October 12, 2021

The Honorable Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G St. N.W.
Washington, DC 20552

**Re: Concern about prior leadership's finding that certain earned wage access products are not "credit" under TILA**

Dear Director Chopra:

## 1. Introduction and Overview

The National Consumer Law Center (on behalf of its low-income clients) and the Center for Responsible Lending congratulate you on your confirmation as Director of the Consumer Financial Protection Bureau (CFPB).

We write to express serious concerns about two actions that the CFPB took a year ago under Director Kathy Kraninger finding that certain earned wage access (EWA) products are not "credit" under the Truth in Lending Act. These actions and the legal reasoning underlying them have the potential to open up huge loopholes in our lending and even fair lending laws.

**We urge the CFPB to regulate fee-based EWA products as credit**. The CFPB should rescind or significantly revise the November 2020 EWA advisory opinion ("Advisory Opinion"). The Bureau should also revoke the December 2020 Compliance Assistance Sandbox Approval (CAS) Order pertaining to certain aspects of PayActiv EWA programs ("CAS Approval Order") or convert it into a time-limited no-action letter, and should order PayActiv to cease misrepresenting the order.

We also urge the Bureau to eliminate or significantly revise the Advisory Opinion Program and the Compliance Assistance Sandbox Program and to make significant changes to the No-Action Letter Policy. As the EWA Advisory Opinion and PayActiv CAS Approval Order demonstrate, these programs result in a secretive, one-sided process that allows industry to obtain favored interpretations of the law that give them a safe harbor from liability without any input from consumers or consumer advocates, other policymakers, competitors, or other members of the public. The CAS Program also results in the impression that the Bureau has endorsed a particular company's financial product, an impression that is being misused in state lobbying efforts and to gain an advantage over competitors.

We appreciate that the free or lower-cost employer-based earned wage access products addressed in the Advisory Opinion and CAS Approval Order may appear to be promising ways to help consumers bridge the gap between paychecks. But these products, particularly those that allow fees, are not without risks, and the Bureau's actions also have repercussions far beyond the limited programs that they directly address. The Bureau did not do any outreach to consumers, competitors or the broader public before announcing these actions.

Critically, the legal reasoning on which these actions are based is flawed and will be – and is being – used to facilitate widespread evasions of credit and, potentially, fair lending laws, with consequent harm to consumers. While both the Advisory Opinion and CAS Approval Order are, on their face, strictly limited to a narrow scope of products, they are already being used to bolster claims that high-cost, fintech payday loans and other dangerous forms of high-cost credit are or should be entirely outside of laws that govern credit. We also fear evasions of laws that prohibit discrimination against communities of color and other protected classes.

Misuse of the Advisory Opinion and CAS Approval Order is predictable and is already happening. In particular, we have reason to believe that PayActiv is not using the CAS Approval Order in good faith. The CAS Approval Order applies to only a limited version of PayActiv's products, and the CFPB specified that the order does not constitute the Bureau's endorsement of the particular aspects of the PayActiv program it approved, let alone other PayActiv products. Yet PayActiv is claiming that the CFPB approval is a "clear signal" that PayActiv sets the "gold standard." PayActiv is using the CFPB approval to urge state legislatures to create gaping holes in their usury laws that would accommodate PayActiv products with costs and other features outside the CAS Approval Order's limits – exemptions that might even be used by new forms of payroll deduction payday lenders offering loans with high fees.

The Advisory Opinion takes the position that, under certain narrow, prescribed circumstances, EWA products that involve no payment whatsoever by the employee, voluntary or otherwise, to access the funds or the program are not "credit" under the Truth in Lending Act (TILA) and Regulation Z because the employee does not incur a "debt." While it is possible that free advances that are repaid in a single payment are not subject to TILA for other reasons, the superfluous and flawed discussion of the scope of "debt" breaks new ground, strays far beyond established understandings of Regulation Z, ignores contrary authorities, and fails to consider the high likelihood that the interpretation will be used to promote widespread evasions of TILA and possibly the Equal Credit Opportunity Act (ECOA).

The CAS Approval Order, applying largely similar reasoning, takes the same position as to the PayActiv model it addresses. Yet the CAS Approval Order includes additional problematic elements, including a model that charges fees, which can be significant, and that potentially involves payroll deductions from future, unearned pay. Other PayActiv programs, not covered by the CAS Approval Order, have even more concerning features, including bank account debiting (even in employer-based programs), higher fees, and repayment options that go beyond earned wages to future wages. Yet the subtleties of what the CFPB has approved and what it has not invariably get lost.

The Advisory Opinion and CAS Approval Order focus on features of EWAs that are not relevant – by the plain text of TILA and Regulation Z – to determining whether a transaction extends credit or creates a debt. Indeed, past regulatory interpretations of TILA routinely found that products were credit despite the presence of these same elements.

We note that the Bureau, in a consent order entered into this month, recently concluded that an income share agreement (ISA) *is* credit. ISA providers have rested on many of the same arguments that EWA providers have to claim that they are not offering "credit." Despite ISA providers' claims that their products are not loans, the Bureau confirmed that "regardless of the name on the label, these products are credit and have to comply with federal consumer protections," Including the Truth in Lending Act.[1] We applaud the Bureau for making this determination in the ISA space and urge it to turn the same discerning eye toward EWAs.

Our anti-discrimination laws, as well as our credit laws, may be threatened by the Bureau's approach. If a product is not "credit," then it could be argued that it also is not be covered by fair lending laws, which use similar definitions. In an era where complex algorithms and use of social media data may exacerbate discrimination against communities of color and other protected classes, it is especially unwise to narrow the scope of our fair lending laws for a potentially broad range of products.

The CFPB never should have put out interpretations with such wide-ranging and complex repercussions without the thorough analysis they deserve. Nor should it have done so without any opportunity for public input.

Indeed, the processes through which these interpretations were forged are deeply problematic. The Bureau reached its conclusions after outreach from industry and secretive back-and-forth with one company, but with no opportunity for consumers or consumer advocates, other policymakers, state regulators, competitors, or other members of the public to offer their views. The lack of broader input is especially troubling because it is debatable whether EWAs are helpful or create their own cycle of debt, and because the interpretations break new ground on the scope of TILA that never should be undertaken on a secretive, one-sided basis without input from other stakeholders. The meager legal analysis in the Advisory Opinion and CAS Approval Order reflect a lack of thorough consideration, both on the legal merits and on the policy repercussions. PayActiv's misuse of the CAS Approval Order also highlights why the CFPB simply should not be in the business of "approving" particular companies' products.

Ultimately, these interpretations underscore the fundamentally misguided policies the CFPB adopted last year to create the advisory opinion program, the compliance assistance sandbox program, and other "innovation" programs. These programs provide a vehicle for industry players to obtain favored interpretations of the law that facilitate evasions, without any opportunity for consumers or others to weigh in. The CFPB's name is being used as an implied endorsement of a company's products, notwithstanding any caveats in the CFPB's actions, and to promote lobbying efforts to weaken state consumer protection laws and to gain contracts over competitors.  In addition to revisiting the EWA Advisory Opinion and CAS Approval Order, we urge the Bureau to eliminate or dramatically revise these programs.

<u>Recommendations</u>:

- **Cover fee-based EWA products as credit under TILA and rescind or significantly revise the EWA Advisory Opinion.** While the Advisory Opinion only covers free products, the errors in the CFPB's discussion of "debt," the complexity of that question, and the dangers of that discussion being used to promote evasions are simply too great – especially in light of the Bureau's

[1] CFPB, CFPB Takes Action Against Student Lender for Misleading Borrowers about Income Share Agreements: Consent Order against Student Loan Originator for Deceptive Practices Sends Clear Message to ISA Industry, Sept. 7, 2021 (quoting Acting Director Dave Uejio), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/

extension of that opinion to fee-based products through PayActiv approval order. Thus, we urge the Bureau simply to rescind the opinion. In the alternative, for the completely free EWAs that the Advisory Opinion addresses, the CFPB could consider revising the Advisory Opinion to eliminate any discussion of "debt" and to focus instead on the lack of TILA coverage for companies that are outside Regulation Z's definition of creditor because they do not regularly offer credit with a finance charge or an agreement to pay in more than four installments.

- **Rescind the PayActiv CAS Approval Order.** The CAS Approval Order gives PayActiv protection from any liability – not just in actions by the CFPB – for acts done in good faith conformity with the order even if the order is determined to be invalid. But PayActiv is not acting in good faith and is misusing the order, and good faith reliance and the broad grant of immunity are not justified given the faulty reasoning underlying the order. Thus, the order should be revoked. If the CFPB wishes to continue collecting data from PayActiv while it studies how to treat EWA programs, the CFPB should end the CAS Approval Order and replace it with a time-limited no-action letter under which the CFPB states its intention not to bring an enforcement action in exchange for the continued collection of data from PayActiv.

- **Immediately order PayActiv to cease and desist from misusing and mischaracterizing the order and give PayActiv a limited time to respond to this letter.** The letter should notify PayActiv of possible grounds for termination raised in this letter and give PayActiv an opportunity to respond within a reasonable period of time.

- **Pending rescission of the Advisory Opinion and CAS Approval Order, issue a public statement emphasizing the limited nature of the two actions, the limited EWA programs to which they apply, and the fact that the CFPB has not endorsed EWAs or PayActiv.** This is necessary to prevent further misunderstanding about the scope and impact of the Advisory Opinion and CAS Approval Order.

- **Supervise EWA and faux EWA providers that charge fees under the CFPB's authority over payday loans.** Given the growth of this market, the CFPB should begin examining EWA providers, as well as companies that offer direct-to-consumer products that falsely claim to be advancing wages. The Bureau has supervision authority over payday loans regardless of how these products are treated under TILA.

- **Eliminate or significantly alter the CFPB's Advisory Opinion Program and Compliance Assistance Sandbox Program, and make significant changes to the Bureau's No-Action Letter Policy and Trial Disclosure Sandbox.** The programs and policies adopted in recent years create secretive, one-sided processes that favor industry and harm consumers; give liability protection for conduct that may violate the law; result in inappropriate endorsement of particular companies or products; purport to limit the grounds on which the CFPB can terminate approvals inappropriately granted; complicate compliance for well-intended companies; and consume Bureau resources better spent on protecting consumers.

## 2. Earned Wage Access Products, Even Free Ones, Pose Risks to Consumers

This letter primarily focuses on our concerns about the CFPB's interpretation of the scope of "credit" under TILA and the way that it could cause problems beyond the narrowly defined EWA programs that the Advisory Opinion and CAS Approval Order address. But for context, we would like to briefly touch on some concerns about EWA products and other payday advance products.

The Advisory Opinion covers only EWA programs that are completely free to the consumer, that do not involve debiting a bank account, for which a payroll deduction may be submitted only once unless there is a technical or administrative error, and with a commitment not to engage in debt collection. Certainly, those programs are far less expensive, and pose fewer risks, to consumers than payday loans.

But even a free EWA, like other balloon-payment loans repaid on payday, poses the risk of a cycle of debt and reborrowing when repayments are not affordable. 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. Even free loans can be unaffordable and trigger a cycle of debt – which is exactly why payday lenders sometimes offer free loans to new customers.[2]

Data indicate that EWAs may put people into an even more extensive cycle of repeat reborrowing than traditional payday loans. The "typical" frequency of use for those who use these products runs from 12 times per year on the low end to 120 at the high end, with most at or above 24 times a year (see following chart).[3] In other words, typical users of these products appear to use them *nearly every pay period.* Some consumers may regularly take advances multiple times during a pay period, and for some workers, the "pay period" is a single day's earnings.

| Company | Typical Frequency Of Use | Typical Advances Per Year* |
|---|---|---|
| Daily Pay | 1.5 times per week | 78 |
| Even | 1.4 accesses per month | 17 |
| FinFit | Limit of 1 access per pay period | 24 |
| FlexWage | 1 to 4 accesses per month depending on employer settings | 12 to 48 |
| Instant Financial | 4 to 5 accesses per pay period | 96 to 120 |
| Payactiv | 1 to 4 accesses per pay period | 24 to 96 |

Source: Aite.
*NCLC calculations assuming semi-monthly pay.

[2] *See* Leslie Parrish and Uriah King, Center for Responsible Lending, Phantom Demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume at 15 (July 9, 2009), https://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf ("CRL, Phantom Deman") (describing how even a free loan is unaffordable); *see also* CFPB, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Final Rule, 82 Fed. Reg. 54472, 54480 (Nov. 17, 2017).
[3] The "typical frequency of use" numbers were reported in Leslie Parrish, Aite, Employer-Based Loans and Early Pay: Disruption Reaching Scale at 13-14 (April 2019). The typical advances per year were calculated by NCLC assuming semi-monthly paychecks.

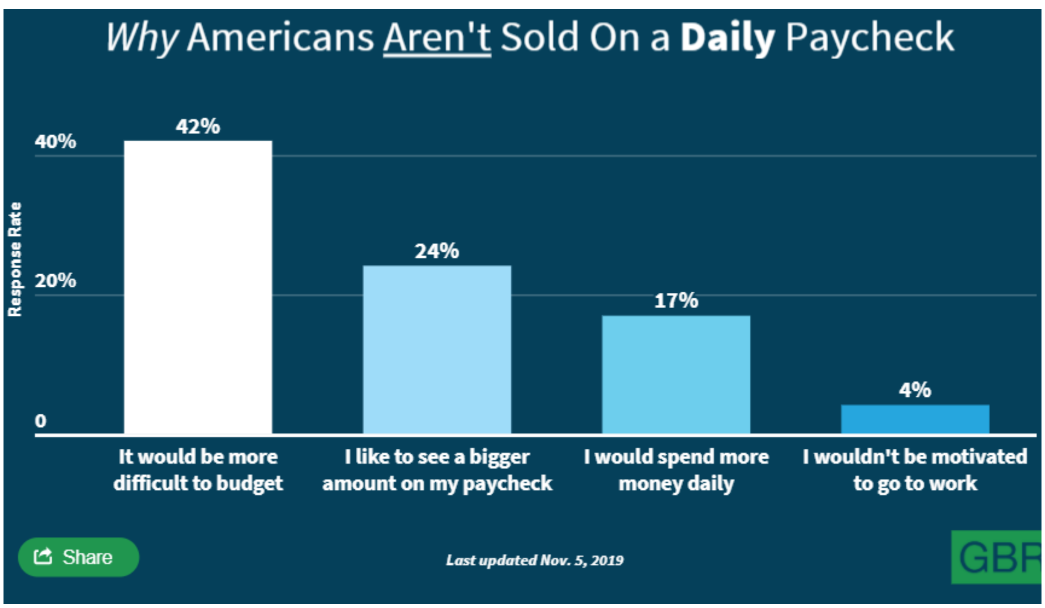
With this cycle of reborrowing, consumers are often not getting liquidity to cover new expenses; the advances are merely filling the gap created by the prior advance. That is, like traditional payday loans, the advances may create their own "phantom" demand.[4]

Even if the cost is zero or low, EWAs pose the same problems as other balloon-payment loans. In 2017, the CFPB required that back-to-back payday loans that do not assess ability to repay step down in size followed by a cooling off period. A similar structure would benefit EWAs, whether ultimately imposed through rules or voluntarily by the employer or EWA provider.[5]

Even without fees, programs that make it easy to spend next week's pay may make it harder to save up for large, monthly expenses like rent. More frequent pay – especially for the low-wage workers who frequently use payday advances – may only make savings and financial management more difficult.

