February 6, 2024

Submitted via email to: regulations@dfpi.ca.gov
cc: peggy.fairman@dfpi.ca.gov; charles.carriere@dfpi.ca.gov
Department of Financial Protection and Innovation
Attn: DeEtte Phelps
2101 Arena Boulevard
Sacramento, California 95834

RE: COMMENT ON SECOND MODIFIED TEXT OF PROPOSED RULEMAKING UNDER THE CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW AND THE CALIFORNIA FINANCING LAW, PRO 01-21

Dear Commissioner:

Payactiv, Inc. ("Payactiv") appreciates the opportunity to provide further feedback to the Department of Financial Protection and Innovation ("DFPI" or "Department") on the second modified text of its proposed rulemaking under the California Consumer Financial Protection Law ("CCFPL") and the California Financing Law ("CFL"), Pro 01-21 ("the Proposal") related to income-based advances, also referred to as earned wage access ("EWA") products.

We have carefully reviewed the Second Modified Text of the Proposal dated January 17, 2024 ("Second Modified Proposal") and offer the attached comments for your consideration. We also attach our prior comment letters for reference. We appreciate the Department's continued dialogue and attention to comments from a wide variety of stakeholders.

As always, we would welcome the opportunity to discuss our suggestions at your earliest convenience. Thank you for your time and consideration.

Aaron Marienthal

Senior Vice President and General Counsel, Payactiv

Payactiv's Comments on the Second Modified Proposal, and References to Legal Analysis

I. Payactiv's Proposed Changes to the First Modified Proposal

We respectfully reiterate our previously suggested changes that would offer significantly more protection for California workers than the Second Modified Proposal. This includes Payactiv's and other providers' proposed changes to the First Modified Text of the Proposal, including the expanded and more consumer-friendly definition of "earned income advance," and the request that Section 1461 be limited to products and providers *that do not meet this expanded definition of "earned income advance."* As such, we incorporate by reference our prior comments and the previously submitted proposed edits to the First Modified Text of the Proposal attached hereto.

II. The Second Modified Proposal (at Section 1461) Continues to Incorrectly Deem All EWA Models (Except Employer-Funded Programs) as "a sale or assignment of wages and a loan subject to the California Financing Law"

We reiterate that the basis for Section 1461(a) and new subdivision (f)[1] – i.e., that the vast majority of EWA is a "sale or assignment of wages" and a "loan" – remains contrary to well-established California law. As previously indicated, for a contract to involve "credit" there must be a "debt," which must include an "obligation" (whether "absolute or contingent").

Indeed, the Department's own proposed Definition of "Credit" in Section 1000(f) is defined as "any credit obligation where the related debt involves ***an obligation to pay money***…." (emph. added). Again, Payactiv does not purchase wages or implicate any "obligation" or "legal duty" to pay money.[2] Without a legal duty or obligation, there can be neither debt nor credit - and hence no loan - as a matter of law. The DFPI lacks the authority to expand these statutory definitions.

Employer-integrated earned wage access products, or those that (a) do not come with a legal duty to repay, (b) that have a contractual relationship with the employer, and (c) that obtain verified employment data from the employer or its service provider, should be excluded from being classified as "loans." These are fundamentally distinct products from loans or advance products because, for example, they use actual data from an employer, they ensure a user is accessing

[1] It is not clear to us why the Department added subsection (f), which effectively repeats what is already stated in subsection (a).

[2] *See* May 17, 2023 Comment Letter at Section V.B; Appendix 1.

already earned but unpaid wages, and they pose no risk of overdrafts, recourse, late fees, or credit impact.

We respectfully request that the Department outline in its final statement of reasons why it views even such employer-integrated, no-obligation products as "loans" under California law.

III. Defining EWA as a "Loan" Remains Confusing and Still Lacks a Material Purpose

Section 1461 still proposes to deem all but one EWA model a "sale or assignment of wages and a loan ***subject to the California Financing Law***." (emph. added). Irrespective of its legal basis, this conclusion will cause confusion and does not appear to serve a material purpose as written, especially given that **(a)** providers of income based advances as defined would not in fact be subject to the California Financing Law ("CFL") if they register with the DFPI[3], **(b)** the Department could accomplish its oversight objective by supervising EWA providers as "covered persons" under Financial Code Section 90005(f) without deeming these products to be loans;[4] and **(c)** unnecessarily calling EWA loans "subject to the California Financing Law" would create significant confusion surrounding what other laws governing credit may or may not apply to EWA, despite the CFL exemption. In other words, a court could be easily confused by the lack of logical consistency in a rule that rightly exempts certain EWA products from licensing under the CFL, but nonetheless unnecessarily classifies EWA a loan for other, unknown reasons.[5]

While we appreciate the Department's inclusion of subsection (d) – which states that Section 1461 "shall not be read to interpret what is a considered a wage assignment under the Labor Code,

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[3] It is not clear to us why the Department proposes to delete former Section 1462 (stating that providers who register would not be "in the business" of a finance lender for purposes of licensure under the CFL) in favor of Section 1461(e) (stating that a provider that registers "does not require a license under" the CFL).

[4] The Department may supervise EWA providers because they are "covered persons" under Financial Code Section 90005(f) – i.e. they engage in offering or providing a "consumer financial product or service," which, in turn, is defined in relevant part as: "A financial product or service that is delivered, offered, or provided for use by consumers primarily for personal, family, or household purposes." Cal. Fin. Code section 90005(e)(1). A "financial product or service" means among other things, "Providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payment system or networks used for processing payment data, including payments made through an online banking system or mobile telecommunications network." Cal. Fin. Code section 90005(k)(7). Indeed, Payactiv's Memorandum of Understanding ("MOU") with the Department states as much:

> The CCFPL provides the Department with authority to regulate and investigate certain consumer financial providers such as the Company. Company offers a consumer financial product or service through its on-demand pay product as defined in the CCFPL and thus is a "covered person" as defined in Financial Code section 90005(f).

[5] Section 1465, which would define optional payments as "charges" under Financial Code Section 22200, is similarly confusing and seemingly unnecessary in light of the licensing exemption in Section 1461(e).

consumer credit or debt under federal law, including the Truth in Lending Act [ ] or a loan or forbearance of money under the California Constitution" – there are still several issues with this provision, including its omission of other credit and debt collection laws, like the Rosenthal Fair Debt Collection Practices Act for example. It is also not clear how a court would interpret this provision, or defer to the Department's statement that Section 1461 "shall not be read to interpret" other state and federal laws.[6] This is a recipe for confusion.

The Department can and should avoid this confusion and risk simply by proceeding to regulate EWA under section 90005(e)(1), and using the proposed structure set out in our prior comment letter, attached hereto for reference.

IV. Conclusion

While we appreciate many of the revisions the Department made in the Second Modified Proposal, the potential ramifications of unnecessarily classifying EWA products as loans and providers as finance lenders remain highly problematic, especially with no apparent corresponding utility in the proposed regulation or benefit to consumers. Accordingly, employer-integrated earned wage access products – those that contract with employers to offer employees access to their own earned wages and that do not implicate a "legal obligation" – should be excluded from being unnecessarily, and incorrectly categorized as "loans."

[6] While the DFPI is entitled to deference in its interpretation of ambiguous terms in the California Finance Code, it is unclear whether its interpretation of the usury provision of the California Constitution, for example, would be entitled to the same level of deference. *See Dobbins v. San Diego County Civil Serv. Comm'n,* 75 Cal. App. 4th 125, 131 (1999) ("Generally, a court will defer to the construction given to an ambiguous statute or rule by the agency charged with its enforcement if that construction has a reasonable basis"). Article XV of the Constitution is not a statute the legislature empowered the DFPI to enforce. It is also not clear what level of deference would apply to DFPI's statement regarding federal law.

APPENDIX 1

May 17, 2023

Submitted via email to: regulations@dfpi.ca.gov
cc: peggy.fairman@dfpi.ca.gov

Commissioner Clothilde Hewlett
California Department of Financial Protection and Innovation
2101 Arena Boulevard
Sacramento, CA 95834

RE: COMMENT ON PROPOSED RULEMAKING UNDER THE CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW AND THE CALIFORNIA FINANCING LAW PRO 01-21

Dear Commissioner:

Payactiv, Inc. ("Payactiv") appreciates the opportunity to provide feedback to the Department of Financial Protection and Innovation ("DFPI" or "Department") on its proposed rulemaking under the California Consumer Financial Protection Law ("CCFPL") and the California Financing Law ("CFL") Pro 01-21 ("the Proposal") related to income-based advances, also referred to as earned wage access ("EWA") products.

Payactiv, a California-based company, is proud of its role in pioneering the EWA industry and of its long-standing history of working collaboratively with policymakers in California, at the federal level, and in other states to ensure consumers can access their earned but unpaid wages in lieu of predatory lending products like payday loans.

As drafted, we believe the Proposal would have numerous unintended consequences and highly adverse impacts on California consumers and businesses. In this comment letter, we outline our concerns with the Proposal and recommend several alternatives for the DFPI to consider, including reverting to its 2021 proposal. We also urge the DFPI to revisit its accompanying 2021 Earned Wage Access Data Findings ("Data Findings") as good policy should rest upon a strong foundation of accurate, complete, and transparent data analysis. We have identified several analytical errors and highlighted additional considerations for the DFPI, and hope greater collaboration and transparency will follow.

We would be happy to discuss our concerns with you and your staff at your convenience.

Sincerely,

Aaron Marienthal, General Counsel
amarienthal@payactiv.com

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I. EXECUTIVE SUMMARY

Payactiv is a leading provider of employer-integrated EWA programs. It was founded to alleviate epidemic financial stress experienced by millions of workers. As a public benefit corporation and Certified B Corporation,[1] Payactiv supports strong consumer protections and a balanced regulatory framework for the EWA industry. While Payactiv supported the DFPI's initial proposed EWA rulemaking in November 2021 ("2021 Proposal"),[2] Payactiv strongly opposes this Proposal for five fundamental reasons.

First, the Proposal would unnecessarily force EWA into a lending framework, an incompatible and ill-fitting regulatory scheme that, as applied to EWA, would adversely impact consumers, businesses, and EWA providers alike. Specifically, regulating EWA as a loan would:

- **Drive EWA providers to become licensed lenders, disincentivizing or eliminating EWA's key consumer protections**, including its lack of recourse, underwriting, and credit score impact;
- **Reduce the number of consumers who would qualify** to use EWA due to creditworthiness;
- **Equate employer-integrated EWA with direct-to-consumer advances**, ignoring important wage verification standards and reducing consumer protections;
- **Add unnecessary cost and complexity**, including confusing disclosures, spousal consent, and expensive notarization requirements for "wage assignments" under the Labor Code;
- **Harm consumers by increasing both the amount and type of fees,** including interest, origination fees, and late fees;
- **Harm businesses** by requiring providers to overhaul their products in California;
- **Decrease fair competition** by restricting product types, and reducing the number of EWA companies that could operate in the state;
- **Reduce wealth creation for California consumers** by limiting access to free or nominal fee-based EWA programs, forcing users to rely on high-cost alternatives like credit cards, bank overdraft, and payday loans; and
- **Require employers to offer credit at the workplace**, which would significantly reduce employer participation in the benefit.

Second, EWA is neither credit nor a wage assignment as a matter of state law. While the Proposal relies on circular and inaccurate interpretations of the terms "credit," "debt," and "wage assignment," the law is clear: for a contract to involve credit there must be a debt, which in turn must include an "obligation" or "legal duty." An employee's revocable authorization allowing Payactiv to submit a payroll deduction to his or her employer is not an "obligation" or "legal duty" to pay money. And there is no sale or assignment of wages in a Payactiv EWA transaction because it does not take any interest in or title to a user's wages.

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1 B Corp Certification is a designation that a business is meeting high standards of verified performance, accountability, and transparency on social impact metrics. Learn more here: https://www.bcorporation.net/en-us/certification/.

2 State of Cal. Dep't of Fin. Prot. and Innovation, Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21) 2 (2021), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-Invitation-for-Comments-for-Publication.pdf.

Third, the Proposal is premised on inaccurate and incomplete Data Findings purporting that EWA companies charge an "APR" of over 300 percent. An APR construct for free and nominal flat-fee EWA programs misrepresents EWA's low fees and cost-savings, and is unhelpful and confusing to consumers. Putting aside these concerns, an accurate APR calculation for an average Payactiv transaction would be approximately *one-fourth of the DFPI's stated figure*. As much of the Proposal is premised upon these Data Findings, this rulemaking should not proceed until the errors are corrected and put into context with fees charged for competing liquidity products. We expect such an analysis will lead the DFPI to conclude that imposing the CFL on providers would not result in lower costs and fees; today licensed lenders can and do charge significantly more for loans than EWA providers, and no for profit companies (to our knowledge) offer loans for free.

Fourth, the Department failed to conduct impact assessments and analyses required by the Administrative Procedure Act ("APA"). Had it done so, the DFPI would have come to the conclusions stated above. It would have also determined that there are several less burdensome and more pro-consumer alternatives that could accomplish the Department's stated objectives of oversight and consumer protection.

Fifth, many of the proposed exemptions, definitions, and exclusions in the Proposal are unnecessarily limiting, ambiguous, or arbitrary. For example, the Proposal would exempt "employer-funded" transactions because, according to the Department, the "employer may not be providing money 'for temporary use'" in such cases. But this creates an artificial distinction between employer-*integrated* programs and employer-*funded* programs when the source of the funds makes no practical difference to the consumer. Funds advanced from a third-party's bank account (including on the employer's behalf) are no more temporary than funds advanced directly from the employer's bank account. This artificial distinction elevates form over substance.

In lieu of the Proposal, the Department should consider at least the following three alternatives that would accomplish the Department's goals without adversely impacting consumers, businesses, and providers in California:

1. **Adopt the 2021 Proposal**. The 2021 Proposal aligns with the Legislature's goal for the DFPI—establishing oversight of new and innovative consumer finance products. It would allow the DFPI to further understand and oversee providers' product configurations, user interfaces and enrollment procedures, fee schedules, and settlement or repayment processes. It also ensures unscrupulous providers do not take advantage of consumers.
2. **Recommend legislation that creates robust consumer protections.** The DFPI can use a revised data analysis and its expertise gleaned through oversight to recommend the Legislature adopt broader consumer protections for EWA products like those being considered by many other state legislatures, *e.g.*, mandatory free options, strong tip and fee disclosures, and reimbursement of overdraft fees.
3. **Expand exemptions for employer-integrated EWA programs** as they meet the spirit of the Department's employer-funded exemption.

As the DFPI has itself stated, "Smart regulation should be data-driven and requires a tailored, collaborative approach."[3] We respectfully urge the DFPI to revisit the Proposal and its

[3] Press Release, Dep't of Fin. Prot. and Innovation, The DFPI Signs MOUs Believed to be Among the Nation's First with Earned Wage Access Companies (Jan. 27, 2021) [hereinafter Press Release, DFPI Signs MOUs], https://dfpi.ca.gov/2021/01/27/the-dfpi-signs-mous-believed-to-be-the-among-the-nations-first-with-earned-wage-access-companies/.

accompanying Data Findings, hear from and meet with providers, consumers, and businesses that offer EWA as an employee benefit, and craft a solution that is uniquely tailored to EWA in a manner that truly leaves room for innovation while also protecting consumers.

We look forward to continuing to partner with the DFPI to maintain EWA as a low-cost, easy-to-use, responsible means for employees in California to access their own earned wages.

II. SUMMARY OF THE 2023 PROPOSAL

This rulemaking commenced with the 2021 Proposal under the CCFPL. The 2021 Proposal would have required EWA providers to: (1) register with the Department; (2) provide the Department with detailed company information, including documentation of the user enrollment process, user agreements, and user messaging; and (3) submit detailed yearly data reports. According to the Department, the 2021 Proposal would have "strengthen[ed] its ability to protect California consumers through compliance examinations of registrants and regular reporting."[4]

In March 2023, the DFPI released the current draft of the Proposal, which differs drastically from the 2021 Proposal. In short, the Proposal would deem virtually all EWA products to be loans and require EWA providers to comply with the CFL and either register with the Department or become licensed under the CFL.[5]

The Department's Initial Statement of Reasons ("ISOR") contends that the Proposal would:

- "[I]ncrease [] consumer welfare, fair competition, and wealth creation in California";
- "[P]romote nondiscriminatory access to financial products"; and
- "Benefit consumers and protect them from unfair practices by clarifying that the CFL's protections apply to advances secured by a consumer's wages."[6]

The Department's Notice of Proposed Rulemaking ("Notice") (at 6) concludes that the Proposal is "not inconsistent with existing federal statutes and regulations."[7] The Notice, as well as the Department's Economic Impact Assessment ("EIA"), posit that the Proposal would not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.[8] The Department also concludes that the Proposal would be unlikely to create new business or eliminate existing

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4 Proposed Regulations Under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act PRO 01-21 (proposed Apr. 5, 2023) (to be codified at Cal. Code Regs. tit. 10) [hereinafter Proposed Regulations], https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf.

5 *Id*. at 10 (providing language for proposed § 1462.5).

6 State of Cal. Dep't of Fin. Prot. and Innovation, Initial Statement of Reasons for the Proposed Adoption of Regulations Under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act PRO 01-21 3 (2023) [hereinafter ISOR], https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf.

7 State of Cal. Dep't of Fin. Prot. and Innovation, Notice of Proposed Rulemaking Under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act PRO 01-21 6 (2023) [hereinafter Notice], https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-NOPA.pdf.

8 *Id*. at 3; ISOR, *supra* note 6, at 4.

businesses or jobs within California.[9]

Finally, the ISOR concludes, "No reasonable alternative considered by the DFPI or that has otherwise been identified and brought to the attention of the DFPI would be as effective and less burdensome, or would lessen any adverse impact on small businesses."[10] The Proposal does not mention or even acknowledge its differences from the 2021 Proposal.

III. OVERVIEW OF EARNED WAGE ACCESS

Amid rising costs of living, income volatility, and persistent inflation, it is getting harder and harder for working Californians to make ends meet.[11] The workforce continues to suffer from a lack of both savings and access to affordable liquidity, where over 100 million working Americans do not have even $400 in savings to weather a financial emergency.[12] That employees must typically wait up to two weeks or more to be paid for time they have already worked only exacerbates this problem. Dominant solutions—payday loans, pawn shops, installment loans, auto title loans, and bank overdrafts—are expensive, create endless cycles of debt, and often worsen consumers' financial situation.

EWA provides employees voluntary, on-demand access to their own earned but unpaid wages when they need it, at little or no cost, and eliminates their need for predatory products that only get consumers deeper in debt—the very problem the Department's predecessor recognized needed solving more than 15 years ago.[13]

A. EWA is Unequivocally Better for Consumers than Traditional Liquidity Products Like Payday Loans

Unlike traditional liquidity products, EWA is non-recourse, has no negative credit score impact, creates no fair lending concerns, and is based on *earned wages*. EWA's costs, if any, also pale in comparison to traditional forms of liquidity. According to the Consumer Financial Protection Bureau ("CFPB"), "[a] fee of $15 per $100 is common" with a payday loan and such a loan may also include ballooning interest rates.[14] The table below compares features and costs of traditional loans under the CFL and the California Deferred Deposit Transaction Law (CDDTL) with EWA, demonstrating EWA's numerous benefits to consumers' financial wellness:

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9 Notice, *supra* note 7, at 8.

10 ISOR, *supra* note 6, at 14.

11 Jessica Dickler, *66% of American workers are worse off financially than a year ago due to inflation, report finds*, CNBC (Oct. 19, 2022, 10:26 AM), https://www.cnbc.com/2022/10/19/report-american-workers-are-worse-off-financially-than-a-year-ago.html.

12 Alicia Adamcyzk, *A record 68% of American households said their savings could cover a $400 emergency in 2021*, Fortune (May 23, 2022, 2:32 PM), https://fortune.com/2022/05/23/record-number-american-households-400-dollar-emergency-savings/.

13 Cal. Dep't of Corps., California Deferred Deposit Transaction Law (2007), https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/02//CDDTL07_Report.pdf.

14 *What are the costs and fees for a payday loan?*, CFPB, https://www.consumerfinance.gov/ask-cfpb/what-are-the-costs-and-fees-for-a-payday-loan-en-1589/ (Aug. 28, 2020).

Differences Between EWA, a CFL Loan, and a CDDTL Loan

Characteristic	Payday Loan Under CFL	Payday Loan under CDDTL	Payactiv EWA
Cost for a $200 14-day advance or loan	[$10 + .75% interest] $11.50	$30.00	$0.00 to $2.99
APR-like comparison (assuming 14 days to repay) for $200 transfer	149.91%	261.71%	0% to 38.9%
Cost for a $100 14-day advance or loan	[$5 + .75% interest] $5.75	$15.00	$0.00 to $2.99
APR-like comparison (assuming 14 days to repay) for $100 transfer	149.91%	391.07%	0% to 77.95%
Recourse against the consumer	Yes	Yes	No
Requires credit check	Typically	Typically	No
Impacts credit score	Typically	Typically	No
Late / Junk fees	Authorized	Authorized	No
Origination fees	Authorized	Authorized	No

Characteristic	Payday Loan Under CFL	Payday Loan under CDDTL	Payactiv EWA
Based on unearned wages	Yes	Yes	No
Creates cycle of debt	Often	Often	No

EWA has become widely accepted by employees, employers, and many regulators as a life-changing benefit for lower-income employees and a critical retention tool for employers both large and small.

