

May 17, 2023

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

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

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

To Whom it May Concern:

This letter is submitted to the California Department of Financial Protection and Innovation ("**DFPI**") on behalf of ZayZoon US Inc. ("**ZayZoon**")¹, in response to the Notice of Proposed Rulemaking issued by the DFPI in March 2023 (the "**Proposed Rule**").² The Proposed Rule would require most providers of earned wage access ("**EWA**")³ products in California to register with the DFPI and provide certain records to the DFPI to facilitate its oversight of registrants and to detect risks to California consumers.

We appreciate the opportunity to provide comments on the Proposed Rule and look forward to working with the DFPI to ensure regulation of this industry appropriately balances consumer protection with consumer access to financially responsible tools. We partner with payroll providers and employers, predominantly in the small to midsize business space, to provide EWA services to consumers. We are hopeful that our extensive experience in working with these partners can provide an additional perspective to assist the DFPI with the development of these important regulations.

ZayZoon supports the development of a regulatory framework for earned wage access, including registration, reasonable reporting requirements, and responsible behavior towards consumers and their finances. However, we are concerned that, by concluding that all EWA disbursements are "loans" and "wage assignments" for purposes of the California Financing Law ("**CFL**")⁴, the Proposed Rule will mean consumers and employers in California will no longer be able to receive EWA services, and will be forced to fall back on using high-cost alternatives, such as payday loans and overdraft fees.

For the reasons discussed below, we do not believe it is appropriate to consider all EWA services to be loans. We note that some EWA models are substantively identical to one particular EWA model that the DFPI has concluded does not constitute "credit" or the establishment of a lending relationship between the

¹ ZayZoon is a financial technology platform that partners with payroll providers and employers to provide consumers with responsible, low-cost financial services, including EWA services, financial literacy tools, and other resources. ZayZoon's goal is to encourage financial inclusion and empowerment of consumers through innovative technology and education.

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

³ EWA services generally provide consumers with early access to earned, but unpaid wages. An EWA disbursement is defined as an "income-based advance" under the Proposed Rule.

⁴ Cal. Fin. Code §§ 22000 et seq.

employee and the EWA provider, in a specific ruling dated February 11, 2022⁵ (“**Specific Ruling**”).

We strongly encourage the DFPI to reconsider its Proposed Rule and provide clarification that, considering the characteristics of certain EWA models, not all EWA models automatically fall under the scope of the CFL. We further recommend that the DFPI establish a distinct registration obligation for those EWA models that differ from traditional credit arrangements, specifically those that are directly integrated with payroll or the employers, and explicitly acknowledge that transactions made under such models are not considered "loans" and should not fall under the purview of the CFL.

ZayZoon would be happy to meet with DFPI directly to discuss these important services and our comments on the Proposed Rule in more detail.

EWA Services provide significant benefits to consumers, and the DFPI should develop a framework that encourages responsible provision of EWA Services

We wish to highlight the substantial benefits EWA products offer to consumers. We urge the DFPI to be mindful of these benefits as it moves forward in its rulemaking process and avoid taking any action that may ultimately harm California consumers by impeding access to EWA services. One of the intents of the Legislature when it enacted the California Consumer Financial Protection Law (“CCFPL”) was to strengthen consumer protections by prioritizing the prevention of unethical businesses from harming the most vulnerable populations,⁶ and we encourage the DFPI to not only consider EWA services in the context of the service itself, as it has done in the Proposed Rule, but also in the context of the alternative financial products that are available to consumers. Affordable financial options are often not available to consumers. We hope the DFPI will be mindful of the benefits of EWA services, and avoid developing rules that may harm California consumers by reducing or removing their access to EWA, thereby pushing them towards significantly higher cost alternatives, such as overdraft/NSF fees or payday lending.

The Proposed Rule, in its current form, defines EWA as a loan, but we believe that a more analogous financial product is a bank account being accessed through an ATM, where the employee’s “account” is comprised of their earned wages that have yet to be paid by the employer, and the EWA service is analogous to an ATM transaction. Customers are able to access cash immediately, for a small flat fee, and the amount of the withdrawal is settled between the bank associated with the ATM and the customer’s bank. The service is simple to understand, generally low cost, and provides immediate access to cash. Similar to how ATM transactions give consumers access to their bank accounts when a bank teller is not available, EWA services give consumers access their earned wages when their paycheck is not yet available.

Access to liquidity is important because consumers face an array of fees that are the direct result of a cash shortfall. EWA services solve this issue by unlocking an employee’s access to their earned wages, thereby eliminating the financial strain, emotional stress and associated fees traditionally associated with predatory lending services or overdraft fees.

