

December 20, 2021

Submitted by E-mail to:
regulations@dfpi.ca.gov
cc: [REDACTED]@dfpi.ca.gov

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

**RE: INVITATION FOR COMMENTS ON PROPOSED RULEMAKING UNDER
THE CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW (PRO 01-21)**

Dear Commissioner:

Payactiv, Inc. ("Payactiv") appreciates the opportunity to provide feedback to the Department of Financial Protection and Innovation, Legal Division ("DFPI") on its proposed rulemaking under the California Consumer Financial Protection Law ("CCFPL") (PRO-01-21) ("Proposal").

A decade ago, we were experienced FinTech professionals, deeply concerned by the absence of responsible alternatives to payday loans, overdrafts, and various other subprime products. We decided we must do something.

We researched available solutions in the market and discovered that fixed wage timing caused by legacy batch-based payroll processing systems was not only inefficient, but punitive for workers who were, in effect, providing interest free loans to their employers. We learned that the lower one's wage, the more necessary it became to provide timely access to that person's earned unpaid wages. The practice of holding wages for a fixed duration, in essence forced savings, was in fact pushing lower income Americans to access predatory products. These individuals needed to borrow to meet basic livelihood needs and by doing so were getting themselves deeper in debt. So, we invented Earned Wage Access ("EWA") and created Payactiv, a public benefit corporation and Certified B Corp, to establish a product where employees could access *their own money* at little or no cost.

Payactiv is not just another company. We are committed to solving the challenges associated with predatory products by making employers a part of the solution. We made EWA low cost, without interest or debt, and now even offer *zero fee* EWA options. We never provide access to wages before they are earned. Accessible amounts are configurable with guardrails. We self-impose fee caps. We agree never to chase employees or employers in the event of a shortfall on payday. We added beneficial features like bill pay, savings, budgeting, and smart AI based triggers to review earnings and spending. In a series of iterative and responsible innovations, we created a novel transaction type and an entirely new FinTech industry.

Now, after years of making a positive difference for millions of people, we are proud of what we have achieved. We also deeply value the DFPI's work to protect consumers. We at Payactiv live that purpose every moment of our lives. As a mission driven FinTech innovator, we are inspired to responsibly empower consumers, and believe we are exactly what the DFPI wants in a consumer financial services company.

To that end, Payactiv welcomes dialogue regarding responsible regulation of the industry, including the DFPI's invitation to comment on the Proposal.

Among other things, the Proposal would require EWA providers to apply for registration with the DFPI and submit detailed annual reports. Specifically, the Regulation's proposed application requirements would allow the DFPI to better understand and oversee providers' product configuration, user interface and enrollment procedures, fee schedules, and settlement or repayment processes. Likewise, the proposed annual reporting mechanism, which appears to build off Memorandums of Understanding ("MOUs") that the DFPI entered into earlier this year with a number of EWA providers, including Payactiv, would provide the DFPI with key usage and fee metrics, including: (i) the number of consumers utilizing a providers' EWA services, (ii) the total dollar amount and number of transactions processed, (iii) the length of time between the transaction and the date of settlement or repayment, (iv) the number of transactions for which settlement or repayment fails in full or in part, and (v) detailed information regarding fees, charges, and income received.

We view the Proposal as a positive development for California consumers and a measured approach at balancing consumer protection and DFPI oversight without stifling innovation. Importantly, the Proposal appears to take into consideration the fact that dozens of companies now offer EWA and pay-advance programs, each with unique business models, wage verification mechanisms, fee structures, and settlement processes.

In sum, Payactiv supports the Proposal because it stands to benefit California workers, and provides a responsible framework for allowing them to access their earned, unpaid wages without having to resort to predatory, high-cost liquidity products that can exacerbate—as opposed to alleviate—their financial stress. In the accompanying attachment, Payactiv respectfully submits: **(i)** background information regarding EWA, **(ii)** a summary of the substantial benefits EWA provides to our shared constituents, and **(iii)** substantive comments regarding the Regulation.

We would be happy to discuss any of these issues with DFPI at its convenience.

