March 13, 2023

Chair Michael Marcotte
House Committee on Commerce and
Economic Development
Vermont State House
115 State Street, Room 35
Montpelier VT 05633

Re: H 87 An act relating to earned wage access service providers

Dear Representative Marcotte,

We present these comments on behalf of the National Consumer Law Center (NCLC). NCLC uses its expertise in consumer law to work for consumer justice and economic security for low-income and other disadvantaged people in the U.S. We also submit these comments with the support of Vermont Legal Aid, Inc. Vermont Legal Aid is a non-profit law firm that since 1968 has provided civil legal services for Vermonters, including those living in poverty, with a disability, or over age 60. Thank you for the opportunity to offer testimony regarding H. 87, a Bill that presents a significant threat to consumers, and particularly to low-income consumers in Vermont.

We understand that drafting of H.87 is ongoing. The last version of the Bill that we reviewed (dated Feb. 13, 2023) was not clear on a number of concepts related to the structure of the payment programs to be regulated. We assume that these aspects of the text are being revised. Given the ongoing drafting, our comments focus on general concerns we have about any legislation that proposes to exempt earned wage programs from the usury and wage assignment protections now in place for Vermont consumers.

We would like to highlight these key points[1]:

- Both employer-based earned wage advances (EWAs) and direct-to-consumer "tip"-based advances are forms of fintech payday loan and should be regulated as such. There is a strong consensus among nearly 100 consumer, civil rights and labor groups that these products should be viewed as loans.[2]

[1] *See also* NCLC, Earned Wage Advances and Other Fintech Payday Loans: Workers Shouldn't Pay to be Paid (March 3, 2023), https://www.nclc.org/resources/earned-wage-advances-and-other-fintech-payday-loans-workers-shouldnt-pay-to-be-paid/.

[2] *See* Press Release, CFPB Urged to Reverse Earned Wage Actions that Threaten to Create Dangerous Fintech Payday Loan Loopholes (Oct. 12, 2021), https://www.nclc.org/cfpb-urged-to-reverse-earned-wage-actions-that-threaten-to-create-dangerous-fintech-payday-loan-loopholes/.

- EWAs and other fintech payday loans have similar problems of rollovers and multiplying fees as traditional payday loans. Fees look small but drain wages and could add up to 498% APR or higher.

- Vermont law is clear that EWAs and other fintech payday loans are loans. H. 87 would override Vermont law to create a large loophole in Vermont's lending laws.

- Any exemption for fintech payday loans would be exploited by traditional payday lenders, who would revamp their products to claim that their loans, as well "represent" wages and are not loans.

I. Employer-based earned wage advances and direct-to-consumer "tip"-based advances are all forms of payday loan.

Earned wage advances (EWA) are a form of payday loan in which funds are advanced, usually by a third-party, to a worker ahead of the payday and are repaid on payday. The amount of the advance is based on the wages that the worker has earned but are not yet due. In the employer-based EWA model the amount of earned wages is determined by integration with the employer's time and attendance system, and the loans, along with finance charges, are typically repaid through payroll deduction or other direct deduction from the wages on payday.

In addition to employer-based EWAs, at least one fintech payday loan provider offers fake EWAs: direct-to-consumer advances that it claims are wages but have no connection to the employer, the time and attendance system, payroll, or wages. Instead, the lender estimates the amount of wages that have been earned but are not yet due, and then repays itself on the expected payday by debiting the worker's bank account. Consumer are pushed into paying purportedly voluntary "tips" and high expedite fees. When the estimated payday amount is wrong, repayment can trigger overdraft and nonsufficient funds fees.

II. EWAs and other fintech payday loans lead to a cycle of borrowing, like traditional payday loans, and fees that look small add up and drain low wages.