"[Without access to EWA], I would need to go back to using the Pawnshop."
- Payactiv user working in the energy sector with two dependents (February 2023)

"We used to always run out of food or gas 3-4 days before payday. I remember having to bounce checks to buy a large pizza that would feed us for two days. It's a relief knowing that it's MY money and I can access it when I need to."
- Payactiv user working in the hospital sector supporting a family of three (February 2023)

B. Payactiv Includes Multiple Free EWA Access Options and Numerous Consumer Protections and Guardrails.

Payactiv pioneered the EWA industry by creating a consumer-friendly alternative to predatory short-term loan and overdraft products and making employers part of the solution. Payactiv allows employees to voluntarily access a percentage of their already earned but unpaid wages at little or no cost prior to payday.[15]

Payactiv offers users multiple ways to access their earned wages for free[16]:

- Free EWA transfers to any account via an automated clearinghouse network (ACH).
- Free EWA transactions to instantly pay a bill through a bill-pay service.
- Free EWA transfers to an Amazon account or to pay for an Uber ride.
- Free and instant EWA to Payactiv Visa Cards with direct deposit.

Users can also pay an optional, flat fee of $1.99 to $2.99 to instantly transfer their wages to any debit card or to pick up their EWA balance in cash at a Walmart. There is no interest, no monthly subscription, and no tips. Payactiv does not charge any recurring, automatic, hidden, late, penalty, or "junk" fees, has no installment payment plans or credit features, and does not limit employee

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[15] Payactiv can limit the amount users are able to withdraw to a percentage of their earned wages to ensure a portion of the user's paycheck can be allocated to monthly expenses.

[16] *Payactiv Transforms Earned Wage Access By Eliminating Access Fees*, PR Newswire (June 30, 2022, 5:38 PM), https://www.prnewswire.com/news-releases/payactiv-transforms-earned-wage-access-by-eliminating-access-fees-301579246.html.

eligibility.

Payactiv partners with more than 1,000 employers in California and has facilitated over $60 million in earned wages for California workers. Payactiv only offers EWA to employees of companies with whom Payactiv has a contractual relationship. In a state where a payday loan costs upwards of $30, all of Payactiv's customers, including those in California, can access EWA for free.

The EWA transaction, plus any applicable fees, is recouped through an employer-facilitated payroll deduction on the employee's next scheduled payday. The employee authorizes each deduction in writing. This process does not allow employees to incur any overdraft or NSF charges from their banks as there are no bank account debits. Payactiv's EWA service does not include any assignment of earned or unearned wages nor does it involve creation of a debt. Instead, Payactiv's EWA programs are based on a simple factoring transaction—Payactiv purchases a future receivable on account of earned wage payments actually received by the employee, but Payactiv has no right, title, nor interest in the wages themselves.

Payactiv has no recourse against the employee if, for any reason, settlement of the EWA transaction through payroll deduction fails or is insufficient. As a non-recourse transaction, Payactiv neither pursues collections—on its own or through a debt collector—against an employee, nor does it report EWA activity to any consumer reporting agency.[17]

Payactiv's app interface also offers free budgeting and savings tools, financial counseling, and discounts on livelihood essentials, like gas and insurance.

"I think every employer should offer this service to their employees. Especially if you're the only person in your family bringing in money, this service is a life saver."
- Payactiv user working in the hospitality sector with one dependent (February 2023)

C. Third-Party Experts Widely Support EWA.

Employer-integrated EWA is a widely popular employee benefit, and EWA services have been broadly adopted by almost every major payroll company and human capital resource management company, including industry leaders like UKG, ADP, Paychex, Intuit, Paycor, and SAP. Workers across age groups, income levels, and sectors express interest in EWA.[18] In a recent survey from ADP, employers offering EWA report 96 percent of employees like it and 96 percent of employees say it improves their sense of financial security.[19] It benefits employers to offer EWA as well, as 96 percent of employers report it helps attract talent and 93 percent report it helps retain talent.[20]

In addition to employers, a wide range of third-party experts have highlighted the benefits of employer-integrated EWA solutions as a safe, responsible alternative for workers in need of short-term liquidity and who lack the credit score to qualify for a loan.

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17 The CRAs do not even have a process for accepting such data from EWA providers.

18 *Earned wage access benefits in today's world of work*, ADP, https://www.adp.com/resources/articles-and-insights/articles/e/earned-wage-access-benefits.aspx (last visited May 3, 2023).

19 ADP, Earned Wage Access: Tapping into the Potential of Flexible Pay for Today's World of Work 6 (2022), adp_ewa_study_whitepaper.pdf.

20 *Id*.

Expert	Excerpt
Bipartisan Policy Center *March 14, 2023*	"EWA providers have successfully disrupted the market for short-term credit by offering an alternative to high-cost options—namely, low-cost access to earned wages between paydays. These providers—whether working hand-in-hand with an employer or directly with the consumer—can help workers manage income volatility by recognizing the behavioral biases and tendencies that people face when economic stresses force them to weigh today's financial needs against tomorrow's financial wellbeing. There is no better time for lawmakers to educate themselves on the promise the industry offers—as an innovation that can expand access to financial services and build financial security, particularly among low-to-moderate-income households—and on the important consumer protection considerations it raises."[21]
Financial Health Network *April 2022*	"EWA – also known as earned wage advance or on-demand pay – allows employees to safely draw some or all of their earned wages before payday. These platforms aim to provide a meaningful alternative to high-cost credit products, such as payday loans or overdraft, and may help to lower employee stress at work."[22]
American Payroll Association *2021*	"When EWA programs are used effectively, employees can gain greater financial security. These programs can help employees with the misalignment of expenses between paydays."[23]
Consumer Financial Protection Bureau Final Small Dollar Loan Rule *November 2017*	"The Bureau notes that the payment of accrued wages on a periodic basis, such as bi-weekly or monthly, appears to be largely driven by efficiency concerns with payroll processing and employers' cash management. In addition, the Bureau believes that the kinds of risks and harms that the Bureau has identified with making covered [small dollar] loans, which are often unaffordable as a result of the identified unfair and abusive practice, may not be present where these types of innovative financial products are subject to appropriate safeguards."[24]

21 Bipartisan Pol'y Ctr., The Promise of On-Demand Access to Earned Wages 15 (2023), https://bipartisanpolicy.org/report/ewa/.

22 Fin. Health Network, Workplace Financial Health Innovation, Rolling Out an Earned Wage Access Program for Your Employees 2 (2022), https://finhealthnetwork.org/wp-content/uploads/2022/04/EWA-Employer-Brief-2022.pdf.

23 *Earned Wage Access*, PayrollOrg, https://www.payroll.org/compliance/compliance-overview/hot-topics/earned-wage-access (last visited May 8, 2023).

24 Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,547 (Nov. 17, 2017) (to be codified at 12 C.F.R. pt. 1041).

Expert	Excerpt
Consumer Financial Protection Bureau Advisory Opinion on Earned Wage Access *November 2020*	"Earned wage access products have recently emerged in the marketplace as an innovative way for employees to meet short-term liquidity needs that arise between paychecks without turning to more costly alternatives like traditional payday loans." "The Bureau understands that the interval of time between hours worked and receiving a paycheck can contribute to employees' financial distress, particularly for new hires when the length of time between the first day of employment and the first paycheck may be longer than subsequent paycheck intervals, depending on where the hire date falls in a pay cycle."[25]
Arizona Attorney General Opinion *December 18, 2022*	"The delay between work performed and pay received often stems from employers' cash management needs, payroll processing inefficiencies, or regulatory uncertainty about wage and hour laws. But that delay can contribute to employees' financial distress, and has resulted in the increased use of short-term, small-dollar credit. EWA products are intended to satisfy the short-term liquidity needs of employees without reliance on payday loans."[26]
Brookings Institution Testimony of Aaron Klein, Senior Fellow in Economic Studies, Brookings Institution *May 3, 2022*	"Overdraft fees are driven in large part by short temporal mismatches in income flows. The provision of short time windows to cure is very impactful. This helps explain the popularity of early wage access and other faster payment options spreading through the banking and fintech systems. It also makes clear the incredibly high cost of our nation's slow payment system born by American families living paycheck to paycheck."[27]

[25] In January 2022, then-Acting CFPB General Counsel Seth Frotman asserted in a letter that there was some "confusion" regarding this guidance and that the CFPB intended to clarify the confusion. Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79,404, 79,405 (Dec. 10, 2020). To date, the Advisory Opinion remains in place.

[26] Earned Wage Access Products, I22-005 Ariz. Op. Att'y Gen. 3 (2022), https://www.azag.gov/opinions/i22-005-r22-011#_ftnref.2.

[27] Aaron Klein, Senior Fellow in Economic Studies, Brookings Institution, Testimony before the United States Senate Committee on Banking, Housing, and Urban Affairs (May 4, 2022), https://www.banking.senate.gov/imo/media/doc/Klein%20Testimony%205-4-22.pdf.

Expert	Excerpt
Center for Responsible Lending *March 14, 2023*	"When these [employer-integrated EWA] programs are free or very low cost, and permit repayment only through payroll deduction without debiting bank accounts or delaying receipt of wages, they may be a better alternative than high-cost payday loans."[28]

"[Without EWA] I would struggle to eat and get back and forth to work, potentially risking my job" – Payactiv user working in the retail sector (February 2023)

"I don't make enough money, and if I didn't have access to my wages I'd be in serious trouble. It just helps out tremendously when living paycheck to paycheck, and running short on money." – Payactiv user and gas station worker (February 2023)

IV. REGULATING EWA LIKE A LOAN WILL HARM CONSUMERS AND BUSINESSES

The DFPI deviates from the 2021 Proposal in significant ways, particularly by suggesting that EWA products should be treated as loans. This conclusion and the resulting Proposal appear hastily conceived, ignore substantial adverse impacts on consumers and businesses, and are premised on flawed factual and legal grounds.

A. The Proposal Would Adversely Affect Consumer Welfare, Fair Competition and Wealth Creation, and Is Incompatible With Existing State Law.

The DFPI concludes in the ISOR: "The benefits anticipated from these proposed regulations include an increase in consumer welfare, fair competition, and wealth creation in California."[29] While this conclusion would have been accurate with respect to the Department's 2021 Proposal, it does not hold true for the current draft. Regulating EWA as a lending product or characterizing EWA as involving a "wage assignment" would adversely impact consumer welfare, fair competition and businesses, and consumer wealth creation in California. Each of these impacts is discussed below.

i Regulating employer-integrated EWA as a lending product would adversely impact consumer welfare and consumer wealth creation.

a. *The Proposal would transform EWA into a recourse lending product subject to underwriting, and consumers would be exposed to collections and credit impact.*

Currently, all major EWA products are non-recourse, do not involve underwriting, and cannot negatively impact a consumer's credit score.[30] This is, in part, because EWA products were designed to be the antithesis of a loan. For example, when a provider is unable to settle an EWA

[28] *Earned Wage Advance is Credit (In Focus Series #3)*, Ctr. for Responsible Lending (Mar. 14, 2023), https://www.responsiblelending.org/research-publication/earned-wage-access-credit-focus-series-3.
[29] ISOR, *supra* note 6, at 3.
[30] ISOR, *supra* note 6, at 24.

transaction through a payroll deduction (or for some direct-to-consumer advance providers, through an account debit), the provider has no ability, contractual or otherwise, to collect from the user, garnish their wages, impact their credit, use collection mechanisms, or resort to the judicial system to recoup funds.

On the surface, the Proposal appears designed to keep these features intact by defining an "income-based advance" as one where "the provider and the business partners(s) have no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not paid in full."[31] But it is unlikely that providers would register under the Proposal and voluntarily limit their recourse if (a) EWA is no different than a loan, and (b) providers could simply become licensed under the CFL with virtually the same effort as registration,[32] and therefore gain additional flexibility and an exemption from California's usury restrictions.[33] Indeed, the Legislature did not exempt CCFPL registrants from the constitutional usury restrictions (from which CFL licensees are exempt), nor did the legislature grant the DFPI the authority to do so.[34]

Of course, if registration under the Proposal would subject a provider to usury (and a plethora of other restrictions[35]) that could be avoided by obtaining a CFL or CDDTL license, it is hard to see why a provider would choose registration over licensure. And, subject to our comments in Section VI.D below, we see no reason a CFL licensee would offer EWA on a non-recourse basis (we are not aware of any CFL licensees who do so). As a result, employees who are unable to repay an EWA transaction would likely become legally liable for deficient amounts and subject to collections and resulting credit damage. **Eliminating the non-recourse nature of EWA, though perhaps unintentional, would harm consumers.**

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31 Proposed Regulations, *supra* note 4, at 8 (referencing text for § 1004 (g)(3)).

32 The administrative differences between registration and licensure are minimal. For example, CCFPL registration does not require a surety bond or a net worth minimum for the registrant, unlike CFL applicants. *Id.* at 12-19 (providing text for §§ 1022-1024). And direct owners and executive officers will not need to be fingerprinted (and are not subject to background checks) as part of CCFPL registration. Strangely, however, CCFPL registrants appear to be required to furnish information on ultimate beneficial owners that are not considered control persons for CFL purposes under recent DFPI rules. Finally, certain items on the NMLS MU1 Form would not be required (Item Number 9 (Approvals and Designations), Item Number 10 (Bank Account Information), and Item Number 17 (Qualifying Individuals)) for CCFPL registration. CCFPL registrants will, however, need to provide documents depicting the sign-up process, disclosures, and contracts, which is not required of CFL applicants.

33 Cal. Const. art. 15 (exempting licensed personal property brokers, as that statute has been amended). The personal property broker license is now the CFL license.

34 Article XV § 1 of the California Constitution exempts certain persons from the constitutional usury restrictions, such as banks, personal property brokers, and "any other class of persons authorized by statute." When the legislature adopted the California Financing Law, which consolidated prior disparate financial services laws, it created a class of persons exempt from Article XV § 1, unambiguously stating "***this division*** creates a class of exempt persons pursuant to Section 1 of Article XV of the California Constitution." (Emphasis added.) No similar exemption was included in the CCFPL. As a result, an income-based advance provider that obtains a registration would ostensibly be subject to ***both*** the CCFPL's regulations and Article XV § 1.

35 *See* Proposed Regulations, *supra* note 4, at 7-8 (referencing text for § 1004(g)). None of these restrictions apply under the CFL, not to mention payday lenders under the CDDTL, who can charge up to 460% APR.

b. *Under either a licensing or registration regime, fees and costs for consumers would increase in both amount and type, and become difficult to understand.*

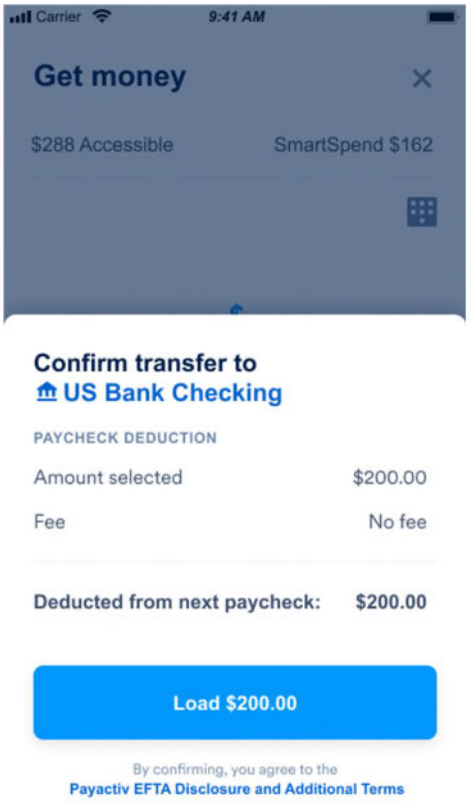
The CFL allows lenders to charge at least three different types of fees, including origination fees, interest, and late fees (which the CFPB considers a "junk fee").[36] EWA providers, on the other hand, cannot collect such fees, and many, like Payactiv, do not even charge for EWA. Treating EWA providers as lenders may reduce or eliminate the incentive to provide EWA for free and without finance charges and junk fees. In other words, it is hard to see why lenders subject to the CFL would not begin charging fees that are allowable under the CFL, *i.e.*, origination fees, interest, and late fees in proportion to the increased underwriting and compliance costs incurred in offering the product as a loan.

With Payactiv, for example, the only fee a user can pay is for optional expedited delivery, which ranges from $1.99 - $2.99. There is no interest, and no late fees. If Payactiv's $2.99 fee for expedited delivery were subject to the CFL's 5% origination fee cap, Payactiv would be forced to do one of two things: (1) institute a minimum transaction amount of $60—which, in many cases, is more earned wages than many consumers want to or can access, or (2) be forced to overhaul its pricing structure for California users and potentially charge interest and late fees, taking into consideration the increased costs associated with licensing, discussed more fully below. **Either option is worse for Payactiv's customers.**

As illustrated in the following side-by-side comparison of a $200 EWA transaction, if Payactiv offered EWA as a licensed CFL lender, its transaction disclosure would likely become convoluted and far more difficult for the average consumer to effectively comprehend, particularly with regard to the total cost:

[36] Cal. Fin. Code §§ 22303, 22304.5.

EWA Transactions Would be More Complicated for Consumers Under CFL

Current EWA Transaction Screen In Payactiv's Mobile App	Hypothetical Transaction Screen Under CFL
	

The hypothetical credit transaction displayed to the right would be drastically more difficult to understand than universally free EWA (on the left), with only nominal flat fees for expedited transfers."[37] Accordingly, the Department's Economic Impact Assessment is incorrect in stating that the Proposal would "limit charges to consumers who obtain income-based advances," and fails to take into account the above considerations. As the chart above (at 9) shows, consumers would likely pay more—not less—if EWA became credit or a "wage assignment".

c. *Classifying EWA as a "wage assignment" would worsen, if not eliminate EWA for consumers because of its incompatibility with the Labor Code.*

Not only would costs and fees increase in amount and type, if EWA transactions constitute "a sale or assignment of wages" under Section 22335,[38] it is not clear how providers could continue to offer their EWA products in California while also complying with the Labor Code's burdensome requirements related to wage assignments.

Specifically, the Labor Code says that a wage assignment must include: (i) a separate written instrument signed by the employee, (ii) written consent of a married employee's spouse, and (iii) filing of a notarized copy of the assignment with the employer.[39] It also states: "under any assignment of wages, a sum not to exceed 50 per centum of the assignor's wages or salary shall be withheld by, and be collectible from, the assignor's employer at the time of each payment of such wages or salary."[40]

It is hard to conceive how *any* EWA provider could offer an EWA product if, for example, an employee needed their spouse to approve each transaction, and was required to get that approval notarized each time. Even if those logistical hurdles could be overcome, the cost of doing so would be enormously prohibitive. In California, a notary can charge up to $15 per signature.[41] This is over four times more costly than Payactiv's highest $2.99 optional fee. The DFPI is silent on this issue, let alone how providers or employers could realistically comply with it, irrespective of the cost. Similarly, the DFPI does not explain how a provider could realistically determine if a customer is married and, if so, obtain their spouse's notarized signature in a manner that would still maintain the viability or usefulness of the product.

Nor has the Department considered the effect such a classification would have on California judicial opinions that have significantly restricted an employer's ability to take an offset against an

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37 It remains unclear why advocates continue to falsely maintain that if EWA were regulated as credit, and fees were converted into an APR, "A $200 advance taken out seven days before payday, for example, would be allowed to charge $1.17." Letter from Lauren Saunders, Assoc. Dir., Nat'l Consumer Law Ctr. & Marisabel Torres, Dir. of Cal. Pol'y, Ctr. for Responsible Lending, to Comm'r Manual P. Alvarez, Dep't of Fin. Prot. and Innovation (Mar. 15, 2021), https://www.nclc.org/wp-content/uploads/2022/08/CRL_CA_DFPI_EWA_Comments.pdf. As demonstrated above, the reality is quite different. As is shown above, a $200 Payactiv EWA transaction (currently $0 to $2.99) could incur fees of more than $20 if the transaction were a loan.

38 ISOR, *supra* note 6, at 53-54.

39 Cal. Lab. Code § 300.

40 *Id.*

41 Dr. Shirley N. Weber, Notary Public Handbook 17 (2023), https://notary.cdn.sos.ca.gov/forms/notary-handbook-current.pdf.

employee's wages for a balloon loan repayment upon termination. In *Barnhill v. Robert Saunders & Co.*, the Court of Appeals held it is unlawful for an employer to deduct from an employee's final paycheck a balloon payment to repay the employee's debt to the employer even when the employee has authorized the payment in writing.[42]

Finally, classifying EWA as a "wage assignment" would seemingly require providers and employers to restrict a user from accessing more than 50 percent of their earned wages. While this is a limitation that may be beneficial for some employees and some employers, accessible balance limits are not one-size-fits-all.

