



May 17, 2023

Ms. Clothilde V. Hewlett
Commissioner, Department of Financial Protection and Innovation
2101 Arena Blvd.
Sacramento, CA 95834
Submitted electronically to regulations@dfpi.ca.gov

Re: PRO-01-21

The undersigned groups – the Center for Responsible Lending, Consumer Federation of California, and National Consumer Law Center – thank you for the opportunity to comment on the Department of Financial Protection and Innovation’s (DFPI or Department) Proposed Regulations Under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act, PRO 01-21.

These comments focus on the regulation of income-based advances and other fintech cash advances and on the amendments to the California Financing Law (CFL) clarifying the scope of the CFL and the charges subject to it. We have joined other comments on other aspects of the proposed regulations.

I. Overview

Overall, we support the proposed regulations, which prevent evasions of California’s important consumer protection laws governing credit. The proposed regulations offer critical protections for workers who are being pushed into paying to be paid and for consumers who are paying 330% APRs on fintech payday loans that are not complying with California law.

We strongly support the conclusion that income-based advances and other types of cash advances are loans under the California Financing Law (CFL), and that tips, expedite fees and other purportedly voluntary payments are “charges” under the CFL. The arguments that fintechs have advanced regarding the purported “nonrecourse” nature of their loans and relevance of whether a payment claims to be voluntary are spurious, as DFPI has found. DFPI’s conclusions are well supported by the CFL itself and the well-established rule that the substance of a transaction, not the purported form, controls in order to prevent evasions of lending laws. This language is among the most important in the earned wage advances sections of this proposed

draft text, and the Department must not water down this clear conclusion when providers of earned wage advances inevitably challenge it.

We do not object to a temporary exemption for income-based advances from the CFL, with an alternative registration path under the California Consumer Financial Protection Law (CCFPL). It is absolutely essential, however, that this exemption is conditioned on compliance with the CFL's limits on charges.

As DFPI's data analysis found, the charges paid by consumers to both tip-based and non-tip companies exceeded an average of 330% annual percentage rate (APR), comparable to the average APRs for licensed payday lenders in California. As an administrative agency, the DFPI of course does not have the ability to waive or ignore the legislature's statutory commands. The CFL's cost caps are the most important aspect of the legislature's statutory scheme in the CFL, and nothing in the CCFPL gives businesses any leeway to skirt the core protections of the CFL (and other consumer protections laws). Thus, any regulatory pathway under the CCFPL for earned wage advances and other fintech cash advances must require compliance with the cost caps in the CFL.

Similarly, applying the CFL's charge limits to all payments received, as required by the CFL, is also a fundamentally important part of this proposed regulations. DFPI rightly rejected any distinction based on the purportedly voluntary nature of payments as both inconsistent with the statute and as more effective than attempting to police the myriad ways that DFPI has already documented that providers can push people into paying "voluntary" charges. DFPI's data showing that 73% of the advances from tip-based services included tips, amounting to \$17 million, supports this conclusion.

These provisions do not result in banning income-based advances and other fintech payday loans. Providers can continue to offer these cash advances as long as they either register or obtain a license, and comply with the CFL rate and charge limits. Indeed, DFPI's proposal still results in allowable APRs that are far too high – up to 213% for a loan of 10 days and much, much more for shorter loans that users often take (290% for a loan of seven days, and over 600% for a three-day loan). As discussed below, these rates should be lowered. While 213% for a 10-day loan is an improvement over 330%, it is still excessive, and certainly enough to enable providers to continue to offer these products. That is especially true for employer-based products, as employers can contribute to the costs, as many do. Indeed, the preferred option is for employers who offer these products to ensure that they are completely free to the worker, as there are at WalMart.

While we support the proposal overall, we have made several suggestions below on how to strengthen it. We will not repeat them all here, but will flag some of the most important ones:

- DFPI should not exempt balloon-payment loans with less than a 15-day term from the CFL requirement that the first payment be due not less than 15 days from the date the loan is made. Balloon payment loans are already a problematic product, and DFPI should not be encourage loans with such extremely short terms.

- If DFPI retains the 15-day exemption, it must prorate the permissible 5% administrative fee or otherwise prevent multiplying fees if the term is less than 15 days. A 15-day loan with a 5% fee would have an APR of 121.7% – already too high – and lenders should not be allowed to charge higher rates or have multiple fees in a 15-day period that exceed that rate.
- The exemption for advances funded directly by employers or other obligors, as in the FlexWage model, should be removed. Those providers should also be required to comply with the CFL’s fee and rate caps for all loans, not merely on average for their portfolio, and the third parties that offer those services require supervision and oversight just like other third parties do.
- The definition of “income-based advance,” which allows CCFPL registration as an exemption from CFL licensing, must be tightened up to clarify that it only covers services integrated with employer time and attendance systems.
- The DFPI should clarify that advances that are to be repaid from income other than wages, salary, commissions or other compensation for services are also loans under the CFL.

We discuss these issues in greater detail below.

II. The Proposed Regulations Rightly Determine that Earned Wage Advances and Other Fintech Payday Loans are Credit Subject to the California Financing Law.

The proposed regulations offer important amendments to prevent evasion of California’s lending laws. In particular, they prevent certain entities from evading those laws by claiming that they are not offering loans.

The clarifications in the proposed regulations will cover at least three categories of loans (described in more detail below):

- (1) Earned wage advances offered by third parties through arrangements with employers (i.e., companies like PayActiv and Daily Pay);
- (2) Fake direct-to-consumer earned wage advances, which claim to be paying wages but have no connection to employers or payroll (i.e., Earnin); and
- (3) Other fintech cash advances offered through fintech banking and financial management apps, which are repaid upon receipt of compensation for services but do not claim to be paying wages (i.e., Dave, Money Lion, and others).¹

While the proposed regulations will temporarily exempt a limited category of “income-based advances” from the CFL if they choose instead to register under the California Consumer

¹ More detail on these categories of fintech payday loans is available in the [Consumer Comments to the CFPB Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services](#) (May 2, 2022) (“CFPB Junk Fees Comments”) and the [Testimony of Lauren Saunders Before the U.S. House Task Force on Financial Technology on Buy Now, Pay Later and Other Fintech Cash Flow Products](#) (Nov. 1, 2021 (“Saunders Fintech Credit Testimony”).

Financial Protection Law (CCFPL), these advances would still be treated as loans and have to comply with the limits on charges for loans under the CFL.

We applaud the Department for its conclusion, in section 1461(a) and (b) of the proposed regulations, that advances repaid by a worker's wages or other compensation for services are loans subject to the CFL and that companies making such advances are "finance lenders" under that statute. We read these provisions, rightly, to apply to all three categories of loans listed above, which this comment refers to collectively as "fintech cash advances." We also strongly support the proposal to require "income-based advance" providers that register under the CCFPL to comply with the charge limitations of the CFL during the temporary four-year period in which they have the option of CCFPL registration in lieu of a CFL license.

The conclusion that these advances are loans is plainly correct under the text and purposes of the CFL and related statutes.

First, the plain text of the relevant statutes establishes that these advances are loans. The CFL defines a "finance lender" as "any person who is engaged in the business of making consumer loans or making commercial loans."² Although "loan" is not defined in the CFL, "loan of money" is defined in the Civil Code as "a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." *See also Milana v. Credit Discount Co.* (1945) 27 Cal. 2d 335, 339 (a loan is "the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use").

With fintech cash advances, consumers receive money from an employer or third-party company and agree to return that money at a later date by authorizing payroll deduction, a bank account debit, or some other mechanism. There can be no question that such transactions are loans under California law.

