



November 27, 2023

VIA EMAIL

Attn: Araceli Dyson & Peggy Fairman
Department of Financial Protection and Innovation
2101 Arena Boulevard
Sacramento, California 95834
regulations@dfpi.ca.gov
peggy.fairman@dfpi.ca.gov

Re: COMMENTS REGARDING NOTICE OF MODIFICATION TO PROPOSED RULEMAKING UNDER THE CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW, CALIFORNIA FINANCING LAW, CALIFORNIA DEFERRED DEPOSIT TRANSACTION LAW, AND CALIFORNIA STUDENT LOAN SERVICING ACT (PRO 01-21)

This letter is submitted to the California Department of Financial Protection and Innovation (“DFPI”) by DailyPay, Inc. (“DailyPay”) in response to DFPI’s Notice of Modification to Proposed Rulemaking, PRO 01-21, dated November 6, 2023 (“Modified Rule”) in relation to the aspects of the Modified Rule relating to income-based advances.

As noted in DailyPay’s previous comment letter, dated May 17, 2023 (“May Letter”), which addresses the DFPI’s Notice of Proposed Rule Making, dated March 17, 2023 (“Proposed Rule”), DailyPay objects to flawed provisions of the Proposed Rule, including the Proposed Rule’s assertion that income-based advances are “loans” for purposes of the California Financing Law (“CFL”), and the framing of California Consumer Financial Protection Law (“CCFPL”) registration as merely a temporary exemption from the CFL, and the inclusion of optional fees within the pertinent definitions of “charges.” Each of these flaws persists in the Modified Rule, and, with respect to the Modified Rule, DailyPay hereby reiterates and incorporates by reference the objections it raised, and the reasons therefore, in the May Letter. Without waiving any of its objections raised in the May Letter, DailyPay proposes a compromise solution in this letter.

The DFPI Should Refrain From Categorically Characterizing All Income-Based Advances As “Loans” In Section 1461 Of The Modified Rule

In this letter, DailyPay wishes to stress its objection to Section 1461 of the Modified Rule, which DailyPay believes is the most problematic provision in the Modified Rule for DailyPay and for other providers of income-based advances. Section 1461 of the Modified Rule improperly characterizes all income-based advances as “loans.” As described in the May Letter, this characterization is problematic because it is ultra vires and unnecessary under the CCFPL, is bad for consumers, and is not supported by law or fact. DailyPay notes that many other commenters expressed similar concerns about this provision in the Proposed Rule. Nonetheless, Section 1461 of



the Modified Rule does not reflect changes in response to such concerns.¹ DailyPay urges the DFPI to refrain from categorically characterizing all income-based advances as “loans.”

Enclosed with this letter for the DFPI’s consideration is a proposed markup to key portions of the Modified Rule. DailyPay urges the DFPI to consider adopting the proposed markup. DailyPay, competing providers of income-based advances, and other stakeholders support this proposed markup.

The proposed markup demonstrates how the DFPI could resolve these problems. Instead of characterizing *all* income-based advances as “loans” subject to the CFL, the proposed markup provides that some income-based advances, specifically those satisfying certain criteria (including a requirement that providers offer consumers a no-cost option to obtain income-based advances and variety of other robust consumer protections) are not subject to the CFL. The relevant criteria, as set forth in the proposed markup’s revised definitions of “income-based advance” and “provider,” are consistent with existing industry best practices. The proposed markup’s approach therefore preserves the CCFPL’s registration process and the DFPI’s corresponding oversight authority over registrants,² while allowing the DFPI to avoid causing various consumer harms, setting bad incentives for providers, or prompting the DFPI to step into the various legal vulnerabilities identified in the May Letter.

