MoneyLion

May 17, 2023

Via E-Mail

Department of Financial Protection and Innovation
2101 Arena Boulevard
Sacramento, California 95834
regulations@dfpi.ca.gov
cc: peggy.fairman@dfpi.ca.gov

Re: PRO 01-21

Dear Commissioner Hewlett:

MoneyLion Technologies Inc. and its corporate affiliates (collectively, MoneyLion) appreciates the opportunity to respond to the State of California Department of Financial Protection and Innovation's (DFPI) request for comment on proposed regulations (Proposed Regulations) under the California Consumer Financial Protection Law (CCFPL) and the California Financing Law (CFL), California Deferred Deposit Transaction Law (CDDTL), and California Student Loan Servicing Act (SLSA) relating to earned wage access (EWA) services, referred to in the Proposed Regulations as "income-based advance" products.

As a stakeholder in the EWA space, MoneyLion has been and remains committed to engaging with the DFPI's efforts to understand the industry and promote the responsible offering of EWA services. To that end, MoneyLion has engaged with the DFPI's existing EWA processes in good faith, including voluntarily agreeing to a memorandum of understanding (MOU) with the DFPI in 2021 to follow certain business practices, provide requested disclosures, and report quarterly data about our EWA product (Instacash). The information we have provided to the DFPI under the MOU demonstrates that MoneyLion's Instacash is a *bona fide* EWA service because customers affirmatively and clearly have no obligation to repay the advances they receive. The information also shows that MoneyLion's Instacash is consumer friendly in other ways and compares favorably to other EWA services in the marketplace.

MoneyLion is strongly supportive of and will continue advocating for clear legislative and regulatory structures for EWA services that ensure the appropriate level of consumer protection for users, while fostering—not hindering—healthy competition and responsible innovation in this industry. In fact, MoneyLion previously stated these positions in its prior comment letter on the proposed regulations published by the DFPI on November 17, 2021, including MoneyLion's support for the proposed registration requirement for EWA service providers under the CCFPL.

It is therefore unfortunate that MoneyLion cannot support the DFPI's approach in the recently issued Proposed Regulations. Despite MoneyLion's and other EWA service providers' ongoing and voluntary sharing of data to provide the DFPI with a better understanding of the nature of EWA services, the DFPI has decided to classify EWA services as loans and the Proposed Regulations would apply inapposite

lending requirements to a consumer-friendly service that—if properly structured and offered like MoneyLion's EWA product—is not a credit product.

Bona fide EWA products provide workers with flexible access to their own wages (beyond arbitrary pay cycles) and, if properly structured, are not loans. Applying inappropriate lending-like requirements to these services will likely lead to more expensive products or the withdrawal of EWA providers from California altogether, creating worse outcomes for consumers. If the Proposed Regulations are adopted in their current form and EWA providers like MoneyLion are driven out of the market, the likely result is that those California consumers who are least able to afford increased fees and/or payment obligations may have to resort to traditional lending products or even predatory products in the marketplace. Perhaps unintentionally but quite significantly, the DFPI's heavy-handed and arbitrarily inconsistent approach proposed in the Proposed Regulations will also likely harm consumers by stifling industry competition and innovation, and subsequently limiting consumer choice.

In addition, despite the DFPI's efforts to create optionality for EWA service providers under its Proposed Regulations, the creation of multiple parallel regulatory frameworks is overly complex, confusing, and incompatible with the nature and features of EWA services.

Instead of moving forward with the Proposed Regulations, the DFPI ideally should engage with the California legislature to enact a new legislative framework that accomplishes the DFPI's goals and protects California consumers while recognizing the consumer-friendly characteristics of *bona fide* EWA services that are differentiable from traditional loan and credit products in the marketplace. A solution that accomplishes these goals is attached to this comment letter in **Exhibit A**. The proposed legislation in Exhibit A, which incorporates feedback from consumer advocacy groups, establishes the DFPI's proposed registration system for EWA providers, solidifies consumer protections, and gives legislative certainty to EWA providers. As evidence of this, versions of the proposed legislation in Exhibit A have received bipartisan support in several state legislatures around the country. Short of this, the DFPI should reconsider the approach taken in the Proposed Regulations and, at a minimum, exclude *bona fide* EWA products from being covered "loans" under the CFL in Section 1461 of the Proposed Regulations, in the same manner that it currently excludes *bona fide* EWA products offered by "obligors" (i.e., employers or employers' agents who provide EWA services). This exclusion would apply only to a properly structured, *bona fide* EWA product where the consumer has no contractual obligation to repay an advance, and where the provider has no legal or contractual claim or remedy against a consumer who chooses not to repay the advance, and where there are no mandatory fees or interest imposed on consumers.

