May 17, 2023

VIA EMAIL (regulations@dfpi.ca.gov)

Department of Financial Protection and Innovation
2101 Arena Boulevard
Sacramento, California 95834
cc: Peggy Fairman (Peggy.Fairman@dfpi.ca.gov)

RE: EarnIn's Comments on Proposed Rulemaking under the California Consumer Financial Protection Law and California Financing Law, et. al (PRO 01-21)

Dear Sir/Madam:

Activehours, Inc., d/b/a EarnIn ("EarnIn") is grateful for the opportunity to provide comments to the California Department of Financial Protection and Innovation ("DFPI" or "Department") in response to its invitation for comments on the proposed rulemaking under the California Consumer Financial Protection Law ("CCFPL") and California Financing Law ("CFL"), among other laws (PRO 01-21).

EarnIn is also appreciative of the Department's thoughtful engagement and discussion on Income-Based Advances ("IBA").[1] EarnIn is proud to have signed a Memorandum of Understanding ("MOU") with the Department in January 2021, which the IBA industry believes was drafted in a manner that reflected the true, innovative nature of IBA products and their benefits to consumers. Since then, EarnIn has provided substantial data to the DFPI via the MOU and continued to engage with the DFPI and respond to DFPI's Invitation for Comment on the initial PRO 01-21 proposals requiring IBA providers to register under the CCFPL.[2] EarnIn has consistently supported regulatory oversight of the IBA industry, including registration under the CCFPL and in Senate Bill 472 in 2019.[3] EarnIn continues to believe CCFPL registration is appropriate for IBA providers. The proposed rule as drafted, however, would impose heavy-handed restrictions that will drive IBA providers out of the CCFPL registration framework and into CFL licensing, a framework which incentivizes traditional loan product offerings with recourse,

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[1] EarnIn believes the term "Earned Wage Access" remains more applicable to the industry, as used in past correspondence, but uses IBA here considering the Department's use of that term.

[2] EarnIn, *Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21)* (Dec. 20, 2021) https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/12/Earnin-12.20.21.pdf.

[3] The California legislature intended the CCFPL to promote consumer-protective innovation in consumer financial products and services, consumer access within financial services, consumer welfare, affordable credit on terms that reasonably reflect consumers' ability to repay, and consumer financial products and services that are understandable and not unfair, deceptive, or abusive.

mandatory fees, delinquency fees, and other fees—all concepts that are not found in IBA offerings. We reiterate here, along with the tens of thousands of comments submitted to the DFPI from employees, union members, businesses and consumer advocates alike: *Requiring CFL licensure of IBA would be careless and would negatively impact consumers and industry alike, neglecting DFPI's twin roles of fostering innovation and securing a fair and healthy financial services marketplace for businesses and consumers in the state of California*. As outlined in Section II of this letter, EarnIn believes that the DFPI's proposed rule ignores and downplays IBA's substantial benefits to consumers.

Moreover, the CCFPL does not grant DFPI the authority to conduct this type of rulemaking. The CCFPL grants DFPI the authority to require registration and reports,[4] and to establish standards for responding to complaints.[5] The CCFPL also empowers DFPI with a variety of authorities other than rulemaking: to analyze markets, implement consumer education initiatives, and to promote innovation.[6] However, the CCFPL does not grant DFPI the authority to regulate fees and terms for financial products or to create its own pilot programs through rulemaking.

Accordingly, EarnIn recommends that DFPI proceed with establishing a registration requirement for IBA providers, while working with the legislature to establish key safeguards that are in line with the legislative goals of the CCFPL and that rest on sound executive authority. *Specifically, EarnIn encourages DFPI to revise the proposed rule to:*

- *Enable IBA providers to charge fees that align with those available under California's special program to expand access to zero-interest, low-cost loans.*
- *Allow IBA providers to preserve consumers' choice of whether or not to pay for IBA services and allow consumers to choose how to compensate providers for the advance services provided.*
- *Mandate fee disclosure as part of a safe harbor that excludes from regulation under the CFL purely voluntary payments and reasonable fees within a consumer's control.*[7]

Section I of this comment letter provides an overview of EarnIn. Section II then outlines EarnIn's primary concerns with the current proposal, as well as the benefits of IBA. Section III recommends broader revisions to the proposed rule to address the concerns discussed in Section II. Lastly, Section IV makes recommendations for additional specific changes to the proposed rule that can be easily addressed.

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[4] *See* Cal. Fin Code § 90009.

[5] *See* Cal. Fin Code § 90008.

[6] *See* Cal. Fin Code § 90006(d)(2)-(4).

[7] We sometimes use the terms "tip," "voluntary payment," and "voluntary fee" in this letter somewhat interchangeably. While EarnIn believes that "tips" is an appropriate term, as voluntary or discretionary or optional payments made by consumers, we do not object to using the terms "voluntary payment" or "voluntary fee" in lieu of "tip."

I. Overview of Earnin

EarnIn is a financial technology company based in Palo Alto, California, founded with the goal of empowering consumers and addressing inequality in the financial system. EarnIn's mission is to create products and solutions that meet the needs of American consumers today.

EarnIn has been a pioneer of the "Earned Wage Access" ("EWA" also known as "IBA") industry. Founded in 2014, EarnIn has aimed to alleviate the economic precariousness facing many Americans, by giving consumers a choice of how and when to receive their earned but unpaid income. Most Americans live "paycheck-to-paycheck," unable to pay for goods and services when they need them while waiting for pay that is tied up in the payroll system. EarnIn enables consumers to access earned wages when they want, without waiting for payday. This means that consumers can obtain necessary goods and services, or deal with small, emergency expenses, on their preferred timeline and avoid high-priced alternatives like payday loans, traditional credit cards, and overdraft fees.[8]

Beyond just avoiding predatory short-term liquidity options, EarnIn empowers consumers to connect their work with the reward for working — this puts workers in control of their financial future. If a worker has an immediate need for income, EarnIn enables access to those funds. The consumer, not the employer, gets to decide when to get paid. This provides consumers with choice and autonomy. There is no practical reason that workers should have to bear the burden of an arbitrary biweekly payroll system. IBA enables workers to avoid income volatility and to ensure that they can get access to funds in an affordable and reliable way. This innovation will be entirely suppressed if DFPI moves forward with the proposed rule.