Sincerely,

Payactiv Co-founders

Safwan Shah
Sohail Aslam
Ijaz Anwar

EXHIBIT A

I. Background on Earned Wage Access.

A. The Problem: Workers Have Historically Had Nowhere to Turn for Affordable Liquidity Without Negative Externalities.

The US workforce continues to suffer from a lack of both savings and access to affordable liquidity, with over 100 million hard working Americans not having even \$400 in savings.¹ Dominant solutions to this problem—payday loans, installment, loans, title loans, and bank overdrafts—are expensive and may worsen, rather than improve, consumers' financial situation. Specifically, U.S. consumers pay more than \$9 billion in fees annually for payday loans², with an average payday loan of \$100 costing \$15 in fees and interest for a two-week period.³ Similarly, consumers spend billions in fees per year for overdraft services, with a median overdraft amount of \$50 and an average fee of \$35.⁴ Due to limited alternatives, these products have become an accepted part of the financial lives of millions of Americans.

Additionally, 83% of employers cite employees' personal financial issues as having an adverse impact on individual and company performance.⁵ It is estimated that employees lose an average of 20 hours a month dealing with personal financial issues.⁶ Not only does this impact productivity, but it creates higher rates of stress-related illnesses, translating into higher health care costs and even more time away from work. Additionally, according to a Princeton University study, a person preoccupied with money problems exhibits a drop in cognitive function similar to a 13-point dip in IQ, or the loss of an entire night's sleep.⁷ Financial stress puts workers at a significant disadvantage.

B. A Consumer-Friendly, Non-Credit Solution: EWA

Payactiv set out to solve this pervasive problem of workers—and primarily low-income ones—being exploited and monetized due to the timing of their paychecks through an award-winning, holistic financial wellness platform that gives employees on-demand access to earned but unpaid wages. Payactiv offers employees whose employers have partnered with Payactiv both *free* and \$1 EWA options.⁸ For those consumers who elect to use Payactiv's \$1 fee-based program, *EWA is 97% less expensive than the average overdraft fee, and nearly 1/7 the cost of the average payday loan.*⁹

¹ Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2017* (May 2018), available at <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>.

² The Pew Charitable Trusts, *Payday Loan Facts and the CFPB's Impact* (May 2017), available at https://www.pewtrusts.org/-/media/assets/2016/06/payday_loan_facts_and_the_cfpbs_impact.pdf.

³ Financial Health Network, *Earned Wage Access and Direct-to-Consumer Advance Usage Trends* (June 15, 2021), available at <https://finhealthnetwork.org/research/earned-wage-access-and-direct-to-consumer-advance-usage-trends/>, hereinafter "Financial Health Network Report."

⁴ *Id.*

As the Consumer Financial Protection Bureau (“CFPB”) noted in its Approval Order to Payactiv¹⁰, Payactiv provides an “innovative mechanism for allowing consumers to bridge the gap between paychecks” and EWA has the “potential to provide consumers with a lower-cost alternative to traditional payday loans, other high-cost credit products, and overdraft fees” and is available to “unbanked or underbanked consumers or consumers with poor, limited, or no credit history.” The CFPB concluded that the described Payactiv EWA transactions do not involve an extension of credit under the Truth in Lending Act because EWA does not involve the creation of a debt. Specifically, “no such liability of the employee arises in the context of the Payactiv EWA Program” because “the accrued cash value of an employee’s earned but unpaid wages is the employee’s own money,” “there is no independent obligation to repay” a Payactiv EWA transaction, the amount Payactiv is entitled to recover does not increase with the passage time, and Payactiv is either free or charges a nominal \$1 non-recurring fee, capped at \$5 per two week pay period.¹¹

In its Memorandum of Understanding with Payactiv, the DFPI likewise acknowledged that Payactiv’s EWA program lacks credit features, noting:

There are no recurring, automatic, hidden or late charges, no interest charges, and no installment payment plans or credit features. The Company does not report transactions to credit bureaus nor does it engage in debt collection. The Company uses factoring transactions to purchase future receivables from consumers, and these transactions are non-recourse to the consumer.¹²

⁵ Mary Mohny, *Financial Literacy Programs Improve Productivity, Performance*, SHRM, (April 12, 2018), at <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/pages/financial-literacy-programs-improve-productivity-performance.aspx>.

