CFPB Urged to Reverse Earned Wage Actions that Threaten to Create Dangerous Fintech Payday Loan Loopholes

October 12, 2021

Opinion and Order Under Former Director Kraninger Promote Evasions of Credit, Fair Lending, and Payday Loan Laws

WASHINGTON – A coalition of 96 consumer, labor, civil rights, legal services, faith, community and financial organizations and academics is urging the Consumer Financial Protection Bureau (CFPB) to revoke or significantly revise two actions taken in late 2020 regarding earned wage access (EWA) products.

The groups’ letter argued that the CFPB’s EWA advisory opinion and PayActiv approval order, which declared certain EWA programs not to be “credit,” threaten to create loopholes in federal credit and fair lending laws and are being misused to promote fintech exemptions in state payday loan laws. The group letter was accompanied by a longer legal analysis, also released today, from the National Consumer Law Center and the Center for Responsible Lending.

“The CFPB’s sloppy legal opinion, issued with no public input, threatens to open a gaping hole in our lending and fair lending laws for fintech payday loans. But earned wage access products are loans – advances on pay, usually for a fee – and carving a loophole for them will just lead workers to get caught in debt traps and cycles where they are paying to be paid,” said Lauren Saunders, associate director of the National Consumer Law Center.

“PayActiv lobbyists are using the misleading imprimatur of CFPB ‘approval’ to push states to authorize a new form of fintech payday loan exempt from usury laws with no fee limits whatsoever,” said Mike Calhoun, president of the Center for Responsible Lending. “We urge the CFPB to revoke its PayActiv approval order to prevent the CFPB name from being used to carve holes in predatory lending laws,” he added.

Late last year, the CFPB took two actions under its “innovation” programs established under former CFPB Director Kathy Kraninger. A November 30, 2020 advisory opinion stated that certain free, employer-based earned wage access programs are not “credit” under the federal Truth in Lending Act (TILA). The two letters pointed out that the CFPB’s legal analysis might be used to support evasions by a variety of fintech credit products, including those that charge fees. Indeed, on December 30, 2020 the CFPB used the same reasoning to conclude that certain fee-based products offered by PayActiv also are not credit covered under TILA, issuing an “approval order” to PayActiv through the Compliance Assistance Sandbox Program. That approval order gave PayActiv protection from legal liability, even if the CFPB’s conclusion was wrong.

The NCLC/CRL legal analysis letter criticized the CFPB’s conclusion, pointing out that:

- earned wage access products “do not involve the employer paying its employees; they are third parties giving an advance on a future paycheck;”
- “an employee could pay up to $36 a month, or $432 a year – real money for the low-wage workers who frequently use these products”; and
• “PayActiv’s right to receive repayment by payroll deduction from future, unearned pay also makes clear that PayActiv users are not receiving earned wages; they incur debt and defer its payment.”

The separate 96-group letter emphasized: “The trend is for employers to offer these products for free, making it especially inappropriate to carve loopholes for fee-based products in consumer protection laws covering credit.”

The groups also pointed out that the Equal Credit Opportunity Act uses a similar definition of “credit” as TILA: “At this critical moment in our nation’s history, we need to expand, not contract, the scope of our anti-discrimination laws.”

The groups highlighted how “the secretive, one-sided Advisory Opinion Program and Compliance Assistance Sandbox Program that led to the EWA actions are deeply flawed” and “give companies the ability to seek skewed interpretations of or exemptions from important consumer protection laws with no public input.”

The NCLC/CRL letter also included screenshots of PayActiv presentations and ads showing how PayActiv is misrepresenting the approval order and using it against competitors. In ads, PayActiv is claiming it is the “only CFPB-approved EWA provider,” even though the CFPB did not approve PayActiv itself or its programs overall, merely certain aspects of its program.

The letters urged the Bureau to:

• Treat earned wage access products as credit and revoke the EWA advisory opinion or revise it to focus only on whether providers of free programs are “creditors” covered by TILA;
• At minimum, revisit the PayActiv approval order and order PayActiv to cease misusing and misrepresenting the order;
• Supervise EWA providers and direct-to-consumer faux EWA products under the Bureau’s authority over payday loans;
• Conduct research on the impact of earned wage access programs; and
• Terminate or significantly revise the Advisory Opinion Program and Compliance Assistance Sandbox program and revisit the Bureau’s other “innovation” programs.