Advancing Economic Justice and Racial Equity

August 30, 2024

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

RE: Truth in Lending (Regulation Z): Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work (2024 Earned Wage Access Interpretive Rule) (Docket No. CFPB-2024-0032)

Dear Director Chopra,

Woodstock Institute appreciates the opportunity to comment on the CFPB's Proposed Interpretive Rule regarding Earned Wage Access (EWA) products. Based in Chicago, Woodstock works to advance economic justice and racial equity within financial systems through research and advocacy at the local, state, and national levels. We are greatly appreciative of all the CFPB's work protecting consumers from predatory financial practices. Woodstock considers the Bureau an essential partner in our work to create a financial system where all people can experience financial security and prosperity.

BACKGROUND

EWA is a relatively new product on the market whereby a consumer can access a portion of pay that they've earned for hours worked before their payday. There are two species of EWA: direct-to-consumer (D2C) and employer-integrated. For D2C products, the consumer repays the EWA on their payday, often via an automatic withdrawal from their bank account triggered by the paycheck ACH transfer arriving in their account. D2C products are available to consumers regardless of their employer. Employer-integrated products operate more like an employee benefit. The employer signs a contract with the EWA provider, which is then integrated into the employer's payroll and accounting software. Thus, employer-integrated products are only available to employees of the company that has contracted with the EWA provider – typically larger companies.

LEGAL INTERPRETATION

I. Whether an EWA product is a loan or "credit"[1] depends on the circumstances and the applicable laws & regulations.

The question of whether an EWA product is a loan is important but is not susceptible to only one answer. Here in Illinois, the term "loan" was intentionally defined broadly in the Predatory Loan Prevention Act (PLPA) to prevent loopholes. Under the PLPA, a loan "means money or credit provided to a consumer in exchange for the consumer's agreement to a certain set of terms."[2] To meet the definition of loan under the PLPA, only two things are required: (1) money and (2) a set of terms. EWA products and many other transmissions of money could fall within this definition.

In the context of the CFPB rules to collect data on small business loans, however, Woodstock provided a narrower formulation. We wrote that that the question of whether a transaction is credit could be boiled down to this:

> when money changes hands, one of two things happens – either (1) the money is transmitted to a recipient as a gift or in exchange for something of present value such that the money then belongs to the recipient, or (2) the money is transmitted to a recipient but the money still effectively belongs to the transmitter and is to be repaid according to certain terms.[3]

Transactions that fall under #1 are not loans; transactions that fall under #2 are loans. Employer-integrated EWAs would fall under category #1, and D2C products would fall under category #2. But, in the context of EWA, this is of academic importance given that *voluntary* payments are not and never have been considered finance charges.

II. *Voluntary* payments are not "finance charges."

Woodstock Institute disagrees with the proposed interpretive rule's treatment of expedite fees and "tips" as automatically and inherently finance charges under the Truth in Lending Act (TILA). Whether these fees are in fact finance charges should instead hinge on whether or not they are truly *voluntary*. This would be a higher-touch and more time- and analysis-intensive approach to regulation, but we believe it would better serve consumers.

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[1] While we recognize that the terms "loan" and "credit" are not always synonymous, for the sake of simplicity, we will use the term "loan" throughout to refer to both loans and credit.

[2] 815 ILCS 123/15-1-10.

[3] Woodstock Institute, comment letter regarding the CFPB's 2021 proposed rules for implementing Section 1071 of the Dodd-Frank Act to collect small business lending data, (Jan. 6, 2022).

The CFPB should monitor EWA providers' practices with respect to how voluntary these charges are in practice. For example, some questions to consider could include: Is there a clear and conspicuous point in the transaction where the consumer can opt out of each fee? Are they required to repeatedly opt out throughout the transaction? Is it implied that opting out of the "tip" will impact the individual consumer's access to the product in the future? Does the expedite fee disclose how fast delivery is compared to standard speed?[4] We also urge the Bureau to consider whether this might be an appropriate place to apply Unfair, Deceptive, or Abusive Acts and Practices (UDAAP) authority.

If the user experience design of the provider's app or platform misleads the consumer or makes it difficult to opt out of these charges, then they are not truly voluntary, and we would support treating them as finance charges.