One survey concluded that "a daily paycheck could be the worst possible thing for your finances": "Workers that receive their wages daily tend to spend it immediately upon receipt and live on a day-to-day basis," said Salvador Gonzalez, a certified public accountant and certified internal auditor who teaches accounting at Walden University. "Unlike workers who get paid weekly, biweekly or even monthly, people that earn a daily paycheck are less likely to have bank accounts, save or build assets."[6]

A worker survey confirmed that many would find it more difficult to manage with a daily paycheck. "Only 8% of the survey's respondents said that getting paid daily would help them budget their paychecks better and grow their savings faster."[7] This graph depicts the challenges of a daily paycheck:




Source: GoBankingRates.com.

[4] *See* CRL, Phantom Demand, *supra.*

[5] *See* NCLC, Early Wage Access: A Good Option for Workers or a Fintech Payday Loan? (March 2020), https://www.nclc.org/images/pdf/banking_and_payment_systems/pb-early-wage-access.pdf.

[6] Grace Lin, GoBankingRates.com, Survey: Turns Out a Daily Paycheck Could Be the Worst Possible Thing for Your Finances: It's harder to control spending when you get paid every day (Nov. 7, 2019), https://www.gobankingrates.com/money/jobs/daily-paycheck-could-be-worst-thing-for-your-finances/.

[7] *Id.*

EWAs often claim that they are a “fintech” solution to the “old technology” of the biweekly paycheck. But it is not clear that there is a problem, or that it would be a good thing to disrupt the biweekly paycheck. The traditional, full biweekly paycheck works well as a savings device for the large, once-a-month bills like rent, credit cards and utilities:

> Americans weren’t wrong when they said it’s harder to manage your money on a daily pay schedule — in fact, the experts agree.
>
> “As a general rule, it’s easier to create a budget when your payment arrives biweekly or monthly because most major expenses (mortgage, rent, student loans, car loans, utilities) are typically paid monthly,” [bank executive Judith] Corprew said. “If you are receiving one or two paychecks every month, it can be easier to determine how much you need to hold for those significant bills. With a daily paycheck, you have to calculate a smaller amount, which can make it difficult to save unless you remain conscious of the exact amount needed from each day’s pay.”[8]

The jury is still out on whether even free EWAs help or hurt consumers, or if the answer is “it depends.”

CFPB research on that topic would be welcome. We urge the CFPB to collect data, which will be useful in understanding how some of these programs work. It will be important to find a way to couple data on the EWA providers’ side with actual data about the impact on the consumer in terms of overdraft and NSF fees (even if not directly triggered by the EWA repayment), late fees on other payments, and general cashflow management. The CFPB should view with a critical eye claims by EWA providers that they help people avoid overdraft fees when those claims are based on assumptions that might not be accurate.[9] We also urge the CFPB to make its research public.

### 3. Fee-or “Tip”-Based Models and Models That Access Consumer Deposit Accounts Pose Special Concerns

Concerns about EWAs start to rise if there are any fees. For example, the PayActiv Access Choice program – one of two programs covered by the CFPB approval order – charges $1 per access, up to $3 for a one-week pay period and up to $5 per biweekly paycheck. In addition, PayActiv charges $1.99 per transfer to employees who want their funds instantly and do not want to wait a day for an ACH transfer to settle. Conversations with several EWA providers have confirmed that it is common for 90% of workers who use EWA to choose the more expensive instant pay option.

Thus, at the high end, assuming 12 instant accesses per month, 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. Even with only four accesses per biweekly pay period – the higher end of the “typical” use reported by PayActiv – that could still be about $27 per month if the employee always uses the expedited feature. And even without use of the instant pay feature, $12 is still real money – several meals – for people on the edge, particularly if that money is not buying additional liquidity and is merely filling the hole caused by the previous EWA.

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[8] *Id.*

[9] EWA providers may be making assumptions that consumers would have incurred overdraft fees in certain situations when that might not necessarily have been the case. In the absence of pay advances, consumers might have forgone spending or covered expenses in another way. Even if a given advance avoided an overdraft fee, it might have triggered a cycle of debt or encouraged excess spending that caused future overdraft, NSF or late fees.

Of course, some EWA providers charge even more, especially those that charge daily. Those more expensive programs are not covered by the CFPB's Advisory Opinion and CAS Approval Order. Yet the CFPB's actions still send a general message of approval for the industry, and a message that these products do not create debt and thus are not covered by credit laws. There may be virtually no limit to how high these fees could get, particularly if these products are excluded from state credit laws.

Some EWA programs that primarily use payroll deduction – including some of PayActiv's programs outside the scope of the Approval Order – also debit bank accounts and can directly trigger overdraft and NSF fees. As we understand it, this typically happens in two situations: In states where payroll deduction hits regulatory obstacles, and when the employee requests an advance after the close of payroll but before payday. In those situations, the program may debit the consumer's checking account directly, potentially triggering overdraft or NSF fees.

While the CFPB's Advisory Opinion and CAS Approval Order do not cover EWAs that debit bank accounts, the nuances get lost as these actions are described and used out in the world. As discussed below, PayActiv is using the CFPB's actions to imply broad approval for all PayActiv programs. The CFPB's actions are also at high risk of being viewed as broadly approving of earned wage access programs regardless of the differences among programs.

The Advisory Opinion and CAS Approval Order also do not cover programs that are direct-to-consumer and are not through an agreement with the employer. The Opinion and Order also do not address the use of purportedly voluntary "tips."[10] Thus, we will not address those programs in this letter. Nonetheless, we would like to flag our concern that CFPB discussion in the now rescinded 2017 payday loan ability-to-repay rule has been used by industry to claim support for a model we view as highly evasive and harmful.[11]

In our recent comments to the California Department of Financial Protection and Innovation, we raised serious concerns about the direct-to-consumer model, about the assumption that so-called tips are purely voluntary, and about the treatment of tips under federal and state lending laws.[12] Companies can employ a variety of strategies to make it difficult not to tip or to make the consumer feel compelled to tip. Even absent those strategies, "tip" models take advantage of consumers' assumption that they will be denied future access if they do not tip and of misunderstanding about how small individual tips add up to high costs over time and high interest rates (similar to $15 per $100 pricing on payday loans).[13]

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[10] A colleague recently recounted how he found it impossible to undo the default tip option in an app, even after deleting and reinstalling the app.

[11] *See* 82 Fed. Reg. 54472, 54531, 54547-48 (Nov. 17, 2017). We note, however, that the exception for no-cost advances in the payday loan rule requires that any tips be true voluntary, which is likely not true for many tip models. Moreover, the need for an exception reinforces that the advances are credit under TILA; otherwise, an exception would not have been necessary.

[12] *See* Comments of NCLC, CRL to Commissioner Manuel P. Alvarez, Dep't of Financial Protection and Innovation re: PRO 02-21, Proposed Rulemaking under the California Consumer Financial Protection Law: Earned Wage Access at 9-12, 20 (Mar. 15, 2021) ("NCLC, CRL CA DFPI Comments"), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/CRL_CA_DFPI_EWA_Comments.pdf.

[13] Most borrowers likely have no idea what a high rate of interest they are paying. *See, e.g.,* Cyrus Farivar, NBC News, Millions use Earnin to get cash before payday. Critics say the app is taking advantage of them. (July 26, 2019).

The "tips" model is also migrating from products that purport to offer access to wages to outright loans.[14] The cost to the consumer is the same whether the price is labeled as a tip or as interest. Even if voluntary, tips could still be finance charges under TILA[15] and they are still subject to state usury laws.[16] Evasions will explode if the CFPB and states do not stop them.

## 4. The Advisory Opinion and CAS Approval Order are based on a fundamental misconstruction of the legal definition of "credit."

### 4.1. Overview

The Advisory Opinion takes the position that, under certain prescribed circumstances, free EWA products are not "credit" under Regulation Z. The CAS Approval Order, applying largely consistent reasoning, takes the same position as to the PayActiv model it addresses.

The Advisory Opinion reasons that EWA products with certain characteristics, "Covered EWA Programs," do not involve "the offering or extension of 'credit' as defined by . . . Regulation Z."[17] In short, Covered EWA Programs are specified as those where the provider contracts with the employer; the provider relies on employer-provided earned wage information; the product carries no cost, including tips, to the consumer; funds are directed to the account of the consumer's choice; repayment is made through an employer-facilitated payroll deduction from the employee's next paycheck, with certain conditions for and limits on repeated attempts if repayment is not made; the provider has no remedy in the event of non-repayment; the provider makes certain warranties; and the provider does not assess credit risk.[18]

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[14] *See, e.g.*, Fast Company, These 2 Black founders aim to offer a fairer alternative to payday loans (Feb. 18, 2021) ("When requesting a loan, for instance, SoLo asks borrowers to choose a "donation" to the app on top of their tip to the lender, starting at 7% or $3.50 for new borrowers seeking $50 loans. Technically, the donation is optional, but the only way to avoid it is through a toggle in SoLo's settings menu, which must be reactivated for each request. There's no way to opt out of donations while making the request itself. Industry watchdogs have also raised concerns about the tipping model. While SoLo's tips are also voluntary, and about 7% of loans funded on the platform involve no tipping at all, the app notes that loans are much more likely to be funded when users tip the maximum amount. Between tips and donations, users may end up paying a rate that's not much more favorable than payday loans, even if the model for late payments is less predatory.").

[15] *See* Federal Reserve System, Truth in Lending, Final rule, 61 Fed. Reg. 49237, 49239 (Sept. 19, 1996) ("The Board has generally taken a case-by-case approach in determining whether particular fees are 'finance charges,' and does not interpret Regulation Z to automatically exclude all 'voluntary' charges from the finance charge.") (implementing the Truth in Lending Act Amendments of 1995, which establish new creditor liability rules for closed-end loans secured by real property or dwellings and consummated on or after September 30, 1995).

[16] Stock v. Meek, 35 Cal.2d 809, 817, 221 P.2d 15, 20 (1950) (Traynor, C.J.) ("The theory of (the Usury) law is that society benefits by the prohibition of loans at excessive interest rates, even though both parties are willing to negotiate them. Accordingly, 'voluntary' payments of interest do not waive the rights of the payors. 'Payments of usury are not considered voluntary, but are deemed to be made under restraint.' (Citation.) If no loophole is provided for lenders, and all borrowers save fraudulent ones are protected, usurious transactions will be discouraged.") (citing cases); *accord* Hardwick v. Wilcox, 11 Cal.App.5th 975, 988-89 (2017); Buck v. Dahlgren, 100 Cal.Rptr. 462 (Ct. App. 1972); Heald v. Friis-Hansen, 52 Cal.2d 834, 837, 345 P.2d 457, 459 (1959) ("In the absence of fraud by the borrower, the parties to a usurious transaction are not *in pari delicto*, and, where a loan agreement calls for usurious interest, the borrower may recover any interest paid.")

[17] Advisory Opinion at 4.

[18] *Id*. at 4-7.

As the Advisory Opinion notes, Regulation Z defines "credit" as "the right to defer payment of debt or to incur debt and defer its payment."[19] The statutory definition of "credit" under TILA is similar.[20] The Advisory Opinion offers the following rationale to support its determination that Covered EWA Programs are not credit:

(a) they "do not implicate a 'debt'";[21]
(b) considering them not to be credit is consistent with a comment to Regulation Z that excludes from its definition of "credit" borrowing against the accrued cash value of an insurance policy or a pension if there is no independent obligation to repay;[22] and
(c) the "totality of the circumstances . . . supports that these programs differ in kind from products the Bureau would generally consider to be credit."[23]

The Bureau also claims that its interpretation is consistent with the discussion of these types of products in the 2017 payday lending rule.[24]

Upon further examination, as discussed in turn below, each of these purported rationales fails.

## 4.2. The Advisory Opinion's discussion of the meaning of "debt" is unreasoned.

### 4.2.1. The Advisory Opinion's application of the Black's Law Dictionary definition of "debt" is unreasonably narrow.

As the Advisory Opinion notes, neither TILA nor Regulation Z define the term "debt" used within the definition of "credit" as "the right to defer payment of debt or to incur debt and defer its payment." The Advisory Opinion simply applies a definition of "debt" from Black's Law Dictionary — a "[l]iability on a claim; a specific sum of money due by agreement or otherwise"[25] — and concludes that "no such liability" arises with Covered EWA Programs.

The Advisory Opinion includes no significant legal analysis of the Black's Law definition. Rather, the Advisory Opinion's purported justifications for its conclusion are the following:

- *Covered EWA "functionally operates like an employer that pays its employees earlier than the scheduled payday,"[26] which "often occurs" when, "for instance," an employee receives a final paycheck on their last day of work, which may be earlier than the scheduled payday*.[27] This analogy fails completely, as that employee clearly has not been advanced funds that it must repay through a subsequent payroll deduction. Moreover, EWAs do *not* involve the employer paying its employees; they are third parties giving an advance on a future paycheck.

[19] *Id*. at 7, citing 12 CFR 1026.2(a)(14).
[20] TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. 1602(f).
[21] Advisory Opinion at 7-8.
[22] *Id*. at 9-10.
[23] *Id*. at 10-12.
[24] *Id*. at 12.
[25] *Id*. at 9 (quoting Debt, Black's Law Dictionary (11th ed. 2019).
[26] *Id*. at 8.
[27] *Id*. at 8, n.24.

- *Wages have been earned.* Yet payday lenders also make loans against wages, some or all of which have often already been earned. Payday borrowers still clearly have an agreement to repay the debt on payday. Payday lenders could also establish a mechanism by which they confirm a borrower's wages have been earned, but their product would still be a loan. In fact, a new generation of fintech infrastructure companies are building APIs to facilitate access to the data in payroll systems that could one day become as ubiquitous – and as available to predatory lenders – as account information from data aggregators is today.[28] This factor cannot distinguish debt from non-debt.

- *The funds are transferred at no cost to the employee, just as receiving a paycheck costs nothing.* Whether there is a charge for credit has absolutely no bearing on whether "debt" has been incurred. The cost is only relevant to whether the lender is a "*creditor*": one who "regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments…."[29] Indeed, a company may be a creditor covered by TILA even if there is no cost to the consumer, such as credit payable in more than four installments.

- *Credit risk is not assessed directly or indirectly.* But the fact that the lender has a powerful repayment mechanism that minimizes the need to assess ability or likelihood to repay does not mean that money is not "due by agreement." Lack of underwriting is a problematic credit practice, not a rationale for finding that credit laws do not apply. Moreover, the EWA provider does take steps to ensure it is repaid when it relies, either directly or through the employer, on the employer's payroll records, and on the employee's representation that it has not previously assigned its wages.[30] Were there truly no "liability" or "sum of money due," the provider would have no need to take payroll records into account. The EWA provider's coordination with the employer to ensure wages are earned and will be repaid is analogous to a payday lender's ensuring that a prospective borrower has a source of income.

These purported rationales entirely fail to support the conclusion that that the extension of funds is not a "liability on a claim" or a "sum of money due" – and thus, not "debt."

We discuss the "liability on a claim" aspect of the Black's definition below in Section 4.2.2 in the context of Bankruptcy Code definition of "claim" and in Section 4.2.4.1 in rebutting the relevance of the warranties EWA providers give regarding claims and collections.