The DFPI Should Revise The Instructions For Completing The Form MU1

As noted in the May Letter, DailyPay objects to the DFPI’s direction that providers of income-based advances applying for registration through NMLS must select the category “consumer loan lending.” *See* Section 1021(a)(2)(D) of the Modified Rule. DailyPay believes that, due to legislation recently enacted in other jurisdictions recognizing that income-based advances are a distinct financial product and licensing and regulating them as such, a proposal is being made to the Board of Managers of the State Regulatory Registry (the entity that administers NMLS) for the establishment of a new, separate category for income-based advances (a.k.a. earned wage access or EWA) to be included on the list of business activities on the Form MU1 in NMLS. DailyPay requests that the DFPI amend Section 1021(a)(2)(D) of the Modified Rule to provide that this new category should instead be used if and when it is made available on the Form MU1. The proposed markup includes proposed language on this point for the DFPI’s consideration.

The DFPI Should Restore The Proposed Rule’s Clarification Regarding The CFL’s 15-Day Rule For Installment Loans

As noted in the May Letter, DailyPay supports the DFPI’s clarification in Section 1463 of the Proposed Rule that no section of the CFL explicitly prohibits “loans” being repaid in a single payment, and that California Financial Code § 22307(b) (requiring an initial loan payment to be due not less than 15 days after the date the loan is made) refers to contracts with “periodical

¹ The May Letter, and such other public comment letters, present a robust record justifying and explaining the concerns of DailyPay and of others about Section 1461 of the Proposed Rule (and therefore, also Section 1461 of the Modified Rule). As noted above, DailyPay again hereby reiterates and incorporates by reference the objections it raised (and the reasons therefore) in the May Letter.

² *See, e.g.*, Cal. Fin. Code § 90010(b) (expressly authorizing, without reliance on the CFL, the DFPI to examine registrants and to require various reports from registrants).



installments,” which the DFPI interprets to apply only to transactions with multiple periodic payments and not to transactions collected in a single payment. Such clarification is critical for income-based advances, as the typical payroll cycle spans only one-week or two-weeks (i.e., less than 15 days). Accordingly, if California Financial Code § 22307(b) were deemed to apply to income-based advances, that provision could prohibit income-based advances from being offered in the state. The Modified Rule has, without explanation, omitted the Proposed Rule’s clarification regarding this provision. If the DFPI does not accept the proposed markup as presented with this letter, DailyPay requests that the DFPI restore the sensible and necessary clarification regarding the CFL’s 15-day rule for installment loans, which was previously in Section 1463 of the Proposed Rule.

The DFPI Should Eliminate Vagueness From the Definitions of “Charges”

DailyPay notes that the Proposed Rule’s flaw regarding the inclusion of optional fees within the pertinent definitions of “charges” has not been fixed by the Modified Rule; rather, the flaw has been exacerbated in the Modified Rule, which now includes as “charges” not only optional fees for income-based advances but also fees, whether optional or not, for “any other service rendered.” *See, e.g.*, Sections 1004(c) and 1465 of the Modified Rule.³ This language is impossibly vague and is especially problematic for providers offering a variety of financial products and services distinct from their income-based advance business lines, such as savings accounts, prepaid cards, digital wallets, budgeting tools, and other products and services. In addition to removing optional fees from the pertinent definitions of “charges,” the DFPI should also remove the phrase “any other service rendered.” To the extent the DFPI might be concerned that optional fees or optional services might be offered by a provider to consumers in a manner such that they are not truly “optional,” the Modified Rule’s broad and vague language is not an appropriate solution; rather, the DFPI should utilize its sweeping UDAAP enforcement authority to pursue the bad actors. *See, e.g.*, Cal. Fin. Code §§ 90003(a)(1), 90012.

Conclusion

DailyPay thanks the DFPI for the opportunity to comment on the Modified Rule. DailyPay requests that the DFPI make any modifications to the Modified Rule available for public comment before finalizing any aspect of the Modified Rule. DailyPay looks forward to working with the DFPI regarding future iterations of this rulemaking.

Sincerely,

DailyPay, Inc.

