CFPB Shouldn't Ditch Prior Earned Wage Access Precedent

By **Eric Goldberg** (February 9, 2024)


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According to recent statements from leadership at the Consumer Financial Protection Bureau, the agency expects to issue some form of guidance on earned wage access, or EWA, products in 2024.

We hope that the CFPB will continue to view EWA as a lower-cost, noncredit, pro-consumer alternative to payday loans and overdraft fees.

However, recent statements from CFPB general counsel Seth Frotman indicate the CFPB may now be concluding that some or all EWA products are credit under federal law. Doing so would threaten the existence of EWA and cause consumers to turn back to costly alternatives.

Before it takes that step, the CFPB should consider whether it is appropriate — from both a legal and policy perspective — to abandon its prior determinations that EWA products are not credit.

Under two prior directors of different political parties, Director Richard Cordray and Kathy Kraninger, the CFPB issued a final rule,[1] an advisory opinion[2] and a now-terminated approval order all supporting EWA products.[3]

These statements all explained why certain EWA products are exempt from consumer credit regulations — namely Regulation Z, which implements the Truth in Lending Act, or TILA, and the CFPB's currently stayed small-dollar lending rule, which would regulate payday loans but exclude EWA.

TILA and Regulation Z govern credit products that are, among other things, subject to a finance charge or payable in more than four installments.[4]

As EWA does not involve installments, TILA can only apply to EWA if it is credit and if it is subject to a finance charge. Regulation Z defines "credit" as "the right to defer payment of a debt or to incur debt and defer its payment."

Whether a product meets this definition is independent of whether it also involves a finance charge.

The CFPB has previously explained why certain EWA programs are not credit and should not be treated like credit.

The CFPB has long acknowledged the innovative and distinct nature of EWA. In 2017, Cordray's small-dollar lending rule excluded certain EWA programs. In doing so, the CFPB explained that the EWA industry did not present the same concerns as did payday loans, and that certain EWA programs may not be credit because they may not involve a debt.[5]

In November 2020, the CFPB next made an official determination on EWA regulation through the issuance of a 14-page advisory opinion clarifying that an employer-integrated EWA program with certain characteristics "does not involve the offering or extension of 'credit' as defined by … Regulation Z."[6] The advisory opinion put forth three primary

reasons why such an EWA program is not a credit product.

First, it concluded covered EWA programs do not satisfy Regulation Z's or TILA's definition of credit because they "do not implicate a debt." The CFPB explained that a debt is a "liability on a claim," but that with EWA "no such liability of the employee arises."[7]

Instead, the CFPB explained, EWA "functionally operates like an employer that pays its employees earlier than the scheduled payday" — as opposed to like a creditor.[8]

Second, the CFPB concluded the determination that EWA is not credit aligns with prior interpretations of Regulation Z. Specifically, the CFPB used the analogy of a consumer who borrows against the accrued cash value of an insurance policy, which the commentary to Regulation Z makes clear is not credit.[9]

Like such a product, a covered EWA program is not credit because "there is no independent obligation to repay" since the employee is only using their own money when they complete an EWA transaction.[10]

Third, the CFPB said the hallmarks of typical credit transactions are missing from EWA transactions. For example, there is no contractual right to secure repayment if a payroll deduction fails, no late fees or prepayment penalties, and no underwriting, no credit reporting and no collections.[11]

Additionally, most of the characteristics of the approval order apply to the majority of EWA providers, regardless of business model, and each of these three enumerated primary reasons why such an EWA program is not a credit product are applicable to the EWA products predominantly used by millions of American consumers today.

The CFPB also concluded in 2020 that a particular EWA program by Payactiv that charged "nominal processing fees" was not credit under Regulation Z.

In that approval order, which was terminated for reasons specific to that company and unrelated to its merits, the CFPB concluded that the provider's fees at issue were not contingent on time or amount, like an interest rate, and were "de minimis in absolute terms and … approximately commensurate with the prevailing expedited transfer fees for non-credit products."[12]

The CFPB noted this product was a "lower cost alternative" to higher cost products.[13]

The CFPB must not abandon its prior, well-reasoned opinions.

