



Innovative Payments Association

110 Chestnut Ridge Rd, Suite 111

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February 1, 2024

Submitted via E-Mail at: regulations@dfpi.ca.gov;

Department of Financial Protection and Innovation
Attn: DeEtte Phelps
2101 Arena Boulevard
Sacramento, California 95834

Re: Notice of Proposed Rulemaking [PRO 01-21]

To whom it may concern:

This letter is submitted to the California Department of Financial Protection and Innovation (the "DFPI") on behalf of the Innovative Payments Association ("IPA"),¹ in response to the Notice of Second Modification to Proposed Rulemaking issued by the DFPI on January 17, 2024 (the "**Second Modification**"), which revises the DFPI's March 2023 proposed rule (the "**Proposed Rule**"),² that would require providers of earned wage advance ("EWA")³ products in California to register with the DFPI and provide certain records to the DFPI to facilitate its oversight of registrants and to detect risks to California consumers, which was first modified by the DFPI on November 7, 2023 (the "**First Modification**").

IPA counts a number of EWA providers among our members, and we appreciate the opportunity to provide comments on DFPI's Second Modification. The IPA again looks forward to continuing to engage with the DFPI to ensure regulation of this industry appropriately balances consumer protection and innovation. The IPA appreciates that DFPI has taken the time to make revisions to its March 2023 Proposed Rule, which it already revised once as part of the First Modification. While the changes to the Proposed Rule within the Second Modification appear on their face to continue to streamline the Proposed Rule's requirements, we are concerned that the Second Modification's change to the fee reporting requirements under Sections 1045(c) and (d), and to the definitions of "Account Transfer Fees" and "Charges" under Section 1004(c), do not go far enough to distinguish between payroll card fees and EWA fees and therefore require further clarification from the DFPI.

¹ The IPA is a trade organization that serves as the leading voice of the electronic payments sector, including prepaid products, mobile wallets, and person-to-person (P2P) technology for consumers, businesses and governments at all levels. The IPA's goal is to encourage efficient use of electronic payments, cultivate financial inclusion through educating and empowering consumers, represent the industry before legislative and regulatory bodies, and provide thought leadership. The comments made in this letter do not necessarily represent the position of all members of the IPA.

² <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/11/Rulemaking-PRO-01-21.pdf>

³ <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-TEXT.pdf?emrc=cf5bce>.

⁴ While they differ between themselves in structure and format, EWA services generally provide consumers with early access to earned, but unpaid wages. Under the Proposed Rule, a "wage-based advance" is defined as funds paid to workers by a provider other than an obligor that are based on wages or compensation that a worker or the worker's obligor has represented, and that a provider has reasonably determined, have been earned but have not, at the time of the disbursement, been paid to the worker for work performed for or on behalf of an obligor or obligors.



Specifically, many EWA providers load EWA funds onto an employee's payroll card. Because payments are made to the payroll card, the provider is often 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. Generally, this includes the ability to make purchases via the card, to obtain cash back at the point-of-sale or through surcharge-free ATM networks, and to transfer funds to an alternative bank account. For this latter service, some providers may assess a fee for an "instant" transfer, as opposed to a standard ACH transfer that is offered for free.

Our members are concerned that, even as modified in the Second Modification, the Proposed Rule's reporting obligations and definitions of "Account Transfer Fees" and "Charges," are still broad enough to implicate the type of payroll card fee described above. We are concerned that such conflation of payroll card fees with other EWA fees may lead to the DFPI gathering and reporting misleading information about the EWA market that could potentially mislead consumers to believe that providers that offer EWA through a payroll card are "high-fee," when in fact those providers offer EWA services at no cost.

With respect to payroll cards in particular, the IPA would like to highlight for the DFPI the Consumer Financial Protection Bureau's ("**CFPB**") Prepaid Account Final Rule ("**Prepaid Rule**"), which went into effect in 2019 and covers prepaid cards (and payroll cards), mobile wallets, and P2P payment forms. The Prepaid Rule exceeds 2000 pages in length and already requires clear and conspicuous disclosure of all fees associated with any covered product, including payroll cards. Additionally, the Prepaid Rule requires that prepaid providers share three disclosures with the consumer before the consumer uses the product, including two separate fee disclosures and a full set of terms and conditions. Thus, any effort to associate or commingle prepaid related fees with EWA products will not only be misleading, but also may cause confusion in the marketplace and confuse and therefore harm the consumer.