If this were not clear enough, the CFL contains a provision specific to assignments of wages and other compensation that confirms the statute's application to these products. Financial Code section 22335 provides that "payment by any person in money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, is, for the purposes of regulation under [the CFL], a loan secured by the assignment." Fintech cash advance lenders obtain an assignment or order for payment when they obtain authorization for payroll deduction, bank account debit tied to receipt of compensation, or another method to directly take part of a consumer's compensation on payday.

Second, the CFL's purposes confirm that fintech cash advances are loans. The Legislature mandated that the CFL be "liberally construed and applied to promote its underlying purposes and policies," including protecting "borrowers against unfair practices by some lenders, having due regard for the interests of legitimate and scrupulous lenders." Fin. Code § 22001. If there were any doubt that fintech cash advance providers fit the plain language definition of

² Cal. Fin. Code § 22009.

“finance lender” under the CFL (and there is not), this provision would erase that doubt by requiring that the CFL be applied to products that operate like loans in all relevant respects.

Third, viewing fintech cash advances as loans is consistent with the longstanding principle that courts and regulators should focus on the substance of a transaction rather than the purported form in order to prevent evasions of usury and lending laws.³

Providers make two principal arguments why their products are not loans: that the advances are allegedly “non-recourse” and that the advances do not carry mandatory finance charges. The Department rightly rejects both of these contentions and correctly finds that to consider fintech cash advance companies “to be offering a product that is not credit would elevate form over substance.”⁴

A. That providers describe their advances as “non-recourse” does not exclude them from the CFL.

Providers frequently argue that they are not subject to state lending laws because their advances are allegedly “non-recourse.” The Department rightly rejects this contention, which is wrong on both the law and the facts.

To begin with, section 22335 plainly says that a wage assignment is a loan, *without stating any requirement that it be “non-recourse.”* California law has long recognized that a transaction wherein an entity obtains a security interest in property is still a loan even if the entity lacks the ability to hold the property owner personally liable. *See, e.g., Aozora Bank, Ltd. v. 1333 North California Boulevard*, 15 Cal.Rptr.3d 340, 342 (Ct. App. 2004) (“In a nonrecourse loan like the one here, the borrower has no personal liability and the lender’s sole recourse is against the security for the obligation. (1 Cal. Real Estate Finance Practice: Strategies and Forms (Cont.Ed.Bar 2003)”).

In any case, companies’ assertions that their earned wage advances are “non-recourse” is a fiction devised in the hope of avoiding regulation. PayActiv, for example, has the right to attempt two more payroll deductions against the consumer’s future, unearned wages.⁵ That is a way of collecting on an obligation. PayActiv also requires employees to make certain “representations and warranties” and “reserve[s] the right to pursue claims against individuals” who breach those representations and warranties.⁶ The fine print of the PayActiv agreement states:

³ See NCLC, Consumer Credit Regulation § 3.9 (3d ed. 2020), updated at library.nclc.org.

⁴ Initial Statement of Reasons (“ISOR”) at 25; *see id.* at 55 & n.92.

⁵ “In some circumstances, you authorize your Employer to attempt such deduction on each of the next two Scheduled Paydays from any wage payment made on those successive Scheduled Paydays, or as applicable you authorize PayActiv to make two further debit attempts, until the FFRWP and applicable Program fees are successfully deducted or debited.” PayActiv Terms & Conditions at 3, 3 (“PayActiv Terms and Conditions”), Appendix A to Compliance Assistance Sandbox Submission to CFPB from Payactiv, Inc. (“PayActiv Sandbox Submission”), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-request_2020-12.PDF.

⁶ PayActiv Sandbox Submission at 9 & n.11; PayActiv Terms & Conditions at 4.

You represent and warrant that, to the best of your knowledge, you have earned the net accessible wages to which the FFRWP relates, that those wages are not subject to reduction in whole or in part by reason of a valid lien or garnishment, and that by requesting an FFRWP, you have a reasonable expectation of receiving those net wages in your next scheduled wage payment.⁷

Thus, if a payroll deduction fails, in addition to the right to attempt twice more to collect the loan from future, yet unearned, wage payments, PayActiv also has the ability to assert a claim against the consumer for breaching this representation and warranty. PayActiv needs to insert this representation and warranty because it is not paying wages; it is making loans in advance of payday that it expects to be repaid on payday.

Similarly, the Earnin agreement states: “When you request a Cash Out, Max Boost, or Balance Shield Cash Out, you represent and warrant that the earned wages being cashed out are just and due to you and that you have not received payment for such wages or any part of the wages from anyone else.”⁸

It is therefore no surprise that, as the Department has noted, nearly all earned wage advances are in fact recouped. *See* ISOR at 54 (quoting Financial Health Network “Earned Wage Access and Direct-to-Consumer Advance Usage Trends,” at p. 2 (April 2021) (finding that advances “were recouped successfully at least 97% of the time)). This confirms that, in reality, earned wage advance companies almost always recoup the amounts they lend to consumers, notwithstanding their disingenuous claims that the transactions are “non-recourse.”

In addition to the fintech cash advances covered by Section 1461(a), the non-recourse argument has been asserted by companies offering advances that are to be repaid from other income beyond by wages, salary, commissions or other compensation for services. DFPI should prevent these arguments from being used to evade the law in other settings.

We urge DFPI to add a provision parallel to proposed section 1461(a) applicable to CFL loans generally stating:

A loan that is by contract to be repaid from an asset the payee owns or from income or a payment that the payee expects to receive is subject to the California Financing Law regardless of the means of collection, whether the provider has legal recourse if the provider is unable to collect the amount advanced, or whether the consumer has the right to cancel collection of the amount advanced.

B. That some companies assert that their product carries only voluntary charges does not exclude them from the CFL.

Providers also contend that they are exempt from lending laws because their products allegedly do not carry mandatory charges. Once again, we applaud the Department for rejecting this blatant attempt to evade the California Financing Law. California law has long rejected

⁷ PayActiv Terms & Conditions at 4.

⁸ <https://www.earnin.com/privacyandterms/cash-out/terms-of-service#repayment>.

attempts to evade its usury limits through a consumer’s purportedly voluntary payment.⁹ With respect to the CFL specifically, that statute permits a lender to “contract for and *receive* charges” only at or below the CFL’s interest rate limits. Fin. Code section 22303 (emphasis added). Similarly, the CFL defines “charges” as “costs charged, contracted for, *or received by* a licensee.” Fin. Code section 22200 (emphasis added). This language confirms that a user’s agreement to charges in excess of usury limits is no defense; the agreement to receive usurious charges is sufficient.

Along the same lines, it is not true that providing an option for consumers to receive an advance free of charge makes earned wage advances not a loan. Indeed, this Department has licensed many “buy now pay later” providers under the CFL notwithstanding that many BNPL loans do not accrue interest or any other finance charge.

Moreover, providers’ assertions that their products carry no mandatory charges ignores the techniques the companies use to encourage consumers to pay for the allegedly “free” product. The principal “non-mandatory” fees that earned wage advance companies charge are “expedite fees” (for faster delivery of proceeds) and “tips,” neither of which is nearly as “voluntary” as the industry maintains.

The vast majority of users – roughly 90% – pay “expedite fees” when necessary to receive an instant advance.¹⁰ This should not be surprising given that the entire purpose of a fintech cash advance is quick access to funds ahead of the regular payday. Providers may offer a “free” version of their product that fails to meet consumers’ needs because it delays funds. But this does not mean that the “expedite fees” that users must pay to access a useful version of the product are not charges, and in fact are not truly “voluntary.”