⁶ E. Thomas Garman, Flora Williams, and Robert Weisman, *Financial Stress and Workplace Performance: Developing Employer–Credit Union Partnerships* (Filene Research Institute, 2002), available at <https://filene.org/learn-something/reports/financial-stress-and-workplace-performance-developing-employer-credit-union>.

⁷ Morgan Kelly, *Poor Concentration: Poverty Reduces Brainpower Needed for Navigating Other Areas of Life*, Princeton University, (August 29, 2013), available at <https://www.princeton.edu/news/2013/08/29/poor-concentration-poverty-reduces-brainpower-needed-navigating-other-areas-life>.

⁸ Users also have an option to select real time delivery options for up to \$1.99.

⁹ Todd Baker and 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 (May 2018), available at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/88_final.pdf.

¹⁰ CFPB, *Compliance Assistance Sandbox Approval to Payactiv, Inc.* (Dec. 30, 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval_order_2020-12.pdf, hereinafter, “Approval Order.”

¹¹ *Id.*

¹² California Dept. of Fin Prot. and Innovation, *Memorandum of Understanding* (Jan. 14, 2021), available at <https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/01/Admin.-Action-Payactiv-Inc.-Memorandum-of-Understanding.pdf>. Payactiv is the only EWA provider to agree to a fee cap in its MOU. *Id.* at 3. Like with the CFPB, Payactiv shares quarterly data with DFPI on a confidential basis.

The Proposal appears to follow this reasoning.

II. Studies Show EWA Helps both Employees and Employers.

Studies regarding EWA confirm it: (1) helps employees control their personal finances and manage unexpected expenses, (2) is a powerful, and viable alternative to the high-cost and often predatory credit products that our lowest-income workers have for years had no choice but to use, and (3) helps employers recruit, retain, and engage their employees, which in turn keeps employees gainfully employed.

The Financial Health Network's April 2021 report¹³ on EWA found that consumers in financial distress typically utilize various options, including payday and title loans, and pawn loans. As mentioned above, payday loans typically cost \$15 per \$100 borrowed for a two-week period, title loans typically cost \$25 per \$100 borrowed for a one-month period (but can be \$500 or more with rollovers¹⁴), and pawn loans typically have an interest rate of between 2% and 25% per month. In contrast, according to the same study, the average amount a consumer paid per EWA transaction was only \$2.59-\$6.27 – significantly less than the alternatives.¹⁵ This conclusion is backed up by the fact that the average amount a consumer pays per \$100 of EWA accessed with Payactiv is less than the average ATM fee.¹⁶ And almost a quarter of Payactiv's users pay no program fee at all by using Payactiv's Access Freedom program, which provides free EWA to users who have direct deposit on a Payactiv Visa Card.

A 2018 Harvard Kennedy School study concluded that Payactiv's EWA product is "more efficient than market alternatives and provide[s] clear and compelling benefits to employees," is "much less expensive than the alternatives available for most low-income employees in the market," and "could be used by a much wider range of employees – many of whom are credit-damaged or credit-invisible – who could not access traditional financial products in the market."¹⁷ The study found that the Payactiv financial wellness benefit was one seventh the cost of a bank overdraft or payday loan, and produced a 19% lower turnover rate among active users.¹⁸ Indeed, according to a recent survey of 5,000 employees across 209 companies, 81% of users said they were more likely to stay in their job with their current employer because of their ability to use Payactiv's EWA program.¹⁹

¹³ Financial Health Network Report at 3, *supra* n. 3.

¹⁴ The Pew Charitable Trusts, *Payday Loan Facts and the CFPB's Impact* (May 2017), available at https://www.pewtrusts.org/-/media/assets/2016/06/payday_loan_facts_and_the_cfpbs_impact.pdf.

¹⁵ See Financial Health Network Report at 11.

¹⁶ See Liz Smith, *Bank ATM Fees: How Much Are They and How Can You Avoid Them?* (Sept. 7, 2021), available at <https://smartasset.com/checking-account/atm-bank-fees> (The average ATM fee is \$2.97 and the average out-of-network ATM fee is \$4.58).

¹⁷ Baker and 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*, *supra* n. 9 at 3.

