



November 27, 2023

VIA EMAIL (regulations@dfpi.ca.gov)

Department of Financial Protection and Innovation
2101 Arena Boulevard
Sacramento, California 95834

RE: EarnIn's Comments on the First Modified Text of Proposed Rulemaking under the California Consumer Financial Protection Law and California Financing Law, et. al (PRO 01-21)

Dear Sir/Madam:

Activehours, Inc., d/b/a EarnIn ("EarnIn") appreciates the thoughtful revisions recently recommended by the California Department of Financial Protection and Innovation's ("DFPI") within their proposed rulemaking under the California Consumer Financial Protection Law ("CCFPL") and California Financing Law ("CFL") (PRO 01-21). EarnIn welcomes purposeful regulation of Income-Based Advances ("IBAs")¹ and appreciates the DFPI's efforts and consideration regarding the comment letters received by its office in March and April 2023.

However, even after the updates, there remain four areas of concern for which EarnIn reserves additional comment:

- I. IBAs are not "loans" under California Law;
- II. Voluntary IBA payments are not "charges" for purposes of the CFL;
- III. Providers deserve clarity that registration under the CCFPL now will not subject IBAs to licensure/fee caps later; and
- IV. IBA reporting requirements for providers should be narrowly tailored.

¹ EarnIn has consistently supported regulatory oversight of the IBA industry, including registration under the CCFPL and in Senate Bill 472 in 2019.



Section I: IBAs are not loans under California Law.

EarnIn recommends that DFPI reconsider its proposal of Section 1461, which would interpret "loan" under the CFL as inclusive of IBAs and other non-recourse advances. Non-recourse advances are not loans.² The CCFPL defines "credit" as the right to "incur debt and defer its payment," and in order to meet the definition of debt there must be "an obligation... to pay."³ Similarly, the usury provisions of the California Constitution contemplate that in order to exceed the maximum interest rates allowable there must be an underlying legal *obligation*.⁴ The proposal to include non-recourse advances under the definition of CFL is therefore inappropriate.

The CFL also is not well-suited for regulating IBAs because there are numerous provisions that are unworkable. For example, the CFL discusses concepts such as "maturity"⁵ and "time"⁶ which, while easily calculable for a loan with a clear obligation and due date, become undefined values when applied to IBAs, particularly IBAs that impose no contractual or legal obligation to repay.

Outside of California, other state entities have recently confirmed the non-credit status of such products. The Arizona Attorney General issued an opinion that an IBA "that is offered as a no-interest and non-recourse product" is not a consumer loan under state law.⁷ Missouri and Nevada also passed comprehensive legislation to explicitly exempt IBAs from traditional lending laws.⁸

² EarnIn's Cash Out Terms (the [EarnIn's Cash Out User Agreement](#)) provides that the consumer has no obligation to repay an advance and that EarnIn will have no legal or contractual claim or remedy against a consumer based on the failure to repay any advance. If though a consumer provides EarnIn with a revocable debit authorization for repayment, that does not establish "a legal obligation" to repay and does not establish a "debt. Indeed, in the event the consumer chooses not to repay or if the debit fails due to a lack of no funds available, or if the debit authorization fails, EarnIn warrants that it will not (i) engage in any debt collection activities against the consumer, (ii) place the amount of the outstanding advance as a debt with, or sell it to, a third party, or (iii) provide any reporting to a consumer reporting agency concerning the amount of the advance.

³ [Cal. Fin. Code § 90005](#) – defining credit and debt.

⁴ [California Constitution Article XV](#) – establishing usury caps.

⁵ See Cal. Fin. Code § 22337(a).

⁶ See Cal. Fin. Code § 22332.

⁷ Arizona Attorney General, Opinion I22-005 (R22-011), available at <https://www.azag.gov/opinions/I22-005-r22-011>.

⁸ Missouri Senate Bill 103 (2023), available at https://senate.mo.gov/23Info/BTS_Web/Bill.aspx?SessionType=R&BillID=44662, and Nevada Senate Bill 290 (2023), available at <https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10146/Overview>



Loans are fundamentally different from IBAs. IBAs are offered on a non-recourse basis, meaning (1) the person providing the IBA has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in full the amount of the advance⁹, and (2) in the event of non-payment, will not (i) engage in debt collection activities or place the amount advanced with or sell to a third party, and (ii) will not make any reports to credit reporting agencies. Indeed, EarnIn's IBA goes further, expressly providing that

