



July 30, 2020

VIA ELECTRONIC MAIL

Dave Girouard, CEO (dave@upstart.com)
Alison Nicoll, General Counsel (alison@upstart.com)
Upstart Network, Inc.
2905 S. Delaware Street
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Re: Potential Discrimination in Upstart Lending Platform

Mr. Girouard and Ms. Nicoll,

We write on behalf of the NAACP Legal Defense & Educational Fund, Inc. (LDF) and the Student Borrower Protection Center (SBPC) to follow up on our correspondence with you regarding potential discrimination in Upstart's lending platform. Our further investigation indicates that the way in which Upstart uses education data in determining an applicant's creditworthiness causes an unjustified disparate impact on Black borrowers in violation of the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA). As the nation grapples with the economic fallout of the ongoing COVID-19 pandemic, the need for equitable access to financial opportunity and credit markets is more apparent than ever. We write now to explore the possibility of coming to an amicable resolution to cure Upstart's platform of its discriminatory impact.

BACKGROUND¹

As we understand Upstart's responses to a request for information issued by a group of Senators earlier this year, one of the inputs for Upstart's algorithm is a table sorting roughly 2,700 schools into eight different tranches. The "primary" mechanism by which these schools are sorted is the average standardized test score—ostensibly on tests such as the Scholastic Achievement Test (SAT) or American College Testing (ACT)—of the incoming class. When an applicant enters

¹ The facts as set forth herein are based on our investigation to date, including a review of Upstart's response to a Request for Information issued by a group of Senators on February 13, 2020. We reserve the right to supplement this information as our investigation continues.



their last attended university or college on the platform, the algorithm tracks that school into a particular tranche. The higher the school’s tranche—the higher the incoming class’s average standardized test scores—the more favorable the terms offered will be. As such, the average incoming class standardized test scores of a particular university can significantly impact how much a borrower pays for credit.

A wealth of social science research reveals racial disparities in scores on standardized tests, such as the SAT and ACT.² These disparities do not reflect differences in academic merit; rather, the process by which new SAT and ACT questions are considered and adopted “operates to select questions with larger racial and ethnic disparities (favoring [w]hites).”³ Unfortunately, this process is iterative; “racially disparate scores drive question selection, which in turn reproduces racially disparate test results in an internally reinforcing cycle.”⁴ The resulting disparities have been historically exploited to pursue anti-integration policies,⁵ and they continue to hinder equal access to higher education.

Moreover, a substantial body of literature shows that standardized testing is a poor predictor of student outcomes.⁶ Recent studies indicate college grade point

² See Richard V. Reeves and Dimitrios Halikias, *Race gaps in SAT scores highlight inequality and hinder upward mobility*, Brookings (Feb. 1, 2017), available online at <https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/>.

³ William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 157 (2002). A test is validated as “reliable” when high-performers perform consistently on the same test taken multiple times under similar conditions. By validating and including questions in which high-scoring test-takers outperform low-scorers and throwing out questions in which low-scorers outperform high-scorers, the SAT’s “reliability” check guarantees the scores of “low scoring” test-takers. The same is true of the ACT as well. See Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles*, in SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS 134 (Joseph A. Soares 2015).

⁴ Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles*, in SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS 134 (Joseph A. Soares 2015) (internal citation omitted).

⁵ See, e.g., Asher Price, *A Secret 1950s Strategy to Keep Out Black Students*, The Atlantic (Sept. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/how-ut-used-standardized-testing-to-slow-integration/597814/> (discussing the University of Texas’s adoption of testing for anti-integrationist purposes following *Brown v. Board of Education*)

⁶ See Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA.J. CONST. L. 1235 (2011) (discussing the ramifications of social science research showing that standardized tests have racially skewed scores and do not accurately predict college performance); Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395, 468–79, 485–90 (2000) (study finding that, despite having lower standardized



average, graduation rates, and postgraduate performance bear virtually no relation to standardized test scores—i.e., a student’s performance in college and in their subsequent career cannot be predicted with any accuracy by looking at standardized test scores.⁷ Standardized testing measures are even less accurate predictors for Black and Latinx students than they are for white students.⁸ Just months ago, the University of California was sued for over-relying on SAT/ACT scores in a way that disadvantages Black and Latinx applicants.⁹ Partially in response to the lawsuit, the University has voted to eliminate the use of standardized test scores entirely in making admissions decisions.¹⁰ Other universities have already moved toward eliminating standardized testing requirements.¹¹

