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March 16, 2023

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Re: Earned Wage Advance Bills

Dear Jonathan,

You have asked for my analysis of how Nevada law and consumer protections would be impacted by potential legislation governing employer-based earned wage advances (EWAs) and fintech payday loans funded by "tips" and expedite fees. One bill governing employer-based EWAs has recently been introduced in Nevada, SB 290, and we understand that talks have been ongoing on conforming it with other proposals governing direct-to-consumer payday advances. In general, the proposals seem similar in approach to the model Earned Wage Access Act proposed by the conservative American Legislative Exchange Council (ALEC)[1] and to bills we have seen in other states.

SB 290 and other legislation promoted by industry would exempt various fintech payday loans from lending laws base on the disingenuous assertion that they are not loans. In my opinion, both employer-based EWAs and direct-to-consumer tip-based advances are a form of payday loan covered by Nevada law. Nevada does not have fee limits for payday loans, but it does have some protections that should govern all payday loans. The protections in the bills promoted by industry are not meaningful and primarily codify the current business model. States that prohibit or tightly regulate payday loans should certainly not authorize a new category of fintech payday loan. Given the existence of the payday loan industry in Nevada, if the state wishes to treat employer-based earned wage advances or tip-based advances differently, there are much more meaningful ways to achieve consumer protections than the current proposals. I discuss these at the end of this letter.

[1] https://alec.org/model-policy/earned-wage-access-act/.

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

Earned wage advances (EWAs) 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, determined by integration with the employer's time and attendance system. The loans are typically repaid through payroll deduction or other direct deduction from the wages on payday. Some employers offer EWAs for free, but normally repayment includes a fee for each advance and often an expedite fee for instant access.

One company, Earnin, also offers a form of fake earned wage advance, with no connection to the employer payroll or its time and attendance system. Instead, Earnin estimates the amount of wages that have been earned but are not yet due. The app also seeks a "tip" in a default amount that may be charged, and the consumer must also agree to an expedite fees, which vary based on the size of the loan, to receive the money quickly. The lender then repays itself by debiting the worker's bank account, just like traditional payday lenders do.

Another fintech cash advance variation, offered by multiple nonbank companies that offer banking and personal financial management apps, does not claim that the advances are wages, but does rely on similar tips and expedite fees.[2] While these advances, as currently offered, would not be covered by legislation governing advances that "represent" wages, they could be reformulated.

All of these variations of fintech payday loans are loans: funds are advanced and are repaid later. They all allow the lender to make subsequent repayment attempts if the initial repayment fails, either by debiting future payrolls or resubmitting bounced payments. Because of the strong repayment mechanisms and high likelihood of repayment, the lenders may agree to forgo other collection methods.

II. EWAs and tip-based advances lead to a cycle of borrowing, like traditional payday loans. Fees that look small add up and drain low wages, with workers effectively paying to be paid.

As with traditional short-term, balloon-payment payday loans, fintech payday loans lead to a cycle of chronic borrowing. A consumer who borrows from next week's pay because they cannot afford an expense out of the current paycheck is likely to face a shortfall the next week,

[2] *See* Comments of National Consumer Law Center (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 ("NCLC Junk Fees Comments").

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]

A recent report by the U.S. General Accounting Office (GAO) found that that users of a direct-to-consumer, tip-based lender, almost certainly Earnin, borrow on average 26 to 33 times a year.[4] One factor the GAO cited for the high frequency was the daily advance limits[5] – which can also multiply fees.

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.[6] Three dollars in fees on a $100 advance repaid in one week has an annual percentage rate (APR) of 156%. A worker who takes two advances a week at $3 per advance could pay more than $25/month – likely several hours' wages. The worker is essentially in a cycle of paying to be paid, as the advances only attempt to fill the gap in the paycheck without providing new liquidity.

