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December 20, 2021

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

Department of Financial Protection and Innovation
Attn: Sandra Sandoval, Legal Assistant
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 (the "Department" or "DFPI") Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law with respect to the proposed rules' treatment of "wage-based advances."

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

Earnin's mission is to build products for a fairer financial system that works for people. People have responded with more than 3 million logins into the Earnin App in 2020, and more than 1.3 million using Earnin's EWA product, Cash Out, to access earned wages. As of September 2021, Earnin has performed more than 125 million transactions and provided access to $10 billion in earnings for its members.

Our Direct-to-Consumer model means that anyone with a paycheck can use our services – regardless of employer. Any employee in the U.S. with a bank account who receives their paycheck via direct deposit can use Earnin, including small businesses, unions, and government employees.

Overall, we support regulations that protect consumers' interests and affirm the basic principle that all EWA providers should play by the same rules. In addition, we are specifically

recommending that the CCFPL rulemaking:

- Avoid regulatory gaps by expanding the scope of the registration requirement to all providers of non-recourse advances;
- Provide regulatory certainty by distinguishing the covered products subject to registration under CFFPL from those requiring a license under the California Finance Lenders Law ("CFL") and California Deferred Deposit Transaction Law ("CDDTL");
- Streamline reporting requirements by clarifying that updates to supplemental information and the organizational chart be required less frequently; and
- Modernize the application process by clarifying that application materials need not be submitted by mail.

These recommendations are aimed at the development of a robust and workable regulatory framework. Earnin supports establishing oversight and providing regulatory certainty to the EWA industry through this rulemaking as the industry develops within California. However, as explained further below, the proposed rules fail to create a consistent regulatory framework and should be modified accordingly. The definition of wage-based advance is at once too narrow and too broad. The proposed rules fail to include income-based providers, though they are functionally similar to wage-based advances from the perspective of California consumers. On the other hand, wage-based advances can include traditional credit products, including installment and payday loans, which are most appropriately regulated under existing statutory authority. Promulgating a rule under the CFFPL is a sensible policy choice only to the extent that it requires registration of entities not otherwise licensed by or registered with the Department. Creating overlapping regulatory requirements or leaving gaps in oversight over the consumer financial services market would weaken rather than strengthen consumer protections for Californians.

The Invitation for Comments includes a list of questions related to the draft rulemaking. Earnin has selected several of these questions and provided brief answers and commentary below.

1. Proposals to streamline the registration process while preserving the DFPI's access to data necessary to detect risks to California consumers and develop risk-based examinations.

You have asked for feedback on how to streamline the registration process. Earnin is recommending that the Department clarify its proposal to (1) streamline the requirement to update supplemental application information and the organizational chart; (2) require reporting at the quarterly rather than monthly level; and (3) permit the electronic submission of application materials.

The current proposal would require registrants to file "any change in the information contained in its application for registration" within thirty days of the change with the commissioner, where possible through NMLS and otherwise directly with the commissioner.[1] Because the Department proposes that the supplemental information outlined in Section 22 be provided as part of the registration application, the current proposal appears to require that registrants mail the

[1] *See* § 40.

Department notice of a broad range of changes within 30 days of the change, including changes, no matter how minor, to the registrant's terms of service and its user interface relating to enrollment and repayment of wage-based advances.

Given the relative frequency with which registrants typically make updates to their website and iterate on the design of the product, such reporting obligations are likely to be triggered frequently. Frequent reporting obligations are unlikely to be helpful for the Department, are burdensome to registrants, and discourage iteration and improvement of disclosures and other consumer-facing communications. Modifying the notice provision as it relates to supplemental information would not materially impact the Department's access to data needed to detect changes to the most important elements of covered products. The Department would still be notified of important changes, for example, those related to the types of products provided or fees and charges. Such changes would be required to be filed through NMLS as an update to the description of the business required in Section 21(8).

Similarly, the requirement to update all application information includes the organizational chart, which could be overly burdensome to registrants.[2] Because the organizational chart requires a complete listing of all direct owners, the notice requirement would require companies to file a new chart in NMLS each time, for example, an employee exercised a stock option, a common form of compensation for providers of wage-based advances. The Department should also clarify that the organizational chart need not display the owners of publicly traded companies. Ownership in publicly traded companies frequently changes, is not subject to registrant control, and, at material levels, is publicly disclosed in filings to the U.S. Securities Exchange Commission. The Department would not benefit from being provided notice of such immaterial changes to the registrant's ownership.

Accordingly, the Department should clarify that changes to the supplemental information required by Section 22 need not be updated within thirty days of any change. Rather, any changes to the supplemental information required by Section 22 should (1) be subject to a "materiality" threshold, and (2) be required no more frequently than quarterly. Likewise, changes to the organizational chart should be required only upon a change in control or with the annual report filing.

Second, the Department should streamline the annual reporting requirement to require aggregate statistics to be reported quarterly rather than monthly. Reporting monthly statistics is overly burdensome to registrants and unlikely to be useful for the Department. The annual report requirement for CFL licensees requires reporting on annual statistics, rather than monthly or quarterly. The annual reports contemplated under the proposed rules are already unusually detailed, requiring individual borrower level information not required from CFL licensees. Implementing the requisite data systems to support such reporting can be costly for registrants and there is no compelling reason in support of increasing the reporting burden requirement for CFFPL registrants. Earnin, therefore, recommends that the Department clarify that information required by Section 51(e)(3) must be provided at a quarterly level.

