Testimony in Opposition to H4456: An Act Relative to Financial Technology Services

Joint Committee on Financial Services

March 22, 2024

Chair Murphy, Chair Feeney,

I am Lauren Saunders, Associate Director of the National Consumer Law Center, a national non-profit organization that uses its consumer law expertise to work for economic justice for vulnerable consumers.

I write in opposition to H4456, which would exempt fintech payday loans from Massachuett's lending laws and interest rate limits. The bill is based on the model law by the conservative American Legislative Exchange Council (ALEC). It offers meaningless protections as cover for exempting a broad swath of cash advance loans from Massachustt's interest rate limits and strong consumer protection laws.

The payday loan industry got its start by arguing that it was not making loans, just charging check cashing fees on deferred checks. **Let me be crystal clear:** If this bill passes, 300% APR payday lending, including by traditional payday lenders, will come to Massachustts.

How Earned Wage Advances and Other Fintech Cash Advances Work

Earned wage advances (EWAs) are advances made ahead of payday, repaid on payday. With employer-based EWAs, a third party typically advances money, based on the amount of wages that have been earned but are not yet due, and is repaid by the consumer through payroll deduction or another method the consumer authorizes. Some employers cover the costs or the programs are structured so they are free to workers, but more commonly workers pay fees.

Other direct-to-consumer cash advances claim to be paying wages but have no connection to payroll and are repaid by debiting a consumer's bank account. They can and do trigger overdraft and nonsufficient funds (NSF) fees. These lenders collect "tips," "donations" and instant access fees.

Both versions result in a cycle of reborrowing and multiplying costs.

The Cost and Impact of Wage Advances: 330% APR Loans and Paying to be Paid

California studied EWAs and collected data on nearly 6 million advances, finding:

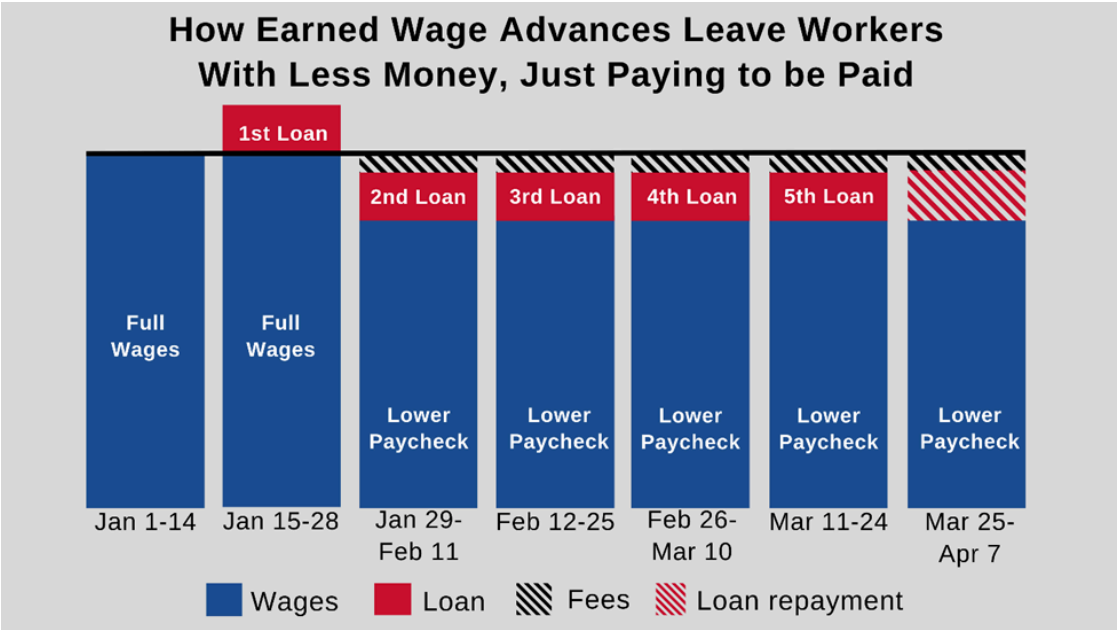
· The average **APR is over 330%,** for both tip-based and employer-based advances.

· Workers take an **average of 36 loans a year and up to 100.**

· Companies that **push "tips" collect them 73% of the time**, generating over $17 million for three companies. California identified "multiple strategies that lenders use to make tips almost as certain as required fees."

· As a practical matter, with the ability to debit payroll or bank accounts, lenders **collect 97% of the time**, and claims that the loans are non-recourse are "immaterial."

As with payday loans, using next week's pay for this week's expenses leaves a hole in the next paycheck that triggers chronic reborrowing. Fees quickly snowball, and workers end up paying to be paid week after week, with less money rather than additional liquidity.



