



Pricing Without Discrimination

ALTERNATIVE STUDENT LOAN PRICING,
INCOME-SHARE AGREEMENTS, AND
THE EQUAL CREDIT OPPORTUNITY ACT

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Executive Summary

New private financing options for higher education are becoming more popular every year. Products that take into account nontraditional lending factors, such as Alternative Finance (AltFinance), or that attempt to predict a student's future income with income-share agreements (ISAs), provide an additional layer of transparency to students and their families with value for money calculations. However, with AltFinance, which prices loans based on a student's perceived likelihood of repayment, and ISAs, in

which an investor obtains repayment based on a student's future income, the risk of Equal Credit Opportunity Act (ECOA) claims is significant. Based on prior research, some of the best graduation rates and future income predictors may disproportionately affect—or have a disparate impact on—protected classes of people. As AltFinance lenders and ISA investors consider these issues, maintaining accurate data to support the business necessity and manifest relationship defense to an ECOA claim is important.

Disclosure

The authors represent numerous businesses offering ISAs or similar structures to both students and consumers. The views and opinions expressed here are the authors'. They do not represent an official position of Nelson Mullins Riley & Scarborough LLP or any of the firm's clients. This is not a complete legal analysis of these issues and should not be treated as the legal advice of Nelson Mullins Riley & Scarborough LLP. You should consult with your legal counsel on any issues touching on those discussed.

Pricing Without Discrimination: Alternative Student Loan Pricing, Income-Share Agreements, and the Equal Credit Opportunity Act

This paper is the fifth in a series examining private financing in higher education from a number of perspectives.

With the increasing costs of postsecondary education and resulting growth in student debt nationwide, students are seeking new and innovative ways to fund their education, and lenders and investors are seeking new and innovative ways to more accurately price student loans and other forms of student financing. Recently, lenders and investors have developed several innovative student finance products that diverge significantly from traditional student lending.

Rather than provide a fixed amount of funding at a predetermined rate based on traditional considerations of credit history and creditworthiness, these alternative financing sources look to factors that may be better predictors of students' success and, in turn, their likelihood and ability to repay.¹

Several alternative finance (AltFinance) companies have developed new methods for evaluating a borrower's ability and likelihood of repaying a loan. While still making loans, these companies, including Common Bond, SoFi, and Zero Bound, use more complex scoring algorithms for credit decisions and purport to reduce the fees and penalties associated with certain traditional loans.

Going a step further, companies such as Upstart take into account alternative underwriting factors, such as school of attendance, grades, major, and job history. The risk of nonrepayment is still on the student in the AltFinance model, but the pricing of the

loan is, in theory, more indicative of the risk of default and likelihood of repayment by the student.

Taking the AltFinance concept a step further, a number of companies now offer income-share agreements (ISAs). ISAs are innovative financial instruments for privately funding education. Depending on their structure, ISAs may act as a hybrid of an equity investment agreement and a purchase-sale agreement, creating an opportunity for individuals to raise capital for themselves in the form of "equity" rather than debt.

Once students graduate, they pay a percentage of their income for an established period of time. This repayment obligation percentage varies somewhat, and the amount that the investor is willing to invest varies. Unlike a loan in which the student has an absolute obligation to repay the principal plus an interest rate, the ISA ties the interests of the investor to the student. The payments due to the investor vary as the student's future income rises or falls.

Therefore, it is in the investor's best interest to accurately gauge both the likelihood of the student completing the degree and course of study and the student's future earnings potential. See Table 1 for a comparison of the features of common public- and private-financing options students can use to fund their education.

Inherent in the AltFinance and ISA models is the need for the investor to predict the student's future success, which raises questions regarding the application

Table 1. Comparison of Student Finance Models

Finance Type	Considers Credit History	Considers Student and Parent Need	Considers Institution, GPA, SAT Scores, and Other Nonfinancial Factors	Financing Party Bears Some Risk for Accurate Prediction of Future Income and Ability to Repay
Stafford/Perkins Loan	No	Yes	No	No
Parent PLUS Loan	Yes, Limited	No	No	No
Private Student Loan	Yes	No	No	No
AltFinance Lenders	Yes	No	Yes	No
Income-Share Agreements	Maybe	No	Yes	Yes

Source: The authors.

of the Equal Credit Opportunity Act (ECOA), particularly those provisions relating to the disparate treatment of protected classes of individuals. AltFinance lenders and ISA investors are presented with a unique challenge. For both, these nontraditional underwriting factors are untested in legal cases.

The challenges to ISA investors are twofold. In addition to the underwriting criteria challenges, it is unclear how courts will treat ISAs and whether ISAs will be treated as debt or equity for purposes of a variety of statutes, including the ECOA.² Prior research has examined many factors that are highly predictive of graduation and future earnings.

To the extent the ECOA applies, AltFinance lenders and ISA investors must exercise caution in deploying these selection and pricing criteria so as to avoid discrimination against groups the ECOA protects. As this paper explains, some of the best graduation and future income predictors may disproportionately affect protected classes of people.

This report first examines the ECOA's analytical framework. Next, it analyzes the factors used to determine the price and availability of credit and the influence the ECOA exerts on traditional lenders. Third, it details the factors that determine loan repayments and the ECOA risks associated with traditional student lending.

In this analysis, the paper examines the best predictors of future earnings and ECOA risks presented by consideration of those factors. From this point, the paper will examine the defenses available to lenders, addressing the likelihood that ISA investors will need to invoke the business necessity and manifest relationship doctrines to defend underwriting decisions. The report concludes by addressing the unique interaction of the ISA model with the ECOA.

The Equal Credit Opportunity Act

The ECOA stands as one of the most significant pieces of antidiscrimination legislation in the United States. Although it has evolved over time, it generally prohibits any lender from discriminating against individuals either in credit availability or pricing when such discrimination is based on an individual belonging to a protected class. At its core, the ECOA seeks to level the playing field so that borrowers are judged solely on their creditworthiness.

Background and Prohibitions on Conduct.

Before the ECOA was enacted in 1974, creditors routinely rejected applicants for credit, based on inaccurate stereotypes about women, divorcees, and racial

minorities.³ To remedy these problems, Congress passed the ECOA in 1974. The ECOA's original version banned discrimination in the extension of credit on the basis of sex or marital status. In 1976, the ECOA was expanded to prohibit discrimination on other grounds, including race, color, religion, national origin, age, the receipt of public assistance income, and the good faith exercise of any right under the Consumer Credit Protection Act.⁴

Ultimately, the implementing regulations for the ECOA were authored by the Federal Reserve Board and enrolled as Regulation B.⁵ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) transferred this authority to the Consumer Financial Protection Bureau (CFPB). Dodd-Frank not only granted rulemaking authority under the ECOA to the CFPB but also, with respect to entities under its jurisdiction, granted authority to the CFPB to enforce compliance with the ECOA and its implementing regulations.⁶

Beyond the additional rulemaking authority granted to the CFPB, additional resources have been allocated in the Department of Justice for the prosecution of claims under the ECOA. For example, the Department of Justice now has a dedicated Fair Lending Unit in the Civil Rights Division.⁷

Application. The ECOA and Regulation B apply to all persons who, in the ordinary course of business, regularly participate in a credit decision, including setting the terms of the credit. The term “creditor” includes a creditor’s assignee, transferee, or subrogee who so participates.⁸ The ECOA prohibitions apply to every aspect of an applicant’s dealings with a creditor, including an application for credit or an existing extension of credit; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures.⁹

To prevent discrimination in the credit-granting process, Regulation B imposes a delicate balance between (1) the creditor’s need to know as much as possible about a prospective borrower and (2) the borrower’s right not to disclose information irrelevant to the credit transaction or relevant

information that may be used in connection with discrimination on a prohibited basis. To this end, the regulation addresses taking, evaluating, and acting on applications and furnishing and maintaining credit information.

Theories of Liability. Although observers have recently debated the subject, regulators have long recognized that the ECOA has two principal theories of liability: disparate treatment and disparate impact.¹⁰ Disparate treatment occurs when a creditor treats an applicant differently based on a prohibited basis such as race or national origin.¹¹

Cases nationwide establish that disparate treatment ranges from overt discrimination to more subtle disparities in treatment. Disparate treatment claims can be based on subtle differences in treatment, but they all involve a policy or practice that treats one class of borrower (or prospective borrower) differently than another in a protected class.

A disparate treatment claim “does not require any showing that the treatment was motivated by prejudice or a conscious intention to discriminate against a person beyond the difference in treatment itself.”¹² The disparate treatment may be overt, in which a lender expressly considers prohibited factors, or comparative, in which a borrower is treated differently on the basis of a prohibited factor.¹³

The two questions that courts will consider are whether the treatment of the individual in the protected class was different than the other individual and whether the different treatment is explainable by a nondiscriminatory factor. The law does not require a showing of intent but does require that the difference in treatment be on the basis of a protected factor.