As with traditional short-term, balloon-payment payday loans, EWAs and "tip"-based advances lead to a cycle of chronic borrowing. A worker who cannot afford an expense out of this week's paycheck is likely to face a shortfall with the next week, triggering another round of borrowing. Research has shown that workers who use EWAs typically do so almost every pay period, taking from 12 to 120 advances per year.[3] One provider, DailyPay, allows employees to initiate up to five transactions *per day.*[4]

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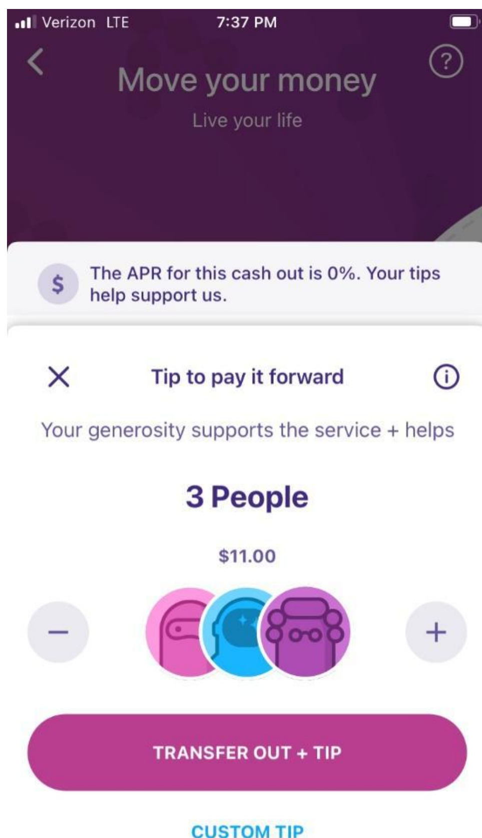
[3] See Testimony of Lauren Saunders Before the Task Force on Financial Technology U.S. House Committee on Financial Services On "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" at 11 (Nov. 21, 2022) (calculations from Aite report), https://www.nclc.org/wp-content/uploads/2022/10/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf (hereinafter "Saunders Testimony").

[4] DailyPay website, Frequently Asked Questions, at https://www.dailypay.com/frequently-asked-questions/ .

Most employer-based EWAs charge fees of $1 to $2 per advance, plus 90% or more of workers also pay a $1 to $2 "expedite" fee to receive the advances quickly.[5] Three dollars in fees on a $100 advance repaid in one week is the equivalent of 156% APR. A worker who took two advances a week at $3 per advance could pay more than $25/month – several hours' wages – fees that only go to attempting to fill the hole from the prior EWA.

"Tip"-based advances can be far more expensive. Consumers are steered into paying purportedly voluntary "tips" that can exceed 10% of the advance, plus expedite fees of $0.99 to $3.99.[6] For example, the Earnin app defaults to an $11 "tip" for a $100 advance to be repaid in 11 days. With a likely $3.99 expedite fee included, the cost would be the equivalent of 497%, though the app displays 0% APR.



Bank account debiting when the advance is repaid can also trigger overdraft or nonsufficient funds fees.

III. EWAs and other fintech payday loans are extensions of credit and must be regulated as such.

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5 See Saunders Testimony at 9 n.35.

6 See Comments of NCLC et al. to CFPB re Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services at 44-59 (May 2, 2022), https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22-1.pdf; Earnin, "Why is there now a fee for Lightning Speed?," https://help.earnin.com/hc/en-us/articles/4407090975635-Why-is-there-now-a-fee-for-Lightning-Speed-.

A. A non-recourse loan is still a loan

EWAs and other fintech payday loans are extensions of credit. They are loans. Under nearly all EWA models, a third-party provides the employee with an advance ahead of when wages are due. The company allows the employee to pay back the sum of money at a later date through payroll deduction or another method. This makes the company that provides the money a lender and the transaction a loan. Similarly, "tip"-based advances provide loans ahead of payday, repaid on payday. For years, EWA and other fintech cash advance lenders have been engaged in an intensive nationwide lobbying campaign to convince policymakers that these simple facts about their transactions are not true.

Lobbyists make one basic argument, and repeat it over and over again, to buttress the contention that these advances are not loans and the lenders should be not subject to laws that apply to other businesses that regularly extend credit. They claim that their products are not loans because they forgo the right to engage in other collection methods beyond seeking repayment through payroll deduction, debiting the bank account, or other repayment methods specified in the agreement. This makes the transactions "non-recourse" obligations because they do not pursue the borrower if the expected repayment method fails. According to the providers, a non-recourse obligation to repay a sum of money does not involve the extension of credit.