Woodstock is concerned that the proposed interpretive rule's reading of "incident to" is too broad. The proposed rule argues that these additional charges are finance charges according to TILA because they are "imposed as an incident to" the extension of credit.[5] It defines "incident" as "anything which is usually connected with another, or connected for some purposes, though not inseparably."[6] However, that is only a small piece of the definition of "incident" as it would have been referenced by legislators when TILA was enacted. The full definition provides more context, stating in relevant part that "[incident to] denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the 'principal.'"[7] This lends itself to a narrower reading of "incident to," closer to the meanings of "inherent in" or "inseparable," as opposed to the vastly broader meaning used in the proposed rule. So long as they are truly *voluntary*, additional charges like "tips" and expedite fees would not be considered inherent in or inseparable from the extension of credit, and thereby not finance charges.

Furthermore, we're concerned that the reasoning in the proposed interpretive rule is so broad that it could be used to classify nearly any charge as a finance charge. The rule argues that, at least in the EWA context, an expedite fee is incident to the "particular" line of credit being extended, regardless of the existence of a slower, free option.[8] However, this implies that any fee paid voluntarily by a consumer in connection with obtaining a loan could be seen as substantially connected to that specific extension of credit, making it a

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[4] In our experience, the standard speed can be remarkably fast, sometimes even faster than stated in the app.
[5] CFPB, *Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work*, Docket No. CFPB-2024-0032 (proposed July 18, 2024) [herein after "Proposed EWA Rule"] at 17.
[6] Proposed EWA Rule at 13, citing *Black's Law Dictionary* (4th ed. 1968).
[7] *Black's Law Dictionary* 904 (4th ed. 1968).
[8] Proposed EWA Rule at 16.

finance charge. This could include fees for optional services, like expedited delivery of a physical credit card or customizable card designs – things for which a designation as a finance charge is clearly inappropriate. In fact, in a 2009 rule, the Federal Reserve clarified the distinction between "finance charges" and "other charges" in open-end credit products, and placed expedited card delivery fees under "other charges," not "finance charges."[9] Given this precedent, voluntary fees should be treated in a similar manner in EWA transactions.[10]

In arguing that these fees are "imposed" by creditors and thereby not voluntary, the CFPB seems to agree that truly voluntary charges should not be considered finance charges; however, it is not clear under what circumstances the CFPB would ever consider a charge voluntary. The proposed interpretive rule seems to regard even the mere presentation of a "tip" option in an EWA transaction as the provider "imposing" the charge on the consumer. Under the proposed interpretive rule's logic, it is unclear to us how a consumer could be presented with an option and make a voluntary choice in an EWA transaction.

With the potential for such far-reaching implications across consumer credit regulations, we urge the CFPB to reconsider this broad interpretation of what constitutes a finance charge.

POLICY CONSIDERATIONS

In the case of EWA products, we urge the Bureau to take a more nuanced approach to regulation than is outlined in the proposed interpretive rule. Compared to the ongoing scourge of predatory loans that carry *mandatory* charges that exceed 100% APR, EWA can be a safe and affordable financial product. By any objective measure, an EWA product is less expensive than a predatory "rent-a-bank" loan that can accrue interest indefinitely.

The proposed rule could have the unintended consequence of driving consumers to products that are known to be ruinous to a consumer's finances and overall wellbeing. Insofar as the proposed rule means that voluntary payments are finance charges in all instances, EWA products would effectively be outlawed in states with rate caps of 36% or lower. A consumer who makes a $1 payment in connection with a $100 EWA transaction the day before their payday would be paying an APR of 365% if the payment were considered a finance charge. By comparison, if the same consumer went to a pawn shop in Illinois, they would likely pay $20 to receive $100. The term of the pawn loan would likely be

[9] *See* 74 FR 5244, 5251 (Jan. 29, 2009).

[10] Similarly, 12 CFR § 1026.52(a) imposes limitations on the total amount of fees a consumer is required to pay with respect to a credit card account during the first year after account opening, which must not exceed 25% of the credit limit. This cap specifically excludes fees that the consumer is not required to pay. §1026.52(a)(2)(ii). The CFPB explicitly identifies "an expedited payment fee" as an example of a fee not covered by the § 1026.52(a) limitation. CFPB, *TILA: Examination Procedures*, 109 (Aug. 2013).

30 days, making the APR 240%. In Illinois, on average, a pawn loan is extended or "rolled over" at least two times, meaning the consumer ends up paying more than $60 to borrow $100. We know of no circumstances under which a consumer could pay as much as $60 for a $100 EWA transaction. Moreover, a failure to pay in the pawn loan context means the loss of the consumer's collateral while a failure to pay in the EWA context would, at most, possibly make the consumer ineligible for future EWA products from the same provider.

