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December 20, 2021

By email to regulations@dfpi.ca.gov
Christopher S. Schultz
Chief Deputy Commissioner
Department of Financial Protection and Innovation
300 S. Spring Street, Suite 15513
Los Angeles, CA 90013

Re: PRO 01-21, Proposed Rulemaking Under the California Consumer Financial Protection Law

Dear Chief Deputy Commissioner Schultz:

This letter is submitted to the California Department of Financial Protection and Innovation (the "DFPI") on behalf of DailyPay, Inc. ("DailyPay") regarding the implementation of the DFPI's proposed rulemaking (the "Proposal") under the California Consumer Financial Protection Law (the "CCFPL").[1] DailyPay supports reasonable, pro-innovation, and flexible regulatory efforts around the nation, and thanks the DFPI for its thoughtful approach to registering providers of "wage-based advances" under the CCFPL.

DailyPay is the nation's leading on-demand pay provider, offering a suite of software and services to employers to enhance the financial wellness of their workers. With most workers living paycheck to paycheck[2] and yet being paid only once or twice a month,[3] unforeseen events between payroll dates can be devastating. DailyPay's service is phenomenally effective at freeing low-income workers from the cycle of predatory payday loan debt and reliance on expensive overdraft programs.

DailyPay's comments below highlight some of its concerns regarding the specific nature and burden of the Proposal's impact upon on-demand pay providers.

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[1] *See* Proposed Regulations Under the California Consumer Financial Protection Law, Pro 01-21 (Nov. 17, 2021) (the "Proposal"), *available at* https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf.
[2] *See* CNBC, *63% of Americans Have Been Living Paycheck to Paycheck Since Covid Hit* (Dec. 11, 2020), *available at* https://www.cnbc.com/2020/12/11/majority-of-americans-are-living-paycheck-to-paycheck-since-covid-hit.html.
[3] Consumer Fin. Prot. Bureau, *Truth in Lending (Regulation Z); Earned Wage Access Programs*, 85 FED. Reg. 79404 (Dec. 10, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-12-10/pdf/2020-26664.pdf.

The Proposal Should Distinguish Employer Payroll-Integrated Earned Wage Access Programs from Direct-to-Consumer Advances

The Proposal identifies a new category of financial services under the CCFPL, "wage-based advances," which is defined as:

> *[F]unds paid to workers by a provider other than an obligor that are based on wages or compensation that a worker or the worker's obligor has represented, and that a provider has reasonably determined, have been earned but have not, at the time of the advance, been paid to the worker for work performed for or on behalf of an obligor or obligors.*[4]

DailyPay believes that this definition, by permitting workers to represent their own compensation amounts, overlooks critical distinctions between employer payroll-integrated programs and direct-to-consumer advances. Employer payroll-integrated programs, like DailyPay's, actually verify earned wages using employer-provided payroll data and resolve transactions through payroll integration with the employer. This approach protects workers from the risks posed by direct-to-consumer advances, such as the ramifications of inaccurate pay estimates by workers and the risks arising from consumer-focused repayment obligations and mechanisms, including debiting consumer accounts and the additional overdraft fees this practice frequently causes.

Employer payroll-integrated programs do not create worker repayment obligations, and they do not rely upon or assess a worker's ability to repay, because these programs assume the risk of the employer's failure to make payroll timely or at all. In contrast, a direct-to-consumer advance is a transaction between the worker and the provider, and it typically requires a provider to monitor a customer's financial condition (often through invasive bank account access, data-mining and/or geo-location tracking practices) and the debiting of consumer accounts for repayment.[5] Without *actual* verification of wages through employer payroll-integrated systems, providers of direct-to-consumer advances foist a variety of different risks upon consumers.

Employer payroll-integrated programs, like DailyPay, have recently proven to be remarkably effective substitutes for predatory payday loans and expensive overdraft programs, freeing workers from a cycle of payday loan debt and overdraft reliance.[6]

[4] Proposal § 1(x); *see also* Proposal § 22(g)(2) (suggesting repayment from the consumer).
[5] *See* Financial Health Network, Earned Wage Access and Direct-to-Consumer Advance Usage Trends 5-6 (June 15, 2021) (distinguishing between verified employer-based programs from direct-to-consumer advance programs), *available at* https://finhealthnetwork.org/research/earned-wage-access-and-direct-to-consumer-advance-usage-trends/.
[6] Aite-Novarica, *Earned Wage Access Use and Outcomes: Findings From a Survey of DailyPay Customers* (Sept. 9, 2021), *available at* https://aite-novarica.com/report/earned-wage-access-use-and-outcomes-findings-survey-dailypay-customers. Aite-Novarica, an independent research and advisory firm specializing in consumer protection and the technology and financial services industries, was commissioned by DailyPay.