Disparate impact (the subject of this analysis), on the other hand, occurs when a creditor employs facially neutral policies or practices that have an adverse effect or impact on a member of a protected class. Although regulators have taken the position that the ECOA encompasses the disparate impact concept, different courts, trial-level courts, and commentators have taken different positions regarding this theory of liability. To date, the United States Supreme Court has not weighed in on this issue. Nevertheless,

the Court's ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* provides guidance.¹⁴

In the *Inclusive Communities* case, the Court concluded that disparate impact is an appropriate theory of liability for Fair Housing Act (FHA) claims. Tellingly, the Court notes that “antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.”¹⁵ Congress expressly notes the effects test as a variable to consider regarding ECOA claims.¹⁶ Nearly every circuit court of appeals to take up the issue has determined that a disparate impact claim is cognizable under the ECOA.¹⁷

Under a disparate impact analysis, the policies or practices will be found to violate the ECOA unless they meet a legitimate business need that cannot reasonably be achieved by means that are less disparate in their impact.¹⁸ The disparate impact test is the most controversial of the various ECOA standards because the challenged policies or practices appear facially neutral but have a “disproportionate adverse impact on applicants from a group protected against discrimination.”¹⁹

Regarding disparate treatment claims, “evidence of discriminatory intent is not necessary to establish that a policy or practice adopted or implemented by a lender that has a disparate impact is in violation of ECOA.”²⁰ Although a disparate impact analysis hinges on how a particular policy operates with respect to those affected by it, “the single fact that a policy or practice creates a disparity on a prohibited basis is not alone proof of a violation.”²¹ Even when the policy or practice creates a disparate impact against an affected class, no claim will lie “where the policy or practice is justified by ‘business necessity’ and there is no less discriminatory alternative.”²²

Business Response to Fair Lending Claims

The Federal Reserve's Regulation B notes two broad types of credit evaluation: traditional judgmental

credit-evaluation systems, which may rely on loan officers' subjective evaluation, and credit-scoring systems that are empirically derived and demonstrably and statistically sound.²³

To combat potential fair-lending claims under the ECOA, businesses look to the automated credit-scoring systems to price credit. As noted by the Federal Reserve Board, “some observers maintain that reliance on automated credit-evaluation systems such as credit-scoring serves to reduce the potential for discrimination in lending because the automated nature of the process reduces the potential for bias to influence lending outcomes.”²⁴

As the Federal Reserve Bank of Kansas explained, “FICO scores are the best known and most widely used consumer credit scores in the United States.”²⁵ In the 1950s, Fair Isaac Corporation developed a credit-scoring model²⁶ that “applies quantitative algorithms to the aggregated credit data to calculate a credit score for a consumer.”²⁷ The aggregated credit data consists of “information reported by banks, credit card companies, mortgagees, and other lenders regarding a consumer's borrowing and repayment history.”²⁸ These numbers ranging from 300 to 850, in theory, represent an estimate of a consumer's credit-worthiness and credit risk.²⁹

As the Federal Reserve Board notes, “relatively little research has been undertaken to assess the potential disparate impact of credit scoring.”³⁰ However, Fair Isaac Corporation conducted a large study of potential disparate impact in credit-scoring models in 1997.³¹ The study compared 800,000 credit reports grouped into two classes of reports: an early report (the predictive report) and a subsequent report (the performance report).

The data Fair Isaac Corporation presented indicated that a given FICO score accurately predicts the likelihood of bad credit events occurring, including consumers becoming 90 days or more delinquent on a credit account, and consumers filing for bankruptcy.³² The study revealed that the variables Fair Isaac Corporation used were, in fact, predictive of future credit performance.³³

Other studies, however, have called into question the predictive validity of credit-scoring systems. In

fact, a review of more than 500,000 consumer credit files by the Consumer Federation of America and the National Credit Reporting Association found that 29 percent of consumers had credit scores that differed by at least 50 points between credit bureaus, while 4 percent had scores that differed by at least 100 points.³⁴

Certain variables may be highly predictive of repayment for nonprotected classes, but the lack of these factors may tend to exclude members of protected classes.

However, even if the factors considered in a scoring model are predictive, that does not mean that they do not violate the ECOA. Critics of credit-scoring models have noted that “even [where] the creditor faithfully relies on his available data, the derived scores may not be correct predictors of creditworthiness for members of protected classes.”³⁵ Certain variables may be highly predictive of repayment for nonprotected classes, but the lack of these factors may tend to exclude members of protected classes.

For example, although home ownership may be a good indicator that a given applicant is a good risk, holding financial ability constant, more white men will have acquired ownership of personal residences than women or minorities. As a result, home ownership probably identifies a larger proportion of financially responsible white men than financially responsible women and minorities.³⁶

While scoring-based models eliminate a user’s ability to inject bias into the scoring system, the models do not guarantee that the scoring criteria will not disparately affect a protected class. Even when a given lender has relied on a computerized credit-scoring model to ensure compliance with governmental regulations, the lender may be forced to defend the underlying criteria used to generate the credit score.

Risk Analysis in Education Lending

From 2005 to 2015, the real amount of educational debt American households owed “more than doubled, from about \$450 billion to more than \$1.1 trillion.”³⁷ Student loan debt now surpasses credit card debt as the single-largest class of non-home mortgage consumer debt.³⁸ In 2010, the percentage of high school graduates going directly to college hit 62.5 percent nationally.³⁹ This participation rate is down slightly from 2008 (63.3 percent—the high mark), but well above prerecession levels of 55.7 percent in 2004.⁴⁰

As the cost of postsecondary education has increased, student loans, and more often private student loans, now comprise a larger portion of college financial aid packages than scholarships and grants.⁴¹ While federal loan programs are generally available to all students, regardless of their credit risk factors, underwriting private student loans involves a lender’s analysis of a student’s credit risk.⁴² The ability to obtain a private student loan, the cost of the private student loan, and whether a student requires a cosigner will all be determined by the lender based on the lender’s perceived risk.⁴³

Student lenders need appropriate means to measure the risk of this huge class of debt. However, the most predominant credit risk evaluation tool in consumer lending is still the credit-scoring system. Because the system focuses on an individual’s past credit performance—and uses this as a predictor for future behavior—the system is inherently limited regarding younger borrowers and those without significant credit history.

Nonetheless, research conducted on student lending has found that an individual’s credit score has a

Table 2. Credit Score as Predictive of Student Loan Delinquency Rate

Credit Score (Measured Before Leaving School)	Average Student Loan Balance	Delinquency Rate
270–499	\$18,927	59.2%
500–599	\$22,504	30.1%
600–679	\$23,704	17.5%
680–729	\$27,454	9.0%
730–900	\$25,540	4.1%
Missing Score	\$11,372	34.1%

Note: “Delinquency” was defined in this study as a borrower who was at least 120 days past due on making a payment during the first five years of the repayment term of a student loan. The credit score used in this analysis is the TransRisk AM Score, not the FICO, and it ranges from 270 to 900 points.

Source: Alvaro Mezza and Kamila Somner, “A Trillion Dollar Question: What Predicts Student Loan Delinquency Risk?,” Board of Governors of the Federal Reserve System, October 16, 2015.

strong predictive value of the likelihood that the student will repay her or his student loans in the future. Table 2 portrays the relationship between credit score and student debt repayment.

However, Mezza and Somner also found that other factors were highly predictive of an individual’s likelihood to repay her or his student loan obligations following graduation. The study concluded that the student’s highest degree and whether the student attended a for-profit or not-for-profit

institution were predictive of future payment (as displayed in Table 3).⁴⁴

While the Mezza and Somner study found each of these three factors to be predictive of future default rates, the only variable found not predictive is the total dollar sum of student debt.⁴⁵

A 2009 study in *Journal of Student Financial Aid* sought to summarize all available research on the best predictors of student loan default.⁴⁶ The study found that institutional characteristics, race, age,

Table 3. Other Factors Predictive of Delinquency Rate

Maximum Degree Obtained	Average Student Loan Balance	Delinquency Rate
No Degree	\$12,524	43.5%
Certificate or Associate’s Degree	\$12,307	22.8%
Bachelor’s Degree	\$24,133	11.1%
Master’s or Above	\$48,260	6.8%

Sector Type	Delinquency Rate, with Degree	Delinquency Rate, with No Degree
Public Four Year	10.3 %	40.9%
Public Two Year	16.6 %	46.4%
Private Four Year (Not-For-Profit)	11.6 %	32.8%
Private (For-Profit)	26.5 %	54.3%

Notes: “Delinquency” was similarly defined as above. The terms “with degree” and “with no degree” represent whether the student completed the course of study and earned a degree from the identified institution.

Source: Alvaro Mezza and Kamila Somner, “A Trillion Dollar Question: What Predicts Student Loan Delinquency Risk?,” Board of Governors of the Federal Reserve System, October 16, 2015.

socioeconomic indicators, collegiate experiences, educational history, and student involvement in and knowledge regarding the financial aid system were all predictive of student loan default. Conversely, the study found that gender, debt attributed to graduate education, program of study, and amount and type of student aid had little correlation to student default rates.⁴⁷

A review of these factors shows that with education lending, lenders can focus on many different variables—both prohibited and permitted—in accurately predicting the likelihood of students repaying their educational debts. For a comprehensive list of factors, see Appendix A.

The ECOA Challenges to Education Loan Underwriting and Student Lending

Given the broad set of predictive factors that student lenders make available for consideration, it is unsurprising that lenders have been subject to ECOA challenges to loan underwriting and pricing.