The Notice states that the Department "evaluated the proposed regulations for consistency and compatibility with existing state regulations and has concluded that these are the only regulations pertaining to … the regulation of advances to be repaid from a consumer's earned or unearned pay under the CFL" and "the proposed regulations are neither inconsistent nor incompatible with existing state regulations."[43] Just one aspect of the California Labor Code's requirements shows this is incorrect. By itself, compliance with the Labor Code and *Barnhill* has the potential to effectively prevent providers from being able to offer—and consumers from being able to obtain—EWA in the state, an impact wholly unaddressed in the Proposal.

d. *The Proposal will result in a decrease in consumer wealth creation.*

While DFPI intends for the Proposal to support consumer wealth creation, it is likely to have the converse effect. Forcing EWA Providers into a lending framework may also trigger underwriting practices and associated credit checks, adversely impacting consumers by significantly limiting the number of consumers who would be able to access their earned but unpaid wages and leaving those who fail to qualify with little option but the traditional, predatory forms of liquidity like payday loans, which, as the DFPI is likely aware, inhibit consumer wealth creation. Each traditional product has obvious problems:

- Payday loans – In California, consumers can pay up to $30 in fees for a single payday loan. This is over ten times the maximum fee that Payactiv ever charges for an expedited delivery. If a consumer needs cash today for an emergency, they could pay no more than $2.99 to receive their already earned wages instantly through Payactiv. Without Payactiv, they might be forced to take out a payday loan with a fee of up to $30. And not only would that consumer have to pay that $30 fee, but the consumer is more likely to enter a cycle of debt in order to keep paying off those fees.

- Overdraft fees – Without EWA, consumers in urgent need of short-term liquidity might decide to overdraft their bank account, which can often result in an overdraft fee of up to $35 or more.[44] Not only is this more than eleven times Payactiv's maximum (and optional) fee, but it can damage the consumer's relationship with their bank.

- Credit cards – Consumers often turn to using traditional credit cards for emergency purchases. While rates vary, the amount of interest would typically exceed the $2.99 maximum optional fee that Payactiv charges. In addition, the consumer would be subject

[42] 177 Cal. Rptr. 803, 807 (Cal. Ct. App. 1981).
[43] Notice, *supra* note 7, at 6.
[44] *Overdraft and Account Fees*, FDIC, https://www.fdic.gov/resources/consumers/consumer-news/2021-12.html (last updated Aug. 17, 2022).

to late fees and credit reporting if they were unable to pay back the interest on time.

- Pawn shops – Like payday loans and credit cards, using pawn shops for short-term liquidity results in interest that would also exceed Payactiv's optional expedited delivery fees.

- Family and friends – Without EWA, some consumers may borrow money from family and friends. Such a loan may not carry interest or fees, but private borrowing may stifle financial independence and may harm dignity and feelings of self-worth.

All of these alternatives are likely to result in a decrease in consumer wealth creation, as they cost significantly more for the consumer than EWA and they risk damaging the consumer's financial situation. Thus, because the Proposal could effectively diminish or eliminate EWA in California and force consumers to rely on more expensive and harmful alternatives, it would result in diminished consumer wealth creation, not more.

ii The Proposal will adversely impact providers and businesses, resulting in a decrease in fair competition.

The DFPI also ignores the potential for substantial adverse impact that the Proposal would have on both providers and their business clients, where over 70 percent of middle-market companies say they are already offering some form of earned-wage access program and most are not interested in offering loans to their employees.[45]

a. *There would be significant costs and complications associated with customizing products, fee structures, and programs specifically for California workers.*

More than 10 years after EWA was introduced, the Proposal would be the first and only regulation in the United States to regulate it as a loan to the detriment of consumers, providers, and businesses. It is not an exaggeration to say the Proposal would require EWA providers to completely overhaul their products. This includes, for example:

- Additional resources to establish underwriting, compliance and collections operations;
- Buying and analyzing credit reports;
- Investing in fair lending compliance;[46]
- Establishing a loan servicing platform;
- Establish a process for credit reporting;
- Building a debt collection process and outsourcing collections; and
- Compliance with Labor Code section 300's notarization and spousal consent requirements.[47]

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45 *Payment trends in 2022*, Citizens Bank, https://www.citizensbank.com/corporate-finance/insights/payment-trends-2022.aspx (last visited May 4, 2023).

46 Currently, Payactiv makes its service available to all of an employer's employees. Given that, and that the product does not involve credit, there are no fair lending concerns.

47 Cal. Lab. Code § 300(b)(6).

This would undoubtedly create significant new and additional costs spanning product development, compliance, legal, marketing, and many other business functions.

The Proposal would also require drastic changes in consumer disclosures at substantial expense to covered businesses (it mentions only that the Proposal would require registration and reporting),[48] and, as set forth above, would make the cost of a transaction exceedingly more difficult for a user to understand.

These costs would have a dramatic impact on the entire EWA ecosystem, from businesses to users. For businesses, these increased costs would impact the ability of new providers to offer new EWA services in California, limit investment in expansion of EWA services, and limit providers' ability to create more jobs in California. As providers seek to recoup their increased costs, the Proposal is likely to limit, if not end, access to free EWA for users, adversely impacting their financial well-being.

b. *The Proposal would result in a decrease in fair competition.*

The Department states that the Proposal would "foster[] competition between lenders by permitting lenders to use various revenue models, including those based upon transaction-based fees, tips, and subscription payments."[49] But these revenue models already exist without conflict and consumers already benefit from a range of products on the market. Instead, the Proposal is likely to require providers to *constrict*—not expand—fee models and may force some providers out of the state. For example, as set forth above in Section IV.A.i.b, the Proposal would either prohibit providers from offering simple flat fees for expedited delivery services or require that they mandate consumers access a minimum amount of earned wages.[50]

Thus, the Proposal would reduce fair competition by reducing the number of EWA companies that could operate in California, and would likely restrict, not increase, revenue models as the Proposal contemplates.

B. Advocates' Policy Arguments Why EWA Should Be Regulated As a Loan Are Unfounded.

Despite EWA's clear benefits, a small number of consumer groups oppose regulatory and legislative efforts to establish practical consumer protections and workable registration and licensing requirements for EWA Providers. These groups have argued without evidence that EWA should be regulated no differently than lending products and payday loans, despite the obvious disadvantages that doing so would have for the end user. In large part, these advocates have been effective at preventing or delaying implementation of sensible oversight and consumer protections for the very consumers they purport to represent.

The factual and legal bases underpinning their claims are unfounded and unsubstantiated.[51] For

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48 ISOR, *supra* note 6, at 4.

49 ISOR, *supra* note 6, at 3.

50 To the extent the DFPI believes claims that employees are harmed by taking too much from future paychecks, requiring larger EWA transactions would only exacerbate this problem.

51 For example, see footnotes in this testimony, where NCLC cites its own employees' conversations and work as sources (and that work is similarly devoid of actual evidence). Lauren Saunders, Assoc. Dir., Nat'l Consumer Law Ctr. Testimony Before the Task Force on Financial Technology U.S. House

example:

Advocate claim: EWA creates cycles of debt and makes financial management more difficult.[52] Even free loans can be unaffordable and trigger a cycle of debt.[53]

In actuality, EWA does the exact opposite, *freeing employees from cycles of debt* created by traditional lending products. Unlike high-interest loans that require consumers to take out new loans to repay their old ones, EWA does not incur interest and creates no such cycle. A customer with a utility bill due can use EWA to pay it in order to avoid a late fee, overdraft fee, or having their service turned off. Claims that free or nominal-fee products may be "unaffordable" are unfounded. **Users are not forced to access their earned wages in successive pay periods in order to repay accumulating interest and fees.**

Advocate claim: Regulating EWA as anything other than credit would lead to erosion of consumer protection and fair lending laws.[54]

Advocates have been making this unsupported claim for more than five years, yet they cite no evidence of any actual erosion. Additionally, no conceivable interpretation of Payactiv's EWA program (nor that of its competitors) could trigger fair lending issues. There is no underwriting and no credit impact, nor has any possible evidence of fair lending issues ever been cited by these advocates. Advocates have largely disregarded these factors. In fact, consumer groups have advocated *against* legislation that would have created important consumer protections.[55]

Advocate claim: The traditional, full bi-weekly paycheck works well as a forced savings device for consumers.[56] Taking an advance on the next paycheck when a consumer cannot cover an expense with the current paycheck creates a hole in the next paycheck.[57]

Claims that the bi-weekly paycheck works well as a forced savings device for consumers are not only patronizing, paternalistic, and out of touch with reality, they are at cross purposes with protecting and enabling workers. The majority of employers run payroll on a bi-weekly cycle but the average worker has bills due at varying times. The bi-weekly pay cycle creates a temporal mismatch between income and fixed monthly bills, and it can be crippling for the worker to show up short before payday despite having already earned enough to cover their expenses. EWA is a lifeline for employees in these payroll cycles, giving workers access to their earned wages when they need them, not when their employer decides to pay them. It appears consumer groups would

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Committee on Financial Services (Nov. 2, 2021) [hereinafter Lauren Saunders Testimony], https://www.nclc.org/wp-content/uploads/2022/10/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf.

52 *Id*.

53 Letter from Lauren K. Saunders, Assoc. Dir., Nat'l Consumer Law Ctr. & Mike Calhoun, President, Ctr. for Responsible Lending, to Rohit Chopra, Dir., Consumer Financial Protection Bureau (Oct. 12, 2021) [hereinafter Letter from Saunders & Calhoun to Director Chopra], https://www.nclc.org/wp-content/uploads/2022/10/EWA-letter-to-CFPB_Oct-4-2021.pdf.

54 Letter from Ams. for Fin. Reform Educ. Fund et al. to Rohit Chopra, Dir., Consumer Financial Protection Bureau (Oct. 12, 2021), https://www.nclc.org/wp-content/uploads/2022/10/CFPB-EWA-letter-coalition-FINAL2.pdf.

55 Letter from Lauren Saunders, Assoc. Dir., Nat'l Consumer Law Ctr., to Senator Anna Caballero (July 5, 2019), https://www.nclc.org/wp-content/uploads/2022/08/ca-sb-472-nclc-opp-letter.pdf.

56 Lauren Saunders Testimony, *supra* note 51.

57 Letter from Saunders & Calhoun to Director Chopra, *supra* note 53.

prefer EWA users utilize existing, higher-cost products instead.

These and other claims from EWA opponents are unsupported by research, and they have not played out in reality for employer-integrated EWA providers like Payactiv. Workers, not advocates, should have the freedom to determine whether and when to access their own earned money, and they should be able to do so without a burdensome and costly array of fees, costs, interest, recourse, and credit impact.

In sum, the Department's conclusion that the Proposal is likely to benefit consumers is either based on misunderstandings of the product, the law, or both. **Regulating EWA as a lending product would not benefit consumers.**

V. AS A MATTER OF LAW, EWA IS NEITHER CREDIT NOR A WAGE ASSIGNMENT

The DFPI's Proposal is also misguided because it would deem programs like Payactiv's EWA program as credit and involving a debt even though it is neither in any legal or practical sense of those terms.

As the DFPI explained in its MOU with Payactiv, Payactiv's program involves: "factoring transactions to purchase future receivables from consumers, and these transactions are non-recourse to the consumer."[58] This is the purchase and sale of a future receivable, not a debt, and, as the Payactiv MOU and DFPI's Proposal both note, the customer is under no contractual obligation to return those funds to Payactiv. Payactiv legally and unambiguously assumes all risk of nonpayment and has no recourse, directly or indirectly, against the employee in the event of nonpayment. Unsurprisingly, no California court has ever held such a transaction is a loan.

The DFPI's rulemaking disregards these facts and never explains why it has the authority or justification to deem the legal structure of Payactiv's program—which is not credit or debt under existing law—as such.

A. The Legislature Never Authorized the DFPI to Regulate Accounts Receivable Purchases Under the CFL.

As an initial matter, there is no evidence the Legislature ever sought to address factoring in the CFL. The legislative history—including that cited by the DFPI in this rulemaking and addressed in further detail below —indicates the Legislature's goal was to address harmful lending practices where employers and others trapped employees in a vicious cycle of selling wages at a discount.

If the Legislature had intended to substantively regulate consumer factoring, it would and could have said so. In fact, the Legislature just did this with commercial factoring five years ago when it enacted SB No. 1235.[59] It is difficult to believe the Legislature forgot to address consumer factoring less than two years later when it adopted the CCFPL.

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[58] Cal. Dep't of Fin. Prot. and Innovation, Memorandum of Understanding Payactiv, Inc. (2021), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/01/Admin.-Action-Payactiv-Inc.-Memorandum-of-Understanding.pdf.

[59] S.1235, 2018 Leg. (Cal. 2018). That law requires providers of commercial financing to give consumer-style "cost-of-credit" disclosures to recipients and directed the DFPI to promulgate regulations governing those disclosures. SB 1235 explicitly included "accounts receivable purchase

The Legislature instead chose a different path to address how to handle new and innovative financial products by adopting the CCFPL, which created the DFPI and authorized it to create new registration systems for these new products.[60] Registration and monitoring would allow the DFPI to gather evidence that could be shared with policymakers in the Legislature, which then could determine whether to adopt new substantive restrictions.[61] It is not clear the Legislature wanted the DFPI to take on substantive regulation itself.[62] Without clear guidance from the Legislature that it considers factoring to be consumer credit, the Proposal exceeds the DFPI's authority under the CCFPL.

B. The Proposal Fails to Establish that EWA Involves a Debt.

The DFPI has also exceeded its authority by deeming Payactiv's purchase of a future receivable to be credit without establishing that it involves a "debt," a necessary requirement to establish a product as "credit" and a "consumer loan" under the CFL.

The statutory definition of "credit" incorporates the statutory definition of "debt."[63] The statute is clear, that all debts involve an "obligation."[64] The Civil Code defines "obligation" as "a legal duty, by which a person is bound to do or not to do a certain thing."[65] **Thus, for a contract to involve "credit" there must be a "debt," which must include an "obligation" (whether "absolute or contingent").**

The DFPI concludes that "income-based advances" meet the definition of "credit" because consumers "receive money today in exchange for agreeing to an *arrangement* in which the advance provider is repaid in the future."[66] However, an *arrangement* is not an "obligation"[67] or a "legal duty" by which the user "is bound to do or not to do a certain thing."

Instead, the Proposal establishes a circular definition that would define the term "credit" to include "without limitation, any credit *obligation* where the related *debt* involves an obligation to pay money, regardless of whether obligation is absolute or contingent, or fixed or variable."[68] The ISOR only contains a conclusory statement (at 15) that some EWA providers require "consumers to execute contingent or variable obligations."

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transaction[s], including factoring" in the statutory definition of "commercial financing." Cal. Fin. Code § 22800(d)(1).

60 Cal. Fin. Code § 300.

61 Cal. Fin. Code § 90009.5.

62 Indeed, deeming new products to be credit when they lack the hallmarks of credit is not one of the DFPI's stated purposes. *See Id.* § 90000.

63 *Id.* §§ 90005(g),(h).

64 *Id.* § 90005(g).

65 Cal. Civ. Code § 1427.

66 ISOR, *supra* note 6, at 24 (emphasis added).

67 Cal. Fin. Code § 90005(g).

68 Proposed Regulations, *supra* note 4, at 2 (providing language for proposed § 1000(f)) (emphasis added). Similarly, the CCFPL defines "credit as "the right granted by a person to another person to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for those purchases." Cal. Fin. Code § 90005(g). And it defines "debt" as "any obligation of a person to pay another person money regardless of whether the obligation is absolute or contingent … ." *Id.* § 90005(h).

But most income-based advance providers like Payactiv do not establish an obligation. To the contrary, a Payactiv user provides a *revocable authorization* for a payroll deduction, which is not "an obligation" or a "legal duty" to pay money. The user has no obligation to make other arrangements for payment in the event there are no such funds available to deduct on payday, if the deduction fails, or if the authorization is revoked.[69] If a borrower fails to repay a loan, on the other hand, the borrower remains obligated to repay or suffer the consequences of default. And, while Payactiv cannot speak for the rest of the industry, its agreement with customers expressly disclaims the creation of a debt.[70]

Indeed, the DFPI recognizes income-based advance providers "often limit their recourse" and "sometimes allow consumers to cancel collection entirely."[71] While the DFPI notes that consumers typically do not avail themselves of these options, it fails to explain why, even if true, this observation would impact the DFPI's conclusion, stating only that "to consider earned wage access companies to be offering a product that is not credit would elevate form over substance."[72] We respectfully disagree. The features that distinguish Payactiv's transaction from "debt" are plainly *substantive* and do not reflect any kind of "obligation," which is required by the Legislature for a product to be credit. In fact, all cases in California where a court has found a debt exists involve a transaction where the borrower has provided some sort of guarantee of repayment.[73]

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69 As the CFPB stated in its (since withdrawn) Approval Order to Payactiv: "there is no independent obligation to repay" a Payactiv EWA Transaction since Payactiv recovers corresponding EWA amounts via employer-facilitated payroll deductions and will never seek repayment from an employee directly or through a payment authorization from the employee's account." Payactiv Approval Order at 5-6 (Dec. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf. CFPB withdrew its Approval Order due to a request from Payactiv. *See* Order to Terminate Sandbox Approval Order (June 30, 2022), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_termination-order_2022-06.pdf. Payactiv is aware of statements made by consumer groups that the fact providers like Payactiv reserve the right to pursue fraud claims against users who breach their representations and warranties transforms the transaction into a debt. *See, e.g.,* https://www.nclc.org/wp-content/uploads/2022/08/CRL_CA_DFPI_EWA_Comments.pdf at 19. These unsupported statements intentionally misread Payactiv's terms and conditions. As Payactiv explained at length in its Compliance Assistance Sandbox application to the CFPB, Payactiv includes this language to reserve the right to pursue fraud. ***Notably, Payactiv has never once relied on this clause***. Regardless, preserving the right to pursue a fraud claim does not transform an EWA transaction into a debt—fraud is prohibited regardless. Neither does a user's revocable authorization for Payactiv to re-submit a failed deduction for the same reasons stated herein.

70 ISOR, *supra* note 6, at 24. The DFPI notes that about three percent of customers did not repay their advances. Those thousands of customers were certainly happy to have non-repayment as an option—they avoided late fees, debt collection, and adverse credit reporting because they chose an income-based advance instead of a loan product. The DFPI appears unconcerned with these potentially adverse consequences that would result if Payactiv transitioned to a traditional lending model and had recourse against these customers.

71 *Id*.

72 *Id*. at 25. Nor does it explain at what level the use of these features would be deemed sufficient.

73 Debt cannot result from a non-recourse factoring transaction because such transactions are not credit transactions. *Refinance Corp. v. N. Lumber Sales*, 329 P.2d 109, 113 (Cal. Dist. Ct. App. 1958) (sale was not a loan where "there was a real purchase [and] no guaranty of repayment of the purchase price"); *Advance Indus. Fin. Co. v. Western Equities, Inc*., 343 P.2d 408, 413 (Cal. Dist. Ct. App. 1959) (sale of accounts was not a loan); *cf. Milana v. Credit Disc. Co*., 163 P.2d 869, 872-873 (Cal. 1945) (transactions deemed not to be sales of accounts receivable but loans because the plaintiff provided a "guarantee" of repayment).

Payactiv has no such guarantee from its customers. The DFPI does not have the authority to replace a statutory definition of credit with its own in order to reach a particular result.

Payactiv's customers have no "contingent" obligation either. Courts have interpreted a "contingent obligation" to be one where a subsequent act obligates a party to do something.[74] As no subsequent act obligates the consumer in Payactiv's Terms and Conditions, its product cannot involve any obligation, "absolute or contingent." As for a purported "variable obligation," a term seemingly invented for use in the Proposal, there is no guidance on what it means or why an EWA provider's factoring transaction could involve a "variable obligation."[75]

The law is clear: there is no credit without a debt, and there is no debt without an obligation. Because there is no "obligation" in an EWA transaction, the Department has improperly interpreted the CFL.

C. Since Non-Recourse EWA Does Not Involve a "Debt," it Cannot be a Consumer Loan Either.

The DFPI also asserts without analysis that a non-recourse EWA product meets the statutory definition of a "consumer loan."[76] Like the Department's "credit" analysis, this interpretation disregards the plain definitions of "loan" in the Civil Code.[77]

The Legislature has defined a "consumer loan" as a "loan" made for "personal, family, or household purposes."[78] In turn, the Civil Code defines a "loan of money" to be "a contract by which one delivers a sum of money to another, and the latter *agrees to return at a future time a sum equivalent to that which he borrowed.*"[79] Just as there is no "obligation" to repay an EWA transaction, Payactiv's EWA transaction expressly lacks any agreement to "to return at a future time a sum equivalent to that which he borrowed."[80] Instead, as set forth above, the user provides a freely *revocable* authorization that his or her employer may perform a payroll deduction if funds are available in the user's subsequent paycheck. And, as noted, Payactiv expressly disclaims any such "agreement to repay."

California courts have long agreed with this distinction.[81] As the Supreme Court explained in *Milana v. Credit Discount Co.*, a sale of a receivable and a loan are different things:

> A sale is the transfer of the property in a thing for a price in money. The transfer of the property in the thing sold for a price is the essence of the transaction. … A loan, on the

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74 *See Kizer v. Hanna*, 767 P.2d 679, 684 (Cal. 1989) (explaining that a debt is a sum "certainly and in all events payable" now and a "contingent debt is a debt "not payable until the contingency occurs") (citations omitted)*; see also State ex. rel. Pension Obligation Bond Com. v. All Persons Interested*, 62 Cal. Rptr. 3d 364, 371 (Cal. Ct. App. 2007) (quoting *Doland v. Clark*, 76 P. 958, 960 (Cal. 1904) ("A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens.").

75 Perhaps a variable obligation is one where the amount of the obligation changes but not its existence. If so, it would not apply to a non-recourse transaction.

76 ISOR, *supra* note 6, at 53-54.

77 *Id*. at 53.

78 Cal. Fin. Code § 22203.

79 Cal. Civ. Code § 1912.

80 *Id*.

