



Submitted via electronic mail

May 17, 2023

Department of Financial Protection and Innovation

Attn: Araceli Dyson

2101 Arena Boulevard

Sacramento, California 95834

Re: FTA Comment on the State of California Department of Financial Protection and Innovation Notice of Proposed Rulemaking PRO 01-21
(PRO 01-21)

The Financial Technology Association (FTA) welcomes the opportunity to provide feedback on the State of California Department of Financial Protection and Innovation (DFPI) Notice of Proposed Rulemaking (the “Proposal” or “NPRM”) regarding earned wage access (EWA) products and providers (described in the NPRM as income-based advances). FTA is a non-profit trade association representing industry leaders shaping the future of finance. We champion the power of technology-centered financial services and advocate for the modernization of financial regulation to support inclusion and responsible innovation, including in the context of EWA products that are helping thousands of consumers avoid traditional high-cost and predatory alternatives while awaiting a paycheck.

I. Introduction

FTA members are committed to EWA standards and requirements that promote consumer protection and transparency, including potential state registration. Within this context, all EWA services, regardless of the business model adopted by the provider, should be treated similarly in order to avoid anti-competitive market developments and allow for consumer-centric product innovation. This equal and fair treatment is vital to ensure that the broadest set of Californians have access to safe EWA products, including under the common circumstance that an employer does not offer such a service to its employees.

Fortunately, the DFPI is well-positioned to craft tailored and appropriate registration requirements and rules for innovative new products that serve California residents well. Indeed, DFPI was



launched with a specific mandate to “promote innovation [and] clarify regulatory hurdles for emerging products . . .”¹

FTA supports this mandate and approach—however, we have concerns that DFPI’s current Proposal misses an opportunity to pursue these objectives and instead may inadvertently harm an area of innovation that is clearly benefiting California consumers. DFPI notes in its Proposal that EWA products demonstrate extremely high customer success metrics,² which is consistent with broader research. A recent survey of nearly 5,000 national EWA customers found that ninety-three percent (93%) said they had a greater sense of financial control after using EWA and ninety-one percent (91%) said they understand how the service works.³ **When an innovative product is working well for consumers—and not subject to widespread complaints—it is proper for a regulator to proceed cautiously before taking measures that may inadvertently impede or alter the well-functioning market.**

FTA accordingly offers the following recommendations:

- 1) In developing a registration framework, DFPI should not and need not define EWA products as credit or loans;
- 2) Gratuities, tips, and other voluntary payments should not be deemed as credit or loan “charges”;
- 3) DFPI should focus on requiring clear disclosures to empower consumers and impose commonsense protections; and
- 4) DFPI should update certain draft provisions and definitions, as detailed below, in order to be less prescriptive and avoid altering the competitive landscape.

¹ California Department of Financial Protection and Innovation History (last accessed May 15, 2023), available at <https://dfpi.ca.gov/history/>.

² See, e.g., DFPI Initial Statement of Reasons (PRO 01-21) (citing the 97% repayment rate found in the following research: Financial Health Network, *Earned Wage Access and Direct-to-Consumer Advance Usage Trends*, at p. 2 (April 2021)), available at <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf>.

³ FTI Consulting, *Re: Direct to Consumer Earned Wage Access User Survey Key Findings* (July 7, 2021), available at <https://www.earnin.com/assets/pdf/FTI-Earned-wage-access-memo.pdf>.



II. Recommendations

- A. *EWA products are not credit and need not be deemed so in order to establish the DFPI registry.*

EWA is a key area of innovation that offers consumers flexibility through on-demand and earlier access to their earned wages that have not yet been deposited into their account, helping workers smooth out cash flow between payroll cycles, which can be as infrequent as biweekly or monthly. EWA gives consumers a helpful tool to make timely payments on everyday expenses, avoid overdrafting their bank accounts, and manage short-term financial shocks.

Importantly, EWA products are not loans and instead simply give employees access to their already earned wages. This substantive distinction matters since the characteristics of EWA products are different from those of credit or loan products—which means that rules regarding credit or loan products would poorly fit EWA products.