A case Sasha Rodriguez filed against Sallie Mae Corp in the District of Connecticut is instructive.⁴⁸ In the *Rodriguez* case, the plaintiff alleged that Sallie Mae engaged in “systemic discriminatory practices in the underwriting of private student loans.”⁴⁹ The basis of the claim was a facially neutral factor—the rate at which students at a given university defaulted on loans—that had a disparate impact on students attending schools with large minority populations. In the case, Rodriguez alleged violations of the ECOA based on claims that:

Sallie Mae foists its loans upon students . . . [and] works in concert with schools, resulting in the schools’ funneling students into Sallie Mae underwritten loans.

Sallie Mae considers the federal cohort default rate (“cohort rate”) of each applicant’s school. The cohort rate is released yearly and adjusts according to the percentage of a school’s borrowers who default

on certain federal student loans during a particular federal fiscal year. The higher a school’s cohort rate, the more likely the student is to receive disproportionately higher interest rates as well as add-on fees.

Sallie Mae knows that a disproportionate number of schools with high minority populations have higher cohort rates than compared with the cohort rates of schools without high minority populations. Using the school a student attends as a factor in underwriting often results in minority students being charged an unjustified interest rate and/or fees simply because of the school the student attends. Despite this knowledge, Sallie Mae continues to use this factor in underwriting its loans.⁵⁰

Sallie Mae sought the dismissal of the claims on the basis that the ECOA did not encompass claims of disparate impact. The court rejected this argument, and the case was allowed to continue.⁵¹ Before the *Rodriguez* court ruled, the parties reached a settlement. Under the settlement, Sallie Mae agreed to pay \$1.8 million in attorney’s fees, stop using a school’s cohort default rate until at least July 1, 2011, and make penalty payments to the “United Negro College Fund and the Hispanic College Fund for the purpose of providing scholarships to students pursuing higher education and for the purpose of credit education.”⁵²

The *Rodriguez* case makes two key points. First, it is imperative for a lender or investor to carefully consider the predictive value of any individual factor when making underwriting decisions. Second, as lenders and investors defend against the ECOA claims, the crux of the debate will be whether individual factors are either overbroad or necessary for the assessment of the risks in the transaction.

Presumably, had Sallie Mae compiled sufficient data that cohort default rates accurately predicted the likelihood of repayment, it could have successfully defended the *Rodriguez* suit. However, like many ECOA cases, it may have been the case (due to the settlement, we may never know) that Sallie Mae employed a broad measure to differentiate students without the necessary data to defend its selection and differentiation criteria.

Defending Against ECOA Claims

Although no other significant reported case involves the ECOA in the student lending context, ECOA cases involving consumer lenders are instructive for those funding education. Several key defenses are available to the lender, including the business necessity defense and the manifest relationship to creditworthiness defense. Other defenses, beyond the scope of this article and that are dependent on certain facts and circumstances, are discussed in Appendix B.

Business Necessity. The ECOA allows a lender to argue that its policy or practice is due to a “legitimate business necessity, such as differences in creditworthiness or the cost of servicing loans” and that there is not “a less discriminatory alternative.”⁵³ Few cases, however, have been decided based on proof of no “less discriminatory alternative.”

It should be noted that in a leading FHA case, the United States Supreme Court concluded that “an important and appropriate means of ensuring that disparate-impact liability is properly limited is to give [defendants] leeway to state and explain the valid interest served by their policies. . . . Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a reasonable measurement of job performance . . . so too must [defendants] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.”⁵⁴ Claims of business necessity may be difficult to sustain given the broad latitude for a plaintiff to articulate a “less discriminatory alternative.”⁵⁵

Manifest Relationship to Creditworthiness. Similar to the business necessity defense, certain credit underwriting criteria that have a disparate impact on a protected class may, nonetheless, survive an ECOA charge when the criteria are “legitimately related to the extension of credit.”⁵⁶ Other courts have articulated the manifest relationship test differently.

Most beneficial to creditors may be a standard articulated by the Northern District of Georgia. In *Cherry v. Amoco Oil Co.*, the court concluded that, on a plaintiff’s showing of a disparate impact, the facially

neutral policy or practice “should be subjected to scrutiny to see if they are really necessary to meet legitimate business objectives, namely, accurately predicting creditworthiness.”⁵⁷ The Northern District of Illinois articulated the test as “once the plaintiff has made the prima facie case, the defendant-lender must demonstrate that any policy, procedure, or practice has a manifest relationship to the creditworthiness of the applicant.”⁵⁸

The origins of the manifest relationship standard arise in the original 1976 Federal Reserve Board interpretations of the ECOA.⁵⁹ The board acknowledged that using certain information “may deny credit to a class of persons protected by [ECOA] at a substantially higher rate than persons not of that class” and determined “in accordance with the Board’s understanding of the *Griggs* decision, [that] such use may be a violation of [ECOA] unless the creditor establishes that the information has a manifest relationship to creditworthiness.”⁶⁰ However, the Federal Reserve Board cautioned:

As the Board understands it, an applicant might then be able to show that other information which a creditor could use, with a lesser discriminatory effect, would serve the creditor’s purpose equally well in predicting creditworthiness [and] would be evidence the creditor was employing the information used merely as a “pretext” for discrimination, e.g., with the intent of discriminating against applicants on a prohibited basis.⁶¹

The Unique Structure of ISAs

In light of the limitations presented by the existing student loan system, many commentators have suggested a shift to ISAs and similar income-driven repayment obligations. Student debt is not generally a problem in and of itself. When the student makes sufficient income to support the loan obligations, the loan repayments are manageable and justified. However, “it becomes a problem when the economic returns to the program financed by the debt are not large enough to pay it off.”⁶²

Although federal loans with income-based repayment exist in the educational context and allow a student to eliminate certain overly burdensome repayment obligations, the ISA industry seeks to “help students avoid bad investments in the first place”⁶³ and make educated decisions regarding the return the student will receive for the educational investment. As this new structure of education financing has evolved, investors are presented with new, uncharted waters regarding ECOA liability.

Introduction to ISAs

An ISA is an alternative to a student loan. Under an ISA, students agree to pay an affordable percentage of their income for a set period after graduation in exchange for funds to help pay for school. Such an agreement is not a loan; there is no fixed amount the student must repay or any interest. Thus, a student’s payments are always affordable, and there is no balance to worry about.⁶⁴

Unlike a traditional loan that contains an absolute obligation for the borrower to repay the debt, ISAs tie the investor’s success with the investee’s future income. Regardless of the structure, ISAs “possess a critical feature in common: an individual seeking immediate financing obtains funds by pledging a percentage of her future income to investors for a certain number of years. ISAs represent a notable departure from traditional forms of individual lending . . . because they effectively grant the funding provider the upside if earnings are higher than expected and the downside risk if they are lower.”⁶⁵ Given the ISA’s nature, the investors now look not only to the likelihood that an investee will make the required payments (similar to lenders) but also to the student’s future income potential (much more so than lenders).

Courts have not taken up the issue of the legal treatment of ISAs. Therefore, the legal treatment of ISAs and, in turn, the ECOA’s applicability has not been addressed. ISAs could be treated as purchase transactions (in which a future asset—the person’s income—is sold to a buyer for a present price) or as

equity investments (in which the investor obtains a distribution right in the person’s future income).

The analysis of ISAs and their legal structure has been debated in literature.⁶⁶ However, if a court determines that ISAs are not loans and are either purchase agreements or equity investments, the ECOA may have no application. Legislation could change this, but the ECOA has been applied only to lending and not to purchase agreements or equity investments.

Evaluating Future Income Potential

Unlike traditional lenders that focus only on the likelihood that a borrower will repay the loan, plus accrued interest, AltFinance lenders and ISA investors assess a student’s future earnings power. The challenge is more difficult for the ISA investor.

The investor, like the student, bears the risk of the student completing the course of study and succeeding in the job market. Because the investee remits a fixed percentage of income for a fixed period of time, an ISA investor is more interested in the student’s total future earnings power than a traditional student lender would be. Successful ISA investors need to accurately predict a student’s future income potential and determine the relative risks associated with the investment.

Given the focus on future income potential, an AltFinance lender and ISA investor may be tempted to consider factors that may be prohibited under the ECOA for a traditional lender to consider. For example, in a recent review of college graduation predictive indicators, several factors were determined the most significant (Table 4).

Although these factors may predict the likelihood that a given student successfully completes a post-secondary education program, the ISA investor, more so than the lender,⁶⁷ must also be concerned with the student’s potential future earnings. Research on this topic is not as widespread as college degree attainment. However, summaries of the literature point to the following:

Table 4. Predictive Indicators for College Graduation

Predictive Indicators for College Graduation	Odds Ratio*
Parent Educational Attainment: Master's Degree	10.6
Parental Educational Attainment: Ph.D., M.D.	7.43
Number of Postsecondary Schools to Which Student Applied: Five or More	5.89
High School Has a College Attendance Rate of 75–100 Percent	4.02
High School Program Included Vocational Education	3.95 (Negative Indicator)
Student Took Time Off from School	3.57 (Negative Indicator)
Student Was Married in High School	3.18 (Negative Indicator)
Teacher Rating: "Student usually works hard."	3.14
Student Went to School Part Time	3.13 (Negative Indicator)
Teacher Rating: "Student will probably go to college."	3.03
Student Volunteered to Help Other Students	2.93
Number of Postsecondary Schools to Which Student Applied: Two to Four	2.92
Number of Postsecondary Schools Visited with Parents: Five or More	2.89
Student Volunteered with Community Groups	2.57
Hours per Week Spent on Extracurricular Activities: More Than Zero but Less Than Four	2.24
Two- to Three-Year Enrollment in Postsecondary School	2.22 (Negative Indicator)
Number of Postsecondary Schools to Which Student Applied: One	2.18
Participated in Social Clubs (Fraternities or Sororities)	2.17
Student (at Any Point in Career) Took an Advanced Placement Course	2.01

Note: *This number represents the odds ratio of a given factor occurring in the set group compared to those without the characteristic. An odds ratio of three would mean that it is three times more likely that a student with that factor will complete postsecondary education compared to a student without that factor. A negative indicator means "less likely."