The fallacy of this argument is apparent from a brief survey of state and federal law.[7]

Through most EWA structures, the employee assigns a portion of earned wages to a funder. For several decades Vermont law has defined an assignment of an interest in wages as an extension of credit that is subject to regulation like other loans. According to the Licensed Lender Act:

> The payment 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**, for the purpose of regulation under this chapter, shall be deemed a loan secured by such assignment.

8 V.S.A. § 2234 (emphasis added). The statute could not be clearer. The payment of money in consideration for an assignment of wages "whether earned or unearned" is a "loan secured by such assignment." *Id.* Section 2234 goes on to state that the amount by which the sum the borrower pays the lender exceeds the amount borrowed is to be treated as a finance charge. *Id.* Finally, section 2234 provides that assignments of wages as consideration for the payment of money and the related finance charges are subject to the credit regulations found in 9 V.S.A chapters 4, 59, and 61. *Id.* Title 9 includes important limitations on the finance charges allowed for regulated loans. 9 V.S.A. § 41a.

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[7] Together with these comments, NCLC has provided the Committee with the text of section 9.10 from National Consumer Law Center's publication, *Consumer Credit Regulation* (3d ed.). This text was recently updated and includes a detailed discussion of treatment of EWAs under federal and state laws.

Similarly, direct-to-consumer fintech payday loans that are not tied to employers or payroll also fit the Vermont definition of "loan" because they are a "payment in money … as consideration for .. other compensation" (the compensation being repayment by debiting the bank account).

There is nothing in Vermont law that excludes credit from the definition of loan based on whether the debt is non-recourse. Lenders that have strong repayment mechanisms may not need to pursue borrowers in the rare event that they are not repaid. Payroll deduction is an almost fail-proof method of repayment; the "risk … is quite low as employers rarely fail to pay their employees their earned wages."[8] Repayment is also highly likely when "tip"-based advances or other payday lenders secure the right to debit banks accounts – and to keep debiting it if an initial debit fails. Thus, lenders may choose to forego other debt collection activities, making their loans technically "non-recourse."[9] But that does not mean their loans are not loans.

The simplistic notion that EWAs and "tip"-based advances merely give consumers access "to their own money" is just a public relations slogan that has nothing to do with whether they constitute "credit." Tax refund anticipation loans (RALs) provide consumers with early access to their own money.[10] Yet, regulators had no difficulty recognizing RALs as extensions of credit subject to Truth-in-Lending Act (TILA).[11]

Reverse mortgages are non-recourse obligations, because the borrower is not personally obligated on the debt. Instead, the lender's only recourse is against the home. Federal law regulates reverse mortgages as extensions of credit.[12] Pawn transactions are another example. A pawn transaction is structured as a sale of an item of personal property to the pawnbroker, with the consumer having the option but no obligation to buy it back. 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.[13] Courts have

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[8] Compliance Assistance Sandbox Submission to CFPB From Payactiv, Inc. at 12 (Dec. 2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-request_2020-12.PDF.

[9] Section 2305 of H. 87 leaves some ambiguity about what is "permissible collection" related to "non-recourse" loans. According to this section, the lender at its discretion can proceed with debt collection against the borrower if the lender decides that the borrower intended not to pay or that the borrower provided information that the lender deems false. In the hands of an abusive debt collector the ability to accuse an unsophisticated consumer of fraud can be a powerful collection tool.

[10] *See* National Consumer Law Center, Consumer Credit Regulation ch. 15 (3d. 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.

[11] Regulation Z Official Interpretation § 1026.17(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).

[12] *See* National Consumer Law Center, Truth in Lending § 8.8 (10th ed. 2019) (discussing TILA provisions applicable to reverse mortgages).