By: _____

Name: Jared DeMatteis

Title: Chief Legal & Strategy Officer

³ DailyPay notes that, despite its objections on this point, the proposed markup enclosed with this letter continues to treat optional fees as “charges.” This is because, if the DFPI accepts the proposed markup as presented with this letter, then DailyPay does not anticipate such definition of “charges” being problematic for DailyPay solely in that scenario.

PROPOSED CHANGES TO

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**

(The original proposed text is shown without underline. The first modifications to the text are shown with underline for additions and strikethrough for deletions.) **Proposed changes to the first modified text of proposed regulations are shown in bold type. Deletions are shown as strikethroughs, and additions are shown as underlined italics.**

Subchapter 4. California Consumer Financial Protection Law

§ 1004. Definitions – Income-Based Advances.

With respect to income-based advances, these terms shall have the following meanings:

(a) “Amount due” means the amount to be paid by the consumer of an income-based advance on the collection date.

(b) “Account transfer fee” means a fee imposed to move an income-based advance from an account designated or required by the provider to other accounts owned or controlled by the consumer. **For purposes of annual reporting account transfer fees pursuant to section 1045, a registrant should only report known account transfer fees assessed by the registrant for funds received from income-based advances.**

(c) “Charges” mean any interest, fees, bonuses, commissions, brokerage, discounts, expenses, and other forms of costs charged, contracted for, or received by a person in connection with ~~the investigating, arranging, negotiating, procuring, guaranteeing, making, servicing, collecting, and enforcing of an income-based advance, or any other service~~ . Charges include, without limitation, subscription fees, expedited funds fees, account transfer fees, and gratuities. For purposes of this definition, “charges” include amounts received by a person from a consumer for payment of optional or discretionary services elected by the consumer in connection with income-based advances, ~~education financing~~.

Commented [A1]: Simplifies the subdivision and removes overly broad language. The term “or any other service rendered” could be interpreted to cover services unrelated to income-based advances and thus beyond the scope of the regulation. As redrafted, the paragraph clarifies that a charge is any fee or other cost charged, contracted for, or received by a person in connection with an income-based advance.

(d) “Collection date” means the date a provider plans to collect all previous unpaid income-based advances made during a particular period. This date may be a consumer’s payday or the date when the provider anticipates that amounts that have accrued to the benefit of the consumer will be paid to the consumer.

(e) “Expedited funds fee” means is any amount paid by a consumer to accelerate the receipt of an income-based advance.

(f) “Gratuity” means 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.

(g) “Income-based advance” means an advance made to a consumer by a **provider** and that has all of the following characteristics:

Commented [A2]: Further proposed revisions (see subdivision j) give special meaning to the word “provider.” Because an income-based advance could be made by someone that does not meet the definition of a provider, amendments to subdivision g replace the term “provider” with the term “person” to improve clarity and ensure that the definitions of income-based advance and provider are not circular.

- (1) The advance is based on income the provider person has reasonably determined to ~~have that has~~ accrued to the benefit of the consumer but has not, at the time of the advance, been paid to the consumer;
- (2) When the advance is made, the advance is scheduled *or anticipated* for collection in a single payment on a date within ~~thirty-one (31)~~ *thirty-four ()* days, and that date corresponds to the date that the provider person anticipates the income described in paragraph (1) of this subdivision will be paid to the consumer; and
- (3) The provider person warrants to the consumer as part of the contract between the parties on behalf of the provider person and, if applicable, any business partners partner(s) that:
- (A) The provider person and any the business partners partner(s) have no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in full the event the amount *of the advance, provided that this provision shall not prohibit a person from suspending income-based advance services to a consumer as a result of the consumer's failure to repay an income-based* ~~advanced is not repaid in full~~; and
- (B) ~~If~~ *With respect to the amount due is not repaid on the collection date, advanced to the consumer, the* provider person and any the business partners partner(s) will not engage in any debt collection activities, ~~if the advance is not repaid on the scheduled date, or~~ place the amount due advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount due. ~~advanced. In this paragraph, "debt collection activities" do not include initiating with the consumer's authorization an electronic fund transfer or payroll deduction to collect any outstanding amount due.~~

Commented [A3]: When employees are paid on a monthly basis, bank holidays and weekends may delay the deposit of wages into a consumer's depository institution account beyond 31 days, due to settlement cycles. The change to 34 days accommodates these delays.