Similarly, DFPI’s data show that companies that solicit “tips” collected them on 73% of transactions.¹¹ The percentage of *consumers* who paid tips is likely even higher, as some consumers may have skipped a tip on one transaction after tipping recently on a previous one. While the “tips” are purportedly voluntary, companies can employ strategies to make it difficult not to tip or to make the consumer feel compelled to tip. As the Department found, these strategies include:

- adding a default tip that must be removed each time,
- user interfaces that send psychological signals,

⁹ *Stock v. Meek*, 35 Cal.2d 809, 817, 221 P.2d 15, 20 (1950) (quoting *Taylor v. Budd*, 217 Cal. 262, 266, 18 P.2d 333 (1933)) (“Payments of usury are not considered voluntary, but are deemed to be made under restraint.”).

¹⁰ See Testimony of Lauren Saunders Before the Task Force on Financial Technology U.S. House Committee on Financial Services On “Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products” (Nov. 21, 2022) at 9 n.35, <https://www.nclc.org/wp-content/uploads/2022/10/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf>.

¹¹ Department of Financial Protection and Innovation, 2021 Earned Wage Access Data Findings at 1 (Q1 2023) (“DFPI Data Findings”), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf?emrc=08148f>.

- disingenuous statements about how the tips support a “community” rather than a large company or wealthy hedge fund,
- the outright denial or reduction of future credit if the consumer does not tip enough.

ISOR at 61-62.

DFPI’s recent consent decree with Solo Funds also outlines a number of techniques used to coerce “tips”:

Pop-up messaging in the Platform urged Borrowers to offer the maximum tip amount to have their loan request fulfilled. One such pop-up claimed that Borrowers who offered the maximum tip amount were two times more likely to have their loan funded. Any Borrower or prospective Borrower new to the Platform must offer a tip or would be less likely to have their loan request fulfilled.¹²

DFPI also found that Solo Funds solicited and made it difficult not to pay “donations”:

Before receiving a loan, the Borrower was also presented with a pop-up prompting the Borrower to pay a donation to SoLo for providing the Platform. The donation was also expressed as a percentage of the loan amount and could be no more than 9%. When making a loan request, Borrowers could not dismiss the donation request prompt; the only way to disable the donation request pop-up was to toggle an unadvertised setting buried in the Platform’s general settings pane. Further, this setting had to be turned off each time the Borrower took out a loan.¹³

While Solo Funds “claims that Borrowers would have been able to retract previously-agreed upon tips and/or donations if Borrowers contacted SoLo’s general customer support in advance of the loan repayment date[,] Borrowers were never advised that they may renege on their prior commitment to make a tip or donation.”¹⁴

Not surprisingly, then, DFPI found that the “vast majority of Borrowers in California paid both a tip and a donation.”¹⁵ Similarly, the Connecticut Banking Commissioner found that 100% of Solo Funds borrowers in that state contained either a lender tip or Solo tip.¹⁶

The pressure techniques that providers use to solicit “tips” and “donations” undermine their contention that these payments are truly voluntary. Even absent any special techniques, consumers who are asked to “tip” before they have received an advance are likely to fear that not tipping will reduce their access. And of course, a “tip” committed before service has been

¹² Consent Order, In re Comm’r of Fin’l Prot’n & Innov. v. Solo Funds, Inc. at 6 (DFPI May 8, 2023), <https://dfpi.ca.gov/enf-s/solo-funds-inc/> (“Solo Funds Consent Order”).

¹³ *Id.* at 7.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Temporary Order to Cease and Desist, In re: Solo Funds Inc., at 3 (Conn. Banking Comm’r May 4, 2022), <https://portal.ct.gov/-/media/DOB/Enforcement/Consumer-Credit/2022-CC-Orders/Solo-Funds-Inc--Temp-CDRestNOI-CDCPOLER.pdf>.

rendered, with a binding authorization for the bank account debit, is hardly a tip for good service; it is a payment for that service.

III. Earned Wage Advances and other Fintech Cash Advances Pose Serious Consumer Harms that the Department is Right to Address.

Employer-integrated earned wage advances, direct-to-consumer fake earned wage advances, and other fintech cash advances present many of the same issues and risks as other balloon-payment payday advance loans. We applaud the Department for recognizing the similarities between these new fintech products and traditional high-cost loans, which amply justify the Department’s decision to require providers of earned wage advances to abide by the interest rate limits in the California Financing Law.¹⁷

First, fintech cash advance providers impose fees that add up to high APRs averaging 330%, with a bewildering array of pricing models that may be designed to evade usury laws, make the costs difficult to compare to other credit options, and make it difficult to understand how small fees can add up. Some companies charge per advance, some per pay period, some per month. Others try to hide the trust cost of their product altogether by relying on “tips” for much of their revenue. Some vary depending on how quickly the consumer wants the advance, with expedite fees that increase based on the size of the advance. But most do have fees that can add up, which is an important reason to require fintech cash advance companies to abide by the interest rate caps in the CFL.

DFPI’s data analysis found triple-digit APRs for both tip-based direct-to-consumer models and non-tip models (primarily employer-based). The average APR was 334% for tip companies and 331% for the non-tip companies, “comparable to the average APRs for licensed payday lenders in California.”¹⁸ DFPI did not calculate APRs for subscription companies.

The typical frequency of use for employer-integrated DailyPay, for example, is reported to be 1.5 times per week – 78 times per year.¹⁹ Even at the low end of \$1.99 per advance available the next business day, that is \$155.22 per year. Undoubtedly many workers who use this service take the option of getting their pay immediately, at a cost of \$2.99 each, or \$233.22 per year if done 1.5 times per week. And those are only averages – some workers may pay far more.

Indeed, despite what the industry may claim, fintech cash advances can be a form of expensive, predatory lending. These advances can be high-cost products that use a variety of

¹⁷ NCLC and CRL have previously submitted in this rulemaking a lengthy analysis of the consumer harms associated with earned wage advances. See https://www.nclc.org/wp-content/uploads/2022/08/CRL_CA_DFPI_EWA_Comments-1.pdf. That analysis, which is incorporated here by reference, is condensed and summarized in the following section.

¹⁸ DFPI Data Findings, *supra*.

¹⁹ Leslie Parrish, Aite, Employer-Based Loans and Early Pay: Disruption Reaching Scale at 13 (April 2019).

techniques to disguise their true costs, so the Department is exactly right to require providers of these products to abide by the interest rate limits in the CFL.

Second, these new forms of cash advances pose the risk of a cycle of debt when repayments are not affordable. Taking an advance on the next paycheck when a consumer cannot cover an expense with the current paycheck creates a hole in the next paycheck that leads to a cycle of debt and reborrowing. The cycle of debt of traditional payday loans is well known. While purporting to be two-week loans, more than three-quarters of payday loan fees come from people stuck in more than 10 loans in succession.²⁰

Fintech cash advances can put people into an extensive cycle of repeat borrowing similar to payday loans. Previous surveys of advance providers have revealed that the typical frequency of use for those who use these advances runs from 12 times per year on the low end to 120 at the high end, with most at or above 24 times a year.²¹ According to a recent GAO report, users of a direct-to-consumer income-advance company used the service between 26 and 33 times a year.²²

These findings are in accord with the Department’s own analysis, which found that users took earned wage advances on average nine times a quarter (with a range of 1 to 25 *times* a quarter) – that is, an average of 36 times a year, with a range of 4 to 100 times.²³ In other words, typical users of these products use them *nearly every pay period*.

With this cycle of reborrowing, consumers are often not getting liquidity to cover new expenses; the advances are merely filling the gap created by the prior advance. That is, like traditional payday loans, the advances create their own demand.²⁴ And the cycle of reborrowing creates the same problems:

“After Earnin had taken all of their money out, and then after a couple of bills, I had no money,” she said. “Luckily at the time I didn’t have to go anywhere. The kids — I found a way to get some gas money to get them to school, I borrowed from my grandma, but it leaves you without any options, really. It’s definitely a vicious cycle.