Instead of a system that primarily serves the interests of employers, EarnIn's services flip the paradigm – EarnIn enables consumers to access *their* money–money that they have *earned*– when they need it. This helps consumers manage their budgets in a way that works for them, gives them greater control over their money, relieves financial stress by giving them visibility into their accrued daily earnings, and allows them quick access to cash to pay bills on time or to pay for groceries, rent, unexpected emergencies, or other financial needs as they arise, without late fees or penalties. EarnIn does all this by enabling consumers to access their earned wages without incurring any additional fees and without falling into a debt spiral if they cannot pay back those advances. There are never debt collectors hounding them, never any lawsuits or wage

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[8] In a 2022 Report, the Federal Reserve Board of Governors reported that "[r]elatively small, unexpected expenses, such as a car repair or a modest medical bill, can be a hardship for many families. When faced with a hypothetical expense of $400, 68 percent of all adults in 2021 said they would have covered it exclusively using cash, savings, or a credit card paid off at the next statement (referred to, altogether, as "cash or its equivalent"). The remainder said they would have paid by borrowing or selling something, or said they would not have been able to cover the expense." *The Fed - Dealing with Unexpected Expenses* (May 2022) www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-dealing-with-unexpected-expenses.htm.

garnishments, and never any dings on the consumer's credit report. This makes EarnIn's services and the IBA industry an innovative, much needed, consumer-friendly alternative to the traditional loan and deferred deposit products currently regulated by California. While traditional loan and deferred deposit products are inherently based on extracting fees for loans and imposing coercive consequences to induce borrowers to repay, EarnIn's IBAs present none of those concerns.

Consumers have found immense value in EarnIn's service – provided with no mandatory fees, interest, or late fees, and no impact on credit score – as reflected in the fact that we have served over 276,000 Californian consumers since the app launched in 2014 with about 122,000 in the last year alone. Overall, EarnIn has provided California consumers with a total of $1.67 billion in earnings and saved them an estimated $117.15 million in potential overdraft fees in the last year.[9] Nationwide, more than 1.3 million consumers have used EarnIn's IBA product, Cash Out, to access more than $5 billion in earned wages in 2022 alone.

Our Direct-to-Consumer model means that anyone with a paycheck can use our services regardless of their employer. Any worker in the U.S. with a bank account who receives their paycheck via direct deposit can use EarnIn, including employees of small businesses, unions, and government agencies. An EarnIn customer in San Jose, California said, "I work at a Veterinary Clinic and this has helped me so much with the cost of living getting higher and higher, but my wage is not. I would be homeless or starving without Earnin's help." All of these are the people that EarnIn seeks to help with its IBA services and why EarnIn seeks a rule that sets appropriate limitations and does not unduly inhibit provision of consumer-valued services.

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[9] According to a 2021 Federal Deposit Insurance Corporation ("FDIC") report, "The cost for overdraft fees varies by bank, but they may cost around $35 per transaction. These fees can add up quickly and can have ripple effects that are costly. Some banks also may charge what are known as continuous overdraft fees, or daily overdraft fees. These are charges assessed every day the account remains overdrawn." FDIC, *Overdraft and Account Fees* (December 2021) https://www.fdic.gov/resources/consumers/consumer-news/2021-12.html. Recognizing that consumers may incur other forms of fees to access short-term liquidity, including similarly expensive late fees, which can run up to $41 per transaction, credit card cash advances (generally a mix of flat fee plus higher interest rates than credit card purchases), or payday loan fees, which can run up to $30 for every $100 in credit, EarnIn calculates the overdraft fee savings using $34.45 as a proxy for per transaction overdraft or other fees saved by using EarnIn's IBA product. *See* CFPB, *CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees* (Feb. 01, 2023) https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/; CFPB, *Credit Card late fees* (March 2022) https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf; CFPB, *What is a payday loan*? (Jan. 17, 2022) https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567.

II. EarnIn's Concerns with the Current Proposal

A. *Subjecting IBAs to the CFL and its Fee Restrictions Would Jeopardize the Benefits that the IBA Industry Provides to Californians*

In 2021, the DFPI entered into MOUs with several IBA providers, paving a path so that IBA could continue to benefit Californians. The MOUs were expressly entered into pursuant to the Department's authority under the CCFPL and provided meaningful clarity to IBA providers and consumers alike.

DFPI's current proposed regulations roll back the MOUs by replacing regulation under the CCFPL with regulation under the CFL, a legal framework that was simply not designed for these products and threatens the IBA industry's ability to offer IBAs to California residents on consumer-friendly terms. DFPI Proposed Rule 01-21 significantly restricts IBA providers' ability to offer their services and would force IBA providers to abandon their no-fee, non-recourse offerings in favor of more traditional models that do not serve California consumers well. Proposed Rule 01-21 would roll back the clock and leave hard-working Californians with fewer and less-attractive, higher cost, alternatives for liquidity during these difficult times. This cannot possibly serve DFPI's policy interests or the interests of Californians.

IBA services arose to fix an archaic employee-unfriendly pay cycle and is disrupting the payday loan industry by presenting a low-cost alternative to predatory offerings, late fees, and overdraft charges. The proposed rule does not appreciate the unique features of IBAs. EarnIn can offer IBAs – "Cash Outs" – because it responsibly limits advances to a portion of the money that consumers have already earned. EarnIn presents a stark contrast to payday lenders that cause consumers to overextend and regularly default—consequences that require such lenders to charge high interest rates or allow for multiple "rollovers" to recoup losses.[10] In fact, Cash Outs have two main advantages over loans, each of which the proposal risks eliminating by reducing IBAs to loans under the CFL: (1) Cash Outs are non-recourse and (2) Cash Outs impose no mandatory fees on consumers. Consumers can control whether or not to make a voluntary payment to EarnIn and can (and do) regularly receive Cash Outs without making any payment whatsoever.

IBAs are economically sustainable because of cross-subsidization over time – some users choose to receive an advance without paying any fee and some choose to pay a voluntary payment (leave a tip) or pay for expedited delivery, while others pay a tip when they are able to do so and choose not to tip when they cannot afford to tip. In 2022, 9.3% of California transactions did not include any tips or fees, and the average tip amount was $2.34. In EarnIn's experience,

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[10] *See* DFPI, *Annual Report of Payday Lending Activity Under the California Deferred Deposit Transaction Law, 2021* (July 2022)(showing that roughly three quarters of all payday loans Subsequent loans by the same borrower, nearly half of which were made the same day that the previous transaction ended, and additional quarter of which were made within a week) https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/07/DFPI_AnnualReport_CDDTL-2021.pdf.

consumers are willing to tip when they can do so because they are indeed grateful for EarnIn's services. Consumers view IBAs differently from loans and they attach value to the fact that IBAs are non-recourse and available at no cost at the consumer's choice. This core, differentiating feature of IBA provides consumers with peace of mind that even if they cannot repay an IBA, they won't be penalized on their credit report, harassed by debt collectors, or have their wages garnished.

