

**ActiveHours, Inc., dba, Earnin Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21)**

**March 8, 2021**

Department of Financial Protection and Innovation  
Attn: Legal Division  
300 S. Spring Street, Suite 15513  
Los Angeles, CA 90013

Dear Sir or Madam:

Thank you for the opportunity to provide comments on your Proposed Rulemaking under the California Consumer Financial Protection Law ("CCFPL").

Please see our commentary submission below in response to the Department of Financial Protection and Innovation's ("DFPI") Invitation for Comments on Proposed Rulemaking Under the California Financial Protection Law.

Earnin is a financial technology company based in Palo Alto, California, founded to empower consumers and provide them the tools they need to work towards financial stability. Earnin is appreciative for DFPI's willingness to engage and discuss Earned Wage Access ("EWA"). Earnin is proud to have signed a Memorandum of Understanding ("MOU") with the DFPI in January 2021.

Our Direct-to-Consumer Earned Wage Access product, Cash Out, enables workers to get paid soon after they work, while providing an alternative to payday lenders and the ability to avoid a cycle of debt. Earnin's Cash Out product has more than 1.3 million active users nationally.

Overall, we support regulations that protect consumers' interests and affirm the basic principle that all Earned Wage Access providers should play by the same rules. In addition, we are specifically recommending that CCFPL rulemaking include the following: 1) exclusion of EWA products as a Financial product or service" that offer an "extension of credit;" 2) clarity around the scope of a UDAAP to ensure that covered entities are not held responsible for the disclosure of third-party fees; 3) a brightline distinction between Earned Wage Access Providers and Deferred Deposit Transaction licensees ("Payday Lenders"); and 4) parity in treatment between Direct-to-Consumer and Employer Integrated EWA models.

Respectively, our comments are as follows:

**I. Definitions a. Financial Code section 90005 establishes definitions that apply to the CCFPL. Are additional definitions needed? For the terms already defined, are any of the definitions unclear, and if so, why? Does any definition result in ambiguity regarding whether an individual or entity, or product or service, falls within the scope of the CCFPL?**

1. The CCFPL and its implementing regulations should clarify that entities that do not fall within the definition of a "creditor" under The Truth in Lending Act/Regulation Z, also do not for purposes of the CCFPL, offer a "financial product or service" by way of offering an "extension of credit."

The CCFPL broadly defines the scope of a financial offering as a "financial product or service" to mean: "Extending credit and servicing extensions of credit, including acquiring, purchasing, selling, brokering extensions of credit, other than solely extending commercial credit to a person who originates consumer credit transactions.<sup>1</sup>" We strongly recommend that the definition and scope of a "financial product or service" offering be consistent and in line with the definition of a "creditor" that extends consumer credit under the Truth in Lending Act ("TILA") and its implementing Regulation Z ("Reg Z").

Reg Z generally defines the entities that extend consumer credit, and are therefore subject to regulation thereunder. Under Reg Z, a "credit" is defined as "the right to defer payment of debt or to incur debt and defer its payment<sup>2</sup>." A "creditor" is defined as "a person or entity who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments, and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract<sup>3</sup>." Generally, an EWA Provider is in the business of delivering earned but unpaid wages or income to a consumer, to which there is no legal right to demand payment, and therefore, is not considered an "extension of credit" under Reg Z, nor do they assess a finance charge, as hereafter explained.

A "finance charge" under Reg Z is defined as "the cost of consumer credit as a dollar amount, and includes "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident or a condition of the extension of credit<sup>4</sup>."

While there is regulatory clarity surrounding what fee or charge would be considered a finance charge under Reg Z, there is less clarity on what does not fall within such

---

<sup>1</sup> Cal. Fin. Code § 90005(k)(12)

<sup>2</sup> 12 CFR § 1026.2(a)(17)(i)

<sup>3</sup> Id. § 1026.2(a)(14)

<sup>4</sup> Id. § 1026.4(a)

definition. We are recommending that the CCFPL regulations specify that certain fees such as voluntary payments, do not fall within the definition of a finance charge for purposes of offering a financial product or service under the CCFPL. Certain EWA Providers will present the customer with an option to make a gratuitous, voluntary payment that the customer can choose to leave as \$0.00. Because of the completely voluntary nature of such a payment that has no bearing on a customer's access to earned wages, it is important to distinguish this type of payment from the definition of a finance charge as it is not an incident or condition to "an extension of credit." Furthermore, this recommendation is consistent with the DFPI's current approach that certain fees and payments that do not fall within the definition of a finance charge under Reg Z. The DFPI stated in its Memorandum of Understanding with five "Earned Wage Access (EWA) Providers" dated January 4, 2021, that subscription fees, voluntary payments, gratuities, and transaction fees for expedited delivery of an (advance pay) are not considered "finance charges" for purposes of TILA, and should not be subject to any APR calculation.

As follows, entities that do not impose a finance charge, but rather voluntary payments for example, and do not require a written agreement requiring repayment payable in more than four installments for an extension of credit, should be specifically excluded from the CCFPL's definition and scope of a "financial product or service," by way of an extension of credit.