The rest of this comment letter is organized as follows: Section I describes MoneyLion's direct-to-consumer EWA service, Instacash, and provides the background context for our comments. Section II describes the issues with relying on the existing CFL legislative framework to regulate the provision of EWA services. Alternatively, if California is unwilling to enact an EWA statutory framework, the DFPI should revise its Proposed Regulations in accordance with the changes outlined in Section III (below).

I. MoneyLion's Instacash EWA Service

MoneyLion is a leading digital financial services and lifestyle content platform. We have purposefully built our platform in pursuit of our mission to rewire the financial system to better consumers' financial lives. We offer our customers a core suite of first-party financial products and services, personalized and actionable financial and non-financial offers in our consumer marketplace, as well as curated money-related content to engage, educate, and empower our customers. Through our network and platform technologies, MoneyLion aims to empower consumers to take control of their money, no matter their financial circumstances.

At MoneyLion, we believe that *bona fide* EWA services are consumer-friendly alternatives to existing products in the marketplace. Moreover, providers of *bona fide* EWA services are compelling examples of companies responsibly innovating to offer products that provide many California consumers with greater control and stability over their financial lives, which also help them avoid costly fees and harmful debt traps. *Bona fid*e EWA services such as our Instacash product give consumers the flexibility to access wages or other income that they have earned, but that has not yet been deposited into their bank accounts (as payroll services generally deposit paychecks on a weekly, biweekly or even monthly basis). These services give consumers the ability to smooth out their cash flows between their direct deposit cycles, allowing them to cover living expenses like bills or unexpected costs without subjecting themselves to overdraft charges, credit card fees, or the need to resort to expensive payday loans.

MoneyLion's EWA service, Instacash, is one of our most popular first-party financial products. Instacash is a direct-to-consumer service that allows our customers to access a portion of their earned income in advance with no interest, no mandatory fees, and no credit check. The customer may elect to receive their advance more quickly in exchange for an optional expedited transfer fee and has the option to pay a "tip" to MoneyLion in appreciation of the service. Both the expedited transfer fees and tips are entirely optional, and choosing not to pay the transfer fee or leave a tip has no impact on a customer's eligibility for the service or their approved advance limit.

Like many EWA services, Instacash is offered on an explicit no-obligation-to-repay basis, as provided in the Instacash terms and conditions entered into with customers. This means that MoneyLion does not legally have a right to compel repayment of an Instacash advance. Moreover, MoneyLion has specifically designed Instacash as a non-credit service to ensure that customers *cannot* rollover or "refinance" advances. Instacash, by design, prevents customers from getting into debt traps and permanently living beyond their means because, among other protections, if the customer chooses not to repay their Instacash advance, they will not be able to request any further advances. Customers can choose not to repay their Instacash advance by simply revoking their automatic payment authorization at least three business days before the scheduled repayment date for the advance. Thus, the choice of whether to continue using Instacash stays fully within the customer's control. MoneyLion does not report repayment activity or outstanding payments to any consumer reporting agency.

As a result, our customers can access Instacash and request Instacash advances without paying any of the optional fees noted above, without signing up for a monthly subscription, and without being obligated to repay the amount they requested. In this comment letter, we will demonstrate that the framework adopted by the Proposed Regulations would jeopardize this outcome for our California customers, many of whom include gig economy workers and freelancers, as well as union workers, teachers and other government employees.

II. <u>We are supportive of consumer protection regulation governing the business of providing income-based advances, but the CFL is the wrong legislative framework to govern income-based advances.</u>

Many EWA services have been designed by providers to be inherently consumer friendly. Several EWA service providers, including MoneyLion, were founded with missions to positively change the financial path of hardworking Americans, millions of whom have been underserved by traditional banks and then taken advantage of by traditional payday lenders. We aim to do this by providing transparent, fair, and simple services like EWA that relieve financial stress today and guide consumers towards long-term financial stability.

Unfortunately, in their current form the Proposed Regulations would likely result in a setback in achieving this mission for California consumers. The Proposed Regulations would classify nearly all EWA services as loans, which we believe will lead to perverse incentives for the industry and worse outcomes for the very consumers whose lives we and other providers have been trying to improve. This section of the comment letter highlights some of these possible outcomes and explains why we believe that, instead of trying to fit the proverbial square peg of EWA services into the round hole of the traditional lending legislative and regulatory framework, it is more appropriate to persuade the California legislature to create a legislative framework to govern and provide consumer protections tailored for EWA services.

A. *Income-based advances provided on a no-obligations basis are not loans and should not be classified as loans by the Proposed Regulations*.

EWA services like Instacash are designed to be provided on an express no-obligation-to-repay basis and therefore are not, by definition, loans. A "loan" is not itself defined by the CFL. Instead, it is defined by California Civil Code Section 1912, which states, "[a] loan of money is 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." (emphasis added). Therefore, a loan is inherently characterized by the borrower's promise to repay the debt.

