



December 20, 2021

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

Subject: PRO 01-21 – Branch Messenger, Inc. Comment on Proposed Rulemaking under the California Consumer Financial Protection Law

Dear Ms. Sandoval:

Branch Messenger, Inc. (“Branch”) appreciates the opportunity to provide comments on the California Department of Financial Protection and Innovation’s (the “Department”) Notice of Proposed Rulemaking issued on November 17, 2021 (the “Proposed Rule”). As a provider of earned wage access (“EWA”), Branch supports the Department’s mission of promoting innovative products and protecting California consumers. Branch also applauds the Department’s ongoing effort to understand the emerging EWA market. While Branch generally supports the Proposed Rule with respect to EWA, it offers this comment for the Department’s consideration when preparing its final rule (the “Final Rule”).

## **I. Overview of Branch and Its EWA Product**

Branch is a leading financial technology company that helps businesses modernize their payment methods to empower working Americans. Fundamentally, Branch helps employers improve employee cash flow by giving those employees faster access to their earned wages.

The need for such access has never been clearer. Despite advances in financial services technology, many employees still must wait weeks to get paid. In fact, according to the Bureau of Labor Statistics, nearly two-thirds of U.S. private businesses still pay employees on a biweekly, semimonthly, or monthly pay period.<sup>1</sup> As the Consumer Financial Protection Bureau (“CFPB”) has noted, employers face numerous obstacles, including “costs,” “cash flow limitations,” “lack of technical ability,” and “regulatory uncertainty,” preventing them from implementing shorter pay cycles.<sup>2</sup> And consumers bear the brunt—and cost—of timing mismatches between wage payments and expenses. These mismatches are cited by the Financial Health Network as a significant reason many low wage workers rely on expensive, short-term credit,<sup>3</sup> including high-cost payday and title

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<sup>1</sup> Bureau of Labor Statistics, Length of Pay Periods in the Current Employment Statistics Survey (last modified Aug. 29, 2019), <https://www.bls.gov/ces/publications/length-pay-period.htm>.

<sup>2</sup> Bureau of Consumer Fin. Prot., Truth in Lending (Regulation Z); Earned Wage Access Programs, *available at* [https://files.consumerfinance.gov/f/documents/cfpb\\_advisory-opinion\\_earned-wage-access\\_2020-11.pdf](https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf)

<sup>3</sup> Rob Levy & Joshua Sledge, Ctr. for Fin. Serv. Innovation, A Complex Portrait: An Examination of Small-Dollar Credit Consumers, *available at* <https://s3.amazonaws.com/cfsi-innovation-files/wp-content/uploads/2017/01/31163518/A-Complex-Portrait-An-Examination-of-Small-Dollar-Credit-Consumers.pdf>.

loans, or otherwise incur overdraft and/or non-sufficient fund (“NSF”) fees charged by most banks. The cost of such products can exacerbate financial stress and even lead to financial instability, lost productivity, and decreased employee well-being. In short, the two-week pay cycle does not always work well for the roughly 78% of workers living paycheck-to-paycheck.

Branch’s EWA program interrupts this cycle and allows employees to meet short-term liquidity needs by accessing their earned wages at no cost, and “without turning to more costly alternatives like traditional payday loans.”<sup>4</sup> Branch’s EWA program also benefits employers. While many “gig economy” jobs offer faster access to earnings, in many cases this work does not provide the stability and benefits of W-2 employment. To compete for and retain workers, however, businesses must address the appeal of gig economy work by offering employees faster access to earned wages.

As a result, EWA has emerged as a growing—and popular—innovation in consumer financial services. There is no question that employer-based EWA programs provide benefits to consumers and employers alike and protect consumers from costly credit alternatives.

A critical feature of Branch’s employer-based EWA program is its complete employer integration. Before offering EWA to any consumer, Branch first enters into an agreement with an employer to offer EWA as a benefit to employees. After verifying hours worked though time and attendance integrations, Branch then provides money to employees based on income that has been earned but not yet paid. Branch assesses no fee, cost, or interest for a consumer to obtain an EWA payment. Funds are instantly deposited to the user’s Branch debit card or can be transferred externally at no additional cost (unless expedited by the consumer). Repayment is made directly from the consumer’s employer to Branch as a payroll deduction. In this way, Branch ensures that all EWA payments represent actual earned wages and provides access to those funds at no cost.