More specifically, unlike a loan product, EWA services are non-recourse and never charge interest. This means that consumers have no legal obligation to repay an advance, and providers cannot take legal action to collect payments. Customers can cancel their engagement with an EWA provider at any time. There is never a credit pull or credit reporting associated with this service. Additionally, nonrepayment does not result in interest or charges to the consumer,⁴ though it usually does limit access to additional EWA advances until the earlier advance is repaid.

Because EWA products are not credit and credit laws would fail to mitigate identifiable risks, other state and federal government entities have confirmed the non-credit status of EWA products.

For example, in finalizing payday loan rules, the CFPB created “specific exclusions and conditional exemptions” for certain EWA products that do “not require the consumer to pay any fees or finance charges” and where the provider “has no legal or contractual claim or remedy against the consumer based on the consumer’s failure to repay in the event the amount advanced

⁴ We note that based on DFPI’s reference to existing research, only 3% of EWA advances fail to be repaid by consumers. See *DFPI Initial Statement of Reasons* (PRO 01-21) (citing the 97% repayment rate found in the following research: Financial Health Network, *Earned Wage Access and Direct-to-Consumer Advance Usage Trends*, at p. 2 (April 2021)), available at <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf>.



is not repaid in full.”⁵ The Treasury Department proposed “to clarify that on-demand pay arrangements are not loans.”⁶ The Arizona Attorney General recently issued an opinion that an “EWA product that is offered as a no-interest and non-recourse product does not fall within [the Arizona] definition of ‘consumer loan.’”⁷ And, Missouri’s legislature recently passed comprehensive legislation, whereby EWA products are specifically exempted from lending laws in favor of a framework tailored to EWA’s risks and benefits.⁸

DFPI should accordingly confirm that EWA products are not credit or a loan. Alternatively, DFPI should defer such policy deliberations and determinations to the legislature, especially when finding EWA products to be loans contravenes federal and state precedent. Such an approach would not undermine the core of the DFPI Proposal to create an EWA provider registry. DFPI should not and need not determine that EWA products are loans, especially when doing so violates its mandate to promote responsible innovation and clarify regulatory hurdles. An unnecessary determination regarding the credit status of EWA products will create harmful precedent and further confusion across state and federal regulation.

Instead of reaching an incorrect and unnecessary conclusion, DFPI should proceed with finalizing an EWA registry framework similar to the rule proposed in November 2021, which will result in the collection of more information from registrants. This information will enable DFPI to better understand the EWA space, product characteristics, and customer outcomes and satisfaction, which can then be used to inform future policy or regulation. This approach is more consistent with DFPI’s mandate and avoids prematurely imposing ill-fitting requirements on an area of financial services innovation that is benefiting consumers.

B. *“Charges” should not mean a voluntary tip, gratuity, or donation.*

The Proposal seeks to define “charges” to include “voluntary or optional payments such as tips and gratuities.”⁹ The Proposal states that including optional and voluntary payments as a charge is

⁵ U.S. Consumer Financial Protection Bureau, *Payday, Vehicle Title, and Certain High-Cost Installment Loans* (Docket No. CFPB-2016-0025), pp. 216-217; 278-281, available at https://files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf.

⁶ <https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf> (107)

⁷ U.S. Department of the Treasury, General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (May 2022), available at <https://www.azag.gov/opinions/i22-005-r22-011>.

⁸ The specific EWA provisions originally found in in Missouri HB 759 were included in the final SB 103 as part of amendment .26H, available at <https://www.house.mo.gov/amendments.aspx?bill=SB103&year=2023&code=R>.

⁹ See DFPI Initial Statement of Reasons (PRO 01-21), p. 60, available at <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-ISOR.pdf>.



consistent with the statutory language that includes payments “received” by a provider. The Proposal does not consider, however, that this language specifically modifies specified categories of payments and “other forms of costs.” None of these categories, including “other forms of costs,” would naturally be read to include payments that are completely discretionary and voluntary in nature. There is a profound distinction between a mandatory, contracted “cost” or charge and a voluntary tip, gratuity or donation. The latter does not form a legal, contractual obligation (unless specifically agreed by the parties). Underscoring this point, in no other contexts or scenarios are such voluntary payments deemed to be “charges”—the Proposal would accordingly upend settled legal norms and commercial expectations.