Source: Daniel Princiotta et al., "Social Indicators Predicting Postsecondary Success," *ChildTrends*, April 1, 2014.

- The largest difference in earnings is seen when a student obtains a bachelor's degree.
- Choice of major field appears to have the greatest impact on long-term earnings, with fields in engineering and math showing the greatest impact.
- The grades earned by students majoring in business, education, science, and math correlate to higher earnings.
- The quality or selectivity of the institution has only a slight effect on earnings. However, students that attend the most highly selective

institutions (top 1–2 percent) improve their earnings in high-status professions such as medicine and law.⁶⁸

Other studies indicate that grade point average (GPA), math ability, and choice of major show strong positive correlations with future earnings.⁶⁹ Similar research has shown that engineering and math majors show the most significant promise of future earnings potential.⁷⁰ The choice of institution has some correlation with future earnings, but the prestige of the school (other than Ivy League universities) had less effect on earnings than did the student's predominant course of study. The nation's science, math, technology, and Ivy League colleges generally produce the highest-earning graduates.⁷¹

A high school student's GPA has been linked with future earnings. In one of the largest studies of its type, researchers determined that a one-point increase in high school GPA correlates to an increased annual earnings in adulthood by approximately 12 percent for men and 14 percent for women.⁷² Whether the GPA is predictive or a positive change in GPA influences the change in earnings remains to be determined.

As is the case with many of these factors, research is still ongoing. It is still unclear whether the factor has a positive effect on earnings or whether the factor is a result of other causes. Nonetheless, the prediction of future earnings remains the lynchpin of the ISA model. As such, this type of correlative research provides some of the best indicators of successful ISA investments.

The ECOA Risks When ISA Investors Predict Future Income

Given the factors discussed above, there is a significant risk that evaluating students on these factors tends to generate disparate impact on protected classes. Because some of the best predictors of student performance and future income are familial factors, such factors will disparately affect traditionally underserved communities. For example, a parent obtaining a master's degree is one of the best

indicators of college graduation; however, parental degree completion tends to favor white children over African American and Latino children.⁷³ As researchers Benjamin Leff and Heather Hughes note, “the issue of ‘differential’ or ‘discriminatory’ pricing, [is] one of the aspects of income-share agreements [that] is both a feature and a bug.”⁷⁴

Is an ISA Subject to the ECOA?

Whether ISA investors are subject to the ECOA has not been resolved. A “creditor” is defined for the ECOA's purposes as “any person who regularly extends, renews, or continues credit.”⁷⁵ “Credit” is, in turn, defined by the ECOA 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.”⁷⁶ Courts nationwide have been split on applying the ECOA to nontraditional lending transactions.

For example, the Ninth Circuit found that an automotive lease agreement was subject to the ECOA,⁷⁷ while the Federal Reserve Board and subsequent other courts have rejected the inclusion of consumer leases in the ECOA's definition of “credit.”⁷⁸ Each situation has been addressed on a case-by-case basis, with courts finding that an application for cellular telephone service was a credit transaction subject to the ECOA, but issuing a bond for performance of a contractor's obligations in exchange for payment of a premium was not subject to the ECOA.⁷⁹

Although no case has addressed whether an ISA is a loan or a right to defer payment, courts have addressed whether certain types of transactions are deemed loans for purposes of state usury statutes. For instance, a Florida court examining this issue found that “earnings on an advance of money that is placed at speculative risk are typically not subject to Florida's usury statutes” and such an advance was not a “loan, expressed or implied.”⁸⁰ Similarly, a Texas court opined that “a loan is not usurious where the promise to pay a sum depends upon a contingency . . . and a contract is not usurious where the lender is to receive uncertain value, as here, even

though the probable value is greater than lawful interest.”⁸¹

The North Carolina Court of Appeals similarly found that the “primary characteristic of a ‘loan’ is repayment of the principal, or its equivalent. Therefore, a transaction in which the borrower’s repayment of the principal is subject to a contingency is not considered a ‘loan,’ because the terms of the transaction do not necessarily require that the borrower repay the sum lent.”⁸² California and Pennsylvania both treat such transactions as loans but do not subject them to the states’ respective usury laws.⁸³ In light of these cases, it is unclear whether ISAs, even when properly structured as either purchase agreements or equity investments, will be subject to the ECOA.

The best argument available to ISA investors is that an ISA is not a loan.

As the law surrounding the treatment of ISAs develops, this is likely the first avenue for clarification. The best argument available to ISA investors is that an ISA is not a loan. Unlike a loan, repaying the invested amount is not an obligation. Unlike a loan, the concerns regarding ability to repay are subsumed into the concept of shared risk. Unlike a loan, the investor must align its interests with the student—seeking to maximize earnings while minimizing costs.

For centuries, equity has been treated as a fundamentally different structure from lending. Equity investors, on one hand, “place their money at the risk of the business while lenders seek a more reliable return.”⁸⁴ Lenders, unlike investors, have a “reasonable expectation of repayment that does not depend solely on the success of the borrower’s venture.”⁸⁵ Although the law is still developing, this argument may hold true for ISAs. For purposes of this analysis, however, it is assumed that the ECOA will apply.

The reason the equity investment model rationale

may be a better avenue for ISA investors involves the treatment of factoring or purchase style transactions. “Factoring in modern commercial practice is understood to refer to the purchase of accounts receivable from a business by a factor who thereby assumes the risk of loss in return for some agreed discount.”⁸⁶ As the prevalence of factoring arrangements increased, more elaborate factoring models have developed, including the factoring of future receivables (for instance, the sale of a future income stream for a present, fixed price).

This model has now trickled down into the consumer market whereby consumers may sell or factor their future disability payments,⁸⁷ structured settlements,⁸⁸ or potential for future litigation recoveries.⁸⁹ At least two cases recognize that factoring-style arrangements, whereby an investor buys a future accounts receivable, are subject to the ECOA. Although the court did not directly address the ECOA issue, the Eastern District of Pennsylvania allowed a case to continue in which a spouse challenged a lender’s requirement that she co-guarantee a commercial factoring arrangement.⁹⁰

In another case in which the ECOA issue was raised, the District of Massachusetts Bankruptcy Court did not rule that the ECOA was inapplicable to factoring-style arrangements. Instead, it decided not to apply the ECOA to a factoring agreement because the factor was not regularly engaged in making credit decisions.⁹¹ Although not dispositive, these cases may indicate courts leaning toward applying the ECOA to structures that are similar to, but not, loans.

AltFinance Lenders’ and ISA Investors’ Defenses to ECOA Claims

If the ECOA applies, the defenses available to AltFinance lenders and ISA investors would be similar to those available to student lenders. However, because an ISA investor will be more interested in predicting the future earnings potential of a student than an AltFinance lender would be, an ISA investor may be more tempted to consider prohibited factors in setting the ISA’s terms.⁹² As a result, the applicability

of the business necessity or the manifest relationship to creditworthiness defenses will become more important.⁹³

Few courts have addressed the issue of business necessity or manifest relationship to creditworthiness regarding consumer lending, but significant attention has been paid to business necessity in the analogous situation of employment discrimination. For purposes of context, remembering that the business necessity defense applies only to disparate impact claims is necessary. Disparate treatment claims cannot be justified by business necessity.

In other words, an ISA investor cannot require a female student to remit a higher portion of her income because this would be overt discrimination on the basis of sex. Similarly, disparate treatment with no nondiscriminatory purpose cannot be justified by business necessity. An ISA investor cannot require that all investees be third-generation American citizens because this would discriminate on the basis of national origin.

To sustain a defense of business necessity, the justification must be manifest and may not be hypothetical or speculative. Factors that may be relevant to the justification include cost and profitability. But even if a policy or practice that has a disparate impact on a prohibited basis can be justified by business necessity, it may still be found to be in violation if an alternative policy or practice could serve the same purpose with less discriminatory effect.⁹⁴

With this rule in mind, the ISA investor should focus on specific factors that have been predictive of future earnings and reasons that other mechanisms would not serve the same, necessary, and compelling business purpose.

Example of Risks

Next, we turn to what research has determined as the best indicators of undergraduate degree completion and future earnings potential. For purposes of this analysis, we use what researchers have determined are the best indicators for each variable: parental educational attainment as an indicator of highest

likelihood to receive degrees and choice of major as an indicator of highest future earnings.

The following tables compare the statistically best graduation and future earnings predictors among various protected classes. This comparison methodology is the first element of an ECOA claim brought by protected class members who are denied an ISA or have differential pricing of their ISA. This comparison shows that many highly valuable graduation and future earnings predictors may present hidden, non-apparent disparate impact on protected classes.

First, Table 5 compares the best graduation predictor—parents obtaining advanced degrees—indicating how this factor may disproportionately affect members of protected classes.