[13] 61 Fed. Reg. 14,952, 14,954 (April 4, 1996), now Regulation Z Official Interpretation § 1026.17(c)(1)-18.

adhered to this view in holding that non-recourse pawn transactions were debts and therefore extensions of credit under TILA.[14]

B. Improvements in technology and innovation should *decrease* and not *increase* the cost of credit to consumers

The gist of what the H. 87 is designed to do is exempt EWAs from the Vermont Licensed Lender Law.[15] Sections 2234 and 2236a of the Licensed Lender Law regulate EWAs today and subject them to an 18% APR limit. EWA providers want a law that lets them charge whatever APR they want.

Vermont enacted its law regulating wage assignment loans in 1996. At that time many borrowers still went to offices, filled out forms, and documents had to be mailed. The Vermont legislature decided in 1996 that an 18% APR was an acceptable interest cap for wage assignment loans. Since then, with the technology advances of the last 25 years, lenders can now provide loans at a fraction of the costs they incurred to make the loans in 1996. But EWA lenders now want to get rid of the cap entirely and charge APRs that range from 125% to 300-400%, and higher. In reality, they are arguing that technological innovations that make lending *less* expensive for providers should make it ten or twenty times *more* expensive for consumers. The EWAs lobbying positions do not make economic sense. This is a lobbying campaign that can succeed only if it confuses policymakers about the goals and objectives of the legislation.

C. Vermont's Consumer Fraud Act applies to EWAs

Vermont's Consumer Fraud Act's[16] safeguards against unfair and deceptive commercial practices could not be more vital than in oversight of an industry whose business model depends on enticing financially stressed low-income workers into dependence on high-cost short-term loans.

The Vermont Attorney General's debt collection regulations, implementing the Consumer Fraud Act, define the term "debt" to mean "money, property, or their equivalent which is due or owing or alleged to be due or owing" Vt. Code R 3-2-103:CP 104. EWAs and "tip"-based advances create debts that employees must repay. The creation and repayment of these debts falls squarely within the Consumer Fraud Act's goal to protect consumers against the wide range of commercial practices that are deemed "unfair" or "deceptive." Because the unfairness and deception standards are flexible, the Attorney General and injured consumers can address new and unexpected problems with fintech payday loans as they appear. Exempting EWAs and other

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[14] Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261, 1262 (9th Cir. 1993) (looking beyond form of pawn transactions to their substance, the transactions were "loans secured by the property, regardless of whether Burnett was personally liable for the debt"); *In re* Spinner, 398 B.R. 84 (Bankr. N.D. Ga. 2008) (pawn transactions are extensions of credit under TILA definitions); Barlow v. Evans, 992 F. Supp. 1299 (M.D. Ala. 1997) (rejecting argument that pawn transaction is not a debt because there is no obligation to repay); 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).

[15] H. 87 § 2307(a).

[16] 9 V.S.A. § 2451, et seq.

fintech payday loans from any aspect of the Consumer Fraud Act would dramatically weaken regulators' ability to protect consumers.[17]

Oversight is especially critical for fintech payday loans that collect high fees and interest in purportedly voluntary "tips" and inflated expedite fees.[18] These practices heighten the need for oversight. Some of the world's largest venture capital and private equity firms fund these new fintech payday loans. Yet, a glance at certain web material shows them masquerading as community-minded non-profits. Under this guise they solicit "donations" from the most cash-strapped Americans. Oversight to deter unfair and deceptive practices in this context is essential.

D. Requests for "voluntary" payment in connection with an extension of credit can be finance charges under Vermont and federal law

Increasingly, fintech payday lenders depend on consumer "tips" for a substantial part of their revenue. They argue that these payments are "voluntary" and therefore not subject to credit regulation. There is no support for this position in state and federal law.