81 *Refinance Corp.*, 329 P.2d at 113; *Advance Indus. Fin. Co.*, 343 P.2d at 413.

> other hand, is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties the transaction will be deemed a loan regardless of its form.[82]

When courts have looked at the "intent" of the parties, they have held a "sale" was really a loan because there was recourse or other guarantee of repayment.[83] In every case where a transaction was found to be a loan the provider had some form of recourse.[84] The intent here is clear: Payactiv's customers provide *no guarantee and Payactiv has no recourse.* And, in practice, Payactiv is unable to recoup thousands of dollars in EWA transactions every month.

The DFPI does not identify the basis for its determination that a non-recourse transaction can be a loan. The closest the DFPI comes is when it says that the risk of capital loss to income-based advance providers is "low" and, therefore, concludes that while the product does not establish a debt, it is close enough and can be a loan.[85] The DFPI's sole support for this "close enough" theory is a citation to an unpublished decision from 2006, *Bistro Exec., Inc. v. Rewards Network, Inc*.[86] However, *Bistro Executive* actually undermines the DFPI's position. There, the court deemed the transactions at issue to be loans because there was *no risk of loss* on behalf of the lender—it had a *contractual* right of recourse against the borrower. The parties' contract in that case permitted "Defendants [the alleged lenders] to 'call' the loan, assuring that, at a minimum, Defendants will receive the amount of their cash advance."[87] No such assurance exists for income-advance providers which, as DFPI notes, *have no means of recovering funds approximately three percent of the time.*[88] In Payactiv's case, this amounts to hundreds of thousands of dollars in unrecovered transactions just in California. If Payactiv was a lender—and it is not—it would ostensibly have legal means to recoup those funds.

Additionally, the court in *Bistro Executive* relied on additional factors not present with income-based advance transactions: (i) the company had "policies and procedures used in administering their cash advance program [that] are similar to [those of a traditional lender" (not present here), (ii) the company "typically require[d] that restaurant owners sign a 'personal guaranty' and that the restaurant execute a 'security agreement' under which Defendants take a broad security interest in all of the restaurant's property" (not present here), and (iii) the Defendant employed underwriters and referred to the transactions as loans in various materials (also not present here).[89] None of these facts make the loans in *Bistro Executive* remotely similar to income-based

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82 *Milana*, 163 P.2d at 871.

83 *See e.g.*, *West Pico Furniture Co. of Los Angeles v. Pac. Fin. Loans*, 76 Cal. Rptr. 30, 33 (Cal. Ct. App. 1969). (side letter providing recourse indicates sale was actually a loan).

84 *See Bistro Exec.*, 2006 WL 6849825, at *8.

85 ISOR, *supra* note 6, at 54. The DFPI asserts without explanation that a three percent non-repayment rate is "remarkabl[e]." *Id*. It's not clear that the rate of non-payment is appreciably different from the default rate for small-dollar loans. For example, a 2013 CFPB study found that payday loan borrowers default about four percent of time on their first loan. CFPB, CFPB Data Point: Payday Lending 10-11 (2014), https://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf.

86 No. CV 04-4640 CBM, 2006 WL 6849825 (C.D. Cal., July 19, 2006).

87 *Id.* at *7.

88 ISOR, *supra* note 6, at 54.

89 *Bistro Exec.*, 2006 WL 6849825, at *8.

advance products as described in the ISOR. In the end, *Bistro Executive* better aligns with cases cited above that require recourse for a transaction to be a loan.[90]

Finally, as noted above, other indicia of consumer loans are lacking with Payactiv's EWA product, including interest charges, risk of debt collection, and credit reporting.[91] Under the *Milana* decision and its progeny like *Bistro Exec.*, the DFPI cannot conclude that Payactiv's EWA service is a consumer loan without disregarding the plain language of the CFL that requires the existence of a debt.

D. The Proposal Relies on Misplaced and Inapplicable Authority to Justify an Improper Reading of the CFL's Definition of a Wage Assignment.

The DFPI also contends (ISOR at 53-54) that an income-based advance is a "sale or assignment" as defined in Financial Code Section 22335, a successor to a nearly 100-year-old statute that was designed to root out pernicious practices where employees were forced to work in the future to repay old debts from selling their wages. Today, Section 22335 explains that the payment of money "for any sale or assignment of, or order for, the payment of wages" is a loan secured by an assignment.

A non-recourse program, such as Payactiv's, is not close to the type of "sale," "assignment," or "order" for the payment of wages that the Legislature sought to root out. Regardless, Section 22335 necessarily requires an actual *sale of wages* from the seller to the buyer and, as a result, the creation of a "debt." Black's Law Dictionary defines an "assignment" as an:

> Act by which one person transfers to another, or causes to vest in that other, the whole of the right, interest, or property which he has in any realty or personalty, in possession or in action, or any share, interest, or subsidiary estate therein[92]

There is no evidence, cited in the ISOR or otherwise, that income-based advance providers, including Payactiv, acquire any "right, interest, or property" in a consumer's wages themselves. By establishing its transactions as non-recourse, and by making the authorization for a payroll deduction revocable, Payactiv's transaction does not meet this definition of an assignment. Just as a revocable authorization to perform a payroll deduction cannot constitute a "debt," "loan," or "obligation," it can constitute neither a sale nor an assignment of wages either. The DFPI cites no

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90 *See supra* notes 81-83 and accompanying text.

91 The DFPI has also held, in an opinion letter regarding a company with higher fees than Payactiv, that EWA transactions that are low cost and do not look like they are evading the CFL's fee caps are unlikely to be loans. E-mail from Clothilde V. Hewlett, Comm'r, Dep't of Fin. Prot. and Innovation, to Carl Morris, FlexWage Solutions (Feb. 11, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf ("The cost of a FlexWage EWA does not suggest evasion of the CFL. As described above, the typical FlexWage user receives $184 for each advance, and the maximum fee for each advance is $5. This fee is substantially lower than the 5 percent administrative fee that a licensee could charge under Financial Code section 22305, even without charging additional periodic interest permitted under other parts of the CFL").

92 *ASSIGNMENT Definition & Legal Meaning*, The Law Dictionary, https://thelawdictionary.org/assignment. *See also, e.g.*, *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1069, (2d Cir. 1995) ("Where the lender has *purchased* the accounts receivable, the borrower's debt is extinguished….").

authority establishing that the Legislature intended to ensnare products with such features.[93] What legislative history does exist shows the Legislature sought to regulate loan sharking activities where employees sold yet-to-be earned wages at a substantial discount that trapped them in a cycle of debt.[94]

Instead, the DFPI relies on dated, inapplicable, and irrelevant authorities that sought to address conduct quite different from what is at issue in this rulemaking. First, the DFPI puts substantial weight on an article from 1941 titled "The Development of Regulatory Small Loan Laws."[95] This article, written by an industry lawyer *after* the adoption of the provision at issue, does not cite any California statutes or any California-specific legislative history. Instead, the article explains that wage assignment laws of that era were adopted to address predatory lending practices where employees were provided loans they could never repay and, as a result, the borrower was caught in a cycle of debt. Even assuming the Legislature's goal was to address these practices, there is no indication that California intended its wage assignment law to reach transactions *that do not involve an actual assignment*, do not trap workers in a cycle of debt, and do not impose any kind of predatory fees. Nor could it, as the wage assignment law predated EWA products by more than 70 years.[96]

The DFPI's reliance on the 1943 case *Lande v. Jurisich* is similarly misplaced. That case involved a former Labor Code provision addressing assignment only of future, *unearned* wages.[97] The DFPI provides no basis to extend that holding to *already earned* wages. This is not merely a semantic difference—the policy reasons addressed in *Lande* concern harm to consumers when they give away their yet-to-be earned wages because it meant individuals would be completing work in the future having already given up the right to be paid for that work.[98] At issue here, however, is whether consumers have a right to access their own, *already earned* wages. Neither *Lande* nor the Hubachek article support a finding that the Legislature sought to treat this sort of activity as a wage assignment.

E. No Regulatory or Legislative Body Has Determined that Employer-Integrated EWA is a Wage Assignment or a Loan.

Accordingly, it is not surprising that, in the near-decade history of EWA, no regulatory or legislative

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93 Cal. Fin. Code § 22335.

94 *See* Robert E. Stone & Jack E. Thomas, California's Legislature Faces the Small Loan Problem, 27 Cal. Law Rev. 286, 286-88 (1939). Fifteen bills were introduced in the California Legislature at the time to address personal property brokers engaging in loan shark activities. As detailed in the cited book, borrowers were routinely being trapped in the cycle of not repaying a prior loan and thus needing to renew their wage assignment every payday. Louis N. Robinson & Rolf Nugent, Regulations of the Small Loan Business 158 (1935). As the loan amount increased, the interest increased. Lenders were also including large final payments in contracts knowing borrowers would be unable to pay them.

95 ISOR, *supra* note 6, at 53 n.88. The author of this article was a practicing lawyer in Illinois with no obvious ties to California or understanding of why the Legislature adopted its wage assignment statute. Nor does he provide any authority to support his assertions.

96 The DFPI appears to imply the wage sale products at issue in the 1930s are similar to the income-advance products of today. The available evidence indicates this is far from the case. Indeed, the example cited in the 1941 article involves the purchase of wages at a steep discount. But Payactiv does not purchase anything at a discount—it gives free, early access to wages.

97 *Lande v. Jurisich*, 139 P.2d 657, 660 (Cal. Dist. Ct. App. 1943).

98 *See supra* note 96 (summarizing legal scholarship on history of wage assignments).

body has concluded that EWA is a loan although several have reached contrary conclusions. The first significant regulatory determination occurred in 2017 when the CFPB, led by then-Director Richard Cordray, specifically exempted EWA products from its Small Dollar Lending Rule that addressed harmful payday lending practices.[99] Since that time, the CFPB, the U.S. Treasury, the Arizona Attorney General, Kansas Office of the State Bank Commissioner, and the DFPI itself have issued subsequent regulatory guidance that certain types of EWA are not credit, a loan, or a wage assignment. No regulatory or legislative body has adopted an opposite conclusion.

A high-level timeline of EWA regulation is provided below, and a full history (including citations) of EWA regulation is provided in Appendix I.

- **October 2017** – The CFPB exempts EWA from the Small Dollar Lending Rule.
- **February 2019** – The first California legislation on EWA, Senate Bill 472, receives broad support in California, including unanimous passage in the Senate.
- **November 2020** – The CFPB issues an Advisory Opinion indicating certain EWA products are not credit.
- **December 2020** – The CFPB issues an Approval Order to Payactiv (now terminated) clarifying that its EWA product as described in its Sandbox Application is not credit or a loan subject to the Truth in Lending Act.
- **January 2021** – The DFPI enters into MOUs with the most well-known EWA providers including Payactiv,[100] and subsequently issues a proposed rulemaking, PRO 01-21.
- **February 2022** – The DFPI issues a ruling to FlexWage indicating the EWA company is not subject to the CFL.
- **March 2022** – The Treasury Department confirms EWA is not a loan in the FY 2023 Greenbook.
- **July 2022** – The Kansas Office of the State Bank Commissioner issues an Interpretive Opinion that FlexWage's EWA program is not a loan or creating debt for the employee.
- **December 2022** – The Arizona Attorney General issues an Opinion confirming that non-recourse EWA is not a loan.
- **March 2023** – The Treasury Department confirms EWA is not a loan in the FY 2024 Greenbook.
- **March 2023** – The DFPI releases an updated draft of PRO 01-21, the first proposal by any regulator indicating that EWA should be treated as credit.

The DFPI should re-examine these developments and the relevant California law, and revise the Proposal accordingly.

VI. THE PROPOSAL IS FLAWED FOR A NUMBER OF ADDITIONAL REASONS

Above, we identify why regulating EWA as credit or a "wage assignment" is both ill-conceived policy and contrary to the law. Below, we address specific concerns about the Proposal that should be addressed even if the basic framework (including the classification of EWA as a wage assignment and a loan) remains.

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99 Richard Cordray, Prepared Remarks on the Payday Rule Press Call (Oct. 5, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-payday-rule-press-call/.

100 Cal. Dep't of Fin. Prot. and Innovation, Memorandum of Understanding Payactiv, Inc. (2021), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/01/Admin.-Action-Payactiv-Inc.-Memorandum-of-Understanding.pdf.

A. The Proposal Is Premised on a Faulty Data Analysis.

In support of the Proposal, the Department claims that "the APRs for advances from companies that do not accept tips were similar, ranging from between 315% and 344%."[101] According to the Department, "[t]he APRs for companies that accept tips and those that do not are generally similar to the average APRs for licensed payday lenders in California."[102] As shown below, this is plainly false with respect to Payactiv. More broadly, the DFPI's data analysis and the conclusions drawn from it are faulty.

As an initial matter, using an APR to evaluate the cost of no or low-fee EWA transactions is neither accurate nor helpful because, as set forth herein, EWA is not credit or associated with interest, nor does the DFPI compare its stated APRs with comparable CFL loans. DFPI cites no precedent to support the theory that an APR should be applied to a non-credit product.[103]

Moreover, the DFPI's conclusions are demonstrably false. As Payactiv explained to the Department in writing on April 28, 2023, the APR for an average Payactiv transaction during the reported timeframe in 2021 was *approximately one-fourth* of what the Department concluded in its Data Findings for non-tip companies. As such, the Department appears to have (1) incorporated *incomplete data* and (2) used *a flawed methodology* to conclude that APRs for EWA transactions are similar to those of payday loans. Specifically, the Data Findings appear fundamentally flawed and incomplete for the following reasons.

First, the DFPI, even after a specific request in writing, does not explain their methodology for the data analysis. The Data Findings do not clarify whether (a) the Department calculated the APR on each individually reported EWA transaction and averaged those individual APR figures to come up with an average APR figure, or (b) it used each companies' average fee amount, average transaction amount, and average days to repay to come up with an average APR.[104] Both of these methodologies offer important and distinct takeaways for interpretation of the findings. In doing so, the Department failed to provide any statistical support for the methodology it used.

Second, the sample size of companies used in the APR calculations is wholly insufficient to represent an average for the breadth of the EWA industry. For example, the Department used data from *only two providers* in its analysis for "non-tip" companies, and it is not clear which ones. These could be employer-integrated providers, direct-to-consumer providers, or both. There is a wide range of provider types and pricing models, and a sample set of only two companies vastly insufficient to make a sweeping conclusion regarding an "average annual APR" for an entire industry. Nor does the DFPI explain how it weighted the data from these two providers.

Third, the Department used outdated data from 2021 when many Providers, including Payactiv, had different fee structures in place. Notably, Payactiv now provides EWA at no cost and only charges between $1.99 and $2.99 for certain types of expedited delivery. Even if an APR calculation was an appropriate construct for EWA (it is not) and even assuming an expedited

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101 ISOR, *supra* note 6, at 62.

102 *Id*.

103 For example, regulators do not use APR when analyzing bank fees, such as overdraft and ATM fees.

104 It is our understanding that the Department used the methodology in (a). It appears that, in Payactiv's case, that methodology could result in more than double the APR than the figure that would result from a computation using the method described in (b). At the very least the Department should have used both methods and explained its methodology.

delivery fee should be included in such an APR calculation (it should not), the APR for some of the most common Payactiv transactions *is significantly less* than the Department's stated figures. Examples of these illustrative APR rates are seen in the table below.

APR Rate for Common EWA Transactions

Example Transaction Amount	Days to Repay[105]	Optional Fee Amount	APR
Any Amount	11	$0	0%
$500	11	$0	0%
		$1.99	13.2%
		$2.99	19.8%
$400	11	$0	0%
		$1.99	16.5%
		$2.99	24.8%
$300	11	$0	0%
		$1.99	22%
		$2.99	33.1%
$200	11	$0	0%
		$1.99	33%
		$2.99	49.6%
$100	11	$0	0%
		$1.99	66%

[105] Payactiv's average days to repay figure exceeds 11.

Example Transaction Amount	Days to Repay[105]	Optional Fee Amount	APR
		$2.99	99.2%
$75	11	$0	0%
		$1.99	88%
		$2.99	132.2%
$50	11	$0	0%
		$1.99	132.1%
		$2.99	198.4%

Fourth, it appears that the DFPI excluded no-fee transactions from its calculations. Confusingly, the Data Findings (at footnote 13) only states: "Those with zeros or blank number of days to repay were removed for this report." A significant share of users opt for free EWA transactions, and thus these 0% APR transactions should be included in any analysis.

Fifth, the DFPI groups the analysis into two broad categories without explanation: (1) companies that accept tips and (2) companies that do not accept tips. While the use of "tips" raises important consumer protection considerations, grouping data this way fails to appropriately distinguish between two inherently distinct EWA products—those that integrate with the employer's time and attendance payroll systems and those that market directly to consumers and estimate wages. When conducting analyses on these products, third-party experts, including the U.S. Government Accountability Office, have distinguished between EWA providers based on whether the provider offers employer-integrated EWA or direct-to-consumer advances—and not based only on whether they solicit "tips."[106] If the DFPI is interested in using APR comparisons, it should do so by distinguishing between employer-integrated EWA and direct-to-consumer advances, and not by using tips. Employer-integrated EWA and direct-to-consumer advances are distinct products, and thus their data should not be grouped together.

Finally, the DFPI omits critical data from its public findings. Notably, while it publicized the average advanced amounts, the average time to repay, and the average tip amount, it explicitly leaves out the average fee amount. It is disingenuous to omit the flat, low-cost, optional fee that users elect to pay for EWA services. As the free and low-cost nature of EWA is one of its primary benefits for consumers, this information should be included in the Data Findings.

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[106] Including the Financial Health Network, Bipartisan Policy Center, the U.S. Government Accountability Office, and myriad state legislatures.

The DFPI has failed to disclose its statistical methodology and rationale. Payactiv sought clarification in writing and in phone conversations with the Department's staff regarding the data the Department relied on in connection with the Data Findings.[107] In particular, Payactiv asked which method the Department used to calculate APR, whether Payactiv's data was included in the Department's calculations, whether no-fee transactions were considered (and if not, why not), and why the Department limited its calculations to data that is now more than 18 months old despite having newer data in its possession. Despite Payactiv's repeated requests for transparency, the Department did not provide an official response to any of its requests.

The Department should not rely on the faulty APR it calculated to justify the Proposal or otherwise cite it as a basis for promoting the Proposal.

B. The Proposal Fails to Comply with the Government Code.

All DFPI rulemakings must comply with the California Administrative Procedure Act, which is set forth in the Government Code ("APA").[108] Here, DFPI has failed to comply with key provisions and, if that failure is not corrected, would be fatal to this rulemaking. Once corrected, we posit that the DFPI's conclusions about the Proposal would no longer be supported.

The APA requires five components be included all ISORs. The DFPI has failed to sufficiently include three of them in its PRO 01-21 rulemaking materials: (1) an economic impact assessment;[109] (2) an initial determination that the action will not have a significant adverse economic impact on business; and (3) a consideration of reasonable alternatives to the Proposal.[110] The goal of the APA is a high level of meaningful public participation in the rulemaking process.[111] Here, the DFPI's failure to support the assertions in the ISOR with facts and evidence has deprived commenters of any meaningful participation in the rulemaking process. This failure should, at the very least, be cause for the DFPI to reconsider its approach and the evidence that supports it. If the DFPI does not, and instead finalizes the Proposal despite these glaring APA violations, a court would likely find that the DFPI has substantially failed to comply with the APA such that the rule would be invalidated.[112]

i The DFPI does not explain why this is not a major rule.

The DFPI assumes without any analysis or explanation that the Proposal would not be a major rule.[113] A major regulation is one that will have an economic impact on California business enterprises and individuals in an amount exceeding $50 million, as estimated by the agency.[114] The DFPI appears to have concluded that the Proposal is not major because the ISOR cites (at 4) the code provisions for the economic impact analysis required for *non-major regulations*: Cal Gov't Code §§ 11346.2(b)(2)(A), 11346.3(b). But the ISOR does not explain how the Department reached that conclusion or contain any calculations about the total amount of economic impact

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107 A copy of Payactiv's letter to the DFPI regarding these requests is provided in Appendix II.
108 Cal. Gov't Code § 11340 et seq.
109 *Id*. § 11346.2(b)(2).
110 *Id*. § 11346.2(b)(4).
111 *Sims v. Dep't of Corr. and Rehab.*, 157 Cal. Rptr. 3d 409, 421 (Cal. Ct. App. 2013).
112 *W. States Petroleum Ass'n v. Bd. of Equalization*, 304 P.3d 188, 204 (Cal. 2013) (citing *Cal. Ass'n of Med. Prods. Suppliers v. Maxwell–Jolly*, 131 Cal. Rptr. 3d 692 (Cal. Ct. App. 2011)).
113 Cal. Gov't Code § 11346.3(b).
114 *Id*. § 11342.358.

imposed by the regulation. As demonstrated herein, the Proposal would have significant, and ongoing, impacts on California businesses and consumers in an amount that is likely to exceed $50 million. The DFPI should revise the Proposal to address these burdens and explain why, or why not, the Proposal is not a major rule.

ii <u>The economic impact assessment, determination of significant economic impact on business, and consideration of reasonable alternatives are all insufficient to satisfy the APA.</u>

a. *The APA requires an economic impact assessment that adequately identifies and addresses the Proposal's significant potential impact; however, none is provided.*

The APA also requires an agency's ISOR to include an economic impact assessment.[115] Even if the Proposal is not "major," the economic impact assessment must assess whether and to what extent the proposed regulation will impact:

- The creation or elimination of jobs within the state.
- The creation of new businesses or the elimination of existing businesses within the state.
- The expansion of businesses currently doing business within the state.
- The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

In determining whether an agency has properly assessed economic impact to businesses from a proposed regulation, California courts have held that "mere speculative belief is not sufficient to support an agency declaration of its initial determination about economic impact."[116] Instead, the economic impact requirements of the APA "plainly call for an evaluation based on facts."[117]

The requirement to include an initial economic impact assessment is intended to "ensure that such information is provided early in the rulemaking process and then refined based on public comment and further consideration at the later stages."[118] Although courts review an agency's economic impact analysis under a deferential standard, they will invalidate rulemakings under the APA where, as here, the agency failed to substantially comply with the requirements such that the public had no meaningful ability to comment on the analysis.

