August 30, 2024 (corrected September 16, 2024)

Comment Intake—2024 Paycheck Advance Interpretive Rule
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work [Docket No. CFPB-2024-0032]

Dear Director Chopra:

On behalf of the National Consumer Law Center (on behalf of its low-income clients),[1] Consumer Federation of America,[2] and the Center for Responsible Lending,[3] thank you for the opportunity to comment on the proposed interpretive rule by the Consumer Financial Protection Bureau (CFPB or Bureau) regarding the applicability of the Truth in Lending Act (TILA) to paycheck advance loans.[4] We commend the CFPB for affirming that paycheck advance loans, regardless of their characterization by lenders, are credit products subject to federal disclosure requirements.

Introduction

As written, the proposed rule confirms the applicability of TILA to paycheck advance loans frequently branded as "Earned Wage Access" (EWA). The undersigned applaud the proposed interpretive rule for affirming that such loans meet the definition of credit and that tips and expedite fees are finance charges.

In part I of this comment letter, we acknowledge our support for the proposed interpretive rule and discuss the procedural appropriateness of an interpretive rulemaking in this instance. Additionally, we discuss the need for a repeal of the 2020 Advisory Opinion. We present findings that show harms consumers face when using payday advances, affirm the applicability of TILA to paycheck advances, and set forth facts that support the legal definitions of credit and finance charges for paycheck advances. Finally, we discuss the importance of TILA disclosures for consumers.

[1] Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has worked for consumer justice and economic security for low-income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. Our multivolume consumer law treatise series includes *Truth in Lending* (11th ed. 2023), the premier treatise on the Truth in Lending Act, and *Consumer Credit Regulation* (3d ed. 2020), which analyzes federal and state law governing consumer credit. NCLC has frequently provided testimony in Congress and comments in agency rulemaking proceedings on consumer credit issues.

[2] The Consumer Federation of America (CFA) is an association of more than 200 non-profit consumer organizations established in 1968 to advance the consumer interest through research, advocacy, and education.

[3] The Center for Responsible Lending is a non-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL's views on lending are informed by its affiliation with Self-Help, one of the nation's largest nonprofit community development financial institutions. Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses and nonprofits and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.

[4] 68 Fed. Reg. 61,358 (July 31, 2024).

In part II, we suggest clarifications of the proposed interpretive rule and its scope. We suggest the proposed interpretive rule be further clarified to ensure that it captures emerging models of earned wage products and fintech cash advance lenders that structure their credit product advances in ways that seek to exploit technical exceptions from federal law.

We recommend:

1) Amending the language of the proposed interpretive rule to include all direct-to-consumer fintech cash advances,
2) Encompassing all advances of income, not just wages,
3) Applying the rule to any advance of anticipated income, whether or not "accrued," and
4) Incorporating into the rule that some advances from employers are loans, not payments of wages.

In addition, consistent with the intention indicated by the Bureau in the proposed interpretive rule, the supplemental information, and release, the CFPB should clarify that its interpretation of the meaning of credit and the scope of finance charges applies beyond a limited subset of existing and emerging models of cash advances.

We also urge the CFPB to continue monitoring this market for evasions, to ensure compliance with the law and to identify, prevent, and correct unfair or deceptive practices. The current proposal does not address subscription fees or the attempt by some fintech cash advance lenders to use an overdraft model to evade regulation under Regulation Z. We encourage the CFPB to do further rulemaking and enforcement as needed to address these issues.

During this comment period, industry has been soliciting comments based on false and misleading claims about the proposed interpretive rule and its impact on consumers. For example, one website stated that the rule makes it "more difficult and expensive," "creating mandatory fees, interest, and impact to credit reports for users."[5] The Bureau should consider this when reviewing comments likely generated from these solicitations.

We appreciate the opportunity to submit comments on this proposal and look forward to a final interpretive rule that will ensure consumers are better protected when accessing credit in this emerging product market.

[5] EarnIn | Tell the Government: Earned Wage Access (EWA) works, don't limit it (quorum.us)

I. The Bureau's proposed interpretive rule will provide greater clarity to the industry and ensure that EWA consumers get the benefit of existing federal consumer protections.