The Vermont Licensed Lender Act mandates that money paid "as consideration for" any sale or assignment of wages "shall be deemed a loan secured by the wage assignment." 8 V.S.A. § 2234. The law does not limit the "consideration" to involuntary payments of money. Section 2234 makes wage assignment loans subject to the limits on finance charges found in 9 V.S.A. § 41a, Vermont's statute limiting finance charges on various types of loan. The subsection of § 41a applicable to fintech payday loans provides:

> (b) The rate of interest or the sum allowed:
>
> (1) For single payment loans by lenders regulated by Title 8 and federal savings and loan associations, the finance charge shall not exceed 18 percent per annum. 9 V.S.A. §41a(b)

Section 41a(b) caps the finance charge that is "allowed" on a loan. It limits the sum the lender can collect from a borrower. The statute does not distinguish "voluntary" from "involuntary" payment of a usurious finance charge.

Indeed, Vermont law has long held that a lender cannot defend against a usury claim by asserting that the borrower voluntarily paid.[19] In allowing remedies for a borrower under

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[17] Although the most recent draft of H. 87 appears to subject EWAs to the Consumer Fraud Act, § 2307(b)(3) is confusing. This subsection deems an EWA obligation to be a "debt" for purposes of the Consumer Fraud Act in the case of unlicensed providers. The implication seems to be that the transactions do *not* create a "debt" subject to the Consumer Fraud Act in the case of a licensed EWA. EWA lenders routinely argue that their transactions do not create "debts" and therefore they should not be regulated as debt collectors.

[18] For more on the problems with "tips" and inflated expedite fees, see Consumer Comments to the CFPB Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services at 43-59 (May 2, 2022), https://www.nclc.org/resources/consumer-comments-cfpb-junk-fees-imposed-by-providers-of-consumer-financial-products-or-services/.

[19] See, e.g., Davis v. Hoy, 2 Aik. 303, 311, 1827 WL 1387, *8 (Vt. 1827) (borrower's "voluntary" payment of interest in excess of six-percent statutory limit must be treated as "imposed upon the borrower, and not voluntary on his

Vermont's 1797 usury statute, the Vermont Supreme Court recognized that individuals in financial distress find themselves "in the power of others," and therefore when usurious charges are paid it is not accurate "to say that the act of paying the money is wholly without constraint."[20] Even 150 years ago there were "numerous cases in the books for the recovery of usury paid—in all which the payments have been voluntary".[21] Otherwise, creditors could routinely evade usury laws by asserting that borrowers "chose" to take out loans at interest rates blatantly in excess of statutory limits.[22]

At the federal level, neither the Federal Reserve Board nor the CFPB have a blanket rule excluding payments labeled as "voluntary" from the scope of the definition of a finance charge. As the Federal Reserve Board stated in construing the TILA implementing regulations: "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." 61 Fed. Reg. 49,237, 49,239 (Sept. 19, 1996). The TILA defines a finance charge as a sum that "directly or indirectly" is imposed "as an incident to the extension of credit."[23] The item need not be a "condition" to the extension of credit. "Tips" are clearly "incident to" the extension of credit.

The tips model is designed to mask the finance charge associated with fintech payday loans. The providers do not dispute that they depend on tips for a large portion of their revenue. The payments are not tips to a human being for good service. They serve the function of a finance charge because they cover the cost of providing credit.

It is important to consider the tipping systems in the context of the enormous power imbalance in which they appear. On the one hand are cash-strapped low income workers who are in desperate financial straits. On the other hand are sophisticated and well-funded companies that have every incentive to keep the borrowers in a long-term pattern of repeat borrowing. Fintech

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part; he is supposed to be in the power of the lender, and he is also usually in embarrassed circumstances, as well when he pays as when he borrows, and if not constrained to pay from a principle of interest alone, a sense of honor may have extorted from him that which in conscience and honour the usurer ought not to retain."); *accord* Wheatly v. Waldo, 36 Vt. 237, 244 (1863) ("It only remains to enquire then, whether a voluntary payment of usury, precludes the party making it from recovering it back in a suit brought by himself for that purpose. To answer this it is only necessary to refer to the Statute, which specifically provides that it may be recovered back by this form of action … ."). *See also*, Stock v. Meek, 221 P.2d 15, 20 (Cal. 1950) ("The theory of [the usury] 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.' Taylor v. Budd, 217 Cal. 262, 266, 18 P.2d 333, 334. If no loophole is provided for lenders, and all borrowers save fraudulent ones are protected, usurious transactions will be discouraged."

