

## Are Income Share Agreements Loans? The CFPB Says Yes

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Last month we wrote a [blog](#) relating to a consent order entered into by the California Department of Financial Protection and Innovation (DFPI) with a servicer of income share agreements. The DFPI determined that, despite claims by the provider to the contrary, the income share agreements are student loans that subject the provider to California's licensing requirements. It did not take long for the CFPB to enter the fray. On September 7, the CFPB entered into a [consent order](#) with Better Future Forward, Inc. and various affiliates (collectively BFF) in which the CFPB determined that the company:

- Engaged in deceptive acts and practices concerning the fact that their income share agreements are student loans;
- Failed to make disclosures required by the Truth in Lending Act and Regulation Z for creditors generally and for originators of private education loans;
- Imposed prepayment penalties on private education loans through its use of a "payment cap" mechanism, in violation of the Truth in Lending Act; and
- Offered or provided a consumer financial product or service not in conformity with federal consumer financial law.

BFF made the argument that its product was not a loan, because if certain terms were not met (including the student's future income exceeding a provided threshold), the student was not obligated to repay the amount received from BFF. The CFPB rejected this position, stating that BFF's income share agreements "are credit under the [Consumer Financial Protection Act] because they grant consumers the right 'to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase.' 12 U.S.C. § 5481(7)."

**Putting It Into Practice:** As we pointed out in our earlier blog, and now reiterate, not to be lost by this action (or the earlier action of the DFPI), however, are the parallels to other cash advance

products. Courts, regulatory agencies, and the plaintiffs' bar have, in a number of recent instances, cast cash advance products as the equivalent of lending products that carry usurious interest rates and violate state and federal prohibitions against unfair and deceptive acts and practices, among other laws. Merchant cash advance transactions, pension advances, and litigation funding advances, among others, bear similar transactional elements and risks to funding companies as income share agreements because, in part, all of these transactions include contingencies such that the funders may receive no return on their investments if future events fail to materialize, e.g., a student under an ISA fails to secure sufficiently gainful employment in the future. Nonetheless, such advance products have been characterized as loans notwithstanding their conditional nature.

While the CFPB's consent order honed in on a student loan provider, providers of the types of programs referenced above or other similar programs may need to consider what program adjustments may be necessary to avoid finding themselves on the CFPB's radar.

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