Commented [A4]: Clarifying

(h) "Obligor" means:

- (1) A consumer's employer, or
- (2) A person other than a consumer's employer ~~who is not an employer, but~~ who is contractually obligated to pay a consumer a sum of money on an hourly, project-based, piecework, or other basis for labor or services provided by the consumer to or for the benefit ~~on behalf~~ of the person.

(i) "Obligor-based advance" means any income-based advance where the provider intends to collect the amounts that have accrued to the benefit of the consumer directly from the consumer's obligor on the collection date.

(j) "Provider" means a person other than an obligor that engages in the business of providing income-based advances, *adheres to the requirements in paragraph (1) of this subdivision, and refrains from engaging in the prohibited acts in paragraph (2) of this* ~~subdivision.~~

(1) To meet the definition of a provider, a person that provides income-based advances to a consumer must do all of the following:

Commented [A5]: Embeds consumer protections within the definition of the term "provider." As clarified later in the regulations, entities that offer income-based advances and that meet the definition of a "provider" will not be subject to or required to obtain licenses under the CFL. In contrast, entities that offer income-based advances but do not meet the definition of the term "provider" will require CFL licenses.

- (A) Develop and implement policies and procedures to respond to inquiries raised by consumers and address complaints from consumers in an expedient manner.
- (B) Whenever it offers a consumer the option to receive proceeds for a charge, the provider must also provide the consumer at least one reasonable option to obtain the same amount of proceeds at no cost and clearly explain how the consumer may select the no-cost option.
- (C) Before entering into an agreement with a consumer for the provision of income-based advances, the provider must do all of the following:
- (i) Inform the consumer of the consumer's rights under the agreement;
 - (ii) Inform the consumer that the agreement is not intended to create a legal obligation for the consumer to repay advances;
 - (iii) Fully and clearly disclose to the consumer all charges associated with the provision of income-based advances.
- (D) Inform the consumer of the fact of any material changes to the terms of conditions of the income-based advance agreement before implementing those changes for that consumer.
- (E) Allow the consumer to cancel use of the provider's income-based advance services at any time, without incurring a charge for that cancellation.
- (F) Comply with all applicable local, state, and federal privacy and information security laws.
- (G) Provide income-based advances to a consumer via any means mutually agreed upon by the consumer and the provider.
- (H) If a provider solicits, charges, or accepts a gratuity from a consumer, the provider must do all of the following:
- (i) Clearly and conspicuously disclose to the consumer immediately prior to each transaction that a gratuity amount may be zero, and that the act of paying a gratuity is voluntary;
 - (ii) Clearly and conspicuously disclose in its service agreement with the consumer that gratuities are voluntary and that the offering of income-based advances, including the amount of an income-based advance a consumer is eligible to request and the frequency with which income-based advances are provided to a consumer, is not contingent on whether the consumer pays a gratuity or on the size of the gratuity.
- (I) If a provider seeks repayment of income-based advances or payment of charges in connection with the provision of income-based advances from a consumer's depository institution account, including via electronic funds transfer, that provider must do all of the following:

(i) Comply with applicable provisions of the federal Electronic Fund Transfer Act, 15 USC 1693 et seq., and regulations adopted pursuant to that act; and

(ii) Reimburse the consumer for the full amount of any overdraft or non-sufficient funds fees imposed on that consumer by the consumer's depository institution, which are caused by the provider attempting to seek repayment of income-based advances or charges on a date before, or in an incorrect amount from, the date or amount previously disclosed to the consumer.