“Another Earnin user, Brian Walker, 38, said that he used the app three times before souring on it. Walker, an engineer, previously declared bankruptcy and doesn’t use credit

²⁰ Consumer Financial Protection Bureau, Payday Loans and Deposit Advance Products (April 24, 2013), https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

²¹ The “typical frequency of use” numbers were reported in Leslie Parrish, Aite, Employer-Based Loans and Early Pay: Disruption Reaching Scale at 13-14 (April 2019). The typical advances per year were calculated by NCLC assuming semi-monthly paychecks.

²² U.S. Government Accountability Office, Financial Technology Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity Is Needed (March 2023), <https://www.gao.gov/assets/gao-23-105536.pdf>.

²³ DFPI Data Findings, *supra*.

²⁴ See Leslie Parrish and Uriah King, Center for Responsible Lending, Phantom Demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume (July 9, 2009), <https://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf>.

cards. He lives in Sioux Falls, South Dakota, where short-term lending is capped by law at 36 percent APR.

“The first time he used the app, to take out \$100 four days before being paid, he tipped \$5. After Earnin pulled his money out of his paycheck, he said he thought to himself: “I’m down \$105 and I’m like, damn, I need that \$100 again.”²⁵

Third, companies do not engage in underwriting for ability to repay. The only underwriting that fintech cash advance apps do is to attempt to verify income to ensure that the pay will be there to cover the payroll deduction or bank account debit; they make no attempt to assess if the worker will be left with enough pay to manage expenses for the next pay period. In this way, too, providers are like other predatory lenders – who only look to their own ability to collect, and not the borrower’s ability to repay.

Fourth, earned wage advances – and even some employer-integrated models – pose a risk of overdraft and nonsufficient funds (NSF) fees. Direct-to-consumer models repay themselves by debiting the consumer’s bank account. Because the apps are not truly advancing wages and are only estimating when wages will be paid, they can make mistakes and trigger a repayment when income has not been deposited to cover it. For example, if the earned wage advance provider fails to take into account an employer’s one-day delay in depositing a worker’s pay when the regular payday falls on a Sunday or holiday, the debit may bounce.

* * *

In sum, fintech cash advances pose numerous harms to consumers. First among these harms is the high cost of credit that consumers pay to use these products. We applaud the Department for tackling this problem head-on by requiring fintech cash advance providers to follow the CFL’s interest rate limits.

IV. The DFPI’s Regulatory Proposal Does Not Ban Fintech Cash Advances

Providers of fintech cash advances will no doubt argue to the Department that its proposed rules prevent them from operating. Indeed, Earnin has already argued to the public that the proposed rules are an “existential threat” to offering their products and has set up a portal for Earnin users to send form comments to the DFPI opposing the rulemaking.²⁶ But these claims are, of course, patently false. Nothing in the proposed rules bans fintech cash advances. Instead, the rules simply require registration or licensure with the Department and that providers comply with the CFL’s cost caps.

Complying with the CFL’s cost caps also does not result in banning fintech cash advances and still permits high APRs – too high. The proposal permits APRs of 213% and beyond for these loans, which is certainly sufficient return for providers to offer them. Providers

²⁵ Cyrus Farivar, NBC News, [Millions use Earnin to get cash before payday. Critics say the app is taking advantage of them.](#) (July 26, 2019).

²⁶ See, e.g., Earnin, Help Keep Access to Your Earnings Safe, <https://www.earnin.com/blog/help-keep-access-to-your-earnings-safe>. A screenshot of this portal is attached to this comment as Exhibit A.

recoup the funds that they advance 97% of the time, which the Department has noted is a figure that exceeds the recoupment rate for licensees under the CFL and Deferred Deposit Transaction Law. ISOR at 24-25. Fintech cash advances have no brick-and-mortar overhead, as most payday lenders do. Earnin closely monitors consumers' pay cycles and payment date, using, we understand, a service that gives it direct access to the timing of bank account deposits. That information, combined with the authorization to debit bank accounts, gives it a high certainty of being repaid and reduces defaults, one of the highest costs for DDTL licenses. The recoupment rate is almost certainly higher for providers that are integrated into an employer's time and attendance system, given the heightened accuracy in that model and that recoupment is processed through a payroll deduction. These loans are thus very low risk, and there is no reason why providers cannot offer them while complying with the CFL's cost caps (which permit excessive, triple digit APRs).

For providers of employer-integrated "income-based advances", the Department is creating a *less onerous* regulatory pathway by permitting them to register in lieu of licensure. And the Department's current proposal contains a waiver of the CFL's 15-day minimum term requirement for all providers. While, as discussed below, we object to certain aspects of the less onerous regulatory pathway, the fact remains that the proposed rules appear to attempt to accommodate the business model of fintech cash advance providers, not shut them down.

The Department must not be swayed by arguments that fintech cash advance providers cannot operate under the proposed rules.

V. Comments on Specific Language in the Proposed Rules

A. Section 1004 (Definitions – Income-Based Advances)

Section 1004(f). The proposed draft text defines "gratuity" as "an optional payment made by a consumer in connection with the provider's provision of an income-based advance to the consumer that does not affect the service rendered by the provider to the consumer." We are concerned that this provision indicates that an optional payment that *does* affect the service rendered is not a gratuity. Such an "optional" payment would of course be a charge (and in any case would count toward the CFL's cost caps), but we nevertheless suggest amending this language as follows to broaden the definition of "gratuity" for purposes of the rulemaking's data reporting requirements (new language bolded):

"Gratuity" means **a payment** made by a consumer in connection with the provider's provision of an income-based advance to the consumer that **is optional and is not made for purposes of obtaining a different type or level of services**.

Section 1004(g). The proposed draft text defines "income-based advance" as, among other things, "based on income that has accrued to the benefit of the consumer but has not, at the time of the advance, been paid to the consumer." We support the Department for excluding from this definition advances based on earned income that a provider purports to have "reasonably" determined rather than income that has "in fact accrued." See ISOR at 21.

However, we urge the Department to tighten up the definition of “income-based advance” to make clearer that only employer-integrated services qualify. The phrase “based on income that has accrued” is vague, and could be argued to apply to models that merely estimate earned income; indeed, that is what they claim today. Thus, we urge that Section 1004(g)(1) be revised to read:

The advance is based on income **that an obligor has confirmed** has accrued to the benefit of the consumer but has not, at the time of that advance, been paid to the consumer.

To the extent that these proposed rules provide an exception, at least to some extent, to the licensure requirements of the CFL, it should be narrowly tailored and should not include providers who purport to advance earned wages but are not integrated into a payroll system. These lenders are unquestionably making direct loans to consumers, and subjecting them to bank account debits, and thus should be subject to the CFL in full force.

The proposed rulemaking rightly requires non-employer integrated providers to become CFL licensees and prevents other companies from using similar fictions to attempt to argue that they are not lenders under California law. The Department’s conclusion in section 1461 that an advance is a loan without regard to “means of collection, whether the provider has legal recourse if the provider is unable to collect the amount it advanced, or whether the consumer has the right to cancel collection of the amount advanced” applies with equal force to fake earned wage advance lenders (as well as to a host of other fintech cash advance companies, noted below, that do not even purport to advance earned wages).

Similarly, the Department’s conclusion in section 1004 that “‘charges’ include, without limitation, subscription fees, expedited funds fees, account transfer fees, and gratuities” appropriately applies broadly to fintech lenders that flout California law.