You do not have an obligation to repay any of the Cash Out Services, and EarnIn will have no legal or contractual claim or remedy against you based on your failure to repay any of the Cash Out Services. However, if you do not repay a Cash Out Service or EarnIn is unable to complete a repayment to EarnIn that you authorized, you will be prevented from using the Cash Out Services until you pay any outstanding authorized payment to EarnIn. EarnIn warrants that it will not (i) engage in any debt collection activities if Cash Out Services are not repaid on the scheduled date, (ii) place the amount of the outstanding Cash Out Services as a debt with, or sell it to, a third party, or (iii) provide any reporting to a consumer reporting agency concerning the amount of the Cash Out Services.¹⁰

Recommendations:

- Exclude non-recourse advances from the interpretation of "loan" under the CFL to avoid future licensing uncertainty and encourage IBA registration in the industry. Specifically, Section 1461 should be updated to exclude eligible IBA providers from the definition of "finance lender" under the CFL.
- Rather than grouping IBAs with consumer loan lending, give IBAs its own "Income Based Advance" category in the registration form to properly recognize that IBAs are innovative and distinct from traditional CFL products (Section 1021)

⁹ Suspending a consumer user of EarnIn's services as a result of the consumer's failure to repay an advance is not a "contractual claim or remedy;" and the absence of any legal obligation by the consumer to repay the advance disqualifies the advance from being a loan and does not create "debt" under California law. See, e.g., *Sw. Concrete Products v. Gosh Cons tr. Corp.*, 51 Cal. 3d 701, 705 (1990) ("[a] loan of money is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount").

¹⁰ EarnIn's Cash Out User Agreement.



Section II: Voluntary IBA payments are not charges for the purposes of CFL

The proposed regulation would deem voluntary or optional payments as “charges” under the CFL, despite the fact that such amounts do not represent costs of credit that the CFL is designed to regulate. There are key distinctions between a mandatory, contract-imposed fee versus an optional voluntary payment. With voluntary payments, the consumer retains flexibility and choice—the opportunity and power to choose whether to pay, what to pay, and when to pay for access to their money when they need it. The CFL’s loan pricing provisions were not designed with voluntary IBA payments in mind. Within the text of CFL, there is no mention of voluntary payments on consumer loans; rather, it discusses how a person might “contract for” charges.” However, “contracting for” such “charges” does not have meaning in the IBA context, because providers have no legal or contractual claim to payment.

Similarly, if a customer chooses to select an expedited funds transfer, they are deciding to pay the fee in order to receive a premium service and not because the IBA terms require it. Choosing an expedited transfer is much like using an ATM to access cash that is yours. Again, the CFL is poorly suited to appreciate these nuances, since it does not contemplate the possibility of ancillary charges that are not required as a condition of receiving a loan.

Defining voluntary payments as charges for purposes of the CFL would deprive consumers of their choices to expedite advance delivery and/or make a voluntary payment to an IBA provider in appreciation of the IBA service. However, EarnIn does not dispute the consumer protection principles that may otherwise animate DFPI’s proposal. To ensure that choice remains voluntary, customers should not be subject to recourse or discriminatory behavior if they choose not to tip –. For example, IBA providers should not disable a service if the borrower does not tip or lower the amount of wages they can access if they do not tip a certain amount. Accordingly, EarnIn recommends that DFPI direct its interpretation that payments are “charges” to only those types of payments that are not truly voluntary. Payments that are legitimately gratuitous or voluntary in that they do not result in changes to the amount or availability of advances should not be treated as “charges” for purposes of the CFL.

¹¹ Cal. Civ. Code § 22303.



Recommendations:

- DFPI should amend Section 1465 to establish a "safe harbor" that excludes purely voluntary payments from charges. To prevent circumvention and confusion, this safe harbor should be accompanied by qualifiers: (1) a payment must be truly voluntary or optional, and not legally required, (2) the provider must clearly and conspicuously disclose that the payment is voluntary, and (3) the customer must not be subject to recourse or difference in service as a result of not making a payment.¹²
- DFPI should clarify within Section 1465 that any optional transfer fees agreed to by a customer is not a charge if (1) the charges are comparable with other expedited fee transfer services in the market, (2) there is a no-cost IBA option, and (3) there are sufficient disclosures to advise the customer of this no-cost option.

Section III: Providers deserve clarity that registration under the CCFPL now will not subject IBAs to Licensure/Fee Caps later

As previously stated, EarnIn believes registration under the CFFPL is appropriate for IBA providers in California. However, because the CCFPL registration requirement is set to expire in 4 years absent legislative intervention, IBA providers could then automatically become subject to full CFL licensing and fee restrictions, per Section 1461 of the proposed regulations. CFL licensing, while serving a critical function of protecting consumers from bad actors, creates a framework that is fundamentally at odds with IBAs.