[20] Davis v. Hoy, 2 Aik. 303, 311, 1827 WL 1387, *8 (Vt. 1827).

[21] Wheatly v. Waldo, 36 Vt. 237, 244 (1863).

[22] There should be no question that a state can regulate lenders' solicitation of finance charges in connection with extensions of credit. Vermont has regulated the extension of credit continuously since the eighteenth century. Lending is a classic commercial activity. No heightened form of First Amendment protection applies to commercial activities. Connecticut Bar Ass'n v. United States, 620 F.3d 81, 93-94 (2d Cir. 2010).

[23] 15 USCA § 1605(a) ("Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.")

payday lenders can manipulate their pitches to confuse borrowers about the nature of tips. For example, they may penalize borrowers who do not tip enough. They may cut off their overdraft alerts.[24] Large tips may be included by default and be cumbersome to override. Overall, the lenders can use new dark patterns and coercive features designed to encourage tipping each time a practice is exposed.

The California Department of Financial Protection and Innovation (DFPI) has noted that "tips" are "charges" under California law because they are "received by" the lender.[25] Under federal law, default provisions of contracts may be considered compulsory even if the consumer can opt out, such as by re-setting a default.[26]

Another purportedly voluntary fee that most EWAs and "tip"-based advances charge is an "expedite" or "instant access" fee, which can range from $1 to $10 per advance. We understand that upwards of 90% of workers' pay those fees.[27] The actual cost of sending funds instantly may be closer to 4.5 cents (and in some cases free)[28] – and thus the fees may be 20 to 100 times the cost. A fee with such a dramatic markup should be considered a finance charge.

IV. Regulators are beginning to take action to recognize most EWAs and other fintech payday loans as credit.

At the federal and state level, there have been mixed messages on whether EWAs are credit. But the growing consensus is that any advance by a third party, not the employer itself, that involves a cost to the consumer is credit and is covered by credit laws.

In 2020 under CFPB Director Kathy Kraninger, the CFPB issued an advisory opinion that found that a limited category of free, employer-based EWA options were not "credit" under the TILA. The Bureau has since warned against broad reliance on this advisory opinion beyond the free products to which it was addressed.[29] Current (then Acting) CFPB General Counsel Seth

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[24] National Consumer Law Center, Center for Responsible Lending, et al. Comment to CFPB Docket No. 2022-0003, 87 Fed. Reg. 5801 (Feb. 2, 2022) Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services, pp. 44-50, available at https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22.pdf .

[25] Calif. DFPI, File No: OP 8206, Letter from Charles Carriere to Carl Morris re Request for Interpretive Opinion – FlexWage at 6 note 4 (Feb. 11, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf (hereinafter "DFPI FlexWage Opinion").

[26] See NCLC, Consumer Banking and Payments Law §§ 5.2.2.3 5.9.5.1 (6th ed. 2018) (discussing cases interpreting ban on compulsory use of particular accounts for wages and ban on compulsory repayment of credit by electronic fund transfer, 15 U.S.C. § 1693k).

[27] See Saunders Testimony at 9 n.35.

[28] See The ClearingHouse, "Simple, Transparent, Uniform Pricing for All Financial Institutions" (showing cost of RTP instant credit transfer at $0.045), https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/rtp_-pricing_02-07-2019.pdf

[29] "Free" EWA products are rarely offered in isolation. Providers typically advertise a "free" option that they know consumers will find unattractive and in this way encourage them to choose the more desirable, typically faster, options that involve fees and charges.