Again, as described in Section I, MoneyLion provides Instacash on an affirmative no-obligation-to-repay basis. The only repercussion a customer experiences if they choose not to repay their Instacash advance is that they are unable to request another Instacash advance. The advances are not sent to collections or sold to debt buyers. Nonpayment and repayment activity are also not reported to any credit reporting agencies. MoneyLion affirmatively discloses to customers that there's no obligation to repay and MoneyLion expressly agrees that it will not take legal action to collect payments. Indeed, when a customer requests an Instacash advance, the customer must agree to MoneyLion's Instacash Terms and Conditions,[1] also provided on our website, which states the following:

> **Instacash is not a loan. MoneyLion is not lending you money in connection with the Instacash service. There is no obligation to repay an Instacash advance.**

Additional detail is provided in Section 8 of the Instacash Terms and Conditions, which states:

> (8) **NO OBLIGATION TO REPAY AN INSTACASH ADVANCE. THERE IS NO OBLIGATION TO REPAY AN INSTACASH ADVANCE;** however, you will not be eligible for any further Instacash Advance(s) until any and all of your previous Instacash Advances have been repaid in full and you have paid any and all Turbo Fees associated with any previous Instacash Advances.

[1] MoneyLion's Instacash Terms and Conditions were updated and published in January 2023. Previously, the Instacash service was governed by MoneyLion's Membership Agreement, last updated in March 2021, which included this relevant language in Section 1(h), "[t]here is no obligation to repay an Instacash Advance; however, You will not be eligible for an Instacash Advance until any and all of Your previous Instacash Advances have been repaid in full and You have paid any and all Turbo Fees and Tips . . . associated with any previous Instacash Advances." Similar information is provided in the FAQs on our website, which inform customers that "[i]f you do not wish to repay an Instacash advance, you can withdraw the payment authorizations on your accounts or debit cards . . ." (https://help.moneylion.com/how-will-my-instacashsm-be-repaid-B1diaGRGt).

> MoneyLion warrants that it has no legal or contractual claim against you based on your failure to repay in full an Instacash Advance, including any Turbo Fees and Tips associated with any Instacash Advance. MoneyLion will not engage in any debt collection activities relating to any unpaid portion of any Instacash Advance or any unpaid Turbo Fees or Tips, place the unpaid portion of any Instacash Advance or any unpaid Turbo Fees or Tips as a debt with, or sell the unpaid portion of any Instacash Advance or any unpaid Turbo Fees or Tips to, a third party, or report to a consumer reporting agency concerning an Instacash Advance. However, MoneyLion will not provide you further Instacash Advances while any portion of an Instacash Advance remains unpaid past your scheduled repayment date. MoneyLion does not waive any rights it may have with respect to any fraudulent activity.

As clearly stated in these terms, when a customer requests an Instacash advance, the customer does not contractually agree to repay the advanced amount—there is no promise to repay the advance Therefore, by definition, Instacash advances, and other similar EWA services, are not loans and should not be classified as such.

B. *The approach taken by the Proposed Regulations would lead to perverse outcomes for the industry that will ultimately harm California consumers.*

As discussed above in Section II.A, MoneyLion disagrees that EWA services should be classified as loans. However, not only would the Proposed Regulations define EWA services as loans, but the Proposed Regulations would also continue to require that EWA services be offered on a non-recourse basis, and would additionally require service providers to not engage in credit reporting or debt collection activities, if the advances remain unpaid. This fundamental paradox would lead to perverse outcomes for both the industry and California consumers.

Under the Proposed Regulations, EWA service providers can choose whether to offer EWA services in one of two ways: (1) first, under the newly proposed registration framework, EWA services must be offered as loans where the customer makes a contractual promise to repay and yet the service provider cannot act on that contractual promise or exercise any of the legal remedies to compel repayment that are available for actual loans, or (2) alternatively, under the existing lending regulatory framework, companies would abandon bona fide EWA products and, instead, offer traditional short-term loans where the customer makes a contractual promise to repay and the company can engage in debt collection activities, file debt-collection lawsuits, and credit report to credit reporting agencies for nonpayment of the debt.

The nonsensical outcome associated with the first structure will mean that EWA service providers who choose to register under the Proposed Regulations would be choosing the worst of all possible worlds. Registrants would be subjecting themselves to inapplicable loan-like requirements while being prohibited from interacting with consumers in a typical creditor-borrower relationship. This would include being legally barred from reporting nonpayment of advances to credit reporting agencies, which may have the side effect of encouraging consumers to overextend themselves. Many EWA service providers will be forced, instead, to opt for the traditional lending regulatory framework to the detriment of California consumers. This means California consumers who use EWA services will become subject to the maximum fees and finance charges allowed under California law, increased debt collection activities, increased debt-collection lawsuits, and negative credit reporting, when today they are not subject to these practices if they choose to utilize EWA services that allow them to avoid resorting to payday loans or overdraft fees. This also will effectively stifle innovation in an industry that has developed the existing consumer-friendly benefits and features of *bona fide* EWA services, which so many California consumers rely upon today.

