February 6, 2024

VIA EMAIL

Attn: DeEtte Phelps
Department of Financial Protection and Innovation
2101 Arena Boulevard
Sacramento, California 95834
regulations@dfpi.ca.gov

Re: COMMENTS REGARDING NOTICE OF SECOND 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) ("SECOND MODIFIED RULE")

DailyPay continues to appreciate the careful manner in which your Department of Financial Protection and Innovation ("DFPI") is considering how best to regulate earned wage access ("EWA"). We also appreciate the DFPI's willingness to regulate, oversee, and monitor the EWA market through its registration authorities under California Consumer Financial Protection Law ("CCFPL"). This approach helps the nascent EWA industry continue to evolve responsibly under DFPI's oversight.

And it is in this spirit of collaboration that we offer additional feedback on DFPI's second modification. For many reasons we believe it is important that the proposed regulations be as clear and fair as possible. One important reason is that California's leadership on this issue will influence how other states and regulators approach our industry.

As noted in DailyPay's previous comment letters concerning this rulemaking, each respectively dated May 17, 2023 and November 27, 2023 (together, the "Prior Letters"), DailyPay disagrees with the assertion that income-based advances are "loans" for purposes of the California Financing Law ("CFL"), the framing of CCFPL registration as merely an exemption from the CFL, and the inclusion of optional fees within the pertinent definitions of "charges." Each of these flaws persists in the Second Modified Rule, and, with respect to the Second Modified Rule, DailyPay reiterates and incorporates by reference the objections it raised, and the reasons therefore, in the Prior Letters. DailyPay proposes an alternative solution in this letter.

In its current form, confusion will still result from DFPI's proposed regulations due to the conflicting signals they send. On one hand, Sections 1461(a) and (f) of the Second Modified Rule suggest that EWA products will generally be considered loans under the CFL. On the other hand, they also assert that EWA providers duly registered with DFPI are exempt from licensure under the CFL but without confirming the inapplicability of rest of the CFL.

We note that separately, the proposed rules would already require EWA providers to register with the DFPI under the CCFPL, and under the CCFPL the DFPI would be independently empowered to exercise a host of administrative, oversight, and supervisory powers over such providers and their products. Accordingly, there is no significant regulatory purpose for including such a confusing characterization of all EWA products offered by registrants as “loans” for purposes of the CFL.

The confusion caused by the proposed regulations ’current approach will negatively impact the employer-integrated model of EWA more than the direct-to-consumer model of EWA. Providers of employer-integrated EWA, like DailyPay, primarily market to, contract with, and integrate with employers to provide EWA services to their workforces. Our employer-customers subject their service providers, like us, to rigorous diligence and oversight processes and have little tolerance for the types of legal and compliance risks created by ambiguities such as those created by the proposed rules. These employers also do not wish to offer “loan” products to their workers. On the other hand, whether a product is characterized as a non-licensed loan will unlikely factor into whether a consumer decides to use such a direct-to-consumer EWA service. As a result, the proposed regulations could cause the relative proportion of workers using verified employer-integrated EWA to shrink in comparison to those using unverified direct-to-consumer EWA.

Beyond ensuring regulatory clarity, there are also many valid and practical reasons not to categorize an employer-integrated EWA product as a “loan” under CFL, as discussed in our Prior Letters, and as reiterated in part below:

First and foremost, accessing *verified* earned but unpaid wages is different from a promise to repay a debt from income that *might* have been earned, or has not yet been earned, by a worker. The employer-integrated EWA model relies on actual and current earnings information that has been verified by the worker’s employer, and does not rely on speculation or prediction to determine what a worker’s earnings might be.

Also, workers themselves prefer to utilize a product that provides access to earnings they have already earned, which is conceptually easier to understand than, say, taking on debt from a payday lender, pawn shop, or other short-term debt provider. Consumers understand this difference and a recent Financial Health Network user survey[1] found this as well.

Third, it is highly likely that the proposed “loan” label will increase costs for consumers without any additional consumer benefits or protections. As noted above, no significant regulatory purpose would be accomplished by characterizing employer-integrated EWA offered by a registrant as a “loan” for purposes of the CFL. Nonetheless, such action would likely increase the cost of capital for our industry. Warehouse credit facilities and other capital sources that support the distribution of EWA products would likely assess and price their risk similarly to unsecured consumer loans. This harm would be unwarranted, because EWA products,

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[1] See “Exploring Earned Wage Access as a Liquidity Solution,” the Financial Health Network, December 14, 2023, accessible at https://finhealthnetwork.org/research/exploring-earned-wage-access-as-a-liquidity-solution/.

especially employer-integrated EWA products, do not resemble unsecured consumer loans. We anticipate such a shift to prompt alterations in the EWA product's nature, and specifically an escalation in costs for consumers or even the potential restriction of product availability. Such changes will negatively impact companies operating in the state and the workers presently using EWA and benefiting from it.