Beyond the proper statutory interpretation, which would not include voluntary payments as a charge, there are strong policy reasons for the DFPI to refrain from unnecessarily finding such payments to be charges. First, as noted above, innovators in this space have developed new models and approaches to better serve consumer needs. In the context of certain EWA products, customer success is underpinned by the behavioral finding that many will voluntarily support businesses that are consumer-centric and mission-oriented, including in ways that allow such businesses to outperform legacy providers. Prematurely and unnecessarily redefining these models in the context of traditional regulation would alter the trajectory of innovation, distort product offerings, tip the scale in favor of incumbents, and limit ongoing competition.

Additionally, as noted above regarding DFPI’s broad authority to implement a registration framework, DFPI need not define EWA products as credit or their voluntary payment models as charges. Instead, DFPI could require registration by providers, collect data and information from such providers, and better inform policy going forward. To this latter point, as detailed in the next section, DFPI should focus efforts on developing appropriate disclosure requirements and consumer safeguards, which do not require (and in fact would be undermined by) defining these products as something they are not.

C. DFPI should focus on requiring clear disclosures to empower consumers and impose commonsense protections.

FTA supports the development of a DFPI registry and appropriate disclosure and consumer safeguard requirements that properly account for the unique nature of EWA products. To this end, we have attached Appendix A, which includes specific recommended language and rule text that can accomplish this objective.



The proposed language includes two primary categories of rules: (i) required disclosures and (ii) prohibited activities.

With respect to disclosures, consumers should be empowered to understand all key terms and aspects of an EWA product. As detailed in Appendix A, this means clearly and conspicuously informing the consumer of his or her rights under the agreement and fully and clearly disclosing all fees associated with the earned wage access services. Specific to certain EWA models, in any case in which the provider solicits or receives a tip, gratuity, or donation from a consumer, the provider should clearly and conspicuously disclose to the consumer immediately prior to each transaction that a tip, gratuity, or donation amount may be zero and is voluntary. Additionally, the provider should clearly and conspicuously disclose in its service contract with the consumer that tips, gratuities, or donations are voluntary and that the offering of EWA services, including the amount of the proceeds a consumer is eligible to request and the frequency with which proceeds are provided to a consumer, is not contingent on whether the consumer pays any tip, gratuity, or donation or on the size of any tip, gratuity, or donation.

With respect to prohibited activities, and as detailed further in Appendix A, a provider should not: compel or attempt to compel payment by a consumer of outstanding proceeds, fees, voluntary tips, gratuities, or other donations to the provider to debit a consumer's depository institution account in violation of applicable payment system rules, use outbound telephone calls to attempt collection from the consumer, file a lawsuit against the consumer, use a third party to pursue collection from the consumer on the provider's behalf, or sell outstanding amounts to a third-party collector or debt buyer for collection from the consumer.

An EWA provider should further not charge a late fee, interest, or other penalty or charge for failure to pay outstanding proceeds, fees, voluntary tips, gratuities, or other donations. Additionally, an EWA provider should not require a consumer's credit report or credit score to determine a consumer's eligibility for earned wage access services, report any information about the consumer to a consumer credit reporting agency or a debt collector, or share with an employer any fees, voluntary tips, gratuities, or other donations that were received from or charged to a consumer for earned wage access services.

Finally, while FTA believes that competition will best serve consumers and lower any fees associated with EWA providers, we would encourage the DFPI to avoid creating de facto



subscription fee or other fee caps and instead work to establish parameters around fees, voluntary tips, gratuities or other donations from a consumer. FTA and its members would welcome the opportunity to help inform that process.

D. Certain Proposal provisions would benefit from updated language and less prescriptive requirements.

As a threshold matter, FTA recommends that the Proposal replace all references of “income-based advances” to “earned wage access services.” This latter terminology is more consistent with ongoing federal and state consideration of these products and more accurately reflects their characteristics. More specifically, EWA products offer consumers flexibility through on-demand and earlier access to their earned wages, helping them make timely payments on everyday expenses, avoid overdrafting their bank accounts, and manage short-term financial shocks. EWA products are not advances on income, a term which introduces greater ambiguity regarding the intended coverage of products.