The most extensive, third-party data DailyPay has on the matter shows that workers overwhelmingly stop using payday loans and incurring overdraft fees once they enjoy access to a service like DailyPay.

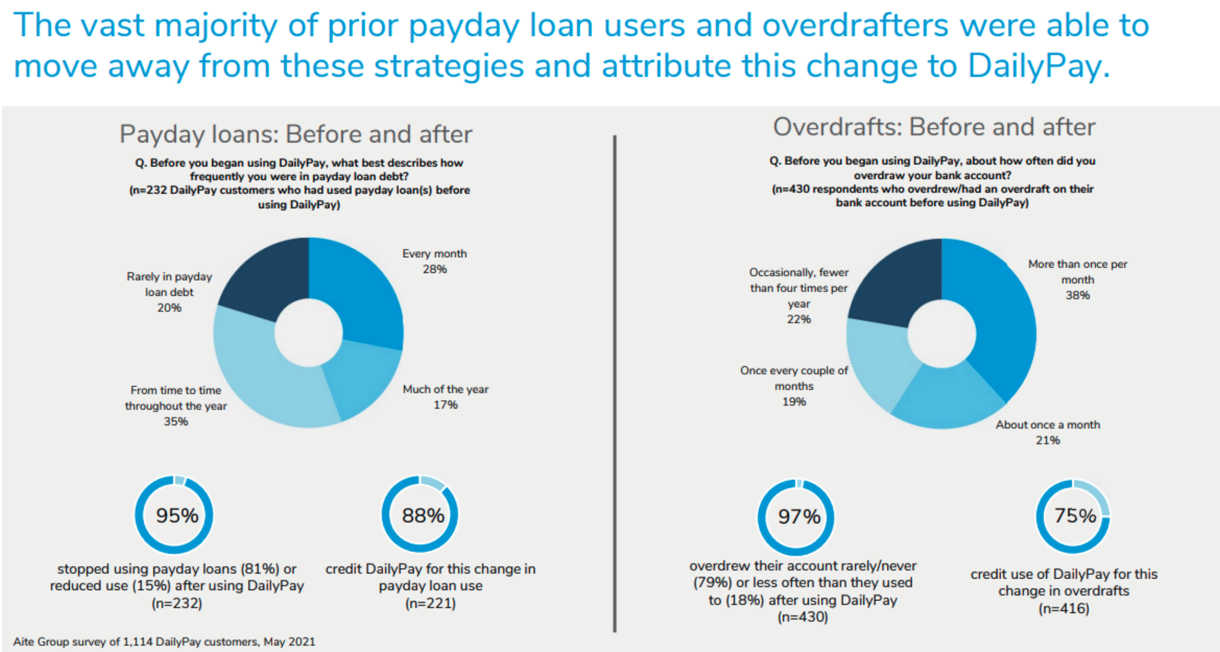

Figure 1: Distribution of prior reliance on payday loans / overdraft fees, and results of access to DailyPay.

As Figure 1 above shows, before using DailyPay, almost 40% of workers reported reliance on overdraft fees as part of their financial management strategies, and 20% reported reliance on payday loans.[7] This data shows that low-income workers are regular users of, and possibly dependent on, payday loans and overdraft programs to make ends meet. The *intensity* of workers' reliance on both payday loans and overdraft programs was astounding. Almost half of those who reported using payday loans also reported being in payday loan debt much of the year or every month, and over half of those who reported using overdraft programs reporting using them monthly or more.

Once they have access to DailyPay, these workers reported a remarkable reduction in payday loan and overdraft program reliance. With DailyPay, almost 4 out of 5 workers reported never or rarely being stuck in a cycle of payday loan debt, and of the remaining 1 out 5 workers, almost all reported *less* reliance on their previously suboptimal financial strategies.

Employer payroll-integrated programs demonstrably create substantial consumer benefits. DailyPay believes the DFPI should recognize their lower-risk and more-beneficial features (versus direct-to-

[7] The incidence of payday loan and overdraft usage in the general population, by contrast, is a small fraction when compared to the subject population. For example, the Pew Charitable Trust found that just 5.5% of the general population has reported using a payday loan in the last 5 years. See Pew Charitable Trust, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, online at: https://www.pewtrusts.org/en/research-and-analysis/reports/2012/07/19/who-borrows-where-they-borrow-and-why

consumer advances) when promulgating rules to regulate the industry and should distinguish the different business models with respect to any compliance, privacy, and consumer protection requirements.

Provisions That Are Potentially Challenging to or Burdensome for Market Participants

Registration Proposal: Notable Items and Specific Challenges

The Proposal, in various places, imposes extensive initial application requirements, as well as substantial ongoing reporting and updating obligations, on providers of wage-based advances. The application requirements are as complicated as (and potentially more detailed than) many traditional license application requirements; yet registration is not a licensing regime. DailyPay believes that these requirements will be burdensome for many existing market participants and may potentially deter new market entrants, thus reducing competition.