The proposed draft text, rightly, does not permit these lenders to register with the Department under these rules because these providers do not make “income-based advances” within the proposed draft text’s definition. *See* section 1462(a)(1)-(2). These lenders include:

- Earnin, which offers direct-to-consumer advances that are not employer integrated and that charge expedite fees and tips.
- Klover, which offers an “instant cash advance.” Klover advertises “No credit check. No interest. No hidden fees,” but Klover does collect “voluntary tips,” “express fees” up to \$9.99 that vary by the amount of the advance, and “subscription fees” of \$2.49.
- Chime, a non-bank deposit account, which offers “Fee-free Overdraft” up to \$200, comparing the “\$0” Chime SpotMe fees to a \$34 traditional overdraft fee, while collecting “tips.”
- Dave, another non-bank “banking” app, which advertises “up to \$200 advances without paying a fee” and “no interest.” Dave collects “tips” and “donations,” and

also charges an “Optional Express Fee” of \$1.99 to \$5.99, depending on the amount advanced.

- MoneyLion, another non-bank banking app, which offers “cash advances up to \$250 with no interest.” MoneyLion collects “tips” plus “delivery fees” of \$3.99 to \$4.99 for instant delivery.
- Brigit, which offers advances up to \$250 with “No credit check. No interest. Pay it back without hidden fees or ‘tips.’” Brigit has a free plan with alerts and budgeting tools, but advances are only available through the Plus Plan, which costs \$9.99/month.
- Loans through Solo Funds, which characterizes itself as a “community” where consumers can access “short-term funds.” To solicit lenders, consumers first set a “lender appreciation tip,” that the vast majority of borrowers pay, along with “donations.” Including tips and donations, charges for Solo Funds exceed the CFL limits and can exceed 292%.²⁷

The Department must be prepared to use its enforcement authority to ensure that these lenders do not fall through the regulatory cracks. We read the proposed draft text to require these providers that do not arrange to get actual information about the consumer’s accrued but unpaid wages to be licensed under the CFL, and we believe that this is the right approach. But the Department must be prepared to address these lenders if they continue to operate without obtaining a CFL license.

B. Section 1045 (Annual Reporting)

We commend the Department for its attempt to create data-reporting obligations for providers of earned wage advances that will allow the Department to assess the harms and benefits of this product. We think, however, that the proposed categories of data to be reported will not be sufficient to provide a full, accurate picture of usage the product. Below, we suggest additional data points to include in this section, with brief descriptions of why the additional data is necessary.

Section 1045(c). In addition to the cost-related metrics in the current proposed text, the Department should require registrants to provide the following information:

- The Department should require registrants to disaggregate advances for which the consumer incurred no “charges,” as that term is defined by Section 1004, subdivision (c), of subchapter 4 of the proposed text. The Department should require registrants to separately report the number of transactions with and without any “charges.”

²⁷ DFPI found that Solo Funds loans normally had a 15-day term and borrowers were encouraged to pay a 12% tip, though individual lenders could demand more, along with a donation up to 9%. We support DFPI’s finding that Solo Funds violated the CFL by brokering loans at rates exceeding the CFL’s limits. *See* Solo Funds Consent Order, *supra*.

- The Department should require registrants, for each subset of transactions (i.e. both those that did and did not result in consumers incurring any “charges”), to separately report the following information:
 - average amount advanced; average cost (if applicable); average duration; and average APR (if applicable); and
 - range of amount advanced; range of cost (if applicable); range of duration; and range of APR (if applicable).
- For non-obligor-based advances, the Department should require registrants to report:
 - The number of California residents impacted by repayment attempts that failed (either partial repayment or no repayment whatsoever); and
 - The number of advances for which the provider attempted to collect repayment (a) two times; and (b) three or more times.

We suggest requiring providers to disaggregate earned wage advances for which the consumer incurred no charges from those that resulted in “charges” for several reasons. First, many earned wage advance providers portray themselves as a superior alternative to high-cost predatory loans in part because, according to the providers, consumers can receive earned wage advances free of charge. We know anecdotally, however, that the vast majority of users do end up paying for their advances. *See supra* at 7 & n.10. Comprehensive data on the mix of no-cost and cost-incurring transactions is lacking, however, so the Department should require data showing what percentage of earned wage advance transactions are free.

Second and relatedly, the Department should require disaggregation of no-cost transactions and those that result in “charges” because of the potential for a relatively small number of no-cost transactions to skew the averages for transactions that do result in “charges.” Obtaining this data broken out will allow the Department to spot any differences between no-cost and transactions that incur “charges.” This will ensure that a small, unrepresentative sample of free transactions does not skew cost data to make earned wage advance transactions appear less costly than they really are.

We also urge the Department to obtain data from registrants showing the range and average for amount advanced, cost, duration, and APR (calculated including all “charges,” as in the 2021 Earned Wage Access Data Findings). Such information is necessary for the Department to evaluate the cost of earned wage advances to consumers.

Finally, we suggest that the Department expand data collection related to repayment attempts to include the number of users impacted by failed repayment attempts and number of advances where the provider attempted multiple times to collect repayment. As discussed above, overdraft and NSF fees are a serious concern with earned wage advances that are not recouped only through payroll deduction, and this data will better illuminate the scope of this issue. These additional specific data points may be easily created using other repayment collection data that

companies are required to produce, so this will not impose any significant additional burden on covered providers.

Thus, we suggest that the Department amend Section 1045(c) as follows (new language bolded):

(c) The number of California residents who received at least one income-based advance in the prior calendar year, and, with respect to all the advances made to those California residents:

(1) The total dollar amount and the total number of income-based advances made, and the total dollar amount of subscription fees, gratuities, expedited funds fees, and account transfer fees paid (each reported separately), and all other charges paid.

(2) The total number of income-based advances made that incurred no “charges,” as that term is defined by Section 1004, subdivision (c), of subchapter 4 of these rules, and total number of income-based advances made that incurred any “charges.”

(3) Separately, for the categories of income-based advances that incurred and did not incur “charges,”

(i) The average length of time between when each income-based advance was made and each advance’s collection date.

(ii) The range of lengths of time between when an income-based advance was made and the advance’s collection date.

(iii) The average amount advanced.

(iv) The range of amounts advanced.

(v) The average length of time between when income-based advances were made and when the amounts due associated with the advances were fully repaid, excluding income-based advances that have not been fully repaid. For the purposes of crediting collections from a resident on a particular collection date where a registrant has made multiple outstanding income-based advances to that consumer, a registrant shall credit collections to the oldest advances first.

(vi) The range of lengths of time between when an income-based advance was made and when the amount due associated with the advance was fully repaid, excluding income-based advances that have not been fully repaid.

(vii) The average cost of the advances, including all “charges” as defined by Section 1004, subdivision (c), of subchapter 4 of these rules.

(ix) The range of costs for the advances, including all “charges” as defined by Section 1004, subdivision (c), of subchapter 4 of these rules

(x) **The average Annual Percentage Rate (APR) for the advances. APR must be calculated inclusive of all “charges” as defined by Section 1004, subdivision (c), of subchapter 4 of these rules.**

(xi) **The range of APRs for the advances, calculated inclusive of all “charges” as defined by Section 1004, subdivision (c), of subchapter 4 of these rules.**

(4) For all non-obligor-based advances, the number of times that the dollar amount collected on a collection date was less than the total dollar amount due in connection with past unpaid advances made to that resident and for these advances, the number of times the provider collected nothing on the collection date, the total dollar amount due and the total dollar amount collected on the original collection dates, the number of times in which the provider attempted to collect from the resident’s bank account on the collection date, the number of times in which a provider made additional attempts to collect from the resident’s bank account after the collection date, the total dollar amount collected after the collection date, **the total number of residents affected by failed collection attempts (including both partial repayment and no repayment), and the number of advances for which the provider attempted collection (i) two times; and (ii) three or more times.**

Section 1045(d). In addition to the usage-related metrics in this section of the current proposed draft text, the Department should require registrants to report:

- Data showing consumers’ annual usage totals, broken down into ranges for ease of reporting (i.e. number of users who took out between 1 and 10 advances each year; 11 and 20 advances each year; 21 and 30 advances each year, etc.)