For example, in *Western States Petroleum*, the Court of Appeals invalidated a regulation because of the agency's "opaque calculation unsupported by any facts or other evidence explaining its validity as a reasonable estimate."[119] In reaching that conclusion, the Court noted that while "affected parties may be well-positioned to elucidate the economic impact of a proposed regulation, the APA does not shift the analytical task entirely onto affected parties. Instead, the statutes require the agency to meet an initial, inclusive, non-exhaustive evidentiary burden."[120]

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115 *Id*. § 11366.3(b).
116 *W. States Petroleum Ass'n*, 304 P.3d at 204 (citing *Cal. Ass'n of Med. Prods. Suppliers v. Maxwell–Jolly*, 131 Cal. Rptr. 3d 692 (Cal. Ct. App. 2011)).
117 *Id*. at 204 (citing *Cal. Ass'n of Med. Prods. Suppliers*, 131 Cal. Rptr. 3d at 709).
118 *Id*. at 205.
119 *Id*. at 206.
120 *Id*. at 207.

Notwithstanding this guidance, here, the ISOR concludes, without supporting evidence or data, that the Proposal's requirements will not affect job creation or elimination, the creation of new businesses or elimination of existing businesses, or the expansion of businesses currently doing business.[121] The ISOR addresses all of these impacts in one paragraph, for a total of three conclusory paragraphs asserting that the registration and reporting requirements would have no impact on businesses in the state. *DFPI cites no data or analyses in these conclusions.*[122]

The ISOR is similarly lacking with respect to the benefits of the regulation to the health and welfare of California residents, stating only that "[t]he DFPI anticipates that the CFL regulations will benefit consumers and protect them from unfair practices by clarifying that the CFL's protections apply to advances secured by a consumer's wages. The regulations will also benefit consumers and businesses by clarifying the law with respect to subscription fees, tips, single-payment collections, repayment plans, and education forbearances."[123] However, the DFPI never identifies a single "unfair practice" in its ISOR.[124]

Accordingly, the ISOR has also failed to satisfy the APA's requirement to make an economic impact assessment using "an evaluation based on facts." As set forth above, the facts result in opposite conclusions.

b. *The APA requires an actual determination of significant economic impact on businesses, but none is provided.*

The APA also requires the DFPI include in the ISOR the "facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business."[125]

Its only attempt to address this requirement is the following conclusory statement that lacks any real evidence or support:

> The DFPI has initially determined that this proposed regulation will not have a significant adverse economic impact on business. In making this determination, the DFPI relied on comment letters from interested parties during preliminary rulemaking activities and past experience with similar requirements under other laws that DFPI administers.[126]

The only thing DFPI does cite in support of that conclusion are comment letters *on the prior proposal*. These letters do not themselves contain the facts, evidence, documents, or testimony

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121 ISOR, *supra* note 6, at 4 ("The Commissioner does not anticipate that these clarifications, taken together, will result in an expansion or reduction of businesses doing business within the state.").

122 The Notice of Proposed Action includes a section titled "Cost Impacts on Representative Private Persons of Business" (p. 7). This section estimates the cost of initial and annual registration for companies covered by the proposed regulation. It is unclear whether or how these cost estimates are related to the ISOR's conclusion that the Proposal will not have a significant economic impact on businesses. To the extent they are related, they are woefully insufficient to support the conclusion in the ISOR because, among other reasons, the ISOR does not even mention the cost estimates in the Notice of Proposed Action.

123 ISOR, *supra* note 6, at 3.

124 The only references to unfair practices in the ISOR concern products other than EWA.

125 Cal. Gov't Code § 11346.2(b)(5)(A).

126 *Id*. § 11346.2(b)(4)(A).

required by the APA. Instead, the comment letters to which the DFPI cites assert, without evidence, that the *previously* proposed requirements "would impose minimal costs on industry" and would be "commensurate with supervision needs."[127] In other words, the DFPI relies on multiple levels of speculation—its own speculative belief that there is no significant adverse economic impact and third-party commenters' uninformed beliefs that no adverse economic impact would result *from the prior proposal.*

Citation to a commenter's "mere speculative belief" is speculation all the same and will not survive judicial review under the APA.[128] Notably, the comment letters that the ISOR relies on to support its conclusion that there is no adverse impact on business are from two consumer advocacy groups (who cite themselves as source material),[129] and not from any businesses that would actually be subject to the regulations or their customers. Unsupported and circular assertions by consumer advocates are hardly the type of "facts, evidence, testimony, or other evidence" on which an agency must rely on in determining an economic impact on business. Accordingly, the ISOR has also failed to satisfy the APA's requirement to make an initial determination that the Proposal will not have a significant adverse impact on business.

c. *The APA requires the DFPI to consider alternatives but the DFPI does not even consider the 2021 Proposal as a reasonable alternative.*

The Proposal is also devoid of alternatives even though the DFPI is required to include and analyze them. Specifically, the APA requires an ISOR to include:

> A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives. Reasonable alternatives to be considered include, but are not limited to, alternatives that are proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.[130]

Here, the ISOR nominally includes a section titled "Consideration of Alternatives" but, again, that section summarizes comments *on DFPI's prior, much narrower, proposal,* rather than considering any meaningful alternatives to the *current* proposal. In introducing that summary of comments, the DFPI explains that stakeholders had requested "various regulations related to the registration

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127 ISOR, *supra* note 6, at 14 n.72.

128 *W. States Petroleum Ass'n*, 304 P.3d at 204 (citing *Cal. Ass'n of Med. Prods Suppliers*, 131 Cal. Rptr. 3d at 708).

129 Letter from Student Borrower Protection Center et al., to Charles Carriere, Senior Couns., Dep't of Fin. Prot. and Innovation, Legal Div. (Dec. 20, 2021), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/12/Joint-Comments-SBPC-CRL-CFC-CR-SDCC-NCLC-Nextgen-CA-YI-12.20.21.pdf; Letter from National Consumer Law Center et al., to Clothilde V. Hewlett, Comm'r, Dep't of Fin. Prot. and Innovation (Dec. 20, 2021), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/12/National-Consumer-Law-Center-12.20.21.pdf.

130 Cal. Gov't Code § 11346.2(b)(4)(A).

requirement proposed" and also requested "changes to some of the [prior] draft regulations,"[131] but these "changes or additions" to the earlier 2021 Proposal were largely minor wordsmithing or technical changes.[132] It is therefore not surprising that the ISOR does not use the word "alternative" to describe them. Nonetheless, it asserts, with minimal explanation, that none of the "changes or additions" suggested in the comments were less burdensome than the regulation being proposed now.[133] Even if such relatively minor changes could be considered "alternatives," they were alternatives to an earlier, much different proposal, not to the one currently being considered. *The DFPI's obligation under the APA is to consider whether there is a less burdensome way to accomplish the purposes of the regulation currently at issue. Considering alternatives on a prior proposal does not meet that standard.*

The failure to consider any alternatives is particularly noticeable given that the Department does not even consider the 2021 Proposal as a reasonable alternative, nor does it address why it abandoned the prior framework in favor of one that is exponentially more burdensome. The ISOR should have explained, but did not, why the 2021 Proposal does not accomplish the DFPI's policy goals, especially given the Department previously commented that the 2021 Proposal "would have "strengthen[ed] its ability to protect California consumers through compliance examinations of registrants and regular reporting."[134]

In addition to considering alternatives generally, the ISOR must include "a description of reasonable alternatives to the regulation that would lessen any adverse impact on small businesses and the agency's reasons for rejecting those alternatives."[135] Here, the ISOR simply restated that requirement with a perfunctory conclusion that "no reasonable alternative considered by the DFPI or that has otherwise been identified and brought to the attention of the DFPI would be as effective and less burdensome, or would lessen any adverse impact on small businesses."[136] It does not address whether any of the companies that would be covered by the proposed regulation are small companies as defined in the APA,[137] nor does it cite any data or evidence about the size of the companies that will be covered. A bald assertion that there are no reasonable alternatives as to small businesses does not meet the DFPI's obligations under the APA.

These deficiencies are made all the more significant given the Proposal would, in fact, adversely impact many California businesses, including both Providers and businesses that offer EWA as an employee benefit as set forth in detail in Section IV.

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131 ISOR, *supra* note 6, at 6.

132 For example, one comment summarized by the DFPI suggested that covered entities be given more than 10 days to comply with a proposed notice requirement. *Id*. at 8. Another comment suggested adding the phrase "if applicable" to a specific provision. *Id*.

133 *Id*.

134 State of Cal. Dep't of Fin. Prot. and Innovation, Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21), *supra* note 2, at 2.

135 Cal. Gov't Code § 11346.2(b)(4)(B).

136 ISOR, *supra* note 6, at 14.

137 Cal. Gov't Code § 11342.610(a).

C. The Proposal Fails to Distinguish Between Employer-integrated EWA Providers and Direct-to-Consumer Advance Providers, Missing an Opportunity to Recognize Vital Consumer Protections.

Employer-integrated EWA providers and direct-to-consumer advance providers function differently and as such should be regulated differently. For example, most employer-integrated providers like, Payactiv, utilize wage and census data, facilitated by their employer-partners, to determine a user's EWA balance. This type of data integration ensures consumers do not access more than they have actually earned. Employer-integrated providers also do not expose employees to overdraft risks because they recoup disbursements through payroll. Direct-to-consumer providers, on the other hand, generally estimate a user's earned wage balance by reviewing prior direct deposit amounts through bank account integrations or by using geolocation technology. In sum, direct-to-consumer advances are a fundamentally different product and pose distinct risks to consumers (e.g., overdraft fees and advances based on *unearned* income). *The Proposal addresses none of these critical consumer protections, and even seems to indicate that no wage verification standard should exist at all.*

Specifically, the Proposal defines "income-based advance" as an advance made to a consumer by a provider and one which "is *based on income* that has accrued to the benefit of the consumer but has not, at the time of the advance, been paid to the consumer."[138]

This definition lends itself to at least three interpretations.

- One interpretation, such as that used by the CFPB, is that an advance "based on income" means an advance based on an employee's time and attendance data (e.g., employer-integrated EWA providers).[139]
- A second interpretation, such as that used by the Arizona Attorney General, is that "based on income" means the provider has reasonably attempted to verify that an employer owes wages to an employee, such as through geolocation or historic pay stub data (e.g., encompassing direct-to-consumer advance providers).[140]
- A third interpretation is that "based on income" may only loosely relate to the method through which the advance is recovered or the date on which the advance is recovered, *i.e.,* through an employee's payroll, or from their bank account on the date on which the consumer receives a direct deposit (e.g., encompassing direct-to-consumer advance providers that do not purport to provide EWA).

Confusingly, the DFPI asserts in the ISOR that the "proposed rule would require the income to *have in fact* accrued to the benefit of the consumer and *not where the provider has 'reasonably' determined* the income that has accrued to the benefit of the consumer."[141] It then states that having a "reasonableness standard" "could operate to *limit* reporting obligations for income-based advance providers whose assessments of consumers' accrued income are less accurate."[142] Thus, as it stands, it is unclear whether advances "based on income" are those that are based on income that "ha[s] in fact accrued to the benefit of the user" as the ISOR says, or whether there is some other standard that a provider must meet before it is considered as having provided an

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138 Proposed Regulations, *supra* note 3, at 6 (providing text for § 1004(g)(1)).
139 Truth in Lending (Regulation Z); Earned Wage Access Programs, *supra* note 25.
140 Earned Wage Access Products, I22-005 Ariz. Op. Att'y Gen., *supra* note 26, at 3-4.
141 ISOR, *supra* note 6, at 21 (emphasis added).
142 *Id*. (emphasis added).

advance that is "based on income that has accrued to the benefit of the consumer."

As a result, the definition of "income-based advance" makes no cognizable distinction between (1) employer-integrated EWA providers that receive time and attendance data from the consumer's employer, and (2) providers that may do little or nothing to verify that a user is entitled to funds from their employer, and therefore often products that more closely resemble traditional credit products. In doing so, the Proposal leaves open ambiguity regarding whether providers like Payactiv (with employer data integrations) would be covered by the Proposal, while cash advance providers that are not integrated (and who recoup funds from a user's bank account on payday but otherwise have no connection to a user's earned wages) would not.

Failing to distinguish between employer-integrated EWA and direct-to-consumer advance products misses a critical opportunity to safeguard essential consumer protections; for example, by ensuring that EWA is truly based on wages that have already been earned and that users are protected against overdrafts (one of the risks EWA is intended to protect against in the first place). As the DFPI stated itself, "Smart regulation should be data-driven and requires a tailored, collaborative approach."[143] Treating these different products the same is neither tailored nor collaborative.

D. The DFPI Should Clarify the Proposed Restriction on Providers' Recourse in Proposed Section 1004(g)(3)(A).

The proposed definition of "income based advance" in Section 1004(g)(3) would require that an income-based advance Provider and its "business partner(s)" have "no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full." The DFPI explains this limitation is "to limit the reporting of income-based advances by CDDTL licensees in their annual reports…."[144] The Department should, at a minimum, clarify the following issues.

First, it is unclear (a) why such a restriction is necessary for registrants as they will not also be reporting on CDDTL loan transactions, and (b) whether this limitation on recourse would also apply to otherwise exempt CFL licensees—*i.e.,* whether the Department intended to create a new category of loans offered by licenses with restricted recourse.[145] As it stands, the exemption for CFL licensees applies "to the extent the licensee offers and provides … income-based advances as defined by Section 1004." It is unclear if this is intended to mean that if a CFL licensee offers an income-based advance, it must be non-recourse.

Second, it is unclear whether the proposed definition would effectively *exclude* income-based advances that *do include recourse*, and if so, why? As it stands, proposed Section 1010(a) states that "no person shall engage in the business of offering or providing subject products to California residents without first registering …" and "subject products" include an "income-based advance" as defined by Section 1004, which by definition only includes those without recourse.

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143 Press Release, Dep't of Fin. Prot. and Innovation, The DFPI Signs MOUs Believed to be Among the Nation's First with Earned Wage Access Companies (Jan. 27, 2021) [hereinafter Press Release, DFPI Signs MOUs], https://dfpi.ca.gov/2021/01/27/the-dfpi-signs-mous-believed-to-be-the-among-the-nations-first-with-earned-wage-access-companies/.

144 ISOR, *supra* note 6, at 21.

145 Proposed Regulations, *supra* note 4, at 9 (referencing text for § 1010(b)(3)).

Third, the extent of the limitation intended by this provision is unclear. The proposed definition limits income-based advances to those where "the provider and the business partner(s) have no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full," which the DFPI interprets as "limited remedies" in the ISOR. However, it neither defines "contractual claim" nor explains what is meant by "limited remedies."[146] The DFPI explains that this provision mirrors the CFPB's 2017 Small Dollar Lending Rule,[147] but that rule includes guidance permitting employers to "obtain[] a one-time authorization to seek repayment…."[148] The DFPI should clarify that the proposed definition does not restrict providers from re-presenting a payroll deduction in a subsequent pay period, for example, which is necessary in certain circumstances, including due to technical and human error.

Finally, proposed Section 1004(g)(3) does not define "business partner[s]" and the ISOR is silent on the term's meaning. The DFPI should also clarify which entities are considered "business partners" subject to this rule.

E. The Proposal Should be Clarified Regarding Providers' Ability to Collect from Employers Pursuant to Proposed Section 1004(g)(3)(B).

Similarly, the Proposal is not clear as to whether the restriction on "debt collection" would be limited to collections from consumers, or if it would also apply to a provider's attempt to collect funds that an employer has failed to remit pursuant to contract. The Proposal would define an income-based advance as one where, "[w]ith respect to the amount advanced to the consumer, the provider and the business partner(s) will not engage in any debt collection activities if the advance is not repaid on the scheduled date."[149] As noted above, most EWA companies do not engage in consumer collections; however, they do retain a contractual right to pursue claims against employers in the rare event an employer fails to perform its contractual obligations to remit payroll deducted funds, for example.[150] The Proposal should be clarified to limit the applicability of the prohibition on debt collection to consumers, as opposed to businesses.

F. Expedited Transfer Fees Should be Expressly Excluded from Proposed Section 1465.

The Proposal's treatment of expedited transfer fees also warrants clarification. Proposed Section 1465 states:

> 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, is a charge under Financial Code section 22200.[151]

The DFPI's stated reasons for this proposed section analyze tips and gratuities exclusively.[152]

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146 ISOR, *supra* note 6, at 21.
147 *Id*. (citing 12 C.F.R. § 1041.3(d)(7)(ii)(B)).
148 12 C.F.R. § 1041.3(d)(7)(ii)(B).
149 Proposed Regulations, *supra* note 4, at 8 (referencing text for § 1004(g)(3)(B)).
150 Similarly, a provider should have the right to pursue such a claim if an employer declares bankruptcy.
151 Proposed Regulations, *supra* note 4, at 42.
152 ISOR, *supra* note 6, at 60-62.

Accordingly, we do not read proposed Section 1465 to include optional and voluntary expedited funds fees in the definition of "charges" under CFL Section 22200. We raise this issue in part because the DFPI proposes to include expedited funds fees in the definition of "charges" under proposed Section 1004(c), but only in order to clarify the reporting requirements under proposed Section 1045 (as opposed to deeming expedited transfer fees subject to Section 22200, and therefore the CFL's rate caps, for example).[153] To minimize confusion, the Department should clarify that expedited transfer fees are not "charges" under Proposed Section 1465. In addition, as it does for certain subscription fees (addressed below), the Department should clarify that expedited transfer fees are subject to Section 22202, subdivision (f), and are authorized under Financial Code section 22154.[154] In the event we are mistaken, and the DFPI intended to characterize expedited funds fees as "charges" for purposes of CFL Section 22200, we urge the DFPI to reconsider for at least three reasons.

First, Payactiv's expedited funds fee is not charged "in connection with []investigating, arranging, negotiating, procuring, guaranteeing, making, servicing, collecting, and enforcing [] a loan" because (a) an EWA transaction is not a loan as set forth above and (b) the legislature clearly intended to permit optional and voluntary fees under CFL Section 22202(f). As the ISOR recognizes, "the CFL expressly excludes certain such costs and fees from the definition of 'charges,'" including "money paid for the sale of goods, services, and insurance."[155] Here, an expedited transfer charge is just that—a charge for a separate service—*i.e*., instant payment delivery through private payment rails[156] or for delivery of cash to a Walmart. Unlike "tips" or "gratuities," such expedited delivery services have an associated, underlying cost to the provider.[157]

Second, classifying expedited transfer fees as "charges" under proposed Section 1465 would not solve for the DFPI's stated concerns about rate caps, especially given that the CFL permits much higher fees than EWA companies charge today (see Part III.A noting that a CFL lender can charge fees with an APR almost four times higher than what Payactiv charges).

Third, the DFPI should not adopt a rule forbidding a provider from utilizing the statutory exemption outlined in Section 22202(f),[158] especially without analysis. The DFPI should instead pursue registration and data collection and defer to the Legislature for any regulation around rate caps.

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153 *Id*. at 20.

154 Proposed Regulations, *supra* note 4, at 40-42 (providing text for § 1464).

155 ISOR, *supra* note 6, at 61.

156 Payactiv utilizes Visa Direct.

157 Expedited delivery fees are also commonly required for sending a check via overnight delivery or wiring money into a customer's account.

158 "'Charges' do not include any of the following . . . [m]oneys paid to, and commissions and benefits received by, a licensee for the sale of goods, services, or insurance, whether or not the sale is in connection with a loan, that the buyer by a separately signed authorization acknowledges is optional, if sale of the goods, services, or insurance has been authorized pursuant to Section 22154." Cal. Fin. Code § 22202(f).

G. Proposed Section 1464 and its $12 Subscription Fee Cap Should be Reconsidered and Clarified.

The DFPI proposes to exclude from the CFL's definition of "charge" certain subscription fees that do not exceed $12.[159] The proposed exclusion would permit a licensee to charge a fee exceeding the statutory limits described in Section 22202 if it meets the proposed limitations—including that the fee allows access to other services, that fees charged for an income-based advance are deducted from the subscription fee, that the consumer can cancel at any time, and that the fee is neither a prerequisite to access an income-based advance nor alters its terms.[160] This proposed exception raises several concerns indicative of larger issues present in the Proposal.

First, the DFPI does not explain why or how it determined that $12 was the right number for a permissible subscription fee, nor does the DFPI indicate whether this figure would adjust with inflation or otherwise. Nothing in the ISOR or in the DFPI's data findings provides a basis for the $12 figure either. Without information as to why DFPI believes $12 is the proper limit or whether the DFPI intends to adjust this number over time, it appears arbitrary and is difficult to provide meaningful comment, particularly regarding whether this proposal would adversely affect Payactiv's customers or products in the long term. By not articulating why a $12 subscription fee achieves the purposes of the statute, providers subject to the rule are left to guess why a $12 subscription fee would warrant a safe harbor, while a $13 subscription fee would not.

