

*Submitted via electronic mail*

November 27, 2023

Department of Financial Protection and Innovation

Attn: Araceli Dyson

2101 Arena Boulevard

Sacramento, California 95834

**Re: FTA Comment on the State of California Department of Financial Protection and Innovation Notice of Modification to Proposed Rulemaking PRO 01-21**

The Financial Technology Association (FTA) welcomes the opportunity to provide feedback on the State of California Department of Financial Protection and Innovation's (DFPI) first modified text of proposed regulations regarding earned wage access (EWA) products and providers (described in the NPRM as income-based advances). FTA is a non-profit trade association representing industry leaders shaping the future of finance. We champion the power of technology-centered financial services and advocate for the modernization of financial regulation to support inclusion and responsible innovation. This includes EWA products helping tens of thousands of California consumers – and millions of consumers nationwide – better manage cash flows between pay cycles while avoiding traditional high-cost and predatory alternatives.

FTA members are committed to EWA standards and requirements that promote consumer protection and transparency, including potential state registration, and appreciate the DFPI's efforts to clarify aspects of its proposed regulation. As you know, EWA provides consumers with access to their wages as those wages are earned, allowing customers to pay bills on time, buy essentials like groceries, access funds for unexpected expenses, and avoid more costly and sometimes negative alternatives to fill personal liquidity gaps. FTA members offer EWA products through various business models and believe that all EWA services, regardless of business model, should be treated similarly to avoid anti-competitive market developments and allow for consumer-friendly product innovation. FTA appreciates the changes DFPI made to the originally-proposed rule to reflect the differences between EWA products and loans. As you will see, the industry proposes additional modifications to include enhanced consumer protections, facilitate appropriate regulatory oversight, and clarify which EWA products are not loans.<sup>1</sup>

EWA services currently offered by FTA members contain a host of consumer protections. Significantly, these EWA services are non-recourse and never charge interest. This means that

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<sup>1</sup> See Joint Trade Letter, "PRO 01-21 on Income-Based Advances, Notice of Proposed Modification," November 27, 2023. Attached as Appendix A.

providers do not take legal action to collect payments, do not refer to credit inquiries or credit checks to determine eligibility or furnish a user's nonpayment to a consumer agency or debt collector, and do not sell or assign a customer's outstanding EWA advance to a third-party debt collector or debt buyer. In addition, there is no cost to access wages based on the time-value of money (interest), and customers can cancel their engagement with an EWA provider at any time. Finally, non-repayment does not result in the accrual of interest to the consumer and any financial penalty to the consumer. However, it usually does limit access to additional EWA advances until the earlier advance is repaid.

We trust that as you review the additional recommendations put forth by the industry, you will see they reflect a thoughtful approach that supports regulatory oversight while enshrining the consumer-centric nature of EWA products in regulation. In particular, implementing these recommendations would empower consumers through clear disclosure requirements and protect consumers by ensuring that EWA providers cannot compel or attempt to compel payments, charge late fees or pull credit information or reports.

We appreciate DFPI's consideration of the industry's recommendations and look forward to working collaboratively with the agency moving forward. If we can provide additional information, please contact the undersigned at [penny@ftassociation.org](mailto:penny@ftassociation.org).

Sincerely,

Penny Lee  
President and CEO  
Financial Technology Association

## Appendix A

**AFC** American Fintech Council

**FTA**  
FINANCIAL  
TECHNOLOGY  
ASSOCIATION

**CHAMBER  
OF PROGRESS**

**payactiv**

earn in

**dailypay.**

**ZayZoon**



**brigit**

**Immediate**

**cross river**



**MoneyLion**

**W WAGESTREAM**

**CLEO**

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~~. 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** 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 ( )* 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 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*

**(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 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.