¹⁸ *Id.* at 11.

¹⁹ Payactiv, "Press Release: 81% Users Will Stay with Their Employer Because of the PayActiv Benefit," (Oct. 2, 2019) at <https://www.payactiv.com/press/81-users-will-stay-with-their-employer-because-of-the-payactiv-benefit/>.

Recent research by the AITE Group confirms that EWA allows users to reduce or *completely end* their use of costly payday loans, and causes them to stop incurring overdraft fees and paying bills late.²⁰ The research also found that EWA users report relying less on friends and family, worrying less about money, and are better able to plan and budget.²¹ In short, EWA solves *the same liquidity problem* as a predatory payday loan or overdraft, except it does so at either little or no cost, with no recourse, no credit impact, no hassle, and no shame. As the testimonials on EWA show, EWA's benefits are real, and impactful.

Despite this research—which demonstrates EWA's unequivocal benefit to financial health—a small number of critics have argued that "the jury is still out," and "it is not clear that there is a problem, or that it would be a good thing to disrupt the biweekly paycheck."²² According to them, "the traditional, full biweekly paycheck works well as a [forced] savings device for the large, once-a month bills like rent, credit cards and utilities"²³ and "more frequent pay – especially for the low-wage workers who frequently use payday advances – may only make savings and financial management more difficult."²⁴

This analysis is unsupported and logically backwards. As the millions of hard-working employees who utilize Payactiv and other EWA programs can attest, EWA *helps make it easier – not harder – for them to meet expenses and pay bills*. This sentiment was captured perfectly in August 2021, when several loyal Payactiv users were interviewed about EWA's impact on their daily lives. As one user explained, EWA helped him pay for an \$80 flat tire repair when he had only \$40 in the bank. Another described how she used EWA to fix a leaky sink. In short, the difficulty in meeting expenses cannot result from *the ability to access one's already earned wages—their own money—prior to payday, especially when that access is free or \$1*. The position that consumers cannot be trusted to receive *their own money* more than once or twice a month is not only patronizing, paternalistic, and out of touch with reality, it is at cross purposes with protecting and enabling the American worker. It is also far beyond the Department's purview.²⁵

²⁰ Leslie Parrish, AITE Group; *DailyPay Use and Impacts: A Summary of Consumer Survey Findings* (July 2021).

²¹ *Id.*

²² National Consumer Law Center, *CFPB Urged to Reverse Earned Wage Actions that Threaten to Create Dangerous Fintech Payday Loan Loopholes*, (Oct. 12, 2021), available at <https://www.nclc.org/media-center/cfpb-urged-to-reverse-earned-wage-actions-that-threaten-to-create-dangerous-fintech-payday-loan-loopholes.html>.

²³ PRO 02-21, *Proposed Rulemaking under the California Consumer Financial Protection Law: Earned Wage Access* (Mar. 15, 2021), available at https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/CRL_CA_DFPI_EWA_Comments.pdf.

²⁴ *Id.* at 12. And, if true, we would expect these same critics to oppose any attempt by employers to pay workers faster or more frequently.

²⁵ These same skeptics also attempt to conflate EWA with credit, claiming that "lack of recourse does not mean a transaction cannot be a loan," analogizing to "nonrecourse loans where the only remedy is to seize the pledged collateral." See n. 23 at 19. Of course, neither Payactiv, nor any other EWA provider to our knowledge, has any such right to seize collateral. To the extent these individuals argue that providers like Payactiv have recourse through the ability to re-present a payroll deduction on successive paydays, *Payactiv's terms expressly allow a user to revoke his or her authorization for representmets at any time without a penalty or fee*. Finally, while they may have a point that "**un**earned wages are not a bank account

III. Substantive Comments on the Regulation

As set forth above, Payactiv supports the Proposal as a whole, but does want to highlight a few technical issues for DFPI's consideration:

Section 1(c) Charges. DFPI should consider making clear the term "charges" excludes fees imposed by providers of wage-based advance products that are unrelated to the wage-based advance itself. For example, Payactiv has other products and services unrelated to EWA, including a pre-paid debit card. Although that card has nominal fees, reporting these fees—which include out-of-network ATM fees—would likely corrupt the data and lead to confusion. DFPI should expressly exclude fees for those other, unrelated products.