Second, the structure of the proposed exception operates as a *de facto* rate cap because fees over the proposed cap would be subject to the CFL—and may therefore be prohibited—while fees below the cap are not. The Financial Code prohibits this.[161] While the Department asserts this cap is necessary "to foster competition" and to provide regulatory certainty,[162] these laudable goals do not permit overriding the CCFPL's prohibition on rate caps. The Department's statement that a fee in excess of $12 may still be permissible pursuant to Section 22202(f) does not change the practical reality that the exception still operates as a *de facto* cap.

Third, it is not clear how the exemption would actually work in practice. As proposed, the fee must allow access to other products and services (§ 1464(a)(2)) and cannot affect the terms of the income-based advance (§ 1464(a)(3)). To the extent the purpose is to allow providers to sell a subscription for income-based advance services, it is not clear why a consumer would purchase a subscription if the provider must offer an income advance under the same terms without the subscription. And if the purpose is to allow providers to sell other goods and services for a monthly subscription fee, the DFPI identifies nothing in the record to support such a fee. Put simply, it is not clear what problem proposed Section 1464 is intended to solve or actually solves, other than allowing providers to charge $144 per year for other goods and services. Given these questions, proposed Section 1464 would not provide the anticipated certainty nor would it foster competition.

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159 Proposed Regulations, *supra* note 4, at 40-42 (providing text of § 1464).

160 *Id.*

161 Cal. Fin. Code § 90009(f)(3) ("Nothing in this paragraph shall be construed to give the department authority to establish a usury limit applicable to an extension of credit.").

162 ISOR, *supra* note 6, at 58 (citations omitted).

H. The Exclusion of Obligors "who [make] advance[s] from their own funds" is Unnecessarily Limiting.

The Proposal would exclude payments that are made from an employer's "own funds."[163] This echoes a 2022 DFPI opinion letter saying the CFL does not apply to a particular provider's EWA product because (1) the employer owned the funds being advanced and (2) the costs were low and did not suggest an attempt to evade the CFL. Curiously, the DFPI no longer relies on "cost" as a rationale for the "employer-funded exclusion" in the Proposal.

i The DFPI's "temporary use" distinction is arbitrary.

The Department's rationale for the employer-funded exclusion is that an employer who pays the consumer early using its own funds is not necessarily providing "money for 'temporary use.'"[164] This creates an unnecessary and artificial distinction between employer-*integrated* programs and employer-*funded* programs. Specifically, the DFPI does not explain why funds advanced from a *third party's bank account* (including on the employer's behalf) are any more "temporary" than funds advanced from the *employer's bank account*. In both cases, the employee receives funds prior to their scheduled payday. In both cases, the employer deducts the amount of the advance from the employee's paycheck. In both cases, the employee has no legal obligation to repay the funds. The mere fact that the employer then reimburses a third party (the provider) does not make the disbursed funds more for "temporary use" as compared to a situation without such reimbursement. The ISOR goes on to indicate that "regulation under the CFL may not be appropriate due to the employer's preexisting obligation to pay the employee based upon services rendered," but it is not clear how the employer's preexisting obligation to pay an employee has any bearing on which entity—the provider or the employer—funds the advance.

ii The DFPI's exception is also arbitrary because it abandons "cost" as a factor in evaluating CFL coverage, a determining factor in its 2022 opinion letter.

In its 2022 EWA opinion letter, the DFPI said that the subject provider's "cost also counsels against application of the CFL" to that EWA program.[165] A year later, the DFPI curiously omitted this reason from a rule that would apply to other EWA programs. Providers covered by the Proposal, such as Payactiv, charge the same or lower fees than the provider in the 2021 order. According to that order, the provider charged a maximum of $3.50 or $5.00 per transaction (depending on an employee's pay cycle). These fees are higher than Payactiv's maximum $2.99 optional fee. If the DFPI determined "cost … counsels against application" of the CFL for one EWA provider, its failure to apply that same reasoning to other EWA providers for the same or lower price appears arbitrary.

At a minimum, the Department should expand the exemption to employer-integrated EWA programs as more fully set forth below.

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163 Proposed Regulations, *supra* note 4, at 38 (providing text for § 1461).

164 ISOR, *supra* note 6, at 54.

165 E-mail from Clothilde V. Hewlett, Comm'r, Dep't of Fin. Prot. and Innovation, to Carl Morris, FlexWage Solutions (Feb. 11, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf.

VII. ALTERNATIVES AND RECOMMENDATIONS FOR THE DFPI

A. The DFPI Should Consider at Least Three Alternatives that Would Accomplish its Goals with less Burden on Consumers and Providers.

The DFPI cites two main goals underlying the portions of the Proposal directed at providers of income-based advances: "oversight" and consumer protection.[166] The ISOR concludes: "No reasonable alternative considered by the DFPI or that has otherwise been identified and brought to the attention of the DFPI would be as effective and less burdensome, or would lessen any adverse impact on small businesses."[167] We respectfully disagree, and outline three alternatives that would more effectively accomplish its stated goals.

i Alternative #1: Adopt the framework provided in the 2021 Proposal.

When the DFPI started this rulemaking in 2021, its stated goal was "to strengthen its ability to protect California consumers through compliance examinations of registrants and regular reporting."[168] The DFPI noted that this would allow it to "better detect risks to California consumers and understand emerging markets for consumer financial products and services."[169] The 2021 Proposal imposed no overly onerous regulations on EWA providers, and did not mention the CFL, lending, or wage assignments.

It also would have accomplished both oversight and consumer protection through registration and detailed annual reporting. Specifically, the application requirements in the DFPI's 2021 Proposal would have allowed the DFPI to better understand and oversee providers' product configuration, user interface and enrollment procedures, fee schedules, and settlement or repayment processes. Likewise, the proposed annual reporting mechanism, which built off of the Department's MOUs with providers, would have provided the DFPI with key usage and fee metrics, including: (i) the number of consumers utilizing a provider's EWA services, (ii) the total dollar amount and number of transactions processed, (iii) the length of time between the transaction and the date of settlement or repayment, (iv) the number of transactions for which settlement or repayment fails in full or in part, and (v) detailed information regarding fees, charges, and income received.[170]

This is sufficient to accomplish the Department's stated goals. Not only would it have provided strong oversight over all providers, it would have allowed the Department to ensure consumers were not being taken advantage of by unscrupulous parties through confusing enrollment processes, unfair repayment mechanisms, or deceptive fees.

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166 ISOR, *supra* note 6, at 53 ("The purpose of this regulation is to provide further clarity on the meaning of 'loan' under the CFL, and to ensure that all consumers receive the benefit of statutory protections created by the Legislature when they receive cash advances secured by their Earnings. This regulation is necessary so that providers of cash advances secured by wages understand that they must operate under the DFPI's oversight and comply with the CFL rate protections the Legislature has enacted.").

167 *Id*. at 14.

168 State of Cal. Dep't of Fin. Prot. and Innovation, Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21), *supra* note 2, at 2.

169 *Id.*

170 *Id*.

In its December 2021 comment letter on the 2021 Proposal, Payactiv explained that it:

> "[V]iews the Proposal as a positive development for California consumers and a measured approach at balancing consumer protection and DFPI oversight without stifling innovation. Importantly, the Proposal appears to take into consideration the fact that dozens of companies now offer EWA and pay-advance programs, each with unique business models, wage verification mechanisms, fee structures, and settlement processes. In sum, Payactiv supports the Proposal because it stands to benefit California workers, and provides a responsible framework for allowing them to access their earned, unpaid wages without having to resort to predatory, high-cost liquidity products that can exacerbate—as opposed to alleviate—their financial stress."[171]

As noted above, the DFPI does not explain why the 2021 Proposal would no longer be adequate to accomplish its stated goals or how a broader substantive attempt to regulate non-loan products under a lending regime could accomplish them, especially as regulating EWA as a credit product *would in fact reduce or eliminate consumer protections already present in most EWA products*. In short, contrary to the ISOR's conclusion, the 2021 Proposal would have been "as effective and less burdensome" and would have "lessen[ed] any adverse impact on small businesses."

To the extent the Department believes compliance with the CFL's rate caps is necessary to ensure consumer protections, it has not established that providers charge fees for EWA services that materially exceed those rate caps. Even Payactiv's highest fee of $2.99 for expedited delivery of funds on an average transaction of approximately $90, for example, is far less than the CFL's 5% origination fee cap, not to mention interest charges or late fees that CFL lenders can charge. The DFPI does not explain why imposing those caps on providers would necessarily result in consumers paying lower fees.

ii Alternative #2: Request a bill from the Legislature that creates comprehensive consumer protections.

The DFPI could utilize data from registered providers and recommend legislation that creates important consumer protections for consumers that are not outlined in its draft Proposal. Pending legislation in Nevada, Vermont, Texas[172], and Wisconsin provides a model framework for California to adopt. These include the following requirements:

- A free or "no cost" option offered to all EWA users.
- High-standard requirements for verifying earned wages.
- Codifying EWA as a non-recourse product with no impact on credit reports, no underwriting, no installment fees, no interest, and no collection activity.
- Strong fee and tip disclosures, including that a tip may be zero and that a tip is voluntary.
- Reimbursement of any overdraft fees caused by attempting to debit on the wrong date or incorrect amount.

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171 E-mail from Safwan Shah et al., Payactiv Co-founder, to Clothilde V. Hewlett, Commissioner, Dep't of Fin. Prot. & Innovation (Dec. 20, 2021), https://dfpi.ca.gov/wpcontent/uploads/sites/337/2021/12/Payactiv-12.19.21.pdf.

172 A bill that is moving forward in the Texas Legislature during the 2023 Legislative Session is included in Appendix III.

Such legislation would be highly effective in meeting the DFPI's stated goals of oversight and consumer protection and would involve far fewer negative consequences and negative impacts than the Proposal.

iii Alternative #3: Expand or create exemptions for employer-integrated products, not just employer-funded products.

As set forth above in Section VI.H, the Department's rationale for exempting employer-funded EWA models applies equally to employer-integrated EWA providers. If an EWA payment satisfies part of an existing financial obligation from the employer to the employee, it should not make a material difference whether the funds come from the employer's bank account or from the account of a third-party contractor. It certainly would not change how the consumer uses or experiences the EWA product. For that reason, and at a minimum, the Department should expand on its proposed exemptions to exempt employer-integrated programs that operate in virtually the same manner as employer-funded programs do.

B. Recommendations for Effective Regulation.

Regardless of how the DFPI approaches alternatives to the Proposal, there are several principles it should follow in adopting regulation that affects the entire EWA industry, which now comprises upwards of fifty different providers and an array of fee structures, wage verification mechanisms, and repayment methods.

i Collaborate with providers and study consumer trends.

As the DFPI has itself stated, "Smart regulation should be data-driven and requires a tailored, collaborative approach."[173] The DFPI also stated in its Data Findings that "further study is needed to understand full impacts to consumers."[174] Additional consumer-level data on out-of-pocket costs, motivations for increased frequency of use, and the consumer demographics in EWA use (*i.e.*, age, race, income, credit score, geography, etc.) would help the DFPI assess trends and risks." This data is likely to come from a longitudinal study of EWA users, and not just from transaction data collection.

The DFPI should have a fulsome understanding of these trends and risks before making any regulation.

ii Distinguish between employer-integrated EWA providers and direct-to-consumer advance providers.

Distinguishing between employer-integrated EWA and direct-to-consumer advances should be a central component to any comprehensive regulatory framework. Failing to make a distinction leaves several consumer protections unaddressed, and equates an employee benefit (that employers want to offer their employees to enhance employee financial wellness) with cash advance apps and loans (that employers are not interested in offering to their employees). The Department should look to state legislatures considering EWA regulation and consumer

[173] Press Release, DFPI Signs MOUs, *supra* note 3.

[174] Cal. Dep't of Fin. Prot. and Innovation, 2021 Earned Wage Access Data Findings 16 (2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf?emrc=08148f.

protections in Nevada, Vermont, Virginia Texas, and Wisconsin, which all make this important distinction.

iii The DFPI should collaborate with external stakeholders, including the Legislature and the Department of Labor.

As set forth in section IV.A.i.c above, the Proposal would likely have a dramatic and negative impact on both providers and consumers as it relates to the California Labor Code. Specifically, any proposal that purports to equate an EWA transaction with a "wage assignment" should be created in collaboration with the Department of Labor, which should clarify that the DFPI's interpretations for purposes of this rulemaking are not applicable to the Labor Code.

iv The DFPI should specify timeframes and effective dates for the Proposal.

The Department did not specify an effective date for the Proposal. Nor did it address how long providers would have to comply with the rule if it is finalized as proposed. As noted above, for a provider like Payactiv, the Proposal would require it to engage in a careful analysis to decide if it still wanted to do business in California as a lender. (As noted above, registration appears to add few benefits over CFL licensure). From there, Payactiv may be required to:

- Complete the CFL application process and compile the necessary supporting materials.
- Develop necessary loan disclosures and loan agreements.
- Work with employers and employees to explain new programs.
- Review existing contractual agreements with employers and vendors.
- Establish compliance with applicable lending laws.
- Develop and implement an underwriting department.
- Establish loan servicing and collections process.

In short, the Proposal would likely require an overhaul to Payactiv's products in California. These changes would significantly impact compliance, legal, product, engineering, finance, marketing, partnerships, and operations teams. Any final proposal should clearly reflect effective dates commensurate with the amount of work involved in ensuring compliance. For reference, we estimate that if the current Proposal were finalized, it could take Payactiv twelve to eighteen months to be ready to comply with the new rule, not including the time the DFPI would need to review a license application. The DFPI should allow providers at least that long to come into compliance with any final rule.

VIII. CONCLUSION

The Proposal is based on a flawed data analysis, disregards governing law, and defies conventional wisdom – all to the detriment of both consumers and businesses in California. The Proposal would also leave countless ambiguities and inconsistencies with other state laws unaddressed and create significant uncertainty for employers and providers. If finalized, the Proposal could cause EWA providers to withdraw from the California market, leaving consumers worse off with high-cost loans and overdrafts as their only alternative, one of the very problems EWA was intended to solve. Respectfully, in the interests of consumers and businesses alike, we implore the DFPI to carefully reconsider the Proposal and work with all stakeholders to formulate a regulation that is tailored to the unique features of earned wage access.

APPENDIX I:
HISTORY OF REGULATION RECOGNIZES EWA AS A NON-CREDIT PRODUCT

- 2007 - The DOC notes the dire need for consumers to have lower cost alternatives to payday loans.

In 2007, one of the Department's predecessors (the Department of Corporations, or "DOC") explained the dire need "for consumers to have lower cost alternatives to payday loan products," especially for consumers whose "credit scores are below a certain level."[175] "Consideration should be given," it said, to whether the purpose of high-cost liquidity products "can be achieved in a less expensive way for consumers, while at the same time allowing companies to profit. The Department is willing to work with the industry, consumer groups, and the legislature to find statutory language that reaches that balance."[176]

- 2012 - EWA is invented to provide consumers with a responsible alternative to payday lending.

A few years later, EWA emerged, answering the DOC's calls by solving the timing problem inherent in traditional payroll structures: the delay between when an employee works and when they are paid for that work.

- October 2017 - The CFPB exempts EWA from the Small Dollar Lending Rule.

In the decade-long history of EWA, regulatory clarity began in 2017 when then CFPB Director Richard Cordray specifically exempted EWA products from the Small Dollar Lending Rule.[177] This was the first public commitment from the Bureau that EWA was not a lending product.

- February to September 2019 - The first California legislation on EWA, Senate Bill 472, receives broad support in California.

In 2019, Payactiv sponsored California Senate Bill 472 that would have created a regulatory framework for EWA service providers.[178] The bill received wide support, including unanimous passage in the Senate 35-0. The bill imposed consumer protection requirements for EWA and oversight of EWA providers. It would have also recognized that EWA is *not* credit.[179] The bill's scope ballooned into other types of products, proving to be unwieldy and unworkable, and it ultimately did not pass.

- November to December 2020 - The CCFPL is enacted, and the CFPB issues an Advisory Opinion and Approval Order indicating certain EWA products are not credit.

In September 2020, Governor Gavin Newsom signed into law the California Consumer Financial Protection Law ("CCFPL"), which gave the newly-renamed DFPI broad authority over an array of

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175 Cal. Dep't of Corps., California Deferred Deposit Transaction Law 42 (2007), https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/02//CDDTL07_Report.pdf.

176 *Id.*

177 Richard Cordray, Prepared Remarks on the Payday Rule Press Call (Oct. 5, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-payday-rule-press-call/.

178 S.472, 2019 Leg. (Cal. 2019), https://abnk.assembly.ca.gov/sites/abnk.assembly.ca.gov/files/201920200SB472_Assembly%20Banking%20And%20Finance.pdf.

179 Dan Quan, *BankThink Don't sideline earned income access*, American Banker (June 3, 2019, 10:00 AM), https://www.americanbanker.com/opinion/dont-sideline-earned-income-access.

financial technology products and companies.

In November and December 2020, the CFPB issued an Advisory Opinion on EWA[180] and a subsequent Approval Order specific to Payactiv.[181] The CFPB's Advisory Opinion clarified that "the accrued cash value of an employee's earned but unpaid wages is the employee's own money. It further states that an employee is "in effect, only using the [employee's] own money" when she accesses earned wages through a Covered EWA Program, and is not incurring debt or deferring its payment."[182] The CFPB's Approval Order to Payactiv similarly stated: "Payactiv EWA Transactions do not provide employees with 'the right to defer payment of debt or to incur debt and defer its payment' because the Payactiv EWA Program does not implicate a 'debt.'" Rather, "the Payactiv EWA Program facilitates employees' access to wages they have already earned, and to which they are already entitled, and thus functionally operates like an employer that pays its employees earlier than the scheduled payday."[183] The Approval Order and Advisory Opinion both confirm that Payactiv's EWA program is neither credit nor a loan. The Approval Order was terminated in June of 2022.[184]

- <u>January 2021 - The DFPI enters into MOUs with the most well-known EWA providers, and subsequently issues a proposed rulemaking, PRO 01-21.</u>

In January 2021, through its new authority under the CCFPL, the Department entered into Memorandums of Understanding ("MOUs") with a core group of EWA providers, including Payactiv. The press release stated that "smart regulation should be data-driven and requires a tailored, collaborative approach."[185] The MOUs require these EWA providers to, among other things, provide quarterly data to the Department and "follow industry best practices."[186] Accordingly, Payactiv and other providers have provided several years of data to the Department.

Building off of the MOUs, the Department issued proposed rulemaking PRO 01-21 in November 2021. According to the Department, this proposed rulemaking would have "strengthen[ed] its ability to protect California consumers through compliance examinations of registrants and regular reporting" (2021 Proposal).[187] Notably absent from the 2021 Proposal was any suggestion that EWA providers were, or should be subject to the California Financing Law or that the provision of EWA constituted a "sale or assignment of wages and a loan."

- <u>February 2022 - The DFPI issues ruling to FlexWage indicating the company is not subject to the CFL.</u>

In February of 2022, the Department ruled that one particular EWA provider, FlexWage, was not subject to the CFL for two main reasons: "(1) employers, not [the provider], provide EWA funds

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180 Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79,404 (Dec. 10. 2020) (to be codified at 12 C.F.R. pt. 1026).

181 Payactiv Approval Order (Dec. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf.

182 Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. at 79,407.

183 Payactiv Approval Order, *supra* note 180, at 5.

184 Order to Terminate Sandbox Approval Order (June 30, 2022), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_termination-order_2022-06.pdf.

185 Press Release, DFPI Signs MOUs, *supra* note 3.

186 *Id.*

187 State of Cal. Dep't of Fin. Prot. and Innovation, Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21), *supra* note 2, at 2.

that do not exceed what they already owe recipients; and (2) the fees charged do not suggest that the product evades California's lending laws."[188] Critical to the Department's conclusion was the fact that "the payment that [the provider] facilitates simply satisfies part of an existing financial obligation from the employer," which is significant because "it does not appear that the employer is providing the recipient with money 'for temporary use.'"[189]

- March 2022 – The Treasury Department confirms EWA is not a loan in the FY 2023 and FY 2024 Greenbooks.

In March 2022, the Treasury Department released its annual Greenbook, which provides revenue analysis of the federal government's revenue proposals. As a part of this, Treasury clarified the tax treatment of on-demand pay arrangements (also known as EWA) and that on-demand pay is not a loan.

Further, the proposal would amend sections 3102, 3111, and 3301 of the Code to clarify that **on-demand pay arrangements are not loans.**[190]

This same language clarifying EWA is not a loan was also included in the FY 2024 Greenbook that was released in March 2023.[191]

- July 2022 - The Kansas Office of the State Bank Commissioner issues an Interpretive Opinion that FlexWage's EWA program is not a loan or creating debt for the employee.

At the request of FlexWage Solutions LLC, the Kansas Office of the State Bank Commissioner ("OSBC") staff issued an Interpretive Opinion in relation to the Kansas Uniform Consumer Credit Code ("UCCC"). The OSBC determined the EWA services described do not require a supervised loan license.[192]

- December 2022 - Arizona Attorney General issues an Opinion confirming that non-recourse EWA is not a loan.