(2) To meet the definition of a provider, a person that provides income-based advances to a consumer may not do any of the following:

(A) Compel or attempt to compel repayment of income-based advances or charges through any of the following means:

(i) A suit against the consumer in a court of competent jurisdiction;

(ii) Use of outbound telephone calls;

(iii) Use of a third party debt collector to pursue collection from the consumer on the provider's behalf;

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

(B) Share with an obligor any portion of charges received from a consumer in connection with income-based advances.

(C) Require a credit report or credit score issued by a consumer reporting agency to determine a consumer's eligibility for income-based advances.

(D) Accept repayment of income-based advances or charges by a consumer via any form of credit, including a credit card.

(E) Impose a charge for failure of a consumer to repay income-based advances or charges.

(F) Report any information about a consumer's failure to repay income-based advances or charges to a consumer reporting agency or debt collector.

(G) If a provider solicits or accepts gratuities from a consumer, that provider may not mislead or deceive consumers about the voluntary nature of those gratuities or make representations that gratuities will benefit any specific individuals.

(3) A person shall not be rendered ineligible to be a provider for purposes of this subdivision by compelling or attempting to compel repayment of income-based advances or charges that were incurred by a consumer through fraudulent or other unlawful means or by pursuing an obligor for a breach of its contractual obligations to that .

Commented [A6]: Ensures that entities making income-based advances may take reasonable steps to recover funds lost through fraud and pursue contractual disputes with obligors.

(k) "Subscription fee" means any periodic fee paid by a consumer under an agreement that includes any right, whether absolute or conditioned, to receive an income-based advance.

NOTE: Authority cited: Section 90009, Financial Code. Reference: Sections 90003, 90005, and 90009, Financial Code.

§ 1021. Registration Application.

The procedures set forth in this section are applicable to a person who is required to be registered pursuant to this subchapter. If an applicant is offering or providing more than one subject product, separate registration is required for each subject product. The application for registration shall be filed as follows:

(a) INITIAL APPLICATION: The applicant shall complete and file Form MU1 in accordance with the instructions of NMLS and this subchapter for transmission to the Commissioner. Unless otherwise specified below, an applicant shall complete all sections of the Form MU1. All exhibits and supporting documents related to the application or amendment required by NMLS or identified in this section shall also be filed with NMLS (unless otherwise specified), in accordance with the instructions of NMLS and this subchapter for transmission to the Commissioner. An applicant shall provide the following information, exhibits, and documentation in the manner provided below.

- (1) ITEMS NOT REQUIRED: Applicants are not required to complete Item Number 9 (Approvals and Designations), Item Number 10 (Bank Account Information), or Item Number 17 (Qualifying Individuals) of Form MU1.
- (2) BUSINESS ACTIVITIES: On Item Number 1 of Form MU1 (Business Activities), an applicant shall indicate that it will offer or provide a subject product according to the following instructions.
 - (A) For debt settlement services, the applicant shall select "Debt settlement/debt adjuster," "Debt management/credit counseling," and/or "Debt Negotiation" as applicable under the Debt section of the form.
 - (B) For student debt relief services, the applicant shall select "Debt settlement/debt adjuster," "Debt management/credit counseling," and/or "Debt Negotiation" as applicable under the Debt section of the form.
 - (C) For education financing, the applicant shall select "Private student loan lending" under the Consumer Finance section of the form.
 - (D) For income-based advances, an applicant shall select "Consumer loan lending" under the Consumer Finance section of the form, **until such time as NMLS creates a separate product category for income-based advances which shall instead be selected at such** .
- (3) IDENTIFYING INFORMATION: An applicant shall provide all identifying information on Item Number 2 of Form MU1, i.e., the entity's name, IRS employee

Commented [A7]: Reflects steps being taken by the State Regulatory Registry to add a new category to MU1 to reflect income-based advances (also known as earned wage access services).

identification number or social security number, legal name amendment, main address (not a P.O. Box), business phone number, toll-free number for consumers, fax line, email address, mailing address, and a statement as to whether the entity conducts business with consumers through branch offices or other business locations.

-----No changes are proposed to the remainder of Section 1021

(Remainder of section is excluded in the interest of brevity)-----

§ 1461. Advances Under the California Financing Law.