Because of the unjustified racial disparities in standardized test scores, Black and Latinx students are far more likely to attend schools with lower average incoming class scores. By using a sorting mechanism reliant in significant part on students’ performance on standardized testing such as the SAT or ACT, Upstart’s platform reproduces the tests’ disparate impact on schools with higher Black and

test scores, Black, Latinx, and Native American graduates from the University of Michigan’s classes of 1970–96 were as successful as their white classmates in terms of income, career satisfaction, and civic contributions); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 957, 968–80 (1996) (arguing that SAT and other standardized tests are racially biased and explaining that standardized test scores have limited predictive power with respect to students’ future performance)

⁷ See Saul Geiser, Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California (Dec. 2017), *available online at* https://cshe.berkeley.edu/sites/default/files/publications/2.roops.cshe.15.2017.geiser.testsrace-blind_admissions.12.18.2017.pdf; see also Sarah Shaffer, *Do ACT and SAT scores matter? New study suggests they shouldn’t*, PBS (Feb. 18, 2014), *available online at* <https://www.pbs.org/newshour/education/nail-biting-standardized-testing-may-miss-mark-college-students>.

⁸ Herman Aguinis, et al., *Differential Prediction Generalization in College Admissions Testing*, 108 J. of Educ. Psych. 1045, 1053 (2016).

⁹ See *Kawika Smith, et al., v. Regents of the University of Calif.*, Case No. RG19046222 (Cal. Sup. Ct., Alameda Cty.).

¹⁰ Press Release, UC Office of the President, University of California Board of Regents unanimously approved changes to standardized testing requirement for undergraduates (May 21, 2020), *available online at* <https://www.universityofcalifornia.edu/press-room/university-california-board-regents-approves-changes-standardized-testing-requirement>.

¹¹ See, e.g., Dawn Rhodes, *University of Chicago to Stop Requiring ACT and SAT Scores for Prospective Undergraduates*, Chicago Tribune (June 14, 2018), <https://www.chicagotribune.com/news/breaking/ct-university-chicago-sat-act-20180614-story.html>.



Latinx populations. Both testing by SBPC and Upstart's own responses to and communications with the Senate confirm such a result.

SBPC's testing focused on graduates of historically Black colleges and universities (HBCUs), and found that they receive materially worse loan terms than similarly situated applicants who go to schools with smaller Black populations. SBPC ran two hypothetical applicants through Upstart's platform. Both applicants sought a \$30,000 loan product with a repayment term of five years. Both applicants were 24-year-old college graduates who majored in computer science and worked as financial analysts. And both applicants had identical credit scores, salaries, employment histories, savings, and loan histories.¹² The *only* difference between the two applicants was each one's undergraduate institution: one applicant graduated from Howard University, one of the most renowned HBCUs, and the other graduated from New York University (NYU).

The results of SBPC's tests are striking: the hypothetical Howard graduate received an offer that charged a \$1,960 origination fee and levied a 21.29% annual percentage rate, while the NYU graduate was offered a package that charged a \$1,231 origination fee and a 16.34% annual percentage rate.¹³ Over the five-year repayment term, therefore, the offer to the Howard graduate would cost \$3,499 more than the one to the NYU graduate. In other words, an individual with the same job, income, savings, and credit score will receive materially worse loan offers *solely* based on whether they attended an HBCU. And, as discussed in greater detail above, the racial demographics of each school—the student population of Howard University is nearly 90% Black, while the NYU student population is just 6% Black—mean that these more expensive offers are disproportionately made to Black applicants.

Upstart's own responses and statements made to the Senate further confirm the platform's troubling disparate impact. As a result of Upstart's sorting algorithm, over 95% of the country's HBCUs fall into the bottom half of Upstart's rankings; just two HBCUs fall into the top half. Thus, as Upstart acknowledged to the Senate, a student choosing between an HBCU and another university faces a potential lifetime penalty if they choose to attend the HBCU.

¹² Student Borrower Protection Ctr., Educational Redlining 16 (Feb. 2020).

¹³ *Id.* at 18.