But even if there is no liability on a claim under the first prong of the Black's definition, EWAs nonetheless involve a "specific sum of money" that *is* "due by agreement." The agreement specifies exactly how that money is to be paid – by the payroll deduction authorization.

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[28] Alex Johnson, FintechTakes, Payroll Data+Fintech (Mar. 1, 2021), https://newsletter.fintechtakes.com/p/payroll-fintech (noting that as fintech apps using Yodlee, MS, Finicity and Plaid have grown in popularity, this has "helped familiarize millions of consumers with the process of giving a third party permission to access their personal financial data. It's easy to forget, but 15 years ago this was a scary thing to do! Bank transaction data aggregators have made it feel safer, which gives payroll API providers a huge leg up").
[29] 12 C.F.R. § 1026.2(a)(17)(i).
[30] PayActiv Program Terms and Conditions at 5, Appendix A to Compliance Assistance Sandbox Application – Payactiv, Inc., https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-request_2020-12.PDF ("YOU ACKNOWLEDGE AND AGREE THAT YOU HAVE NOT ASSIGNED, TRANSFERRED OR CONVEYED YOUR WAGES FROM EMPLOYER OR ANY PART THEREOF.").

The Advisory Opinion does acknowledge in a footnote the comment to Regulation Z most analogous to EWA – the comment explaining that payday loans are credit. Yet the Advisory Opinion wholly fails to wrestle with this comment – even as one could easily replace a few phrases of this comment and accurately describe EWA, as we do in blackline here:

> "Credit includes a transaction in which a cash **or check or electronic** advance is made to a consumer in exchange for ~~the consumer's personal check, or in exchange for~~ the consumer's authorization to ~~debit the consumer's deposit account~~ **deduct the funds from the consumer's pay**, and where the parties agree ~~either~~ that ~~the check will not be cashed or deposited, or that the consumer's deposit account will not be debited,~~ **such deduction shall not occur** until a designated future date."[31]

Many loans, their status as credit not debated, are repaid via payroll deduction. Thus, the Advisory Opinion's application of the Black's Law Dictionary definition is unreasonably narrow – even assuming that the Black's definition controls. We question that assumption in the next section.

#### 4.2.2. The Advisory Opinion fails to consider other sources that may inform the definition of "debt."

The Advisory Opinion applies an overly narrow definition of "debt" from Black's Law while failing to consider other sources that may inform that definition.

First, the Advisory Opinion ignores the only case law of which we are aware under TILA that addresses the definition of "debt," which uses a different approach, applying the Fair Debt Collection Practices Act (FDCPA) definition of "debt": "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."[32] The CFPB failed to consider any of the case law under the FDCPA's definition of "debt."

Second, the Advisory Opinion ignores that Regulation Z's Official Interpretation specifies that state law may provide guidance for construing terms that TILA does not define.[33] The Advisory Opinion does not consider state law. California, for example, has two definitions of "debt."

The new California Consumer Financial Protection Law defines "debt" as:

> any obligation of a person to pay another person money regardless of whether the obligation is absolute or contingent, has been reduced to judgment, is fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured and includes any obligation that gives rise to right of an equitable remedy for breach of performance if the breach gives rise to a right to payment.[34]

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[31] 12 C.F.R. part 1026, supp. I, comment 2(a)(14)-2.

[32] Pollice v. Nat'l Tax Funding, Ltd. P'ship, 225 F.3d 379 (3d Cir. 2000) (looking to FDCPA definition of debt in a case involving a TILA claim, 12 U.S.C. 1692a(5)).

[33] 12 C.F.R. § 1026.2(b)(3).

[34] California Consumer Financial Protection Law (CCFPL), Cal. Fin. Code § 90005(h) (eff. Jan. 21, 2021), state: Under the Bankruptcy Code, a "debt" is defined at 11 U.S.C. § 101(12) as a "claim", which in turn is defined at 11 U.S.C. §

EWA agreements, for example, create an obligation to pay money by payroll deduction, even if that obligation is contingent on the deduction being successful and is not enforceable through a lawsuit. (Whether there is an "obligation" is discussed in more detail in Section 4.2.4.1 addressing the relevance of the warranties EWA providers give regarding claims and collections.)

California's Rosenthal Fair Debt Collection Practices Act also contains a definition of "debt":

> The term "debt" means money, property or their equivalent which is due or owing or alleged to be due or owing from a natural person to another person.[35]

At the point that the EWA has been advanced, there is money due and owing on payday, with an agreement to repay it by payroll deduction.

The Advisory Opinion gives no consideration to other aspects of California's definitions of debt or those of any other state.

Third, the Advisory Opinion fails to consider definitions of debt in other federal statutes, like the Bankruptcy Code, and how they inform this question. The Bankruptcy Code defines "debt" as a "liability on a claim."[36] The Code defines a "claim" to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[37]

The Supreme Court has rejected the argument that "claim" means "enforceable claim." Rejecting the argument that a debt beyond the statute of limitation was not a "claim," the Court explained:

> A "claim" is a "right to payment." 11 U.S.C. § 101(5)(A). State law usually determines whether a person has such a right…. And Alabama's law, like the law of many States, provides that a creditor has the right to payment of a debt even after the limitations period has expired….
>
> Johnson argues that the Code's word "claim" means "enforceable claim." … The word "enforceable" does not appear in the Code's definition of "claim." See 11 U.S.C. § 101(5)…. And it is difficult to square Johnson's interpretation with our later statement that "Congress intended ... to adopt the broadest available definition of 'claim.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991).
>
> Similarly, § 101(5)(A) says that a "claim" is a "right to payment," "whether or not such right is ... fixed, *contingent,* ... [or] *disputed*." If a contingency does not arise, or if a claimant loses a

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101(5) as: "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."

[35] Calif. Civil Code § 1788.2(d).

[36] 11 U.S.C. § 101(12) ("The term 'debt' means liability on a claim.")

[37] 11 U.S.C. § 101(5)(A). Part B of Code Section 101(5) goes on to define a "claim" as a right to equitable remedies for breach of performance.

dispute, then the claim is unenforceable. Yet this section makes clear that the unenforceable claim is nonetheless a "right to payment," hence a "claim," as the Code uses those terms.[38]

Just like the word "claim" has a broad meaning, courts have also observed that "'debt' is to be given a broad and expansive reading for purposes of the Bankruptcy Code, and that when a creditor has a claim against a debtor—even if the claim is unliquidated, unfixed, or contingent—the debtor has incurred a debt to the creditor."[39]

The Advisory Opinion fails to consider how the case law under the Bankruptcy Code definition of "debt" might inform the interpretation of TILA or of state law debt definitions. (See below for discussion of how the Bankruptcy Code definition rebuts the argument that a limitation on means of collecting prevents something from being debt.)

#### 4.2.3. The Advisory Opinion's analogy to borrowing against insurance policies or pensions is misguided and dangerous.

The Advisory Opinion claims that its conclusion that Covered EWA Programs are not credit under Regulation Z is consistent with the comment to Regulation Z excluding from credit "[b]orrowing against the accrued cash value of an insurance policy or a pension account if there is no independent obligation to repay."[40] The Advisory Opinion references the Federal Reserve Board's rationale from 1981 – that "the consumer is, in effect, only using the consumer's own money."[41]

First, a 40-year old obscure comment in a different context, which was not based on TILA's text, should not be used reflexively in a new context without considering whether it is consistent with TILA's purpose. Providing early access to one's own money or accrued value has not stopped regulators from recognizing products as credit. Tax refund anticipation loans (RALs) routinely employ the device of providing consumers early access to their "own money."[42] Yet, regulators had no difficulty recognizing RALs as extensions of credit subject to TILA.[43] The same is true of home equity loans – people borrow against accrued value, essentially their own money. The TILA statute and regulation define credit as the right to incur a debt and defer its payment. They do not require any "independent" obligation to repay the debt from distinct sources. To our knowledge, this concept has never been adopted in any other context when interpreting TILA. The definition of "credit" is not dependent on the source of payment. Payroll deduction is a method of payment.

Second, the Advisory Opinion claims that "there is no independent obligation to repay" a Covered EWA because the provider may only recover funds through an "employer-facilitated payroll deduction" and "has no claim direct or indirect against the employee" for nonpayment. We address the relevance of the warranties EWA providers give regarding claims and collections at Section 4.2.4.1 below. That is a

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[38] Johnson v. Midland Funding, LLC, 137 S. Ct. 1407, 1412 (2017).
[39] In re Chase & Sandborn Corp., 904 F.2d 588, 595 (11th Cir. 1990) (citing In re Energy Cooperative, inc., 832 F.2d 997, 1001 (7th Cir. 1987)) (rejecting argument that a contingent obligation was not a debt).
[40] Advisory Opinion at 9, citing 12 CFR part 1026, supp. I, comment 2(a)(14)-1(v).
[41] *Id.* (citing 46 Fed. Reg. 20848, 20851 (Apr. 7, 1981)).
[42] *See* National Consumer Law Center, Consumer Credit Regulation ch. 15 (3d ed. 2020) (discussing RALs). RALs provide advances to taxpayers in exchange for the right to collect a payment from the government in the amount of a taxpayer's anticipated tax refund.
[43] 12 C.F.R. § 226.17(c)(1)-17. *See also* Salazar v. Cash Now Store, 31 P.3d 161, 167 (Colo. 2001) (RALS are loans subject to state small dollar loan statute, rejecting argument that they are "choses in action" rather than loans).

separate issue from whether there is an obligation to repay. Payroll deduction is a method of payment, and the EWA agreement obligates the consumer to repay by payroll deduction. Other payroll deduction loans are widely accepted to be credit.

Even if there were no an "independent obligation to repay," the argument that there is not one is strained to say the least. The PayActiv Approval Order argues: "Employees have no obligation to make any payments directly or indirectly to Payactiv at any time."[44] Yet why doesn't a contract authorizing payments to PayActiv through payroll deduction constitute an obligation to make payments by payroll deduction? Payroll deduction is certainly a method of making payments directly to PayActiv. The employee is obligated; they are not permitted to cancel the payroll deduction.

Third, the ambiguity around when pension advances are credit has caused problems for regulators and consumers alike, which should only offer strong caution against regulating other products similarly. Warnings from federal and state[45] regulators about the dangers of pension advances abound, and they typically include discussion of how pension advances may claim not to be a loan and thus not make clear or accurate disclosures of costs. The U.S. General Accounting Office ("GAO") has noted with concern that "[t]here is limited federal oversight of pension advances," "pos[ing] consumer risks."[46] The CFPB has a consumer advisory addressing "pension advance traps," noting that they "typically charge high interest rates and fees" and "often target government retirees" and that military retirees and veterans should be "on guard."[47] The advisory notes that "[p]ension advance companies may not always advertise their fees and interest rates, but you will certainly feel them in your bottom line." The FTC's advisory, "Pension Advances: Not So Fast," advises that the effective APRs on these advances can exceed 100%, noting that "[t[his information may not be disclosed in ads or contracts, so it's important to ask and get it in writing."[48] NCLC found that the APR for pension advances ranged from 27% to 106%.[49] If pension advances were clearly defined as credit under Regulation Z, the very problems that the GAO, CFPB, FTC and others have highlighted – high, undisclosed APRs, obscure pricing, inability to understand the cost – would not be such a problem.

CFPB has taken two enforcement actions against pension advance providers (in 2015 and 2018), both alleging, *inter alia*, that the providers had engaged in unfair, deceptive, and/or abusive practices by falsely claiming that their products were not loans and not disclosing the cost of the loans.[50] Numerous states have taken enforcement actions as well.[51]

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[44] CAS Approval Order at 6.

[45] *See*, *e.g.*, https://www.michigan.gov/ag/0,4534,7-359-81903_20942-340186–,00.html#:~:text=Often%2C%20the%20fees%20and%20costs,%25%20to%20106%25%20a%20year.

[46] GAP, Pension Advance Transactions: Questionable Business Practices Identified and the Federal Response, Testimony Before the Special Committee on Aging, U.S. Senate at 14 (Sept. 30, 2015), https://www.gao.gov/assets/gao-15-846t.pdf.

[47] CFPB, "Consumer advisory: 3 pension advance traps to avoid," Mar. 16, 2015, https://www.consumerfinance.gov/about-us/blog/consumer-advisory-3-pension-advance-traps-to-avoid/.

[48] https://www.consumer.ftc.gov/articles/0513-pension-advances-not-so-fast. See also GAO Report (July 2014),

[49] Michigan Department of Attorney General, Pension Advances Are a Shaky Deal for Borrowers and Investors Alike, https://www.michigan.gov/ag/0,4534,7-359-81903_20942-340186–,00.html#:~:text=Often%2C%20the%20fees%20and%20costs,%25%20to%20106%25%20a%20year (discussing NCLC finding).

[50] *See* https://files.consumerfinance.gov/f/201508_cfpb_complaint-pension-funding-llc-pension-income.pdf; https://files.consumerfinance.gov/f/documents/bcfp_future-income-payments_complaint_2018-09.pdf.

[51] *See* https://money.cnn.com/2013/05/21/retirement/pension-advance/.

These problems with pension advances should be a warning *not* to regulate other products similarly, rather than a weak attempt to justify exempting other products from "credit." The lesson is that pension advance loans are credit and should be protected by TILA, not that the CFPB should fail to learn from past regulatory errors and make the same mistake twice.

Borrowing against a life insurance policy also poses dangers. The way in which compounding interest decreases the value of the life insurance policy well beyond the borrowed amount is opaque and could leave people with deeply depleted policies.[52] It is not clear why there is any policy or legal justification for not subjecting these loans to the APR disclosures and other requirements of TILA.

#### 4.2.4. The application of a "totality of the circumstances" approach is deeply flawed.

Finally, the Advisory Opinion claims that the "totality of circumstances" supports the conclusion that Covered EWA Programs are not credit because (i) providers have no rights against the employee in the event of nonpayment; (ii) employees are not charged a participation fee or required to use a certain account; (iii) no interest or other fees are charged against the transaction; (iv) there are no late fees or prepayment penalties; (v) providers do not take payment authorization from the employee, such as a check, ACH, or debit authorization; (vi) providers do not pull credit reports or scores or otherwise assess credit risk; (vii) providers do not report to consumer reporting agencies; and (viii) providers do not engage in debt collection activities. Lastly, the Advisory Opinion notes that its approach is consistent with its approach to EWAs in the 2017 payday lending rule.

While some of these factors, in particular the lack of fees, impact the ultimate question of TILA coverage <u>for certain EWA programs</u>, they are mostly irrelevant to the question of whether a product is "credit" under TILA. Most of these factors have no need for elaboration, because ample products that are clearly credit share some combination of these characteristics. We will spend some time addressing the question whether providers have rights against employees, as EWAs' claim that they are "non-recourse"[53] is often one of their top talking points for evading coverage under credit laws. We will also address the no-fee characteristic and the reference to the 2017 payday rule.

##### 4.2.4.1. Debt is still debt and credit even if the creditor makes warranties limiting how the debt can be collected.

The CFPB justifies the view that the EWA programs covered by the Advisory Opinion "have no rights against the employee in the event of nonpayment"[54] Neither the Advisory Opinion nor the CAS Approval Order makes any blanket assertion that EWAs are "non-recourse" or that non-recourse transactions cannot be credit under TILA. Similarly, neither one expresses any view on whether EWA is "factoring" (and whether that would be relevant even if it is), but those arguments were advanced by PayActiv. Those arguments have no merit.

