Innovative Payments Association
110 Chestnut Ridge Rd, Suite 111
Montvale, NJ 07645
btate@ipa.org

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Submitted via E-Mail at: regulations@dfpi.ca.gov;
Peggy.Fairman@dfpi.ca.gov

Department of Financial Protection and Innovation
Attn: Araceli Dyson
2101 Arena Boulevard
Sacramento, California 85834

Re: Notice of Proposed Rulemaking
[PRO 01-21]

To Whom it May Concern:

This letter is submitted to the California Department of Financial Protection and Innovation (the "**DFPI**") on behalf of the Innovative Payments Association ("**IPA**"),[1] in response to the Notice of Proposed Rulemaking issued by the DFPI in March 2023 (the "**Proposed Rule**").[2] In relevant part, the Proposed Rule would require providers of earned wage advance ("**EWA**")[3] products in California to register with the DFPI and provide certain records to the DFPI to facilitate its oversight of registrants and to detect risks to California consumers.

IPA counts a number of EWA providers among our members and we appreciate the opportunity to provide comments on the Proposed Rule and look forward to working with the DFPI to ensure regulation of this industry appropriately balances consumer protection and innovation. While our members are generally not opposed to the Proposed Rule's registration requirement, we are concerned that while the Proposed Rule includes some acknowledgment of the different models and structures EWA services take in the marketplace, it fails to differentiate between these models in concluding that all EWA disbursements are *per se* "loans" for purposes of the California Financing Law ("**CFL**").[4]

For the reasons discussed below, we do not believe it is appropriate to paint all EWA services with such a broad brush. In particular, we note that some EWA models do not contain any features or

[1] The IPA is a trade organization that serves as the leading voice of the electronic payments sector, including prepaid products, mobile wallets, and person-to-person (P2P) technology for consumers, businesses and governments at all levels. The IPA's goal is to encourage efficient use of electronic payments, cultivate financial inclusion through educating and empowering consumers, represent the industry before legislative and regulatory bodies, and provide thought leadership. The comments made in this letter do not necessarily represent the position of all members of the IPA.

[2] https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-TEXT.pdf?emrc=cf5bce.

[3] While they differ between themselves in structure and format, EWA services generally provide consumers with early access to earned, but unpaid wages. Under the Proposed Rule, a "wage-based advance" is defined as funds 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 disbursement, been paid to the worker for work performed for or on behalf of an obligor or obligors.

[4] Cal. Fin. Code §§ 22000 et seq.

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functionality that resemble "credit" or the establishment of a lending relationship between the employee and the EWA provider. We urge the DFPI to re-examine this aspect of its Proposed Rule and clarify that, based on the features and functionality of some EWA models, not all EWA models are *per se* covered by the CFL. We urge the DFPI to adopt a separate registration requirement for those EWA models that do not resemble credit and to expressly recognize that disbursements under such models are not "loans" and should not be subject to CFL.

Finally, we note that IPA would be happy to meet with DFPI directly to discuss these important services and our comments to the Proposed Rule in more detail.

Employer-Based EWA Models differ in important ways from Direct-to-Consumer Models and should not be treated as loans for purposes of the CFL

The Proposed Rule broadly states that all EWA disbursements uniformly constitute "loans" subject to the CFL.[5] The Proposed Rule suggests that because EWA disbursements are "loans" under the CFL, providers are generally required to obtain a license under the CFL unless they meet the exceptions to licensing requirement provided under the Proposed Rule. Specifically, the Proposed Rule would require providers of EWA services to obtain a license under the CFL unless: (i) the provider registers with the DFPI and (ii) where the fees assessed to the recipient in connection with the EWA disbursement do not exceed those permitted by the CFL. While the Proposed Rule does differentiate between employer-based and direct-to-consumer EWA models in some respects (e.g., different reporting requirements apply to what the Proposed Rule refers to as "obligor based" and "non-obligor based" wage advances), it otherwise treats the two models as the same for purposes of characterizing the disbursements under either model as *per se* "loans."