Lastly, the proposal would require the submission of a large amount of registration materials by mail, such as detailed statistical information relating to the wage-based advances provided by the

[2] *See* § 20(a)(5).

registrant, images documenting the standard enrollment or application process, copies of representative contracts and disclosures, and images documenting the process by which California residents request and repay wage-based advances and related notifications.[3] Earnin is recommending that the Department accept such submissions electronically instead of by mail. Like most EWA providers, Earnin operates and interacts with California residents largely through the internet. Especially during the COVID-19 pandemic and related state of emergency in California, Earnin's workforce has been working remotely. Further, Earnin has been successfully providing reports under its MOU with the Department via email. Requiring submission of materials (and any updates to those materials) by mail is inefficient, raising costs both to registrants for submitting application materials and to the Department in processing, reviewing, and analyzing such materials. Accordingly, the Department should clarify the rules to allow electronic submission of all materials from registrants and applicants.

4. Proposals for annual reporting requirements that were not included in the draft rules that would help the DFPI better understand the risks and benefits of the covered products for California consumers.

Earnin believes that additional reporting requirements could help the Department better understand the risks and benefits of the advances for California consumers and help ensure that providers are appropriately tracking data for annual reporting requirements. Specifically, Earnin recommends that the Department require registrants annually report, to the extent applicable, the following statistics:

(1) The total number and dollar amount of transactions in which an advance was not repaid in full or in part to a registrant.
(2) The total number and dollar amount of transactions in which an advance was partially repaid to a registrant.
(3) The total dollar amount of unpaid advances attributable to the transactions described in (1) and (2) above.
(4) The total number and dollar amount of transactions in which an advance was repaid in full or in part after the original, scheduled repayment date.

5. Proposals to clarify whether and when the registration requirements apply to Department licensees and licensees and registrants of other state agencies. For example, if a DFPI licensee originates bona fide retail installment contracts (RIC) that meet the definition of education financing, should the licensee be required to register in connection with its RIC origination practices?

Earnin strongly recommends that the Department plug the regulatory gaps and clarify the registration requirements in the proposed definitions related to wage-based advances. The Department can do so by modifying the definition of wage-based advances to capture a broader range of advance providers under the CCFPL's registration requirement and exclude those subject to the CFL or CDDTL.

[3] *See* § 22.

As drafted, the proposed definition of covered entities contemplates an employment or contractor arrangement where the advance is provided following a determination of compensation for work that has been earned but not yet been paid. The drafted definitions appear to not cover providers that base their advances on other methods of determination other than earned wages. For example, providers of income-based advances that issue advances based on any source of income, including sources other than wages, would appear not to be required to register under the draft rules. The Department should not discriminate between providers that issue advances based on earned wages and providers that issue advances on other bases. Rather than focusing on a precedent employment relationship as determinative of the registration requirement, the Department should require registration of any provider of an advance, other than those required to be licensed under the CFL or CDDTL. Specifically, the Department should modify its definitions of "obligor" and "wage-based advances" to clarify in its rulemaking that any provider of non-recourse advances to a California consumer is subject to the CCFPL registration requirement as a provider of an advance pay product (i.e. whether or not the advance is based on a determination that wages have been earned).

To that end, and as previously communicated to the Department, it is imperative that the CCFPL rulemaking explicitly define and distinguish the unique features of advance pay products–no mandatory fees and non-recourse–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 31 days[4]. Contrastingly, advance pay 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, advance pay 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. Accordingly, we strongly recommend that the CCFPL rulemaking specifically differentiates between advance products and payday loans based on the aforementioned distinctions.

Similarly, the Department should clarify that non-recourse advances that are not subject to a finance charge are covered products under the CCFPL, but not the CFL. The CFL does not define "loan" nor has any court or administrative body squarely addressed the term in the context of the CFL. The structure of the statute, however, assumes that a lender will charge interest and implement a structured repayment schedule.[5] The Department itself has also noted the importance of interest and fees in this analysis. In one Commissioner's Opinion, the Department suggested that interest-free loans are not subject to the CFL.[6] The Department can codify this interpretation of the CFL while ensuring that, through the CCFPL registration requirement, the Department has the ability and information regarding non-recourse advances to protect California residents from financial abuses in the marketplace for financial products and services.

[4] Cal. Financial Code Section § 23035.
[5] *See, e.g.,* Cal. Fin. Code § 22307.
[6] Commissioner's Opinion, 1995 Cal. Sec. LEXIS 2 (Sept. 11, 1995).

Earnin applauds the Department's efforts to provide oversight over the Earned Wage Access industry. Earnin recommends that the Department clarify its proposal to define and distinguish the covered products subject to registration under CFFPL, from those that are subject to licensure under the CFL or CDDTL. By tying the registration requirement to advances that are wage-based, the Department improperly exempts other forms of advances while nominally roping into the CFFPL traditional creditors and payday lenders that are subject to the requirements of the CFL and CDDTL. The Department should take this rulemaking as an opportunity to clarify that each of these statutory regimes is exclusive of the others and that registration or licensure under one precludes the need to apply under the others, and avoid creating regulatory gaps or confusion. These clarifications would facilitate the development of a coherent regulatory structure that creates a level playing field and adequate oversight for providers of advances.

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

Very truly yours,

DocuSigned by:

[redacted]

Sangeetha Raghunathan
General Counsel and Chief Compliance Officer

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