Frotman sent a letter emphasizing: “Products that include the payment of any fee, voluntary or not, are excluded from the scope of the advisory opinion and may well be TILA [Truth in Lending Act] credit.”[30]

Also in late 2020, as the Kraninger leadership of the CFPB was ending, the Bureau gave time-limited approval to the application of an EWA provider, PayActiv, to operate with specified conditions under the Bureau’s since-ended “Compliance Assistance Sandbox” policy.[31] This sandbox approval order applied only to PayActiv, was to be in effect only for 24 months, did not create any general rule for EWA products, and was entitled to little or no deference. Consumer advocates, including 96 consumer, labor, civil rights, legal services, faith based organizations, and academics sharply criticized the decision.[32] In 2022 the CFPB rescinded the approval.[33]

An opinion by the California Department of Financial Protection and Innovation (DFPI) found that an earned wage provider with a unique business model, FlexWage, did not offer “loans” under California law. There were two “necessary elements” to the California finding that make clear that most other EWAs *are* loans: “(1) employers, *not Flexwage*, provide EWA funds that do not exceed what they already owe recipients; and (2) the fees charged do not suggest that the product evades California’s lending laws.”[34] DFPI noted that “essential” to the finding was that, in FlexWage’s model, the funds were paid directly by the employer, not advanced by a third party.[35] According to DFPI, a “third‑party with no financial obligation to the employee could not rely upon this reasoning, because the funds provided would be for the recipient’s temporary use, and the third‑party would presumably arrange to recoup the amounts it advanced.”[36] Second, even as to EWAs paid by the employer, DFPI also relied on the fact that the program did

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[30] Letter from then-Acting CFPB General Counsel Seth Frotman to Beverly Brown Ruggia, et al. (Jan. 18, 2022), https://www.nclc.org/wp-content/uploads/2022/10/Letter-from-S.-Frotman-to-B.-Ruggia-et-al-re-EWA-AO-1.18.22-1.pdf. Mr. Frotman also indicated that he intended to recommend to the current CFPB Director that he provide greater clarity on these issues.

[31] The EWA provider Payactiv’s application for Sandbox approval and the Bureau’s approval letter are available at: https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-issues-an-approval-order-to-facilitate-employee-access-to-earned-but-unpaid-wages/

[32] *See* NCLC, et al., Letter to Director Consumer Financial Protection Bureau Re: Concern about prior leadership’s finding that certain earned wage access products are not “credit” under the TILA (Oct. 12, 2021) https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/EWA-letter-to-CFPB_Oct-4-2021.pdf and coalition letter https://www.nclc.org/wp-content/uploads/2022/10/CFPB-EWA-letter-coalition-FINAL2.pdf .

[33] Order to Terminate Sandbox Approval Order, In re Payactiv, Inc. (CFPB Dec. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_termination-order_2022-06.pdf; CFPB, Press Release, Rescinds Special Regulatory Treatment for Payactiv (June 30, 2022) (noting that Payactiv requested the termination after the CFPB informed Payactiv that it was considering terminating the approval order in light of certain public statements the company made wrongly suggesting a CFPB endorsement of its products).

[34] Calif. DFPI, File No: OP 8206, Letter from Charles Carriere to Carl Morris re Request for Interpretive Opinion – FlexWage at 4 (Feb. 11, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf (hereinafter “DFPI FlexWage Opinion”).

[35] Id. at 5. Similarly, the offhand dicta in the discussion of the CFPB’s 2017 Payday Lending Rule mentioned an “employer” that allows an employee to draw wages early, not a third party that advances those wages and is repaid later. The opinion also does not address the impact of a state law that prohibits an *employer* from having an employee agree to an assignment of wages, such as 21 V.S.A. § 344.

[36] Id. at 4.

not suggest evasion of California lending laws because the fees charged were lower than could be charged on loans by finance lenders.[37] The DFPI opinion went to great lengths to emphasize, more generally, that California's finance law "should be interpreted broadly to cover any transaction where a worker grants someone an interest, or otherwise agrees to allow a someone else to receive, their earned or unearned wages."[38]

Arizona's outgoing attorney general, in his final days, issued an advisory opinion that took a different approach, finding that EWAs were not loans under Arizona law. However, the opinion made assertions that contradicted Arizona law and misinterpreted both federal and California law. Advocates have asked the new attorney general to reconsider the opinion.[39]

Connecticut's regulator has served a cease-and-desist order against Solo Funds, finding that purportedly voluntary "tips" on payday loans were the equivalent of APRs ranging from 43% to 4280%, and the lender violated Connecticut's lending and licensing laws.[40]

V. Traditional payday lenders will exploit any loopholes in Vermont's credit laws

Vermont should exercise great caution in creating loopholes in its consumer protection laws governing payday loans and other forms of credit. Those loopholes will not only be problematic for fintech payday loans that bear a close resemblance to traditional payday loans. The loopholes will also be exploited by regular payday lenders.