Our members do not believe it is appropriate to treat all EWA services in the marketplace as loans that would potentially be subject to the CFL. Specifically, we believe it would be appropriate for the DFPI to keep the wide variation in EWA models in mind when making regulatory policy and when making policy statements (e.g. all EWA disbursements are loans) and decisions regarding this rapidly evolving marketplace.[6] It is essential for the DFPI to recognize that EWA is a relatively new product and a one-size-fits-all solution may not be appropriate. Fundamentally, we think it is critical for the DFPI to acknowledge that not all EWA transactions are loans.

Employer-based models rely on integration between the EWA provider, the employer, and the employer's payroll processor. Direct-to-consumer models are offered directly to end-users by the EWA provider, sometimes with the assistance of a third party who verifies the end-user's income. As such, where

[5] *See* Statement of Reasons available at https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-NOPA.pdf?emrc=642b02d52d4f7 (stating that any advance of funds to be repaid from a consumer's future earned or unearned pay is a loan subject to CFL).

[6] Such a determination would be consistent with DFPI's advisory opinion issued last year with respect to FlexWage, in which DFPI found that an employer based EWA product was not subject to the CFL. *See* https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf. It is also consistent with opinions of other state agencies, such as in Arizona where in 2022, the Attorney General found that a fully non-recourse EWA disbursement did not qualify as a "loan" for purposes of Arizona law. *See* https://www.azag.gov/opinions/i22-005-r22-011.

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employer-based EWA models provide employees access to their actual accrued but unpaid wages based on data directly from the employer and its payroll processor, some direct-to-consumer models provide the same data based on payroll data and their pre-existing financial services relationship with the employee. Repayment for a disbursement under an employer-based model generally requires payment from the employer to the EWA provider directly as part of a payroll deduction.

For these reasons, while the majority of the IPA's members who are EWA providers operate in the employer-based space, we note that some direct-to-consumer models do not resemble credit and have important and beneficial uses in the marketplace as well, particularly for independent contractors, consultants, persons between jobs who still may receive a paycheck, and other similarly situated people in the workforce today, and thus we believe that direct-to-consumer offerings, along with the appropriate regulatory guardrails which focus on the individual attributes of the particular model, and not its status as employer-based or direct-to-consumer, should continue to be a viable and valuable option for many Americans who work independently. However, our members urge DFPI to make sure to account for the differences in the various models being utilized today when it moves into the next phase of its rulemaking. Accordingly, it is critical that DFPI clarify that disbursements under employer-based models do not constitute "loans" for purposes of the CFL.[7]

With respect to how the Proposed Rule should treat direct-to-consumer EWA models more broadly, we urge the DFPI to consider additional steps to level the playing field between employer-based and direct-to-consumer models and increase marketplace competition and benefits to consumers. While the structure of how each model differs in terms of how they reach the end-user, each model has its own unique benefits and target market. For example, employer-based models generally focus on larger employers and direct-to-consumer models offer options for workers whose employers do not have a EWA arrangement. Indirect competition between the various EWA models will offer much broader coverage to expand access and will facilitate greater competition, expand consumer choice, and lower cost delivery of this important benefit.

To this end, we believe that several elements of the Consumer Financial Protection Bureau's ("**CFPB**") 2020 advisory opinion pertaining to EWA products (the "**Advisory Opinion**" described in more detail below) can serve as a useful framework for additional requirements with respect to direct-to-consumer EWA products, including the following:

- Ensuring that direct-to-consumer models are non-recourse and do not engage in debt collection activities in relation to a EWA transaction.
- Ensuring that consumers under a direct-to-consumer EWA model have a straightforward option to access their funds without a fee, voluntary or otherwise.
- Ensuring that direct-to-consumer EWA providers give consumers clear and conspicuous disclosure of all the terms and conditions of the EWA service including that the provider has no legal recourse against the employee and will not engage in debt collection activities.

[7] In addition to the features described above, we note that some employer-based and direct-to-consumer EWA models contain a number of other features and characteristics that are inconsistent with a loan, including the following: (i) advances are non-recourse in the event of a failed or partially failed payroll deduction for repayment of the advance and (ii) the individual credit risk of the employee is not assessed.

