/2022/09/19/stanford-law-introduces-income-share-agreements.

3. Stanford's Pilot Program: An Example of Shifting and Experimental ISA Terms

While many schools have offered ISAs with a maximum value between $10,000 and $40,000 and an intention to supplement—not replace—subsidized federal student loans,[145] Stanford Law's pilot ISA program will dole out $170,000 to law students and seems to be designed so that students do not need to take out any federal loans.[146] In addition, Stanford's program will include a novel *maximum income* cap of $225,000.[147]

This cap will ensure that under the program's repayment rate of 10% of a graduate's income, the monthly payments for the ISA will not exceed $1,875—even for the highest-paid graduates.[148] The maximum income cap feature of Stanford Law's program could thus serve to make ISAs more attractive to law students who expect to earn Big Law salaries of $225,000 by their second year of work.[149] To that end, high-earning students may become more protected from feeling like they overpaid on an ISA, and low-earning students may benefit from term changes that seek to keep ISAs competitive with other loan offerings.

Stanford Law's ISA pilot program also bolsters the position that ISAs will remain viable to investors. In particular, one concern about legislation and increased federal regulation is that policymakers will stifle experimentation.[150] Milton Freidman himself shared this fear when he first contemplated the ISA model.[151] More specifically, Friedman worried that the various parameters involved in implementing an ISA would be difficult to get right (from an investor's or a student's perspective) and would be in danger of becoming political footballs if the government became too involved in setting them.[152]

Along these lines, there is a belief that to avoid smothering the ISA market, the government should leave room for private testing of different parameter values.[153] With respect to the government's attempt at ISA regulation with the Act, the drastic changes from the ISA terms offered at previous schools to the pilot program Stanford Law plans to

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145. Bair & Cooper, *supra* note 4.

146. Karen Sloan, *Stanford Law to offer 'income share' financing as law school costs soar*, REUTERS (Sept. 15, 2022, 12:54 PM), https://www.reuters.com/legal/legalindustry/stanford-law-offer-income-share-financing-law-school-costs-soar-2022-09-15/. The $170,000 ISA amount was selected as the median amount students are projected to borrow, and this sum covers most of the cost of Stanford Law's three-year J.D. program at its $66,924 annual tuition.

147. *Id.*

148. *Id.*

149. *The 2024 salary survey*, CHAMBERS ASSOC., https://www.chambers-associate.com/law-firms/law-firm-salaries (last visited May 21, 2024).

150. *See* Bair & Cooper, *supra* note 4, at 15; *see also* Price, *supra* note 141, at 15.

151. *See* Price, *supra* note 141, at 15; *see also* Friedman, *supra* note 5, at 12.

152. Friedman, *supra* note 5, at 12.

153. Bair & Cooper, *supra* note 4, at 15.

launch demonstrates that there is still plenty of flexibility for ISA providers to customize their products. Accordingly, ISA providers should feel confident that they can perfect a recipe that makes ISAs valuable to both students and investors.

With greater clarity and stability for investors, increased protections for students, and the flexibility for change brought by the Act's, ISAs will remain a viable source of education funding even in the face of enacted legislation. Thus, while there has been a recent decline in ISA usage,[154] the ISA market remains poised to take off.

IV. SOLUTIONS

A. ISA Funding

While the Act's proposals and increased federal regulation will greatly reduce the risk that ISAs are used predatorily against students, additional solutions may strengthen protection for students. The solution that is likely the most important for this purpose is for schools to fund their ISA programs in a way that prioritizes students over returns on capital. In particular, instead of relying on ISAs funded by profit-seeking investors who seek a return on their capital (e.g., yield-based models),[155] schools should strive to structure ISA funds to function with little to no returns.