[52] *See* Tony Steuer, Amy Danise, Forbes, The Dangers of Life Insurance Policy Loans (Sept. 29, 2020), https://www.forbes.com/advisor/life-insurance/dangers-of-policy-loans/.
[53] *See*, *e.g.*, https://www.payactiv.com/blog/its-official-payactiv-is-the-only-cfpb-approved-ewa-provider/, https://www.dailypay.com/legal/program-terms/.
[54] Advisory Opinion at 10.

PayActiv's application cites a long string of commercial cases for its argument that an EWA is not credit because it is a "non-recourse factoring transaction"[55] – in effect, a sale of receivables at a discount.

These business-to-business cases, not interpreting statutes directly applicable to TILA, have nothing to do with the application of federal consumer law. It is not unusual for businesses to sell assets and engage in complicated transactions, and depending on the facts, a business-to-business sale of receivables could be a *bona fide* sale, with the discounted price reflecting the reasonable value of an asset, or it could be a disguised form of credit.[56] But these cases have nothing to do with a consumer's sale of wages – something that consumers do not normally do. Moreover, PayActiv's purported lack of recourse is not determinative where, as PayActiv admits, the risk of nonpayment "is quite low as employers rarely fail to pay their employees their earned wages."[57]

Whatever the treatment of commercial factoring transactions, numerous state statutes explicitly define the sale or assignment of earned wages as "loans." The California Financing Law, for example, states:

> The payment by any person in money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, **whether earned or to be earned**, is, for the purposes of regulation under this division, a loan secured by the assignment. The amount by which the assigned compensation exceeds the amount of the consideration actually paid is interest and charges upon or for the loan, calculated from the date of payment to the date the compensation is payable.[58]

Nonetheless, while the Advisory Opinion and CAS Approval Order avoid discussing non-recourse transactions and factoring, both do point to certain warranties that EWA providers give employees as justification that Covered EWAs are not credit – warranties that the provider has no contractual claim or remedy, direct or indirect, against the employee and that it will not engage in debt collection, report to consumer reporting agencies, or involve third-party debt collectors.[59] The Advisory Opinion offers no elaboration as to why these warranties support the legal conclusion that there is no debt or credit. The Bureau's reliance on the significance of these warranties is troubling, as other creditors can and do support their claim that they are not offering credit by pointing to similar warranties.

Merely disavowing the right to collect a loan by other means does not mean that it is not debt. Earnin uses that same argument for its faux EWA product, which is direct-to-consumer, not through payroll, with no connection to the employer or to actual wages; is collected through the right to debit the borrower's bank account; and involves the payment of interest hidden as "tips" that were, and perhaps

[55] PayActiv application at 11-14.
[56] For example, the case Refinance Corp. v. Northern Lumber Sales, Inc., 329 P.2d 109 (Cal. App. 1958), has been cited in support of the claim that a sale transaction without recourse is not a loan. *Refinance Corp*. involved the sale by a lumber company of receivables where the purchaser bore the risk of "insolvency of the customer." *Id.* at 76. The court's primary finding was that the sales were a *bona fide* sale, and in fact the court found that separate receivable sales made *with* recourse were also sales, not loans.
[57] PayActiv application at 12.
[58] Calif. Financing Law § 22335 (emphasis added). Just a few of the many others are N.M. Stat. § 58-15-21; R.I. Stat. § 19-14.1-6; Mo. Stat. § 408.210; Ky. Rev. Stat. § 286.4-570.
[59] At 10; Approval at 4.

still are, a condition of credit.[60] This is plainly a loan, even though Earnin states that it forgoes debt collection activities and some (but not all) contractual liability remedies for nonpayment.[61]

TILA and other federal statutes support that non-recourse debt is still debt, and credit, and the presence of warranties forgoing certain remedies is not determinative for the same reason. Reverse mortgages are non-recourse obligations and most TILA provisions apply to them.[62] More than twenty years ago, pawn brokers raised many of the same arguments about non-recourse debt that EWA providers are circulating today. The Federal Reserve Board rejected these arguments when it adopted an Official Staff Interpretation in 1996 and made pawnbrokers subject to TILA.[63] Courts adhered to this view in holding that non-recourse pawn transactions were debts and therefore credit extensions under TILA.[64]

EWAs also create a "debt" and a "claim" under the Bankruptcy Code definitions discussed above, even if the providers have relinquished methods of collecting those debts. For example, if a consumer who expected to be paid on the 15th day of the month obtained $100 from an EWA provider on the 5th day of the month, then filed a petition for bankruptcy relief on the 10th day of the same month, the EWA provider would have a $100 "right to payment" for a pre-petition debt in the consumer's bankruptcy case.

The Fair Debt Collection Practices Act similarly defines the word "debt" in a way that includes non-recourse debts. The Supreme Court recently made this clear in *Obduskey v. McCarthy & Holthus LLP*.[65] In that case*,* lawyers who conducted non-judicial mortgage foreclosures argued that they did not collect debts when they foreclosed on properties because they did not seek to collect the unpaid mortgage debts as personal liabilities of the borrowers. Instead, the lawyers sought only to take possession of the collateral properties. The Supreme Court rejected this narrow view of the term "debt." According to the Court, the attorneys were enforcing a debt obligation even though they proceeded only against a specific item of property and did not seek to enforce claims for personal liability against borrowers.[66]

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[60] For a longer discussion of why Earnin does have some recourse against "tips" and why they are interest covered by state usury laws, see NCLC, CRL CA DFPI Comments at 8-10, 15, 20.

[61] The Earnin agreement not only says "Failed or rejected debits may be reinitiated at any time up to 150 days after the first debit," but also states: "you warrant that the earned wages being cashed out are just and due to you and that you have not received payment for such wages or any part of the wages from anyone else…. You agree that you will not … request a Cash Out, Max Boost, or use Balance Shield Cash Out for any earned wages that you do not have the complete right, title and interest in or for which you have already received payment;…
If we, in our sole discretion, have reason to believe that you may have engaged in any activities restricted by these Terms of Service or by law, we may take various actions to protect ourselves," including "we may take legal action against you." Earnin claims that it "will not engage in collection efforts to collect payments due to us," but it says "we may hold you liable to Earnin for the amount of damages caused by your violation of these Terms of Service." https://www.earnin.com/privacyandterms/#terms.

[62] *See* § 8.8, *infra,* discussing TILA provisions applicable to reverse mortgages.

[63] 61 Fed. Reg. 14,952, 14,954 (April 4, 1996), now Official Interpretation § 1026.17(c)(1)-18 ("Pawn Transactions. When, in connection with an extension of credit, a consumer pledges or sells an item to a pawnbroker creditor in return for a sum of money and retains the right to redeem the item for a greater sum (the redemption price) within a specified period of time, disclosures are required.").

[64] *In re* Spinner, 398 B.R. 84 (Bankr. N.D. Ga. 2008) (pawn transactions are extensions of credit under TILA definitions); Wiley v. Earl's Pawn and Jewelry, Inc., 950 F. Supp. 1108, 1113 (M.D. Ala. 1997) (rejecting pawn lender's characterization of no debt for purposes of TILA where no personal liability for consumer).

[65] 139 S.Ct. 1029 (2019).

[66] *Id.* at 1036.

Similarly, as discussed above, the Bankruptcy Code definition of "debt" and of "liability on a claim" (which is the definition of debt) includes contingent, unenforceable and other non-recourse debts.

It's clear in other contexts that forgoing the right to sue on an obligation does not mean it is not debt and credit.[67] Mortgage lenders could agree to proceed by nonjudicial foreclosure with no deficiency. Online tribal lenders do not sue. But no one suggests that these mortgages or online loans are not debt and credit.

More generally, the warranties that EWA providers give have minimal relevance given the power of payroll deduction. We note the CFPB's prior observation about the special power that lenders have when borrowers are required to agree to repay money due through payroll deduction:

> Wage assignments represent a particularly extreme form of a lender taking the control of a borrower's funds away from a borrower. When wages are assigned to the lender, the lender does not even need to go through the process of submitting a request for payment to the borrower's financial institution; the money is simply forwarded to the lender without ever passing through the borrower's hands. The Bureau is concerned that where loan agreements provide for wage assignments, a lender can continue to obtain payment as long as the consumer receives income, even if the consumer does not have the ability to repay the loan while meeting her major financial obligations and basic living expenses. This concern applies equally to contract provisions that would require the consumer to repay the loan through payroll deductions or deductions from other sources of income, as such provisions would operate in essentially the same way to extract unaffordable payments.[68]

Similarly, a recent article observed how new technology – payroll automated program interfaces (APIs) – may make it even easier for lenders to use payroll deduction to obtain payment:

> Further, when loan repayments are pulled directly out of a consumer's paycheck, called payroll-attached lending, it de-risks a loan significantly. It is akin to a loan that is securitized with a consumer's income stream, or by factoring a consumer's paycheck, rather than a true unsecured loan where the lender depends on the customer's willingness to repay. This sort of "voluntary garnishment" can reduce losses for lenders … [P]ulling directly from payroll puts the lender in question at the top.[69]

A leading advocate for financial access for the underserved, Timothy Ogden, called this prospect of expanding access to payroll deduction "hair-raising":

> I mean, they aren't even pretending that they're doing anything other than garnishing lower income people's wages! Overdraft fees are for suckers! Those dumb banks have to wait for the money to be actually deposited into an account before they can take it!

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[67] *See, e.g.,* Aozora Bank, Ltd. v. 1333 North California Boulevard, 15 Cal.Rptr.3d 340, 342 (Ct. App. 2004) ("In a nonrecourse loan like the one here, the borrower has no personal liability and the lender's sole recourse is against the security for the obligation.").

[68] CFPB, Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54583 n.621 (Nov. 17, 2017).

[69] Anish Acharya, Seema Amble, and Rex Salisbury, Andreessen Horowitz, The Promise of Payroll APIs (Oct. 20, 2020), https://a16z.com/2020/10/20/payroll-apis/,

> This isn't an isolated thing. Here's a related post[70] which points out that getting consumers to agree to this voluntary garnishment via signing over access to payroll systems is going to be much easier because people have gotten used to giving Plaid, Venmo and others access to their accounts.

Ogden went on to add a special warning for regulators considering facilitating products based on payroll deduction:

> I keep thinking about Matt Levine's line that the fate of FinTech is to relearn all the lessons of modern finance painfully–but of course, this is about regulators relearning how bad private lenders being able to garnish wages is (see the first few chapters of Anne Fleming's *City of Debtors* on how early American microfinance used wage garnishment). Just so it's clear: "voluntary garnishment" isn't a problem to be fixed with financial literacy; it's a problem to be fixed by regulating it out of existence.[71]

While reasonably priced, affordable payroll deduction loans with responsible terms have their place, these concerns underscore the importance of not allowing loans to escape the protections for credit just because they are repaid by payroll deduction without any other recourse.

For example, a predatory lender that offers online installment loans at 160% APR recently announced a new payroll deduction loan program.[72] While those particular payroll deduction loans are at rates less astronomical than 160% APR and are not denying their status as loans, one could imagine a high-cost lender offering payday loans through employers styled as earned wage access, perhaps with a fee that is lower than conventional payday loans but far higher than today's earned wage access programs. The certainty of being repaid through payroll deduction would enable the lender to forgo other means of recourse. Other than the size of the fee, there might be little to distinguish these loans from the EWAs that the Bureau has said are not credit.

#### 4.2.4.2. The 2017 payday rule's discussion referenced by the Advisory Opinion was only speculative.

The Advisory Opinion also notes the 2017 payday loan rule's statement that:

> [S]ome efforts to give consumers access to accrued wages may not be credit at all. For instance, when an employer allows an employee to draw accrued wages ahead of a scheduled payday and then later reduces the employee's paycheck by the amount drawn, there is a quite plausible argument that the transaction does not involve 'credit' because the employee may not be incurring a debt at all.[73]

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[70] Alex Johnson, FintechTakes, Payroll Data+Fintech (Mar. 1, 2021), https://newsletter.fintechtakes.com/p/payroll-fintech.

[71] Timothy Ogden, Financial Access Initiative, The Weekly faiV, The Wage Garnishment Edition (Mar. 8, 2021), https://www.financialaccess.org/faiv/2021/3/8/the-wage-garnishment-edition.

[72] *See* Press Release, OppFi Announces New Relationship with Best Money Moves to Expand Credit Access Through Employers with SalaryTap (June 9, 2021), https://www.businesswire.com/news/home/20210609005183/en/OppFi-Announces-New-Relationship-with-Best-Money-Moves-to-Expand-Credit-Access-Through-Employers-with-SalaryTap.

[73] 82 Fed. Reg. 54472, 54547 (Nov. 17, 2017).

Yet that speculative statement contained no analysis and was in a context where the Bureau did not need to reach a conclusion on whether a product was "credit" or "debt." The statement also focuses on employers, not third-party providers. The more relevant aspect of the payday loan rule was the observation that other wage advance programs were more likely to constitute credit and thus, without an exemption, would have been covered by that rule. The Bureau excluded certain advances made by an employer or by the employer's business partner on certain conditions. [74]

## 5. The approval order for PayActiv poses significant additional concerns.

The reasoning in the Advisory Opinion, on its own, is deeply problematic for the reasons discussed above. The approval order for PayActiv ("CAS Approval Order") poses additional concerns, discussed below.

### 5.1. The CAS Approval Order exempts from "credit" an EWA program that includes re-presentments of payroll deductions up to twice for reasons unspecified.

The Advisory Opinion allows Covered EWA Programs to pursue one additional employer-facilitated payroll deduction, but only "in the event of an administrative or technical error."[75] The Advisory Opinion specifically excludes from such circumstance "situations in which the employer has garnished an employee's wages following a Covered EWA Transaction."[76]

But the CAS Approval Order goes farther, permitting re-presentment of a payroll deduction *two times* and for reasons unspecified[77] – which presumably could include garnishments against the initial payroll.[78] This permission renders far less meaningful PayActiv's commitment that it will not take payment from any consumer account. Instead, PayActiv collects unpaid payments straight from subsequent payrolls, giving it a relatively extraordinary super lien position, second only to garnishment orders.

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 funds advanced and the agreement to repay them fall into any of the various definitions of debt discussed above, including a specific sum of money due by agreement, any obligation to pay money, and a contingent obligation.

### 5.2. The CAS Approval Order covers a program that charges fees, which could approach $36/month.

As discussed above, while we disagree with the interpretation in the Advisory Opinion that the Covered EWA Programs do not result in "debt" under TILA, it is possible that they are not covered by TILA for a different reason: They are free and have only one payment, and thus the providers may not be creditors

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[74] *Id.*
[75] Advisory Opinion at 10
[76] Advisory Opinion at 6.
[77] CAS Approval Order at 3.
[78] We understand from FlexWage that their model is more tightly integrated with payroll and takes into account actual information about garnishments and other deductions. We are not aware of any other EWA programs that do so.

under TILA. The most serious problem with the Advisory Opinion is not ultimately its implications for the TILA treatment of the narrowly defined programs to which it is limited; it is the slippery slope and misuse of the "debt" discussion, including in the EWA context, and ramifications for coverage of "credit" in other contexts.