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The CFPB has recognized that disbursements under employer-based models should not be viewed as "credit" as defined in either the Truth in Lending Act or Regulation Z

Important precedence for differentiating between employer and direct-to-consumer EWA models can be found in the treatment of EWA services by the CFPB, particularly in the Advisory Opinion cited above. CFPB's 2020 Advisory Opinion details certain features that EWA services may adopt to avoid their products being deemed to offer "credit" under the Truth in Lending Act ("**TILA**") and Regulation Z.[8] Many of the features highlighted in the Advisory Opinion to establish that a EWA disbursement does not constitute "credit" are commonly found in employer-based EWA models including the following:

- The providers of service contracts with employers to provide and offer services to the employers' employees.
- The provider recovers the amount of the EWA transaction only through employer payroll.
- In the event of a failed or partial payroll deduction, the provider retains no legal recourse against the employee.
- Prior to entering into an EWA transaction, the provider clearly and conspicuously explains to the employee, and warrants as part of a contract, that it (i) will not require the employee to pay any charges or fees; (ii) has no legal recourse against the employee, including no right to take payment from a consumer account; and (iii) will not engage in debt collection activities related to the EWA transaction.
- The provider will not directly or indirectly assess the credit risk of individual employees.

The Advisory Opinion notes that other EWA business models may not involve an extension of credit or may otherwise be exempt from TILA compliance, but that the CFPB's Advisory Opinion does not address those situations.

While there are a number of different EWA program models in the marketplace, and not every model works for every person and every employer, it is notable that the CFPB Advisory Opinion chose to differentiate between employer-based EWA models and direct-to-consumer EWA models with respect to qualifying for its safe-harbor exclusion from TILA and Regulation Z. In doing so, the CFPB recognized that employer-based models inherently operate and function less like a "loan" than their direct-to-consumer counterparts. We believe this recognition of the differences inherent between the two models is appropriate and urge the DFPI to revise its Proposed Rule to similarly recognize that employer-based EWA models do not qualify as *per se* loans under the CFL.

EWA services provide benefits to consumers, allowing them to handle financial stressors without the need to resort to costly alternatives such as payday loans and overdraft fees

In addition to our request that the DFPI re-examine the Proposed Rule's treatment of employer-based EWA models for purposes of the CFL, our members also wish to highlight the substantial benefits EWA products offer to consumers. We urge the DFPI to be mindful of these benefits as it moves forward

[8] Available at https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf.

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in its rulemaking process and avoid taking any action that may ultimately harm California consumers by impeding access to EWA services.

EWA products seek to address the timing mismatch between workers' hours on the job and receipt of their paychecks by facilitating on-demand access to an employee's earned but unpaid wages. EWA providers have developed a variety of business models and solutions to try to reduce the gap described above. Generally, these programs involve a EWA provider enabling workers to request a percentage of earned net wages prior to payday.

Such a service is critical when financial stress occurs. Affordable expense management options are not often available to hardworking Americans. For example, according to the Financial Health Network's April 2022 report on EWA, employees experiencing financial distress typically utilize one of three options:[9] (1) overdraft of their bank account with an average fee of $35; (2) title and payday loans with fees ranging from $15 to $100; or (3) pawn loans with fees ranging from $75 to $100. U.S. consumers pay more than $12 billion per year in overdraft fees and $9 billion each year in fees for payday loans. Alternatively, many EWA services cost consumers an average of $2.59 to $6.27 per transaction and some programs charge workers no fees. None of these offerings create cycles of debt or an inability-to-pay risk.

More than 100 million Americans have less than $400 in savings and would experience financial hardship if they received an unexpected bill for medical expenses or a car repair. The COVID-19 pandemic and soaring inflation has placed incredible strain on low-income Americans and families.

Income volatility can lead to poverty for families. In *The Financial Diaries*, the authors write that trying to understand poverty only through the lens of annual income misses both problems and possible solutions:

"The data show that poverty is not usually about struggling to makes ends meet each month on a small, but predictable budget. Rather, insufficiency of resources is accompanied by instability. […] The income dips, on the other hand, can present severe financial challenges that are not always evident in yearly data."[10]

Enabled by advances in financial services technology, EWA products have emerged as an affordable option for workers to meet short-term liquidity needs that arise between paychecks, without having to rely on more costly alternatives such as payday loans or overdraft fees. According to the study referenced above, the majority of providers offer free models of EWA to their employees.

In addition to core EWA services, many providers integrate EWA with financial literacy resources, such as budgeting and savings tools, to prevent workers from overspending on the assumption that they have more money than they have earned.