Under the CFL, fee caps are narrowly tailored based on the loan size and type, with a functional bias toward interest based on the unpaid principal. For example, the CFL assumes at a minimum that terms will last for at least one month and that there remains a monthly outstanding balance from which maximum fees allowable can be calculated.¹³

The CCFPL, in contrast, is an appropriate means of consumer protection, allowing the DFPI to examine registrants for violations of law. Registration and reporting also allows for market monitoring, an important input for the legislature to determine whether a permanent licensing or other substantive regulation is warranted. The CCFPL, however, is not meant to permit DFPI to establish a permanent licensing system itself, as reflected in its 4-year expiration provision, and the effect of

¹² For the purposes of (2), a customer losing access to further advances from the service until outstanding balances owed are repaid is not recourse or discrimination.

¹³ Cal Civ. Code § 22303.



this rulemaking to cause the CFL to apply to IBA providers upon expiration would therefore be inappropriate. We understand that the intent of the proposed language was not to result in the CFL applying, but rather for the registration requirement to terminate upon the 4-year expiration. We recommend that this be expressly clarified in the final rule.

To reiterate, IBAs are not loans and should not be regulated under the CFL. If DFPI were to subject non-recourse IBAs to CFL fee caps, it would negatively impact consumers by limiting access to innovative products that help consumers avoid predatory loans and costly overdraft fees alternatives.

Recommendations:

- Exclude the rulemaking from the CFL to avoid future licensing uncertainty and encourage IBA registration in the industry. Specifically, Section 1461 should be updated to exclude eligible IBA providers from the definition of finance lender under the CFL.

Section IV: IBA reporting requirements for providers should be narrowly tailored

EarnIn is proud to have signed a Memorandum of Understanding ("MOU") with the Department in January 2021, which the EarnIn believes was drafted in a manner that reflected the true, innovative nature of IBA products and their benefits to consumers. Since then, EarnIn has provided substantial data to the DFPI via the MOU as part of our dedication to supporting responsible regulation of IBA products.

EarnIn is aligned with the majority of the reporting requirements proposed. Unfortunately, some of the proposals for IBA providers are overly broad or burdensome. EarnIn specifically believes the following reporting mandates for IBAs present no clear nexus to identifying, addressing, or mitigating customer harms in the marketplace.

Recommendations:

- Indirect Owners. EarnIn recommends that DFPI limit its vetting in Section 1021 of certain minor ultimate beneficial owners of CCFPL registrants. DFPI has recently clarified that ultimate beneficial owners of an applicant that own only an economic interest in the applicant but do not control the management or



direct the lending activities of an applicant are not subject to CFL vetting.¹⁴ We believe the same rationale should dictate that the same limitations should apply to CCFPL registrants; and EarnIn recommends that the DFPI clarify the same, namely requiring that applicants provide background information only about individuals who beneficially own or control the IBA activities of an applicant to the same degree as set forth in 10 Cal. Code Regs. 1404(l), (m); 1422.

- Other Services Rendered. EarnIn recommends that DFPI exclude charges for “other services rendered” from the scope of reporting required under Section 1045, as it is unlikely to yield relevant data. Companies may offer products that are distinct and offered independently from IBAs, and unless such offerings are inextricably linked to the provision of IBAs, reporting information on such products is irrelevant and burdensome. Section 1041 already casts a wide net by mandating data reporting for non-IBA products sold in a common bundle or subscription with IBA products.
- Debit Rail Attempts. EarnIn recommends that DFPI limit its reporting to exclude the number of attempts made to debit an account via card networks under Section 1045. Pursuant to DFPI’s Statement of Reasons, debit rail attempts to recover IBAs is pertinent information to identify overdraft risks and resulting customer harm.¹⁵ However, it is highly unlikely that a debit card “attempt” could create an overdraft in a bank account, and the use of debit rails is already highly regulated by card network rules. Debit card transaction attempts are subject to an initial “authorization” step in which the account holding institution will decline an authorization request if there are not sufficient funds in the account. In other words, when the authorization is declined, there is no settlement that occurs to overdraft an account. And while some institutions have historically charged overdraft fees for transactions that were authorized by an intervening transaction caused the settlement to bring the account negative, federal regulators have determined that such behavior generally constitutes an unlawful practice.¹⁶ Accordingly, debit card attempts are more consumer-friendly than ACH transactions: there is already a lower risk of an overdraft due to the authorization process, and in the event of an overdraft, federal law generally prohibits the charging of an overdraft fee.

¹⁴ See 10 Cal. Code Regs. 1404(l), (m); 1422.

¹⁵ See [DFPI’s Initial Statement of Reasons](#) regarding debit card attempts, pg. 49.