Tip-based advances can be far more expensive. Consumers are steered into paying purportedly voluntary "tips" that can be more 10% of the advance, plus expedite fees of $0.99 to $3.99.[7] For example, the Earnin app adds an $11 default "tip" for a $100 advance for 11 days, but displays "0% APR." With a likely $3.99 expedite fee included, the $14.99 total cost is the equivalent of 497% APR.

A cost of $15 for a $100 loan is typical of conventional payday loan pricing. A borrower who took out 30 such advances would pay $450 a year – money that low-wage workers can hardly afford. Indeed, the GAO report found that the direct-to-consumer, tip-based lender indicated that about 78 percent of its users made under $25,000 a year.[8]

Bank account debiting when the advance is repaid can also trigger overdraft or nonsufficient funds fees. Earnin promises to repay those fees, but consumers have continued to complain about overdraft fees, even after Earnin paid millions to settle a class action lawsuit in 2021.[9] For example, one consumer complained in January 2023 about frustrations when repeated debits

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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 ("Saunders Testimony").

[4] U.S. General Accounting Office, GAO-23-105536, Financial Technology: Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity Is Needed at 23-24 (March 8, 2023), https://www.gao.gov/assets/gao-23-105536.pdf ("GAO Financial Technology Report").

[5] *Id.* at 24.

[6] *See id.* at 9 n.35.

[7] *See* NCLC Junk Fees Comments at 44-59; 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-.

[8] *See* GAO Financial Technology Report at 24.

[9] *See* Cohen & Malad, LLP, OWNER OF EARNIN PAY ADVANCE APP AGREES TO $12.5 MILLION SETTLEMENT, https://www.cohenandmalad.com/news/owner-of-earnin-pay-advance-app-agrees-to-12-5-million-settlement/.

triggered $216 in overdraft fees that had yet to be refunded nearly 3 months later.[10] Earnin also has refused to repay late fees that consumers incurred when the Earnin debit before payday caused other bills to bounce.[11]

III. Claims that Earned Wage Advances and Tip-Based Advances are Not Loans are Inaccurate.

Lobbyists for fintech payday lenders claim that their loans are not loans based on two main arguments. First, they claim that the advances are not loans because they "represent" wage payments and are supposedly "non-recourse." Second, they claim that purportedly voluntary payments such as "tips" and expedite fees are not interest or charges under lending laws. Both arguments should be rejected by Nevada.

A. *Advances of wages, even earned wages, are loans, not wages.*

Lobbyist claim that EWAs and tip-based advances are not loans because they represent a payment of wages already earned by the employees. Even a cursory examination of Nevada's small loan law reveals the fallacy of this assertion. Both types of advances fall within the language of Nevada's small loan law, and those that debit bank accounts also should fall under its payday loan law.

Both employer-based earned wage advances and direct-to-consumer tip-based advances are also loans under Nevada's small loan law:

> The payment of money … as consideration for any sale, assignment or order for the payment of wages, salary, commissions or other compensation for services ***earned or to be earned***, shall, for the purposes of regulation under this chapter, ***be deemed a loan*** of money secured by the sale, assignment or order.[12]

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[10] *See* Better Business Bureau, *https://www.bbb.org/us/ca/palo-alto/profile/financial-services/activehours-inc-1216-642613/complaints#1438483863* ("Earnin is operating as a payday lender in the ****************. On October 28, 2022 they withdrew $315.00 from my checking account but the account only had $27.00 in available funds. This caused me to have a negative balance and three overdraft fees of $36.00. Please see the attachment. I finally paid off the negative $460.00 and had a positive balance of $230.00 when they attacked again on January 5, 2023 and withdrew another $315.00. This again cost me almost $100 in overdraft fees and left me with a negative $12.12 balance. I revoked their authorization for them to withdraw on 10/15/2022, enough time to make sure they were on notice. I left my bank account linked to them meaning their computer's had access to my available balance. I reached out to them regarding the second withdraw and the overdraft fees. Them withdrawing this money goes against their business motto and operating agreement. They are not licensed to operate as a loan lender in ******** and I want my $630.00 back plus the $108.00 in October overdraft fees (which has been returned) and the new $108.00 in overdraft fees. The company does not have a phone call service option and only goes by chat and email. I was told on 01/06/2023 that a specialist would be in touch and I have not heard back from anyone with Earnin. The company should not be allowed to operate as is and by over-drafting my account this should be a consumer violation.").