Next, Tables 6 and 7 compare the best future earnings predictor—collegiate major—indicating how this factor may disproportionately affect members of protected classes. The charts compare the majors of select racial and gender groups and then compares these selections to PayScale’s Top 100 majors for future income and Bottom 100 majors for future income.

The potential for disparate impact against religious groups also arises when ISA investors underwrite ISAs by college major. In a 2009 study, researchers with the National Bureau of Economic Research concluded that more religious individuals will tend to migrate to the humanities, social sciences, and education.⁹⁵ Highly religious individuals seem to prefer education majors, while less religious students tend to select biological sciences, physical science, engineering, and vocational majors.⁹⁶

Looking at PayScale’s value of the respective majors, these trends will place more religious individuals into college majors with lower future earnings potential.⁹⁷ In light of these data, somewhat unsurprisingly, the Bottom 100 institutions in the nation by average mid-career pay, included more religious institutions. Of the 100 institutions ranked 934 to 1034, 34 percent were deemed “religious institutions.”⁹⁸ Comparatively, of the Top 100, only 12 institutions were deemed “religious institutions.”⁹⁹

These data indicate that the potential for ECOA risks is high. It would not be difficult to show that the

Table 5. Potential Disparate Impact of Parental Education as Pricing Factor

Protected Class	Majority Group	Minority Group(s)
Race	White: 12.1%	Black: 8.2% Asian: 21.4% Hispanic: 4.7%
Religion	Christian: 9%	Evangelical Christian: 7% Catholic: 10% Historically Black: 6% Jewish: 31% Muslim: 17% Buddhist: 20% Hindu: 48% Unaffiliated: 11%
National Origin	Native Born: 11.9%	Foreign Born: 12.5%
Sex	Male: 12.0%	Female: 12.0%
Marital Status	N/A	N/A
Age	35 to 44 Years: 13.8%	25 to 34 Years: 10.9% 45 to 64 Years: 12.1% 65 and Older: 11.3%

Note: Data are based on percentage of given population that has an advanced degree. For instance, 12.1 percent of whites' parents attained an advanced degree.

Sources: Camille Ryan and Kurt Bauman, "Educational Attainment in the United States: 2015," US Census Bureau, March 2016; and Pew Research Center, "America's Changing Religious Landscape," May 12, 2015.

best future earnings performance predictors disproportionately impact protected classes of individuals. Should such a claim be made, the onus will shift to the ISA investor to defend the claim on the basis that these factors are the best predictors of future ISA performance (the manifest relationship to ISA performance defense) or that they are necessitated by the business realities of the ISA relationship (the business necessity defense).

In either circumstance, the ISA investor's ability to compile performance data and compare cohorts of students will be the single most valuable piece of information in defending such a claim. ISA providers would be wise to closely monitor performance-based

data and look for discrepancies in the treatment of similarly situated individuals.

The challenge for AltFinance lenders may be greater. Because the AltFinance lender is making a loan, the business question that must be answered is the likelihood of repayment. The AltFinance lender is charged with a multistep struggle to show that these alternative underwriting factors have a manifest relationship not with future earnings but with the likelihood that students repay their student loan. This may prove more difficult to show statistically when factors that courts have found nondiscriminatory (such as credit reports) are already highly predictive of likelihood of repayment.

Table 6. Potential Racial Disparate Impact of College Major as Pricing Factor

Percentage of Races and Ethnicities Obtaining Bachelor Degrees in Most Popular Majors	
<p style="text-align: center;">Asian</p> <p>(11.8% in Top 100 Majors; 7.2% in Bottom 100 Majors):</p> <ul style="list-style-type: none"> • Business Administration (8.2%) • Biology (8.2%) • Nursing (5.7%) • <i>Psychology</i> (5.5%) • Accounting (3.8%) • Economics (3.7%) • Finance (2.6%) • Political Science (2.1%) • <i>Sociology</i> (1.7%) • Electrical Engineering (1.7%) 	<p style="text-align: center;">Black</p> <p>(2.3% in Top 100 Majors; 18.2% in Bottom 100 Majors):</p> <ul style="list-style-type: none"> • Business Administration (10.3%) • <i>Psychology</i> (7.2%) • Nursing (5.8%) • <i>Criminal Justice/Safety Studies</i> (3.5%) • Biology (3.3%) • <i>Sociology</i> (3.2%) • <i>Social Work</i> (2.3%) • Accounting (2.3%) • Political Science (2.2%) • <i>Criminal Justice/Law Enforcement</i> (2.0%)
<p style="text-align: center;">Hispanic</p> <p>(2.7% in Top 100 Majors; 15.3% in Bottom 100 Majors):</p> <ul style="list-style-type: none"> • Business Administration (7.7%) • <i>Psychology</i> (7.6%) • Nursing (4.9%) • Biology (3.5%) • <i>Sociology</i> (2.9%) • <i>Criminal Justice/Safety Studies</i> (2.8%) • Accounting (2.7%) • Political Science (2.6%) • English (2.2%) • <i>Multi or Interdisciplinary Studies</i> (2.0%) 	<p style="text-align: center;">White</p> <p>(4.8% in Top 100 Majors; 8.6% in Bottom 100 Majors):</p> <ul style="list-style-type: none"> • Business Administration (6.5%) • <i>Psychology</i> (6.0%) • Nursing (5.9%) • Biology (3.5%) • Accounting (2.8%) • English (2.8%) • <i>Elementary Education</i> (2.6%) • History (2.4%) • Political Science (2.3%) • Marketing (2.0%)

Note: The table lists the majors that have the highest proportion of students from a given race and ethnicity. The percentage shows the percentage of majors of the identified racial group. Majors listed in bold are in Payscale’s Top 100 majors for future incomes; those in italics are in Payscale’s Bottom 100 majors for future incomes. For instance, 8.2 percent of Asians major in business administration. Source: Peter L. Hinrichs, “Racial and Ethnic Differences in College Major Choice,” Federal Reserve Bank of Cleveland, March 31, 2015.

Concluding Thoughts

The application of the ECOA to ISAs, like the legal and regulatory treatment of the ISA model, has not yet been determined. Should the ECOA apply to ISAs, there is a significant risk for disparate impact claims. Regardless

of the reasons, the factors that most correlate with graduation and future earnings potential tend to disparately affect protected classes of individuals.

The need for ISA investors to have accurate statistical data is never clearer than with ECOA challenges. In the event that ISA investors face ECOA challenges,

Table 7. Potential Sex Disparate Impact of College Major as Pricing Factor

Most Popular Majors by Sex	
<p>Female-Dominated Majors:</p> <ul style="list-style-type: none"> • <i>Early Childhood Education (97%)</i> • <i>Medical Assisting Services (96%)</i> • <i>School Student Counseling (94%)</i> • Communication Disorders Science and Services (94%) • Library Science (93%) • <i>Family and Consumer Sciences (93%)</i> • Nursing (92%) • <i>Elementary Education (91%)</i> • <i>Nutrition Sciences (89%)</i> • <i>Special Needs Education (88%)</i> 	<p>Male-Dominated Majors:</p> <ul style="list-style-type: none"> • Naval Architecture and Marine Engineering (97%) • Mechanical Engineering (94%) • Military Technologies (93%) • Construction Services (92%) • Electrical and Mechanical Repair and Technologies (91%) • Nuclear Engineering (91%) • Industrial Production Technologies (91%) • Mechanical Engineering (90%) • Mining and Mineral Engineering (90%) • Electrical Engineering (90%)

Note: The table lists the majors that have the highest proportion of students from a given sex. The percentage shows the percentage of majors of the identified sex. Majors listed in bold are in Payscale’s Top 100 majors for future income; those in italics are in Payscale’s Bottom 100 majors for future incomes.

Source: Anthony P. Carnevale, Jeff Strohl, and Michelle Melton, “What’s It Worth: The Economic Value of College Majors,” Georgetown University, Center on Education and the Workforce, 2015.

they will also look to these data to demonstrate the business necessity of such consideration and that the challenged factor has a manifest relationship to the future performance of the student.

Similarly, the focus on alternative underwriting criteria for AltFinance lenders presents a significant ECOA risk. Because many of the factors presently considered tend to have disparate impacts on protected classes of individuals, it is imperative that AltFinance lenders develop data to substantiate the necessity of including these factors in underwriting decisions.

AltFinance lenders will also be faced with proving that traditional, nondiscriminatory underwriting is insufficient for AltFinance student loans and that these new factors have a manifest relationship to the likelihood of repayment and, in turn, the pricing of the student loan.

Proponents argue that one of the greatest benefits of AltFinance and ISA models is the transparency it provides to students and their families as they consider postsecondary education.

“Advocates for human capital contracts emphasize information-generating benefits of income-share financing, as the pricing of individual income-share agreements would communicate information to students about the [investor]’s assessment of a student’s potential and of the value of the programs or careers the student is pursuing.”¹⁰⁰

At present, there is little value for money analysis provided in federal lending programs. Rather, these programs provide funds based on need and do not differentially price based on factors relative to future earnings, ability to repay the funds, or likelihood of graduation. On the other hand, the ISA investor—tasked with the obligation of predicting the likelihood of future outcomes—may be in a significantly better position to help students and families understand the value (or lack thereof) in a given course of study.

Presumably, students considering ISA funding can compare their choice of institution, field of study, and time in school when making informed educational

decisions. Few would argue that this transparency would harm a given student.