Principal Officer Reporting Requirements Are Overly Broad

The Proposal requires all "principal officers" to register in the Nationwide Multistate Licensing System & Registry ("NMLS"), which include "president, chief executive officer, treasurer, chief financial officer, and any other officer with direct responsibility for the conduct of the applicant's activities in [California]."[8] DailyPay is concerned that the catchall phrase "any other officer with direct responsibility for the conduct of the applicant's activities" is overly broad and could impose unwarranted administrative burdens on the providers as they spend time identifying and managing reporting for the correct "principal officers."[9] DailyPay also questions the DFPI's need for such extensive reporting in connection with a registration rather than a license. Due to the ongoing obligation to update information imposed by the Proposal, the inclusion of reporting obligations with respect to unnecessary personnel also increases a provider's ongoing compliance burdens. Over-including personnel in such applications will not be helpful for the DFPI either, because regulatory resources would be wasted wading through immaterial information.

To this end, DailyPay believes the Proposal should identify a narrower and more definitive set of key personnel for purposes of such reporting, at most commensurate with the DFPI's requirements for other regulated entities that are already subject to the DFPI's jurisdiction, such as requiring a Form MU2 from only specified executive officers, control persons, or or ultimate beneficial owners of 10% or more of the applicant.[10] This will not only reduce the confusion among the market participants but also streamline oversight efforts.

[8] Proposal §§ 1(v); 21(a).
[9] Similarly, the requirement of the management chart could cause a company to include more personnel than necessary. Proposal § 21(a)(7).
[10] *See, e.g.*, NMLS California Financing Law License Application 5 (Oct. 15, 2021), *available at* https://mortgage.nationwidelicensingsystem.org/slr/PublishedStateDocuments/CA-DFPI-Financing-Law-Company-New-App-Checklist.pdf.

Ownership Reporting Requirements Are Overly Broad

The Proposal also includes exhaustive ownership reporting requirements. DailyPay questions the need to submit extensive ownership information in connection with a registration, and notes that private investors are often intent on preserving the confidentiality of their investments and other information, such that these reporting requirements might have a chilling effect on industry investment. The required ownership reports also involve an "indirect" ownership concept, which could create a troublesome and potentially boundless list of parties to be disclosed, including limited partners of investors, which providers often do not have access to. These requirements could impose obligations on a provider to obtain and deliver information from persons that the provider cannot control.

DailyPay notes that the proposal presumes "control" from a 10% ownership position. This is a low threshold, especially considering that registration is designed to apply only to providers that are not part of a heavily regulated industry, like banking. Control is often thought of as majority ownership, and even an "active minority" ownership is commonly thought of as 20-50% ownership. Further, there is some ambiguity in the Proposal about how an ownership position would be calculated (e.g., classes, conversion, dilution, etc.). The DFPI should consider narrower ownership reporting requirements that are more appropriate for a registration regime and that are not excessively burdensome.

Non-Subject Products and Services Should Not Be Subject to the Proposal

The Proposal requires a provider's business description to include a description of all products and services provided to California residents (not limited to "subject products"), a schedule of all charges associated with such products and services, and a detailed description of how California residents pay the charges.[11] This information request is much broader than necessary because it extends to products and services that are not subject to the Proposal, and is burdensome for providers offering multiple products and services. DailyPay believes that providers subject to the Proposal should be positioned on the same footing as all other businesses in California with respect to the offering non-subject products and services.

Ongoing Obligations to Update Routine Business Information That Frequently Changes Are Burdensome

One of the more burdensome aspects of the Proposal from an administrative and compliance perspective is the requirement to provide continuous updates of any changes in the information contained in an application for registration. DailyPay notes that the timing of these updates is unclear. Under Section 21(d), an applicant must file an amendment to its application within only 10 days of a change. In contrast, Section 40 provides that all amendments must be filed within 30 days of a change "except as provided in subsection (d) of this section [40]." There is no Section 40(d).

[11] Proposal § 21(a)(8)(A)-(C).

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The Proposal requires various marketing information,[12] including detailed information like website addresses and social media accounts where marketing can be seen, to be updated with the DFPI upon any change of the information in the initial application filing.[13] Similar requirements apply to apps or other user experience interfaces.[14] Marketing and web/app development activities are diverse and constantly changing; and an ongoing obligation to update the DFPI about every single change would be too burdensome and even unworkable for providers who typically have active marketing programs and digital presences.