Reducing access to EWA could be a boon to traditional predatory lenders. The link between EWA and predatory loans is not speculative. In January 2024, we published a report regarding the success of our state's interest rate cap.[11] The report includes the results of a survey that one of the largest D2C companies, EarnIn, did of its customers. Of the 51,594 EarnIn customers given the opportunity to respond to the survey, 1,379 responded. The survey showed that access to cash via EarnIn's EWA reduced people's use of high-cost loans, such as pawn loans and payday loans, by 62%: 26% of respondents said they used these loans before becoming EarnIn customers, and just 10% said they had used them since becoming EarnIn customers.[12] Just as EWA can reduce consumers' reliance on predatory loans, reducing or eliminating access to EWA could increase consumers' reliance on such loans. As advocates and the CFPB work to stop bad actors from preying on consumers via predatory consumer loan products like payday loans, pawn loans, and auto title loans, consumers' financial needs and emergencies do not automatically stop as well. Consumers need safe and affordable options to address short-term cash needs – including robust options that do not involve credit, since additional debt is not always the best solution.[13] We believe that safe and responsible EWA products have a role to play in that landscape, with proper regulation, and should be part of a suite of credit products and financial strategies to serve consumers.

But we are concerned that the proposed interpretive rule's broad approach may instead eliminate this option from the marketplace or make it more expensive by pushing it into the "rent-a-bank" industry, which would further bolster the disingenuous arguments from predatory lenders that consumers suffer without them and have no additional options. If we can ensure that additional charges in the EWA industry remain truly voluntary and

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[11] Woodstock Institute, *Illinois's Predatory Loan Prevention Act: The Impacts of the State's 36% Rate Cap – The PLPA is Working!* (Jan. 2024).
[12] The EarnIn survey is not a scientific poll. Rather, it is simply a snapshot of a particular group of people at a particular time.
[13] Woodstock Institute maintains a Resource Guide on the WeProsper Illinois website, which compiles financial strategies, assistance programs, and products that comply with our state's 36% APR cap. The Guide is intended to present a variety of safe and affordable options to consumers who otherwise may have turned to very high-cost products like payday loans.

consumers understand the cost-benefit analysis for each choice they make during an EWA transaction, then a truly free advance option can remain on the market.

DATA COLLECTION

One of our favorite refrains at Woodstock Institute comes from former Supreme Court Justice Louis Brandeis: "sunlight is the best disinfectant." In our field, rich and publicly available data serves as our sunlight. Strong data can reinforce existing knowledge from impacted communities, adding detail and scale to their lived experiences. Data can also illuminate new problems of which advocates were previously unaware, reveal the true scope of a problem, or direct us to refocus our energies on a different problem with greater capacity to drive change. In short, Woodstock is always in favor of more and richer data.

We applaud the use of the CFPB's market monitoring power to obtain data from eight employer-integrated EWA providers, and your publishing of the report that accompanied this interpretive rule.[14] However, there is still a lack of rich data on the D2C market. We believe CFPB is best positioned to obtain that data on a national scale, but, to whatever extent possible, we also encourage CFPB to make raw data publicly available, thereby leveraging the research and data analysis power of advocates across the country. In Woodstock's experience with the D2C market thus far, we've found some good-faith actors and some predatory actors in that space. We urge the CFPB to further examine the D2C market to learn more about potentially predatory business practices. We believe a more detailed analysis of this large segment of the market will further illuminate the need for a nuanced regulatory approach to these products.

CONCLUSION

Woodstock deeply values the CFPB's work and crucial role in protecting consumers across the country. The success of our work depends heavily on the success of the CFPB. While we understand that we've taken a different position on this issue than the Bureau and many of our advocacy partners, we hope our comments will be taken in the spirit of cooperation and support that they were intended.

For any questions or further information, please contact Jane Doyle, Senior Regulatory Policy Associate at jdoyle@woodstockinst.org.[15] Thank you for the opportunity to provide comments on this important issue.

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[14] CFPB, *Data Spotlight: Developments in the Paycheck Advance Market* (Jul. 18, 2024).

[15] Special thanks to Woodstock CEO Horacio Mendez, Senior VP for Policy & Advocacy Brent Adams, and Law Intern John Kauffman for their contributions to this comment letter.