



Innovative Payments Association

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Submitted via E-Mail at: FederalRegisterComments@cfpb.gov

Consumer Financial Protection Bureau

Attn: Director Rohit Chopra

1700 G Street NW

Washington, DC 20552

Re: Response to Request for Public Input on Approach to Regulations and Comments on
Earned Wage Access Services

Dear Director Chopra:

This letter is submitted to the Consumer Financial Protection Bureau (the "**CFPB**") on behalf of the Innovative Payments Association ("**IPA**"),¹ in response to CFPB Director Rohit Chopra's request for public input in his blog post published on June 17, 2022 titled "Rethinking the approach to regulations" (the "**Post**"),² together with the CFPB's recent comments in connection with Earned Wage Access ("**EWA**") services, of which many of our members are providers.

We are concerned that, based on the comments in the Post and elsewhere, the CFPB appears poised to review and possibly reconsider its existing Advisory Opinion governing EWA services, which has been relied upon by the industry as the framework for the development and offering of these critical products. As discussed in more detail below, we believe such an action could be incredibly disruptive to American workers who rely on this service as a lifeline between paychecks and have an anti-competitive impact on the marketplace. We ask that, prior to taking any such action, the CFPB first engage with the public, including EWA providers, to learn more about the specific ways EWA is provided. Specifically, to understand the benefits to employees and wage earners, address any concerns the CFPB may have with the current Advisory Opinion, and assess the potential negative impact that any changes to the current Advisory Opinion would have on the marketplace and consumers.

Background

In the Post, Director Chopra summarizes the CFPB's current intent to move away from the issuance of overly-complicated rulemakings in favor of providing "bright-line guidance that can withstand evolution in the marketplace over time."³ Of particular note to our membership is the Director's comment that the

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

² Consumerfinance.gov, [Rethinking the approach to regulations](https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/), June 17, 2022, available at <https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/>.

³ *Id.*



CFPB would modify its interpretation of existing law to the marketplace utilizing the agency's "Advisory Opinion Program" (the "**Program**"), launched in 2020 to provide interpretive rules to industry in a more efficient manner. One of the earliest advisory opinions issued under the Program concerned EWA services, which was issued on November 30, 2020 (the "**EWA Advisory Opinion**").⁴ Our members were surprised to read recent comments from the CFPB in connection with EWA services that indicate the agency may revisit or withdraw the EWA Advisory Opinion and take additional action to provide even "greater clarity" concerning the application of the definition of "credit" under Regulation Z.⁵ We note that while the CFPB's final Advisory Opinion Policy contains a section labeled "Rescission of Advisory Opinions," it does not lay out a process where a policy that has been implemented and relied upon can be withdrawn.⁶ The CFPB's recent comments did not explain what part of its prior guidance the agency now believes was unclear or erroneous. Our members believe the EWA Advisory Opinion already provides clear and concise guidance and does not require further clarification.

While the CFPB's Advisory Opinion Policy contemplates the modification or rescission of advisory opinions, it does not state when modification or rescission would be appropriate, or the procedure for such changes. The policy does, however, go into detail about the factors it will consider when evaluating whether to issue an advisory opinion, providing a list of factors that favor the publication of an advisory opinion and a list of those that counsel against it. Two factors that weigh against issuing an advisory opinion are:

- (1) the interpretive issue is the subject of an ongoing CFPB investigation or enforcement action;
- (2) the interpretive issue is the subject of an ongoing or planned rulemaking.

The IPA believes circumstances that would disfavor the issuance of an advisory opinion should also disfavor the modification or rescission of an existing advisory opinion. Just as an agency should not be allowed to issue guidance in an attempt to strengthen a contemplated enforcement action, it should not be allowed to modify or revoke guidance to achieve the same goal.

Given the high degree of uncertainty that could result from material changes to or withdrawal of the EWA Advisory Opinion – which in turn could have negative impacts to consumers and the marketplace – we request that the CFPB meet with industry stakeholders before taking any action in the EWA sector in an effort to learn in greater detail about the wide variety of product offerings in this sector and how providers are meeting the needs of their consumers in a safe, transparent, and efficient manner. Further, we strongly urge the CFPB not to move forward with any action without following a clearly articulated process for doing so, which must provide for transparency and a full account of all stakeholder feedback and minimization of any risk of harm to consumers who rely on EWA services.

Brief Summary of the EWA Advisory Opinion

⁴ https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf.

⁵ See Consumerfinance.gov, [CFPB Rescinds Special Regulatory Treatment for Payactiv](https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-special-regulatory-treatment-for-payactiv/), June 30, 2022 <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-special-regulatory-treatment-for-payactiv/>; See also, letter from Seth Frotman, Acting CFPB General Counsel, to consumer advocacy groups concerning the CFPB's advisory opinion on earned wage access, Jan. 18, 2022, available at <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2022/01/1456000-1456884-letter-from-s.-frotman-to-b.-ruggia-et-al-re-ewa-ao-1.18.22.pdf>.

⁶ https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_policy_2020-11.pdf.