C. *Defining voluntary or optional fees as a "charge" under Financial Code, Section 22200 will lead to EWA providers imposing mandatory fees rather than preserving an option for customers to receive income-based advances at no cost.*

MoneyLion believes that (1) optional or voluntary charges should not fall within the definition of "charge" under the CFL or (2) even if they do, then the Proposed Regulations should clarify that optional or voluntary charges should not be included in determining the applicable maximum charges that may be made under the CFL. This is because optional or voluntary charges are avoidable by the customer, and the amount and frequency that the customer incurs these charges are entirely within the customer's control. MoneyLion believes that if the Proposed Regulations are adopted as drafted, and therefore, optional or voluntary charges are subject to the maximum finance charges and fees permitted under CA law, it will take this control away from the customer and result in EWA service providers imposing *mandatory* fees instead. This will reduce choices in the marketplace and lead to worse outcomes for California consumers. These outcomes are additional examples of why applying loan-like regulations to EWA services is inappropriate.

Under the Proposed Regulations, any potential charges incurred in connection with an EWA service, including optional gratuities or expedited transfer fees, would fall within the definition of "charge" under the CFL and be subject to the limitations on "charge" imposed by that law. However, because of the avoidable nature of these charges, and the fact that customers control the amount and frequency of these charges, MoneyLion respectfully disagrees that optional or voluntary charges should be included in the CFL's definition of "charge." Moreover, the Proposed Regulations would create disparate and unfair treatment of optional fees for EWA products (arbitrarily recharacterized as finance charges) versus optional fees for actual loans and other traditional credit products (*not* included as finance charges).

As described in Section I, the only revenue MoneyLion receives in connection with its provision of Instacash today is from optional gratuities received from customers, and an optional expedited transfer fee if the customer chooses to receive their Instacash advance disbursement more quickly. Therefore, today, a customer can request an Instacash advance from MoneyLion without (1) contractually promising to pay the advance back and (2) even if they repay their Instacash advance, they can do so *without paying any fees at all*. This control is at the core of how MoneyLion and other EWA providers have designed these services: customers themselves are able to determine how to use EWA services in a manner that works best for them, with flexibility to alter their usage as they go through life's financial ups and downs.

If voluntary or optional fees can be avoided by the customer, then they should not be included in the definition of "charge" or in determining the applicable maximum charges that may be made under the CFL. Such an approach is already built into the CFL itself, which excludes a number of fees that a finance lender can impose under the definition of "charge" and when determining the applicable maximum charges allowed. These include the dishonored check fee, as provided under Section 22320, and the delinquency fee, as provided under Section 22320.5. These exclusions make sense because such fees are avoidable by the customer, provided that the customer repays their debt on time in accordance with their payment schedule, and therefore, the fees are not a condition of the extension of credit. Furthermore, because gratuities are fully voluntary today, how much and how often a customer pays gratuities are also within the customer's control. Like other service providers, the customer can customize the amount of gratuities they wish to leave.

The gratuities our customers generally provide us, together with the optional expedited transfer fees, enable MoneyLion to continue to provide EWA services pursuant to the consumer-friendly terms we have today. However, if the Proposed Regulations subject optional and voluntary fees to the applicable maximum charge limits imposed by the CFL (and especially, if providers will also have to continue to

provide EWA services on a non-recourse basis while becoming subject to inapplicable lending regulations), we and other EWA providers may have no choice but to impose mandatory fees for use of the EWA service. MoneyLion does not believe that this is a consumer-friendly outcome, especially when many of our Instacash customers are hardworking Americans who cannot afford unexpected expenses and who feel financially unstable.

D. *The Proposed Regulations would exclude obligors who provide instant cash out services for their employees, which are essentially identical to bona fide EWA services.*

MoneyLion appreciates that the DFPI has taken a fair approach in recognizing multiple business models in the EWA industry. As the DFPI is aware, there are two predominant EWA business models: (1) an employer-based model that offers early access to wages in partnership with an employer or the employer's payroll service provider as an employee benefit; and (2) a direct-to-consumer model that provides early access to income directly to consumers. MoneyLion supports the equal regulatory treatment of both EWA business models, as long as they offer *bona fide* EWA services, and believes doing so fosters consumer choice and innovation. However, while the Proposed Regulations would generally regulate EWA providers equally, the DFPI has chosen in its Proposed Regulations to exclude "obligors" who provide instant cash out services for their employees, which is in principle the exact same service as *bona fide* EWA services, but provided by the obligor rather than by a service provider. In fact, in many instances, an obligor/employer would be using a third-party service provider to provide such services to its employees on the obligor's behalf. If the DFPI has concluded that an obligor providing the service to its own employees should be carved out from the definition of a loan, then the DFPI should reach the same conclusion with respect to all *bona fide* EWA services, where consumers genuinely have no obligation to repay.