## **II. The CFPB and the Department Have Both Recognized the Consumer Benefits Offered by EWA Providers**

On November 30, 2020, the CFPB addressed EWA in a landmark advisory opinion (the “Advisory Opinion”), which determined that certain EWA programs did not meet the definition of credit under federal law and therefore provided a genuine, non-lending alternative to consumers.<sup>5</sup> The CFPB’s Advisory Opinion was consistent with other federal rulings related to products that provide consumers with access to “their own money.”<sup>6</sup>

Soon after the CFPB’s opinion, on January 22, 2021, Branch entered a Memorandum of Understanding (“MOU”) with the Department which allowed Branch to continue offering its EWA product to California consumers under the California Consumer Financial Protection Law. As part of the MOU, Branch agreed to provide the Department with specific quarterly data associated with Branch’s EWA program, submit to regular examination of its books and records, follow specified

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<sup>4</sup> Bureau of Consumer Fin. Prot., *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.*, 46 FR 20848, 20851 (Apr. 7, 1981) (“where the consumer borrows money against the accrued cash value of an insurance policy, credit has not been extended because the consumer is, in effect, only using the consumer’s own money.”); *see also* Bureau of Consumer Fin. Prot., Truth in Lending (Regulation Z); Earned Wage Access Programs, at n.28.

best practices when providing its EWA product, and make certain disclosures to California consumers.<sup>7</sup> While the data have been shared confidentially, Branch is confident that the Department is in possession of material confirming that Branch’s product is safe, beneficial and popular with California consumers and employers.

## II. As a Provider of Worker Benefits, Branch Supports the Department’s Objectives for the Notice of Proposed Rulemaking

The Department’s notice posits three objectives behind crafting the Proposed Rule: (1) strengthening consumer protection for California consumers and detecting risks to consumers, (2) understanding the economic impact on California business and consumers, and (3) understanding and encouraging the emerging markets for innovative consumer financial services, including providers of “wage-based advances” or EWA.

- **Consumer Protection.** By its very nature, Branch’s EWA program protects consumers from the cost and stress of delayed wage payments and the resulting reliance on credit and exposure to high-cost bank fees. As articulated in the CFPB’s Advisory Opinion, employer-based, no-cost EWA programs like Branch’s provide a valuable alternative to the high-cost, and sometimes predatory financial products, that employees rely on to bridge the gap to the next delayed paycheck. Branch is committed to consumer protection, as demonstrated by the features and guardrails built into its employer-based EWA product:
  - Branch’s EWA payments are based *solely* on employer-verified, *earned wages*. As a payroll integrated product, Branch EWA satisfies wage-verification standards contemplated in the Proposed Rule.
  - Unlike other high-cost financial products, Branch users cannot use one earned wage payment to pay off a prior Branch earned wage payment.
  - Branch protects consumers by only allowing EWA payments on a limited portion of earned wages (up to 50% of the consumer’s earned wages).
  - Branch charges no fees or costs to users to access EWA payments.
  - Branch reports consumer complaint information to the Department under the MOU, which demonstrates that Branch users are happy with the service and strongly support Branch’s EWA product.
- **Economic Impact on California Businesses and Consumers.** By creating practical regulations that promote EWA providers in California, California consumers and businesses will experience significant positive impacts. For consumers, EWA payments merely provide access to consumers’ already earned money. As the CFPB had held, in similar circumstances, EWA operates “like an employer that pays its employees earlier than the scheduled payday.”<sup>8</sup> Likewise, the sensible regulation of EWA providers allows California businesses to offer competitive employee benefits that many businesses have found essential to retaining their workforce. California businesses seeking to hire lower-wage workers face intense competition from nontraditional alternatives such as app-based

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<sup>7</sup> Cal. Dept. of Fin. Prot. and Innovation, Memorandum of Understanding Branch Messenger, Inc., *available at* <https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/01/Admin.-Action-Branch-Messenger-Inc.-Memorandum-of-Understanding.pdf>.

<sup>8</sup> Bureau of Consumer Fin. Prot., *supra* note 2.

delivery and driving services. As a result, hiring and retaining W-2 employees has become more difficult for California businesses. By enabling employers to offer EWA products—which provides an employee with faster access to their earnings—the Proposed Rule would promote competition and allow California businesses to attract workers. Indeed, Branch’s research and public studies have confirmed that employers who offer EWA experience tangible economic benefits, including increased shift coverage, decreased turnover, and increased applicant volume.<sup>9</sup>

- **Emerging Markets for Innovative Products and Services.** In entering its MOU with Branch and other EWA providers in early 2021, the Department took a critical step towards encouraging innovation and allowing the burgeoning market for EWA in California to continue to flourish. Branch believes that the Department should continue to encourage these emerging markets by utilizing the data provided by Branch and other EWA providers pursuant to the MOU, and data produced pursuant to any Final Rule, to create practical regulatory guidance for EWA providers. The EWA industry has been critical to California consumers for almost a decade and new entrants join the market every day. Regulations imposing significant requirements or onerous reporting obligations would likely chill innovation for consumer financial products and may drive EWA providers out of the California market entirely.

### III. Branch’s Position and Comments on the Proposed Rule

Branch appreciates the opportunity to provide comment and seeks to offer practical and specific input consistent with the Department’s objectives.