The Bureau begins heading straight down that slippery slope itself in the CAS Approval Order, as PayActiv charges fees. The approval reasons that these fees are "nominal." Yet as discussed in Section 3 above, employees who use expedited access will pay $2.99 per advance, which at the high end could reach about $36/month or $432 a year. Even half that amount is not a de minimis sum for many families.

But the issue is not whether the fees are reasonable or nominal. Wage advances result in debt, the repayment of which is deferred, and the fees are a finance charge. Thus, in the PayActiv program covered by the CAS Approval Order, PayActiv is a creditor and subject to TILA. There is no "nominal" or "de minimis" exception to the finance charge definition in TILA. One could argue whether there should be, but there is not.

The Bureau also reasons that this fee "does not bear hallmarks of fees levied alongside an extension of credit" in part because it does not vary based on (i) the size of the transaction, (ii) the period of time between the transaction and the payroll deduction, or (iii) the creditworthiness of the employee.[79] But these "hallmarks" have nothing to do with the definition of credit and no bearing on whether PayActiv's EWAs result in debt and thus credit under TILA.

Nor are these factors even relevant to whether the fees are a finance charge making PayActiv a creditor subject to TILA. The only aspects of the fees that matter for TILA purposes are those that impact whether they are a finance charge. A finance charge "includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction."[80] This definition is completely unrelated to the "hallmarks" identified by the Bureau.

## 6. The interpretations of what is credit are dangerous and could have repercussions that would allow so-called "fintech" products to evade the credit laws that protect consumers, resulting in consumer harm.

The CFPB's flawed interpretation of the term "debt" could have wide-ranging repercussions and invite evasions of credit laws.

First, as noted above, if a product is not "credit" because the consumer has not incurred "debt," it does not matter what the price tag is. The free or low-cost nature of the limited EWA programs that are subject of the Advisory Opinion and CAS Approval Order is not determinative of the question whether "debt" has been incurred.

Thus, it might not matter if an EWA charged $100 month or $1,000. Payday lenders and others could put warranties foregoing claims and use of third-party debt collectors in their agreements and claim they are not offering credit despite a high price tag. The increasing ability of lenders to use technology to be

[79] CAS Approval Order at 5.
[80] 12 C.F.R. § 1026.4(a).

assured repayment without using traditional debt collection tactics, discussed above, may make this an attractive bargain. Indeed, payday lenders that take this approach might even argue that they are outside the definition of "payday loan" under the Dodd-Frank Act and thus outside the CFPB's statutory supervision authority.

The irrelevance of pricing to whether a product results in "debt" has not been lost on industry lawyers. A law firm that represents PayActiv has flagged that the fee limits in the Advisory Opinion may not be critical to the legal conclusion:

> It is worth questioning the legal soundness of the CFPB's focus on fees in the context of determining whether a product is credit. Indeed, the question of whether a financial services provider charges for a product or service is not part of the definition of "credit" in Regulation Z. As the opinion acknowledged, 'credit' simply means 'the right to defer payment of debt or to incur debt and defer its payment.'[81]

(As noted above, the lack of fees may be relevant to the definition of creditor, which in turn may affect coverage of a debt as "credit" under TILA; but lack of fees does not impact whether a product is a debt.)

Second, as discussed below, PayActiv and other EWA providers are exploiting or will exploit the Advisory Opinion and CAS Approval Order in order to seek carveouts from state laws broader than the parameters of the opinion or order. These include EWAs that are direct to consumers, take electronic authorizations from the borrower, cause NSF and overdraft fees, or engage in other harmful practices. Payday lenders could easily devise products that fit into this exemption. Even with fees capped, these exempt pay advances could be useful to payday lenders as starter loans to get people sucked into a cycle of debt that can be exploited to steer the consumer into more costly and larger payday loans.[82]

More broadly, the Advisory Opinion could provide arguments for other emerging products that claim not to be credit or covered by credit laws. These include income share agreements, PACE loans, shared appreciation home financing, and some online point-of-sale retail financing. We thank the Bureau for its recent action against an income share agreement provider for, among other things, falsely claiming that its product is not a loan.[83] And the CFPB certainly does not appear ready to conclude that any of these other products are outside TILA. But courts might extend the Advisory Opinion in ways the CFPB would not. And the CFPB might struggle to assert appropriate oversight over these products when the Bureau's interpretation of "debt" gets thrown back at it.

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[81] Joseph Reilly, Carolee Hoover and Alexander Gershen, How CFPB Earned Wage Access Order Benefits Fintech Cos., Law360.com, Feb. 9, 2021.

[82] Some high-cost installment lenders use short-term payday loans as a bait-and-switch method of ensnaring consumers in bigger, more expensive installment loans.

[83] CFPB, CFPB Takes Action Against Student Lender for Misleading Borrowers about Income Share Agreements: Consent Order against Student Loan Originator for Deceptive Practices Sends Clear Message to ISA Industry, Sept. 7, 2021, https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/.

*Income share agreements*

Providers of income share agreements (ISAs) claim that their transactions are not loans and do not involve extensions of "credit."[84] They claim that students do not have an unconditional obligation to repay: participants (i.e., borrowers) only pay if they have income above a specified threshold, and ISAs cap the period of time during which a participant (i.e., borrower) can be required to make payments without regard to the amount of payments made. Thus, they argue the funder assumes the risk of nonpayment and does not have a right of recourse or the ability to compel payment.[85]

While the CFPB has recently made clear that at least one ISA provider was offering "private education loans" under TILA[86], and its Advisory Opinion and CAS Approval Order are limited to their facts, the Bureau nonetheless must be extremely cautious before endorsing legal interpretations that could be used in other contexts with harmful impacts. The CFPB's consent decree is not binding on other ISA providers offering products with slight differences that industry may attempt to use as a smokescreen in attempts to evade consumer protections, and courts might also use the CFPB's reasoning in the opinion and order to reach the opposition conclusion.

Thankfully, neither the Advisory Opinion nor the CAS Approval Order adopts the position that the possibility of less than full repayment, or lack of recourse to compel further payments, exempts a product from the TILA definition of "credit." Nonetheless, the CFPB hints at non-recourse arguments by focusing on the warranties that EWA providers give that they have no contractual claim or remedy against the employee in the event of nonpayment.

Yet, loans where there is a risk of nonpayment, and with repayment based on income leading to the possibility of partial forgiveness, are nothing new.[87] ISAs are the functional equivalent to student loans with income-driven repayment options.[88] Under those programs, students' obligations may eventually be discharged even if the principal is not fully repaid, with no further claim or recourse against the student. In addition, as with EWAs, the actual likelihood of nonpayment – and thus the significance of the non-recourse warranties – is remote. The repayment period for ISAs typically ranges from five to ten years or more and may be extended; it is highly likely that, for the vast majority of borrowers, all of the loan plus a hefty finance charge will be repaid over this period.

[84] *See, e.g.,* Morrison Foerster, Regulatory Treatment of Educational ISAs Under Federal and Select State Consumer Credit Statutes at 1 (March 2019), https://media2.mofo.com/documents/190408-regulatory-educational-consumer-credit-statutes.pdf.
[85] *Id.*
[86] 15 U.S.C. § 1650(a)(8).
[87] Joanna Pearl and Brian Shearer, *Credit by any Other Name: How Federal Consumer Financial Law Governs Income Share Agreements* at 8, Sept. 11, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3661989.
[88] *Id.* at 15.

ISAs' failure to comply with credit laws poses severe risks to borrowers.[89] There is already evidence that ISAs are being used to students' detriment to prop up unscrupulous for-profit college providers.[90] Some ISA providers rely on extensive misrepresentations and deceptive tactics regarding the costs and risks associated with their products,[91] have prepayment penalties that lock borrowers into expensive credit,[92] and deploy a wide range of risky practices such as illegally removing key language from consumer contracts meant to protect borrowers from fraud.[93] ISAs do not disclose APRs, making it difficult for borrowers to shop among options and to understand the cost of credit.

Because ISAs often supplement additional federal or private loans, borrowers may stack student loan products, leading to unaffordable debt for low-income borrowers and their families. The repayment terms are obscure, and may well turn out to be far more expensive, onerous, and lengthy than borrowers anticipate. Payment flexibility during periods of low or no income may not be as generous as borrowers expect or may include hidden traps that trigger penalties or term extensions. Some ISA contracts obscure debt collection practices. ISAs offered at Purdue University, for example, allows for their state tax refunds to be garnished if they do not repay.

Fair lending problems could arise to the extent that non-recourse warranties are used to argue that ISAs are not credit subject to ECOA, as discussed below. The algorithms by which ISA providers determine the amount the borrower will pay back can often be skewed based on factors such as college major, earning potential, and whether a student attends an institution that predominantly serves students of color.[94] Ultimately, this type of pricing model can lead to discrimination and will provide the most favorable terms to those borrowers who already have the greatest access to low-priced credit and to higher education. There is troubling evidence that discriminatory practices along these lines are already taking place.[95]

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[89] *Id.* at 3-4, 13-14; *see also* Comments of *See* Comments of NCLC, CRL, and Student Borrower Protection Center to CA Dep't of Financial Protection and Innovation re: PRO 01-21, Proposed Rulemaking under the California Consumer Financial Protection Law (Mar. 15, 2021), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/CA_DFPI_ISA_Commets.pdf.

[90] *See* Aarthi Swaminathan, Yahoo Finance, "For-profit coding school sued over allegedly 'predatory' student contracts" (July 1, 2021), https://news.yahoo.com/make-school-pbc-coding-sued-over-allegedly-predatory-student-contracts-161009450.html.

[91]*See* Danielle Douglas-Gabriel, Washington Post, "Groups to FTC: Company pushing student income-share agreements deceives customers" (June 1, 2020), https://www.washingtonpost.com/education/2020/06/01/groups-ftc-company-pushing-income-share-agreements-student-loans-deceives-customers/.

[92] *See* Mike Pierce, Tamara Cesaretti, Student Borrower Protection Center, Income Share Agreements and TILA's Ban on Prepayment Penalties (Mar. 30, 2020), https://protectborrowers.org/wp-content/uploads/2021/03/ISA-Prepayment-Memo.pdf.

[93] *See* Benjamin Roesch, Ben Kaufman, Student Borrower Protection Center, "Income Share Agreements and the FTC's Holder Rule" (Mar. 11, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802911.

[94] *See* Student Borrower Protection Center, *Solving Student Debt or Compounding the Crisis: Income Share Agreements and Fair Lending Risks* (July 2020), https://protectborrowers.org/wp-content/uploads/2020/07/SBPC_Hayes_Milton_Relman_ISA.pdf.

[95] *See Stacey Cowley,* New York Times, A Novel Way to Finance School May Penalize Students From H.B.C.U.s, Study Finds (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/business/student-loans-black-students-hbcu.html.

Thus, the stakes involved with whether ISAs are regulated as credit are extremely high, particularly in the nation's second-largest credit market that is already saddling borrowers with billions in unaffordable debt.

*PACE loans*

Non-recourse arguments have also been used to argue that PACE loans are not "credit." PACE loan contracts create a debt because the homeowner voluntarily agrees to repay a sum of money in exchange for the promise of the local governmental agency to pay a contractor to install energy efficient or other home improvements. Lenders claim that PACE loans are not credit because the obligation runs with the land if sold and there is no personal recourse against the borrower once the property is sold. But until the property is sold, the borrower is required to make payments and is subject to foreclosure if they do not. Moreover, homeowners frequently find that it is impossible to get financing to purchase or refinance a home without paying off the PACE lien. For example, a potential buyer cannot use government housing programs to finance a home purchase with a PACE lien. Thus, the claim that the loan "runs with the land" and is not an obligation of the borrower is more apparent than real. A PACE assessment may also reduce the sale price – so one way or another, the borrower is on the hook for the loan.

The failure of PACE providers to comply with credit laws has resulted in devastating harms to borrowers. PACE providers do not comply with the ability-to-repay requirement for mortgages under TILA and the loans have resulted in high tax assessments that elderly and other homeowners cannot afford. Providers also do not comply with the tax escrow requirements for higher-priced loans.

The claim that PACE loans are not credit has also impacted deterrence of and remedies against contractor misrepresentations, fraud and scams, which are rampant in the PACE area. The FTC's holder rule requires that contracts for seller-arranged financing include clauses allowing the borrower to assert against the creditor any claims and defenses that they have against the seller.[96] Yet PACE loans routinely do the opposite – insulating the PACE provider that has armed and enabled the contractor from the contractors' misconduct.

Thus, the CFPB should have considered the possibility that its reliance on contractual warranties in the EWA context could be misused by PACE loan providers.

*Shared appreciation home financings*

Shared appreciation home financing is another area where providers are offering credit but claiming not to be doing so. Providers claim to purchase a fractional share of the home subject only to the right to recoup that share upon sale. The same arguments that are made about EWA providers' lack of recourse beyond the sale of wages could be made about the sale of a fractional share of a home. As with ISAs and PACE loans, failure to comply with credit laws poses real risks to consumers, including lack of transparency about pricing, inability to compare costs, failure to consider ability to repay, hidden traps, failure to comply with mortgage laws, as well as circumvention of the special rules for reverse

[96] 16 C.F.R. §433.2.

mortgages.[97] Here again, the CFPB should consider the potential for its interpretations about certain EWA programs to be taken out of context.

**7. The narrow interpretation of "debt" could also weaken fair lending protection.**

The hints the Bureau provides for how companies can structure their products to claim that they are not offering "credit" covered by TILA have another potentially disturbing impact: The products might also attempt to evade fair lending laws. The Equal Credit Opportunity Act (ECOA) and Regulation B incorporate a similar definition of "credit" as TILA does: "Credit means the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor."[98] Regulation B also does not define "debt."

The ECOA "credit" definition is broader than the TILA one in two respects: In addition to deferring debt, it also includes the right to purchase property or services and defer payment therefor. And the definition of "creditor" in Regulation B (incorporated into the definition of "credit") is broader than in Regulation Z and does not require a finance charge or more than four installments.[99] Thus, some creditors will be subject to ECOA even if they are not subject to TILA.

Nonetheless, for programs that do not involve the purchase of property or services,[100] the CFPB's narrow interpretation of "debt" could be used to attempt to narrow the scope of ECOA's important fair lending protections. Companies could use payroll deduction and add warranties foregoing other collection methods, claiming that there is no debt and therefore no ECOA credit either.

At a time when the racial injustices in this country have become more and more apparent, and in light of the Bureau's recent commitment to prioritize racial justice, the CFPB should not be doing anything that risks narrowing the scope of our fundamental fair lending protections.[101] This is all the more important in the "fintech" context, where the use of vast amounts of big data and alternative data (including social media data and other information that correlates with race or other protected classes), algorithms and machine learning may result in profound disparate impacts.