We encourage the DFPI to view EWA services as a low-cost access to liquidity, not credit. We further encourage the DFPI to compare the costs of various financial products to consumers as it looks to regulate

⁵ In its specific ruling dated February 11, 2022, the DFPI found that an employer-based, employer-funded EWA product was not subject to the CFL. *See generally* <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf>

⁶ Fin. Code § 90000, subd. (a)(4).

EWA. According to the Financial Health Network, the average amount a user paid per disbursement was \$2.59 - \$6.27.⁷ The average out-of-network ATM fee is \$4.66.⁸

In contrast, the average overdraft fee in 2022 was \$29.80 and the average NSF fee is \$26.58.⁹ According to the Consumer Financial Protection Bureau (“CFPB”), the **daily** limit on these fees varies from bank to bank, but can be as high as \$288 per day.¹⁰ For debit card purchases, the median amount triggering an overdraft fee is \$24.¹¹ For ZayZoon customers that had previously incurred an overdraft fee or an NSF fee, we have seen a significant drop-off in the amount of overdraft and NSF fees incurred by such customers since they were able to access EWA services. For these customers, the average savings from avoiding overdraft fees per customer was \$10.96/month, and the average savings from avoiding NSF fees per customer was \$32.33/month.¹²

Payday loans are another costly tool for consumers. In California, the average cost to consumers to borrow \$500 for 4 months is \$360.¹³ With most EWA providers, the cost to access \$500 is less than \$20.¹⁴ Customers with access to ZayZoon report a 61% drop in payday loan use, and nearly 50% fewer payday loans taken per month.¹⁵

When the consumer costs are compared, we hope it’s clear that EWA is a different financial product from, and an extremely desirable alternative to, overdrafts and payday loans. We are concerned that the DFPI has not properly considered the potential consequences to consumers should the final rule restrict or outright prevent California consumers’ access to responsible, low-cost products like EWA. In the Initial Statement of Reasons (“ISOR”), the DFPI acknowledges that EWA provides serve economically vulnerable populations,¹⁶ but there is nothing in the Economic Impact Assessment to indicate that any analysis has been conducted on the negative impacts to consumers by inhibiting their access to EWA services. We urge the DFPI to not just solely at EWA as a product, but rather to consider it in light of the alternatives available to consumers. We believe that this analysis is critical if the DFPI is to prioritize the prevention of unethical businesses from harming the most vulnerable populations.

Employer-Based EWA Models differ in important ways from Direct-to-Consumer Models

The Proposed Rule broadly states that most EWA disbursements constitute "loans" and “wage assignments” subject to the CFL, and requires, with certain exceptions, providers of EWA services to obtain a license under the CFL. While the Proposed Rule does differentiate between employer-based EWA and direct-to-consumer models for certain reporting requirements, it otherwise treats the two models

⁷ Financial Health Network, *Earned Wage Access Report*, p. 11, available at https://cfsi-innovation-files-2018.s3.amazonaws.com/wp-content/uploads/2021/04/26190749/EWA_D2C_Advance-_sage_Trends_FINAL.pdf

⁸ <https://www.bankrate.com/banking/checking/checking-account-survey/>

⁹ <https://www.bankrate.com/banking/checking/checking-account-survey/> [emphasis added]

¹⁰ https://files.consumerfinance.gov/f/documents/cfpb_overdraft-chart_2022-02.pdf

¹¹ https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf p.5

¹² These numbers are based on surveyed ZayZoon customer data from customers, where such customers had incurred at least one overdraft or NSF fee, as applicable.

¹³ <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2022/how-well-does-your-state-protect-payday-loan-borrowers>

¹⁴ Certain EWA providers have limits on access, as set out in the Government Accountability Office’s 2023 Report on Financial Technology. The \$20 amount here is calculated using the model with the lowest limits, thereby requiring the most amount of transactions to access \$500, and using their highest fee listed. <https://www.gao.gov/assets/gao-23-105536.pdf>, p. 50.

¹⁵ ZayZoon Customer Survey of 637 ZayZoon customers, January 2023.

¹⁶ ISOR, p.2, available at <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf?emrc=e1ffd2>

as the same for purposes of characterizing the disbursements under either model as "loans."

We believe that treating nearly all EWA services, without any regard for the differences in such models, as loans will negatively impact consumers by reducing their access to responsible EWA services. In this section, we will provide a brief overview of the differences between the two main models.

Employer-based models rely on integration between the EWA provider, the employer, and the employer's payroll processor. These EWA providers primarily rely on data received through this integration to determine and verify an employee's accrued earnings. Direct-to-consumer models are offered directly to consumers by the direct-to-consumer provider, and will use other data, such as other third-party data or a pre-existing financial relationship with the consumer, to determine an employee's earnings. Recoupment of a disbursement under an employer-based EWA model is generally accomplished through a payroll deduction on the employee's next settlement date. Recoupment for direct-to-consumer models is generally accomplished by debiting the consumer's bank account upon confirmation of a payroll deposit.