We suggest that the Department require reporting of annual usage totals in addition to monthly and quarterly totals to show whether consumers’ usage of earned wage advances tends to be consistent across the year. This would help provide insight into whether the consumers who demonstrate high levels of usage in one quarter also demonstrate the same in later quarters. Given the very high numbers likely to result here, however, it is appropriate for the Department to ask for ranges. Thus, we recommend complementing subsection 1045(d) with a new subsection (e) as follows:

(e) For the entirety of the prior calendar year, the number of California residents who received between 1 and 10 income-based advances (inclusive); who received between 11 and 20 income-based advances; who received between 21 and 30 income-based advances; who received between 31 and 40 income-based advances; who received between 41 and 50 income-based advances; who received between 51 and 60 income-based advances; and who received 61 or more income-based advances.

The Department should adopt rules requiring it to publish a yearly report consolidating the results of providers’ annual reports. In rulemakings in related contexts, the Department has promulgated language specifically requiring it to issue a report each year that consolidates the data reported to it by the relevant group of licensees. *See, e.g.,* Cal. Code Regs. Tit. 10, § 2030

(rules re annual report for lenders licensed under the DDTL). The Department should do the same here to ensure that in future years the public receives critical information about how earned wage advances affect consumers.

The 2021 Earned Wage Access Data Findings report was extraordinarily helpful in shedding light on how consumers use earned wage advances and on what those products cost, and the Department should commit to issuing a similar report in subsequent years. This is particularly important because, in this rulemaking, the Department plans to create at least a partial exemption to some of the requirements in the CFL that would otherwise apply to lenders making income-based advances. Thus, ongoing public monitoring of providers registered under this rulemaking is needed. We suggest that the Department adopt a new section 1045(f), as follows:

(f) The Department of Financial Protection and Innovation will prepare an annual consolidated report that incorporates the information received from each and every annual report submitted by registrants for the designated year. The annual consolidated report will be available to the public.

C. Section 1461 (Advances Under the California Financing Law)

We applaud the Department for stating categorically that an earned wage advance is “a loan subject to the California Financing Law” and that companies and consumers involved in these transactions are “finance lenders” and “borrowers” (respectively) under that statute. This language is among the most important in the earned wage advances sections of this proposed draft text, and the Department must not water down this clear conclusion when providers of earned wage advances inevitably challenge it.

We do object, however, to the proposed language exempting from this section “obligors [e.g. employers] who advance from their own funds only income that has accrued to the benefit of a consumer, but that has not, at the time of the advance, been paid to the consumer.” This exemption codifies the position that DFPI took in the FlexWage advisory opinion.²⁸ However, nothing in the CFL’s definition of “finance lender” categorically excludes “obligors,” which makes sense because employers may make loans to employees in a variety of circumstances.

From the employee’s perspective it does not matter at all whether the funds for the payroll advance come from the employer or a third-party earned wage advance provider. In both cases, the employee repays the advance on payday through a payroll deduction (or another method). And either way, the worker uses a third-party app to access the advance and incurs fees to obtain an advance ahead of the regularly scheduled payday.

Moreover, one of the two “necessary elements” in the FlexWage advisory opinion was that “the fees charged do not suggest that the product evades California’s lending laws,” because FlexWage’s fee on the average advance “is substantially lower than the 5 percent administrative

²⁸ DFPI, Fil No: OP 8206, Letter from Charles Carriere to Carl Morris re Request for Interpretive Opinion – FlexWage (Feb. 11, 2022), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf> (hereinafter “DFPI FlexWage Opinion”).

fee that a licensee could charge under Financial Code section 22305, even without charging additional periodic interest permitted under other parts of the CFL.”²⁹ But if DFPI is not supervising FlexWage, it cannot be certain that its fees will remain low, or that it is not otherwise complying with the law or committing unfair, deceptive or abusive practices.

In addition, DFPI found that the cost of a FlexWage advance was below the CFL’s limits for a “typical” advance of \$184, not that all FlexWage advances comply with those limits. The CFL’s limits on charges apply to each loan, not to an average of the lender’s portfolio. FlexWage should not be allowed to escape CFL limits that apply to other income-based advance providers.

With respect to the Department’s legal reasoning, we respectfully disagree with the Department’s conclusion in its 2022 FlexWage Interpretive Opinion that, with employer-funded programs, “it does not appear that the employer is providing the recipient with money ‘for temporary use.’”³⁰ Employees do not have any right to earned but unpaid wages prior to payday, and obligors that provide funds to employees in advance of payday do so because they will be repaid through a payroll deduction later. We understand that, in the Flex Wage model, the employer does not make an actual early wage payment with all required deductions from that payment; instead, on payday, the employee receives it regular pay, with a deduction for the advance. That repayment from the regularly scheduled payroll makes the initial advance one for temporary use.

Rather than this categorical carveout, the Department should exclude from section 1461 only employer-funded programs that do not charge consumers *anything* (including gratuities or expedite fees). Thus, we recommend that the Department to amend the exclusion for obligors in section 1461 as follows (new language bolded):

This section does not apply to obligors, as that term is defined by Section 1004, subdivision (h), of subchapter 4 of these rules who advance from their own funds only income that has accrued to the benefit of a consumer, but that has not, at the time of the advance, been paid to the consumer, **and that advance from their own funds without the consumer incurring any charges, as that term is defined by Section 1004, subdivision (c), of subchapter 4 of these rules.**

Alternatively, DFPI could exempt obligors themselves (as long as the obligor receives no charges), but include their-party earned wage advance providers like FlexWage as brokers, who are prohibited under CFL 22306 from receiving any charges that exceed the CFL’s limits.

D. Section 1462 (Licensure of Advance Providers – Income-Based Advances)

Subpart (a) of this provision exempts from CFL licensure income-based advance providers that register with the DFPI under these rules, under certain conditions.

We do not object to this exemption as a temporary measure, although we generally believe that the CFL should apply with full force to income-based advance providers.

²⁹ *Id.* at 5.

³⁰ *Id.*

Nonetheless, we understand that DFPI may need additional time to study impact of the full CFL provisions on income-based advances and to plan for a transition to CFL licensing.

As discussed above, we believe that this exemption should only apply to employer-integrated products, and we interpret the definition of “income-based advance” to be limited to products that directly confirm actual earned wages. Advances that have no connection to time and attendance systems are not a new product; they are simply a direct loan to consumers that has no basis for an exemption.

It is critical, however, that DFPI has proposed to apply the charge limits of the CFL to providers who chose to register under the CCFPL instead of obtaining a CFL license. The CCFPL does not give DFPI the authority to override preexisting statutes. The cost limitations of the CFL are the most important part of that regime, and the CCFPL was not enacted to allow a pathway for evasive business models to skirt the core protections of California’s consumer protection laws. Allowing an exemption from registration without applying charge and rate caps would be a misuse of CCFPL authority.

For similar reasons, we support the decision, in subpart (b) of this provision, for this exemption to expire when this rulemaking’s registration requirement itself expires. *See* Fin. Code section 90009.5. Subpart (b) will ensure that there is no regulatory void if and when the registration requirement ends, because at that point those providers will be required to obtain CFL licenses. This provision is particularly appropriate here for income-based advance providers in light of the Department’s (correct) conclusion that “income-based advances” (as well as other earned wage advances) are loans under the CFL. Thus, these rules should be only a temporary, transitional solution on the path to full CFL licensure and compliance for providers of income-based advances. We applaud the Department for confirming that here.