Fast forward to 2024. EWA programs remain a reliable low-cost alternative. Some providers have used the CFPB's guidance as a road map for the development of their programs.

What has changed since the CFPB's 2020 guidance? The CFPB has new leadership, which may wish the CFPB hadn't issued the earlier guidance.

In two letters — one in 2022[14] and another last month[15] — Frotman attempted to distance the CFPB from its own thrice-stated determinations supporting EWA and instead hints that EWA might actually be TILA credit after all. It is not clear why the CFPB is considering a 180-degree policy change.

There are several concerning statements in these letters.

For example, in his 2022 letter, Frotman briefly acknowledged the fact that programs that charge "nominal processing fees" may not be credit, but then confusingly said that "the payment of any fee … may well be TILA credit."[16]

However, TILA, Regulation Z and the advisory opinion all make clear that it is not the presence of a fee that determines whether a product is credit but the existence of a debt. Deeming EWA products to be credit solely on the basis of whether a fee is present would conflate the meaning of "credit" and "finance charge," which are separate terms in TILA.

For noninstallment products, coverage under Regulation Z requires both credit and a finance charge. The presence of a finance charge does not transform a noncredit product into credit. In any event, most EWA companies do not impose finance charges.

Some do charge voluntary fees for expedited delivery of funds, in large part to cover their increased costs. But such fees are not one of the 11 enumerated examples of finance charges in Regulation Z.[17]

A determination that these fees are finance charges would be reversing decades of precedent, including statements by the CFPB itself in its EWA guidance and the Board of Governors of the Federal Reserve System, which has said that optional expedited payment fees for repayments "are not finance charges under TILA and Regulation Z because the consumer has a reasonable means for making payment on the account without paying a fee to the creditor."[18]

A haphazard determination that EWA constitutes "credit" solely on the basis of whether a provider imposes a nominal, voluntary fee could lead certain states to adopt similarly misguided conclusions — namely that fees for optional services like expedited funds transfers should be subject to state interest rate caps.

But much like applying an annual percentage rate to a fee for overnighting a check or for using an ATM, applying an annual percentage rate to an optional, flat and nominal fee for a faster EWA payment will eradicate instant delivery options altogether, depriving users of timely access to their earned unpaid income when they need it the most.

This is exactly what happened this month in Connecticut after the state banking regulator deemed most voluntary fees to be subject to the state's small loan law.

A recent study by the Financial Health Network shows that consumers greatly value EWA's instant delivery option that allows them to meet their short-term liquidity needs, and the flexibility on payment timing means they could align the EWA access options to their financial needs.[19]

In a recent comment letter to the California Department of Financial Protection and Innovation, Frotman suggested — without any explanation — that EWA products "share fundamental similarities with payday products."[20]

Frotman not only failed to identify what those similarities are, but also does not address any of the eight differences the CFPB set forth in the 2020 advisory opinion between credit and EWA products.[21] Frotman also disregarded the CFPB's small-dollar lending rule, which determined through a yearslong notice-and-comment process that EWA programs did not warrant the same regulatory treatment as payday loans.[22]

The unarticulated comparison to payday loans is particularly disturbing given that EWA is the most viable and affordable alternative to predatory payday loans.

For example, in California, a licensed payday lender can charge up to $45 for a 14-day, $250 payday loan. EWA can provide the same liquidity for $0 to $4, with no underwriting, interest, recourse, late fees or credit bureau reporting.

Frotman's letters have caused substantial confusion. Has the CFPB flip-flopped on its prior determination that EWA is an "innovative product" that provides liquidity to consumers, so they do not have to turn to "more costly alternatives like traditional payday loans[?]" It's hard to say.