If the DFPI Proposed Rule 01-21 is adopted as drafted, the restrictions that DFPI proposes to place on IBAs would significantly constrain the manner in which IBA providers can continue to offer consumers the choice of what to pay while being sustainable. Many providers are likely to cease offering IBAs to be able to survive economically, leaving many more consumers with only traditional, high-cost, and/or predatory alternatives to help them make ends meet. This cannot be the outcome that DFPI envisions.

If California seeks to encourage innovation and the development of safe, small dollar liquidity options for consumers, the proposed rule in no way serves that goal. Forcing IBAs into the CFL licensure regime – a regime that does not recognize IBA's unique features or value - incentivizes IBA providers to operate like traditional lenders in an antiquated system, a system based on "creditworthiness" checks, punitive fees and actions, and restricting access to liquidity based on a consumer's credit history. Without the proposed rule, EarnIn's incentives are aligned to our customers' goals and the way they want to live their lives, without leaving the most vulnerable Californians with the burden of fees, interest, or the pressures of legal recourse, credit reporting, and so on. In fact, EarnIn's program does not in any way index to higher wealth individuals, but rather is predicated on serving all people who need or want to smooth out their pay or otherwise have needs not met by existing systems. Our customer stories and anecdotes bear this out. We serve consumer needs by enabling consumer choice and consumer access. *Forcing IBAs into a CFL framework limits consumer choice and access.*

IBA products are dramatically different from the traditional loan products regulated under the CFL and deserve purpose-built regulatory oversight and guidance appropriate to innovative products like IBAs. To avoid perverse incentives and preserve the benefits of the consumer-friendly innovation of IBAs, EarnIn strongly encourages DFPI to revise its proposal to create reasonable regulations and guidance in the context of CCFPL registration.

B. *The Proposed Rule Would Subject IBA Providers to an Unfounded and Misguided Fee Cap That is Designed for CFL Lenders – a Completely Different Regulatory Regime Governing a Fundamentally Different Product – and Would Eliminate Consumer Choice*

As discussed in the previous section, the proposed rule, if implemented, would have tremendously negative effects for Californians. Moreover, the proposal's design is fundamentally misguided from a policy and product perspective. The CFL is not a natural fit for innovative, short-term, non-interest-bearing, non-recourse IBA products that offer consumers the choice of whether

or not to pay for the service. The proposal therefore makes a categorical error in applying the CFL's product and pricing limitations to IBAs. DFPI's proposal could and should focus on overseeing and regulating IBA providers without invoking the CFL.

The CFL adopts very specific requirements that significantly limit loan options available to California consumers. For example, CFL loans cannot be offered for terms that are too long[11] or too short.[12] Charges are also narrowly tailored based on the loan size and type, with a functional bias toward interest based on the unpaid principal, rather than fixed fees.[13] This level of granularity is not well-suited for IBAs.

Similarly, the policy rationale for limiting what a consumer can pay voluntarily (tip) is extremely thin. As the DFPI is aware, the average tip for EarnIn in 2022 was $2.34. The short duration of IBAs makes calculation of an APR for a voluntary fee on an annualized basis misleading and undermines consumers' ability to meaningfully compare voluntary IBA charges with the prices of alternative sources of liquidity.[14] We have found no other regulation in California that caps voluntary payments or tips that consumers may voluntarily pay, whether for a cup of coffee, a meal, a car ride, or otherwise. If a consumer is grateful for an advance, why should the government prevent them from leaving a tip of their choice?

Indeed, the current DFPI proposal implicitly recognizes that shoe-horning IBA products into the CFL is an ill-fitting choice since the proposal finds it necessary to carve out multiple CFL loan regulations from their application to IBAs in a piecemeal and awkward fashion. In particular, the proposal adds an exemption to the CFL regarding loan repayment and another exemption to allow for a type of charge that can normally not be charged by a CFL licensee in order to "modernize" the CFL and make it feasible for providers subject to its provisions to offer IBAs.[15] Rather than bend over backwards to make changes to the CFL to accommodate IBAs (under questionable authority, as described below), DFPI can and should rely on its authority to regulate new products like IBAs under the CCFPL, which (as we've noted) was intended to promote consumer welfare, innovation in consumer financial products and services, and consumer access within financial services.

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[11] *See* Cal. Fin Code § 22334(setting a schedule of maximum loan terms by loan size).

[12] *See* Cal. Fin Code § 22307(prohibiting loans from being repayable within 15 days).

[13] For example, loans between $2,500 and $10,000 must last at least one year, meaning the interest fee cap of 36% (plus the Federal Funds Rate) may result in interest charges over roughly $1,000, far exceeding the maximum fixed fee of $50 that can be charged. *See* Cal. Fin Code §§ 22334(c); 22304.5(a); 22305.

[14] *S*ee footnote 8, supra. Alternative sources of liquidity are not limited to traditional loans.

[15] *See* DFPI, PRO 01-21 Initial Statement of Reasons, Pages 57-58 (describing proposed sections 1463 and 1464) https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf.

More importantly, by subjecting IBAs to the CFL pricing structure,[16] DFPI generally restricts the amount of voluntary payments and non-interest charges that an IBA provider can charge to up to 5% of the amount of each advance.[17] As described in the previous section, this limitation takes away consumer choice and threatens to fundamentally transform the IBA industry for the worse.

The CFL pricing structure is entirely inappropriate for IBA regulation. The 5% cap was designed under the CFL, which anticipates that nearly all revenue for covered products will be mandatory interest-based charges repayable over many months based on the unpaid portion of the advance. By contrast, IBA products do not include interest-based charges, or any mandatory charges, and are otherwise very different, as noted in this letter. The CFL also does not work for IBA in other ways. The CFL prohibits even the first payment on a loan from being due within two weeks of the advance. IBA products, however, are repaid from the consumer's next paycheck, which is almost always within two weeks of the advance.[18] These two examples of CFL restrictions demonstrate that the CFL is the wrong fit here. Ironically, by DFPI's own proposed requirement, an IBA would *need* to be repaid on the next payday – *precisely the type of product that the CFL is designed to exclude from its pricing and regulatory scheme*.