As described both in Section I above and in MoneyLion's prior comment letter to the DFPI with respect to the DFPI's proposed regulations published on November 17, 2021, the principle behind EWA services is to provide a consumer with early access to income that the consumer has already earned, but has not yet been paid to the consumer. Proposed Section 1461(a) states that "[t]his section does not apply to obligors . . . 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 proposed Section, which excludes income advances made directly by an employer to their employees, also describes exactly what direct-to-consumer EWA services offer: funds advanced by EWA providers are income already earned and the consumer does not have a legal obligation to repay. Put another way, *bona fide* EWA services (advancing funds already earned with neither a mandatory finance charge nor a legal obligation to repay) are not "loans" under California law, federal law, and, generally, common law across the country—regardless of whether the service is offered by an employer directly or through a separate provider. The disparate treatment in the Proposed Regulations would be arbitrary and capricious and would unfairly pick winners and losers in the marketplace.

The approach taken by the Proposed Regulations would also unfairly penalize the segment of California consumers who are not fortunate enough to work for conscientious employers who offer instant cash out or EWA services as an employee benefit. Our customers and those of other EWA providers choose to use our services precisely because they do not have access to this benefit elsewhere. The exclusion drafted in proposed Section 1461(a) would unfairly favor large-scale employers who have the resources to offer EWA services themselves and arbitrarily ignore the needs of California residents who work for small businesses, the government or military, union workers, as well as the increasing number of workers who rely on multiple income streams through short-term, temporary or freelance work, all of whom are segments of the population who benefit from direct-to-consumer EWA services, such as MoneyLion's Instacash service.

Therefore, the DFPI should make sure that all similar services, regardless of who is providing the service, are regulated in the same way, as long as they are *bona fide* EWA services that do not charge any interest, and are provided on a no-obligation-to-repay basis. If the DFPI can be comfortable that employer-provided EWA services are not loans, then the DFPI should be equally comfortable that third party-provided EWA services are also not loans, when the product features, terms, and conditions are substantively the same.

III. At a minimum, the Proposed Regulations should be amended to remove some of the fundamental paradoxes described above.

If the DFPI decides to adopt the general regulatory framework outlined in the Proposed Regulations, then at a minimum, the Proposed Regulations should be amended so that the framework more appropriately fits the consumer-friendly characteristics of EWA services provided today. Therefore, in addition to the points discussed in Section II, we respectfully request that the DFPI consider the suggestions below.

A. *The Proposed Regulations should exclude from their scope EWA services that are provided on a no-obligation-to-repay basis and where there is an option to receive such an EWA service at no cost*.

For the reasons described in Section II.A and Section II.B above, MoneyLion respectfully requests that the scope of the Proposed Regulations be modified in proposed Section 1461 so that EWA services that are explicitly provided on a no-obligation-to-repay basis are excluded from the definition of loans for purposes of the CFL—in the same manner that it currently excludes EWA products offered by obligors—the while still being subject to the general EWA registration framework. To qualify for the exclusion, the DFPI should clarify that such an EWA service must be provided on a no-obligation-to-repay basis pursuant to the terms and conditions under which it is offered, with limited exceptions for fraud, abuse, or errors, and must be offered without mandatory fees or interest. In addition, the EWA service provider may offer EWA services as part of a financial membership with a mandatory subscription fee, and may receive voluntary or optional charges, provided that the customer has at least one option of being able to receive EWA services at no cost. This would preserve the consumer-friendly characteristics of EWA services without subjecting them to the traditional and inapposite lending framework.

In addition, it would be helpful for the DFPI to clarify that "debt collection activities" do not include when a provider seeks repayment of outstanding proceeds from a customer's authorized payment method, including via an electronic transfer, pursuant to the terms of any payment authorization executed by the customer. While we believe such a technical clarification would not be needed if the above recommendation was accepted, it is an important clarification given that EWA advances are, by definition, repaid from those payment methods once a customer receives their earned income into their account.

B. *Voluntary or optional charges should not be defined as "charge," nor should they be included in determining the applicable maximum charges that may be made under the CFL.*

For the reasons described above in Section II.C, MoneyLion respectfully requests that the Proposed Regulations be amended to explicitly state that (1) optional or voluntary charges should not fall within the definition of "charge" under the CFL and (2) that optional or voluntary charges should not be included in determining the applicable maximum charges that may be made under the CFL.

