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August 30, 2024

Submitted via E-Mail at: 2024-Paycheck-Advance-Interpretive-Rule@cfpb.gov

Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: 2024 Paycheck Advance Interpretive Rule
[Docket No. CFPB-2024-0032]

To whom it may concern:

This letter is submitted to the Consumer Financial Protection Bureau (the "**CFPB**") on behalf of the Innovative Payments Association ("**IPA**"),[1] in response to the proposed 2024 Paycheck Advance Interpretive Rule issued by the CFPB on July 18, 2024 and published in the Federal Register on July 31, 2024 (the "**Interpretive Rule**").[2] We appreciate the opportunity to provide feedback to the CFPB on this important topic and to highlight our members' serious concerns with several aspects of the proposed Interpretive Rule. If you have questions about our comments, we would be happy to discuss them further.

The Interpretive Rule broadly covers all types of earned wage access ("**EWA**") products and services, which the CFPB defines to include (i) the provision of funds to a consumer based on, by estimate or otherwise, the wages the consumer has accrued in a given pay cycle; and (ii) repayment to a third-party provider through some automatic means, generally a payroll deduction or preauthorized debit to the consumer's account.[3] The CFPB concludes that all such products, including those that are non-recourse and where the provider's only remedy in the event of non-repayment is to shut off a consumer from further disbursements, represent "debt". According to the CFPB's analysis, the mere "act of repayment" is sufficient proof that the consumer had an *obligation* to pay back the EWA disbursement and the pre-payday access therefore meets the plain meaning of the word "debt." As such, to the extent an EWA disbursement is subject to a "finance charge,"[4] it would be covered by the obligations of the Truth in Lending Act (**TILA**) and Regulation Z.[5]

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[1] The IPA is a trade organization that serves as the leading voice of the electronic payments sector, including prepaid products, mobile wallets, and person-to-person (P2P) technology for consumers, businesses and governments at all levels. The IPA's goal is to encourage efficient use of electronic payments, cultivate financial inclusion through educating and empowering consumers, represent the industry before legislative and regulatory bodies, and provide thought leadership. The comments made in this letter do not necessarily represent the position of all members of the IPA.

[2] 89 Fed. Reg. 61358 (July 31, 2024).

[3] *Id.*

[4] Defined under Regulation Z as any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.

[5] As discussed below, we believe many EWA models, including employer integrated / non-recourse models, do not create a "debt" on the part of the consumer and should therefore be excluded from TILA and Regulation Z. As such,

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Many of our members have noted that some of the analysis underpinning the Interpretive Rule appears to depart from the CFPB's prior guidance on the topic of EWA services, the CFPB's 2020 advisory opinion (the "2020 Advisory Opinion").[6] Under the 2020 Advisory Opinion, the CFPB concluded that EWA services featuring certain characteristics, such as being nonrecourse, were inconsistent with the definition of "credit" for purposes of Regulation Z.[7] In coming to this conclusion, the 2020 Advisory Opinion echoed comments former CFPB Director Richard Cordray made when exempting similarly structured EWA services from the CFPB's 2017 small-dollar credit rule and stating that the rule "excludes from coverage some new 'fintech' innovations, such as certain no-cost advancements and programs to disburse earned wages when offered by employers or their business partners."[8] For its part, the present iteration of the CFPB sets aside the 2020 Advisory Opinion's analysis of what constitutes a "debt" for purposes of TILA and Regulation-Z without addressing the valid considerations that gave rise to the 2020 approach.[9]

The subject of EWA services is an important topic for the IPA, which counts several EWA providers and partner financial institutions, among its members. As the IPA has noted in several other of our comment letters,[10] EWA products and services provide significant benefits to employees and employers alike. EWA services have grown into a popular and important tool for employees to use in addressing the issue of timing mismatches between when they receive compensation for their labor and when they incur expenses. As the CFPB notes in the Interpretive Rule, this mismatch is a major source of demand for consumer credit and often drives consumers to costly sources of short-term liquidity, such as payday loans. Notably, EWA products and the significant benefits they provide to consumers, have developed largely in response to that consumer demand and in reliance on the position evidenced by the 2020 Advisory Opinion, the exceptions in the 2017 Payday Rule, and comments from the CFPB encouraging the very type of innovation and consumer-friendly practices present in many EWA models. On this point, we note that while the Interpretive Rule alludes to the similarities and differences between EWA products on the one hand and payday lending services on the other, it does not discuss what those similarities and differences are. As part of any final version of the Interpretive Rule, our members encourage the CFPB to articulate the differences between EWA and payday lending models with particular attention to the benefits many EWA products offer to consumers to help them manage their day-to-day financial lives in comparison to payday lending alternatives, including, but not limited to, the significantly lower cost associated with EWA, ease of use for the consumer, and accessibility.[11]

With this background in mind, our members have expressed several serious concerns regarding the Interpretive Rule, not the least of which is whether the credit framework is fit-for-purpose for regulation of

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the question of whether charges assessed in connection with such models meet the definition of a "finance charge" are immaterial.