#### 1. Definition of “Worker”.

The Proposed Rule defines a “worker,” with respect to EWA, as a “natural person who has earned wages or compensation in this state as an employee or an independent contractor.” Proposed Rule (“P.R.”) §1(y). Branch requests that the definition of “worker” be modified to remove reference to an “independent contractor.” Federal and state laws generally treat employees differently to independent contractors. In California, employers are required to pay employees their *wages* and withhold taxes, along with other obligations. By contrast, independent contractors are responsible for their own taxes and withholdings, can provide services to multiple “obligors,” may not be paid on an hourly or periodic basis, and are not entitled to—and do not generally receive—itemized paychecks in California or other states. By defining a “worker” to encompass both employees and independent contractors, the Proposed Rule would be overbroad and cause confusion.<sup>10</sup>

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<sup>9</sup> See, e.g., Todd Baker & Snigdha Kumar, *The Power of the Salary Link: Assessing the Benefits of Employer-Sponsored FinTech Liquidity and Credit Solutions for Low-Wage Working Americans and their Employers*, Harvard Kennedy School (2018); *The Ultimate Guide to Earned Wage Access [EWA]*, Branch, *available at* <https://www.branchapp.com/resources/ultimate-guide-to-ewa>.

<sup>10</sup> For these reasons, Branch similarly recommends modifying the definition of an “obligor,” to remove reference to subsection (B), which expands the scope of the Proposed Rule to include businesses that retain independent contractors. Under the Proposed Rule, an “obligor,” with respect to wage-based advances, is defined as either of the following:

- (A) An employer.
- (B) A person who is not an employer, but who is contractually obligated to

## 2. Uniform Data Reporting.

Branch supports the Department's request for data to understand the impact of EWA on California consumers. With this objective in mind, Branch currently provides quarterly data to the Department, pursuant to the MOU, to facilitate its oversight. To ensure consistency between the data furnished under the Department's terms as stated in the MOU and the reporting suggested under the Proposed Rule, Branch requests that the Department eliminate any obligation to report monthly data, such as those outlined in P.R. §51(e)(3), and to maintain a quarterly cadence for reporting on EWA. In addition to the cost and burden of frequent data gathering and reporting, Branch believes that smaller data sets may have a tendency to provide an incomplete picture of relevant consumer behavior and would not be as reliable or actionable as quarterly or annual data provided by EWA providers.

With streamlined and uniform reporting requirements, the information Branch reports to the Department can be easily produced and reproduced in a standard format, especially if other states follow the Department's leadership and create data-driven regulation of EWA providers. By seeking uniform and consistent reporting, Branch and other EWA providers will avoid the adverse economic impacts and burdens of collecting non-standard data and off-cycle reporting.

## 3. Reporting Data Associated with Those Who Received 0-6 Advances.

Branch also proposes modifying some of the reporting requirements in order for the Department to receive the data actually necessary to detect risks and help the Department further understand the risks and benefits of the EWA industry. Under Section 51(e)(1)-(3), the Proposed Rule seeks aggregate data associated with the number of California workers who paid Branch, but received anywhere from zero to six earned wage advances, for each month and each quarter. Branch believes aggregate customer information would be more useful for the Department in understanding the EWA industry and consumer risks than reporting the specific number of advances (0-6 advances/month).

For example, under Section 51(e)(1)-(2) of the Proposed Rule, annual total data associated with 0-1 advances/year would be reported in the aggregate, while the same data would be sought on a monthly and quarterly basis under Proposed Rule § 51(e)(3). Branch believes that this data would be largely duplicative and confusing and would not facilitate meaningful oversight by the Department. Branch suggests that the Proposed Rule be streamlined to require one meaningful and useful data set.

Additionally, under Section 51(e)(3), the Proposed Rule seeks data on California consumers who received anywhere from 2-6 advances/month and 2-6 advances/quarter. Branch believes that this data would be largely duplicative to annual data on the total EWA payments received by customers and other data points—including the total number of delinquent accounts or the number that

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pay a worker a sum of money on an hourly, project-based, piecework, or other basis for labor or services provided by the worker or consumer to or on behalf of the person.

P.R. § 1(u)(1).

obtained a rollover of advance to the next pay period—would provide the Department with useful data that could be utilized to further understand the EWA industry.

4. Confidential Nature of Branch Business Information.

Branch requests that all data required by the Department be treated by the Department as confidential. Branch requests that any Final Rule would make clear which information collected in connection with registration or obtained through annual reporting should be confidential and not subject to public disclosure. Branch specifically request that its business information, including gross income [P.R. § 51(f)] and trade secrets, be exempt from public disclosure by the Department. Disclosure could place providers like Branch at a competitive disadvantage and ultimately discourage the emerging EWA market.

Branch also seeks confirmation that the Department will continue to maintain the confidentiality of all data submitted by Branch under the MOU, and as applicable, where allowed under California law, under any Final Rule. *See* Gov. Code §§ 6254(d)(2), (d)(4), (f).

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Branch appreciates the opportunity to respond to the Department’s invitation for comment welcomes the chance to promote responsible innovation, to provide access to employer-based EWA, and to support the Department’s mission of promoting competition and protecting California consumers. Thank you for considering this comment. Please do not hesitate to contact me if you have any questions or need further information from Branch.

Sincerely,



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Smitha Mortis  
General Counsel  
Branch Messenger, Inc.