C. *The provisions governing monthly subscription fees are arbitrary, too prescriptive, and will result in less innovation and consumer choice.*

MoneyLion respectfully believes that proposed Section 1464 governing subscription fees goes beyond the intended scope of the Proposed Regulations and should be removed entirely. Part of the innovation brought by financial technology companies to the financial services industry includes designing, combining, and delivering financial products and services in ways that traditional financial institutions do not contemplate, in order to better meet the needs of the modern American consumer. If Section 1464 is adopted as proposed, many financial technology companies will avoid adding EWA services to any financial memberships they offer simply to avoid application of this proposed provision, which will mean fewer options for California consumers using EWA services.

If the DFPI wishes to include consumer protections for subscription fees covering EWA services in the Proposed Regulations, then Section 1464 should be rewritten to state that an EWA service provider may include EWA services in a financial membership and charge mandatory subscription fees for such a membership, ***provided that the consumer has at least one other option of receiving EWA services at no cost***. This simple requirement, consistent with the proposed legislative framework included in Exhibit A, would appear to alleviate all of the concerns the DFPI seems to be seeking to address with the proposed Section 1464.

Some of the specific issues with proposed Section 1464 are provided below:

- The scope of Section 1464 is not clear and is drafted in a vague and potentially confusing manner. Section 1464(a)(2) states that: "[e]nrollment in the income-based advance program allows the borrower to access other products or services other than income-based advances without additional charge." This implies that Section 1464 would apply to any financial membership that includes EWA services, but could also be interpreted to mean that if a service provider charges a subscription fee for EWA services, then such a subscription must include other products and services. If the DFPI intended this provision to be read as the latter, then the language of Section 1464(a)(2) should at least be clarified.

- The $12 cap on monthly subscription fees provided in Section 1464(a)(1) is too prescriptive and arbitrary. Financial technology companies should offer financial memberships with benefits and at prices based on the needs and desires of their customers and that are supported by their own internal data and analysis based on the specific bundle of products and services that are included in the membership. If the subscription fee necessarily includes access to other products and services (as seemingly required by proposed Section 1464(a)(2)), then it is also inappropriate for the fee to be prescribed in regulations proposed to cover EWA services alone. In addition, the empirical basis for the DFPI's choice of a $12 cap remains unclear.

- Section 1464(a)(3) should be removed in its entirety or alternatively, replaced with a provision stating that EWA services included in a financial membership must also be offered in compliance with the requirements set forth in the Proposed Regulations, e.g., on a non-recourse basis. Currently, Section 1464(a)(3) states that "[p]ayment of the subscription fee and the amount of the subscription fee does not affect the terms upon which income-based advances are made available to the borrower." This is also too prescriptive and fails to allow companies to design their own financial memberships in ways that benefit consumers. For example, Section 1464(a)(3) as proposed would seemingly prohibit an EWA service provider from benefitting a consumer by offering a higher EWA advance limit to a consumer if the EWA service is provided through a

subscription offering. These are the types of choices an EWA service provider should be permitted to offer and choices a consumer should be permitted to make for themselves.

- If Section 1464 is rewritten as suggested above, i.e., that an EWA service provider may charge a mandatory subscription fee for a membership that includes EWA services, provided that the consumer continues to have at least one option of accessing EWA services at no cost, then Section 1464(a)(5) should be removed in its entirety. Instead, the consumer should be able to choose which type of contract they enter into when accessing EWA services offered by a specific service provider, but once they choose to incur a mandatory subscription fee, then that fee by nature is and should no longer be optional.

- Section 1464(a)(6) should be removed entirely. It is arbitrary and inappropriate to prescribe this type of fee crediting in regulations, and doing so will limit consumer choice.

Separately, depending on the bundle of financial products and services offered in a subscription or membership program, there are already other laws and regulations that provide adequate consumer protections, including laws governing auto-renewal of subscription contracts. The inclusion of proposed Section 1464 would add an arbitrary limit on fees and create another layer of unnecessary regulatory complexity without improving consumer choice in the marketplace.

D. *Annual fee assessments should be a flat fee rather than a pro rata rate.*

The Proposed Regulations should modify the calculation of the annual assessment in Section 1040 such that it should stipulate a flat fee rather than a pro rata fee based on the proportion of the registrant's gross income from subject products provided to California residents compared to the aggregate gross income from all registrants, based on subject products provided to California residents. The flat fee could be subject to annual revisions by the DFPI based on inflation or the Consumer Price Index. A pro rata fee could vary drastically each year depending on the activities in the industry, especially as it would be based on gross income earned from *all* subject products, not just the subject products provided by a registrant. This would make it difficult for each service provider to budget and plan for such a potentially large expense at the end of the quarter, and what is quite commonly, the end of the fiscal year as well.