E. Section 1463 (Loans to be Collected in a Single Periodic Payment)

In Section 1463 of the proposed draft text, the Department plans to waive the requirements of Financial Code section 22307, subdivision (b), for loans that are collected in a single periodic payment. That statutory provision makes the first payment on a CFL loan “due not less than 15 days . . . from the date the loan is made.”

We object to this decision to waive a component of the CFL for balloon-payment loans. This statute reflects the legislature’s judgment that borrowers should not be requirement to make an initial loan payment within 15 days of origination, which clearly applies to balloon-payment loans. Balloon-payment loans are an intrinsically harmful product, *see supra* at 8-11, so there is no justification for the DFPI to cast aside this 15-day consumer protection for the most harmful subset of loans. If the Department is nevertheless going to retain this provision, it must make related changes to the application of Financial Code section 22305 to income-based advances. That section permits lenders to charge a 5% administrative fee when originating a loan. Sections 22305 and 22307 are part of an articulated statutory scheme that works together. Section 22305 permits the charging of a 5% administrative fee while section 22307 limits the impact of that fee on the overall APR of the loan by ensuring that no loan has a term of less than 15 days.

Even allowing this fee on a 15-day balloon-payment loan results in very high-cost loans that are undoubtedly not what the legislature intended. A 15-day loan with a 5% administrative fee would carry an annual percentage rate of 121.7%, or 122.7% if allowable interest is included. Yet the CFL generally caps the rate for loans up to \$225 at 30%.³¹ While it also allows a 5% administration fee, loans under the CFL are generally installment loans with far longer terms than 15 days, minimizing the impact of that fee on the all-inclusive rate. The legislature would not have intended to allow the administration fee to vastly inflate the interest rate and permit loans with 122% APRs.

Thus, if the Department is going to give lenders a pass on section 22307's term requirement, it must alter the application of section 22305 to ensure APRs do not go even higher if consumers are being charged a full 5% administrative fee for loans that have a term shorter than 15 days. For example, the APR on a 10-day loan with a 5% fee would be 182.5%. Given that the Department's own data demonstrates that many consumers use earned wage advances repeatedly during the same pay period, many consumers could pay several administrative fees for different advances that are all due in far less than 15 days.

In fact, the 5% limit could effectively be evaded when the consumer rolls over loans within a 15-day period. For example, a consumer could take out a \$50 advance and incur a \$2.50 fee, both repaid ten days later. The consumer could then take out another \$50 advance with another \$2.50 fee, repaid five days later. Altogether, the consumer has really only borrowed \$50 for 15 days, but has paid \$5.00 in fees – 10% rather than 5%. Lenders might attempt to structure their products to encourage or even require this kind of extremely short-term loan triggering reborrowing.

To resolve this issue, we propose two possible solutions. First, the Department could require providers to prorate the administrative fee based on the term of the advance (so an advance repayable in 12 days could charge a 4% administrative fee; one repayable in 9 days could charge a 3% administrative fee, etc.). Second, the Department could allow a provider to charge only one administrative fee per 15-day period. Third, the Department could bar providers from charging subsequent administrative fees to the same consumer within a 15-day time period on amounts that have been repaid and reborrowed within that time period.

Finally, at a minimum the Department should amend the language in section 1463 to apply this section only to "income-based advances" as defined in these regulations. While we are opposed to the Department waiving Financial Code section 22307(b) for any balloon-payment loan, we are especially troubled by the proposal to waive this requirement for loans that do not qualify as "income-based advances." "Income-based advances," which, as discussed above, must be based on actually verified wage data, may pose less consumer harm than balloon-payment loans that are not based on actually verified wage data. This is so because "income-based advances" are generally more accurate about whether the consumer has in fact earned wages that have not yet been paid and because those loans are less likely to result in overdraft fees because they are generally recouped through payroll deduction. Thus, while we oppose waiving section

³¹ Cal. Fin. Code § 22303(a).

22307(b) in any circumstances, we strongly oppose the Department plan to do so even for the more harmful subset of advances that are not employer-integrated. There is no reason to give these products, which are nothing more than a payday loan masquerading as an earned wage advance, a free pass from the Legislature’s determination about minimum loan term.

Thus, we recommend amending section 1463 as follows (new language bolded):

Financial Code section 22307, subdivision (b), does not apply to **income-based advances** to be collected in a single periodic payment.

F. Section 1464 (Subscription Fees)

We support the Department’s decision to exclude subscription fees from the CFL’s definition of “charges” only under certain conditions, including that the subscription fee must be capped ((a)(1)); cannot affect the terms upon which the user receives income-based advances ((a)(3)); cannot be a prerequisite to receiving income-based advances ((a)(5)); and must be applied to cover borrowing costs ((a)(6)). The Department has rightly recognized that subscription fees that must be paid to access income-based advances, or that affect the terms upon which advances are provided, are plainly “costs charged . . . in connection with the . . . making . . . of a loan” and thus “charges” under the CFL. Fin. Code section 22200.

To guard against attempted evasions of these rules, the Department should require providers to inform consumers, in a clear, conspicuous, and readily understandable manner, that payment of a subscription fee is not a prerequisite to receiving income-based advances. Thus, we suggest amending subsection (a)(5) of this provision as follows (new language bolded):

The subscription fee is not a prerequisite to receiving income-based advances from the licensee, and the licensee obtains signed authorization, which may be an electronic signature, from the borrower acknowledging the subscription is optional, pursuant to Financial Code section 22202, subdivision (f). **Prior to obtaining this acknowledgement, the licensee must inform the borrower, in a manner that is clear, conspicuous, and readily understandable, that subscription fee is not a prerequisite to receiving income-based advances from the licensee.**³²

G. Section 1465 (Voluntary or Optional Charges)

We fully support the Department’s determination that all voluntary charges, including any tips and gratuities, received by an earned wage advance provider are “charges” under the CFL. This commonsense conclusion flows inevitably from the text of the CFL itself, which defines “charges” as “costs charged, contracted for, *or received by* a licensee.” Fin. Code section 22200 (emphasis added). It would be nonsensical to argue that tips paid to earned wage advance providers are not “received by” those providers. And, as discussed above, there is no voluntariness exception in the CFL or California usury law more generally. *See supra* at 6 & n.9.

³² On a more minor point, it appears that “licensee” in this provision should instead read “provider,” to make clear that this provision applies to providers that register under these rules as well as those that obtain a CFL license.

Thus, any conclusion contrary to the Department’s current assessment of tips and other voluntary charges as “charges” under the CFL would violate the plain text of that statute.

The same is true of expedite fees, which are necessary for the service to be functional. The whole point of earned wage advances is to obtain funds ahead of payday; consumers who cannot wait for payday will almost always pay expedite fees rather than wait one to three business days. Not surprisingly, we have been informed by providers that 90% of consumers pay these fees.³³

Inflated expedite fees are clearly a disguised finance charge. Providers charge expedite fees as high as \$8.99, vastly exceeding the cost of delivering funds instantly, which is likely in the range of 4.5 cents if there is any cost at all.³⁴ Many providers charge fees that increase as the amount borrowed increases, just like interest does.³⁵ For example, Money Lion charges a “Turbo Fee” of \$0.99 to \$5.99, depending on the advance amount, to expedite disbursement of an advance to a Money Lion RoarMoney account, even though that transfer is likely an internal bookkeeping measure that costs Money Lion nothing. For transfers to an external debit card, Money Lion charges a \$1.99 Turbo Fee if the advance is \$5 or less, and \$8.99 if it is \$100.³⁶

It also bears mentioning that, for many providers, the tips and expedite fees that they collect are also “costs . . . contracted for” as part of the loan, which is an alternative formulation of “charges” in the CFL definition. When a borrower consents to pay a lender a tip or expedite fee, those amounts are effectively included in the loan contract and in the contractual authorization to debit those amounts, along with the principal, from the bank account or wage payment. In that case, the lender will have “contracted for” the tip or expedite fee, so they are “charges.”