Further, the concerns that motivate CFL price limits are not present for IBAs. The product restrictions that define IBA–the advances have no mandatory fees and are non-recourse–are sufficiently protective of consumers. Price limits are intended to avoid consumers being forced to pay high fees. That is not applicable to IBA products, which do not force or require a fee at all. IBAs empower consumers with the choice not to pay any charges and still receive the service. As such, the consumer protection motivations underlying CFL pricing are wholly inapplicable here. In EarnIn's experience, consumers understand the IBA service and make choices about how to pay for IBA service, as reflected by consumers adjusting their payment behavior based on the different advances they request. For example, in our last quarter, nearly half of all advances, 46.5%, did not include any tip at all, and 62.4% had tips of one dollar or less (we noted earlier that 9.3% of California transactions in 2022 did not include any *tips or fees*, showing that consumers also vary how they choose to pay). Thus, consumers should be trusted to make decisions about tipping and/or paying voluntary fees; and DFPI should address its underlying

[16] Section 1462, subdivision (a)(3) would only make CCFPL registration available to IBA providers that do not collect charges in excess of what would be permitted were the IBA provider a CFL licensee.

[17] The CFL generally prohibits non-interest based charges, other than, for loans that are $2,500 or less, an administrative fee of the lesser of 5% of the principal amount or fifty dollars ($50). *See* Cal. Fin Code §§ 22305 (permitting administrative fees); 22306 (prohibiting charges not expressly authorized or permitted by the CFL). By declaring voluntary tips and gratuities to be charges, the CFL would disincentivize use of free products with voluntary payments and incentivize a "fee for all" system.

[18] DFPI, *2021 Earned Wage Access Data Findings*, Page 1 (Q1 2023) https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf.

concerns in a limited way, by requiring explicit disclosure of voluntary fees. It should not deprive consumers of the choice of whether to pay voluntary fees and if so, how much.

These pricing restrictions are also misguided in the context of the broader regulatory scheme in California, which contains various exceptions from the CFL for non-traditional financiers and credit products. These programs, discussed in the next section, recognize that the CFL product and fee restrictions are not appropriate for all types of products that meet consumers' short-term liquidity needs, and support the argument that the CFL is not an appropriate framework for IBAs.

C. *The Restrictions that Would be Placed on IBA Providers Conflict with Legislative Efforts to Expand Access to Responsible Short-Term Liquidity*

California has designed multiple programs to expand access to low-cost, small-dollar advance products that are not unlike IBAs. We note that the California legislature determined in Senate Bill 896 (Chapter 190, Statutes 2014) that a 7% origination fee by non-profit originators would be "low-cost" for short term loans that, like IBAs, do not charge interest. Accordingly, the legislature encouraged non-profits to offer such small loans at 7% of the principal or $90, whichever is less.[19] Clearly, IBA products with voluntary charges of less than 7% of the advance amount are a superior product to what Senate Bill 896 permits. Moreover, we note that the reach of the SB 896 program is unfortunately limited – In 2021, only 1,086 loans were approved, according to a report compiled by DFPI.[20] If non-profits are permitted to operate with more than 5% fees, and have not been able to create a successful liquidity product, why are for-profit companies being held to a more restrictive standard? DFPI offers no justification for the discrepancy between the treatment of state-proffered alternatives and the caps on for-profit alternatives in the current proposal. For example, the discrepancy between the legislature allowing non-profits to charge a *mandatory* fee of 7% and the DFPI proposing a cap that would prohibit consumers from choosing to pay IBA providers a *voluntary, non-mandatory* tip of 7% is hard to reconcile in the context of legislative intent. In fact, it seems to us that this demonstrates that DFPI's proposed limits on IBAs are inconsistent with the legislature's objectives.[21]

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[19] Cal. Fin. Code § 22066.

[20] DFPI, Annual Report of Non-Profits Providing Zero-Interest Consumer Loans (Jul. 2022) https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/07/2021_Annual-Report_Nonprofit_2021.pdf.

[21] Ironically, if California was able to reduce the cost of payday loans, overdraft fees, and all other consumer short-term liquidity options to the amount of voluntary charges associated with IBAs, the state would achieve a resounding success. And yet, the DFPI's proposed rule does nothing to address these other, more expensive, less consumer-friendly alternatives and instead threatens the continued existence of IBAs.

In another example, California adopted a "Pilot Program"[22] to encourage "more robust small-dollar lending in California," a program that EarnIn believes has unfortunately also failed to meet the needs of Californians. This so-called "Responsible Pilot Program" permits for-profit companies to charge interest of up to 36% on the unpaid balance of loans under $1,000.[23] More loans have been made under the Pilot Program than the non-profit program: 96,574 in 2021 (which is also less than a quarter of the completely free Cash Outs EarnIn made in the last year). However, the Pilot Program loans were not short-term and not nearly as consumer-friendly as IBAs, as reflected by the fact that nearly all loans under the Pilot Program cost consumers over a third of their principal amount, and that's not counting the 32% of loans with late fees (which EarnIn never charges).[24] And, as noted, many EarnIn customers pay nothing for the EarnIn IBA service; those that do pay do so voluntarily.[25]

As the establishment of these programs illustrates, alternatives to high-cost credit are needed in California. IBAs provide one kind of alternative. Accordingly, the innovation of EarnIn and other IBA providers should be preserved and encouraged, not disadvantaged and discouraged by being boot-strapped into an ill-fitting vehicle like CFL.

We further note that the proposed rule does not consider the fact that the IBA industry is working well today, with EarnIn – one of several IBA providers in the state – meeting the needs of over 200,000 California consumers. Moreover, EarnIn has extraordinarily high positive ratings from consumers, and low levels of complaints.[26] EarnIn's Net Promoter Score (NPS), which measures customer satisfaction, is currently 72 (in comparison, NPS scores of big banks are

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[22] See DFPI, *About the Increased Access to Responsible Small Dollar Loans Pilot Program* https://dfpi.ca.gov/about-the-increased-access-to-responsible-small-dollar-loans- pilot-program/; DFPI, *Small Dollar Loan Pilot Program Reports* https://dfpi.ca.gov/california-financing-law-publications/#sdl.

[23] Cal. Fin. Code § 22370.

[24] In 2021, DFPI reported that nearly all Pilot Program loans had APRs of 35% or more and had loan terms of 360 days or more. DFPI also reported that 32% of loans had late fees and that nearly $2 million of late fees were collected. See DFPI, Annual Report of Activity Under Small Dollar Loan Pilot Program, pages 4, 15, and 16 (July 2022)

https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/07/2021_AnnualReport_RSDL.pdf.

