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Alert | Financial Regulatory & Compliance

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CFPB Proposes Interpretive Rule for Earned Wage Access Products

Go-To Guide:

- CFPB's proposed interpretive rule would classify earned wage access products as consumer "credit" under the Truth in Lending Act (TILA) and its implementing Regulation Z.
- Under the proposal, expedited delivery fees and voluntary "tips" consumers pay related to earned wage access products would constitute "finance charges" under TILA and Regulation Z.
- If the proposed rule takes effect, earned wage access providers operating in the United States would be impacted and subject to federal regulatory disclosure requirements.
- The proposed interpretive rule intends to replace the CFPB's 2020 advisory opinion on earned wage access programs.

On July 18, 2024, the Consumer Financial Protection Bureau (CFPB) issued a Proposed Interpretive Rule and Request for Comment (Proposed Rule) addressing credit products in the paycheck advance marketplace, such as those marketed as "earned wage access" or "earned wage advance" products (EWA). The Proposed Rule intends "to help market participants determine when certain existing requirements under Federal law are triggered." The Proposed Rule concludes that common EWA products are a type of

consumer credit subject to TILA[1] and Regulation Z[2]. It also determines that expedited delivery fees and "tips" users of EWA products pay are made in "substantial connection" with such extensions of credit, and therefore constitute "finance charges" that EWA providers must disclose to consumers under TILA and Regulation Z.

The Proposed Rule seeks to replace the CFPB's November 2020 advisory opinion on certain EWA products, "which stated that some earned wage products are not 'credit' because they would not constitute 'debt.'" The previous advisory opinion was focused on advances provided by an employer to an employee with no costs to the employee, a narrow form of EWA. In that opinion, the CFPB determined that such products were effectively "providing earned wages to consumers early and, therefore, were not debts." That opinion considered only one narrow product and not "the full scope of available precedent and definitions in common legal usage when reaching its narrow conclusion." According to the CFPB, that opinion evaluated neither now-commonplace EWA products, often offered by third parties, that require or solicit fees from the consumers, nor the applicability of TILA and Regulation Z to the current commonplace forms of EWA products.

EWA Products Constitute Consumer Credit

Regulation Z defines "credit" as "the right to defer payment of debt or to incur debt and defer its payment."[3] TILA contains a virtually identical definition.[4] While neither TILA nor Regulation Z define "debt," the Proposed Rule states that the term ordinarily means "something owed," without limitation.[5] As the Proposed Rule further explains, at the time of TILA's enactment, Black's Law Dictionary defined "debt" to mean "a financial liability or obligation owed by one person, the debtor, to another, the creditor."[6] Accordingly, the Proposed Rule would apply these common definitions and uses to state that for purposes of TILA and Regulation Z, the term "debt" "includes any obligation by a consumer to pay another party." The Proposed Rule further looks to state and federal debt collection laws defining "debt" to support its reasoning and approach.

Based on the above, the CFPB has concluded that "[EWA] products provide consumers with 'the right to defer payment of debt or to incur debt and defer its payment' because they incur a 'debt' when they obtain money with an obligation to repay[.]" If consumers repay via payroll deduction, "[i]t is still an act of repayment" according to the CFPB, and the EWA transaction constitutes a consumer credit product covered by TILA and Regulation Z.

Consumer Payments Made 'Incident to the Extension of Credit' Constitute Finance Charges

TILA and Regulation Z generally apply to a person who "offers or extends credit" under certain conditions, such as if "[t]he credit is subject to a finance charge[.]"[7] The finance charge "is the cost of consumer credit as a dollar amount" that 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."[8]

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[1] 15 U.S.C. §§ 1601 et seq.
[2] 12 CFR Part 1026.
[3] 12 CFR § 1026.2(a)(14).
[4] 15 U.S.C. § 1602(f) defines credit as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."
[5] The Rule cites the definition of "debt" in the Merriam-Webster dictionary.
[6] Debt, Black's Law Dictionary (4th ed. 1968).
[7] 12 CFR § 1026.1(c)(1)(iii).
[8] 12 CFR § 1026.4(a).