Although the focus of this analysis has been on potential harm to traditionally underserved communities and protected classes of people, the ISA may significantly benefit these very groups.¹⁰¹ These traditionally underserved communities may have the least experience with complex loan products or the existing knowledge to compare institutions, fields of study, and value return for educational investments. The ISA model's centralizing principle model aligns the investor's interests with the student's.

As tuition prices rise and fewer families can simply pay for college, students are faced with multiple funding sources. AltFinance and ISAs have the potential to help students quantify the value of their educational investment and lower the risks associated with

postsecondary education. With this transparency comes the risk of reinforcing the socioeconomic disparities in America today.

While this risk is present in both loans and ISAs, ISA investors' careful deployment of ISA capital provides the opportunity for traditionally underserved communities to have more accurate information regarding the returns on educational investments. Perhaps the greatest promise of ISAs is the ability to help students finance education without themselves bearing all the risk of the single-largest consumer investment outside of one's home.

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Appendix A: Predictive and Non-Predictive Lending Factors

Category	Lending Factors	Predictive or Non-Predictive	Comment
Institutional Characteristics	Less-than-two-year, proprietary, or community colleges	Predictive	"Students who attend less-than-two-year, proprietary, or community colleges have higher default rates than their peers at four-year or more selective institutions."
	Wealth of institution	Predictive	"Greater institutional investment and instructional support is associated with decreased likelihood of default."
Student Characteristics	Race of student	Predictive	"Researchers have been remarkably consistent in their conclusions on this point—finding students of color more likely to default than their Caucasian peers . . . and African-Americans at the greatest risk of defaulting."
	Increased age of student	Predictive	"Nearly all studies that considered the age of the student—either while enrolled in school or at the start of the loan repayment period—concluded that as age increases so does the likelihood of loan default."
	Gender	Non-Predictive	"Several studies . . . found no significant difference in the likelihood of default between men and women, even after considering women's comparatively lower average earnings and greater repayment problems."
Socioeconomic Contexts	Number of dependents claimed by student	Predictive	"The greater the number of dependents claimed by a student, the greater the likelihood of loan default."
	Marital status (separated, divorced, or widowed)	Predictive	"Being separated, divorced, or widowed was found to increase the probability of defaulting by more than 7 percent."
	Recipients of financial support from families/parents	Predictive	"Students who could count on support from their families, including parents, were less likely to default than those who had no family support."
	Educational attainment of parent(s)	Predictive	"Students whose parents had higher levels of formal education were less likely to default than first-generation college students."
	Income of family	Predictive	"The higher the family income the lower the likelihood the student will default."

Category	Lending Factors	Predictive or Non-Predictive	Comment
	Expected postgraduation earnings	Predictive	"As postgraduation or departure earnings increase, the likelihood of default decreases."
	Likelihood of unemployment	Predictive	"Unemployment . . . increases the likelihood of default, making success in the job market critical to repaying student loans."
	Postgraduation debt burden	Predictive	"As debt burden increases so does the likelihood of default."
	Monthly debt repayment as percentage of income	Predictive	"If monthly debt burden exceeds 8 percent of income, the debt is considered unmanageable. [One study] noted that 11 percent of borrowers reported unmanageable debt levels . . . with more than 20 percent of these students eventually defaulting."
	High debt obligation attributed to graduate education	Non-Predictive	"Students who incurred high levels of debt by attending graduate school were actually less likely on average to default."
College Experiences	Continuous enrollment at institution	Predictive	"Students who enroll continuously . . . are less prone to default on average."
	Greater number of credit hours	Predictive	"Students who . . . enroll in more rather than fewer credit hours . . . are less prone to default on average."
	Percentage of attempted courses completed	Predictive	"Students who . . . complete their attempted courses (i.e. do not receive incompletes) . . . are less prone to default on average."
	Graduation in eight semesters	Predictive	"Students who . . . graduate within eight semesters are less prone to default on average."
	Transfer to another institution (weak correlation)	Predictive	"Findings regarding academic mobility—reflected in transfer behaviors—and the likelihood of default in the studies we reviewed were mixed."
	Means of obtaining high school degree	Predictive	"Students who dropped out of high school or earned a GED were more likely to default than students who had earned a regular diploma."
	Completion of postsecondary program	Predictive	"Completing a postsecondary program is the strongest single predictor of not defaulting regardless of institution type."
	Completion of academic curriculum	Predictive	"Students who had earned sufficient credits to be classified as seniors were less likely to default than those who progressed to junior status, and so on."
	High school performance	Predictive	"As high school rank, standardized test scores, and high school GPA increased in the studies we reviewed, the likelihood of default generally decreased."

Category	Lending Factors	Predictive or Non-Predictive	Comment
	Expected future earnings	Predictive	"Graduates in fields with lower expected future earnings had a higher probability of experiencing repayment problems."
	Program of study	Non-Predictive	"The effects of major choice disappeared after controlling for total debt and postcollege earnings."
Financial Aid and Education Debt	Recipient of grants and scholarships	Predictive	"Grants and scholarships reduced the probability of default."
	Amount of aid, type of loans, number of loans, and loan consolidation	Non-Predictive	"The amount of aid, the types and number of loans, and loan consolidation had no effect on default."
Student Knowledge and Attitudes	Credit card debt	Predictive	"Students with high levels of loan debt were also likely to carry significant credit card debt. . . Moreover, students were more likely to prioritize the repayment of credit card debt over that of student loan debt."
	Credit counseling	Predictive	Researchers studying the "effects of loan counseling or consumer education programs . . . have found they appear to be related to lower rates of default."
	Knowledge of loan repayment obligations	Non-Predictive	"Not knowing a loan had to be repaid did not predict likelihood of loan default."

Source: Jacob P. K. Gross et al., "What Matters in Student Loan Default: A Review of the Research Literature," *Journal of Student Financial Aid* 39, no. 1 (2009): 19.

Appendix B: Other Defenses Available to AltFinance Lenders and ISA Investors

Other defenses to an ECOA case are available to the lender but rely on unique sets of facts. For sake of brevity, they are not discussed in full detail in this article. However, these other defenses may be available to AltFinance lenders and ISA investors:

Inability to Qualify for Loan Requested. To state a claim for violating the ECOA, “a plaintiff must allege that she was a member of a protected class, that she was qualified for the loan that she requested, and that the lender declined the loan and showed a preference for a non-protected individual.”

Inability to Identify Particular Policy. A plaintiff asserting a disparate impact claim must also “identify a specific policy or practice which the defendant has used to discriminate and must also demonstrate with statistical evidence that the practice or policy has an adverse effect on the protected group.” To overcome a motion to dismiss, the plaintiff must show a “causal connection between a facially neutral policy and the resultant proportion of minority group members in the population at issue.”

Statistical Discrepancy. To establish a disparate impact claim, many plaintiffs will look to statistical data. A plaintiff “must show that the policy has a significantly greater discriminatory impact on [the protected class]. The conventional way to do this is to compare representation of the protected class in the applicant pool with representation in the group actually accepted from the pool.” However, the general applicant pool is not necessarily the same as the general population. The plaintiff must show the statistical data’s validity.

Statute of Limitations. Generally, violating the ECOA will occur on the date that the affected individuals sign their loan documents. The ECOA has a two-year statute of limitations. This is a short window of time, especially when the effects of such pricing determinations may not be known for some time after origination. However, a number of courts, following United States Supreme Court precedent in *Havens Realty Corp. v. Coleman*, have found that “where a plaintiff challenges an ongoing discriminatory practice rather than an isolated incident of conduct, and the practice continues into the limitations period, the complaint is timely if filed within the statutory period from the last occurrence of the practice.”

Notes

1. Many student loans do not consider any factors related to creditworthiness or ability to repay. Both the Stafford and Perkins loan programs are based on a student's demonstrated need for the funds. They are agnostic to the program attended or the cost of attendance. See FinAid Page, "Student Loans," www.finaid.org/loans/studentloan.phtml. Parental PLUS loans are available based on a minimal review of parental credit history, which looks only for adverse credit history, as opposed to a credit score. See FinAid Page, "Parent Loans," www.finaid.org/loans/parentloan.phtml.

2. Although not significantly addressed in case law, an ISA is not new. One of the earliest articulations of the concept dates to Milton Friedman in the mid-1950s. See *The Economist*, "Graduate Stock," April 22, 2015.

3. 142 Am. Jur. Proof of Facts 3d 259 (2014) citing S. Rep. No. 589-94 U.S.C., 2d Sess., as reprinted in 1976 U.S.C.C.A.N. 405.

4. See 15 U.S.C. § 1691.

5. Regulation B appears at 12 C.F.R. §§ 202.1 *et seq.*

6. Consumer Financial Protection Bureau, "Equal Credit Opportunity Act," June 2013.

7. Thomas E. Perez, "The Attorney General's 2011 Annual Report to the Congress," US Department of Justice, March 2012,

1.

8. Consumer Financial Protection Bureau, "Equal Credit Opportunity Act."

9. *Ibid.*

10. See Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266-01 (addressing the concept of disparate impact regarding ECOA claims as explained by the Departments of Housing and Urban Development, Justice, and Treasury along with the Office of Thrift Supervision, Federal Reserve System, Federal Deposit Insurance Corporation, Federal Housing Financing Board, Federal Trade Commission, and National Credit Union Association).