¹⁶ See Consumer Financial Protection Bureau, *Consumer Financial Protection Circular 2022-06, “Unanticipated overdraft fee assessment practices”* (Oct. 26, 2022).



Conclusion

IBA products empower customers to access wages as those wages are earned, to solve short-term liquidity crunches and take control of their finances. Regulating IBAs as loans would not align with accepted legal precedent and could create licensing uncertainty for years to come. EarnIn appreciates that the DFPI proposes that IBAs not be treated as loans under the CFL for registered providers. EarnIn recommends that DFPI further amend the proposed rule to (1) clarify that IBAs are not loans for CFL purposes, (2) recognize that voluntary payments on IBAs are not charges for CFL purposes, and (3) create a transparent registration process that clearly does not default registrants to licensure under the CFL. In accordance with the comments and recommendations in this letter, Earnin recommends that the DFPI adopt the recommended proposed changes as set forth in the "Recommended changes to the proposed regulations in the First Modified Text of the Proposal dated November 6, 2023 for PRO 01-21 on Income-Based Advances" proposed on behalf of the earned wage access ("EWA") industry in the letter dated November 27, 2023, attached as Attachment 1, as jointly approved by the following companies and trade associations: American Fintech Council ("AFC"), Financial Technology Association ("FTA"), Chamber of Progress, DailyPay, EarnIn, Payactiv, Cross River Bank, Immediate, Brigit, Cleo, MoneyLion, Wagestream, and ZayZoon.

EarnIn also recommends that the DFPI mandate reporting only in the areas likely to identify potential customer harm, as set forth in Section IV of this letter.

Thank you for considering these comments. We look forward to continuing to work with the DFPI to develop thoughtful IBA regulations that encourage innovation, consumer access and transparency, without inadvertently harming consumers through regulatory mismatch. Please do not hesitate to contact me if you would like to discuss these comments or if EarnIn can provide any other information.

Sincerely,

A handwritten signature in blue ink, appearing to read "David E. Durant".

David E. Durant
General Counsel
Activehours, Inc., d/b/a EarnIn

Attachment

AFC American Fintech Council

FTA
FINANCIAL
TECHNOLOGY
ASSOCIATION

 **CHAMBER
OF PROGRESS**

payactiv

earn in

dailypay.

 **ZayZoon**



brigit

Immediate cross river™

 **WAGESTREAM**

CLEO



MoneyLion

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 earned wage access (EWA) industry – represented by the companies and trade associations signed on to this letter – we are respectfully submitting our recommended changes to the proposed regulations in the First Modified Text of the Proposal dated November 6, 2023 for PRO 01-21 on Income-Based Advances (Proposed Modifications).

Despite the exemption created by Section 1462, Section 1461 would continue to misclassify EWA as a loan and providers as “finance lenders” within the meaning of the Financing Law. We recommend a few select revisions to the Proposed Modifications to provide clarity and expand consumer protections. This will eliminate the unnecessary negative impacts to both the industry and California consumers if the Department promulgated the proposal as presently written.

In addition to the recommended revisions, we have also provided a brief explanation for each of the changes in the corresponding comments.

We thank the Department for the opportunity to provide these recommended changes, and strongly urge their adoption to support working Californians.

Sincerely,

American Fintech Council
Phil Goldfeder, CEO

Brigit
Stephen Bowe, Vice President, Head of Legal & Compliance

Chamber of Progress
Adam Kovacevich, CEO

Cleo
Neela Kiely, Head of Legal & Compliance

Cross River
Tara Rider, Head of State Government Affairs

DailyPay
Jared DeMatteis, Chief Legal & Strategy Officer

EarnIn
David Durant, General Counsel

Financial Technology Association
Penny Lee, President & CEO

Immediate
Michael Orme, Chief Operating Officer

MoneyLion
Adam VanWagner, Chief Legal Officer

Payactiv
Aaron Marienthal, General Counsel

WageStream
Kevin Lefton, Head of Legal & Regulatory, North America

ZayZoon
Garth McAdam, General Counsel

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 rendered.~~ 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,*

(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~~ *person* and that has all of the following characteristics:

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.

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 (34) 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 ~~entire~~ 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 advance 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 person.

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 MUI 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 MUI. 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 MUI.
- (2) BUSINESS ACTIVITIES: On Item Number 1 of Form MUI (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 time.
- (3) IDENTIFYING INFORMATION: An applicant shall provide all identifying information on Item Number 2 of Form MUI, 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 MUI 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 met:

(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 loan 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 (j) of an advance of funds as described in ~~Section 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 (~~d~~Divisions 9 (commencing with ~~s~~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 Law, 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 PaymentsCharges.

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 loan, 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.