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

[7] *Id*.

[8] 82 Fed. Reg. 54472 – 54921, 54547 (Nov. 17, 2017).

[9] 89 Fed. Reg. 61361.

[10] Please see our prior letter submitted to the CFPB on August 1, 2022 for further discussion on EWA products and the many benefits they provide to consumers.

[11] https://finhealthnetwork.org/research/earned-wage-access-and-direct-to-consumer-advance-usage-trends/.

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EWA in that the credit framework was not intended for non-recourse, short-duration products. These concerns are detailed in full below and include CFPB's conclusion that EWA disbursements – even those that are non-recourse to the consumer – qualify as "debt" for purposes of TILA and Regulation Z. The CFPB's stated goal in the proposed Interpretive Rule was to provide clarity to the EWA marketplace. However, due to the limited nature of the proposal, some of the IPA's members have noted that it is unusual for an agency to propose guidance in the form of a limited interpretive rule to further clarify earlier guidance in the form of a limited advisory opinion to establish the regulatory framework for an entire product set. We urge the CFPB to consider whether additional study and research on products, consumer needs, and the impact of a "credit" distinction on the payments consumers see as simply wages.

Contrary to the CFPB's conclusion, most EWA services do not create a "debt" owed by a consumer to an EWA provider and should not be subject to TILA and Regulation Z

In an effort to reach a conclusion that all such products and services, by their "plain legal definition," feature consumer debt, the proposed Interpretive Rule paints EWA products and services with the same broad brush. The proposed rule attempts to place EWA in the same category as mortgages and auto loans. This characterization ignores the fact that there are a multitude of different EWA models in the marketplace. While some models may contain credit-like features, most EWA products do not. Accordingly, we urge the CFPB to adopt guidance recognizing those variations instead of adopting an approach that treats products and services that differ markedly in their features, structure, and distribution models, as if they are the same.

Also of concern to our members is the Interpretive Rule's discussion of the definition of "debt." While the CFPB cites a number of sources for a common definition and understanding of "debt" – including Black's law dictionary, state and bankruptcy law cases, and the Fair Debt Collection Practices Act ("**FDCPA**") – the CFPB language ignores the fact that debt exists not because a repayment occurs but rather because an ***obligation*** to repay is created.[12] This fact is notable because in many EWA models, employer-integrated models in particular, there is simply no obligation created on the part of the consumer to repay the EWA disbursement or the ability of a creditor to compel repayment. While the consumer may be shut off from future use of the service, EWA disbursements are typically offered with no recourse for repayment. Similarly, while the CFPB gives significant weight to the fact that repayment of an EWA disbursement often occurs through automatic means, it completely ignores the fact that, in many instances, employees can change or even cancel auto-pay arrangements at any time without monetary penalty.[13]

In addition to not being supported by the common legal definitions of the term "debt," the proposed Interpretive Rule's conclusion conflicts with the prevailing view of non-recourse EWA services under state law and under guidance from other federal agencies. Several states, including Kansas, South Carolina,

[12] *See, e.g.,* FDCPA (defining debt as "any *obligation* or alleged *obligation* to pay money arising out of a transaction . . . ." (emphasis added)) 12 U.S.C. 5481(12); Debt, Black's Law Dictionary (4th ed. 1968) (defining debt as "[a] sum of money *due by certain and express agreement*" (emphasis added); Debt, Wex, https://www.law.cornell.edu/wex/debt (last updated Sept. 2021).

[13] Notably, courts have declined to accept the CFPB's expansive interpretation of the definition of "credit." Specifically, the U.S. District Court for the District of Utah recently declined to adopt a definition of "credit" from the CFPB that the court deemed too expansive and noted was "roundly rejected by the federal courts." CFPB v. Snap Fin. LLC, 2024 WL 3625007, *5 (D. Utah, Aug. 1, 2024).

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Nevada, Wisconsin, and Missouri, have recently enacted legislation recognizing that EWA products and services with certain structural features, such as a lack of recourse, are not loans or credit. and that the provider is not a lender or creditor.[14] Further, in its annual Green Book, the U.S. Department of Treasury, has proposed amending the Internal Revenue Code to clarify that EWA arrangements are not loans.[15] At the very least, the presence of such conflicting law and guidance underscores the fact that there are a multitude of EWA models in the marketplace and it is not feasible or appropriate to cover all of them with a single, broad rule, much less the Interpretative Rule that the CFPB has proposed, without explanatory rule text and commentary and lacking vigorous research or analysis.[16]

Finally, the proposed Interpretive Rule suggests that all employees who access EWA are debtors and their employers are creditors, contrary to the fact that wages are *owed* to the employee. Thus, if a wage payment transaction contemplates a debtor-creditor relationship, the CFPB has misconstrued the relationship. The worker is the creditor and the employer is the debtor. In this context, the EWA provider is not making an advance or loan of wages to a worker; they are facilitating the payment of debt owed to the worker from their employer. Generally, in most employer-employee agreements, it is the employee who must act first by providing their labor to their employer based on the expectation that the employer will eventually act and second, by compensating the employee for the work that has been performed. In short, if there is a debt, it is the employer who owes a debt (compensation) to the employee.