[25] EarnIn has tried without success to replicate the data that DFPI has used to support its conclusions regarding topics like APR for the existing IBA services. *See* DFPI, *2021 Earned Wage Access Data Findings*, Pages 6-9 (Q1 2023) https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf. We have been unable to do so. Using the formulas shared by the DFPI, our analysis reflects a significantly different picture, even if one assumes that APR calculations are appropriate in this context, and that voluntary charges not received in exchange for credit should be included in APR, which we do not.

[26] EarnIn has a BBB Rating of A-, had only 13 complaints lodged with the CFPB in 2022 (2 in California), and has a 4.6 rating in the GooglePlay App store and 4.7 rating in the Apple App Store.

much lower: Chase -1, Wells Fargo -12, Bank of America -24).[27] Moreover, as DFPI's 2021 Earned Wage Access Data Finding report has acknowledged, complaints received about IBAs are not typically about voluntary fees or the price of the IBA products and services.[28] Finally, we also note that DFPI's proposed rule is promulgated at a time when the DFPI acknowledges that it is seeking to regulate where is does not fully understand the benefits and risks of IBAs:

> "These findings highlight early trends of earned wage access company practices in California based on data from several prominent market actors. However, further study is needed to understand full impacts to consumers. Additional consumer-level data on out-of-pocket costs, motivations for increased frequency of use, and the consumer demographics in EWA use (i.e., age, race, income, credit score, geography, etc.) would help the DFPI assess trends and risks."[29]

Regrettably, by ignoring the benefits of IBA products and focusing on perceived problems that are not supported by data, the DFPI proposal threatens to push IBAs into more traditional loan products—loan products that have not solved the consumer needs that IBAs and the non-profit and Pilot Programs were designed to address, needlessly risks harming consumers and stifling innovation, and needlessly conflicts with legislative efforts to expand access to responsible short-term liquidity products that serve and benefit California consumers.[30]

D. *DFPI's Rulemaking Takes an Unprecedented & Unfounded Approach to the CFL in Order to Circumvent the CCFPL and Key Legislative Safeguards*

The rulemaking process for PRO 01-21 reflects an expansive and inappropriate exercise of authority not properly granted to DFPI. We believe that this proposed rulemaking stretches into

[27] Customer Guru, *FINANCIAL SERVICES / BANKING NET PROMOTER SCORE 2023 BENCHMARKS* https://customer.guru/net-promoter-score/industry/financial-services-banking.

[28] DFPI, *2021 Earned Wage Access Data Findings*, Page 14 (Q1 2023) https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf.

[29] *Id.* at Page 16 (emphasis added).

[30] Perhaps ironically, the DFPI seems to suggest that the success of IBA products – as measured by low rates of loss – is not to be celebrated as showing that the products work for Californians but rather that it should cause suspicion and imposition of a regulatory scheme that will deprive California consumers of the benefits of existing IBA products. See, DFPI, PRO 01-21 Initial Statement of Reasons, Page 54 https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf. We draw fundamentally different conclusions from DFPI's conclusion that this data shows a need to regulate IBA products as loans under the CFL, given the data, benefits, and reasons stated in this letter. Rather, we believe that the data suggests that consumers value the service and want to keep using it particularly because it meets their needs and does not come with punitive fees and negative consequences connected with traditional loan products (including CFL-regulated products). High rates of loss reflect irresponsible lending practices that ignore consumer needs and allow, or even encourage, consumers to overextend themselves.

the legislative realm, which is the exclusive province of the California legislature, which previously provided for the small dollar lending pilot programs and attempted to enact the EWA licensing regime that, ultimately, failed in the Assembly.

The proposed rule also represents a significant departure from how the Department previously thought about IBAs, with no justification for the departure. DFPI has not determined that IBA providers were subject to the CFL until now. In fact, DFPI's initial proposal as part of this PRO 01-21 rulemaking contemplated only requiring registration for IBA providers under the CCFPL, without subjecting IBA providers to the CFL's licensing requirement,[31] and did not seek feedback on the stance that the CFL should apply to IBAs at all. The CCFPL does not contemplate application of the CFL to IBA providers because the CCFPL was designed to "fill" the oversight gaps left by "outdated" statutes that "fail to cover new business models and practices"[32] and because CFL licensees are not subject to the CCFPL.[33] Accordingly, DFPI's initial CCFPL registration IBA requirement implicitly functioned as a recognition that the CFL was not the right tool to apply to IBA providers.

Moreover, DFPI specifically stated that the CCFPL provided "appropriate authority to oversee areas of the financial marketplace previously unregulated by the DFPI, including…early wage access products."[34] In other words, at the time the CCFPL became law, DFPI believed that the CCFPL was the right regime to regulate IBA and that the CFL did not apply to early wage access products (or IBAs); additional legislative authority was necessary to enable regulation of IBA providers. DFPI has not reasonably identified the basis of its change in thinking or why it now believes that the authority exists to regulate IBA via the CFL.

DFPI's registration authority is constrained by the CCFPL. It may not require registration for more than four years without seeking legislative approval.[35] In this rulemaking, however, all IBA providers are declared to be subject to the CFL, unless registered under the new CCFPL registration system. This improperly abrogates the safeguards built-in to the CCFPL. With this move, DFPI has laid the groundwork for significant regulatory confusion and created a perpetual registration requirement that will outlast the CCFPL's statutory deadline. Once the four-year CCFPL deadline passes, registrants will be suddenly forced to transition to CFL license since DFPI's determination that CCFPL registrants do need to obtain a CFL license will expire, but not

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[31] PRO 01-21 – CCFPL Registration.

[32] AB 1864, *Assembly Floor Analysis* (Aug. 25, 2020) https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864.

[33] *See* Cal. Fin. Code § 90002(b)(2).

[34] DFPI, *DFPI Marks Success in Implementation of the California Consumer Financial Protection Law* (Mar 23, 2022) https://dfpi.ca.gov/2022/03/23/dfpi-marks-success-in-implementation-of-the-california-consumer-financial-protection-law/.

[35] *See* Cal. Fin. Code § 90009.5(b).

its determination that all IBA providers are subject to the CFL.[36] This creates significant uncertainty and instability for the industry and undermines the very purpose of establishing a uniform regulatory scheme. It is also contrary to the wishes of the drafters of the CCFPL,[37] who intended that the CCFPL rulemaking would only create a temporary registration system unless the California legislature acts.[38] DFPI's proposal overreaches and encroaches into territory that should be left to the California legislature.