For these reasons, we ask the DFPI to further modify its Proposed Rule to first remove the "Account Transfer Fee" altogether, and second, to clearly state that the definition of "Charges" under Section 1004(c) of the Proposed Rule is limited to fees assessed directly for income based advance services and does not include any charges assessed in connection with a payroll card.

We also wish to express our disappointment that, after issuing now three versions of the Proposed Rule, the DFPI in its Second Modification continues to fail to acknowledge that the current EWA marketplace contains a wide variety of EWA providers and products, and not all EWA products are loans.⁴ Without such a declaration, a final rule issued by DFPI would be inconsistent with the Consumer Financial Protection Bureau's ("**CFPB**") 2020 EWA Advisory Opinion⁵, and former CFPB Director Richard Cordray's 2017 [statement](#) specifically excluding certain EWA from the agency's Payday Lending Rule.⁶

While our members are generally not opposed to the March 2023 Proposed Rule's registration requirement, the IPA remains concerned that while the Proposed Rule, as modified, includes a discussion of the different models and structures EWA services take in the marketplace, DFPI has failed again to

⁵ <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-finalizes-advisory-opinions-policy-and-announces-two-new-advisory-opinions/>



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differentiate between these models in concluding that all EWA disbursements are *per se* "loans" for purposes of the California Financing Law ("CFL").⁷

As we outlined in our May 2023 response to the DFPI's March 2023 Proposed Rule, and again in our response to the First Modification, we would like to reiterate that many EWA models do not contain any features or functionality that resemble "credit", nor do they constitute the establishment of a lending relationship between the employee and the EWA provider. We encourage the DFPI to continue to examine this aspect of the Proposed Rule, and the First Modification, and the Second Modification, and once and for all clarify that, based on the features and functionality of some EWA models, all EWA models are not *per se* covered by the CFL. We urge the DFPI to adopt a separate registration requirement for EWA models that do not resemble credit and expressly recognize that disbursements under such models are not "loans" and should not be subject to CFL.

Our members do not believe it is appropriate to treat all EWA services in the marketplace as loans that would potentially be subject to the CFL. Specifically, we believe it would be appropriate for the DFPI to permit the wide variation in EWA models serving millions of Californians today when making regulatory policy and when issuing policy statements (e.g., all EWA disbursements are loans) and making decisions in this rapidly evolving marketplace.⁸

It is critical for the DFPI to have a firm understanding that EWA is a relatively new product and regulatory clarity is uniquely important in the current marketplace. Thus, a one-size-fits-all solution is not the most appropriate or effective means to regulate a product that has helped millions manage their own money in the event of an emergency. Moreover, depending on the particular product or provider, the differences in how EWA products function can be minor or significant from one product to another. At a minimum, we think it is essential for the DFPI to acknowledge that not all EWA transactions are loans before issuing a final rule, and we respectfully request this revision.

Conclusion

The IPA appreciates the opportunity to submit these comments to the DFPI on the Second Modification. If you have any questions on any of the comments contained in this letter, please do not hesitate to contact me at:

⁶ <https://www.consumerfinance.gov/about-us/newsroom/cfbp-finalizes-rule-stop-payday-debt-traps/#:~:text=%E2%80%9CThe%20CFPB's%20new%20rule%20puts,loans%20they%20can't%20afford.>

⁷ Cal. Fin. Code §§ 22000 et seq.

⁸ Such a determination would be consistent with DFPI's advisory opinion issued last year with respect to FlexWage, in which DFPI found that an employer based EWA product was not subject to the CFL. See <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf>. It is also consistent with opinions of other state agencies, such as in Arizona where in 2022, the Attorney General found that a fully non-recourse EWA disbursement did not qualify as a "loan" for purposes of Arizona law. See <https://www.azag.gov/opinions/i22-005-r22-011>.



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Sincerely,

Brian Tate
President and CEO
IPA