While the Proposed Rule notes that neither TILA nor Regulation Z explain the phrase "incident to the extension of credit," it points to the meaning of the term "incident" in Black's Law Dictionary when TILA was enacted[9] and a Supreme Court decision[10] to conclude that, "any payment exacted by the creditor that *is* substantially connected must be part of the finance charge" (emphasis included in the Proposed Rule).

The Proposed Rule then applies this framework to expedited delivery fees and tips that consumers commonly pay for EWA products, while also noting that such payments may be "part of the finance charge even if the credit can be obtained without making such payment." In other words, even if not a condition for the extension of credit, these payments "are nonetheless finance charges because the creditor exacts them in connection with the extension of credit."

Voluntary 'Tips' or Gratuities Are Finance Charges

The Proposed Rule determines that voluntary "tips" consumers pay for EWA products are "substantially connected to the extension of credit," and are therefore "incident" to the credit. Voluntary "tips" may otherwise be referred to as "gratuities," "donations," "voluntary contributions," or other similar terms. The Proposed Rule notes various practices EWA providers use to elicit such "voluntary" payments from consumers, including:

- "default 'tip' amounts that the consumer must remove each time to avoid being charged;
- suggesting particular 'tip' amounts or percentages;
- suggesting or stating that 'tips' serve to ensure the future supply of credit to the individual or other users; and
- including multiple prompts to 'tip' throughout the process of receiving credit."

The Proposed Rule considers such voluntary "tips" to be "substantially connected" to the extension of credit because there is a close and clear connection between the "tip" payment and the credit extended to the consumer.

Expedited Funds Delivery Fees are Finance Charges

Many EWA products offer a default delivery timeline that may take several days for the consumer to receive their funds, and a faster delivery of funds – often instantaneous – in exchange for a fee. The Proposed Rule notes, "[t]hough consumers may not have to opt for faster funds, when they do so, the resulting speed is a feature of the credit extended, so the resulting fee is part of the cost of credit." Because the very nature and purpose of EWA is the early delivery of expected funds, the Proposed Rule determines that a speedier delivery option for a fee is an "integral feature" of the credit extended, even though it may be optional. Consumers pay a voluntary fee in exchange for faster delivery of the funds, and therefore the fee is "immediately and directly connected to the particular extension of credit." Additionally, the Proposed Rule views an expedited funds delivery fee as a "condition" to the extension of credit because of its direct relationship with a speedier delivery time. Based on this reasoning, the Proposed Rule determines that such expedited funds delivery fees are finance charges associated with the extension of credit.

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[9] Incident means "anything which is usually connected with another, or connected for some purposes, though not inseparably." Black's Law Dictionary (4th ed. 1968).

[10] *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 240–41 (2004) (stating that with regard to TILA's finance charge provision, "[while] the phrase 'incident to or in conjunction with' implies some necessary connection between the antecedent and its object . . . the phrase 'incident to' does not make clear whether a substantial (as opposed to a remote) connection is required.")

Rule's Potential Impact on Consumers and EWA Providers

The Proposed Rule would require all EWA providers operating in the U.S. to disclose "tips" and expedited funds delivery fees to consumers in compliance with Regulation Z. While this would add a new layer of federal compliance, it is uncertain whether additional states will follow suit and seek to apply a general loan law framework and loan licensing requirements to EWA products and their providers. Several states have already addressed some of the uncertainty by enacting specific EWA requirements.

EWA providers and associated businesses should consider the potential impact of the Proposed Rule's required disclosures on their business models and prepare for its likely implementation and replacement of the CFPB 2020 advisory opinion. The comment period has ended and the CFPB has not indicated when the Proposed Rule would take effect.

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