THE FAIR HOUSING ACT AND THE EQUAL CREDIT OPPORTUNITY ACT

The ECOA prohibits any creditor from “discriminat[ing] against any applicant, with respect to any aspect of a credit transaction, on the basis of race” 15 U.S.C. § 1691(a)(1). Similarly, the FHA prohibits a lender from “discriminat[ing] against any person in . . . [t]he making or purchasing of loans . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling.” 42 U.S.C. § 3605(a), (b)(1)(A). Both statutes implicate core antidiscrimination norms, and “must be construed broadly to effectuate [their] remedial goals.” *Yeh Ho v. Wells Fargo Bank, N.A.*, No. 15 CV 81522, 2020 WL 820264, at *4 (S.D. Fla. Feb. 19, 2020) (ECOA); *accord Mohamed v. McLaurin*, 390 F. Supp. 3d 520, 545 (D. Vt. 2019) (FHA). And both statutes proscribe practices that intentionally discriminate against or have an unjustified disparate impact on protected groups. *See* 12 C.F.R. § 202.6(a) n.2 (ECOA recognizes both theories of liability); 24 C.F.R. § 100.500 (FHA proscribes disparate impact as well as disparate treatment).

Basing creditworthiness determinations on the average incoming test scores at a particular university has an unjustified disparate impact on Black borrowers, who are disproportionately likely to attend schools with lower average incoming standardized test scores and therefore be deemed as riskier borrowers under Upstart’s algorithm. This disparate impact is especially pronounced for graduates of HBCUs. As of 2018, approximately 76% of students enrolled at HBCUs identified as Black.¹⁴ The penalty Upstart applies to those who attend HBCUs or other schools with lower average standardized test scores will thus be disproportionately borne by Black borrowers.

Upstart’s reliance on standardized test scores not only produces inequitable, discriminatory results, it also has no legitimate purpose. The average incoming standardized test score at a college or university is of minimal, if any, predictive value in determining a borrower’s ability to repay loans. For example, Upstart’s treatment of HBCUs as “riskier” propositions, solely because of incoming standardized test scores, is at odds with reality—HBCUs have long served as a pipeline for upward mobility for Black students across the country.

Despite comprising just 3% of American universities, HBCUs produce approximately 20% of Black college graduates, and approximately 25% of Black

¹⁴ United States Dep’t of Educ., *Fast Facts: Historically Black Colleges and Universities*, <https://nces.ed.gov/fastfacts/display.asp?id=667> (last visited Mar. 23, 2020).



graduates in the fields of science, technology, engineering, and mathematics.¹⁵ Twenty-five percent of Black teachers graduate from HBCUs.¹⁶ And yet tuition at HBCUs is, on average, thirty percent less than at comparable non-HBCUs.¹⁷ As the Department of Education has recognized, HBCUs “still have an outside role in preparing students to meet urgent national priorities in STEM fields, in filling teaching jobs, and in uplifting boys and men of color.”¹⁸ Perhaps unsurprisingly, then, Black HBCU graduates consistently score higher on markers of social, financial and physical wellbeing than their peers who attend non-HBCUs.¹⁹ To treat an HBCU graduate as less creditworthy than their peers at comparable other institutions has little, if any, basis in reality.

Upstart’s algorithm ignores the many reasons why a high-achieving student may choose to attend an HBCU over another institution. The value of attending an HBCU is much greater than the incoming standardized test scores of its incoming class. Because Upstart’s use of education data in the algorithm “lacks relevance to [assessing creditworthiness], it becomes suspect.” *Robinson v. 12 Lofts Realty*, 610 F.2d 1032, 1041 (2d Cir. 1979).

As we have stated previously, we appreciate and share Upstart’s stated goal of expanding access to credit for the credit invisible—a group that is comprised disproportionately of people of color. Such an expansion must not, however, arbitrarily disadvantage Black borrowers. We welcome the opportunity to discuss ways of equitably expanding access to credit marketplaces with you, and hope you accept our invitation to reevaluate how Upstart can better serve all people.

¹⁵ Michael Lomax, *Six Reasons HBCUs Are More Important Than Ever*, United Negro College Fund, <https://uncof.org/the-latest/6-reasons-hbcus-are-more-important-than-ever> (last visited Apr. 3, 2020).

¹⁶ Arne Duncan, U.S. Secretary of Educ., Opening Remarks at the 2014 National HBCU Conference (Sept. 23, 2014), *available online at* <https://www.ed.gov/news/speeches/hbcu-value-proposition>.

¹⁷ Lomax, *supra* n.15.

¹⁸ Duncan, *supra* n.16.

¹⁹ Sean Seymour & Julie Ray, *Grads of Historically Black Colleges Have Well-Being Edge*, Gallup (Oct. 27, 2015), *available online at* <https://news.gallup.com/poll/186362/grads-historically-black-colleges-edge.aspx>.

Ltr. to Mr. Girouard
July 30, 2020
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Sincerely,

A handwritten signature in blue ink, appearing to read "Ashok Chandran", with a horizontal line underneath.

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