[11] *See, e.g.,* CFPB Complaint #4665089, https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/4665089.

[12] Nev. Rev. Stat. § 675.330 (emphasis added). Note, however, that Nevada prohibits licenses under its small loan law from taking wage assignments: "No assignment of wages, salary, commissions or other compensation for services, ***whether earned or to be earned***, given to a licensee as security for a loan under this chapter, shall be valid." Nev. Rev. Stat. § 675.340 (emphasis added).

A historical perspective is useful in examining the claim that EWAs are not loans. Nevada's small loan law is based on the Uniform Small Loan Law, which deliberately covered salary lenders who purchased earned wages at a discount. In order to prevent evasions of usury laws and to control the practice, *the model law specifically subjected wage advances to treatment as a loan*. Indeed, a 1941 law review article written in the years following the model law's development noted that the law subjected "all wage purchases, whether *bona fide* or not, to the small loan law."[13]

Any wage advance that is repaid by debiting a bank account (as direct-to-consumer apps do, as well as some employer-based EWAs) also fits Nevada's definition of "deferred deposit loan," which governs payday loans. These advances are:

> a transaction in which, pursuant to a loan agreement:
>
> 1. A customer tenders to another person:
>
> > …(b) Written authorization for an electronic transfer of money for a specified amount from the account of the customer; and
>
> 2. The other person:
>
> > (a) Provides to the customer an amount of money that is equal to … the amount specified in the written authorization for an electronic transfer of money, less any fee charged for the transaction; and

(b) Agrees, for a specified period, not to … execute an electronic transfer of money for the amount specified in the written authorization.[14]

Lobbyists have cited an opinion by the California Department of Financial Protection and Innovation (DFPI) finding that one earned wage provider with a unique business model, FlexWage, did not offer "loans" under California law. However, DFPI cited "two necessary elements: (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," because FlexWage charged less than it could under the lending laws.[15]

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[13] F. B. Hubachek, The Development of Regulatory Small Loan Laws, 8 *Law and Contemporary Problems* 108-145, 138, 142 (Winter 1941), https://scholarship.law.duke.edu/lcp/vol8/iss1/11.).

[14] Nev. Rev. Stat. § 604A.050.

[15] Calif. DFPI, Fil No: OP 8206, Letter from Charles Carriere to Carl Morris re Request for Interpretive Opinion – FlexWage at 5 (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"). 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. I question California's conclusion that employers offering FlexWage are not offering loans, but California limited the impact of that finding but

In contrast, direct-to-consumer payday lenders and most employer-based earned wage advances do not involve wages paid directly by the employer. They cannot "rely upon this reasoning [regarding FinWise], 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 …."[16]

Wage payments must comply with wage and hour laws and other labor laws, which typically prohibit discounting wages through fees and require that taxes and other deductions be taken.[17] The claim that direct-to-consumer payday advances are wages is even more far-fetched, as they have no connection to employers, payroll, or wages.

Moreover, actual wage payments do not need to be repaid. Payday advances – loans – do. Nearly every EWA and tip-based advance involves an advance by a third-party lender that is repaid later, whether by payroll deduction, deductions from direct deposits routed through the lender, or debiting a bank account.

B. *Non-recourse obligations can be loans, and EWAs are not necessarily non-recourse*

Fintech payday lenders also claim that they are not making loans because the debts they create are "non-recourse," with lenders forgoing certain collection methods. But there are many non-recourse loans. The fact that a transaction is non-recourse does not mean it is not a loan.