H4456 Creates a Broad Exemption for Fintech Payday Loans, and Even Traditional Payday Loans, with Meaningless Protections

H4456 declares that fintech payday loans are not loans and their costs are not interest subject to Massachusetts' protections against predatory lending.

Currently in Massachusetts, loans under $6,000 are limited to "23% per annum of the unpaid balances of the amount financed calculated according to the actuarial method plus an administrative fee of $20."[1] H4456 exempts fintech payday loans from this rate cap, declaring that "fees, voluntary tips, gratuities, or other donations paid by a consumer to a licensee in accordance with this part shall not be considered interest or finance charges." The bill also declares that loans styled as earned wage access services are not "a loan or other form of credit or debt."

While framed as a technology bill and leading with a licensure regime, the heart of this bill is to circumvent existing usury protections and introduce payday lending to the Commonwealth.

Just like payday loans, most earned wage advances are advances of money by a third party, before pay is due, repaid later by the consumer (directly or indirectly). Indeed, the nation's small dollar loan laws arose out of the abuses of salary lenders. In a December 2023 letter, the CFPB traced the evolution of payday advances and found that earned wage advances "**share fundamental similarities with payday lending products**."

Even traditional payday lenders could exploit the bill's broad scope, which reaches any loan based on income that a consumer "represents" and a provider "reasonably determines" has been earned or accrued in exchange for services. Payday lenders would merely need to (1) ask for the consumer's representation that they have worked a few days since the last paycheck and to (2) look at bank statements to determine the consumer's paycheck amount and schedule **– as payday lenders already do.**

Any payday lender that fit the bill's broad definition would be free to offer triple-digit APR loans in Massachusetts, with no cost limit whatsoever.

In exchange, the so-called protections offered in the bill are meaningless and merely codify existing business models:

- Providers would have to offer a no-cost option, but they do so today, and those options are slow (delaying the advance) or inconvenient (not into the consumer's own bank account) and are hardly used by consumers. The

[1] 209 CMR 26.01: Rate order

nature of small dollar loans is based on urgency. That's why the vast majority of consumers pay for expedited funds.

- Declaring that tips are voluntary does not stop their high cost, the use of dark patterns and psychological tricks to push people into tipping or making it hard to undo a tip, or every possible repercussion of not tipping enough.

- The narrow requirement that the lender repay overdraft and NSF fees in limited circumstances does not cover all overdraft, NSF or late fees people will incur, and pledges to repay those fees do not work today as people cannot get through to customer service or are often rebuffed when they do.

- The prohibition of credit reporting is meaningless, as payday lenders do not use or report to traditional credit bureaus today.

- The "non-recourse" ban on using debt collectors, lawsuits or debt buyers does not help as lenders have recourse to the paycheck or bank account, collect 97% of the time.

The Bill Follows the Path of States that Do Not Protect Consumers and is Unworthy of Massachusetts

The ALEC model earned wage bill has so far been adopted in Missouri, Nevada and Wisconsin. Those states have no interest rate limits and rampant payday loan markets. They may have little to lose by authorizing a new form of payday loan.

But Massachusetts has never authorized payday loans and should not do so now. Instead, it should follow the path of Connecticut, a state like Massachusetts with strong consumer protections, and apply its existing lending framework to new types of loans. The regulators of California, Maryland and Washington State, as well, have proposed to treat earned wage advances as loans. Massachusetts must do so as well.

The CFPB Will Soon Be Issuing Guidance

It is especially inappropriate for Massachusetts to adopt a new loophole in its consumer protection laws when the CFPB is about to come out with guidance that may inform how Massachusetts views and treats these products. We expect that guidance soon.

In February 2023, the CFPB stated in a letter to the Government Accountability Office that it agreed with GAO's recommendation to clarify the application of the Truth in Lending Act's definition of credit to earned wage access products not covered by the CFPB's 2020 advisory opinion (which only covered completely free advances) and that the CFPB "intends to issue further clarification in this area."

In a signal that the guidance is likely coming soon, a December 2023 CFPB blog reaffirmed that, given the many developments in this market, the agency plans to issue guidance.

Massachusetts should not rush to enact legislation that may be at odds with the approach of the nation's top consumer protection agency.

Old Wine in New Bottles

Evasions often take the form of new innovations. We must reject clever arguments used as an excuse for gutting Massachusetts' consumer protection laws.

High-cost earned wage advances drain fees from low-wage workers, disproportionately from communities of color, who just end up paying to be paid. The loans should comply with Massachusetts' lending laws.

Thank you for the opportunity to testify. I urge you to oppose H4456. If you have any questions, please feel free to reach out to me at lsaunders@nclc.org.