A. The overly broad, yet incomplete nature of the 2020 advisory opinion on EWA products created confusion regarding the appropriate federal laws that lenders must comply with.

We commend the Bureau for acknowledging that the 2020 advisory opinion needs to be repealed. As the Bureau's proposal notes, NCLC and CRL raised the confusion created by the opinion in their letter to Director Chopra of October 2021.[6] Even though the opinion addressed a very narrowly defined EWA program that met seven specific criteria and was completely fee-free, it was soon used to support industry's narrative that no paycheck advance products create a debt and none are subject to credit laws. The advisory opinion also contained flawed reasoning in the discussion of "credit" under the Truth in Lending Act (TILA) and Regulation Z and the ways in which paycheck advances may impose "debt" on a consumer. Further, the silence of the 2020 advisory opinion on finance charges was taken by some to mean that the fees and tips collected by paycheck advance lenders were not considered finance charges.

B. It is proper for an agency to use an interpretive rule to rescind a previously issued advisory opinion.

The Supreme Court held in Perez v. Mortgage Bankers Association[7] that an agency need not issue a new notice and comment period when it is repealing an advisory opinion. The Court noted that "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule."[8] The Court specifically approved of an agency's repeal of an opinion letter and its replacement with an interpretive rule, and held that doing so without a notice and comment rulemaking procedure complied with the Administrative Procedures Act.[9]

Interpretive rules do not create new obligations. Rather, they affirm the obligations of lenders that already exist. In this instance, the Bureau's proposed interpretive rule does not purport to create new obligations. It merely reminds industry participants that paycheck advances are credit and that tips and expedite fees are finance charges under preexisting federal law.

Given that the CFPB's proposal only confirms the applicability of existing regulations and definitions, an interpretive rule is the proper method to dispense this information, and the affirmation of lender responsibilities is fully supported by law.

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[6] *See* Letter Urging CFPB to Rescind Earned Wage Advisory Opinion and No Action Letter - NCLC, discussion of Payctiv claiming it was the gold standard of lenders at 2.
[7] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015).
[8] Perez at 101
[9] *Id.* at 98

The proposed interpretive rule also does not "create a standard independent of the statute or legislative rule it interprets." Rather, it affirms the status of paycheck advances under the law.[10] There is also no suggestion that noncompliance "forms an independent basis for action in matters that determine the rights and obligations of any member of the public."[11] Instead, the interpretive rule is consistent with the purposes of the Truth in Lending Act to provide "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."[12] Similarly, the definition of credit is consistent with that set forth in TILA and Regulation Z.[13] The definition of finance charges set forth in the interpretive rule is consistent with Regulation Z.[14]

Finally, though no notice and comment period is required under the Administrative Procedure Act, the Bureau has voluntarily presented the public with an opportunity to comment. That act, which is more than Perez requires, is consistent with the recommendations set forth by the Administrative Conference of the United States and allows all members of the public to argue for a modification, rescission, or waiver of a proposed interpretive rule through the comment process.[15]

Accordingly, existing caselaw, the statutory requirements of the Administrative Procedures Act, and the recommendations of the Administrative Conference all confirm the appropriateness of the proposed interpretive rule.

C. CRL findings demonstrate the consumer harms associated with fintech cash advances.

We applaud the CFPB for collecting and analyzing data related to the use of paycheck advance products. Its recent Data Spotlight highlights many of the consumer harms associated with these loans.[16] Deceptive advertising, loan terms designed to compel repeated use by consumers, and increased overdrafts experienced by users all reinforce the need to hold lenders who offer these products accountable to disclosure requirements under TILA and Regulation Z.

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[10] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES Adoption of Recommendations Federal Register / Vol. 84, No. 153 / (August 2019) 2019-16946.pdf (govinfo.gov)
[11] *Id.*
[12] 15 USC CHAPTER 41, SUBCHAPTER I: CONSUMER CREDIT COST DISCLOSURE (house.gov)
[13] § 1026.2 Definitions and rules of construction. | Consumer Financial Protection Bureau (consumerfinance.gov). *See* section I.D. of these comments.
[14] § 1026.2 Definitions and rules of construction. | Consumer Financial Protection Bureau (consumerfinance.gov). *See* section I.E. of these comments.
[15] 2019-16946.pdf (govinfo.gov)
[16] Data Spotlight: Developments in the Paycheck Advance Market | Consumer Financial Protection Bureau (consumerfinance.gov)