At the very least, if the annual fee had to be based on a pro rata calculation, then it should be:

- Based on the proportion of the registrant's total payments received in connection with each subject product, rather than gross income (see comment III.E below);

- Assessed on a subject product by subject product basis, so that each registrant would pay a fee based on the proportion of market share that they occupy in the services they offer, rather than estimating the size of the market of all subject products;

- Be payable by January 31 rather than December 31, in order to give each registrant adequate and reasonable time to plan for and manage a cash outflow at the end of the calendar year that cannot be estimated by the registrant alone.

E. *Registrants should not be required to provide gross income relating to provision of income-based advances.*

The Proposed Regulations should not require each registrant to report their gross income for the prior calendar year from subject products provided to California residents, as currently required under Section 1022(a)(5). Instead, the Proposed Regulations should request a more objective figure to report that is easier to track, consistent across different providers, and more accurately reflects a registrant's activity in offering a subject product. One possible alternative is for registrants to provide the total advance payments received on all income-based advances offered over a calendar year, plus any optional or voluntary fees received.

IV. Conclusion

While MoneyLion strongly supports the need for adequate consumer protections in the EWA industry, we respectfully disagree with the approach taken by the DFPI in the Proposed Regulations, which we believe does not reflect the true nature of EWA services and will result in worse outcomes for California consumers. We hope that the DFPI considers the points raised in this comment letter and that it will work together with the industry and other stakeholders to create a legislative and regulatory framework that is more appropriate to the design, offering, and usage of *bona fide* EWA services. Doing so will ensure consumer protection and the continued benefit that EWA services bring to California consumers.

We thank you for the opportunity to provide these comments.

Sincerely,

[redacted]

Adam VanWagner
Chief Legal Officer, MoneyLion

Exhibit A

Model Legislation for EWA Products

Add a new Division 24.5 to the Financial Code, commencing with Section 95000

95000. This division shall be known and may be cited as the California Earned Wage Access Regulation Act.

95001. Unless the context otherwise requires, the definitions in this chapter apply throughout this division.

95002. (a) No person shall engage in the business of offering or providing earned wage access services in this state, without first registering with the commissioner in accordance with the requirements of this division and any rules promulgated by the commissioner under this division or Division 24 (commencing with Section 90000).

(b) Persons registered under this division shall be subject to the California Consumer Financial Protection Law (commencing with Division 24).

(c) This division shall not apply to any persons exempted from Division 24 pursuant to Section 90002.

95003. (a) "Commissioner" means the Commissioner of Financial Protection and Innovation.

(b) "Consumer" means an individual who resides in this state.

(c) “Consumer-directed wage access services” means offering or providing earned wage access services directly to a consumer based on the consumer’s representations and the provider’s reasonable determination of the consumer’s earned but unpaid income.

(d) "Earned but unpaid income" means salary, wages, compensation, or income that a consumer has represented and that a provider has reasonably determined has been earned or has accrued to the benefit of the consumer in exchange for the consumer’s provision of services to an employer or on behalf of an employer, but has not, at the time of the payment of proceeds, been paid to the consumer by the employer.

(e) "Earned wage access services" means the business of providing consumer-directed wage access services, employer-integrated wage access services, or both.

(f) "Earned wage access services provider" or "provider" means a person who is in the business of offering and providing earned wage access services to consumers.

(g) “Employer” means a person who employs a consumer or any other person who is contractually obligated to pay a consumer earned but unpaid income in exchange for a consumer’s provision of services to the employer or on behalf of the employer, including on an hourly, project-based, piecework, or other basis and including where the user is acting as an independent contractor with respect to the employer. “Employer” does not include a customer of an employer or any other person whose obligation to make a payment of salary, wages, compensation, or other income to a consumer is not based on the provision of services by that consumer for or on behalf of such person.

(h) “Employer-integrated wage access services” means the business of delivering to consumers access to earned but unpaid income that is based on employment, income, and attendance data obtained directly or indirectly from an employer.

(i) “Fee” means any of the following:

1. A fee imposed by a provider for delivery or expedited delivery of proceeds to a consumer.

2. A subscription or membership fee imposed by a provider for a bona fide group of services that include earned wage access services.

3. An amount paid by an employer to a provider on a consumer's behalf, which entitles the consumer to receive proceeds at reduced or no cost to the consumer.

“Fee” does not mean a voluntary tip, gratuity, or donation.

(j) "Outstanding proceeds" means proceeds remitted to a consumer by a provider that have not yet been repaid to that provider.

(k) "Person" means a corporation, partnership, cooperative, association, or other business entity.

(l) "Proceeds" means a payment to a consumer by a provider that is based on earned but unpaid income.