In December 2022, Arizona's Attorney General issued an Opinion confirming that EWA is not a "consumer loan" for two reasons:

First, the Opinion states EWA represents a payment of wages already earned by the employee and does not allow recourse against the employee in the event the EWA provider is unable to recoup the disbursed funds.

Second, the Opinion states an EWA product does not fit the state's definition of a "consumer loan"

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188 E-mail from Clothilde V. Hewlett, Comm'r, Dep't of Fin. Prot. and Innovation, to Carl Morris, FlexWage Solutions (Feb. 11, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf.

189 *Id.*

190 Dep't of the Treasury, General Explanations of the Administration's Fiscal Year 2023 Revenue Proposals 107 (2022), https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf.

191 Dep't of the Treasury, General Explanations of the Administration's Fiscal Year 2024 Revenue Proposals (2023), https://home.treasury.gov/system/files/131/General-Explanations-FY2024.pdf.

192 Letter from Dana Branam, Dir. of Licensing, Consumer and Mortgage Lending Div., Kan. Off. of the State Bank Comm'r, to Carl Morris, FlexWage Solutions LLC (July 7, 2022), https://flexwage.com/wp-content/uploads/2022/12/FlexWage-Solutions-Kansas-OSBC-Opinion-Letter-070722.pdf.

so long as the provider does not impose a finance charge. The Opinion indicates that "a fee for an expedited transfer of an EWA payment" or "interchange revenue from money spent using a payment card" do not constitute finance charges under Arizona law.

The Opinion was the first public opinion on EWA by an attorney general from any state, and followed guidance from the CFPB and other state regulators who have come to similar conclusions that EWA is not a loan so long as the program meets a specific set of criteria.

- March 2023 - The DFPI releases updated draft of PRO 01-21, the first proposal by any regulator indicating that EWA should be treated as credit.

In March of 2023, the Department released its updated draft of the Proposal along with a Statement of Reasons, which in turn relies on a "2021 Earned Wage Access Data Findings" Report ("Report") that outlines a series of broad conclusions purportedly based on data the Department received and combined from various EWA providers. Unfortunately, the Report's data analysis is based on data from only a limited number of companies and appears to have been designed to artificially inflate APR figures as a pretext for the Proposal's treatment of EWA as a lending product.

APPENDIX II:
COPY OF PAYACTIV LETTER TO THE DFPI

akerman

Eric Goldberg

Akerman LLP
The Victor Building
750 9th Street, N.W.
Washington, DC 20001

[redacted]
F: 202.585.6220
[redacted]

April 28, 2023

BY E-MAIL (PAUL.YEE@DFPI.CA.GOV AND PEGGY.FAIRMAN@DFPI.CA.GOV)

Ms. Peggy Fairman
Mr. Paul Yee
Senior Counsels
Department of Financial Protection and Innovation
One Sansome Street, Suite 600
San Francisco, CA 94104-4428

RE: 2021 Earned Wage Access Data Findings (Cited in ISOR for PRO 01-21)

Dear Ms. Fairman and Mr. Yee:

We write to seek clarification regarding the use of data submitted by Payactiv, Inc. ("Payactiv) in the 2021 Earned Wage Access Data Findings report ("Report").[1] The Department of Financial Protection and Innovation ("DFPI" or "Department") issued the Report in connection with PRO 01-21 – CCFPL, CFL, CDDTL, and SLSA – Registration Requirements under the CCFPL ("EWA Rulemaking").

As you know, pursuant to the Memorandum of Understanding ("MOU") between DFPI and Payactiv, Payactiv has provided to DFPI certain confidential data about its business and earned wage access service customers in California. Specifically, we understand that DFPI used at least two quarters of data provided by Payactiv in connection with its analyses in the Report.[2] Based on this data and data submitted by other companies, the Report sets forth various data points, including that "[t]he average annual APR was 334% for tip companies and 331% for the non-tip companies."[3]

Payactiv has significant concerns about using APR, a measure of credit costs, for a non-credit product such as earned wage access. Further, as we have discussed via email and over the phone, we have been unable to recreate the same APR conclusions as DFPI using the information provided

[1] Available at https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf?emrc=08148f.
[2] Report at 5 n.5.
[3] Report at 1.

in the Report. We have attached our analysis to this letter; which shows an "APR" of approximately 88-89 percent (depending on the method), not the 334% listed in the Report.

To be better understand the Report and how DFPI used Payactiv's data, we respectfully request you answer the following questions:

1. The Report notes (at 6) that data from some companies was excluded from the APR portion of the analysis. Does the APR analysis include data from Payactiv? If so, what 2021 Payactiv data did you include? (Payactiv changed how data was reported midway through 2021.)

2. Did DFPI include in its analysis transactions in which the customer paid no fee? (In 2021, customers with a Payactiv card and had direct deposit paid no fee—optional or mandatory—to access their earned wages onto the card. These no-fee-transactions are included in the data provided by Payactiv.)

3. Which companies' data was included in the non-tip pool?

4. Was the start date and end date for data used in 2021 consistent among all companies?

5. The Report states (at 1) DFPI reviewed data from 2021. In mid-2022, Payactiv eliminated its $1 fee for earned wage access transactions. Had this most recent data been included, the results would likely have been different. Why did DFPI not include the 2022 data in its analysis?

6. We are unclear of the method DFPI used to calculate an "average APR." Did DFPI:
   a. Average all of a company's transactions and then compute one APR?
   b. Compute an APR for each transaction and then average those APR figures together?
   c. Whichever of these methods you chose, were the calculations done separately for each company and then averaged together?

As you know, we initially asked for clarification on this data on March 27th. Thereafter, you asked Payactiv to submit its questions in writing. Accordingly, we submitted these questions to you via email on April 21st and subsequently discussed them over the phone with Mr. Yee on April 26th. During our call, it was unclear whether the Department would agree to provide any substantive response. We reiterate that the large discrepancy between the Department's calculations and our own is highly concerning.

We expect that the Department will be forthcoming in providing the requested information so we can determine how the Department performed its analyses and better understand DFPI's reasoning in connection with the EWA Rulemaking. In order for Payactiv to have time to incorporate this understanding in its comment on the EWA Rulemaking (currently due on May 17, 2023), we respectfully request a response no later than May 10, 2023.

Thank you for considering this request. Please contact me with any questions.

Regards,

[redacted]

Eric Goldberg

Enclosure

cc:
Ijaz Anwar, Chief Operating Officer, Payactiv, Inc.
Aaron Marienthal, SVP, General Counsel, Payactiv, Inc.

APPENDIX III:
PROPOSED EARNED WAGE ACCESS LEGISLATION IN TEXAS

The draft of House Bill No. 3827 is provided below and is also available online at the Texas Legislature at the following URL address:

https://capitol.texas.gov/Search/DocViewer.aspx?ID=88RHB038273B&QueryText=%22HB+3827%22&DocType=B

H.B. No. 3827

By: Lambert

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of earned wage access services; requiring an occupational license; providing an administrative penalty; imposing fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 14.107, Finance Code, is amended to read as follows:

Sec. 14.107. FEES. (a) The finance commission shall establish reasonable and necessary fees for carrying out the commissioner's powers and duties under this chapter, Title 4, Chapter 393 with respect to a credit access business, and Chapters 371, 392, [~~and~~] 394, and 398 and under Chapters 51, 302, 601, and 621, Business & Commerce Code.

(b) The finance commission by rule shall set the fees for

licensing and examination, as applicable, under Chapter 393 with respect to a credit access business or Chapter 342, 347, 348, 351, 353, [~~or~~] 371, or 398 at amounts or rates necessary to recover the costs of administering those chapters. The rules may provide that the amount of a fee charged to a license holder is based on the volume of the license holder's regulated business and other key factors. The commissioner may provide for collection of a single fee for the term of the license from a person licensed under Subchapter G of Chapter 393 or Chapter 342, 347, 348, 351, or 371. The fee must include amounts due for both licensing and examination.

SECTION 2. Section 14.112(a), Finance Code, is amended to read as follows:

(a) The finance commission by rule shall prescribe the licensing or registration period for licenses and registrations issued under Chapters 342, 345, 347, 348, 351, 352, 353, 371, 393, [~~and~~] 394, and 398 of this code and Chapter 1956, Occupations Code, not to exceed two years.

SECTION 3. Section 14.201, Finance Code, is amended to read

as follows:

Sec. 14.201. INVESTIGATION AND ENFORCEMENT AUTHORITY.

Investigative and enforcement authority under this subchapter

applies only to:

(1) this chapter;

(2) Subtitles B and C, Title 4;

(3) Chapter 393 with respect to a credit access

business;

(4) Chapter 394;

(5) Chapter 398; and

(6) [~~(5)~~] Subchapter B, Chapter 1956, Occupations

Code.

SECTION 4. Sections 14.251(a) and (b), Finance Code, are

amended to read as follows:

(a) The commissioner may assess an administrative penalty

against a person who knowingly and wilfully violates or causes a

violation of this chapter, Chapter 394, Chapter 398, or Subtitle B,

Title 4, or a rule adopted under this chapter, Chapter 394, Chapter

398, or Subtitle B, Title 4.

(b) The commissioner may order the following businesses or other persons to pay restitution to an identifiable person:

(1) a person who violates or causes a violation of this chapter, Chapter 394, or Subtitle B, Title 4, or a rule adopted under this chapter, Chapter 394, or Subtitle B, Title 4;

(2) a credit access business who violates or causes a violation of Chapter 393 or a rule adopted under Chapter 393;

(3) an earned wage access services provider who violates or causes a violation of Chapter 398 or a rule adopted under Chapter 398; or

(4) [~~(3)~~] a person who violates or causes a violation of Subchapter B, Chapter 1956, Occupations Code, or a rule adopted under that subchapter.

SECTION 5. Title 5, Finance Code, is amended by adding Chapter 398 to read as follows:

CHAPTER 398. EARNED WAGE ACCESS SERVICES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 398.001. DEFINITIONS. In this chapter:

(1) "Commissioner" means the consumer credit

commissioner.

(2) "Consumer" means an individual who resides in this state.

(3) "Consumer-directed wage access services" means offering or providing services directly to a consumer based on the consumer's earned but unpaid income.

(4) "Earned but unpaid income" means salary, wages, compensation, or income that:

(A) a consumer represents, and a provider reasonably determines, has been earned or has accrued to the benefit of the consumer in exchange for the consumer's provision of services to an employer or on the employer's behalf; and

(B) has not, at the time of the payment of proceeds, been paid to the consumer by the employer.

(5) "Earned wage access services" means the business of providing:

(A) consumer-directed wage access services;

(B) employer-integrated wage access services; or

(C) both consumer-directed wage access services

and employer-integrated wage access services.

(6) "Earned wage access services provider" or "provider" means a person who is in the business of offering and providing earned wage access services to consumers.

(7) "Employer" means a person who employs a consumer or a person who is contractually obligated to pay a consumer earned but unpaid income on an hourly, project-based, piecework, or other basis, in exchange for the consumer's provision of services to the employer or on the employer's behalf, including to a consumer who is acting as an independent contractor with respect to the employer. The term does not include a customer of the employer or a person whose obligation to pay salary, wages, compensation, or other income to a consumer is not based on the consumer's provision of services for or on behalf of that person.

(8) "Employer-integrated wage access services" means delivering to consumers access to earned but unpaid income that is based on employment, income, and attendance data obtained directly or indirectly from an employer.

(9) "Fee" includes an amount charged by a provider for

expedited delivery or other delivery of proceeds to a consumer and for a subscription or membership fee charged by a provider for a bona fide group of services that includes earned wage access services. The term does not include a voluntary tip, gratuity, or donation paid to the provider.

(10) "Outstanding proceeds" means proceeds remitted to a consumer by a provider that have not been repaid to that provider.

(11) "Person" means a corporation, partnership, cooperative, association, or other business entity.

(12) "Proceeds" means a payment to a consumer by a provider that is based on earned but unpaid income.

Sec. 398.002. APPLICABILITY OF AND CONFLICT WITH OTHER LAW.

(a) A person licensed under this chapter is not subject to the provisions of Chapter 151 or Title 4 of this code with respect to earned wage access services offered or provided by the person.

(b) If there is a conflict between a provision of this chapter and any other provision of this title, the provision of this chapter controls.

Sec. 398.003. WAIVER VOID. A waiver of a provision of this chapter by a consumer is void.

SUBCHAPTER B. LICENSE REQUIRED; APPLICATION FOR AND ISSUANCE OF LICENSE

Sec. 398.051. LICENSE REQUIRED. (a) Except as provided by Subsection (c), a person must hold a license under this chapter to engage in the business of offering or providing earned wage access services in this state.

(b) A person may not use any device, subterfuge, or pretense to evade the application of this section.

(c) The following persons are not required to obtain a license under Subsection (a):

(1) a bank, credit union, savings bank, or savings and loan association organized under the laws of the United States or under the laws of the financial institution's state of domicile; or

(2) an employer that offers a portion of salary, wages, or compensation directly to its employees or independent contractors before the normally scheduled pay date.

Sec. 398.052. APPLICATION REQUIREMENTS; FEES. (a) The

application for a license under this chapter must:

(1) be under oath;

(2) give the approximate location from which the business is to be conducted or state that the business will be conducted entirely online;

(3) identify the business's principal parties in interest; and

(4) contain other relevant information that the commissioner requires.

(b) On the filing of one or more license applications, the applicant shall pay to the commissioner an investigation fee of $200.

(c) On the filing of each license application, the applicant shall pay to the commissioner a license fee in an amount determined as provided by Section 14.107.

Sec. 398.053. BOND. (a) If the commissioner requires, an applicant for a license under this chapter shall file with the application a bond that is:

(1) in the amount of $10,000, regardless of the number

of license applications filed by the applicant;

(2) satisfactory to the commissioner; and

(3) issued by a surety company qualified to do

business as a surety in this state.

(b) The bond must be in favor of this state for the use of

this state and the use of a person who has a cause of action under

this chapter against the license holder.

(c) The bond must be conditioned on:

(1) the license holder's faithful performance under

this chapter and rules adopted under this chapter; and

(2) the payment of all amounts that become due to this

state or another person under this chapter during the period for

which the bond is given.

(d) The aggregate liability of a surety to all persons

damaged by the license holder's violation of this chapter may not

exceed the amount of the bond.

Sec. 398.054. INVESTIGATION OF APPLICATION. On the filing

of an application and a bond, if required under Section 398.053, and

on payment of the required fees, the commissioner shall conduct an

investigation to determine whether to issue the license.

Sec. 398.055. APPROVAL OR DENIAL OF APPLICATION; ISSUANCE OF LICENSE. (a) The commissioner shall approve the application and issue to the applicant a license under this chapter if the commissioner finds that:

(1) the financial responsibility, experience, character, and general fitness of the applicant are sufficient to:

(A) command the confidence of the public; and

(B) warrant the belief that the business will be operated lawfully and fairly, within the purposes of this chapter; and

(2) the applicant has net assets of at least $25,000 available for the operation of the business as determined in accordance with Section 398.103.

(b) If the commissioner does not find the eligibility requirements of Subsection (a) are met, the commissioner shall notify the applicant.

(c) If an applicant requests a hearing on the application not later than the 30th day after the date of notification under

Subsection (b), the applicant is entitled to a hearing not later than the 60th day after the date of the request.

(d) The commissioner shall approve or deny the application not later than the 60th day after the date of the filing of a completed application with payment of the required fees or, if a hearing is held, after the date of the completion of the hearing on the application. The commissioner and the applicant may agree to a later date in writing.

Sec. 398.056. DISPOSITION OF FEES ON DENIAL OF APPLICATION. If the commissioner denies the application, the commissioner shall retain the investigation fee and shall return to the applicant the license fee submitted with the application.

Sec. 398.057. LICENSE TERM. A license issued under this chapter is valid for the period prescribed by finance commission rule adopted under Section 14.112.

SUBCHAPTER C. LICENSE

Sec. 398.101. NAME AND PLACE ON LICENSE. (a) A license must state:

(1) the name of the license holder; and

(2) the address of the office from which the business is to be conducted or, if the business is to be conducted entirely online, the address of the license holder's headquarters.

(b) A license holder may not conduct business under this chapter under a name other than the name stated on the license.

(c) A license holder may not conduct business under this chapter at a location other than the address stated on the license, unless the business is to be conducted entirely online.

Sec. 398.102. LICENSE DISPLAY. A license holder shall display a license at the place of business provided on the license or include its license number on the business's Internet website if it conducts business online.

Sec. 398.103. MINIMUM ASSETS FOR LICENSE. A license holder shall maintain for each office for which a license is held net assets of at least $25,000 that are used or readily available for use in conducting the business of that office. A license holder that operates entirely online shall maintain net assets of at least $25,000.

Sec. 398.104. LICENSE FEE. Not later than the 30th day

before the date the license expires, a license holder shall pay to the commissioner for each license held a fee in an amount determined as provided by Section 14.107.

Sec. 398.105. EXPIRATION OF LICENSE ON FAILURE TO PAY FEE. If the fee for a license is not paid before the 16th day after the date on which the written notice of delinquency of payment has been given to the license holder, the license expires on that day.

Sec. 398.106. GROUNDS FOR REFUSING LICENSE RENEWAL. The commissioner may refuse to renew the license of a person who fails to comply with an order issued by the commissioner to enforce this chapter.

Sec. 398.107. LICENSE SUSPENSION OR REVOCATION. After notice and opportunity for a hearing, the commissioner may suspend or revoke a license if the commissioner finds that:

(1) the license holder failed to pay the license fee, an examination fee, an investigation fee, or another charge imposed by the commissioner under this chapter;

(2) the license holder, knowingly or without the exercise of due care, violated this chapter or a rule adopted or

order issued under this chapter; or

(3) a fact or condition exists that, if it had existed or had been known to exist at the time of the original application for the license, clearly would have justified the commissioner's denial of the application.

Sec. 398.108. CORPORATE CHARTER FORFEITURE. (a) A license holder who violates this chapter is subject to revocation of the holder's license and, if the license holder is a corporation, forfeiture of the corporation's charter.

(b) When the attorney general is notified of a violation of this chapter and revocation of a license, the attorney general shall file suit in a district court in Travis County, if the license holder is a corporation, for forfeiture of the license holder's charter.

Sec. 398.109. LICENSE SUSPENSION OR REVOCATION FILED WITH PUBLIC RECORDS. The decision of the commissioner on the suspension or revocation of a license and the evidence considered by the commissioner in making the decision shall be filed in the public records of the commissioner.

Sec. 398.110. REINSTATEMENT OF SUSPENDED LICENSE; ISSUANCE OF NEW LICENSE AFTER REVOCATION. The commissioner may reinstate a suspended license or issue a new license on application to a person whose license has been revoked if at the time of the reinstatement or issuance no fact or condition exists that clearly would have justified the commissioner's denial of an original application for the license.

Sec. 398.111. SURRENDER OF LICENSE. A license holder may surrender a license issued under this chapter by complying with the commissioner's written instructions relating to the surrender.

Sec. 398.112. EFFECT OF LICENSE SUSPENSION, REVOCATION, OR SURRENDER. (a) The suspension, revocation, or surrender of a license issued under this chapter does not affect the obligation of a contract between the license holder and a consumer entered into before the revocation, suspension, or surrender.

(b) Surrender of a license does not affect the license holder's civil or criminal liability for an act committed before surrender.

Sec. 398.113. MOVING AN OFFICE. (a) A license holder shall

give written notice to the commissioner before the 30th day preceding the date the license holder moves an office from the location provided on the license.

(b) The commissioner shall amend a license holder's license accordingly.

Sec. 398.114. TRANSFER OR ASSIGNMENT OF LICENSE. A license may be transferred or assigned only with the approval of the commissioner.

SUBCHAPTER D. LIMITING LIABILITY BY LATE LICENSURE

Sec. 398.151. PAYMENT OF FEES. A person who obtains or renews a license under this chapter after the date on which the person was required to obtain or renew the license may limit the person's liability as provided by this subchapter by paying to the commissioner:

(1) all prior license fees that the person should have paid under this chapter; and

(2) a late filing fee as provided by Section 398.152.

Sec. 398.152. LATE FILING FEE FOR OBTAINING OR RENEWING LICENSE. (a) The late filing fee for renewing an expired license

is $1,000 if the license:

(1) was in good standing when it expired; and

(2) is renewed not later than the 180th day after its expiration date.

(b) The late filing fee is $5,000 for:

(1) obtaining a license after the time it is required under this chapter; or

(2) renewing an expired license to which Subsection (a) does not apply.

Sec. 398.153. EFFECT OF COMPLIANCE WITH SUBCHAPTER FOR LICENSE HOLDER. (a) A person who renews an expired license and pays the applicable license fees and, if required, a late filing fee as provided by Section 398.152 is considered for all purposes to have held the required license as if it had not expired.

(b) A person who under this section is considered to have held a license is not subject to any liability, forfeiture, or penalty, other than as provided by this subchapter, relating to the person's not holding a license during the period for which the license fees and late filing fee are paid under Section 398.152.

Sec. 398.154. EFFECT OF COMPLIANCE WITH SUBCHAPTER ON PERSON OTHER THAN LICENSE HOLDER. A benefit provided to a person under Section 398.153 also applies to that person's employees or other agents, employers, predecessors, successors, and assigns but does not apply to any other person required to be licensed under this title.