1. Lenders use deceptive advertising that obscures the nature of paycheck advance products.

EWA providers use deceptive advertising to veil the true nature of their lending products from consumers. Many companies entice consumers by claiming that they can receive money instantly, with no mandatory fees, despite fine print disclosures stating the opposite.[17] They also conceal the fact that the company is a lender. For example, one employer-integrated provider, DailyPay, describes its paycheck advances as "early transfers," intimating that the consumer is simply transferring their actual wages from their employer's payroll system.[18] DailyPay goes on to claim that its product helps consumers avoid interest rates and other fees, without disclosing that expedite fees.[19]

Another employer-integrated provider, Payactiv, quotes a consumer who declared: "It's my money...I'm not borrowing it."[20] EarnIn, a direct-to-consumer provider, labels its income-based advance product as "Cash Out" as if the loan is nothing more than a withdrawal from one's own account.[21] These deceptive descriptions conceal the fact that consumers are taking a credit advance of funds from the EWA providers, not making direct withdrawals from their actual accrued wages. The misleading information also deprives consumers of the material terms of the loan transaction, namely, the finance charge.

TILA's disclosure requirements and Regulation Z's definition of finance charges offer key protections against deceptive advertising by ensuring that consumers have access to the material terms of each loan agreement and by representing the cost of each loan in a manner consistent with other credit products. Accordingly, we agree with the CFPB's decision to clarify that paycheck advance loan providers must make the disclosures required by the Truth in Lending Act for all transactions that fall under the appropriate thresholds for TILA.

2. Users experience high levels of repeat borrowing.

Most paycheck advances can put people into an extensive cycle of repeat borrowing nearly identical to the harms experienced by users of payday loans. According to a recent GAO report, users of a direct-to-consumer, income-advance company used the service between 26 and 33 times a year.[22] These findings are in accord with the California DFPI's analysis, which found that users took earned wage advances on average nine times a quarter (with a range of 1 to 25 times a quarter) – that is, an average of 36 times a

[17] *See, e.g.*, EarnIn | You worked today. Get paid today (advertising "No interest, mandatory fees, or credit checks," and stating "Don't wait weeks until payday to use your hard-earned money. Get it within minutes of earning it instead."; an inconspicuous footnote says that "Fees apply to use Lightning Speed," but then implies that any transfer takes just "up to thirty minutes").
[18] Earned Wage Access Explained: Benefits and Regulations (dailypay.com)
[19] Earned Wage Access Explained: Benefits and Regulations (dailypay.com)
[20] On-Demand Pay App - Payactiv
[21] Enjoy Your Payday in Advance with Cash Out | EarnIn
[22] U.S. Government Accountability Office, Financial Technology Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity Is Needed (March 2023), https://www.gao.gov/assets/gao-23-105536.pdf.

year, with a range of 4 to 100 times.[23] In other words, typical users of these products use them nearly every pay period.

With this cycle of reborrowing, consumers do not get liquidity to cover new expenses; instead, the advances merely fill the gap created by the prior advance. As a result, like traditional payday loans, paycheck advances create their own demand.[24] And the cycle of reborrowing creates the same problems of financial instability.

The frequency of advances adds to the cost, especially if consumers are paying expedite fees and tips with each advance. Some lenders restrict how much can be borrowed in a single advance while permitting multiple advances per pay period and even per day, to increase the number of advances and amount paid in fees. For example, one company allows consumers to take out $750 per pay period but only up to $100 per day.[25]

Disclosure of finance charges will provide consumers with key information about the cost of EWAs. Considering the frequency of use by consumers, many of whom are taking out multiple loans per month continuing throughout the year, the APR is a particularly appropriate measure of these costs.

