

**96 consumer, labor, civil rights, legal services, faith,
community and financial organizations and academics**

October 12, 2021

Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Rescind earned wage access advisory opinion and sandbox approval and treat fee-based earned wage access products as credit

Dear Director Chopra,

Congratulations on your confirmation as Director of the Consumer Financial Protection Bureau. The 96 undersigned consumer, labor, civil rights, legal services, faith, community and financial organizations and academics write to express concerns about the treatment of earned wage access (EWA) products. While free earned wage advances may be a better option for consumers than costly payday loans, these products are not without risks. **Viewing earned wage advances, especially fee-based ones, as something other than credit will lead to evasion of consumer protection and fair lending laws.**

We urge the CFPB to regulate fee-based earned wage access products as credit. The CFPB should rescind the Bureau's November 2020 EWA Advisory Opinion or to revise its unsound reasoning to prevent evasions of credit laws. The CFPB should also revisit the December 2020 Compliance Assistance Sandbox Approval Order regarding PayActiv for the same reason, and to **order PayActiv to cease misusing the order.** We also urge the Bureau to eliminate or significantly alter the "innovation" programs adopted in the last few years, which have resulted in a secretive, one-sided process for industry to seek exemptions from or skewed interpretations of critical consumer protection laws without any input from consumers, competitors, or the general public.

Earned wage access products have grown in recent years. These products vary considerably, from ones that are completely free and are offered through employers, to fee-based products, to products that have no connection to employers. **The trend is for employers to offer these products for free, making it especially inappropriate to carve loopholes for fee-based products in consumer protection laws covering credit.**

Regardless of how they are structured, the essence of virtually all of these programs is that a third party advances funds to the consumer before the consumer's regular payday and is repaid later in some fashion out of the paycheck. That is a loan. Methods to verify that the consumer has earned wages coming to them are simply a form of underwriting or security. Many loans are based on people's "own money," including secured loans or secured credit cards, reverse

mortgages, and loans made to bridge a lag in receipt of a coming payment that is due the consumer. Similarly, the involvement of the employer or the use of payroll deduction does not mean that an advance is not a loan.

Viewing these products as something other than loans leads to evasions of federal credit laws, such as the Truth in Lending Act (TILA), and of state laws, in particular usury laws.

The Bureau's EWA Advisory Opinion and PayActiv Approval Order both rest on the conclusion that the particular programs at issue are not offering "credit" within the meaning of TILA. Although the Advisory Opinion is limited to certain free programs, the definition of "credit" under TILA is not related to price. Free programs might be exempt from TILA for other reasons (i.e., if the provider is not a "creditor" as defined by TILA). But the reasoning on which the Advisory Opinion is based could be used to facilitate widespread evasions of credit laws beyond EWA programs, with consequent harm to consumers. The PayActiv Approval Order suffers from the same legal flaws, and exacerbates them by expanding the TILA exemption to a program that charges fees, which though nominally low could add up at the high end, including expedite fees, to \$36 per month.

Indeed, the Bureau's EWA Advisory Opinion and PayActiv Approval Order *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. Lobbyists for the earned wage access industry are using the Bureau's actions to promote exemptions from state usury and lending laws on the grounds that broad categories of products, regardless of price, are not credit. PayActiv is also using the CFPB order against competitors, claiming, misleadingly, that the CFPB has "approved PayActiv's EWA Program," and that PayActiv's program "is the only way to remain in compliance with the CFPB."

We are also concerned about the potential impact on fair lending laws. The Equal Credit Opportunity Act (ECOA) uses a definition of "credit" that is similar, though not identical, to TILA. The reasoning of the Bureau's EWA opinion and order could be used in an attempt to weaken the scope of ECOA and its protections against discrimination against communities of color and other protected classes. This is especially concerning given the potential disparate impacts resulting from the use of artificial intelligence, big data and machine learning. At this critical moment in our nation's history, we need to expand, not contract, the scope of our anti-discrimination laws. We appreciate your and the Bureau's renewed commitment to addressing racial inequities, and urge you to look seriously at whether the EWA opinion and order potentially undermine racial justice goals.

Treating earned wage access products as credit does not mean that they should not exist. Free or very low-cost programs that are repaid entirely through payroll deduction or otherwise without debiting bank accounts or delaying receipt of wages may be a better alternative to high-cost payday loans. But these products are not without risks. They lead to the same cycle of repeat reborrowing as other balloon payment loans, and may lead to difficulties meeting future expenses or large bills such as rent or other monthly expenses.

Programs that charge fees are particularly concerning, and the trend is for employers to offer earned wage access for free, making it especially inappropriate to carve loopholes for fee-based products in consumer protection laws covering credit. Even nominally low fees can add up due to the cycle of reborrowing and the frequent addition of expedite fees. In the end, consumers may simply end up in a situation where they are routinely paying to be paid.