95004. (a) A person required to register pursuant to this division shall do all of the following:

1. Before entering into an agreement with a consumer for the provision of earned wage access services, provide the consumer with a written document that informs the consumer of his or her rights under the agreement and fully and clearly discloses all fees associated with the earned wage access services. The document may be in paper or electronic form and may be included as part of the contract to provide earned wage access services.

2. Inform the consumer of the fact of any material changes to the terms and conditions of the earned wage access services before implementing those changes for that consumer.

3. Offer each consumer at least one opportunity per pay period to receive proceeds at no cost to that consumer and clearly and conspicuously inform the consumer how they may elect this option.

4. Provide proceeds to a consumer by any means mutually agreed upon by the consumer and provider.

5. In any case in which the provider will seek repayment of outstanding proceeds, fees, voluntary tips, gratuities, or other donations from a consumer’s account at a depository institution, including via electronic funds transfer:

    A. Comply with applicable provisions of the federal Electronic Funds Transfer Act and its implementing regulations.

    B. Reimburse the consumer for the full amount of any overdraft or non-sufficient funds fees imposed on a consumer by the consumer’s depository institution that were caused by the provider attempting to seek payment of any outstanding proceeds, fees, voluntary tips,

gratuities, or other donations on a date before, or in an incorrect amount from, the date or amount disclosed to the consumer.

6. Develop and implement policies and procedures to respond to questions raised by consumers and address complaints from consumers in an expedient manner.

7. In any case in which the provider solicits or receives a tip, gratuity, or donation from a consumer:

    A. Clearly and conspicuously disclose to the consumer immediately prior to each transaction that a tip, gratuity, or donation amount may be zero and is voluntary.

    B. Clearly and conspicuously disclose in its service contract with the consumer that tips, gratuities, or donations are voluntary and that the offering of earned wage access services, including the amount of the proceeds a consumer is eligible to request and the frequency with which proceeds are provided to a consumer, is not contingent on whether the consumer pays any tip, gratuity, or donation or on the size of any tip, gratuity, or donation.

    C. Refrain from misleading or deceiving consumers about the voluntary nature of such tips, gratuities, or donations.

    D. Refrain from making representations that tips or gratuities will benefit any specific, individual person.

(b) The provisions of subparagraph (B) of paragraph (5) of subdivision (a) shall not apply with respect to payments of outstanding proceeds, fees, tips, gratuities, or other donations incurred by a consumer through fraudulent means.

95005. (a) A person required to register pursuant to this division shall not do any of the following in connection with the offer or provision of earned wage access services to consumers:

1. Compel or attempt to compel payment by a consumer of outstanding proceeds, fees, voluntary tips, gratuities, or other donations to the provider through any of the following means:

    A. Repeated attempts to debit a consumer's depository institution account in violation of applicable payment system rules.

    B. Use of outbound telephone calls to attempt collection from the consumer.

    C. A suit against the consumer in a court of competent jurisdiction.

    D. Use of a third party to pursue collection from the consumer on the provider's behalf.

    E. Sale of outstanding amounts to a third-party collector or debt buyer for collection from the consumer.

2. Charge a late fee, deferral fee, interest, or other penalty or charge for failure to pay outstanding proceeds, fees, voluntary tips, gratuities, or other donations.

3. Charge or collect fees, voluntary tips, gratuities or other donations from a consumer that in total, per transaction, exceed 10% of the amount of proceeds provided to a consumer during that transaction.

4. Accept payment of outstanding proceeds, fees, voluntary tips, gratuities, or other donations from a consumer via credit card or charge card.

5. Require a consumer's credit report or credit score to determine a consumer's eligibility for earned wage access services.

6. Report any information about the consumer to a consumer credit reporting agency or a debt collector, regarding the inability of the provider to be repaid outstanding proceeds, fees, voluntary tips, gratuities, or other donations by that consumer.

7. Share with an employer any fees, voluntary tips, gratuities, or other donations that were received from or charged to a consumer for earned wage access services.

(b) An earned wage access services provider is not precluded from using any of the methods described in paragraph (1) of subdivision (a) to compel or attempt to compel repayment of outstanding amounts incurred by a consumer through fraudulent or unlawful means, or from pursuing an employer for breach of its contractual obligations to the provider.

95006. (a) A provider registered under this division shall not be subject to or required to be licensed under Division 1.2 or Division 9.

(b) A provider registered under this division shall not be subject to provisions of the Labor Code applicable to wage assignment in connection with proceeds provided to a consumer in accordance with this division.

95007. (a) This act shall be operative on July 1, 2024.

(b) Notwithstanding subdivision (b) of Section 90009.5, registrations issued under this division shall not expire on January 1 of the calendar year that is four years following the initial year of required registration.