11. See 12 C.F.R. Part 1002 Supp. I § 1002.4(a)-1; 12 C.F.R. Part 1002 Supp. I § 1002.4(a)-1. Disparate treatment may be overt (when the creditor openly discriminates on a prohibited basis) or it may be found through comparing the treatment of applicants who receive different treatment for no discernable reason other than a prohibited basis. In the latter case, it is not necessary that the creditor acts with any specific intent to discriminate.

12. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266-01 (April 15, 1994).

13. For example, overt disparate treatment occurs when a lender offers a credit card with a limit of up to \$750 for applicants age 21-30 and \$1,500 for applicants over 30. This policy violates the ECOA's prohibition on discrimination on the basis of age. Federal Reserve Board, *Federal Fair Lending Regulations and Statutes*, in Consumer Compliance Handbook (Board of Governors of the Federal Reserve Board, 2006), 2. For example, nonovert disparate treatment occurs when a nonminority couple applies for an automobile loan. The lender finds adverse information in the couple's credit report. The lender discusses the credit report with the couple and determines that the adverse information, a judgment against the couple, was incorrect, as the judgment had been vacated. The nonminority couple was granted a loan. A minority couple applied for a similar loan with the same lender. On discovering adverse information in the minority couple's credit report, the lender denies the loan application on the basis of the adverse information without giving the couple an opportunity to discuss the report. *Ibid.*

14. Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

15. *Ibid.*, 135 S. Ct. at 2518.

16. See S. Rep. No. 94-589, at 4 (1976), as reprinted in 1976 U.S.C.C.A.N. 403, 406. ("In determining the existence of discrimination on these grounds, as well as on the other grounds discussed below, courts or agencies are free to look at the effects of a creditor's practices.")

17. See Francesca Lina Procaccini, “Stemming the Rising Risk of Credit Inequality: The Fair and Faithful Interpretation of the Equal Credit Opportunity Act’s Disparate Impact Prohibition,” 9 *Harvard Law and Policy Review* S43, S72 (2015) (citing *Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005); *Miller v. Am. Express Co.*, 688 F.2d 1235, 1239–40 (9th Cir. 1982); *Bhandari v. First Nat’l Bank of Commerce*, 808 F.2d 1082, 1101 (5th Cir. 1987), *vacated and remanded on other grounds*, O’Connell & Kittrell v. Kingery, 492 U.S. 901 (1989); *Haynes v. Bank of Wedowee*, 634 F.2d 266, 269 n.5 (5th Cir. 1981); *Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104, 108 (D. Mass. 2009); *Guerra v. GMAC LLC*, 2:08-CV-01297-LDD, 2009 WL 449153 (ED, Pa. February 20, 2009); *Dismuke v. Connor*, 05-CV-1003, 2007 WL 4463567 (WD, Ark. December 14, 2007); *Powell v. Am. Gen. Fin., Inc.*, 310 F. Supp. 2d 481, 487 (NDNY 2004); *Smith v. Chrysler Fin. Co.*, CIV.A. 00–6003 (DMC), 2003 WL 328719 (DNJ January 15, 2003); *Wide ex rel. Estate of Wilson v. Union Acceptance Corp.*, IP 02-0104-C-M/S, 2002 WL 31730920 (SD, Ind. November 19, 2002); *Osborne v. Bank of Am., Nat’l Ass’n.*, 234 F. Supp. 2d 804, 811–12 (MD, Tenn. 2002); *Faulkner v. Glickman*, 172 F.Supp.2d 732, 737 (D. Md. 2001); *Church of Zion Christian Ctr., Inc. v. SouthTrust Bank of Alabama*, CA 96-0922-MJ-C, 1997 WL 33644511 (SD, Ala. July 31, 1997); *Latimore v. Citibank, F.S.B.*, 979 F. Supp. 662, 664 n.7 (ND, Ill. 1997); *A.B. & S. Auto Serv., Inc. v. South Shore Bank of Chi.*, 962 F. Supp. 1056, 1060 (ND, Ill. 1997); *Gross v. United States Small Bus. Admin.*, 669 F. Supp. 50 (NDNY 1987); *Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835 (WD, Mo. 1981); *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026 (ND, Ga. 1980)).

18. See 12 C.F.R. Part 1002 Supp. I § 1002.6(a)–2.

19. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266–01 (April 15, 1994).

20. *Ibid.*

21. *Ibid.*

22. *Ibid.*

23. Regulation B (Equal Credit Opportunity), 12 C.F.R. 202.2(p),(t)(2016).

24. Board of Governors of the Federal Reserve System, “Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit,” August 2007, 51.

25. Geetesh Bhardwaj and Rajdeep Sengupta, “Credit Scoring and Loan Default,” Federal Reserve Bank of Kansas City, February 2015.

26. Beginning in 1956, Bill Fair and Earl Isaac, two mathematicians from the Stanford Research Institute, began work on a computer model that used statistics and mathematics along with consumer credit information to create numeric credit scores more quickly and reliably than the traditional methods of the time. In the early 1960s, with the progression of faster computer systems, Fair, Isaac, the company they founded, introduced a behavior scoring model that could predict the credit risk of an institution’s existing customers and, in the following two decades, laid the foundation for the types of credit scoring systems that are used today. Although other companies have entered the credit scoring arena, Fair, Isaac is considered the pioneer of the technique and accounts for a majority of all consumer credit scorecards used worldwide. See Kenneth G. Gunter, “Computerized Credit Scoring’s Effect on the Lending Industry,” *North Carolina Banking Institute Journal* 4 (2000): 443, 445.

27. *Fair Isaac Corporation Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 738 (D. Minn. 2009), *adhered to*, 711 F. Supp. 2d 991 (D. Minn. 2010), *aff’d*, 650 F.3d 1139 (8th Cir. 2011), *and aff’d*, 650 F.3d 1139 (8th Cir. 2011).

28. *Ibid.*, 738.

29. *Hillis v. Equifax Consumer Servs., Inc.*, 237 FRD 491, 493 (ND Ga. 2006).

30. Board of Governors of the Federal Reserve System, “Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit,” August 2007, 53.

31. Javier Martell et al., “The Effectiveness of Scoring on Low-to-Moderate-Income and High-Minority Area Populations,” August 1997.

32. *Ibid.*, Figures 1 and 3.

33. Board of Governors of the Federal Reserve System, “Report to the Congress on Credit Scoring.”

34. Carolyn Carter et al., “The Credit Card Market and Regulation: In Need of Repair,” *North Carolina Banking Institute Journal* 10 (2006): 23, 41 (citing Consumer Federation of America and National Credit Reporting Association, “Credit Score Accuracy

and Implications for Consumers,” December 17, 2002, 17–24.

35. “Credit Scoring and ECOA: Applying the Effects Test,” *Yale Law Journal* 88 (1979): 1450, 1456.
36. *Ibid.*, 1457.
37. Alvaro Mezza and Kamila Sommer, “A Trillion Dollar Question: What Predicts Student Loan Delinquency Risk?,” Board of Governors of the Federal Reserve System, October 16, 2015 (using a data set of 34,981 individuals who were between the ages of 23 and 31 in 2004).
38. *Ibid.*
39. The most recent data available are from 2010. See Tom Mortenson, “Postsecondary Opportunity,” NCHEMS Information Center for Higher Education Policymaking and Analysis, 2010.
40. *Ibid.*
41. Kamille Wolff Dean, “Student Loans, Politics, and the Occupy Movement: Financial Aid Rebellion and Reform,” *John Marshall Law Review* 105, 112 (2012) (citing Erin Dillon and Kevin Carey, “Drowning in Debt: The Emerging Student Loan Crisis,” ERIC Institute of Education Sciences, 2, July 9, 2009; Kim Clark, “Cheaper Student Loans but Shortage of College Grants Likely in 2011 and 2012,” *US News & World Report*, January 31, 2011, www.usnews.com/education/best-colleges/paying-for-college/articles/2011/01/31/cheaper-student-loans-but-shortage-of-college-grants-likely-in-2011-and-2012; and Jennifer Liberto, “Students Face Squeeze in Pell Grants,” *CNNMoney*, December 17, 2011, http://money.cnn.com/2011/12/16/pf/congress_student_loans/index.htm).
42. Generally, a student need only complete the Free Application for Federal Student Aid (FAFSA) form. FAFSA and underwriting student loans are not dependent on college or a student’s prior credit score, although an adverse credit history may be considered for PLUS loans. See US Department of Education, “Federal Versus Private Loans,” 2016.
43. *Ibid.*
44. *Ibid.*, Tables 6 and 7.
45. *Ibid.*, 25 (“A specification based solely on student loan balances . . . is associated with minimal explanatory power and is, therefore, of minimal use for achieving the objection of efficient targeting”). This finding lends support to the basic argument for using ISAs: the total student debt is not the driving factor for repayment. Rather, the appropriate analysis is whether the student’s future earnings can justify and support the debt that the student incurs.
46. Jacob P. K. Gross et al., “What Matters in Student Loan Default: A Review of the Research Literature,” *Journal of Student Financial Aid* 39, no. 1 (2009): 19.
47. *Ibid.*, 21–26 (internal citations omitted).
48. *Rodriguez v. Sallie Mae (SLM) Corp.*, No. 3:07-cv-01866-WWE (D. Conn. December 18, 2007).
49. *Ibid.*, Complaint, ECF Dckt. Ent. 1, p. 1 (December 18, 2007).
50. *Ibid.*, 6–10.
51. *Ibid.*, Memorandum of Decision on Motion to Dismiss Amended Complaint, ECF Dckt. Ent. 85, 5–6 (March 6, 2009).
52. *Ibid.*, 14.
53. *Jones v. Ford Motor Credit Co.*, No. 00CIV.8330RJHKNF, 2005 WL 743213, at *9 (S.D.N.Y. March 31, 2005).
54. *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, ___ US ___, 135 S. Ct. 2507, 2522–23, 192 L. Ed. 2d 514 (2015).
55. US General Accounting Office, *Fair Lending: Federal Oversight and Enforcement Improved but Some Challenges Remain*, August, 1996, 9.
56. See *A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chicago*, 962 F. Supp. 1056, 1064 (N.D. Ill. 1997) (finding that consideration of criminal background disproportionately harmed African Americans but was nevertheless justified because it was a required factor for SBA lending and because it legitimately relates to “character and judgment”).
57. 490 F. Supp. 1026, 1030 (N.D. Ga. 1980).
58. *A.B. & S. Auto Serv.*, 962 F. Supp. at 1061.
59. 41 Fed. Reg. 29,870, 29,874 (July 20, 1976).

