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November 27, 2023

Submitted via E-Mail to regulations@dfpi.ca.gov and Peggy.Fairman@dfpi.ca.gov

Department of Financial Protection, Legal Division
Attn: Araceli Dyson
2101 Arena Boulevard
Sacramento, California 95834

Re: Proposed Rulemaking PRO-01-21

To Whom It May Concern:

This comment letter is submitted by Instant Financial USA Inc. ("Instant") in response to the Notice of Modification to Proposed Rulemaking PRO-01-21 ("Modification") published by the Department of Financial Protection and Innovation ("DFPI") on November 7, 2023. The Modification made several changes to DFPI's March 17, 2023 proposed rule ("Proposed Rule"). The Proposed Rule as modified would create registration and reporting obligations for certain financial service providers, including those providing earned wage access ("EWA") services which the proposal refers to as income-based advances ("IBAs").

We are a member of the Innovative Payments Association and support the comment letter regarding the Modification submitted by the association. We write separately to provide additional comments about the proposed Modification.

Instant is a financial services company based in Atlanta that provides EWA and other disbursement services to a number of employers and their workers. Instant offers an employer-integrated EWA service that allows workers to access wages that they have earned but which have yet to be paid to them. Like several other providers in the market, Instant loads EWA funds on to the employee's payroll card. Because payments are made to the payroll card, Instant is able to offer the EWA service without a fee to the employee.

When EWA funds are deposited on their payroll card, employees may access those funds in the same way they access any other funds on their card. They may make purchases using their card without a fee, and may obtain cash back at the point-of-sale. They may access cash without a fee through a large network of surcharge-free ATMS and may also obtain cash through teller-assisted withdrawals at most banks, again without a fee. And finally, cardholders may transfer funds from their payroll card to a personal bank account. We offer standard transfers through ACH without charge and instant transfers for a small fee.

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2500 Northwinds Pkwy Suite 375, Alpharetta, GA 30022

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We are concerned that the Modification would require Instant to report payroll card fees as EWA fees. Under Sections 1045(c) and (d), Instant would be required to include account transfer fees and other “charges” assessed to California residents in its reporting. In Section 1004(b), account transfer fee is defined as a fee to move funds from an account designated by the provider, such as a payroll card, to another bank account. As originally drafted, the regulation would require reporting of all transfers of EWA funds out of a payroll card account. The rule was silent on how a provider was supposed to determine whether the funds on the payroll card were from an EWA or another source. The Modification attempts to address this problem by adding language that would only require reporting if the funds being transferred were received from an IBA. Money, however, is fungible and once dollars are comingled in an account, their origin cannot be determined. It is not possible for a provider to determine whether comingled funds in an account came from wages, an EWA, or another source. Because the changes to Section 1004 do not solve the problem, providers are left reporting all fees for card-to-bank transfer as IBA fees.

The modifications to Section 1004(c) actually make this issue even worse. Section 1004(c) defines “charges” which under Sections 1045(c) and (d) have to be reported on a monthly, quarterly, and annual basis. Under the initial Proposed Rule, charges included fees and gratuities assessed in connection with making an EWA. The Modification alters this definition by adding the phrase “or any other service rendered” so that that charges would include fees for EWA and any other service provided by the licensee. This effectively means that for EWA providers who load funds on to a payroll card, all payroll card fees would become IBA fees and would have to be reported to DFPI.

By conflating payroll card fees with EWA fees, the Modification will cause DFPI to gather and report misleading statistics about the EWA market which will place certain providers at a competitive disadvantage and will create significant consumer confusion and harm. The reported “charges” for licensees providing EWA through payroll cards would be drastically increased, making providers who offer EWA for free to appear to be high-cost providers. Consumers, confused by the misleading statistics generated by DFPI, may choose to use EWA providers who charge them fees, membership dues, or solicit them for tips when they could have received an EWA for free from Instant or other providers.

For these reasons, Instant urges DFPI to amend the modified Proposed Rule to limit the scope of “charges” to those fees assessed for IBA services and to remove the reporting requirement for account transfer fees. We appreciate the opportunity to submit these comments on the Proposed Rule. If you have any questions about these comments, please feel free to contact me at Tal.Clark@instant.co.

Sincerely,

Tal Clark

Chief Executive Officer

Instant Financial USA Inc.

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