**8. The CAS Approval Order should be rescinded because PayActiv cannot rely on it in good faith and is not using it in good faith, and because the CAS Approval Order is being used in ways that will result in harm to consumers.**

The CFPB states that the CAS Approval Order gives PayActiv "a safe harbor from liability under TILA and Regulation Z, to the fullest extent permitted by [15 U.S.C. § 1640(f)], as to any act done or omitted in

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[97] *See* Lauren Saunders, NCLC, Fintech and Consumer Protection: A Snapshot at 15 (March 2019), https://www.nclc.org/images/pdf/cons-protection/rpt-fintech-and-consumer-protection-a-snapshot-march2019.pdf.
[98] 12 C.F.R. § 1002.2(j).
[99] *See* 12 C.F.R. § 1002.2(*l*).
[100] Arguably, EWAs offer a service of enabling early wage access.
[101] Even if ECOA does not apply, discrimination should also be viewed as an unfair, deceptive and abusive practice. *See* Student Borrower Protection Center, Discrimination is "Unfair" (Apr. 2021), https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf. Nonetheless, ECOA has an established body of interpretations and provides critical protections that may be lacking under an unfairness theory, including a private right of action, attorneys' fees, and punitive damages in appropriate cases.

good faith conformity with this Approval Order."[102] Notably, under Section 1640(f), liability protection does not automatically apply merely because the CFPB has issued an approval. Whether a company is acting in conformity with an approval, and whether it is acting in good faith, are both questions of fact.[103] In addition, one of the grounds for terminating the PayActiv approval is if "Payactiv fails to substantially comply in good faith with the CAST."[104] Compliance in good faith should include acting in good faith and refraining from misusing or mischaracterizing the approval order.

The CAS Approval Order should be rescinded because (1) the legal conclusions are erroneous and PayActiv cannot rely on them in good faith; (2) PayActiv is misusing and misconstruing the approval and is not acting or complying in good faith; (3) the approval order is being used in ways that will result in harm to consumers, and (4) the PayActiv program is likely more costly in practice to employees and is not performing as the CFPB anticipated.

The CFPB has not broadly "approved" PayActiv itself, nor its EWA program overall. The CFPB uses the term "approval order" and "approval" in a very specific legal context: The good-faith conformity liability limitations of TILA.

The CAS Approval Order plainly states that "this order (Approval Order) approves of Payactiv's offering or providing the *described aspects* of [PayActiv's] earned wage access (EWA) program …."[105] The approval is also "limited to those particularized applications of law … contained in Section V below." Section V is limited to whether the specific PayActiv EWA Program at issue is offering or extending "credit" as defined in section 1026.2(a)(14) of Regulation Z.[106] The approval explicitly takes no view on "Whether Payactiv EWA Transactions comply with state wage and hour laws" or "Whether other Payactiv programs … involve offering or extending Regulation Z credit."[107] The approval does not discuss compliance with laws against unfair, deceptive or abusive practices or any other laws.

The CFPB also explicitly states: "this Approval Order does not constitute the Bureau's endorsement of the Payactiv EWA Program or any other product or service offered or provided by Payactiv."[108]

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[102] Approval at 1. That provision of TILA states: "No provision of this section, section 1607(b) of this title, section 1607(c) of this title, section 1607(e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or *approva*l by an official or employee of the Federal Reserve System duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C. § 1640(f) (emphasis added).

[103] *See, e.g*., Lewis v. Walker-Thomas Furniture Co., 416 F. Supp. 514 (D.D.C. 1976) ("More importantly, the questions of whether defendant actually relied on that material and whether such reliance was in good faith raise issues of fact that cannot yet be resolved. It is doubtful that such matters, on which defendant bears the burden of proof under the Act, can ever be decided on papers …."); Leon v. Washington Mut. Bank, 164 F. Supp. 2d 1034 (N.D. Ill. 2001).

[104] Approval at 8. We do not believe that the CFPB is limited to the narrow termination grounds in the approval. For example, if the CFPB concludes that there is a significant chance that its interpretation was erroneous or would harm consumers, the Approval does not limit the CFPB's duties under the Dodd-Frank Act to enforce and promote compliance with the law and to protect consumers.

[105] CAS Approval Order at 1 (emphasis added).

[106] *Id*. at 4.

[107] *Id*. at 8.

[108] *Id*. at 1.

As discussed above, there are very strong indications that the Bureau's interpretation of the term "debt" and thus the scope of TILA "credit" is wrong. The Bureau's scanty analysis failed to consider the extensive grounds for a contrary conclusion. These comments, which we will provide to PayActiv, put in question whether PayActiv can continue to rely in good faith on the interpretation in the approval. Moreover, the CFPB has a duty to rescind an interpretation that it has reason to believe is invalid and inconsistent with TILA, because the approval has the potential to protect conduct in violation of TILA.

PayActiv is ignoring the limited scope of the approval order and is mispresenting the CFPB's action as having much broader endorsement and legal scope than it does. PayActiv also states or implies that other EWA products are disapproved by CFPB. In repeated webinars, emails to legislators and employers, ads, tweets and press releases, PayActiv:

- Touts the CFPB's "approval" of PayActiv to imply "endorsed," without noting the technical meaning of "approval" and what was actually approved;
- Claims CFPB "approval" of PayActiv itself, its entire program, and its model or methods generally, without explaining that the approval was limited to specific aspects of specific PayActiv programs and not all of them;
- Implies that the CFPB's interpretation that PayActiv is not offering "credit" applies to all PayActiv programs, potentially including the bank account debiting program that the CFPB specifically excluded;[109]
- States that the CFPB has approved PayActiv's "pricing model";[110]
- States or implies that the CFPB has approved PayActiv's legal compliance generally, not merely one aspect of one statute for one program;
- States that PayActiv's EWA program is the "Only CFPB Compliant EWA"[111] and "is the only way to remain in compliance with the CFPB";[112]
- States that other models "do not comply with the CFPB's guidance" and implies that PayActiv has the only legally compliant product on the market.

In one email to state legislative staff, a PayActiv lobbyist calls the approval a "watershed moment for EWA [that] sends a clear signal that **Payactiv is the market leader and sets the compliance gold standard** for the industry."[113]

Here are other examples, which are attached as Exhibits A, B, C, and D.

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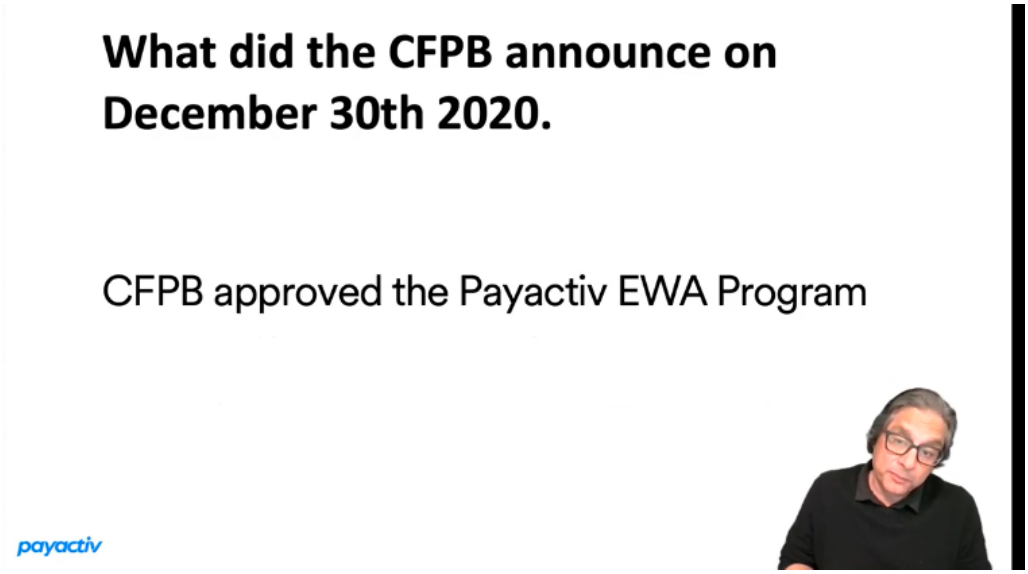
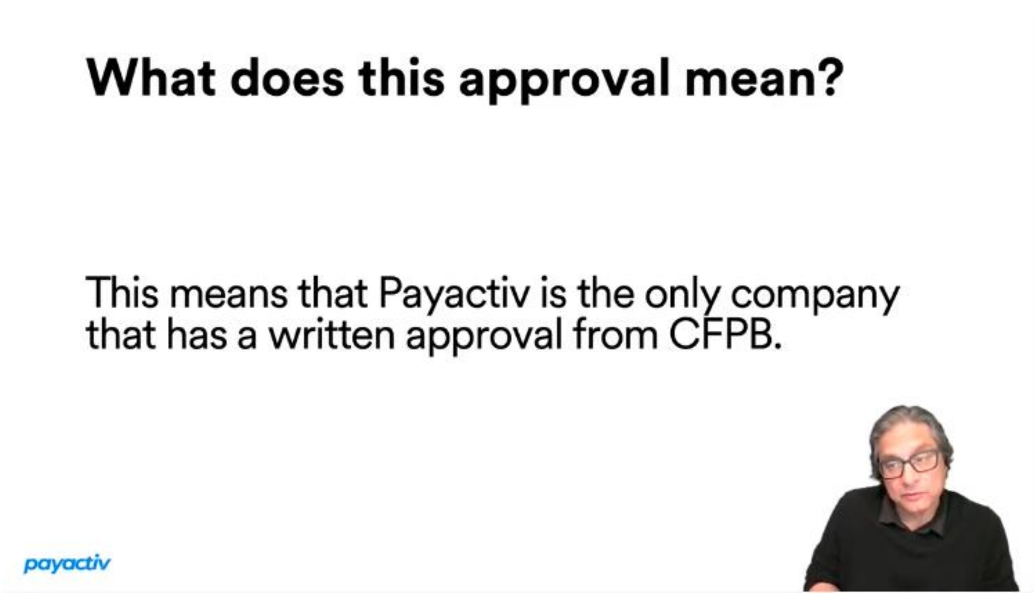
[109] Exhibit A.
[110] Exhibit B.
[111] Exhibit D.
[112] Exhibit C.
[113] Email on file with authors (emphasis in original).


What did the CFPB announce on
December 30th 2020.
CFPB approved the Payactiv EWA Program
payactiv


What does this approval mean?
This means that Payactiv is the only company
that has a written approval from CFPB.
payactiv

# Why does it matter so much?

**First** - On Nov 30, 2020, the CFPB announced that there is **regulatory uncertainty** around EWA programs as it relates to TILA. Now, a month later, it ruled that **Payactiv does not face such uncertainty and is approved.**

For **employers looking to offer EWA,** Payactiv is ***the only EWA provider*** with confirmation that it is not a credit product. No other provider can give the same assurance. **Don't believe spin—there is only one approved model.**

**Second** – The CFPB has **not** approved programs that accept Tips, or require employee bank account to be debited (vs payroll deduction), or require an employee to direct deposit an entire paycheck into a third-party account.

**Third** – The CFPB's rulings mark the first time any regulator has formally ruled on EWA since Payactiv created this product 8 years ago. Payactiv is proud that regulators have recognized this important innovation.

**Finally** – The CFPB approval order has shown preference for No-Fee or de minimis fee models, as well as Payroll deduction as the mechanism to reconcile EWA on paydate. This is the roadmap that Payactiv created.

# What are some key highlights?

The approval is a multi-page document. Let me summarize the key findings. Each an - Industry FIRST.

**Industry First No 1** – Payactiv EWA Program **does not create or defer debt**. This is key to the legal definition of "credit" under TILA. *EWA from Payactiv does not treat the employee as a borrower.*

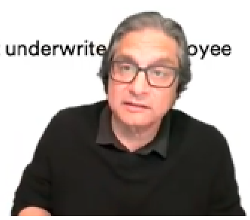
**Industry First No 2** – Payactiv is 'True Earned Wage Access' – the Bureau validated Payactiv's innovation. "The accrued cash value of an employee's earned but unpaid wages *is the employee's own money.*"

**Industry First No 3** – Both Payactiv's Access Freedom (no fees) and Access Choice a ($1 non-recurring fee) are APPROVED. Payactiv is the only company whose pricing models are approved.

**Industry First No 4** – EWA reimbursement through payroll deduction ensures employees are not at risk of recourse, *i.e.*, collections, which distinguishes Payactiv's EWA from credit.

**Industry First No 5** – The employee is never underwritten, just as employers don't underwrite oyee for payroll. This shows the transaction involves no credit risk.

**Finally** – Payactiv EWA is an "innovative mechanism" that provides a meaningful **alternative to credit**.



payactiv


**PayActiv** @PayActiv · Jan 11

Payactiv is the only CFPB-Approved EWA provider. Beware of forced-account models that claim they do not require any form of "employee payback." These models do not comply with the CFPB's guidance and face legal and regulatory risk.

Beware of the Spin: Payactiv Is The Only EWA Provi...
While any EWA provider can apply for approval from the CFPB, Payactiv is the only provider to have ...
payactiv.com

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One email states that the CFPB "has Approved only Payactiv's EWA model," that two Payactiv programs "are the only EWA programs in the entire industry that were approved," that PayActiv has "the only approved method to recoup EWA funds from employees" and "The CFPB has granted ONLY Payactiv Approval."[114] One ad states that PayActiv is "the only CFPB-approved provider" – yet the CFPB did not approve a provider; it issued an approval order for certain "described aspects" of an EWA program.

In most instances, these misleading statements went uncorrected. On one occasion, PayActiv did correct a press release and change "approved" in this statement and a second one to instead refer to an "Approval Order":

- PayActiv is "the only vendor with an EWA program specifically approved by the Consumer Financial Protection Board [sic] (CFPB)"[115]

PayActiv is clearly using the approval order to get a leg up on its competition.[116] That alone is concerning enough, given the CFPB's mission of promoting competition. But PayActiv's use of the approval order goes beyond the impacts on its competitors.

**PayActiv is also using the approval order and the CFPB's purported imprimatur to push for damaging changes to state usury laws to exempt products well beyond those considered by the CFPB.** PayActiv is actively promoting legislation in several states to exempt products like PayActiv's, **with no limit on fees**, from usury and payday loan laws and **without the other guardrails the Advisory Opinion and CAS Approval Order included**.

For example, one PayActiv lobbyist email to a state legislative staffer states that the CFPB issued an approval order "confirming that Payactiv is not 'credit' under TILA and Regulation Z and granting Payactiv a 2 year safe harbor from enforcement of these federal laws."[117] The email fails to make clear that the CFPB approval is limited only to "described aspects" of the specific PayActiv program at issue and does not apply to "other Payactiv programs."

We expect that other payday advance companies, which are also pushing exemptions from state usury laws, will use the CFPB Advisory Opinion or CAS Approval Order to argue that they are not offering credit and thus should be exempt from usury laws. Thus, the impact of the approval could be that the CFPB's supposed blessing is used to enable more high-cost, damaging products on the market.

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[114] PayActiv email (Dec. 31, 2020), on file with authors.
[115] *Compare* PayActiv, Press Release, Correction – PayActiv (Mar. 3, 2012), https://apnews.com/press-release/pr-newswire/business-personal-loans-personal-finance-1d3b91c8f222a5424bf7e54a357001df *with* Hancock Whitney Bank Offers PayActiv EWA Program to Business Clients (Mar. 2, 2021), https://finance.yahoo.com/news/hancock-whitney-bank-offers-payactiv-110000833.html.
[116] Indeed, competitors have indicated to an author of this letter that they believe they have lost contracts to PayActiv due solely to PayActiv's having been "approved."
[117] Email on file with authors.