For example, Nevada has auto title loans. In *Department of Business and Industry, Financial Institutions Division v. Title Max*, 495 P.3d 506, 512 (Nev. 2021), the Nevada Supreme Court observed that "In contrast to a deferred deposit loan, a title loan is nonrecourse, meaning that the lender's recovery will ultimately be limited to the value of the vehicle that secures its loan."

Similarly, payday loans are certainly loans, even though Nevada law states that a lender that rolls over or extends repayment of a loan with additional fees may "not commence any civil action or process of alternative dispute resolution on a defaulted loan or any extension or repayment plan thereof."[18]

Industry has also pointed to comments adopted in 1981 by the Federal Reserve Board finding that loans against the accrued value of an insurance policy or pension account are not "credit" under the federal Truth in Lending Act (TILA) if the consumer is not contractually obligated to repay. However, those 1981 TILA exemptions are limited to the specific situations addressed, rest on facts that may make them unique, and have proved very problematic.[19] TILA regulations do not create any general rule that non-recourse loans are not credit.

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emphasizing that a necessary part of that conclusion was that FlexWage was not charging more than it could if it were a lender.

[16] *Id*. at 4.

[17] *See* NCLC, Consumer Credit Regulation § 9.10.2 (3d ed 2020, updated at library.nclc.org).

[18] Nev. Rev. Stat. § 604A.5019(2)(f).

[19] *See* National Consumer Law Center, Truth in Lending § 2.1a.2.5 (2023 online update), library.nclc.org.

In fact, several types of non-recourse loans, including reverse mortgages, refund anticipation loans. and pawn loans, are credit under TILA.[20] Many other legal authorities support the view that non-recourse obligations are debt, and thus the right to incur debt and repay it later is credit.[21]

Moreover, fintech payday lenders actually do have recourse. They have strong repayment mechanisms, the right to pursue failed payments, and even the right to sue the borrower over claims of "fraud." Thus, they can afford to forgo other ways of pursuing 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."[22] 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. But that does not mean their loans are not loans.

C. *"Tips" and inflated expedite fees are disguised interest and charges.*

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. However, there is generally no exception for "voluntary" charges from interest rate laws.[23] For example, 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.[24] The general counsel of the Consumer Financial Protection Bureau has also noted that earned wage products "that include the payment of any fee, voluntary or not, … may well be [Truth in Lending Act] credit."[25]

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, paid voluntarily after the service.

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[20] *Id*. § 2.2.4.1a.5.

[21] *Id*. See also National Consumer Law Center, Consumer Credit Regulation § 7.5.3.6 (2023 online update),

[22] 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.

[23] *See, e.g.,* Kline v. Robinson, 428 P.2d 1090 (Nev. 1967) (finding that borrower entitled to refund of usurious interest voluntarily paid, explaining that the "reasoning behind this rule is well stated in Stock v. Meek, 35 Cal.2d 809, 221 P.2d 15, 20 (1950), where Chief Justice Traynor said, 'The theory of that 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.' A fortiori, usurious interest involuntarily paid is recoverable."); NCLC, Consumer Credit Regulation § 7.7.6.3 ("Though lenders have asserted the voluntary payment defense in usury cases, the majority of jurisdictions addressing the issue have refused to apply it in those circumstances.")

[24] DFPI FlexWage Opinion at 6 n.4.

[25] 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 Director that he provide greater clarity on these issues.

Instead, tip-based advances seek payments to cover the cost of loan, pledged before the loan is made. 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 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.[26] 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.

Fintech payday lenders insert a default "tip" amount, putting the onus on borrowers to change it every time. 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.[27]
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.[28] The actual cost of sending funds instantly may be closer to 4.5 cents (and in some cases free)[29] – 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. Recommendations to prevent a new breed of abusive fintech payday loans.