Section 1004(g)(2) of the Proposal currently defines covered products to require that “the advance [be] scheduled for collection in a single payment on a date within thirty-one (31) days” of when the provider believes the consumer will be paid her wages. While FTA agrees with the spirit of this provision, we recommend that the DFPI avoid setting a specific date to collect the advance in favor of a more flexible approach that considers a period of time from when the individual is paid. This less prescriptive approach will prove more feasible in implementation, especially given the various ways employees are paid wages in the U.S.

Section 1004(g)(3)(A) of the Proposal currently reads that in order to qualify as an EWA product, the provider must warrant to the consumer that the provider has “no legal or contractual claim or remedy” (emphasis added) in the event of a failure to repay. While we agree with the general spirit and intent of this requirement, we note that it may be inadvertently overbroad in certain, limited situations, such as in cases of fraud, abuse, or mistake. To this end, we encourage the DFPI to update this provision to track the language in the Proposal’s “Initial Statement of Reasons,” which specifically notes that an EWA product should be defined as having “limited remedies against the consumer” (emphasis added), in order to allow certain protective actions in these exceptional situations.



Additionally, in defining the characteristics of “income-based advances” pursuant to Section 1004(g)(3)(B), the DFPI should clarify that “debt collection activities” do not include when a provider seeks repayments of outstanding proceeds from a consumer’s deposit account, including via an electronic transfer.

Furthermore, Section 1461(a) of the Proposal states that all EWA payments will be considered a loan. As detailed above, FTA strongly opposes this designation given the highly distinguishable characteristics of EWA products as compared to loans. These distinctions are not “elevating form over substance,” as differences in product attributes result in different risks that should be thoughtfully identified and then mitigated by tailored regulation (as, for example, proposed in Appendix A).

Finally, Section 1464, subdivision (a)(1), provides that a monthly subscription fee is authorized if “the monthly subscription fee does not exceed \$12 per month.” We urge DFPI to reconsider use of an overly prescriptive and arbitrary fee cap that may serve to impede ongoing and robust market competition that is already leading to better, more responsible, and lower cost products for consumers. The proposed registry will also further inform DFPI on the nature of the current EWA market, which can then allow thoughtful consideration of future pricing parameters, should they be necessary.

* * *

We appreciate the opportunity to provide feedback on DFPI’s Proposal. As detailed above, we are supportive of the proposed EWA registry and believe this framework can help inform further DFPI efforts to safeguard consumers and mitigate identifiable risks. We are also supportive of efforts to enhance the clarity and consistency of EWA disclosures and prohibit certain activities that pose a risk to consumers. We urge DFPI, however, to reconsider the Proposal’s unnecessary and unwarranted designation of EWA products as loans; it is neither proper nor necessary to reach such a conclusion that will undermine innovation, competition, and regulatory clarity—in contravention of DFPI’s mandate. We thank you for your consideration of our comments and look forward to ongoing engagement with DFPI.

Sincerely,

A handwritten signature in black ink that reads "Penny Lee". The signature is fluid and cursive, with a long horizontal stroke at the end.

Penny Lee
CEO
Financial Technology Association



APPENDIX A

FTA Suggested Amendments and Additions to the Proposed Rule Text

- Change all references in the regulations from “income-based advances” to “earned wage access services.”
- Create a new Article 3, Subchapter 4, California Consumer Financial Protection Law, beginning with Section 1046, that reads as follows, and renumber proposed “Article 3. Revocation and Surrender” as “Article 4. Revocation and Surrender”

Article 3. Operating Requirements and Prohibitions Applicable to Earned Wage Access Services Providers

Section 1046. Requirements – Earned Wage Access Services Providers

(a) A person that meets the definition of an earned wage access services provider under Section 1004 of Subchapter 4, who is required to register with the Department pursuant to Section 1010 of Subchapter 4, shall do all of the following:

(1) Before entering into an agreement with a consumer for the provision of earned wage access services, provide the consumer with a written document that informs the consumer of his or her rights under the agreement and fully and clearly discloses all fees associated with the earned wage access services. The document may be in paper or electronic form and may be included as part of the contract to provide earned wage access services.