Another reason that the PayActiv approval order should be rescinded is because the product likely is not performing as anticipated in the Application.[118] The Application states that transfers cost $1, with a cap of $3 for a one-week pay period or $5 for a bi-weekly pay period.[119] The order contains a footnote noting that PayActiv charges an additional $1.99 to employees who seek instant transfers to a non-PayActiv account. The CFPB discussion's focus on the $1 fee indicates that additional fees would be the exception, with most employees paying no more than $1 per transfer. However, if PayActiv's programs perform in the way that we understand most EWA programs to work, the vast majority of employees – upwards of 90% – may pay $2.99 per transfer, and thus potentially far more on a monthly basis than the CFPB anticipated. We also believe that the $1.99 surcharge is above the amount needed to compensate PayActiv for the out-of-pocket costs of using Visa Direct or Walmart's Direct2Cash, and thus it is likely another hidden revenue source. Thus, if the PayActiv program turns out to be far more expensive than the CFPB anticipated and to rely on a deceptive or abusive funding stream, then that performance provides an additional reason to revoke the Approval Order.

For all of these reasons – the faulty legal reasoning, PayActiv's lack of good faith in its use of the Approval Order, the cost to consumers, and the harm and misinformation the order is causing more generally – the CFPB should simply revoke the Approval Order. The CFPB should give PayActiv a short time period to respond but should act quickly as the order is causing active harm.

If the CFPB is reluctant to fully terminate the agreement with PayActiv and is obtaining data from PayActiv as part of the CAS program, the CFPB could consider changing the agreement into a no-action letter that expires no later than the original two-year duration of the Approval Order and ideally sooner. A no-action letter would reassure PayActiv that the CFPB's termination of the Approval Order does not reflect any immediate plans to pursue an enforcement action against PayActiv, while at the same time not providing the same immunity that the Approval Order does for potential violations of the law. Any no-action letter must be accompanied by a commitment by PayActiv to cease misrepresenting and misusing the CFPB's actions and to continue providing data. But simply revoking the Approval Order is the better option.

Under no circumstances should the CFPB extend the Approval Order beyond the two-year duration that the CFPB announced (expiring approximately December 30, 2022).[120] If the CFPB declines to revoke the Approval Order, it should announce that the order will not be extended. The CFPB should also clarify the narrow scope of the Approval Order and the fact that it has not "approved" in any lay sense of the word either PayActiv itself or its programs generally. And once again, the CFPB should order PayActiv to cease misusing the approval order.

### 9. The CFPB should supervise EWA and faux EWA providers that charge fees using the Bureau's supervision authority over payday loans

Separate from the question of whether EWA programs are "credit" under TILA, the CFPB should begin a program of supervising EWA providers using its authority over a nondepository covered person that "offers or provides to a consumer a payday loan."[121] This supervision should extend to any EWA provider

[118] CAS Approval Order at 8.
[119] CAS Approval Order at 3.
[120] CAS Approval Order at 8.
[121] 12 U.S.C. § 5514(a)(1)(E).

that charges fees, as well as other direct-to-consumer fintech lenders with no connection to payroll that purport to offer earned wage access and disguise fees as purportedly voluntary "tips." Any advance on pay, even if pay has already been earned but not paid, is essentially a payday loan, thus giving the CFPB supervision authority.

This market is growing substantially with no oversight, while claiming to be exempt from consumer protection laws and from federal or state supervision. Products may operate behind the scenes in ways that are very different form the public perception or representation.

For example, Earnin claims that its "tips" are voluntary, yet it was reducing the amount of credit it made available to consumers who did not tip enough. While it curtailed that practice when it came to light, we now have heard that it is using other tactics to make it extremely difficult not to "tip." Moreover, Earnin (and others who use the "tips" model) sets a tip by default, and a default that the consumer must undo has the same legal status as a compulsory finance charge.[122]

Employer-based products, as well, may employ practices that increase costs or lead to cycles of reborrowing typical of payday loans. CFPB supervision would enable the CFPB to look out for any unfair, deceptive or abusive practices along with other potential violations of consumer lending and other consumer financial protection laws.

**10. The discussion breaks new ground on the scope of TILA and potentially other credit laws that never should be undertaken on a secretive, one-sided basis without input from other stakeholders.**

As demonstrated by the various products claiming they are not credit for various reasons, the CFPB's statements are bound to have ramifications and to be cited beyond their original scope. And the stakes are enormously high: whether or not something is credit and carries the protections of credit under a variety of laws has profound ramifications at both the federal and state levels.

It is unquestionably improper for the Bureau to have made a determination as significant as the meaning of "debt" under the Truth in Lending Act, as applied to any particular product, without providing notice and opportunity to comment. This is especially true in the context of a product that is experiencing dramatic growth, puts itself first in line for consumer's wages, and more closely resembles a payday loan – a product widely known to pose severe risks to consumers – than it does any other product on the market. And failing to seek broader input was all the more egregious given the overlaps between the arguments offered in the EWA context and those made with respect to a broader range of products that pose severe risks to consumers by their failure to comply with credit laws.

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[122] Courts and the CFPB have found violations of the Electronic Fund Transfer Act's ban on compulsory use when electronic repayment is a default method, even if the consumer can undo the default. *See* de la Torre v. CashCall, Inc., 56 F. Supp. 3d 1073, 2014 WL 3752796, at *8 (N.D. Cal. July 30, 2014), vacated on other grounds, 2014 WL 7277377 (N.D. Cal. Dec. 22, 2014); Fed. Trade Comm'n v. Payday Fin., L.L.C., 989 F. Supp. 2d 799 (D.S.D. 2013); Pinkett v. First Citizens Bank, 2010 WL 1910520 (N.D. Ill. May 10, 2010); O'Donovan v. CashCall, Inc., 2009 WL 1833990 (N.D. Cal. June 24, 2009); W. Va. ex rel. McGraw v. CashCall, Inc. et al., No. 08-C-1964 (W.V. Cir. Ct. Sept. 10, 2012), available at www.nclc.org/unreported; In re Integrity Advance, L.L.C., CFPB No. 2015-CFPB-0029 (Jan. 11, 2021).

11. **These problems point to the fundamentally misguided nature of the design of the advisory opinion program, compliance assistance sandbox program, and other "innovation" programs.**

These problems point to the fundamentally misguided nature of the design of the advisory opinion program, compliance assistance sandbox program, and other "innovation" programs. As we warned in our prior comments (cited where applicable below), these programs inappropriately:

- create secretive, one-sided processes that favor industry and harm consumers and competitors;
- give liability protection for conduct that may violate the law;
- result in inappropriate endorsement of particular companies;
- constrain the CFPB's ability to terminate approvals inappropriately granted;
- limit the CFPB's ability to undertake supervision and enforcement;
- complicate compliance for well-intended companies; and
- consume Bureau resources considering numerous industry requests that are better spent on protecting consumers.

All of these problems can be seen in the EWA Advisory Opinion and CAS Approval Order, and in the new requests that the CFPB has received from other providers seeking similar opinions outside of public view. But the risks of embarking on a program of interpretive rules, advisory opinions and approval orders outside of regulations and the official commentary go beyond the problems created by secrecy and lack of notice and comment.

Inevitably, this new body of interpretations only raises more questions and complicates, rather than eases, compliance – as shown by the myriad of questions we alone have raised about the implications of one narrow set of actions. While there may be occasions when it is appropriate for the CFPB to issue an interpretation outside of a formal notice and comment process, those should be rare occasions, driven by the CFPB's initiative, not by programs designed to encourage industry requests to which the Bureau must respond.

As we discussed in our comments on the proposed no-action letter and sandbox programs, the Federal Reserve did away with its advisory opinion program thirty years ago on account of the chaos it inflicted. And that was at a time before the advent of email and the internet made it easier to submit and process requests and easier for law firms to drum up businesses by publicizing the CFPB's programs and actions. In 1981, the FRB proposed the first Official Staff Commentary (OSC) to TILA as the official vehicle for interpretations on which companies may rely to take advantage of the good-faith reliance safe harbor. The purpose of the OSC was to help companies to comply with the law and to improve the previous chaotic system of unofficial staff letters.[123] As the FRB explained:

> The final commentary will be issued as an official staff interpretation, providing creditors with protection under § 130(f) of the Truth in Lending Act. Under that section, creditors acting in conformity with an official staff interpretation have no liability for violations arising from those actions.

[123] The introduction to the first proposed Official Staff Interpretations stated: "The commentary applies and interprets the requirements of Truth in Lending to open-end and closed-end consumer credit, and is intended to substitute for individual Board and staff interpretations of the regulation." 46 Fed. Reg. 28560 (May 27, 1981) (emphasis added).

> The commentary will significantly alter the staff's approach to providing interpretations of the regulation. Under the prior regulation, staff opinions were issued in response to individual inquiries regarding specific fact situations, and were normally limited to those facts. Subsequent variations in those facts were similarly addressed in individual responses tailored to the variations. More than 1500 letters interpreting and applying the prior regulation were issued on this basis.
>
> The commentary is expected to replace Board and staff interpretations as *the sole vehicle for interpreting the regulation.* The commentary will, however, be more general than the interpretations issued under the prior regulation. Unlike the earlier interpretations, the commentary will not attempt to address and resolve every question regarding the application of the regulation to specific sets of facts. Although originally designed to aid creditors in complying, the longstanding practice of trying to respond in writing to each and every special circumstance has instead created an enormous amount of regulatory material. The *cumulative effect of the interpretations has been to complicate, rather than facilitate, compliance by layering one set of distinctions on top of another. Rather than resolving questions, this material in the aggregate has served to generate further questions.*[124]

That is exactly what has happened here – and after only a handful of advisory opinions and approvals.

The CFPB also risks misallocating critical resources away from consumer protection when it devotes time to considering and processing requests for advisory opinions, no action letters, and sandbox approvals. All of these requests, to be properly considered, must be closely examined in light of all of their ramifications. Even requests that are denied consume time. The Bureau's resources are limited, and they must be focused most efficiently on furthering consumer protection, not responding endlessly to industry requests.

It is also noteworthy that consumers and consumer advocates also have questions about the interpretation of the law, yet the CFPB's advisory opinion program is only focused on narrowing protections in ways that industry seeks, and not geared to requests for opinions that would further consumer protection or narrow the pathway for evasions. Moreover, the impact of interpretative rules tends to be one-sided: Industry can rely on interpretive rules as a safe harbor from liability, even if the rule turns out to be incorrect or invalid for any reason,[125]including for violating notice and comment rules. And a consumer might have difficulty having standing to challenge the rule. But a company subject to an interpretive rule that strengthened consumer protection would have standing to challenge it, including on the grounds that it was actually a legislative rule that required notice and comment, and the rule could potentially be overturned retroactively.

[124] *Id.*

[125] *See, e.g.*, 15 U.S.C. § 1640(f). The good-faith reliance provisions of the Electronic Funds Transfer Act and ECOA are the same.

Consequently, we urge the Bureau to:

- **Eliminate or significantly alter the advisory opinion program**.[126] Outside of the public notice and comment process, the CFPB should not be providing legal advice to or in response to requests from individual companies that it regulates, and especially not in a form that triggers protection from liability. Responses to inquiries should, at most, be limited to pointing companies to existing laws, regulations and public documents, not providing advice to interpret them. The CFPB can do companies a service simply by helping them identify existing resources and by creating materials that distill the law into a digestible form. But it is inappropriate for the CFPB to issue opinions that interpret the law as an outgrowth of a private exchange in the context of just one company's concerns.

  This is not to say that the CFPB should never issue interpretive rules. But they should be issued on rare occasions and be driven by a focus on the CFPB's consumer protection mission rather than a program to seek requests from industry.

- **Eliminate the program of seeking applications for no-action letters (NALs) and revise the policy for those letters**.[127] For similar reasons, the CFPB should not be affirmatively seeking out applications for NALs from industry. NALs should be used in limited circumstances when the Bureau, at its own initiative based on its priorities, believes that a time-limited data collection and oversight program will help it to study an issue where there does not appear to be immediate risk to consumers.[128] The CFPB should also reverse the 2019 changes to the NAL policy and, in particular, ensure that:
  - NALs cannot be used in circumstances where the company is facing litigation, enforcement, regulatory action or an investigation.
  - CFPB has unlimited discretion to revoke a NAL at any time for any reason and to take enforcement or supervisory action if warranted. General rules of due process pose sufficient protection to ensure that the Bureau could not unfairly impose retroactive liability for conduct that it previously condoned.
  - NALs are not used to address issues involving unfair, deceptive or abusive acts or practices.

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[126] For a more detailed discussion of the problems with the CFPB's proposed advisory program, see Comments of Americans for Financial Reform et al. on Advisory Opinions Proposal, Docket No. CFPB-2020-0019 (Aug. 21, 2020), https://www.nclc.org/images/pdf/regulatory_reform/advisory-opinion-cfpb-consumer-comments-2020.pdf.

[127] For a more detailed discussion of the problems with the CFPB's No-Action Letter Policy, see Comments of Americans for Financial Reform Education Fund et al. on Policy on No-Action Letters and the BCFP Product Sandbox, Docket No. CFPB-2018-0042 (Feb. 11, 2019), https://www.nclc.org/images/pdf/rulemaking/nclc-comments-nal-product-sandbox.pdf.

[128] The risk of NALs can be shown by the CFPB's first NAL regarding Upstart. Despite the Bureau's initial assessment that the approval rate and APR analysis results provided for minority, female, and 62 and older applicants showed no disparities that require further fair lending analysis under the NAL compliance plan, https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/, a subsequent report found that Upstart offered a higher rate to a hypothetical graduate who attended minority-serving institutions than a similarly situated graduate at a school with a student body with less than 20 percent Black or Latinx students. *See* Student Borrower Protection Center, New Report Finds 'Educational Redlining' Penalizes Borrowers Who Attended Community Colleges and Minority-Serving Institutions, Perpetuates Systemic Disparities (Feb. 5, 2020), https://protectborrowers.org/new-report-finds-educational-redlining-penalizes-borrowers-who-attended-community-colleges-and-minority-serving-institutions-perpetuates-systemic-disparities/.

- NALs are not misinterpreted or used as an endorsement of a company or product and are not and should not be used as a Bureau interpretation of the law.
- NALs do not preempt state authorities from exercising their enforcement powers under the Dodd-Frank Act.

- **Eliminate the Compliance Assistance Sandbox program or any "approval" of products**.[129] The CAS program has all of the problems discussed above along with additional dangers. Because it is focused on individual programs and results in an "approval," it triggers protection from liability that is wholly inappropriate. In addition, the "approval" runs a significant danger of being misused and misinterpreted. PayActiv's misuse of the limited approval of certain features of its earned wage access program is a case in point. While the Bureau used the term "approval" with a limited, legal meaning, that term inevitably will convey the false impression of the Bureau's broader approval or endorsement of a company and its products. The Bureau should not be endorsing individual companies' products, which will harm both consumers and competitors.

- **Revise the Trial Disclosure Sandbox program.**[130] While the Bureau has statutory authority to conduct time-limited trial programs for the purpose of improving model forms, the Bureau's Trial Disclosure Sandbox program goes much farther. The program allows trials to go beyond improving model forms and to exempt companies from legally required disclosures and to continue for years on end.

Overall, in all of the CFPB's programs focused on innovation, emerging issues, interpretation and guidance, the CFPB should emphasize these principles:

- No approval of individual companies or their products
- No actions taken in response to requests from anonymous parties
- Equal input from all stakeholders, not one-sided processes
- Full consideration of all ramifications, with input from all parts of the Bureau
- No weakening or waivers of or exemptions from consumer protection laws
- No limits on the CFPB's powers to protect the public
- An emphasis on transparency, not shielding information from public scrutiny

These principles are sorely missing in the Bureau's current "innovation" and advisory opinion programs.