The secretive, one-sided Advisory Opinion Program and Compliance Assistance Sandbox Program that led to these actions are deeply flawed. The Bureau did not do any outreach to consumers, competitors or the broader public before issuing its Advisory Opinion or PayActiv Approval Order. We urge the Bureau to seek further input on the impact of these programs and to conduct research on their actual impact, beyond the claims asserted by providers.

The lack of outreach demonstrates the flaws in the Advisory Opinion Program and Compliance Assistance Sandbox (CAS) Program. These programs give companies the ability to seek skewed interpretations of or exemptions from important consumer protection laws with no public input, despite the potential wide-ranging and complex repercussions. The programs do not ensure that the Bureau has full information before acting, and the CAS program limits the Bureau's ability to rescind an ill-advised approval order. The misuse of the PayActiv approval order also highlights why the CFPB simply should not be in the business of issuing "approvals" to particular companies' products.

For these reasons, we urge the Bureau to:

- Treat fee-based earned wage access products as credit covered by TILA;
- Rescind the EWA advisory opinion, or revise it to focus only on whether providers of free programs are "creditors" covered by TILA;
- Revisit and potentially revoke the PayActiv approval order after affording PayActiv due process;
- Order PayActiv to cease misusing and misrepresenting the approval order;
- Supervise fee-based earned wage access providers under the CFPB's authority over payday loans;
- Conduct research on the impact of earned wage access programs;
- Terminate or significantly revise the Advisory Opinion Program and Compliance Assistance Sandbox program and revisit the Bureau's other "innovation" programs

Thank you for considering this request.

Yours very truly,

National organizations

Americans for Financial Reform Education Fund
Center for LGBTQ Economic Advancement & Research (CLEAR)
Center for Responsible Lending

Child Welfare League of America
Consumer Action
Consumer Federation of America
Consumer Reports
Consumers for Auto Reliability and Safety
Credit Builders Alliance
Heartland Alliance
Leadership Conference on Civil and Human Rights
NAACP
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Center for Law and Economic Justice
National Community Action Partnership
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Employment Law Project
PolicyLink
Prosperity Now
Public Good Law Center
Revolving Door Project
Service Employees International Union
SPLC Action Fund
The Strategic Organizing Center
U.S. PIRG
Woodstock Institute

State and local organizations and academics

Alaska PIRG
Center for Economic Integrity
Wildfire: Igniting Community Action to End Poverty in Arizona
Arkansans Against Abusive Payday Lending
California Reinvestment Coalition
CALPIRG
Consumer Federation of California
Public Counsel (California)
Public Law Center (California)
Aspen Family Connections
LaMedichi Savings Clubs
MANAUS
Connecticut Legal Services, Inc.
Delaware Community Reinvestment Action Council, Inc.
National CAPACD
National Consumers League

Prof. Arthur E. Wilmarth, Jr., George Washington University Law School
Tzedek DC
Florida Legal Services, Inc.
Jacksonville Area Legal Aid
Legal Aid Service of Broward County, Inc.
Legal Aid Society of the Orange County Bar Assn., Inc.
Georgia Watch
Financial Inclusion for All Illinois
Housing Action Illinois
Legal Action Chicago
Northwest Side Housing Center
VOCEL
Indiana Institute for Working Families
Prosperity Indiana
Prof. Christopher Odinet, University of Iowa College of Law
Maine Center for Economic Policy
Maine Equal Justice
CASH Campaign of Maryland
Maryland Consumer Rights Coalition
Public Justice Center (Maryland)
"Prof. Kathleen C. Engel, Suffolk University Law School
Suffolk University Law School"
Community Economic Development Association of Michigan (CEDAM)
Missouri Faith Voices
Legal Aid Center of Southern Nevada
Prof. Benjamin P. Edwards, University of Nevada, Las Vegas William S. Boyd School of Law
Washoe Legal Services
Legal Services of New Jersey
New Jersey Appleseed Public Interest Law Center
New Jersey Citizen Action
Guadalupe Credit Union
Lutheran Advocacy Ministry - New Mexico
New Mexico Center on Law & Poverty
Prosperity Works
Empire Justice Center
New Economy Project
New York Public Interest Research Group (NYPIRG)
New Yorkers for Responsible Lending
NC Coalition for Responsible Lending
Prof. Cathy Lesser Mansfield, Case Western Reserve University Law School
SEIU Oregon
Community Legal Service of Philadelphia
Prof. James J. Pierson, Chatham University Business Department
SC Appleseed Legal Justice Center

RAISE Texas
Texas Appleseed
Prof. Christopher L. Peterson, University of Utah School of Law
Legal Aid Justice Center (Virginia)
Virginia Citizens Consumer Council
Virginia Organizing
Virginia Poverty Law Center
Columbia Legal Services
Statewide Poverty Action Network (Washington)