Lobbyist are pushing to exempt from lending laws a category of earned wage advance that goes far beyond employer-based programs integrated with time and attendance systems and repaid from payroll. As in the model bill by the American Legislative Exchange Council (ALEC), the exemption would be available to any lender that claims to be making payments loosely "based on" wages that the consumer has "represented" and the provider has "reasonably

[37] Id. at 5-6.

[38] Id. at 4. The DFPI opinion also discusses how the Uniform Small Loan Law of the early 20th century, on which most states' small loan laws are based, was intended to capture advances of wages both earned and to be earned. See id. at 3.

[39] *See* Letter urging the Arizona Attorney General to Rescind Opinion Letter regarding Earned Wage Access Product (Jan. 24, 2023), https://www.nclc.org/resources/letter-urging-the-arizona-attorney-general-to-rescind-opinion-letter-regarding-earned-wage-access-product/.

[40] *See* In the Matter of Solo Funds, Inc., NMLS No. 1909701 Connecticut Banking Commissioner's Order May 4, 2022 available at https://portal.ct.gov/-/media/DOB/Enforcement/Consumer-Credit/2022-CC-Orders/Solo-Funds-Inc--Temp-CDRestNOI-CDCPOLER.pdf .

determined" have been earned or accrued.[41] Yet that definition could be satisfied any time a consumer goes to a payday lender when the paycheck is running out before the next payday.

The tremendous threat that EWA bills pose to predatory lending protections is why a coalition of 96 consumer, labor, civil rights, legal services, faith, community and financial organizations and academics has urged the CFPB to treat EWAs and other fintech payday loans as credit.[42]

Vermont has strong laws that prohibit the debt trap of payday loans that devastate consumers in many other states. It should be leery about allowing clever lobbyists to eviscerate those protections. Payday loans exist because, decades ago, lobbyists convinced legislatures that the "deferred presentment" of checks was not a loan. Today's fintech payday loans are the same thing: Old wine in new bottles.

VI. Conclusion: H. 87 creates a loophole in Vermont consumer protection law that will promote evasions and predatory lending.

Vermont has built a strong framework to protect consumers from predatory lending. These include the prohibition against payday loans and careful regulation of wage assignments.

The Legislature should be leery of sales pitches asserting that an innovative new technology justifies tearing down consumer protections that have been in effect for decades. The jargon about "non-recourse" loans and employees who only want to access "their own money" are the emperor's new clothes. There is really nothing there, except a studied attempt to confuse policymakers into overturning settled state law. The fintech payday lenders' reasoning leads to a very slippery slope. Waiting in the wings are a host of purveyors of other shaky and dangerous financial products ready to tell the legislature that their loans are not really loans and their credit is not really credit.

We ask that the Legislature proceed with extreme caution in this area and act only with benefit of data that should become available to policymakers in the years to come.

Yours very truly,

[41] See ALEC, Earned Wage Access Act, https://alec.org/model-policy/earned-wage-access-act/. Vermont H. 87 § 2301(3) defines "Earned but unpaid income" to mean wages or compensation that has not yet been paid to a consumer "as determined by a provider *based on information submitted by a consumer* or obligor" (emphasis added). By allowing a lender to advance funds in an amount the consumer requests without reliance on employer-integrated payroll data, this language permits transactions that are essentially direct to consumer payday loans, contrary to existing Vermont law.

[42] *See* Press Release, CFPB Urged to Reverse Earned Wage Actions that Threaten to Create Dangerous Fintech Payday Loan Loopholes (Oct. 12, 2021), https://www.nclc.org/cfpb-urged-to-reverse-earned-wage-actions-that-threaten-to-create-dangerous-fintech-payday-loan-loopholes/.

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