



July 18, 2024

Department of Financial Protection and Innovation

Attn: DeEtte Phelps

2101 Arena Boulevard

Sacramento, California 95834

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

Dear Ms. Phelps,

On behalf of The American Fintech Council (AFC)¹, I am submitting this comment letter in response to the request for additional comment by the California Department of Financial Protection and Innovation (DFPI or Department) regarding modifications to the proposed regulations on Income-Based Advances (Proposed Regulation), commonly referred to as Earned Wage Access (EWA).² We thank the DFPI for the opportunity to provide further comments on the Proposed Modifications.

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

AFC's members embrace the creation of pragmatic regulations that allow responsible actors to serve Californians effectively. AFC remains supportive of establishing a pragmatic EWA

¹ American Fintech Council's (AFC) membership spans Earned Wage Access (EWA) providers, lenders, banks, payments providers, loan servicers, credit bureaus, and personal financial management companies.

² For the purposes of this comment letter, we refer to Income-Based Advances under the proposed regulation as Earned Wage Access services.

³ AFC, *Modernizing Financial Services through Innovation and Competition*, Statement for the Record On Behalf of the American Fintech Council before The Subcommittee on Digital Assets, Financial Technology and Inclusion of the House Committee on Financial Services United States House of Representatives, 118th Congress, (Oct. 25, 2023), available at <https://www.fintechcouncil.org/advocacy/modernizing-financial-services-through-innovation-and-competition>.

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

As noted in our initial response to the proposed regulations and reiterated in a subsequent response to the modified proposed regulations,⁴ we appreciate the Department's efforts to pursue an EWA regulatory framework that creates prudent registration, disclosure, and data reporting requirements. However, we maintain our concern with the Department's continued designation of EWA services as a loan under Sec. 1461 of the Proposed Regulation is incongruent with prudent regulatory practices and ultimately creates unclear and inconsistent requirements for EWA providers.

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

Reiterating the views of our previous response to the Department's Proposed Regulation, AFC believes that, as written, the proposed regulation creates a confusing and conflicting regulatory framework for the EWA industry in California, especially since it provides a pathway to be exempt from needing a California Financing Law (CFL) lending license but not a corresponding exemption from being classified as a loan under the CFL. DFPI correctly avoids defining "Income-Based Advances" as a loan within Sec. 1004 of the Proposed Regulation. However, Sec. 1461(a) the proposed regulation continues to hold that advances in any type—which would seem to include EWA—are considered as loans under California Financing Law. Interpreting Sec. 1461 with the definitions established in Sec. 1004 creates confusing and conflicting standards for evaluating EWA services within the law. Further, given the additional language provided in Sec. 1461(e), which denotes the specific aspect of "wage assignment"—which is a

⁴ AFC, *Comment Response to Proposed Rule PRO 01-21 regarding Earned Wage Access*, (May 17, 2023), available at <https://www.fintechcouncil.org/advocacy/american-fintech-councils-comment-letter-response-to-the-california-department-of-financial-protection-and-innovations-proposed-rulemaking-regarding-earned-wage-access-products>, and *Comment Response to Proposed Rule PRO 01-21 regarding Earned Wage Access*, (Nov. 27, 2023), available at <https://www.fintechcouncil.org/advocacy/afc-comment-letter-regarding-the-california-dfpis-proposed-modifications-to-its-regulation-for-income-based-advances-pro-01-21>.

part of EWA services operations—as not “consumer credit under the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.), or a loan or forbearance of money under the California Constitution, article XV, section 1”.⁵

AFC believes that this confusion regarding EWA’s status as a loan under Sec. 1461 of the Proposed Regulation remains in violation of the “clarity” standard as defined in Sec. 16, Title 1, of the California Code of Regulations (CCR).⁶ The California Office of Administrative Law’s interpretation of Sec. 1461 within its Decision of Disapproval correctly noted that, as previously construed Sec. 1461 did not satisfy the clarity standard of the CCR because of internal inconsistencies that rendered the Proposed Regulation “not easily understood by those not easily understood by those directly affected by them”.⁷ While DFPI has sought to address the specific concerns expressed within OAL’s Decision of Disapproval, AFC believes that the efforts proposed amendments to Sec. 1461’s language in the Proposed Regulation do not sufficiently meet the clarity standards established under CCR and continues to propagate opacity in regards to the designation of EWA services in a manner that renders the Proposed Regulation not easily understood by the EWA providers that are directly affected by the aforementioned provision. Therefore, AFC recommends DFPI further amend its Proposed Regulation to remove its designation of EWA services as loans under that law.

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

Sincerely,

Ian P. Moloney
SVP, Head of Policy and Regulatory Affairs
American Fintech Council

⁵ California Department of Financial Protection and Innovation, *Third 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*, (Jul. 2, 2024).

⁶ See Gov. Code, Sec. 11340, Subd. (b) and Gov. Code, Sec. 11349.1, Subd. (a)(3).

⁷ California Office of Administrative Law, *Decision of Disapproval of Regulatory Action*, OAL Matter No. 2024-0314-01S, Page 7.