Structuring the IBA registration regime as a carve-out from the CFL is highly unusual and unnecessary. It also highlights that the application of the CFL regime to IBA is inappropriate and reinforces the wisdom in DFPI's initial proposal to conduct an IBA rulemaking focused solely on requiring registration of IBA providers without invoking the CFL.

Further, if and when the registration regime expires, IBA providers would be required to obtain CFL licenses and become subject to disclosure and related provisions for which compliance is impossible or would be misleading to consumers. For example, IBAs are offered with no contractual or legal obligation to repay, rendering CFL concepts like "maturity"[39] or the "time"[40] for which a loan is made as undefined, or misleading. Unless the DFPI's intent is to remove the non-recourse consumer benefit from the IBA service, such disclosures could even provide consumers with the mistaken impression that they have undertaken an *obligation to repay* when, in fact, they have not.[41]

Not only does the application of the CFL upon expiration of this rulemaking contradict legislative intentions, but it also creates the potential for future unbridled exercise of authority from the DFPI, which EarnIn believes is also contrary to the California legislature's intent and reaches well beyond the constraints that the California legislature sought to impose. For example, in this

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[36] *Compare* PRO 01-21 § 1462(b)(rendering the exemption from CFL licensure inoperative upon the expiration of the CCFPL registration requirements for IBA providers.) *to* PRO 01-21 § 1461(subjecting IBA providers to the CFL licensing requirement independent of the expiration of the CCFPL registration requirement for IBA providers).

[37] Subdivision b of section 1461 of the proposal would operate to subject IBA providers that had registered under the CCFPL to the CFL licensing requirement.

[38] *See* Cal. Fin. Code § 90009.5(b); AB 1864, *Assembly Floor Analysis* (Aug. 25, 2020) https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864 (summarizing the 4-year sunset provision as "legislative oversight of DFPI").

[39] *See* Cal. Fin. Code § 22337(a).

[40] *See* Cal. Fin. Code § 22332.

[41] This concept of maturity for IBAs lacking an obligation to repay is also not clearly defined in provisions that are would be operative to CCFPL registrants under the proposal, even absent the expiration of the CCFPL registration requirement, because they define the permitted charges that CCFPL registrants would receive. *See, e.g.,* Cal. Fin. Code § 22308 (limiting certain charges based on the charge that would result at "maturity of the contract").

rulemaking, DFPI would create an exemption from CFL licensure as well as a unique permission for CCFPL registrants that is not available to other CFL licensees: the ability to charge a $12 subscription fee. In effect, this creates a pilot program much like the zero-interest or responsible small dollar programs established by the California legislature but does so without explicit legislative authority or direction. Indeed, though DFPI does not explain how it determined $12 was the appropriate threshold, it appears that the $12 subscription fee, as well as much of the language in the rule, is adapted from SB-472, a bill introduced in 2019 providing for IBA licensure that never passed,[42] which again suggests that this determination usurps the legislative prerogative reserved to the California legislature. The CCFPL did not provide DFPI with the authority to reintroduce or recreate SB-472. The CCFPL only authorizes DFPI to require IBA registration, and even that authority sunsets without legislative approval. Yet, this rulemaking approximates SB-472. DFPI is creating a perpetual licensing requirement for IBA providers, subject to similar fee caps and restrictions as SB-472, despite the absence of the democratic process in which SB-472, or any bill like it, would receive sufficient votes in the California legislature and be signed into law by the governor.

Rather than assume non-delegated authority, DFPI should embrace its mandate under the CCFPL to establish a registration requirement and then, rather than displace the California legislature, work with it to enshrine a more comprehensive and permanent set of safeguards and rules for the industry.

III. EarnIn's Recommended Rulemaking Alternatives

As noted above, the proposed rule as written is untenable for IBA providers. However, EarnIn continues to support appropriate efforts to regulate the space. As such, EarnIn fully supports the proposed rule or legislation with certain key revisions, further discussed below, as well as with consumer protections that are notably absent from the DFPI's proposal.

A. *DFPI Should Establish a CCFPL Registration Requirement for IBA Providers Independent of the CFL*

EarnIn recommends that the Department adopt a rule establishing a comprehensive CCFPL registration requirement for IBA providers, but without otherwise subjecting providers to CFL licensure.

In the previous section, we outlined numerous concerns with both the substance of the proposal and the interplay between the proposed rule and the CFL. EarnIn believes that these infirmities all stem from attempting to shoehorn IBA products into the CFL. Instead, DFPI should clarify that IBA providers are *not* subject to the CFL and return to its previous proposal to create a registration requirement under the CCFPL.

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[42] Senate Bill No. 472 (2019-2020 Reg. Sess.) §51.

B. *DFPI Should Equalize the Fees that IBA Providers May Assess to the Same Level Permissible under California's Special Program to Expand Access to Zero-Interest, Low-Cost Loans.*

EarnIn recommends that DFPI modify its proposal to allow IBA registrants to charge fees that are reasonable considering the short-term nature of IBA products. Specifically, DFPI should authorize IBA registrants to collect charges that would not exceed the charges that would be permitted for a loan originated under Section 22066 of the Financial Code, which "facilitate[s] the making of zero-interest, low-cost loans."[43]

Given the short time frame inherent in the IBA product, IBAs are much more like the zero-interest non-profit loans offered by non-profit organizations under a CFL exemption than the mostly-interest loan products that can be offered by CFL licensees. Accordingly, and especially given that California legislators have determined that 7% is "low-cost", DFPI should permit IBA providers to receive an average of up to 7% of the "principal" of all IBA transactions in a month.

This recommendation is not only tailored to more reasonably reflect the structure of IBAs, but also has the benefit of providing a modest incentive to IBA providers to offer IBAs as a CCFPL registrant rather than obtain a CFL license. In turn, IBA providers are more likely to continue offering non-recourse IBA products as opposed to more profitable and less consumer-friendly loan products.

C. *DFPI Should Create Clear Guidance to Solve Concerns About Tipping and Mandate Disclosure Rather Than Treating Voluntary Fees that are Within a Consumer's Control as "Charges" Subject to Caps*

EarnIn recommends that DFPI adopt a disclosure-based safe harbor for voluntary payments (tips) and fees instead of interpreting such amounts as "charges" under the CFL.[44] This alternative would help DFPI accomplish its policy objectives and aligns well with the text of the CFL regarding optional services as well as with California common law regarding usury.