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[129] For a more detailed discussion of the problems with the CFPB's Compliance Assistance Sandbox program, see *id.* We also have some concerns about the CFPB's Trial Disclosure Sandbox program,

[130] For a more detailed discussion of the problems with the CFPB's Trial Disclosure program, see Comments of Allied Progress et al. on Opposition to Policy to Encourage Trial Disclosure Programs, Docket No. CFPB-2018-0023 (Oct. 10, 2018), https://www.nclc.org/images/pdf/rulemaking/short-opposition-to-trial-disclosure-programs-oct2018.pdf; Comments of NCLC et al. on Policy to Encourage Trial Disclosure Programs, Docket No. CFPB-2018-0023 (Oct. 10, 2018), https://www.nclc.org/images/pdf/regulatory_reform/group-comments-to-CFPB-trial-disclosure-programs-oct2018.pdf.

## 12. Recommendations

For all of the foregoing reasons, we urge the Bureau to:

- **Cover fee-based EWA products as credit under TILA and rescind or significantly revise the EWA Advisory Opinion.** While the Advisory Opinion only covers free products, the errors in the CFPB's discussion of "debt," the complexity of that question, and the dangers of that discussion being used to promote evasions are simply too great – especially in light of the Bureau's extension of that opinion to fee-based products through PayActiv approval order. Thus, we urge the Bureau simply to rescind the opinion. In the alternative, for the completely free EWAs that the Advisory Opinion addresses, the CFPB could consider revising the Advisory Opinion to eliminate any discussion of "debt" and to focus instead on the lack of TILA coverage for companies that are outside Regulation Z's definition of creditor because they do not regularly offer credit with a finance charge or an agreement to pay in more than four installments.

- **Rescind the PayActiv CAS Approval Order.** The CAS Approval Order incorrectly declares that a fee-based EWA program that may involve debiting future payrolls is not credit under TILA. The CFPB must reverse that opinion, which has repercussions beyond PayActiv. The CAS Approval Order also inappropriately gives PayActiv protection from any liability – not just in actions by the CFPB – for acts done in good faith conformity with the order even if the order is determined to be invalid. But PayActiv is not acting in good faith and is misusing the order, and good faith reliance and the broad grant of immunity are not justified given the faulty reasoning underlying the order. Thus, the order should be revoked. If the CFPB wishes to continue collecting data from PayActiv while it studies how to treat EWA programs, the CFPB should end the CAS Approval Order and replace it with a time-limited no-action letter. That no-action letter should indicate that fee-based EWA programs are (or may be) credit, but that the CFPB does not intend to bring an enforcement action while it continues to study the issue and to collect data from PayActiv.

- **Immediately order PayActiv to cease and desist from misusing and mischaracterizing the order and give PayActiv a limited time to respond to this letter.** The letter should notify PayActiv of possible grounds for termination raised in this letter and give PayActiv an opportunity to respond within a reasonable period of time.

- **Pending rescission of the Advisory Opinion and CAS Approval Order, issue a public statement emphasizing the limited nature of the two actions, the limited EWA programs to which they apply, and the fact that the CFPB has not endorsed EWAs or PayActiv.** This is necessary to prevent further misunderstanding about the scope and impact of the Advisory Opinion and CAS Approval Order.

- **Supervise EWA and faux EWA providers that charge fees under the CFPB's authority over payday loans.** Given the growth of this market, the CFPB should begin examining EWA providers, as well as companies that offer direct-to-consumer products that falsely claim to be advancing wages. The Bureau has supervision authority over payday loans regardless of how these products are treated under TILA.

- **Eliminate or significantly alter the CFPB's Advisory Opinion Program and Compliance Assistance Sandbox Program, and make significant changes to the Bureau's No-Action Letter Policy and Trial Disclosure Sandbox.** The programs and policies adopted in recent years create secretive, one-sided processes that favor industry and harm consumers; give liability protection for conduct that may violate the law; result in inappropriate endorsement of particular companies or products; purport to limit the grounds on which the CFPB can terminate approvals inappropriately granted; complicate compliance for well-intended companies; and consume Bureau resources better spent on protecting consumers.

We would welcome the opportunity to discuss our concerns with you. If you have any questions, please contact us at lsaunders@nclc.org or mike.calhoun@responsiblelending.org.

Thank you for considering our views.

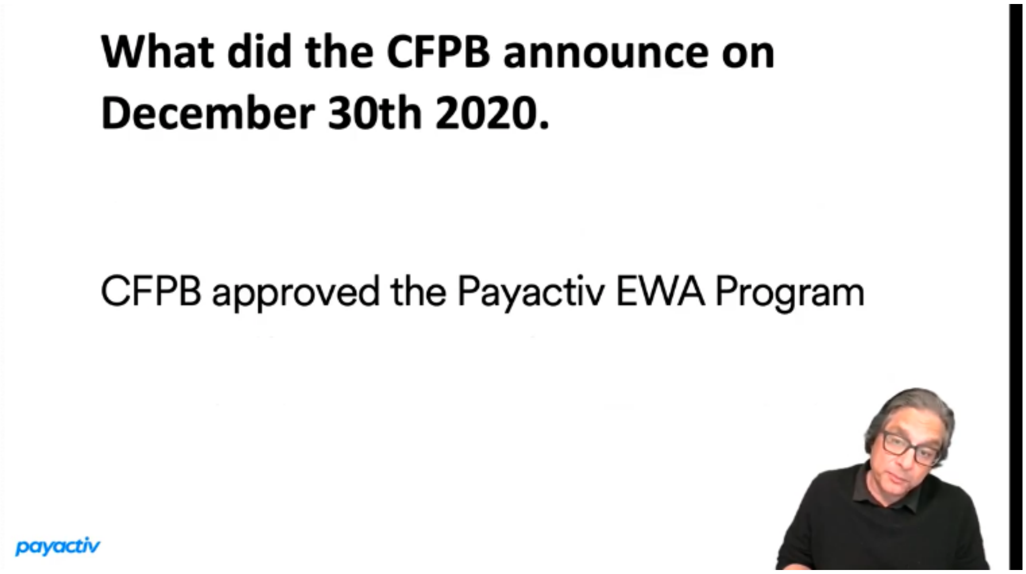
Yours very truly,

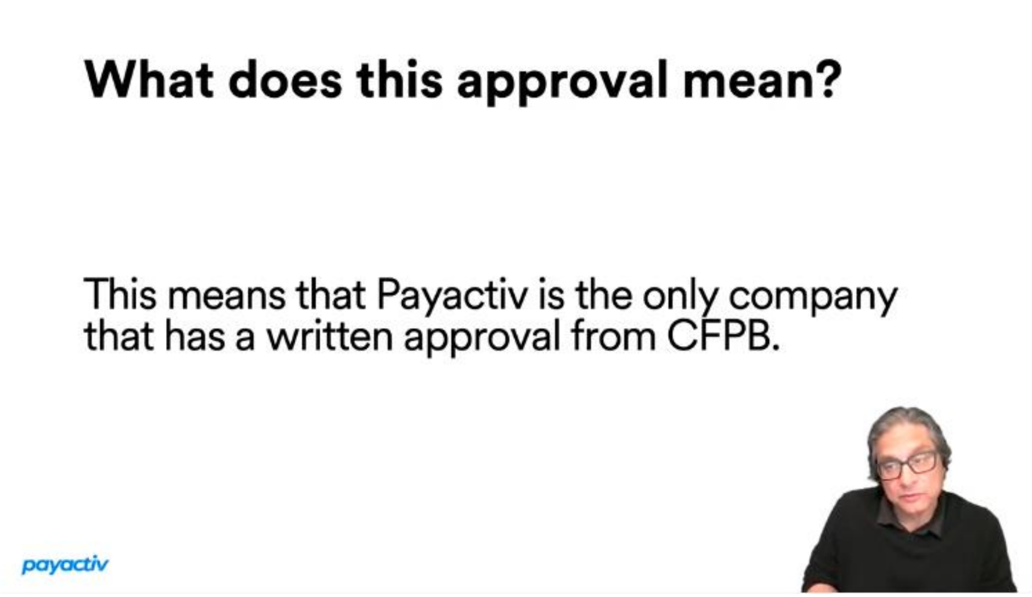
Lauren K. Saunders
Associate Director
National Consumer Law Center
(on behalf of its low-income clients)

Mike Calhoun
President
Center for Responsible Lending

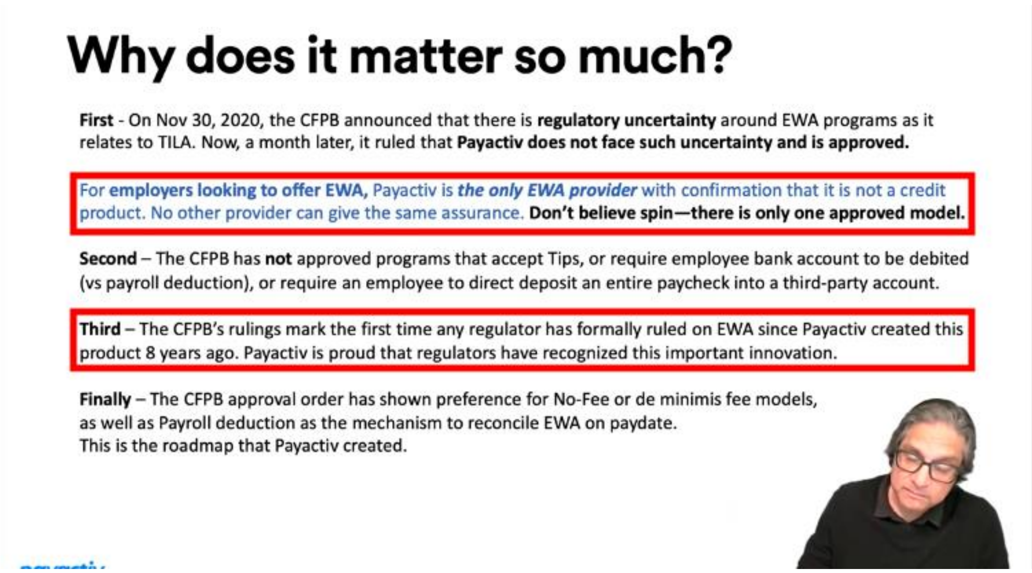
**PayActiv Representations**
**About CFPB's Earned Wage Access Action**

**EXHIBIT A:**



# EXHIBIT B


Why does it matter so much?
First - On Nov 30, 2020, the CFPB announced that there is regulatory uncertainty around EWA programs as it relates to TILA. Now, a month later, it ruled that Payactiv does not face such uncertainty and is approved.
For employers looking to offer EWA, Payactiv is the only EWA provider with confirmation that it is not a credit product. No other provider can give the same assurance. Don't believe spin—there is only one approved model.
Second – The CFPB has not approved programs that accept Tips, or require employee bank account to be debited (vs payroll deduction), or require an employee to direct deposit an entire paycheck into a third-party account.
Third – The CFPB's rulings mark the first time any regulator has formally ruled on EWA since Payactiv created this product 8 years ago. Payactiv is proud that regulators have recognized this important innovation.
Finally – The CFPB approval order has shown preference for No-Fee or de minimis fee models, as well as Payroll deduction as the mechanism to reconcile EWA on paydate.
This is the roadmap that Payactiv created.

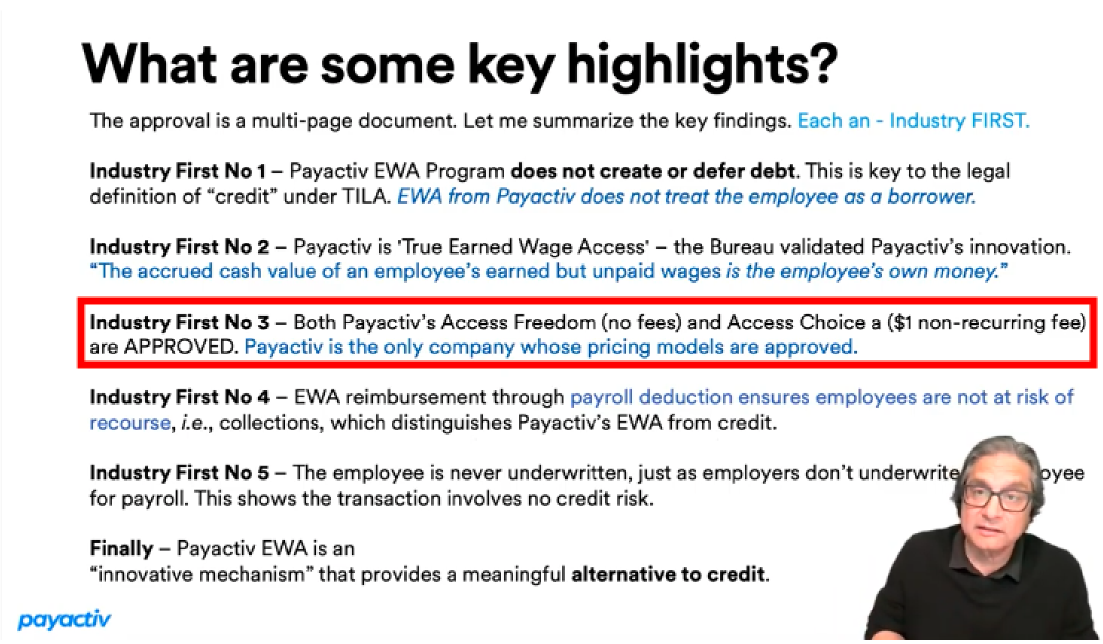

What are some key highlights?
The approval is a multi-page document. Let me summarize the key findings. Each an - Industry FIRST.
Industry First No 1 – Payactiv EWA Program does not create or defer debt. This is key to the legal definition of "credit" under TILA. EWA from Payactiv does not treat the employee as a borrower.
Industry First No 2 – Payactiv is 'True Earned Wage Access' – the Bureau validated Payactiv's innovation. "The accrued cash value of an employee's earned but unpaid wages is the employee's own money."
Industry First No 3 – Both Payactiv's Access Freedom (no fees) and Access Choice a ($1 non-recurring fee) are APPROVED. Payactiv is the only company whose pricing models are approved.
Industry First No 4 – EWA reimbursement through payroll deduction ensures employees are not at risk of recourse, i.e., collections, which distinguishes Payactiv's EWA from credit.
Industry First No 5 – The employee is never underwritten, just as employers don't underwrite oyee for payroll. This shows the transaction involves no credit risk.
Finally – Payactiv EWA is an "innovative mechanism" that provides a meaningful alternative to credit.
payactiv

**EXHIBIT C**


Conclusion
For every business, large or small, 100 employees or 100,000 employees in all 50 states.
The EWA program of Payactiv is the only way to remain in compliance with the CFPB.
Certified
B
Corporation
Public Benefit Corporation
Our Commitment
Our mission, vision, values, and quest to give workers access to the best financial services, are all rooted in the values reflected in our B-Corporation and Public Benefit Corporation Status.
Consumer Champion Award

# EXHIBIT D

**PayActiv** @PayActiv · Jan 11

Payactiv is the only CFPB-Approved EWA provider. Beware of forced-account models that claim they do not require any form of "employee payback." These models do not comply with the CFPB's guidance and face legal and regulatory risk.

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While any EWA provider can apply for approval from the CFPB, Payactiv is the only provider to have ...
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