3. Users experience higher overdraft fees after using paycheck advances.

Not only does repeated use drain money from consumers, but available data also demonstrate that consumers who use EWA experience more financial distress because of associated increases in overdraft fees. A recent analysis of EWA transactions conducted by the Center for Responsible Lending found that users of direct-to-consumer EWA experienced in increase in overdraft fees after an initial advance. The average number of overdraft fees increased from 3.0 in the three months leading up to borrowers' first advance to 4.7 overdrafts in the three months afterwards. All consumers, regardless of overdraft frequency, saw their overdraft activity increase. Over three months, the number of overdrafts for low and moderate users more than doubled, rising from 1.0 to 2.3 (and up to 19) and from 2.3 to 4.4 (and up to 20), respectively. Meanwhile, heavy overdraft users saw their overdrafts increase from 11.0 to 11.6 (and up to 53).[26]

D. Paycheck advances are covered by TILA.

We agree with the Bureau's analysis that paycheck advances are a debt that needs to be repaid and fit the definition of credit in TILA and Reg Z.[27] Neither TILA nor Regulation Z defines the term "debt," which

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[23] 2021 Earned Wage Access Data Findings (ca.gov) page 11

[24] *See* Leslie Parrish and Uriah King, Center for Responsible Lending, Phantom Demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume (July 9, 2009), https://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf.

[25] Lucia Constantine, et al, Center for Responsible Lending, Not Free: The Large Hidden Costs of Small-Dollar Loans Made Through Cash Advance Apps at 3 (April 2024) (hereinafter "*Not Free*").

[26] *Not Free* page 6

[27] § 1026.2 Definitions and rules of construction. | Consumer Financial Protection Bureau (consumerfinance.gov)

is used within the definition of "credit" as "the right to defer payment of debt or to incur debt and defer its payment."[28]

One of the fatal flaws in the 2020 Advisory Opinion is that, without proper reason, it takes the position that under certain prescribed circumstances, free EWA products are not "credit" under Regulation Z because they do not implicate a debt.

The 2020 Advisory Opinion failed to consider that paycheck advances fit the already existing legal definitions of debt, such as in the bankruptcy setting.[29] There is no merit to the paycheck advance providers' claim that their transactions do not create debt because they are not recourse. Indeed, bankruptcy courts have interpreted non-recourse obligations as debt,[30] and the Supreme Court found that a non-recourse obligation creates a claim and therefore a debt under the Fair Debt Collection Practices Act.[31] In addition, paycheck advances fit the definition of debt in a number of state laws.[32] Lack of recourse does not mean that a transaction is not a debt.

Whether paycheck advance products are non-recourse in reality is also open to dispute. When determining whether a product is credit and subject to TILA, the Bureau and the Federal Reserve Board before it have long looked to the substance rather than the form of the transaction. (See section II.B). Nearly all earned wage advances are in fact recouped, notwithstanding earned wage advance companies' disingenuous claims that the transactions are "non-recourse."[33] Because lenders have access to consumer bank accounts (or consumer's paycheck), they are almost certain to recover the funds advanced. Accordingly, other traditional methods used for debt collection are not necessary. Though these lenders choose not to pursue these methods at this time, it does not mean no debt is incurred. The providers' terms and conditions stating that the debt is non-recourse[34] should not control over the substance of the transaction.

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[28] 12 CFR 1026.2(a)(14).

[29] As the Bureau notes, in the bankruptcy context, the definition is as follows: "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. 101(8). See also, 2.2.2.5 Non-Recourse Debts Are Still Debts | Truth in Lending | NCLC Digital Library

[30] *Johnson v. Home State Bank*, 501 U.S. 78, 83—84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). See 2.2.2.5 Non-Recourse Debts Are Still Debts | Truth in Lending | NCLC Digital Library

[31] *Obduskey v. McCarthy & Holthus L.L.P*, 139 S. Ct. 1029, cited in 2.2.2.5 Non-Recourse Debts Are Still Debts | Truth in Lending | NCLC Digital Library

[32] Footnote 19 in the proposed interpretive rule lists state laws that define debt. Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work (consumerfinance.gov)

[33] quoting Financial Health Network "Earned Wage Access and Direct-to-Consumer Advance Usage Trends," at p. 2 (April 2021) (finding that advances "were recouped successfully at least 97% of the time).

