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Via electronic mail

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Comment on Proposed Rule Addressing “Income-Based Advances” and Related Charges

The Consumer Financial Protection Bureau (CFPB) appreciates the opportunity to comment on the California Department of Financial Protection and Innovation (DFPI)’s proposal to undertake registration and examinations of providers of what DFPI refers to as “income-based advances.”¹ The CFPB is the primary regulator of consumer financial products and services at the federal level. Among its responsibilities, the CFPB has an obligation to coordinate with other regulators, including states, to promote consistent regulatory treatment of consumer financial products and services.²

I. Income-Based Advance Products Have Long Existed

Income-based advances – products where repayment is related, theoretically or concretely, to a worker’s next payday – have long been part of the U.S. consumer lending market. As DFPI references, in the early 1900s, these products often took the form of wage “sales” or

¹ DFPI, Notice of Modification to Proposed Rulemaking, PRO 01-21 (Nov. 6, 2023).

² 12 U.S.C. § 5495; *see also* CFPB, Consumer Financial Protection Circular 2022-01: System of *Consumer Financial Protection Circulars* to agencies enforcing federal consumer financial law (May 16, 2022), https://files.consumerfinance.gov/f/documents/cfpb_2022-01_circular_2022-05.pdf.

assignments.³ In the 1990s, payday lending products proliferated and were often promoted as “deferred presentment” transactions.⁴ Banks have marketed similar products as “deposit advances.”⁵ With all these products, a consumer receives funds that are typically repayable in full on their next payday.

Some firms have recently begun to market income-based advance products that either are or purport to be made based on wages that the employee has earned using various branding terms, such as “earned wage access.” As DFPI has recognized, firms marketing their products in this manner include both firms seeking to integrate cash advances through an employer, where repayment of the advance is made via payroll deduction, and firms that, without the involvement of an employer, contract with a consumer to obtain authorization to debit the consumer’s bank account to collect repayment of the advance. In both scenarios, and especially when advances are provided and repayment is collected without the involvement of the consumer’s employer, these products share fundamental similarities with payday lending products. And federal and state regulators have long administered laws and regulations that apply to income-based advance products such as payday loans.⁶

II. Supervision Promotes Robust Consumer Protection

The Consumer Financial Protection Act provides that the CFPB may conduct examinations of providers of consumer financial products and services, which, broadly speaking, include providers of income-based advance products.⁷ At the same time, states have long provided critical oversight of nondepository providers of consumer financial products and services, like those typically offering income-based advance products.

While providers of these products generally do not need a federal license, they frequently must obtain licenses from the states in which they operate. In turn, obtaining a license often subjects a licensee to supervisory examinations for compliance with applicable law. This supervision is critically important for ensuring that firms are meeting their legal obligations. The CFPB believes that it is consistent with this longstanding practice to subject providers of income-based

³ See DFPI, Initial Statement of Reasons, PRO 01-21, at 53 n.88 (Mar. 15, 2023) (citing F. B. Hubachek, The Development of Regulatory Small Loan Laws, 8 Law and Contemporary Problems 108-145, 138, 142 (Winter 1941)).

⁴ See, e.g., *Turner v. E-Z Check Cashing*, 35 F. Supp. 2d 1042, 1048 (M.D. Tenn. 1999) (holding that transactions described by defendant as “deferred presentment” transactions were extensions of credit and noting that “[o]ther courts which have addressed the issue are unanimous in holding that those who participate in the deferred presentment/check-cashing business are ‘creditors’”); see also Board of Governors of the Federal Reserve System, 65 Fed. Reg. 17,129, 17,130 (Mar. 31, 2000) (“[A]greements [to defer payment of a debt] are deemed to be ‘credit’ as defined by [Regulation Z] however they are described—as payday loans, cash advances, check advance loans, deferred presentment transactions, or by another name.”).

⁵ See generally CFPB, Payday Loans and Deposit Advance Products (Apr. 24, 2013), https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

⁶ The laws that the CFPB administers that apply to income-based advance products such as payday lending include the Consumer Financial Protection Act, the Truth in Lending Act, the Equal Credit Opportunity Act, and the Electronic Fund Transfer Act, as well as those laws’ implementing regulations.

⁷ See 12 U.S.C. § 5514(a)(1).

advances marketed as “earned wage access” to state oversight – as providers of other income-based advance products, such as payday loans that have long been offered in some states, are. Rigorous supervision of all income-based advance products helps to ensure that the label of a product does not determine how providers are held accountable, or the extent to which consumers are protected, under the law.

III. Definitions of “Loans” and “Charges”

The CFPB notes that DFPI’s proposal would clarify that income-based advances are “loans” under the California Financing Law and that “charges” under that law include “gratuities” as well as “expedite fees.” By treating these products as loans and including a variety of charges that accompany the advance, DFPI’s proposal takes a similar approach as the Truth in Lending Act and its implementing Regulation Z, which generally applies to extensions of consumer credit⁸ and provides that 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,” with certain limited exceptions.⁹ As DFPI pursues its supervisory work, both state and federal law provide critical consumer protections.¹⁰

As the CFPB has stated previously, the CFPB plans to issue further guidance to provide greater clarity concerning the application of the Truth in Lending Act in this market.¹¹ The CFPB’s previous advisory opinion on this topic should not be misrepresented: Products that do not fit within its very narrow scope are not excluded from existing laws. To the contrary, the CFPB supports efforts to subject such products to rigorous oversight for the full scope of existing state and federal consumer protection and lending laws.

IV. Conclusion

The CFPB believes that, in light of the emergence of firms marketing “earned wage access” income-based advance products, it is appropriate for states to ensure that these products are treated similarly to other income-based advance products with respect to supervision for compliance with applicable law, including ensuring that costs are accurately reflected in the price

⁸ See 12 C.F.R. 1026.1(c).

⁹ 12 C.F.R. 1026.4(a).

¹⁰ States have authority under the Consumer Financial Protection Act to bring claims with respect to violations of the federal consumer financial laws, including the Truth in Lending Act. See CFPB, Authority of States to Enforce the Consumer Financial Protection Act of 2010 (May 2022) (“[W]hen a covered person or service provider violates any of the Federal consumer financial laws, section 1042 [of the Consumer Financial Protection Act] gives States authority to address that violation by bringing a claim under section 1036(a)(1)(A) of the [Consumer Financial Protection Act].”), https://files.consumerfinance.gov/f/documents/cfpb_section-1042_interpretive-rule_2022-05.pdf.

¹¹ See Letter from CFPB Director Rohit Chopra (Feb. 13, 2023) in Government Accountability Office, Financial Technology: Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity is Needed, GAO-23-105536, at 51 (Mar. 2023), <https://www.gao.gov/assets/gao-23-105536.pdf>.

of credit. Thank you for your consideration of the CFPB's input as you plan for examinations in this market.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Seth Frotman".

Seth Frotman
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Consumer Financial Protection Bureau