November 27, 2023

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

Re: PRO 01-21 on Income-Based Advances, Notice of Proposed Modification

Dear Ms. Dyson,

On behalf of The American Fintech Council (AFC)[1], I am submitting this comment letter in response to the request for additional comment by the California Department of Financial Protection and Innovation (DFPI or Department) regarding modifications to the proposed regulations on Income-Based Advances (Proposed Modifications), commonly referred to as Earned Wage Access (EWA).[2] We thank the DFPI for the opportunity to provide further comments on the Proposed Modifications. While not enclosed with this letter, please note that AFC strongly supports the proposed revisions to the draft regulations submitted by EWA providers on November 27, 2023.

AFC's mission is to promote an innovative, transparent, inclusive, and customer-centric financial system by supporting the responsible growth of lending, fostering innovation in financial technology (Fintech), and encouraging sound public policy. AFC members are at the forefront of fostering competition in consumer finance and pioneering ways to better serve underserved consumer segments and geographies. AFC has publicly advocated for a clear and consistent regulatory framework for EWA that avoids duplicative or diverging requirements and accurately reflects the nuances of the innovative service.[3] Our members are also lowering the cost of

[1] American Fintech Council's (AFC) membership spans Earned Wage Access (EWA) providers, lenders, banks, payments providers, loan servicers, credit bureaus, and personal financial management companies.
[2] For the purposes of this comment letter, we refer to Income-Based Advances under the proposed regulation as Earned Wage Access services.
[3] AFC, *Modernizing Financial Services through Innovation and Competition*, Statement for the Record On Behalf of the American Fintech Council before The Subcommittee on Digital Assets, Financial Technology and Inclusion of the House Committee on Financial Services United States House of Representatives, 118th Congress, (Oct. 25, 2023), available at https://static1.squarespace.com/static/6026acf418b9392d406b9977/t/653c3ba7472c6f26c046cc58/1698446248201/Statement+for+the+Record+Innovation+Subcommittee+Final+10.25.23.pdf.

financial transactions, allowing them to help meet demand for high-quality, affordable financial products.

AFC's members embrace the creation of pragmatic regulations that allow responsible actors to serve Californians effectively. AFC remains supportive of establishing a pragmatic EWA registration regime that accurately characterizes the services offered, allows for optionality, and adapts proper consumer protections. As noted in our initial response to the proposed regulations,[4] we appreciate the Department's efforts to pursue an EWA regulatory framework that creates prudent registration, disclosure, and data reporting requirements. Within our policy principles, AFC has consistently advocated for a distinct regulatory framework for EWA services, wholly separate from existing lending laws to ensure that regulations within the sector adequately reflect the nuances of how EWA services are provided. While distinct, we still encourage this regulatory framework to establish meaningful consumer protections for EWA services that are derived, in principle, from established consumer protection laws. These consumer protection principles include prohibitions on recourse or collections through the Unfair, Deceptive, Abusive Acts or Practices (UDAAP) Act, data reporting, extensive fee and tip disclosures that are not hidden in terms and conditions, and reimbursement of overdraft fees. It is our sincere belief that the establishment of consumer protections of this type will ensure that responsible EWA providers can flourish for the benefit of employees.

I. AFC recommends removing loan language found in Sec. 1461 of the proposed regulation to create clear and consistent requirements for EWA services

As it relates to the current iteration of the proposed regulation, AFC is encouraged by DFPI's definition of "Income-Based Advances" as enumerated in Sec. 1004. Defining the "Income-Based Advances", commonly referred to as EWA, as DFPI has in Sec. 1004 embodies many of the principles AFC recommends for the EWA industry. Importantly, Sec. 1004 is absent of any language that would imply EWA is a loan under the proposed regulation. Further, many of the modifications DFPI has pursued, particularly those modifications related to additional reporting requirements and the removal of the proposed requirements around subscription fees present beneficial changes to the proposed regulation. AFC believes that these modifications will improve the ability for EWA providers to serve Californians responsibly through the business model that fits their situation best.