In its Initial Statement of Reasons, DFPI describes its belief that the text of the CFL mandates the inclusion of tips and other voluntary fees as "charges" under the CFL and cites several policy considerations militating toward the same. Specifically, DFPI raises its concerns about four strategies: (1) disabling a service if a borrower does not tip; (2) arranging user interface elements to making tipping hard to avoid; (3) making it difficult to avoid tipping or not advertising that a particular payment is optional; and (4) claiming, presumably falsely, that tips are used to

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[43] Cal. Fin. Code § 22066(a).

[44] While it is not obvious that the DFPI has authority to mandate disclosures under the CCFPL, EarnIn supports a legislative solution that serves consumers and sets clear ground rules for industry.

help other vulnerable consumers or for charitable contributions. DFPI also cites concern about the cost of tips.[45]

However, these concerns are not solved by capping payments associated with IBAs; such concerns are mitigated through clearer guidelines and clear and conspicuous disclosures. EarnIn recommends that the DFPI address these concerns by using a surgical approach to limiting the provider's behavior over which it has concerns instead of attempting to use caps as a panacea. As part of such an approach, EarnIn offers several specific recommendations.

First, the DFPI should establish a "safe harbor" from the definition of "charges" that excludes eligible, and clearly and conspicuously disclosed, voluntary fees or payments that do not use the strategies that it finds concerning. Second, the DFPI should address its first concern by recognizing that a tip offered in exchange for maintaining a service is not a bona fide tip. Instead of adopting a blanket policy of treating all voluntary payments (tips) as charges, DFPI could define what it considers to be bona fide tips and then exclude those tips from the definition of "charges." Third, the DFPI should also adopt a rule that would recognize that the practice of disabling a service in exchange for not "tipping" is actually a payment in exchange for that service, and, to the extent the service constitutes the provision of a loan, that such a "tip" is a charge for a loan under the CFL.[46]

Similarly, DFPI's next three concerns all relate to consumers' lack of understanding, such as failing to understand that tips can be avoided or how to avoid them. These concerns are most directly addressed by excluding from the definition of "charge" any tips or voluntary fees that are received after a clear and conspicuous disclosure. DFPI should provide clear guidelines for the content of such disclosure, such as requiring the disclosure of the voluntary nature of the fee and how it can be avoided without affecting the consumer's ability to receive an IBA.

This type of safe harbor aligns with the CFL's statutory exclusions for the definition of "charges" that depend on disclosure. Subdivision (f) of section 22202 of the Financial Code excludes from the definition of "charges" payments for services where such amounts are paid pursuant to "a separately signed authorization" that acknowledges that such amounts are "optional", as long as the payments are authorized "pursuant to Section 22154."[47] This provision recognizes a principle that "charges" do not properly include amounts that consumers understand

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[45] *See* DFPI, PRO 01-21 Initial Statement of Reasons, Pages 60-62 https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf.

[46] Alternatively, DFPI may enforce existing law in such cases, obviating the need for such a rule. Indeed, DFPI recently did so. *See Consent Order,* In the Matter of DFPI v. SoLo Funds, Inc. (May 8, 2023)(finding that "tips" constituted charges where the "tip" offered impacted the ability for a borrower to receive a loan).

[47] In full, the provision reads as follows: "Moneys paid to, and commissions and benefits received by, a licensee for the sale of goods, services, or insurance, whether or not the sale is in connection with a loan, that the buyer by a separately signed authorization acknowledges is optional, if sale of the goods, services, or insurance has been authorized pursuant to Section 22154."

are clearly optional and that are not paid as consideration for the loan. And just as DFPI proposes to authorize the payment of certain subscription fees pursuant to section 22154 of the Financial Code, DFPI can use this rulemaking as opportunity to provide a safe harbor exclusion from the definition of charges for tips and other voluntary fees that are properly disclosed as long as they do not, on average across all transactions in a month, exceed 7%.

This recommendation appropriately balances consumer protection aims without overreaching. It further preserves consumer agency and the consumer's ability to make decisions about tipping and/or paying voluntary fees.

This approach also aligns with California common law regarding the effect of voluntary acts on usury limitations. The California Supreme Court has held "that a debtor by voluntary act cannot render an otherwise valid transaction usurious."[48] Under California common law, this exception has come to be known as the "Interest Contingency Rule." For an agreement to be usurious, it "must in its inception *require* a payment of usury" and "subsequent events do not render a legal contract usurious."[49] Interest will only be usurious "when it is 'absolutely repayable by the borrower.'"[50] Typically, this rule has come up in cases where either in addition to, or in lieu of, charging interest, a lender seeks a share of profits for a related transaction.[51] Courts have generally rejected borrower attempts to characterize profits that banks generate on such transactions as usurious.[52]

In the same way that voluntary payments are not considered part of a usury calculation under California common law, properly disclosed voluntary payments should not be considered part of capped "charges" under the CFL. DFPI should adopt this narrower definition of "charges" and exclude reasonable and disclosed voluntary payments.

IV. Additional Recommendations

While EarnIn's primary concerns are addressed above, we further wish to call to DFPI's attention several more specific discrepancies in the proposed rule.

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[48] *Sw. Concrete Prod. v. Gosh Constr. Corp.*, 51 Cal. 3d 701, 706 (1990) (holding that late payment fees were not usurious).

[49] *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal. App. 4th 525, 533 (2007)(emphasis added).

[50] *Id*. at 534.

[51] *Id*. at 534-35.

[52] *Id*.; and *see Adar Bays, LLC v. GeneSYS ID*, Inc., 341 F. Supp. 3d 339, 354–56 (S.D.N.Y. 2018) (holding that discount on converted stock was too uncertain at time of contracting to be included as "interest" for determining whether a loan was usurious).

A. *The Department Should Align its Review of Ultimate Beneficial Owners under the CCFPL with the CFL*

EarnIn recommends that DFPI limit its vetting of certain minor ultimate beneficial owners of CCFPL registrants. DFPI has recently clarified that ultimate beneficial owners of an applicant that own only an economic interest in the applicant but do not manage the lending activities of the applicant are not subject to CFL vetting.[53] There is no reason why the same limitations should not apply to CCFPL registrants and EarnIn recommends that the DFPI clarify the same.