**II. Unlawful, Unfair, Deceptive and Abusive Acts and Practices (Consumer) a. Are there specific acts or practices in the market for consumer financial products or services that stakeholders believe are unlawful, unfair, deceptive, or abusive? If so, please describe the act or practice (with specific examples, if possible) and explain why the act or practice is unlawful, unfair, deceptive, or abusive. Should the DFPI identify the act or practice as unlawful, unfair, deceptive, or abusive through regulation? (Fin. Code § 90009, subd. (c).) If so, describe the harm the act or practice causes consumers, the frequency of the act or practice (if known), and any other relevant information concerning the cause or potential causes of the act or practice. Please also describe what requirements the DFPI should adopt to prevent the act or practice.**

---

You have requested feedback regarding what specific acts or practices in the market for consumer financial products or services that stakeholders believe are unlawful, unfair, deceptive, or abusive. Earnin is committed to making sure its consumers accurately understand how Earnin and its services operate. We feel it is equally important to address acts or practices that do not fall within these categories with the CCFPL's rulemaking.

2. The CCFPL and its implementing regulations should make clear that it is not a deceptive or unfair act or practice if a provider does not disclose third-party fees that a customer may be assessed.

Certain companies such as EWA Providers, as previously described, may market an EWA product as having “no mandatory fees,” or “no charges,” as they do not charge or collect any mandatory fees for access or use to their products and services. Nonetheless, such EWA customers may be assessed third party fees that EWA Providers do not control, do not receive benefit, and in many instances, do not have specific knowledge. No business should be held responsible from a UDAAP standpoint for making customers aware of third-party fees that customers may incur.

An example of such third-party fees are overdrafts that are charged by banks. EWA Providers do not assess, collect or control whether an overdraft fee occurs. When a customer’s bank account has insufficient funds, any merchant transaction can trigger an overdraft fee and the customer is subject to the bank’s ordering of their pending credits and debits.

3. The CCFPL and its implementing regulations should make clear that financial product offerings, such as Earned Wage Access (EWA), are not deceptively a short-term, payday loan when they are non-recourse, there are no mandatory fees, and no interest is assessed to the customer.

It is imperative that the CCFPL rulemaking explicitly define and distinguish the unique features of EWA’s no mandatory fees, non-recourse, and funds remitted based on “Earned But Unpaid Income” (the wages or compensation that have been earned but have not been paid to the consumer), from short-term, payday loans.

Deferred Deposit Transaction licensees (“payday lenders”) originate what is often referred to as a “payday loan,” defined generally as a short-term, small-dollar loan made to borrowers by charging a mandatory fee, interest and APR rates (with a legal right to demand repayment, i.e., recourse loan), usually to address temporary cash-flow shortages, that require repayment within 45 days.

Contrastingly, EWA products do not charge mandatory fees or interest, and are non-recourse, meaning there is no legal right to demand payment. Additionally, unlike payday lenders, EWA Providers enable workers to access their earned wages after they work, providing a financially responsible alternative to payday lenders and the ability to avoid a continuous cycle of debt. An EWA service provides consumers with access to unpaid wages that have been earned or are otherwise entitled to be received by the consumer, and have been reasonably determined by an EWA Provider. EWA Providers deliver the “Proceeds,” meaning, the amount of earned, but unpaid income that has

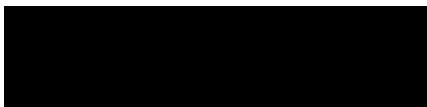
been remitted to the customer by an EWA Provider. EWA Proceeds are not considered loans because they are not based on a future wage assignment, but rather reflect wages that have already been accrued. CCFPL rulemaking should therefore highlight the fact that an EWA product is not a loan in general terms, and more specifically, is not a payday loan. Accordingly, we strongly recommend that CCFPL rulemaking specifically differentiate between EWA products and payday loans based on the aforementioned distinctions.

4. The CCFPL and its implementing regulations should acknowledge that there are two different EWA business models that both offer EWA products and services, and as a result, should be treated similarly in any resulting regulation.

CCFPL rulemaking should acknowledge that EWA Providers can operate as either Direct-to-Consumer or Employer Integrated models. In the Employer Integrated model, the EWA Provider integrates directly with the employer's payroll system. In this model, the employer typically controls the access and cost of the EWA product offering to their employees. In contrast, in the Direct to Consumer model, the EWA Provider is not linked to any employer's payroll system, rather it has its own work time and attendance system to reasonably determine customers' earnings. A consumer benefit of the Direct to Consumer model is that irrespective of who their employer is, or the size of their employer, the customer can flexibly utilize the EWA service to cover expenses that arise between paydays. We recommend that CCFPL rulemaking acknowledge both forms of EWA models and that they be treated similarly as EWA product offerings.

We look forward to working with you on CCFPL regulations, and continuing our partnership with the DFPI.

Very truly yours,



Sangeetha Raghunathan  
General Counsel and Chief Compliance Officer

ActiveHours, Inc., dba, Earnin  
200 Portage Avenue  
Palo Alto, CA 04306