(2) Inform the consumer of the fact of any material changes to the terms and conditions of the earned wage access services before implementing those changes for that consumer.

(3) Offer each consumer at least one opportunity per pay period to receive proceeds at no cost to that consumer and clearly and conspicuously inform the consumer how they may elect this option.



(4) Provide proceeds to a consumer by any means mutually agreed upon by the consumer and provider.

(5) In any case in which the provider will seek repayment of outstanding proceeds, fees, voluntary tips, gratuities, or other donations from a consumer's account at a depository institution, including via electronic funds transfer:

(A) Comply with applicable provisions of the federal Electronic Funds Transfer Act and its implementing regulations.

(B) Reimburse the consumer for the full amount of any overdraft or non-sufficient funds fees imposed on a consumer by the consumer's depository institution that were caused by the provider attempting to seek payment of any outstanding proceeds, fees, voluntary tips, gratuities, or other donations on a date before, or in an incorrect amount from, the date or amount disclosed to the consumer.

(6) Develop and implement policies and procedures to respond to questions raised by consumers and address complaints from consumers in an expedient manner.

(7) In any case in which the provider solicits or receives a tip, gratuity, or donation from a consumer:

(A) Clearly and conspicuously disclose to the consumer immediately prior to each transaction that a tip, gratuity, or donation amount may be zero and is voluntary.

(B) Clearly and conspicuously disclose in its service contract with the consumer that tips, gratuities, or donations are voluntary and that the offering of earned wage access services, including the amount of the proceeds a consumer is eligible to request and the frequency with which proceeds are provided to a consumer, is not contingent on whether the consumer pays any tip, gratuity, or donation or on the size of any tip, gratuity, or donation.



(C) Refrain from misleading or deceiving consumers about the voluntary nature of such tips, gratuities, or donations.

(D) Refrain from making representations that tips or gratuities will benefit any specific, individual person.

(b) The provisions of subparagraph (B) of paragraph (5) of subdivision (a) shall not apply with respect to payments of outstanding proceeds, fees, tips, gratuities, or other donations incurred by a consumer through fraudulent means.

Section 1047. Prohibitions – Earned Wage Access Services Providers

1047. (a) A person that meets the definition of an earned wage access services provider under Section 1004 of Subchapter 4, who is required to register with the Department pursuant to Section 1010 of Subchapter 4, shall not do any of the following in connection with the offer or provision of earned wage access services to consumers:

(1) Compel or attempt to compel payment by a consumer of outstanding proceeds, fees, voluntary tips, gratuities, or other donations to the provider through any of the following means:

(A) Repeated attempts to debit a consumer’s depository institution account in violation of applicable payment system rules.

(B) Use of outbound telephone calls to attempt collection from the consumer.

(C) A suit against the consumer in a court of competent jurisdiction.

(D) Use of a third party to pursue collection from the consumer on the provider’s behalf.

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

(2) Base the amount of proceeds a consumer is eligible to request or the frequency with which a consumer is eligible to request proceeds on whether the consumer pays any fee, tip, gratuity, or donation or on the size of any fee, tip, gratuity, or donation paid by a consumer.

(3) Charge a late fee, deferral fee, interest, or other penalty or charge for failure to pay outstanding proceeds, fees, voluntary tips, gratuities, or other donations.

(4) Charge or collect fees, voluntary tips, gratuities or other donations from a



consumer that in total, per transaction, [DFPI to consider parameters].

(6) Require a consumer's credit report or credit score to determine a consumer's eligibility for earned wage access services.

(7) Report any information about the consumer to a consumer credit reporting agency or a debt collector, regarding the inability of the provider to be repaid outstanding proceeds, fees, voluntary tips, gratuities, or other donations by that consumer.

(8) Share with an employer any fees, voluntary tips, gratuities, or other donations that were received from or charged to a consumer for earned wage access services.

(b) An earned wage access services provider is not precluded from using any of the methods described in paragraph (1) of subdivision (a) to compel or attempt to compel repayment of outstanding amounts incurred by a consumer through fraudulent or unlawful means, or from pursuing an employer for breach of its contractual obligations to the provider.