(a) Any advance of funds to be repaid in whole or in part by the receipt of a consumer's wages, salary, commissions, or other compensation for services, is a sale or assignment of wages and a loan subject to the California Financing Law, unless either of the following conditions is :

(1) The advance of funds is an income-based advance, as that term is defined by California Code of Regulations, title 10, section 1004, subdivision (g) and the person advancing those funds is a provider, as that term is defined in California Code of Regulations, title 10, section 1004, subdivision (j) regardless of the funding provider's 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. ~~or~~

(2) The funds are provided by an obligor. ~~This section does not apply to obligors,~~ as that term is defined by California Code of Regulations, title 10, section Section 1004, subdivision (h), of subchapter 4 of these rules who advance advances from ~~their~~ its 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.

(b) A consumer who receives an advance of funds considered a under subdivision (a) of this section is a borrower, and a ~~provider~~ a person who makes an that advance is a finance lender within the meaning of the California Financing Law.

(c) For the purposes of determining whether an advance of funds to a California consumer is to be repaid in whole or in part by the receipt of wages, salary, commissions, or other compensation for services, the source of funds from which the lender ordinarily collects its advances in similar transactions may be considered.

(d) This section shall not be read to interpret what is considered a wage assignment under the Labor Code, 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.

NOTE: Authority cited: Sections 22150 and 90009, Financial Code. Reference: Sections 22203 and 22335, Financial Code.

§ 1462. Licensure of Advance Providers – Income-Based Advances.

(a) A provider, as defined by California Code of Regulations, title 10, Section 1004, subdivision (l) of an advance of funds as described in sSection 1461 of these rules is not “in

Commented [A8]: Exempts from the CFL income-based advances made by entities that meet the definition of a provider, as that term is proposed to be redefined in subdivision (j) of Section 1004 of Subchapter 4. Retains the current exemption for funds provided by obligors.

Commented [A9]: Clarifying

Commented [A10]: Ensures that the language of Sections 1461 and 1462 is internally consistent.

the business” of a finance lender or broker for purposes of licensure under Financial Code section 22100 of the California Financing Law (~~Divisions~~ 9 (commencing with ~~Section~~ 22000) of the Financial Code) if:

(1) The advance of funds is an income-based advance as defined by California Code of Regulations, title 10, section Section 1004, subdivision (g), and of subchapter 4 of these rules; ~~and~~

(2) The provider is registered with the Department to offer income-based advances under California Code of Regulations, title 10, section Section 1010 of subchapter 4; or

(3) The provider has received written notification from the Commissioner that it is exempt from the California Financing [redacted] and

~~1. The charges collected by the provider in connection with each income-based advance do not exceed charges that would be permitted under the California Financing Law if the provider were licensed under that law.~~

This ~~paragraph~~ (b) **Paragraph (2) of subdivision (a)** section shall expire when the registration requirements for income-based advance providers under ~~s~~Section 1010 of subchapter 4 of these rules expire.

NOTE: Authority cited: Sections 22150 and 90009, Financial Code. Reference: Sections 22100 and 22335, Financial Code.

§ 1465. Voluntary or Optional ~~Payments~~Charges.

A voluntary or optional payment, including, without limitation, a tip or gratuity, paid by a borrower to a licensee or any other person in connection with the investigating, arranging, negotiating, procuring, guaranteeing, making, servicing, collecting, and enforcing of a loan or any other service rendered in connection with a [redacted], is a charge under Financial Code section 22200.

NOTE: Authority cited: Sections 22150 and 90009, Financial Code. Reference: Sections 22200 ~~and 22335~~, Financial Code.

Commented [A11]: Acknowledges that Commissioner-issued Interpretive Opinions could also exempt a provider of income-based advances from the requirement to be licensed under the CFL.

Commented [A12]: Narrows the phrase “or any other service rendered” by clarifying that the service must be in connection with a loan subject to the CFL.