[9] https://protect-us.mimecast.com/s/FXYTC9rpLvtzwn76howW4c?domain=finhealthnetwork.org.
[10] Morduch, Jonathan, and Rachel Schneider, The financial Diaries: How American Families Cope in a World of Uncertainty, Princeton: Princeton University Press, 2017, page 156.

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This positive view of EWA was shared by the former CFPB Director Richard Cordray in 2017 when the CFPB released its final rule for regulating payday loans.[11] In published remarks accompanying the rule, former Director Cordray expressly stated that through the agency's thorough five-year examination of the payday loan market, which included reviewing millions of records, field hearings, more than a million public comments, the CFPB intentionally excluded from coverage "some new fintech innovations, such as certain no-cost advances and programs to advance earned wages when offered by **employers or their business partners**."[12] (emphasis added)

Shortly thereafter, EWA services quickly emerged as a valuable tool to aid American workers in managing financial strain and budgeting. While some consumer groups assert that EWA could make savings and financial management more difficult, this contention is simply out of touch with the reality experienced by many workers who feel they have a right to access their own wages. These workers are in the best position to determine when it is necessary for them to access their wages, including those wages that have been earned but not yet paid due to the timing of wage payments decided by their employers.[13] In short, EWA allows employees to gain greater control over their own finances.

The benefits of EWA services have also been praised by members of Congress. Specifically, during a Senate Banking Committee hearing on New Consumer Financial Products, Chairman Sherrod Brown acknowledged that "*employer-based earned wage advances with strong consumer protections can, in fact, help workers cover unexpected expenses or emergencies*." In his opening statement to the committee, Ranking Member Pat Toomey described EWA as, "*an appealing alternative to payday loans for workers who want an advance on their wages. Many people don't have savings available to pay for unexpected expenses that can arise in between pay periods….EWA can help consumers to meet such expenses and others…*" He also noted that market competition is the best way to achieve consumer protection, and warned against burdensome regulation that could stifle innovation.

Given the significant benefits that employer-based EWA services offer to consumers, our members are concerned that changes to the regulatory framework under which these services operate has the potential to negatively impact consumers and should only be undertaken after a full accounting of feedback from industry stakeholders (including meeting with them in-person) and pursuant to a clear, well-defined process for making such changes.

Provisions related to wage assignments should not encompass advances that are repaid by debiting a bank account

The discussion of Section 1461 in the Initial Statement of Reasons suggests that DFPI will consider an authorization to debit a worker's bank account to facilitate an advance to be a wage assignment. The Statement asserts that "by timing debits from a consumer's bank account to coincide with when a consumer's

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[11] https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-payday-rule-press-call/.

[12] *Id.* It is also notable that the Biden Administration, as part of its 2024 budget proposal, has proposed amendments to the Internal Revenue Code to ensure that "on-demand pay arrangements" are not treated as loans. *See https://home.treasury.gov/system/files/131/General-Explanations-FY2024.pdf*

[13] https://www.bls.gov/ces/publications/length-pay-period htm.

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wages are deposited into their account" a provider would be utilizing a wage assignment. This analysis is legally incorrect. A wage assignment can only take place when the assignee has the right to receive wages directly from the employer. When wages are electronically transferred into the worker's bank account, the funds are received by the employee, held in the employee's bank account, and cease to be a payment of wages. An authorization to debit that account is an authorization to collect from bank deposits, not from a payment wages. This conclusion is supported by the legal authority cited by DFPI which states that the provisions related to wage assignments in the Labor Code are designed "to reach every form of instrument which could result in the impounding of a wage earner's wages *before he received them*." *Lande v. Jurisch*, 59 Cal.App.2d 613, 619 (1943) (emphasis added). In the situation where an employee has been paid by direct deposit, the worker has received their wages in their bank account, and thus no mechanism which debits that account can be deemed a wage assignment under California law.

Error in definition of "Charges"

In Section 1004(c), the definition of "Charges" contains a reference to "education financing" that should be "income-based loans."

Conclusion

The IPA appreciates the opportunity to submit these comments to the DFPI on the Proposed Rule. If you have any questions on any of the comments contained in this letter, please do not hesitate to contact me at: btate@ipa.org.

Sincerely,

[redacted]

Brian Tate
President and CEO
IPA
btate@ipa.org