[34] Brigit Terms of Service (Last revised June 20, 2024), https://www.hellobrigit.com/terms (last visited 8/20/2024) ("… you may elect to receive one or more non-recourse Advances … Brigit warrants that it has no legal or contractual claim against you based on a failure to repay an Advance, but Brigit will suspend your access to the Services until you repay an Advance in full. With respect to a failure to repay an Advance, Brigit warrants it will not engage in any debt collection activities, place the amount owed with or sell to a third party for the purpose of debt collection activities, or report you to a consumer reporting agency. Brigit may send you an email, text or SMS message reminding you of an upcoming payment, however, such email, text or SMS message should not be construed as a demand for payment."); Cleo, Terms & Conditions, Last Updated April 5, 2024, https://web.meetcleo.com/page/term-conditions (last visited 8/20/2024) ("Cash Advances are non-recourse. This means that you have no obligation to repay a Cash Advance…. You may revoke authorization to withdraw payment

Income-based advances create an obligation that must be repaid. The fact that it is repaid by directly withdrawing the money from the consumer's bank account rather than in some other way is immaterial.

E. Tips and expedite fees fit the definition of finance charges under TILA.

Regulation Z defines the finance charge as "the cost of consumer credit as a dollar amount."[35] Unless specifically excluded by the regulation, this 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."[36] Tips and expedite fees meet TILA's general definition of a finance charge and do not fall into any excluded categories. We will take tips and expedite fees in turn and explain how they fit the definition of finance charges.

1. Tips

Tips are imposed by lenders. This is because while they are not technically always required, they are actively solicited by lenders, quite common, and difficult to escape. Indeed, tips are frequently assessed. The California DFPI's data analysis found that 73% of the advances from tip-based services included tips, amounting to $17 million.[37]

Moreover, lenders that use the "tips" model, such as EarnIn, typically set a tip by default. A default that the consumer must undo has the same legal status as a compulsory finance charge. By way of analogy, courts and the CFPB have found violations of the Electronic Fund Transfer Act's ban on compulsory use when electronic repayment is a default method, even if the consumer can undo the default.[38]

Companies use a host of strategies to make it difficult not to tip or to make the consumer feel compelled to tip. These strategies include:

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at any time.'); Empower, Terms of Service, Last Updated: May 17, 2024, https://empower.me/terms/ (last visited 8/20/2024) ("We offer Empower Advances on a non-recourse basis. This means you have no unconditional obligation to repay any Empower Advance. Consequently, we warrant to you that we have no contractual or legal claim against you for an Empower Advance, and we will not engage in debt collection activities, place the amount advanced with or sell to a third party, or make any reports to credit reporting agencies regarding your Empower Advance."); MoneyLion, Terms of Service, Last Updated May 28, 2024, https://www.moneylion.com/terms-and-conditions/ (last visited 8/20/2024) ("**INSTACASH IS NOT A LOAN. MONEYLION IS NOT LENDING YOU MONEY IN CONNECTION WITH THE INSTACASH SERVICE. THERE IS NO OBLIGATION TO REPAY AN INSTACASH ADVANCE.**") (original emphasis).

[35] § 1026.4 Finance charge. | Consumer Financial Protection Bureau (consumerfinance.gov)

[36] *Id.*

[37] 2021 Earned Wage Access Data Findings (ca.gov)

[38] *See* de la Torre v. CashCall, Inc., 56 F. Supp. 3d 1073, 2014 WL 3752796, at *8 (N.D. Cal. July 30, 2014), *vacated on other grounds*, 2014 WL 7277377 (N.D. Cal. Dec. 22, 2014); Fed. Trade Comm'n v. Payday Fin., L.L.C., 989 F. Supp. 2d 799 (D.S.D. 2013); Pinkett v. First Citizens Bank, 2010 WL 1910520 (N.D. Ill. May 10, 2010); O'Donovan v. CashCall, Inc., 2009 WL 1833990 (N.D. Cal. June 24, 2009); W. Va. ex rel. McGraw v. CashCall, Inc. et al., No. 08-C-1964 (W.V. Cir. Ct. Sept. 10, 2012), available at www.nclc.org/unreported; In re Integrity Advance, L.L.C., CFPB No. 2015-CFPB-0029 (Jan. 11, 2021).

a. adding a default tip that must be removed each time,
b. user interfaces that send psychological signals,
c. disingenuous statements about how the tips support a "community" rather than a large company or wealthy hedge fund,
d. the outright denial or reduction of future credit if the consumer does not tip enough, and/or deeming tips "donations."