If it has flip-flopped, the CFPB would have to explain what two prior CFPB directors got wrong. More fundamentally, the CFPB should understand that subjecting EWA to credit laws could be its death knell.

In states with annual percentage rate caps, consumers would have no choice but to turn to "more costly alternatives like traditional payday loans" if those caps are shoehorned to apply to EWA. This should not be the CFPB's prerogative.

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Disclosure: Eric advised Payactiv regarding the approval order discussed above.

[1] 82 Fed. Reg. 54,472, 54,547 (Nov. 17, 2017).

[2] CFPB, Advisory Opinion on Truth in Lending (Regulation Z); Earned Wage Access Programs (Nov. 30, 2020) [hereinafter Advisory Opinion], https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf.

[3] CFPB, Approval Order to Payactiv, Inc. (Dec. 30, 2020) [hereinafter Approval Order], https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf. The Order was terminated June 30, 2022. See CFPB, Order to Terminate Sandbox Approval Order (June 30, 2022), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_termination-order_2022-06.pdf.

[4] 12 C.F.R. § 1026.1(c)(1).

[5] 82 Fed. Reg. at 54,547 (explaining that EWA products are "especially likely" to not be debt when they are non-recourse and involve only a payroll deduction).

[6] Advisory Opinion, supra note 2, at 4. "Covered EWA Programs" are defined as those with the following characteristics:

(1) The provider must contract with the employer.

(2) The EWA transaction should not exceed earned wages based on information provided by the employer to the Provider.

(3) The employee does not pay a fee (voluntary or otherwise) for disbursements to the employee's account of choice, though "the Bureau notes that there may be EWA programs that charge nominal processing fees… that nonetheless do not involve the offering or extension of 'credit'."

(4) The provider recovers the advance only through payroll deduction from the next paycheck (with one additional deduction allowed for technical failure).

(5) The provider has no legal or contractual claim or remedy against the employee other than refraining from offering the employee additional EWA transactions.

(6) The provider must make certain warranties to the employee: there will be no fees, no recourse against the employee, and no debt collection activities.

(7) The provider may not assess individual credit risk. Id. at 4-7.

[7] Id. at 8 (citations omitted).

[8] As the CFPB itself pointed out, this interpretation is aligned with the CFPB's previous discussion of EWA products from its 2017 Payday Lending Rule, wherein it stated that with EWA products, "there is a quite plausible argument that the transaction does not involve 'credit' because the employee may not be incurring a debt at all." 82 Fed. Reg. at 54,547.

[9] Advisory Opinion, supra note 2, at 9 (citing Reg. Z cmt. 2(a)(14)-1.v; other citations omitted).

[10] Id. at 9.

[11] Id. at 10-12.

[12] Approval Order, supra note 3, at 5.

[13] Id. at 1.

[14] Letter from Seth Frotman, Acting General Counsel, CFPB, to Beverly Brown Ruggia, et al., Fin. Just. Program, New Jersey Citizen Action (Jan. 18, 2022), https://www.nclc.org/wp-content/uploads/2022/10/Letter-from-S.-Frotman-to-B.-Ruggia-et-al-re-EWA-AO-1.18.22-1.pdf.

[15] Seth Frotman, Comment Letter on Proposed Rule Addressing "Income-Based Advances" and Related Charges (Nov. 27, 2023), https://files.consumerfinance.gov/f/documents/cfpb_comment-letter-to-dfpi-2023-11.pdf.

[16] Letter from Seth Frotman to Beverly Brown Ruggia, supra note 14, at 2.

[17] 12 C.F.R. §1026.4(b).

[18] 68 Fed. Reg. 16,185, 16,186 (Apr. 3, 2003).

[19] Fin. Health Network, Exploring Earned Wage Access as a Liquidity Solution (2023), https://finhealthnetwork.org/research/exploring-earned-wage-access-as-a-liquidity-solution/.

[20] Seth Frotman Comment Letter, supra note 15, at 2.

[21] See supra note 6.

[22] 82 Fed. Reg. at 54,547.