The Proposal requires "[i]mages documenting the process by which California residents request and repay wage-based advances (as applicable), and any standard notifications provided to the California residents during the request and repayment process," as well as any standard enrollment materials or applications provided to California residents and copies of representative contracts and disclosures.[15] Many on-demand pay providers, like DailyPay, constantly update their user experience to be as seamless and helpful as possible and revise their terms of service to cover new features. Requiring providers to report every minor update or revision to the DFPI within 30 days seems overly burdensome and unnecessary.

Given the frequency of routine business changes (such as changes in marketing channels and user experience interfaces), the ongoing obligation to update this information would create extensive and potentially incessant compliance, monitoring, and notification processes. The DFPI should consider removing these types of information from the obligation to update, or at least providing a materiality threshold for updating such information and time-limiting such updates to an annual or other appropriate periodic basis (as opposed to a rolling basis).

In addition to the core components of an application, which are submitted electronically, an applicant must also separately mail supplemental information to the DFPI as part of an application.[16] Because this supplemental information is considered part of the application, obligations under Section 40 to update the DFPI regarding any changes appear to apply to this supplemental information, and it is unclear whether or why such updated supplemental information must be mailed. The supplemental information contains garden-variety information, much of which exists in native electronic form, and much of which changes frequently. The process of assembling, printing, and mailing this information could be extremely burdensome for registrants. DailyPay recommends the DFPI reconsider this mailing requirement and permit submission of supplemental application material (and any related updates) by NMLS or other electronic means.

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[12] Proposal § 21(a)(8)(D).
[13] Proposal § 40.
[14] Proposal § 22(g)(2).
[15] Proposal § 22(c), (g).
[16] Proposal § 22.

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Clarity Regarding Branch Offices Should Be Provided

DailyPay also notes that "Branch office" is defined as "a location of the applicant other than the applicant's principal place of business…"[17] From this formulation, it appears that any location might be considered a branch, as opposed to only locations where the "subject product" activity is physically conducted with the public. For example, would a back-office call center or a datacenter constitute a branch? Presumably, a branch also would only be a location within California.

Approval of an Application for Registration Should Be Automatic or Governed by Objective Standards

DailyPay notes that the Proposal appears to include a discretionary component with respect to registration approvals.[18] The DFPI should clarify what objective standards or timelines it will use for approval. In light of the limited effect of the registration under Section 11, the DFPI should consider whether approving a registration should be an automatic, more ministerial function. DailyPay believes an automatic approval process will encourage more entities to enter the subject product industries and provide additional datapoints to the DFPI, and the benefits will ultimately inure to the Californians.

Reporting: Notable Items and Specific Challenges

Differences in Provider Business Models Should Be Reflected

The proposed data reporting obligations under the Proposal do not differentiate between different business models in the wage-based advance industry.

For example, the Proposal does not require submission of information about the practice of debiting consumer accounts for repayment or whether users subject to such practices have suffered overdraft fees caused by the wage-based advance provider's conduct. Direct-to-Consumer Advance providers regularly engage in such practices for repayment and frequently cause such outcomes, and some have even found themselves subject to class-action litigation and related settlements. For payroll-integrated earned wage access provider like DailyPay, which does not require any worker repayment, reporting requirements related to repayment should be considered inapplicable, and DailyPay would appreciate the DFPI's development of different approaches to these distinct business models.

Logistical Challenges

Providing a full calendar year report of the Annual Report information for the year preceding the applicant's registration application[19] will be challenging, because under the Proposal applicants cannot

[17] Proposal § 1(b).
[18] Proposal § 21(c) ("An application is approved when the commissioner determines that the application is complete and notifies the applicant…that the application is approved.").
[19] Proposal § 22(a).

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operate during that preceding year without the registration being later sought. Due to this lookback, the Proposal also requires applicants to submit records which an applicant might have previously been unaware of and not maintained, because it was not yet an applicant during that preceding year.

Aggregating Some Data But Not Other Data Appears Arbitrary

The Proposal requires providers to report periodically the number of users who received advances less than six times to be itemized in a given period, but requires the number of users receiving advances six or more times to be aggregated, in each case to be included in both monthly and quarterly reports. DailyPay notes the categories and reporting frequencies seem arbitrary, and asks that the DFPI to clarify its policy goals for imposing these reporting requirements, so that the industry can respond with appropriate types of data to be useful for the DFPI.

The Confidentiality of Submitted Commercial and Personal Information Should Be Assured

While the Proposal is silent on the matter, DailyPay would expect all information provided to the DFPI under the Proposal to be confidential. DailyPay believes that it is imperative to expressly assure the confidentiality of the information that would be collected by the DFPI under the Proposal, as such information will include trade secrets and commercially and personally sensitive information from the market participants.

Conclusion

DailyPay welcomes thoughtful and flexible regulatory proposals. DailyPay thanks the DFPI for the opportunity to comment on the Proposal and looks forward to working with the DFPI regarding future rulemakings.

Sincerely,

[redacted]

Matthew Kopko
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DailyPay