A particular provider's strategies may evolve over time, but always retain the goal of making tips unavoidable. For example, EarnIn users reported having their access to advances restricted if they did not tip enough,[39] though EarnIn appears to have changed that practice after it became public. Later, EarnIn's terms and conditions contained language stating that a user had to pre-authorize a tip amount of at least $1.50, otherwise automatic access to an EarnIn feature offering advances to prevent overdrafts would be cut off and would have to be manually turned back on each time.[40] That language appears to have disappeared from EarnIn's terms and conditions, too, and the company is now relying on behavioral economics to guilt and pressure consumers into adding tips to their loan amounts, and on creating obstacles that impede the consumer's ability to decline to "tip." The attached screenshots from 2024 show that a consumer must make multiple clicks to clear a default tip from a transaction.[41] In this example, the consumer does not have an option to leave a $0 tip when the lender EarnIn solicits the tip after approving the paycheck advance, stating that the tips "support" EarnIn. The lowest amount available is $6. If the consumer clicks an edit icon, the tip is defaulted to $11. The consumer sees a message that "optional tips keep us running for members like you." The consumer then must manually scroll down to leave a $0 tip.

The pressure techniques that providers use to solicit "tips" and "donations"[42] undermine their contention that these payments are truly voluntary. Even absent any special techniques, consumers who are asked to "tip" before they have received an advance are likely to fear that not tipping will reduce their access. And of course, a "tip" committed before service has been rendered, with a binding authorization for the bank account debit, is hardly a gratuity for good service; it is a payment for that service.

A consumer noted that they did not intend to give nor agree to a default tip on the EarnIn app and were unable to recover it:

> Today, XX/XX/2021, I used the app called Earnin to make a cash out of {$100.00}. I clicked cashout and like the app promises, it's not obligatory to pay any fees. Instead, the app didn't even have an option to accept or decline any charges, it just automatically charged a pre-set tip amount that the app forcibly charged (by fraud) without my consent and without any approval. Instead

[39] Kevin Dugan, New York Post, Cash-advance app Earnin gets subpoenaed by NY regulator: source (Mar. 28, 2019) ("Earnin encouraged users to leave a tip of anywhere between zero and $14 on a $100 weekly loan. Users who don't leave a tip appear to have their credit restricted. Meanwhile, a $14 tip would equate to a 730-percent APR — nearly 30 times higher than New York's 25 percent cap.").
[40] NCLC et al., Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services Comments to the Consumer Financial Protection Bureau (Jan. 2023) at 49 https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22.pdf..
[41] *See* screenshot collection, Appendix A, full video on file with NCLC.
[42] Some peer to peer fintech lending platforms solicit both "tips" and "donations," with the donation supporting the lending platform rather than a person funding the loan. A donation paid to a loan broker or platform is a finance charge, just as a tip is.

> of clicking ok or anything, I closed the app. I didn't even authorize it. I contacted the company via email and got an autoreply saying they don't monitor or reply to contacts. I asked Earnin to refund this illegally charged fee and remove the transaction. They refused to do so. I told them this is fraud and that I was also contacting the XXXX XXXX store because charging unauthorized fees like this is fraud and violates the app store terms of use. The person representing EarnIn continued being rude and refused to give me back the money they stole.[43]

Moreover, when a borrower consents to pay a lender a tip or expedite fee, those amounts are effectively included in the loan contract and in the contractual authorization to debit those amounts, along with the principal, from the borrower's bank account or wage payment. Whether or not a consumer must agree to make these payments as a condition of receiving the loan funds, once the consumer has agreed to them they are part of the consumer's contractual obligation, and the paycheck advance lender can enforce that obligation by debiting the consumer's bank account. As an example from another context, a consumer taking out a mortgage loan might have a choice between paying 5 points with a lower interest rate, or paying 3 points with a higher interest rate. If the consumer opts for 5 points, that amount will be written into the loan contract. Those points are part of the consumer's debt and are finance charges even though it was the consumer's choice to opt for a loan that included them.