SUBCHAPTER E. DISCLOSURE STATEMENT

Sec. 398.201. DISCLOSURE STATEMENT. (a) Before executing a contract with a consumer for the provision of earned wage access services, an earned wage access services provider shall provide the consumer with a disclosure that:

(1) may be in written or electronic form;

(2) may be included as part of the contract to provide earned wage access services;

(3) uses a font and language intended to be easily understood by a layperson;

(4) informs the consumer of the consumer's rights under the contract;

(5) fully and clearly discloses each fee associated

with the earned wage access services;

(6) includes an explanation of the consumer's right to proceed against the surety bond under Section 398.053; and

(7) provides the name and address of the surety company that issued the surety bond.

(b) An earned wage access services provider must notify a consumer of any material change to the information provided in a disclosure statement under Subsection (a) to that consumer, using a font and language intended to be easily understood by a layperson, before implementing the particular change with respect to that consumer.

Sec. 398.202. COPY OF DISCLOSURE STATEMENT. An earned wage access services provider shall keep in its files a copy of the disclosure statement, including any notifications of material changes to the statement, required under Section 398.201 that includes the consumer's written or digital signature acknowledging receipt of the disclosure statement or notification until the second anniversary of the date on which the provider provides the disclosure or notification.

SUBCHAPTER F. CONTRACT FOR SERVICES

Sec. 398.251. FORM AND TERMS OF CONTRACT. (a) Each contract for the provision of earned wage access services to a consumer by a provider may be in writing or electronic form and must:

(1) be dated;

(2) include the written or digital signature of the consumer; and

(3) use a font and language intended to be easily understood by a layperson.

(b) Each contract must disclose that:

(1) the provider is required to offer the consumer at least one reasonable option to obtain proceeds at no cost to the consumer and clearly explain how to elect that no-cost option;

(2) fee obligations are subject to the limitations on compelling or attempting to compel repayment under Section 398.301(a)(6);

(3) proceeds will be provided to the consumer using a method agreed to by the consumer and the provider;

(4) the consumer may cancel at any time the consumer's participation in the provider's earned wage access services without incurring a cancellation fee;

(5) the provider is required to develop and implement policies and procedures to respond to questions asked and concerns raised by consumers and to address complaints from consumers in an expedient manner;

(6) if a provider seeks repayment of outstanding proceeds, a fee, or another payment from a consumer, including a voluntary tip, gratuity, or other donation, from a consumer's account at a depository institution, including through an electronic funds transfer, the provider must:

(A) comply with applicable provisions of and regulations adopted under the federal Electronic Fund Transfer Act (15 U.S.C. Section 1693 et seq.); and

(B) unless the payment sought by the provider was incurred by the consumer using fraudulent or unlawful means, reimburse the consumer for the full amount of any overdraft or non-sufficient funds fees imposed on the consumer by the consumer's

depository institution if the provider attempts to seek any payment from the consumer on a date before, or in a different amount from, the date or amount disclosed to the consumer for that payment;

(7) the provider is required to comply with all local, state, and federal privacy and information security laws; and

(8) if the provider solicits, charges, or receives a tip, gratuity, or donation from the consumer, the provider:

(A) must clearly and conspicuously disclose to the consumer immediately before each transaction that the tip, gratuity, or donation is voluntary and may be set to zero by the consumer;

(B) must clearly and conspicuously disclose in the contract and other service contracts with consumers that any tip, gratuity, or donation from a consumer to a provider is voluntary and the offering of earned wage access services, including the amount of proceeds a consumer is eligible to request and the frequency with which proceeds are provided to a consumer, is not contingent on whether a consumer pays any tip, gratuity, or donation or on the size of any tip, gratuity, or donation;

(C) may not mislead or deceive the consumer regarding the voluntary nature of the tip, gratuity, or donation; and

(D) may not represent that the tip, gratuity, or donation will benefit a specific individual.

Sec. 398.252. ISSUANCE OF CONTRACT. An earned wage access services provider shall make available to the consumer a copy of the completed contract, when receipt of the document is acknowledged by the consumer.

SUBCHAPTER G. PROHIBITIONS

Sec. 398.301. PROHIBITED ACTS. (a) An earned wage access services provider may not, in connection with providing earned wage access services to consumers:

(1) share with an employer any fees, tips, gratuities, or other donations that were received from or charged to a consumer for earned wage access services;

(2) accept payment of outstanding proceeds, a fee, or a tip, gratuity, or other donation from a consumer through use of a credit card or charge card;

(3) charge a late fee, deferral fee, interest, or other penalty or charge for failure to pay outstanding proceeds, a fee, or a tip, gratuity, or other donation;

(4) report any information regarding the provider's inability to receive repayment of outstanding proceeds, or receive a fee or a tip, gratuity, or other donation, from a consumer to a consumer credit reporting agency or a debt collector;

(5) require a consumer's credit report or credit score to determine the consumer's eligibility for earned wage access services; or

(6) compel or attempt to compel payment by a consumer of outstanding proceeds, a fee, or a tip, gratuity, or other donation to the provider by:

(A) repeatedly attempting to debit a consumer's depository institution account in violation of applicable payment system rules;

(B) making outbound telephone calls to the consumer;

(C) filing a suit against the consumer;

(D) using a third party to pursue collection of the payment from the consumer on the provider's behalf; or

(E) selling the outstanding amount to a third-party collector or debt buyer for purposes of collection from the consumer.

(b) An earned wage access services provider is not precluded from using any of the methods described by Subsection (a)(6) to:

(1) compel or attempt to compel repayment of outstanding amounts incurred by a consumer through fraudulent or unlawful means; or

(2) pursue an employer for breach of the employer's contractual obligations to the provider.

Sec. 398.302. FALSE OR MISLEADING REPRESENTATION OR STATEMENT. An earned wage access services provider may not make or use a false or misleading representation or statement to a consumer during the offer or provision of earned wage access services.

Sec. 398.303. FRAUDULENT OR DECEPTIVE CONDUCT. An earned wage access services provider may not directly or indirectly engage in a fraudulent or deceptive act, practice, or course of business

relating to the offer or provision of earned wage access services.

Sec. 398.304. ADVERTISING SERVICES WITHOUT OBTAINING LICENSE PROHIBITED. An earned wage access services provider may not advertise its services if the provider has not obtained a license under this chapter.

Sec. 398.305. WAIVER OF CONSUMER RIGHT PROHIBITED. An earned wage access services provider may not attempt to cause a consumer to waive a right under this chapter.

SUBCHAPTER H. ADMINISTRATION OF CHAPTER

Sec. 398.351. ADOPTION OF RULES. (a) The Finance Commission of Texas may adopt rules to enforce this chapter.

(b) The commissioner shall recommend proposed rules to the finance commission.

Sec. 398.352. EXAMINATION OF PROVIDERS; ACCESS TO RECORDS.

(a) The commissioner or the commissioner's representative shall, at the times the commissioner considers necessary:

(1) examine each place of business of each licensed provider; and

(2) investigate the licensed provider's transactions

and records, including books, accounts, papers, and correspondence, to the extent the transactions and records pertain to the business regulated under this chapter.

(b) The licensed provider shall:

(1) give the commissioner or the commissioner's representative free access to the provider's office, place of business, files, safes, and vaults; and

(2) provide the commissioner electronic copies of books, accounts, papers, and correspondence as requested by the commissioner.

(c) During an examination the commissioner or the commissioner's representative may administer oaths and examine any person under oath on any subject pertinent to a matter that the commissioner is authorized or required to consider, investigate, or secure information about under this chapter.

(d) Information obtained under this section is confidential.

(e) A licensed provider's violation of Subsection (b) is a ground for the suspension or revocation of the provider's license.

Sec. 398.353. GENERAL INVESTIGATION. To discover a violation of this chapter or to obtain information required under this chapter, the commissioner or the commissioner's representative may investigate the records, including books, accounts, papers, and correspondence, of a licensed provider or other person who the commissioner has reasonable cause to believe is violating this chapter, regardless of whether the person claims to not be subject to this chapter.

Sec. 398.354. CERTIFICATE; CERTIFIED DOCUMENT. On application by any person and on payment of any associated cost, the commissioner shall furnish under the commissioner's seal and signed by the commissioner or an assistant of the commissioner:

(1) a certificate of good standing; or

(2) a certified copy of a license, rule, or order.

Sec. 398.355. TRANSCRIPT OF HEARING: PUBLIC. The transcript of a hearing held by the commissioner under this chapter is a public record.

Sec. 398.356. APPOINTMENT OF AGENT. A licensed provider shall maintain on file with the commissioner the name and address of

the provider's registered agent for service of process.

Sec. 398.357. PAYMENT OF EXAMINATION COSTS AND ADMINISTRATION EXPENSES. A licensed provider shall pay to the commissioner an amount assessed by the commissioner to cover the direct and indirect cost of an examination under Section 398.352 and a proportionate share of general administrative expenses.

Sec. 398.358. LICENSEE'S RECORDS. (a) A licensed provider shall maintain a record of each transaction conducted under this chapter as is necessary to enable the commissioner to determine whether the provider is complying with this chapter.

(b) A licensed provider shall keep the record and make it available electronically or physically in this state, until the later of:

(1) the fourth anniversary of the date of the transaction; or

(2) the second anniversary of the date on which the final entry is made in the record.

(c) The commissioner shall accept a licensed provider's system of records if the system discloses the information

reasonably required under Subsection (a).

Sec. 398.359. ANNUAL REPORT. (a) Each year, not later than May 1 or a later date set by the commissioner, a licensed provider shall file with the commissioner a report that contains relevant information required by the commissioner concerning the provider's business and operations in this state during the preceding calendar year. The report must include:

(1) the total number of transactions in which the provider paid proceeds to a consumer;

(2) the total number of consumers to whom the provider paid proceeds;

(3) the total dollar amount of proceeds paid to all consumers;

(4) the total dollar amount of fees, tips, gratuities, or donations the provider received from consumers;

(5) the total number and dollar amount of transactions in which a payment of proceeds was made to a consumer for which the provider did not receive repayment of the outstanding proceeds;

(6) the total number and dollar amount of transactions

in which a payment of proceeds was made to a consumer for which the provider received partial repayment of the outstanding proceeds;

(7) the total dollar amount of unpaid, outstanding proceeds attributable to transactions described by Subdivision (6);

(8) the total number and dollar amount of transactions in which outstanding proceeds were repaid after the original, scheduled repayment date; and

(9) the total number of written consumer complaints received by the provider in connection with the provision of earned wage access services and a list of the reason for each complaint, listed by frequency of reason for the complaint.

(b) A report under this section must be:

(1) under oath; and

(2) in the form prescribed by the commissioner.

(c) A report under this section is confidential.

(d) Annually the commissioner shall prepare and publish a consolidated analysis and recapitulation of reports filed under this section.

SECTION 6. Section 411.095(a), Government Code, is amended to read as follows:

(a) The consumer credit commissioner is entitled to obtain from the department criminal history record information that relates to a person who is:

(1) an applicant for or holder of a license or registration under Chapter 180, 342, 347, 348, 351, 353, 371, 393, [~~or~~] 394, or 398, Finance Code;

(2) an employee of or volunteer with the Office of Consumer Credit Commissioner;

(3) an applicant for employment with the Office of Consumer Credit Commissioner; or

(4) a contractor or subcontractor of the Office of Consumer Credit Commissioner.

SECTION 7. A person engaging in business as an earned wage access services provider on the effective date of this Act must obtain a license in accordance with Chapter 398, Finance Code, as added by this Act, not later than January 1, 2024.

SECTION 8. Sections 398.201 and 398.251, Finance Code, as

added by this Act, apply only to a contract for earned wage access services entered into on or after the effective date of this Act.

SECTION 9. This Act takes effect September 1, 2023.

APPENDIX 2

November 27, 2023

Submitted via email to: regulations@dfpi.ca.gov
cc: peggy.fairman@dfpi.ca.gov; charles.carriere@dfpi.ca.gov

Department of Financial Protection and Innovation
Attn: Araceli Dyson
2101 Arena Boulevard
Sacramento, California 95834

RE: COMMENT ON FIRST MODIFIED TEXT OF PROPOSED RULEMAKING UNDER THE CALIFORNIA CONSUMER FINANCIAL PROTECTION LAW AND THE CALIFORNIA FINANCING LAW, PRO 01-21

Dear Commissioner:

Payactiv, Inc. ("Payactiv") appreciates the opportunity to provide additional feedback to the Department of Financial Protection and Innovation ("DFPI" or "Department") on the first modified text of its proposed rulemaking under the California Consumer Financial Protection Law ("CCFPL") and the California Financing Law ("CFL"), Pro 01-21 ("the Proposal") related to income-based advances, also referred to as earned wage access ("EWA") products.

We have carefully reviewed the First Modified Text of the Proposal dated November 6, 2023 ("Modified Proposal"), and appreciate the consideration that went into the revisions. We also appreciate the Department's continued engagement over the course of the last several months, its careful attention to comments, and its focus on ensuring consumer protection while promoting innovation.

Attached, please find our comment on the Modified Proposal, along with an agreed upon set of proposed line edits from numerous EWA providers, including Payactiv.

We would welcome the opportunity to discuss our suggestions at your earliest convenience. Thank you for your time and consideration.

Aaron Marienthal

Senior Vice President and General Counsel, Payactiv

I. Summary of Relevant Revisions in Modified Proposal

Relevant to EWA, the Modified Proposal would keep proposed Section 1461 intact by continuing to classify EWA as a "loan" and "wage assignment," and providers of EWA as "finance lenders." However, proposed Section 1461 now includes new subsection (d), which would clarify that Section 1461 should not be read to interpret what is a wage assignment under the Labor Code, consumer credit under the federal Truth in Lending Act ("TILA"), or a loan under the California Constitution's usury provision.

Similarly, revised Section 1462 continues to exempt EWA providers from the "CFL by stating that providers are "not 'in the business' of a finance lender or broker for purposes of licensure under [CFL] section 22100" so long as the advance (1) is offered in accordance with the proposed regulation, and (2) the provider registers with the Department.

Finally, former subsection (3) of Section 1462 has been removed.[1]

II. Providers That Do Not Offer Loans and Comply With Best Practices Should be Excluded from Section 1461.

As it currently stands, Section 1461 – which classifies EWA as a loan and a wage assignment – remains unclear. As written, this section will cause significant harm to most EWA providers without a corresponding benefit to consumers. We respectfully urge the Department to reconsider the scope of Section 1461 for the following reasons:

First, the conclusion that a non-recourse, no-obligation product is a "loan" under the CFL remains legally flawed. For a contract to involve "credit" there must be a "debt," which must include an "obligation" (whether "absolute or contingent").[2] Because "income-based advances" – as we propose that term be defined – do not involve an "obligation," or "legal duty" to pay money, they do not implicate a "debt" or "loan" as a matter of law.[3]

[1] Payactiv agrees with the removal of this subsection because it would have inappropriately subjected providers to the substantive requirements of the CFL. As described more fully in our May 17, 2023 comment letter, this would have, at a minimum (a) incentivized providers to become licensed lenders, potentially transforming EWA into a traditional, recourse-based credit product, (b) required Payactiv and other providers to overhaul their pricing structures and likely begin charging users origination fees, interest, and late fees, (c) reduced or eliminated free EWA access options, and (d) made EWA access confusing and less consumer friendly.

[2] *See* May 17, 2023 Comment Letter at Section V.B.

[3] As detailed in the proposed revisions, the expanded definitions of "provider" and "income-based advance" contain numerous meaningful consumer protections and clarify that to qualify as such, a provider must inform a user that the provider does not intend to create any legal obligation to repay, and that the user can cancel the services at any time without a charge.

As a result, **the Department should limit Section 1461 to products and providers that do not meet the expanded definition of "earned income advance" as set forth in the proposed revisions to Section 1004(g) attached hereto.** By doing so, the Department would (a) create meaningful consumer protections for California users,[4] (b) avoid evasions of the CFL by unscrupulous actors, and (c) be aligned with California law.

Second, given the proposed edits, Section 1461 does not appear to serve a material purpose as written. The Department's Initial Statement of Reasons (ISOR) states (at 54), in part, that Section 1461(a) "is necessary to ensure that providers understand that limitations on collection do not operate to exclude companies from regulation." But the proposed regulation can and does achieve this purpose – ensuring that providers are subject to regulation regardless of limitations on collections – without unnecessarily misclassifying products offered by registrants as a lending arrangement. **It would be more appropriate to define as "loans" those products that do not meet the expanded definition of "earned income advance."**

To the extent the Department believes that it must categorize EWA as a loan in order to supervise providers under the CFL, we respectfully reiterate that the Department may supervise EWA providers because they are "covered persons" under Financial Code Section 90005(f) – *i.e.* they engage in offering or providing a "consumer financial product or service," which, in turn, is defined in relevant part as: "A financial product or service that is delivered, offered, or provided for use by consumers primarily for personal, family, or household purposes." Cal. Fin. Code section 90005(e)(1). A "financial product or service" means among other things, "**Providing payments** or other financial data processing **products or services to a consumer by any technological means**, including processing or storing financial or banking data for any payment instrument, or through any payment system or networks used for processing payment data, including payments made through an online banking system or mobile telecommunications network." Cal. Fin. Code section 90005(k)(7).

We see no reason why this would not apply to EWA. There is no question that EWA involves the provision of payments, that it fits this definition of "consumer financial product or service," or that the DFPI has authority to regulate EWA as a non-credit solution.[5] Indeed, Payactiv's Memorandum of Understanding ("MOU") with the Department states as much:

> The CCFPL provides the Department with authority to regulate and investigate certain consumer financial providers such as the Company. Company offers a consumer financial product or service through its on-demand pay product as

[4] This includes (1) no recourse against the consumer; (2) no credit impact or creditworthiness check; (3) no late fees, penalties, or interest; (4) a mandatory "no cost" or free option; (5) clear disclosures regarding fees and the absence of a legal obligation to repay; (6) the ability to cancel without a charge; (7) reimbursement for certain overdraft or non-sufficient funds fees; and (8) clear disclosure that tips may be zero and are voluntary.

[5] Employer-integrated EWA providers may also be covered persons because they may "collect[], analyz[e], maintain[], or provid[e] … other account information … used … in connection with any decision regarding the offering of a consumer financial product or service…." Cal. Fin. Code section 90005(k)(9). Payactiv, for example, uses employer payroll data to provide EWA. In addition, EWA providers could be classified as a covered person via the "catch-all" provision located in Cal. Fin. Code section 90005(k)(12).

defined in the CCFPL and thus is a "covered person" as defined in Financial Code section 90005(f).[6]

Third, as we have previously shared with the Department, employers who offer employer-integrated EWA as a benefit to their employees often do so in part because they are averse to loan products, and endeavor to help their employees avoid payday loans, overdrafts, and other small dollar lending products. Moreover, in our experience, many providers' contractual arrangements with partners, employers, and financial institutions are contingent or premised upon EWA being *distinct* from credit products. As a result, unnecessarily deeming EWA to be a loan will (1) decrease employer incentive or interest in offering or continuing to offer EWA as an employee benefit, leaving such employees with less consumer-friendly alternatives, and (2) put contractual relationships between providers, partners, and employers at risk. If EWA benefits are taken away from workers, these workers will miss out on the inherent protections in the employer-integrated EWA model – including a contractual relationship with the employer and verified time and attendance payroll and census data – and will be forced to turn to less safe, or higher-cost options.

Finally, while we appreciate the Department's clarifying language in new Section 1461(d), considerable uncertainty would remain absent our suggested revisions, particularly with respect to EWA's treatment under other state and federal laws, such as California's Debt Collection Licensing Act ("DCLA"), the California Deferred Deposit Transaction Law ("CDDTL"), or the Military Lending Act ("MLA"). For example, as drafted, the Department's proposed classification of EWA as a "loan" in Section 1461 will create confusion about whether EWA implicates a "consumer debt" under the DCLA, a "deferred deposit transaction" under the CDDTL, or a "consumer loan" under the MLA and other federal credit laws. This is reason alone to avoid sweeping, and unneeded, classifications that may impact both state and federal laws beyond those articulated in revised subsection (d) of Section 1461. As a result, the Department should adopt suggested revisions to Section 1461 such that it encompasses only products and providers that **do not meet** the expanded definitions of "income-based advances" or "providers" respectively. **If the Department does not intend to adopt these suggested revisions, it should, at a minimum, expand upon revised subsection (d) of Section 1461 and include a broad "catch-all" category of laws and regulations that Section 1461 shall not be read to interpret.**

III. Conclusion

While we appreciate the revisions the Department made in the Modified Proposal, the ramifications of unnecessarily classifying EWA products as loans and providers as finance lenders cannot be understated. Accordingly, we, along with several other providers as identified in Exhibit A, urge the Department to adopt the proposed revisions to the Proposal as set forth herein, and create powerful consumer protections without adversely impacting providers. We

[6] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/01/Admin.-Action-Payactiv-Inc.-Memorandum-of-Understanding.pdf

think these proposed revisions accomplish the DFPI's consumer protection and oversight goals without harming EWA providers or their customers.

We thank the DFPI for its continued efforts to create strong, meaningful protections for consumers while allowing for innovative products that serve workers and provide alternatives to high-cost lending products. We remain committed to providing constructive feedback to the Department on its rulemaking and are available to discuss at your convenience.

Exhibit A

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 rendered**~~. 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**~~ ***person*** 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 (34)*** 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.

(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 subdivision***

(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 [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

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 time***.

(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 met:***

(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 loan*** 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 (j)*** 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 (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), 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 Law ~~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~~S~~ection 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 loan***, is a charge under Financial Code section 22200.

NOTE: Authority cited: Sections 22150 and 90009, Financial Code. Reference: Section~~s~~ 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.