The payday loan industry was created when clever lobbyists managed to convince legislatures that the "deferred deposit" or "deferred presentment" of a check was not a loan at all, and the fee was more like a check cashing fee than interest. The arguments today about "earned wage access products" are eerily similar, with fees for payday advances being compared to an ATM fee.

The bills pushed by industry claim to regulate these new fintech payday loans, but do little more than codify their existing business model. SB 290 and other proposed bills do not place any limits on fees or costs, prevent overdraft or nonsufficient funds fees, or stop snowballing

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[26] 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 .

[27] *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).

[28] *See* Saunders Testimony at 9 n.35.

[29] *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.

rollovers that result in workers paying to be paid. The bills do not ensure that workers will have enough funds left on payday for other expenses, prevent the myriad of creative ways that lenders can push borrowers into "tipping" or paying other fees, or weaken the stranglehold that lenders have over borrowers when they have the right to grab their paycheck or debit their bank account.

Moreover, these industry bills are written so broadly that traditional payday lenders – long known for their creativity and evasions – can easily revamp their loans to become the payment of "earned wages." Old school payday lenders can also ask consumers to "represent" what wages have been earned and not yet paid, and to "reasonably determine" expected earnings. Consumers often go to payday lenders after working several days since their last paycheck, but when money has run out before payday.

The concern about the evasion of consumer protection laws through the guise of earned wage advances is widespread. That is why 96 consumer, labor, civil rights, legal services, faith, community and financial organizations and academics have urged that earned wage advances and other fintech payday loans must be treated as credit and be subject to credit laws.[30]

While Nevada does not have strong protections against the harms of payday loans, it does have some requirements. These include rules that the lender:

- Limit the loan or a combination of loans by all lenders to an amount that is greater than 25% of a borrower's expected gross monthly income;[31]
- Determine, upon consideration of a number of specified underwriting factors, that the consumer has a reasonable ability to repay the loan;[32]
- Offer extended payment plans in some circumstances;[33] and
- Report loans to a state database.[34]

There is no reason that new fintech payday loans should not, at a minimum, have to comply with these requirements.

If Nevada wishes to authorize a new class of payday loans that avoid some of the worst problems with traditional payday loans, it must adopt much more substantive protections, going well beyond codifying the business model of providers of earned wage advances and tip-based advances.

In general, short-term, balloon-payment loans are a poor way of meeting consumers' credit needs or enhancing their ability to manage their finances, even if they did not have high costs.

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[30] Letter from 96 consumer, labor, civil rights, legal services, faith, community and financial organizations and academic to CFPB Director Rohit Chopra (Oct. 12, 2021), https://www.nclc.org/wp-content/uploads/2022/10/CFPB-EWA-letter-coalition-FINAL2.pdf.

[31] Nev. Rev. Stat. §§ 604A.5017(1), 604A.5018(1)(A).

[32] Nev. Rev. Stat. § 604A.5011.

[33] Nev. Rev. Stat. § 604A.5026.

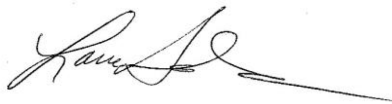
[34] Nev. Rev. Stat. § 604A.5017(2)(b).

These loans lead to a cycle of reborrowing where most loans are merely filling the hole caused by the previous loan rather than helping consumers meet unexpected expenses.

But minimal requirements for earned wage advances and tip-based advances would include:

- Treat them as loans subject to the protections that govern similar types of loans;
- Apply all applicable usury caps and strictly cap all payments, including tips and expedite fees, to a low monthly amount, i.e., $5;
- Prohibit repeat debiting of bank accounts and payrolls;
- Prohibit the solicitation of tips, as states should not enshrine in law the fiction that a "tip" is different from a finance charge; if the legislation will nonetheless permit tips, require providers to disclose the tips as a cost, including part of a required APR calculation, and to set the default tip amount to $0; and
- Require licenses and supervise providers.

Please let me know if you have any questions.
Yours very truly,



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