Section 1(x) Wage-based advance. Payactiv urges DFPI to consider a term other than "wage-based advance." Payactiv is concerned the term could be confused with other, unrelated products.

Section 12. Representations Concerning Registration. DFPI should confirm that this Section 12 would not prohibit a registrant from representing to the public that it has registered with DFPI pursuant to the rule and that DFPI has approved its registration. Payactiv agrees that registrants should not represent they are licensed.

Section 40. Notice of Changes. This provision would require notification to DFPI of any "changes" in a registrant's application. DFPI should narrow what it deems to be a change material enough to warrant notice. For example, Payactiv frequently iterates its mobile app and website. This sort of information must be included in an application, but the obligation to notify DFPI upon each such change would be burdensome and not necessarily helpful to DFPI. Payactiv requests that "changes" be limited to substantial material changes such as ownership and senior leadership changes, and product pricing changes.

Section 51. Annual Reporting. DFPI should make clear that it deems any data provided by registrants to be included in the exemption from the California Public Records Act ("CPRA"). The CPRA excludes from public disclosure: "Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions...."²⁶ DFPI should make clear it deems registrants to be "financial institutions" for purpose of this exception. DFPI should also deem annual reporting data subject to the CPRA's exemption for: "Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency" that regulates financial institutions.²⁷ The EWA marketplace is highly competitive. Payactiv has worked hard and has invested substantial resources in developing its EWA program and does not want its business information accessible to competitors.

that employees have a right to access," Payactiv (and most other EWA providers to our knowledge) do not provide access to **unearned** wages. *Id.* at 4.

²⁶ Cal. Gov't Code § 6254(d)(1).

²⁷ Cal. Gov't Code § 6254(d)(2).

Use of the term "resident." Payactiv urges DFPI to consider not hinging various provisions in the Proposal off of the term "resident."²⁸ Payactiv and other EWA providers provide their services to workers, as defined in the Proposal. In a few instances, however, the Proposal would apply to residents, not workers. While Payactiv knows the state in which an employee works, it does not always know that employee's current state of residence.²⁹ To require Payactiv to obtain residence data would involve significant expense and impose undue burden on users. Payactiv also works hard to minimize the amount of data it takes in and stores. Payactiv suggests DFPI instead adjust the rule to apply to workers only and not residents, for the portions of the Proposal that apply to wage-based advances. This would allow Payactiv to avoid the expense and risk of taking in more consumer data.

IV. Conclusion.

Payactiv took an innovative market-based approach and introduced a better and remarkably less expensive alternative to payday loans, putting billions of dollars into workers hands before they would have otherwise been paid by their employer. Even the National Consumer Law Center ("NCLC"), one of the critics mentioned above, last year released proposed best practices for EWA companies that largely align with the structure of Payactiv's program.³⁰ Accordingly, Payactiv is proud to help solve a pervasive problem facing millions of Californians, and proud to do so responsibly, with fee caps, no debt, no impact credit scores, and no stigma associated with other traditional liquidity options. We are grateful for the Department's attention to this important innovation, its engagement with Payactiv and other EWA providers, and its thoughtful approach to regulation of the industry.

²⁸ See, e.g., Sections 50(a) (fees determined based on revenue derived from California residents); section 50(f) (requiring data on income derived from California residents).

²⁹ For example, an employee may work in Reno, Nevada and live across the border in Truckee, California (or vice versa).

³⁰ NCLC's proposed guardrails for EWA programs with certain characteristics: (i) the fee is minimal, such as \$5/month, (ii) the service is employer-based and accesses actual payroll records. Direct-to consumer models should not be exempt, (iii) the advance is repaid from the employer, not the worker's bank account; and (iv) access is limited to 50% of net unpaid income, after deductions and garnishments. See National Consumer Law Center, *Early Wage Access: A Good Opinion for Workers or a Fintech Payday Loan?*, at 2 (March 2020), available at https://www.nclc.org/images/pdf/banking_and_payment_systems/pb-early-wage-access.pdf. This is quite similar to the Payactiv EWA program described in the Approval Order. See Approval Order.