For the reasons discussed above, our members strongly disagree with the proposed Interpretive Rule's conclusion that all EWA products that feature some form of automatic repayment are de facto "debt," and we urge the CFPB to reconsider its conclusions and the need to differentiate between the various EWA models in the marketplace. Surely, EWA products that offer non-recourse protections should not constitute "debt" and should not be covered by any final version of the Interpretive Rule.

The CFPB's broad interpretation of "finance charge" presents several issues that are of concern to our members

The proposed Interpretive Rule takes a broad view of what constitutes a charge "incident" to the extension of credit to conclude that two "fees" commonly assessed in connection with EWA services – fees for the expedited receipt of funds (virtually always offered alongside a free means of receipt) and voluntary tips – constitute "finance charges" because they are *incident* to the receipt of the EWA disbursement.

The conclusion that tips and expedited fund transfer fees paid in connection with an EWA disbursement are "finance charges" raises practical concerns of how providers will be able to comply with requirements to convert these "finance charges" into an APR disclosable to the end user. Is the provider

[14] *See, e.g.,* Mo. Ann. Stat. § 361.749.6.(1)(b).
[15] *See* Treasury's General Explanations of the Administration's Fiscal Year 2023 Revenue Proposals, available at https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf.
[16] Additionally, we note that Congress has been pursuing EWA-tailored legislation at the federal level. The House Financial Services Committee recently passed H.R. 7428, the Earned Wage Access Consumer Protection Act. The legislation defines earned wage access as a non-credit product and proposes specific consumer disclosures and protections for the first time at the federal level. Among other comments shared by our members, some have noted that when Congress is actively engaged in lawmaking related to a popular consumer product with high satisfaction scores, it is appropriate for the regulator to defer to this branch of government.

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expected to calculate APRs based merely on an assumption as to how much a user may voluntarily tip for the service or that a user may, in their discretion, opt to expedite a transfer and incur a fee? Our members have also expressed concern that the CFPB's broad interpretations of "finance charge" and "debt" could have unanticipated, negative consequences for other services such as payroll cards, or early ACH payments, that facilitate wage distribution to employees. Finally, we note that the CFPB's analysis and conclusions with respect to its test for determining a "finance charge" appear to be contrary to precedent and existing case law.[17]

For these reasons, we ask that the CFPB reconsider its conclusions that voluntary tips and avoidable expedited funds fees qualify as "finance charges" for the purposes of TILA and Regulation Z.

The CFPB should engage in additional study and research before finalizing its Interpretive Rule

As noted above, the CFPB has followed an unusual process in developing a regulatory framework for EWA products. Many of our members are concerned that the use of guidance in the form of the proposed Interpretive Rule to revise and replace previous guidance in the form of the 2020 Advisory Opinion arises from a process not subject to the rigorous research and study requirements one would expect of a proposal of this magnitude, that could significantly impact both consumers and the EWA industry.

Compliance with TILA and Regulation Z will lead to a dramatic increase in compliance costs and burdens for providers without commensurate consumer protections. The credit framework will increase costs, which could be passed through to consumers, while the disclosures and other protections offered by credit will not bring about better outcomes. In fact, we believe credit-based disclosures for a product that grants access to already earned wages, is non-recourse, and does not impact credit rating will create confusion for consumers. Additionally, imposing a federal TILA standard on EWA transactions could result in impacts to access for consumers, which could push consumers to more costly alternatives.

We urge the CFPB to do more study of the EWA market. Such a study should consider whether or not the proposed credit framework addresses the risks of EWA and improves the outcomes for consumers. We believe a clear, inclusive, open, and transparent process that considers all stakeholders is beneficial for everyone – including consumers, industry, the market, and financial regulatory agencies.

The IPA appreciates your consideration of our comments. If you have any questions or wish to discuss this letter, please do not hesitate to contact me at: btate@ipa.org.

[17] *See* Veale v. Citibank FSB, 85 F.3d 577, 579 (11th Cir. 1996) (concluding that an optional expedited delivery fee was not a "finance charge" where the borrower could choose to avoid the fee by obtaining delivery through an alternative method).

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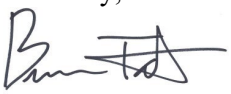
Sincerely,



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