October 24, 2023

Rep. Bryan Steil
1526 Longworth HOB
Washington, DC 20515

Congressman Steil,

The undersigned organizations write to express our opposition to the draft Earned Wage Access Consumer Act. In the guise of offering protections, the bill obscures its true effect: **to exempt fintech cash advances from the Truth in Lending Act, to endorse a form of loan that makes workers pay to be paid, and to facilitate new evasions by payday lenders.** It is especially inappropriate to authorize a new class of fintech cash advance with costs imposed on low-wage workers, disproportionately impacting communities of color, when there are a growing number of options to obtain early pay at no cost.

Earned wage advances are loans made to workers ahead of payday that are repaid on payday. The amount of the loan is tied to the wages that have been earned but are not due until payday. True earned wage advances are offered through employers, often with fees, but some employers offer early pay for free. Fake direct-to-consumer providers claim to be paying earned wages but have no connection to wages or payroll, are repaid by debiting bank accounts, and collect purportedly voluntary “tips.” Both models charge inflated expedite fees if the worker wants the advance quickly, which nearly everyone does.

California data based on nearly 6 million transactions shows how the costs of these advances add up.[1] Including all of the costs, **the average annual percentage rate (APR) for these advances is over 330%** for both the employer-based companies that charge fees and for the companies that collect “tips.” Tip-based companies collected tips 73% of the time, generating $17.55 million in tip revenue plus another $6.24 million in other fees, likely expedite fees. Workers get very little credit, with a typical advance of $40 to $100 for 10 days. The fees add up, as the average worker takes out 36 loans a year, and as many as 100.

The draft bill would obscure the relative cost of these fintech cash advances. It would exempt these loans from the Truth in Lending Act (TILA) and prevent the ability to compare their cost to other credit options. Just like traditional payday lenders, it is no surprise that these lenders want to avoid disclosing a 330% APR, especially given the way the loans roll over and over. While the costs may vary, especially for the tip-based lenders, the apps through which the advances are made can easily adjust the APR to correspond to the amount of default tip that is inserted, or to any different amount that the consumer selects.

The bill would facilitate evasion by payday lenders. The bill’s definition of “earned wage access service” would extend to any loan that is “based on the consumer’s representations and the provider’s reasonable determination of the consumer’s earned but unpaid income.” That vague definition could easily be exploited by traditional payday lenders.

The bill perpetrates the myth that these fintech cash advances are not credit. The bill would be used to persuade state legislators to enact the model bill by the American Legislative Exchange Council (ALEC)[2] in order to exempt these advances from state credit laws, including fee and rate caps. Again, they are following the payday lenders' model, just like traditional payday lenders took root by convincing legislators that their loans were not loans and were instead only a modest fee for deferring cashing of a check.

The bill would undermine or block coming guidance from the Consumer Financial Protection Bureau (CFPB) and facilitate new evasions by payday lenders. The bill purports to give the CFPB authority to regulate these advances, but the CFPB already has ample authority. Indeed, the CFPB has told the General Accounting Office that it plans to clarify the treatment of earned wage advances under TILA.[3] CFPB then-Acting General Counsel Seth Frotman warned two years ago that earned wage advances that charge any kind of fee, voluntary or not, "may well be TILA credit." The bill would limit the CFPB's options in how to ensure that consumers receive clear information and how to prevent evasions of federal lending laws.

The protections in the bill are not meaningful. The bill purports to offer a number of protections that would apply to fintech cash advances. But the bill largely codifies lenders' current business model without adding significant new protections. Companies do not need to file civil suit, use third-party debt collectors or sell to debt buyers when they are able to collect 97% of the time through their stranglehold over the consumer's paycheck or bank account.[4] The bill requires compliance with the Electronic Fund Transfer Act, but the EFTA's ban on compulsory repayment of credit by preauthorized electronic fund transfer would not apply if the advances are not deemed to be credit. The bill limits certain repercussions of not tipping enough but does not stop all of the "multiple strategies that lenders use to make tips almost as certain as required fees."[5]

The costs of fintech cash advances fall primarily on low-wage workers who need a living wage, not a product that just makes them pay to be paid. Balloon-payment loans should not be exempted from credit laws, however they are styled, as they merely lead to a cycle of reborrowing where each advance repays the previous one without providing new liquidity.

For these reasons, we oppose the draft Earned Wage Access Consumer Act.

Yours very truly,

AFL-CIO
Americans for Financial Reform
American Economic Liberties Project
Consumer Action
Center for Responsible Lending
Consumer Federation of America
Consumer Federation of California
Consumer Reports
Delaware Community Reinvestment Action Council, Inc.

Florida Consumer Action Network
Georgia Watch
NAACP
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
New Economy Project
New Jersey Appleseed Public Interest Law Center
New Jersey Citizen Action
New Yorkers for Responsible Lending
Prosperity Indiana
U.S. PIRG
Texas Appleseed
Tzedek DC

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[1] *See* National Consumer Law Center, Data on Earned Wage Advances and Fintech Payday Loan "Tips" Show High Costs for Low-Wage Workers (Apr. 10, 2023); Calif. Dep't of Fin'l Prot'n & Innov., 2021 Earned Wage Access Data Findings (Analysis completed Q1 2023) ("CA DFPI EWA Data").

[2] *See* ALEC, Earned Wage Access Act.

[3] In a February 13, 2023 letter to the GAO, CFPB Director Rohit Chopra stated that he agreed with the BA"s recommendation that the CFPB issue clarification on the application of the TILA definition of "credit" for earned wage access products other than the free ones covered by the CFPB's November 2020 advisory opinion. *See* Appendix III to U.S. GAO, Financial Technology: Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity Is Needed (March 2023). Director Chopra said in a July 17 interview that he hopes to have a revised advisory opinion completed in 2024. *See* Evan Weinberg, Yun Park, Bloomberg Law, States Set Collision Course Over Pay-on-Demand for Earned Wages (Aug. 10, 2023).

[4] *See* Financial Health Network, "Earned Wage Access and Direct-to-Consumer Advance Usage Trends" at 2 (April 2021) (finding that advances "were recouped successfully at least 97% of the time"); Calif. Dep't of Fin'l Prot'n & Innov., Initial Statement of Reasons For The Proposed Adoption Of Regulations Under The California Consumer Financial Protection Law And The California Financing Law, California Deferred Deposit Transaction Law, And California Student Loan Servicing Act Pro 01-21 at 24-25 (March 17, 2023) ("These successful collection rates significantly exceed the rates of the DFPI's CFL and CDDTL licensees, who offer credit under those laws. Furthermore, such income-based advance models would be unsustainable if the majority of consumers did not repay providers, and providers employ language in advertising and consumer communications that reflects this reality. In light of these considerations, to consider earned wage access companies to be offering a product that is not credit would elevate form over substance.").

[5] CA DFPI EWA Data at 61.