In the EWA Advisory Opinion, the CFPB clarifies the application of the Truth in Lending Act ("TILA") to EWA programs and creates a safe harbor for certain EWA programs that the CFPB does not view as involving an extension of credit, which triggers TILA and Regulation Z, including programs containing the following characteristics:⁷

- The provider of the service contracts with employers to provide and offer services to the employer's employees.
- The amount of the EWA transaction does not exceed the accrued cash value of wages the employee has earned up to the transaction date, which is determined based on timely information provided by the employer.
- The employee makes no payment, voluntary or otherwise, to access EWA funds.
- The provider recovers the amount of the EWA transaction only through employer payroll.
- In the event of a failed or partial payroll deduction, the provider retains no legal recourse against the employee.
- Prior to entering into an EWA transaction, the provider clearly and conspicuously explains to the employee and warrants as part of a contract that it (i) will not require the employee to pay any charges or fees; (ii) has no legal recourse against the employee, including no right to take payment from a consumer account; and (iii) will not engage in debt collection activities related to the EWA transaction.
- The provider will not directly or indirectly assess the credit risk of individual employees.
- The EWA Advisory Opinion notes that other EWA business models may not involve an extension of credit or may otherwise be exempt from TILA compliance, but that this advisory opinion does not address those situations.

While there are a number of different EWA program models in the marketplace, and not every model works for every person and every employer, the EWA Advisory Opinion has provided the guideposts for program design. A number of EWA providers have relied upon it to create low cost, transparent, employer-based services. Since its issuance, the EWA Advisory Opinion has given providers much needed clarity and certainty, enabling them to offer services to consumers with confidence that such offerings will not later be deemed to constitute an extension of "credit" under TILA and Regulation Z. In short, the EWA Advisory Opinion provides the exact type of "bright-line" road map championed in the Post,⁸ and many existing EWA providers have tailored their services to align with this guidance.

EWA services are beneficial to consumers, allowing them to handle financial stressors without the need to resort to costly alternatives such as payday loans and overdraft fees

⁷ 12 CFR § 1026.2(a)(14).

⁸ Notably, broad support for a conclusion that certain EWA services are not "credit" or a "loan" can be found in President Biden's recent budget proposal for fiscal year 2023, which notes that EWA services that act as on-demand pay arrangements are not loans, and further proposes amendments to several provisions of the Internal Revenue Code to make this fact clear. A copy of the budget proposal is available at https://www.whitehouse.gov/wp-content/uploads/2022/03/budget_fy2023.pdf.



EWA products seek to address the timing mismatch between workers' hours on the job and receipt of their paychecks by facilitating on-demand access to an employee's earned but unpaid wages. At present, EWA providers have developed a variety of business models and solutions to try to reduce the gap described above. Generally, these programs involve an EWA provider enabling workers to request a percentage of earned net wages prior to payday.

Such a service is critical when one considers that when financial stress occurs, affordable expense management options are not often available to hardworking Americans. For example, according to the Financial Health Network's April 2022 report on EWA, employees experiencing financial distress typically utilize one of three options:⁹ (1) overdraft of their bank account with an average fee of \$35; (2) title and payday loans with a fee range from \$15 to \$100; or (3) pawn loans with fee range from \$75 to \$100. U.S. consumers pay more than \$12 billion per year in overdraft fees and \$9 billion each year in fees for payday loans. Alternatively, many EWA services cost consumers an average of \$2.59 to \$6.27 per transaction. Some programs charge workers no fees. None of these offerings create cycles of debt or an inability-to-pay risk.

There are over 100 million Americans who have less than \$400 in savings and would experience a financial shock if they received an unexpected bill, from medical expenses or a car repair bill. The COVID-19 pandemic and soaring inflation has placed incredible strain on low-income Americans and families.

Income volatility can lead to poverty for families. In *The Financial Diaries*, the authors write that trying to understand poverty only through the lens of annual income misses both problems and possible solutions:

"The data show that poverty is not usually about struggling to make ends meet each month on a small, but predictable budget. Rather, insufficiency of resources is accompanied by instability. [...] The income dips, on the other hand, can present severe financial challenges that are not always evident in yearly data."¹⁰

Enabled by advances in financial services technology, EWA products have emerged as a new option for workers to meet short-term liquidity needs that arise between paychecks without having to solely rely on more costly alternatives like traditional payday loans or overdraft programs. According to the study referenced above, the majority of providers offer free models of EWA to their employees.

Employer based EWA services, such as the ones similar to those described by the EWA Advisory Opinion, have been shown to be an effective alternative to replace payday loans and eliminate overdraft fees, freeing many low-income consumers from a cycle of debt. This is because, in contrast to a payday loan, funds received by a worker in connection with an employer-based EWA programs are based on the worker's own wages that have already been earned by the worker, for work which has been performed. Importantly, such EWA services do not involve an advance for services yet to be provided or create a debt incurred by an employee against future performance. In addition to core EWA services, many providers

⁹ <https://protect-us.mimecast.com/s/FXYTC9rpLvtzwn76howW4c?domain=finhealthnetwork.org>.