Finally, we strongly support the Department’s policy determination that subjecting all “voluntary fees” to the CFL’s cost limits is more effective than attempting to police the myriad ways that providers solicit tips. *See* ISOR at 61. Companies use a host of techniques to solicit tips, and these methods evolve over time. For example, Earnin users reported having their access to advances restricted if they did not tip enough,³⁷ though Earnin appears to have changed that practice after it became public. Later, Earnin’s terms and conditions contained language stating that a user had to pre-authorize a tip amount of at least \$1.50, otherwise automatic access to an Earnin feature offering advances to prevent overdrafts would be cut off and would have to be

³³ *See* Saunders Fintech Credit Testimony at 9.

³⁴ *See* CFPB Junk Fees Comments at 43.

³⁵ *See* Earnin, [Why is there now a fee for Lightning Speed?](#); CFPB Junk Fees Comments, *supra*, at 53-58.

³⁶ *See* <https://www.moneylion.com/instacash/> (answer under “How much does Instacash cost?”) (last visited 5/11/2023).

³⁷ Kevin Dugan, New York Post, [Cash-advance app Earnin gets subpoenaed by NY regulator: source](#) (Mar. 28, 2019) (“Earnin encouraged users to leave a tip of anywhere between zero and \$14 on a \$100 weekly loan. Users who don’t leave a tip appear to have their credit restricted. Meanwhile, a \$14 tip would equate to a 730-percent APR — nearly 30 times higher than New York’s 25 percent cap.”).

manually turned back on each time.³⁸ Now that language appears to have disappeared from the terms and conditions, and it is not clear what strategies the company is using to induce tips. DFPI cannot be forced to play whack-a-mole. It is a far more efficient use of the Department’s scarce resources to simply apply the CFL’s cost caps to so-called “voluntary” fees than to attempt to police the practices, many of which are deceptive, that companies use to induce those fees.

H. Additional Provisions that Merit Brief Mention

Section 1012(a) (Representations Concerning Registration). We applaud the Department for clearly stating that it is a deceptive practice to represent that “registrant’s acts, practices, or business have been approved by” the DFPI. In the past, we have seen EWA providers (most notably PayActiv) misrepresent government regulatory materials as “approval” of their product.³⁹ The Department is absolutely right to prevent providers from misrepresenting registration under these rules to influence legislators and regulators in other jurisdictions.

Section 1430.1 (California Consumer Financial Protection Law Registration Exemption: Reporting). We support the decision, in subpart (a) of these rules, to exempt a CFL licensee that makes income-based advances from the registration requirement of this rulemaking only if the licensee makes such advances “within the scope of its [CFL] license” (including, most importantly, that the licensee abide by the consumer protections in the CFL). This provision is needed to avoid confusion around the legal status of income-based advances made by CFL licensees.

We also support the language, in subpart (b) of these rules, to require income-based advance providers who obtain a CFL license rather than register under these rules to nonetheless file an annual report with the information specifically required under these rules. This provision will allow the Department to comprehensively monitor the income-based advance industry without missing key information that would be lost if CFL licensees that make income-based advances did not have to separately report data related to those advances.

Section 2030.5 (California Consumer Financial Protection Law Registration Exemption: Reporting). For the same reasons as discussed above for Section 1430.1, we support subparts (a) and (b) of this provision.

* * *

If further information would be useful, please reach out to Andrew Kushner at andrew.kushner@responsiblelending.org or Lauren Saunders at lsaunders@nclc.org.

³⁸ NCLC et al., Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services Comments to the Consumer Financial Protection Bureau (Jan. 2023) at 49, <https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22.pdf>.

³⁹ NCLC and CRL, Ltr. to CFPB Director Chopra re Concern about prior leadership’s finding that certain earned wage advances are not “credit” under TILA (Oct. 2021) at 29-33, https://www.nclc.org/wp-content/uploads/2022/10/EWA-letter-to-CFPB_Oct-4-2021.pdf.

Yours very truly,

Andrew Kushner
Policy Counsel
Center for Responsible Lending

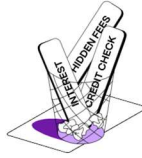
Robert Herrell
Executive Director
Consumer Federation of California

Lauren Saunders
Associate Director
National Consumer Law Center

Exhibit A

April 26, 2023

Help Keep Access to Your Earnings Safe



The State of California issued notice of a decision, which, if enacted, represents an existential threat to Earned Wage Access (EWA). The term EWA refers to the access of earnings before payday. *In short, California is seeking to regulate EWA as short term loans, which could impact your credit score and limit your ability to choose what to pay.* This would take away your right to choose what to pay.

Californians need your help to stop this misguided, harmful regulation.

As you know, EarnIn helps you access your money when you need it, no mandatory fees, no questions, no catch. EarnIn and other Earned Wage Access providers were designed specifically to disrupt the payday loan industry and present an alternative to bad actors.

Here's how you can help protect access to your pay as you earn.

California regulators are accepting comments from the public. Your voice matters. Share how you value EarnIn and the difference EarnIn has made in your life. If this ruling would impact you and your family's ability to manage your money, *they need to know.*

Submit comments in the form on this page, or by any of the following methods by [Wednesday, May 17, 2023](#).

Protect Earned Wage Access

California's DFPI is currently accepting comments from the public. Your voice matters. If you want to join us in correcting the record and charting a better path forward for users, submit your Earned Wage Access story in a comment to the DFPI. Tell the DFPI how EarnIn has made a difference in your life and how this ruling would impact you and your family's ability to manage your money.

Compose Your Message

- Governor
- State Senator
- State Assemblymember

more

Subject

PRO 01-21

Message Body

I write in strong opposition to the proposed rulemaking on Earned Wage Access services. Like millions of Californians who live paycheck to paycheck, my EWA app

[View my comments on Facebook](#)

Switch Message

Enter Your Info

Your Information

Prefix * First Name * Last Name *

Email *

Send me text alerts

Mobile Number *

Home Information

Street Address *

ZIP Code * Enter Zip for City and State

ZIP Code * Enter Zip for City and State

Permissions

Give EarnIn permission to send a communication on my behalf on this issue.

Permission to Send Message

EarnIn may send me advocacy emails through VoterVoice

Remember me

Send Message



When sharing your story, consider a few things:

- EarnIn and EWA Provides Critical Economic Benefit to Users.
- EarnIn provided access to over \$15 billion in earned wages for its Community Members across the country since the company's inception
- EWA providers like EarnIn offer a non-mandatory fee, non-recourse,
- DFPI's regulation is not based in fact nor informed by the positive
- EarnIn and other EWA providers were designed to disrupt the payday loan industry and present a low cost alternative to other predatory
- EarnIn comes with no credit checks, interest, or mandatory fees, and always has a no cost EWA option, aiming to remove barriers for

By Email:

Comments may be submitted electronically to regulations@dfpi.ca.gov with a copy to Peggy.Fairman@dfpi.ca.gov. Please put PRO 01-21 in the subject line.

By Postal Mail:

Department of Financial Protection and Innovation
Attn: Araceli Dyson
2101 Arena Boulevard
Sacramento, California 95834