However, as written, the proposed regulation creates a confusing and conflicting regulatory framework for the EWA industry in California, especially since it provides a pathway to be exempt from needing a CFL lending license but not a corresponding exemption from being classified as a loan under the CFL. As noted above, DFPI correctly avoids defining "Income-Based Advances" as a loan within Sec. 1004 of the proposed regulation. However, Sec. 1461(a)

[4] AFC, *Comment Response to Proposed Rule PRO 01-21 regarding Earned Wage Access*, (May 17, 2023), available at https://static1.squarespace.com/static/6026acf418b9392d406b9977/t/646569c00b73de531bbb9620/1684367808765/AFC+CA+DFPI+EWA+Comment+Response+Final+5.17.23.pdf.

the proposed regulation continues to hold that advances in any type—which would seem to include EWA—are considered as loans under California Financing Law. Interpreting Sec. 1461 with the definitions established in Sec. 1004 seems to create confusing and conflicting standards for evaluating EWA services within the law. Further, given the additional language provided in Sec. 1461(d), which denotes the specific aspect of "wage assignment"—which is a part of EWA services operations—as not "consumer credit under the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.), or a loan or forbearance of money under the California Constitution, article XV, section 1",[5] there is additional ambiguity to the actual standing of EWA as a loan given since wage assignment can be a operational aspect of an EWA service.

Simply put, EWA is not a loan and should not be regulated as such. Unlike a loan, EWA services provide employees access to wages they have already earned prior to their arbitrary biweekly or monthly pay period when they are short on funds between paychecks. EWA services have no recourse, interest, late fees, credit impacts, or underwriting. EWA represents a responsible and innovative alternative to payday loans that, while serving consumers in a similar manner, does not engage in the mandatory fees, interest accrual, and harsh debt collection practices found in payday lending. Responsible and affordable EWA companies are democratizing financial services and disrupting broken legacy systems that have historically put consumers at a disadvantage.

To attempt to assimilate EWA services into the existing lending regulatory framework would place unnecessary and inapplicable requirements on EWA providers that would ultimately make their services unviable for California families. Further, it could subject Californians to a number of charges and practices that do not currently exist in EWA services, such as origination costs, late fees, underwriting, and credit checks. In turn, this could decrease the amount of access that Californians have to EWA services and undercut the financial inclusion that EWA providers seek to offer.

We therefore recommend that DFPI further modify its regulations to remove or amend the language remaining in Sec. 1461 of the proposed regulation that categorizes EWA, even implicitly, as a loan to ensure that EWA is accurately characterized as a wholly separate, non-lending service, and that EWA providers are not subject to ill-fitting lending regulations in any capacity.

II. AFC recommends amending the "Income-Based Advances" nomenclature in the proposed regulation

Establishing the proper nomenclature for innovative products and services, while difficult, is an important aspect to ensuring clear and consistent understanding throughout the industry and

[5] California Department of Financial Protection and Innovation, *First Modified Text of Proposed Regulations Department of Financial Protection and Innovation Title 10. Investment Chapter 3. Commissioner Of Financial Protection and Innovation PRO 01-21*, (Nov. 6, 2023).

broader society. Consumers derive their understanding of financial products and services, at least in part, by the terminology used to categorize and characterize the product or service. Using the term “Income-Based Advance”, as is done throughout the DFPI’s proposed regulation establishes nomenclature that is incongruous with the actual services offered by EWA providers.

Importantly, EWA is not an advance. An advance, as commonly understood in financial services, is predicated on provision of funds based on the future or potential earning of those funds. The use of the term “advance” within the DFPI does not accurately describe EWA services, since, as noted above, the services are predicated on access to wages employees have already earned prior to their request to an EWA provider to withdrawal funds. Secondly, while EWA is based on an employee’s income; thus making “income-based” correct in principle. As noted, employees using EWA are entitled to wages that they have already earned, not simply those that are part of their overall income. Thus, “earned wage” seems far more accurate in practice than “income-based” when describing the actual services provided by an EWA provider.

With these points in mind, to characterize EWA as an “Income-Based Advance”, even nominally, within the regulation establishes an inaccurate characterization of the service provided. In turn, this can create confusion within the minds of regulators, industry stakeholders, and California consumers when discussing EWA or using the term in common parlance. Thus, AFC recommends that DFPI amend its nomenclature within the regulation from “Income-Based Advances” to “Earned Wage Access”.

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AFC appreciates the opportunity to comment on DFPI’s Proposed Modifications regarding the regulation of Income-Based Advances. AFC and its members seek to ensure that Earned Wage Access remains a viable, cost-effective, and consumer protected sector that provides employees the opportunity to access the wages they have earned when they need them without having to go to high-cost alternatives. DFPI, through its proposed regulation, has the opportunity to ensure that EWA remains a viable option for California employees. It is with this in mind, that we urge DFPI to carefully consider our recommendations and the specific proposed changes from responsible providers already submitted, when finalizing its proposed regulations.

Sincerely,

Ian P. Moloney
SVP, Head of Federal and State Policy
American Fintech Council