Based on the public record, we understand that a minority of commenters do not agree with our view that all EWA services are not "loans." Furthermore, we understand that some such commenters do not agree with some of our views about the attendant implications of labelling EWA as "loans." We do, however, note that even some of the most vocal of such commenters have acknowledged that employer-integrated EWA poses less risk of consumer harm and can be treated differently from direct-to-consumer EWA for purposes of the CFL.[2] And while we disagree with almost all of this commentary, it appears to us there may be room for a compromise on this narrow point.

Accordingly, we recommend and have enclosed with this letter some narrowly tailored amendments to the proposed regulations that are intended by us to achieve this objective by more clearly exempting employer-integrated EWA products from being called "loans" under the CFL when: the advance is an "obligor-based advance (i.e., settlement occurs directly from employer), the provider has contracted with the employer, the worker's earnings are verified by the employer, and the provider has registered with the DFPI.

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

Sincerely,

Ryan Naples
Director of Public Policy

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[2] See, e.g., Comment Letter regarding Pro-01-21 to DFPI from Center for Responsible Lending, Consumer Federation of California, National Consumer Law Center, and Office of Kat Taylor, dated November 27, 2023 (see letter generally, as well as at 6: "To the extent that these proposed rules provide an exception, at least to some extent, to the licensure requirements of the CFL, it should be narrowly tailored and should not include providers who make cash advances with no connection to employers").

Article 4. Loans.

§ 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, 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. 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 from their 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 under subdivision (a) of this section is a borrower and a provider who makes an 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 or debt under federal law, including the ~~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.

(e) A provider of an advance of funds as described in subdivision (a) does not require a license under the California Financing Law if:

> (1) The advance of funds is an income-based advance as defined by California Code of Regulations, title 10, section 1004, subdivision (g), and
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> (2) The provider is registered with the Department to offer income-based advances under California Code of Regulations, title 10, section 1010. This paragraph shall expire when the registration requirements for income-based advance providers under section 1010 expire.

(f) Income-based advances under California Code of Regulations, title 10, section 1004, subdivision (g), are sales or assignments of wages or loans under subdivision (a) of this section~~.~~, except those satisfying the following criteria:

> (1) The advance of funds is an obligor-based advance as defined by California Code of Regulations, title 10, section 1004, subdivision (i),

(2) The provider has contracted with the obligor as defined by California Code of Regulations, title 10, section 1004, subdivision (h) to provide income-based advance services,

(3) The provider's determination of accrued but unpaid income pursuant to California Code of Regulations, title 10, section 1004(g)(1) is made based on employment, income, or attendance data obtained directly or indirectly from an obligor, including, without limitation, an obligor's payroll service provider, and

(4) The provider is registered with the Department to offer income-based advances under California Code of Regulations, title 10, section 1010. This paragraph shall expire when the registration requirements for income-based advance providers under section 1010 expire.

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

(a) A provider of an advance of funds as described in sSection 1461 of these rules is not "in the business" of a finance lender or broker for purposes of licensure under Financial Code section 22100 of the California Financing Law (dDivisions 9 (commencing with sSection 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), andof subchapter 4 of these rules;

(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; and

(3) 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.

(b) This paragraph section shall expire when the registration requirements for income-based advance providers under sSection 1010 of subchapter 4 of these rules expire.

§ 1462.5. Licensure of Advance Providers – Education Financing.

(a) A provider of an advance of funds as described in sSection 1461 of these rules is not "in the business" of a finance lender or broker for purposes of licensure under Financial Code section 22100 of the California Financing Law (dDivision 9 (commencing with sSection 22000) of the Financial Code) if:

(1) The advance of funds is education financing with income-driven based repayment provisions, as those terms are defined in California Code of Regulations, title 10, section 1003, subdivisions (b) and (d) of Section 1003 of subchapter 4 of these rules;

(2) The provider is registered with the Department to offer education financing under California Code of Regulations, title 10, section 1010, Section 1010 of subchapter 4 of these rules or is licensed under the Student Loan Servicing Act (dDivision 12.5

(commencing with s~~S~~ection 28100) of the Financial Code) and exempt from registration under California Code of Regulations, title 10, section 2044.1; Section 2044.1 of subchapter 15 of these rules; and

(3) The charges collected by the provider in connection with the education financing do not exceed charges that would be permitted under the California Financing Law if the provider were licensed under that law and the financing were provided under the authority of that law.

(b) This section shall expire when the registration requirements for education financing providers under California Code of Regulations, title 10, section 1010, ~~Section 1010 of subchapter 4 of these rules~~ expire.

~~§ 1463. Loans to be Collected in a Single Periodic Payment.~~

~~Financial Code section 22307, subdivision (b), does not apply to loans to be collected in a single periodic payment.~~

§ 1463. Income-Based Advances to be Collected in a Single Periodic Payment.

Financial Code section 22307, subdivision (b), does not apply to income-based advances as defined by California Code of Regulations, title 10, section 1004, subdivision (g) to be collected in a single periodic payment.