We wish to be clear that we are not taking the position that direct-to-consumer models are necessarily worse for consumers, or that earnings verification may end up being inaccurate as a result of this method. Further, while a payroll deduction will never trigger an overdraft fee, many direct-to-consumer models have consumer-friendly refund policies in place to ensure that the consumer is not negatively impacted by an overdraft arising from the debit. Direct-to-consumer models can be offered in extremely consumer responsible ways, and to consumers that would not otherwise have access to EWA services because their employer has not partnered with a provider.

However, we believe that employer-based EWA models have certain fundamental elements that are not reflected in the Proposed Rule, and we strongly urge the DFPI to take these elements into account as it considers the final rule.

It is critical that DFPI clarify that disbursements under employer-based EWA models do not constitute "loans" for purposes of the CFL. By doing so, the DFPI would better align the Proposed Rule with the Advisory Opinion¹⁷ issued by the CFPB in 2020. In the Advisory Opinion, the CFPB set forth the parameters that EWA services may adopt to avoid their products being deemed to offer "credit" under the Truth in Lending Act ("TILA") and Regulation Z,¹⁸ and most of these parameters are commonly found in employer-based EWA models. While the Advisory Opinion is admittedly not intended to be a blanket approval of all EWA models, we believe that the Advisory Opinion is a positive recognition of EWA by the CFPB, particularly employer-based models, and urge the DFPI to revise its Proposed Rule to similarly recognize that employer-based EWA models are not loans under the CFL.

It is also worth noting that Federal representatives from both sides of the aisle have indicated support for EWA services. Sherrod Brown, the Chairman of the Senate Banking Committee, has stated that "employer-based earned wage advances with strong consumer protections can, in fact, help workers cover unexpected expenses or emergencies."¹⁹ Then-Ranking Member Pat Toomey described EWA as, "an appealing alternative to payday loans ... EWA can help consumers to meet such [unexpected] expenses and others."²⁰

¹⁷ CFPB Advisory Opinion, November 2020, *available at* https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf

¹⁸ *Id.* p.4-7.

¹⁹ Senate Banking Committee Hearing, *New Consumer Financial Products and the Impacts to Workers*, September 13, 2022.

²⁰ *Ibid.*

With respect to how the Proposed Rule should treat direct-to-consumer models more broadly, we urge the DFPI to consider additional steps to permit direct-to-consumer models to operate in California. Direct-to-consumer models may have unique benefits to consumers, and generally offer their services to employees whose employers have not partnered with an employer-based EWA provider. Indirect competition between the various EWA models will offer many benefits to consumers, such as broader coverage, increased competition, expanded consumer choice, and lower cost delivery of this important benefit.

The DFPI has recognized that one EWA Model is not subject to the CFL, and should expand the scope of this decision to include employer-based EWA models

The DFPI states that it “does not approve or endorse business models”²¹, but the DFPI has previously ruled²² that a certain EWA model is not subject to the CFL. The framework set forth in the Proposed Rule seemingly confirms this special treatment of this single EWA model.²³ We believe that the Proposed Rule will effectively push EWA providers to adopt this model, and that the DFPI has failed to consider the economic impact that this would have on businesses operating in the state. As set out below, we believe that the effective requirement that EWA be “employer-funded” in order to not be subject to the CFL would either negatively impact small to midsize businesses in California, with the greatest negative effect felt by businesses in predominantly minority populated communities. For these reasons, we urge the DFPI to expand its exemption for employer-funded, employer-based EWA models to include all employer-based EWA models.

In a specific ruling dated February 11, 2022 (the “**Specific Ruling**”), the DFPI addressed one business model that provides EWA services, and determined that that model is not a loan subject to the CFL. In reaching this conclusion, the DFPI relied upon two necessary elements: (1) employers provide EWA funds that do not exceed what they already owe recipients; and (2) the fees charged do not suggest that the product evades California’s lending laws.²⁴ The DFPI went on to say that, because the funds came from the employer, the disbursement by the EWA provider “simply satisfies an existing financial obligation from the employer to the employee” and, because it is satisfying an existing financial obligation, it “does not appear that the employer is providing the recipient with money “for temporary use”.”²⁵

We agree with the DFPI’s analysis that, by satisfying an existing financial obligation from the employer to the employee, an EWA disbursement is not “for temporary use” and therefore should not be considered a “loan”. However, we urge the DFPI to reconsider the scope of the Specific Ruling, and its application within the Proposed Rule. We believe that the crux of the analysis should not be the source of funds, but instead be the idea of “satisfies part of an existing financial obligation from the employer to the employee.” Because employer-based EWA providers have a relationship with both the employer and the employee, disbursements made under employer-based EWA models can, upon the agreement of all parties, satisfy part of an existing financial obligation from the employer to the employee, therefore such disbursements are not for temporary use.