B. *The Proposed Rule Should be Revised to Avoid Regulatory Uncertainty with Respect to Wage Assignment*

The proposed rule states that "any advance of funds to be repaid in whole or in part by the receipt of a consumer's wages, salary, commissions, or other compensation for services, is a sale or assignment of wages and a loan subject to the California Financing Law." While we appreciate that DFPI does not enforce California labor law,[54] this conclusion puts all IBA providers, and indeed, all CFL lenders, at risk of being deemed to engage in unlawful wage assignments whenever they initiate a debit into a consumer's deposit account into which they receive wages or other income. Wage assignments are stringently regulated in California and contemplate a third-party diverting wages directly from an employer, i.e., before they are received by the employee.[55] Indeed, prior DFPI rulings recognize this view.[56]

Regrettably, the proposed rule does not clearly articulate the circumstances in which an advance of funds would be treated as one "to be repaid" by wages or other income and would be treated as a wage assignment. The Department further suggests an extremely broad interpretation that may include not only payroll deductions or other arrangements with employers, but also the practice of "timing debits from a consumer's bank account to coincide with when a consumer's wages are deposited into their account."[57]

Wage assignment, as generally understood and as interpreted in other parts of the California Code, is completely different from initiating a debit to consumer's account for recoupment of an advance, particularly a revocable debit. The proposed rule therefore

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[53] *See* 10 Cal. Code Regs. 1404(l), (m); 1422.

[54] Further, the CFL expresses that its treatment of wage assignments does not affect their treatment elsewhere. *See* Cal. Fin. Code § 22335 *("This section shall not be construed as modifying or affecting existing statutes governing wage assignments in the state, or as authorizing those assignments.").*

[55] *See, e.g.,* Cal. Labor Code § 300.

[56] DFPI, OP 8206, *Re: Request for Interpretive Opinion – FlexWage* (Feb. 11, 2021) https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf.

[57] DFPI, PRO 01-21 Initial Statement of Reasons, Page 53 https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf.

unnecessarily implies that all IBA providers are engaging in potentially unlawful wage assignments.

EarnIn recommends that DFPI clarify that debits to a consumer account do not constitute wage assignment.

C. *DFPI Should Clarify That "Direct-to-Consumer" Models are Eligible for Treatment as Income-Based Advance Providers*

EarnIn recommends that DFPI make clarifications to the definition of income-based advance to ensure that it does not inadvertently exclude direct-to-consumer IBA providers from coverage under the rule. Specifically, DFPI should ensure that the definition of IBA includes advances that the provider has *reasonably determined* are based on earned, not-yet paid income.

DFPI has recognized two types of business models for IBA providers. In DFPI's words, there is "1) a business-to-business (B-to-B) model in which the EWA company contracts with employers who then roll the services into benefits for their employees and 2) a direct-to-consumer (D-to-C) model in which the EWA company works directly with the employee, eliminating the employer from transactions."[58]

Nothing in the rule or statement of reasons suggests that DFPI intends to prohibit development of direct-to-consumer IBA models. In fact, the statement of reasons clarifies that DFPI is proposing a rule change to the CFL in express contemplation that both direct-to-consumer and business-to-business providers will rely upon the rule change to provide IBAs.[59] However, the rule defines IBA in a manner that could inadvertently make it impossible for providers to offer IBAs on a direct-to-consumer basis, which would severely harm consumer choice and competition as. In particular, the definition of IBA requires that the advance is based on income "that has accrued to the benefit of the consumer."[60] DFPI explains that it contemplated but rejected a "reasonableness standard"[61] for the determination of accrued income, instead intending to require the income to have actually been earned, rather than reasonably determined to have been

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[58] DFPI, *2021 Earned Wage Access Data Findings*, Page 2 (Q1 2023) https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf.

[59] DFPI, PRO 01-21 Initial Statement of Reasons, Page 57 https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf.

[60] Proposed Section 1004, subdivision (g)(1).

[61] DFPI, PRO 01-21 Initial Statement of Reasons, Page 21 https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf. We think this supposition is unsupported and conclusory. We don't believe that this definition in fact describes industry practices "accurately", as explained in this section. Further, unspecified concerns about reporting are best addressed by tailoring the reporting requirements rather than the in a definition of a term that determines eligibility for CCFPL registration.

earned.[62] DFPI explains that "[t]his definition is necessary to accurately reflect industry practices" and avoid "limit[ing] reporting obligations" for providers whose assessments are "less accurate."[63] This explanation may improperly suggest that IBA providers must have absolute certainty that income has actually accrued to a consumer's benefit.

An "absolute certainty" standard would be impossible to meet as a practical matter. It certainly would not "accurately reflect industry practices." Until payroll is processed at the end of a pay period, it is not possible to determine with absolute certainty what income has actually accrued to an employee's benefit, even with integration into a payroll or employer's time-and-attendance system. Until payroll is processed, it may not be possible to capture whether an employee has or will change their health care plan elections or retirement account contributions, for example. Overtime pay is also a particularly hard problem and depends on whether overtime is calculated daily or on another basis, as well as hours worked later in a pay period. Accordingly, a reasonableness standard for an earned income determination is particularly appropriate in this context.

Further, it is not clear to us why DFPI seems to believe that a reasonableness standard may negatively affect reporting obligations. Despite any concerns DFPI may have, industry participants tend to do very well in making these determinations reasonably, even if not always perfectly. In fact, DFPI cites data from a report analyzing the direct-to-consumer model, even editorializing that the rate of EWA non-repayment (regardless of model) is "remarkably low," suggesting that industry does well in determining how much income has actually been accrued.[64] DFPI can and should set safeguards to make sure IBA providers are making appropriate determinations of earned income. EarnIn believes that a reasonableness standard would accomplish this goal without creating uncertainty about the regulatory viability of the direct-to-consumer model and recommends that DFPI accordingly adopt a reasonableness standard.

* * *

We are grateful for the opportunity to provide comments on the proposed registration requirement, and we thank you in advance for your time and thoughtful consideration of these and other comments submitted to the Department. If you have questions or require any other information, please do not hesitate to contact me. We look forward to continued dialogue about Earned Wage Access and to helping DFPI understand emerging markets for consumer financial products and services. We fully support purpose-built regulatory oversight and guidance appropriate to innovative products like IBAs and DFPI's statutory mandate of promoting access

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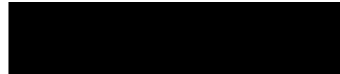
[62] *Id*.

[63] *Id.*

[64] DFPI, PRO 01-21 Initial Statement of Reasons, Page 54 https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf.

to nondiscriminatory and consumer-protective innovation and financial products and services. Thus, we look forward to future discussions about the same.

Sincerely,



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