60. *Ibid.*, 29,880.
61. *Ibid.*
62. Miguel Palacios, Tonio DeSorrento, and Andrew P. Kelly, *Investing in Value, Sharing Risk*, American Enterprise Institute, February 2014, 3.
63. *Ibid.*, 3–4 (“[ISAs] reward high-quality, low-cost programs while limiting the generosity or availability of financing to low performing programs” and “help students choose a program that is likely to lead to a job after graduation,” whereas “the existing system [allows a] student [to] get the same federal loan for any accredited program, regardless of how likely the student is to be successful.”)
64. Kevin James, “9 Things to Know About Income-Share Agreements,” *US News & World Report*, August 4, 2015.
65. Shu-Yi Oei and Diane Ring, “Human Equity? Regulating the New Income Share Agreements,” *Vanderbilt Law Review* 68 (2015): 681, 684.
66. Shu-Yi Oei and Diane M. Ring, “The New ‘Human Equity’ Transactions,” *California Law Review Circuit* 5 (2014) 266, 272.
67. Student lenders certainly are concerned with the future income of the student. Nothing herein is meant to indicate that a student lender does not consider the future earnings potential of the student. However, for the lender, the concern is the earnings necessary to service the debt obligation. In the ISA context, the investor wants to work with the student to maximize earnings (and, thus, the investor’s return) while minimizing the initial investment outlay—the costs of obtaining the degree.
68. George Kuh et al., *What Matters to Student Success: A Review of the Literature*, National Postsecondary Education Cooperative, July 2006, 77–78.
69. Computer science, engineering, business, economics, health, nursing, criminology, communications, history, and math majors all showed higher average income than those majoring in other fields. See Paul Oehrlein, “Determining the Future Income of College Students,” Illinois Wesleyan University, 2009.
70. Payscale Human Capital, “Highest Paying Bachelor Degrees by Salary Potential,” 2016.
71. Kim Clark, “Graduates of These Colleges Make the Most Money,” *Money*, March 5, 2015.
72. Michael T. French et al., “What You Do in High School Matters: High School GPA, Educational Attainment, and Labor Market Earnings as a Young Adult,” *Eastern Economic Journal* 41, no. 3 (2015): 370–86.
73. ChildTrends Data Bank, “Parental Education: Indicators on Children and Youth,” December 2015.
74. Benjamin M. Leff and Heather Hughes, “Student Loan Derivatives: Improving on Income-Based Approaches to Financing Law School,” *Villanova Law Review* 61 (2016): 99, 143.
75. 15 U.S.C. § 1691a(e); and *Laramore v. Ritchie Realty Mgmt. Co.*, 397 F.3d 544, 546 (7th Cir. 2005).
76. 15 U.S.C. § 1691a(d); and *Laramore*, 397 F.3d at 546.
77. *Brothers v. First Leasing*, 724 F.2d 789 (9th Cir. 1984).
78. 50 Fed. Reg. 48,019–48,020 (1985); and *Laramore*, 397 F.3d 544 (7th Cir. 2005). See also *Head v. North Pier Apartment Tower, a/k/a Broadacre Management*, 2003 WL 22127885 (N.D. Ill. 2003) (finding a residential landlord was not a creditor for ECOA purposes).
79. *Williams v. AT&T Wireless Services, Inc.*, 5 F. Supp. 2d 1142 (W.D. Wash. 1998); and *Universal Bonding Ins. Co. v. Esko & Young, Inc.*, No. 90Co2995, 1991 WL 30049, at *3 (N.D. Ill. February 28, 1991).
80. *L’Arbalete, Inc. v. Zaczac*, 474 F. Supp. 2d 1314, 1324 (S.D. Fla. 2007).
81. *Beavers v. Taylor*, 434 S.W.2d 230, 231 (Tex. Civ. App. 1968), *writ refused* NRE (Feb. 26, 1969); *accord Anglo-Dutch Petroleum Int’l, Inc. v. Haskell*, 193 S.W.3d 87, 96 (Tex. App. 2006).
82. But see *Odell v. Legal Bucks LLC*, 192 N.C. App. 298, 312–13, 665 S.E.2d 767, 777 (2008) (finding a contract to purchase future litigation settlement fund was an advance under state law and thus subject to North Carolina usury law that included advances).
83. See *WRI Opportunity Loans II LLC v. Cooper*, 154 Cal. App. 4th 525, 534, 65 Cal. Rptr. 3d 205, 212 (2007) (“A loan that will give the creditor a greater profit than the highest permissible rate of interest upon the occurrence of a condition is not usurious if the repayment promised on failure of the condition to occur is materially less than the amount of the loan . . . with the highest

permissible interest, unless a transaction is given this form as a colorable device to obtain a greater profit than is permissible”) (internal citations omitted); and *Olwine v. Torrens*, 236 Pa. Super. 51, 55, 344 A.2d 665, 667 (1975).

84. *Texas Farm Bureau v. United States*, 725 F.2d 307, 314 (5th Cir. 1984) (internal citations omitted).

85. *Elec. Modules Corp. v. United States*, 695 F.2d 1367, 1371 (Fed. Cir. 1982) (internal citations omitted).

86. 32 Am. Jur. 2d, *Factors and Commission Merchants* § 2 (2016).

87. Federal Trade Commission, “What to Know Before Selling Your Disability Payments,” September 2014.

88. Craig Guillot, “Want Structured Settlement Cash Now? Not So Fast!” *Bankrate.com*, December 17, 2015.

89. Martin Estevo, “The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed,” *Fordham Journal of Corporate & Financial Law* 10 (2004).

90. *Philadelphia Factors Inc. v. Gordon*, No. CIV. A. 98–3578, 1999 WL 225866, at *9 (E.D. Pa. April 16, 1999).

91. *In re Burm*, No. 14-12139-HJB, 2016 WL 3910645, at *12 (Bankr. D. Mass. July 12, 2016).

92. While some champions believe that such criteria will lead to transparency (i.e., students will clearly understand the perceived value of their educational decisions), there are risks that some of the best indicators of future income will disparately select against protected classes. These individuals will either be unable to secure an ISA or will face a less economically favorable investment (less money invested or a higher percentage of future income paid).

93. Some courts treat these factors as two different standards. However, both arise from a similar set of factors. In both circumstances, the lender may defend a disparate impact claim by showing that the factor, although discriminatory in impact, is an accurate predictor of performance and that no less discriminatory factor could have been used. Business necessity tended to evolve out of the employment cases in which a discriminatory factor was considered necessary (i.e., grammar proficiency for an administrative assistant that will be drafting communications with clients) while manifest relationship developed in the credit space involving objectively predictive criteria (i.e., past criminal history is predictive of likelihood of borrower meeting repayment obligations).

94. Federal Reserve Board, *Fair Lending Regulations and Statutes: Overview*, Consumer Compliance Handbook, 3, January 2006.

95. Miles Kimball et al., “Empirics on the Origins of Preferences: The Case of College Major and Religiosity,” National Bureau of Economic Research, July 2009, <http://www.nber.org/papers/w15182.pdf>.

96. *Ibid.*, at 25–33, Tables 2–4.

97. Payscale Human Capital, “Highest Paying Bachelor Degrees by Salary Potential,” 2016.

98. PayScale Human Capital, “Best Universities and Colleges by Salary Potential,” 2016.

99. *Ibid.*

100. Benjamin M. Leff and Heather Hughes, “Student Loan Derivatives: Improving on Income-Based Approaches to Financing Law School,” *Villanova Law Review* 61 (2016): 114–15.

101. Beyond the additional value proposition provided through the ISA funding model, an ISA must be more accepted by certain traditionally underrepresented groups. As Professor Kelchen at Seton Hall University notes, “loan aversion is particularly common among minority and first-generation students. So a product that doesn’t come with fixed payments might benefit these students.” See Robert Kelchen, “Are Income Share Agreements a Good Way to Pay for College?,” *The Conversation*, May 5, 2016, <http://theconversation.com/are-income-share-agreements-a-good-way-to-pay-for-college-58697>.