²¹ ISOR, p. 27

²² See generally Specific Ruling.

²³ Text of Proposed Rulemaking (“**TOPR**”), §1461(a), which carves out obligor paid models from being a sale or assignment of wages, and a loan subject to the CFL, *available at* <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-TEXT.pdf?emrc=cf5bce>

²⁴ Special Ruling, p. 4.

²⁵ *Id.*, p.4-5.

By shifting the focus from the purported source of funds to the satisfaction of financial obligations, the DFPI would achieve additional anticipated benefits from the regulatory action. First, this would expand the number of EWA models that can operate without being considered a loan under the CFL, which fosters competition between EWA providers and thereby lowers the cost of delivery of the services. Second, this would protect California businesses, in particular small to midsize businesses, operating in the state of California without increasing any risks faced by consumers.

Businesses, especially smaller businesses, face similar financial difficulties to lower income consumers. They very often have cash flow issues, and effectively operate “paycheck to paycheck” in the same way that many employees traditionally do. JPMorgan Chase Institute research shows that **50 percent of small businesses are operating with fewer than 15 cash buffer days**,²⁶ and this concern is especially prevalent in Black and Hispanic communities. “In all majority Black or Hispanic communities, most small businesses had fewer than 14 cash buffer days.”²⁷

Given these widespread cash flow issues, employers are often unable to fund these EWA disbursements. If the Proposed Rule remains as drafted, the employees working for these employers would have significantly reduced, or no, access to EWA services. In acceptance of these cash-flow issues faced by many businesses, certain employer-based EWA models that claim to be employer-funded advertise that they can also “lend” money to the employer for the purposes of EWA.

However, we would encourage the DFPI to look at the substance of these “loans” for the purposes of EWA to businesses that are already facing cash flow shortages. If the EWA provider is truly lending these funds to the business, this burdens the employer with additional debt, greater cash flow uncertainty, and increased risk of bankruptcy.²⁸

Alternatively, if there is no true debt burden on the employer from these loans, they are simply illusory “lending” to the employer whereby the EWA disbursements are still effectively funded by the EWA provider, simply under the guise that they are funded by the employer. This is substantively identical to employer-based models, with the only distinction being this symbolic “loan” by the EWA provider to the employer. Therefore, distinguishing employer-funded models from employer-based EWA models may lead to a symbolic “loan”, at best, or a financially risky loan for the business at worst.

There is no benefit to consumers from distinguishing “employer funded” EWA models from other employer-based EWA models, and requiring this funding structure may mean the consumer is worse off. If the employer is unable to fund EWA advances themselves, and is unwilling to take on a debt burden to do so, the consumer may not be given access to this important financial service.

Employer-based EWA providers can, through their relationships with employers and employees, “satisfy the existing financial obligations of the employer to the employee.” We urge the DFPI to reconsider the special distinction for employer-funded models, and instead focus on the relationship between the consumer, employer, and EWA provider. If all parties agree that the EWA advance is satisfying an existing obligation to the employee, the advance is not “for temporary use”, and therefore should not be deemed a loan. This would foster competition, lower cost of delivery, elevate substance over form,

²⁶ <https://www.jpmorganchase.com/institute/research/small-business/place-matters-small-business-financial-health-in-urban-communities>

²⁷ *Ibid.*

²⁸ <https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-facing-uncertainty.pdf>, p.23

increase consumer access to responsible EWA services, and protect small to midsize businesses, particularly in Black and Hispanic communities, from the risks of taking on additional debt.

Conclusion

EWA is an emerging financial tool that offers employees greater control over their finances. ZayZoon supports responsible EWA regulation, and ZayZoon is in full support of the regulation of EWA, provided it is done in a carefully considered manner. Given the significant benefits that employer-based EWA services offer to consumers, we are concerned that the proposed changes to the regulatory framework for EWA services has the potential to negatively impact consumers and businesses in California, and should only be undertaken with a full understanding of the effects of any new regulations on industry stakeholders, businesses, and, most importantly, consumers.

ZayZoon appreciates the opportunity to submit these comments to the DFPI on the Proposed Rule. Thank you for taking the time to consider our comments. If you have any questions on any of the comments contained in this letter, please do not hesitate to contact me at garth.mcadam@zayzoon.com.

Sincerely,



Garth McAdam
General Counsel, ZayZoon