For instance, schools, like some nonprofit educational providers,[156] may utilize institutional or philanthropic funds to jumpstart an ISA fund and then seek a return just high enough to replenish the ISA fund for future students.[157] Examples of the use of such evergreen funds at a university include the University of Utah's Invest in U ISA program, as well as Robert Smith's recently announced initiative for historically black colleges and universities.[158] Alternatively, using a deferred tuition model, schools may receive future tuition payments from successful participants in exchange for the current education of those participants, effectively stretching the school's grant funding for a few years until it is repaid.[159] Unlike yield-based models, which must serve the interests of outside investors, both of these models funnel ISA money directly into

154. Yoder, *supra* note 4.

155. Ritter & Webber, *supra* note 2, at 14.

156. *Id.*; *see also* Tony Wan, *When a Pandemic Upends Labor Markets, Will a New Workforce ISA Fund Work?*, EDSURGE (Oct. 28, 2020), https://www.edsurge.com/news/2020-10-28-when-a-pandemic-upends-labor-markets-will-a-new-workforce-isa-fund-work.

157. Ritter & Webber, *supra* note 2, at 14. (This model of funding is referred to as evergreen funds.)

158. Ethan Pollack, *Can Student-centered Income Share Agreements Improve Economic Opportunity and Equity?*, THE ASPEN INST., Nov. 2020, at 3.

159. *Id.*

student success,[160] better aligning the school's and the students' interests in respectively giving and gaining a valuable education.

B. Time-Dependent Payment Caps

The use of time-dependent payment caps is an additional solution that would benefit students and would address one of the strongest criticisms against ISAs—that ISAs' traditional payment caps constitute a prepayment penalty. One way to set a time-dependent payment cap on an ISA would be to set an APR cap on the ISA.[161]

While ISAs do not have an interest rate, as described above, an APR may be calculated for an ISA after it has been paid off.[162] Under the traditional approach of setting a fixed payment cap (e.g., 1.5x the borrowed ISA amount), the APR of the ISA decreases over time.[163] As an illustrative example, for $10,000 borrowed under an ISA with a 1.5x payment cap, the APR for prepaying the aggregate $15,000[164] at five months into the payment period would be 101%, while the APR for prepaying this aggregate sum at forty-five months into the payment period would be a much lower 11%.

With an APR cap, the prepayment of an ISA obligation would be fixed at a manageable level, such as 20%.[165] Under this scheme, prepayments on an ISA would start lower and grow over time, as a student would pay the lesser amount of the payment cap or the APR-based early termination value.[166] For instance, continuing with the $10,000 and 1.5x payment cap example, prepaying the ISA under a 20% APR cap would cost $10,862 at five months and $15,000 at forty-five months.[167]

In addition to lessening the prepayment, penalty-like blow of early termination of an ISA with a payment cap, an APR cap would help students better understand how their obligations with an ISA compare to other loans. In particular, the APR cap would clarify how obligations under an ISA evolve over time. Thus, a time-dependent payment cap, such as an APR cap, could go far in protecting students from predatory practices.

160. *Id.* at 9.
161. Delaney, *supra* note 66.
162. *Id.* The APR may be determined based on the total amount paid to end the ISA obligation, the original amount distributed under the ISA, and the time elapsed before the ISA was repaid.
163. *Id.*
164. 1.5 times the initially borrowed $10,000.
165. Delaney, *supra* note 66.
166. *Id.*
167. *Id.*

V. CONCLUSION

While ISA funding that does not emphasize returns and time-dependent payment caps may each offer more robust protections to students enrolled in an ISA, the regulations proposed by the ISA Student Protection Act of 2022 offer an incredibly promising start to shaping ISAs into a viable, non-predatory option for financing secondary education. The ideas put forth in the Act should be passed because they will carve out a space for predictable federal regulation over ISAs and for better metrics and transparency on the impact of ISAs. Once such regulations are passed, considerations like ISA funding sources and time-dependent payment caps can and will be explored and advocated for more fully because ISA regulation will be more centralized and will be more reliably data-driven. More importantly, with the ratification of such regulations, students can be assured that ISAs will serve as an increasingly sensible tool to gain access to education.