¹⁰ Morduch, Jonathan, and Rachel Schneider, *The financial Diaries: How American Families Cope in a World of Uncertainty*, Princeton: Princeton University Press, 2017, page 156.



integrate EWA with financial literacy resources, such as budgeting and savings tools, to prevent workers from overspending on the assumption that they have more money than they have earned.

EWA services have quickly emerged as a valuable tool to aid American workers in managing financial strain and budgeting. While some consumer groups assert more frequent pay makes savings and financial management more difficult, this is simply out of touch with the reality experienced by many workers who have a right to their own wages. These workers are in the best position to determine when it is necessary for them to access their wages, including those wages that have been earned but not yet paid due to the timing of wage payment decided by their employers.¹¹ In short, EWA allows employees to gain greater control over their own financial lives.

Any adverse changes to the regulatory framework under which these services operate has the potential to negatively impact consumers and should only be undertaken after a full accounting of the feedback from industry stakeholders (including meeting with them in-person) and pursuant to a clear, well-defined process for making such changes.

EWA providers offer the type of services the CFPB has actively encouraged through the EWA Advisory Opinion and the CFPB's rulemakings and statements

The development and growth of EWA services, and the important benefits they afford to U.S. consumers, has taken place in large part as a result of the CFPB's own encouragement for the development of such services. Such encouragement can be seen both in the EWA Advisory Opinion's conclusion that certain EWA services do not have the characteristics of a "credit," as well as the CFPB's prior rulemakings and statements touching on the newly emerging EWA service and seeking to encourage its development and growth.

In particular, then CFPB Director Richard Cordray exempted employer-sponsored EWA programs from the CFPB's 2017 small-dollar credit rule stating that the rule "excludes from coverage some new 'fintech' innovations, such as certain no-cost advances and programs to advance earned wages when offered by employers or their business partners."¹² Moreover, Director Cordray went further than just exempting such products by actively inviting and encouraging industry to develop EWA services, noting that the CFPB has consistently "expressed interest in encouraging more experimentation in this space."¹³

Director Cordray's statements helped lay the foundation for the development of EWA products and incentivized innovators to develop alternatives to more costly products such as payday loans. Providers have met Director Cordray's challenge, developing EWA products that have been utilized by more than 55 million Americans.¹⁴ EWA products continue to be a valuable resource for consumers facing financial stress due to events beyond their control.

¹¹ <https://www.bls.gov/ces/publications/length-pay-period.htm>.

¹² 82 Fed. Reg. 54472 – 54921, 54547 (Nov. 17, 2017).

¹³ *Id.*

¹⁴ Financial Health Network, Earned Wage Access and Direct-to-Consumer Advance Usage Trends, April 2021, available at https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2021/04/26190749/EWA_D2C_Advance-sage_Trends_FINAL.pdf.



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We encourage the CFPB to understand the ways in which revisiting or revoking EWA Advisory Opinion would negatively impact consumers

Given the significant benefits provided by EWA services, the IPA is concerned that the CFPB's plans to revisit or revoke the EWA Advisory Opinion would negatively impact consumers. In particular, retroactively changing the rules under which these services have been developed could require expensive product revisions and impose other burdens on providers. This would risk making the services more expensive for consumers or result in their removal from the marketplace. Such a change would also be confusing to consumers who will not understand, for example, why they are now being required to obtain a credit check for a product that grants access to already earned wages, does not require any advancement of funds, is often fee-free, is non-recourse, and does not impact their credit rating.

Furthermore, we believe that the EWA Advisory Opinion already provides sufficient clarity with respect to the definition of "credit" under Regulation Z in connection with EWA services designed in accordance with the Opinion and additional guidance from the CFPB is simply not necessary at this time.¹⁵ As noted above, such a change would be more than a difference of "interpretation" of law and could have far reaching consequences and negative impacts for consumers and industry. Moreover, any such change without an opportunity for public comment arguably would not satisfy the "arbitrary and capricious" standard given the good faith reliance by the industry on the guidance set forth in the Opinion.

In light of the above concerns, we strongly urge the CFPB to obtain and consider comprehensive EWA stakeholder input, including from EWA service providers before taking any action on the Advisory Opinion. We note that one criticism of the EWA Advisory Opinion is that it was implemented through an opaque process that did not provide for full stakeholder input. We believe a clear, inclusive open process that considers all stakeholders is beneficial for everyone – including consumers, industry, the market, and regulatory agencies. The realization of Director Chopra's stated goal - to create clear, bright-line rules governing financial services that can withstand marketplace evolution - depends on a fair and open process. But only if CFPB's review of the Advisory Opinion provides ample notice and opportunity for comment and direct engagement.

Conclusion

The IPA appreciates the opportunity to provide input to the CFPB on this important topic. We would also welcome the opportunity to discuss the items covered in this letter in-person with the CFPB.

If you have any questions or feedback relating to any of the comments contained in this letter, or would like to arrange engagement with industry stakeholders on this issue, please do not hesitate to contact me at: btate@ipa.org.

¹⁵ In particular, the EWA Advisory Opinion generally adopts a "totality of the circumstances" test to conclude that a EWA service meeting the characteristics set forth in the opinion do not constitute "credit" under Regulation Z. We see no reason to revisit this analysis or conclusion by the CFPB.



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Sincerely,

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