2. Expedite fees

Like tips, expedite fees are payable directly by the consumer and imposed directly by the creditor as a condition of the extension of credit. Expedite fees are a condition of the extension of credit, if a consumer wants to access the frequently advertised speed and ease of obtaining funds. Lenders advertise instant access to cash and obscure the fees necessary for immediate access in fine print and footnotes.

The vast majority of users – roughly 80% – pay "expedite fees" when necessary to receive an instant advance.[44] This should not be surprising given that the entire purpose of a fintech cash advance is quick access to funds ahead of the regular payday. Providers may offer a "free" version of their product that fails to meet consumers' needs because it delays funds. But this does not mean that the "expedite fees" that users must pay to access a useful version of the product are not charges, and in fact they are not truly "voluntary." Consumers who cannot wait for payday will almost always pay expedite fees rather than wait one to three business days.

Inflated expedite fees are clearly a disguised finance charge. Providers charge expedite fees as high as $8.99, vastly exceeding the cost of delivering funds instantly, which is likely in the range of 4.5 cents if there is any cost at all.[45] Many providers charge fees that increase as the amount borrowed increases, just like interest does.[46] For example, Money Lion charges a "Turbo Fee" of $.49 to $8.99, depending on the advance amount, to expedite disbursement of an advance to a Money Lion RoarMoney account, even though that transfer is likely an internal bookkeeping measure that costs Money Lion nothing. For

[43] Complaint ID 4551776, CFPB database
[44] *Not Free page 3*
[45] *See* CFPB Junk Fees Comments at 43.
[46] *See* Earnin, Why is there now a fee for Lightning Speed?; CFPB Junk Fees Comments, *supra*, at 53-58.

transfers to an external debit card or checking account, Money Lion charges a $1.99 Turbo Fee if the advance is $5 or less, and $8.99 if it is $90-100.[47]

As discussed above, once the consumer has agreed to pay an expedite fee, it is part of the consumer's contractual obligation, which must be repaid along with the principal. Accordingly, we agree with the Bureau's conclusion that expedite fees are finance charges.

F. Disclosures required by TILA will help protect EWA users.

As discussed in section I.C. above, paycheck and income-based advances are high-cost credit products. However, some lenders obscure this fact from consumers by violating federal disclosure laws. We applaud the CFPB for affirming that TILA does, and has always, applied to paycheck and income-based advances.[48]

TILA's disclosure obligation ensures that consumers receive vital information about the cost of credit, and it empowers them to compare credit options using a standard measure. It is more than appropriate to use an annualized percentage rate to represent the cost of paycheck advances, since multiple data analyses demonstrate that consumers become trapped in a cycle of repeat borrowing that lasts for months or longer. Currently, lenders in this industry prominently advertise 0% APR, and no interest for their loans. Even if finance charges are below the threshold required for disclosure under TILA, lenders should not be allowed to advertise 0% APR when the loan products include finance charges. Using "0% APR" for an instant advance that does in fact have a fee, even if below the threshold for disclosure, should be considered unfair and deceptive and also a violation of TILA's APR calculation rules.

[47] *See* Pricing | MoneyLion ("Instant Cash Advances" chart under Fee Schedules) (last visited 8/26/2024).

[48] This confirmation also serves as much needed guidance for state lawmakers and regulators who have grappled with the applicability of TILA to EWA products. For example, the California DFPI signed Memorandums of Understanding with several EWA providers in 2021 that evidence some confusion about the application of TILA to these products. *See, e.g.*,Memorandum of Understanding, Even Responsible Finance, Inc. (Cal. DFPI Jan. 8, 2021), *available at* https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/01/Admin.-Action-Even-Responsible-Finance-Inc.-Memorandum-of-Understanding.pdf Just three years later, the DFPI stated: "[T]he Department cannot make law by way of voluntary MOUs, and the Department is not the primary authority on the interpretation of the Truth in Lending Act. The Department therefore gives no credit to a statement of law negotiated by enforcement counsel in an MOU concerning the treatment of tips and other charges under federal law, particularly when such statements were unaccompanied by legal reasoning or citation to controlling authority and served solely to outline a methodology for MOU reporting. (See De La Torre v. CashCall, Inc. (2018) 5 Cal.5th 966, 987 [declining to credit statement of law of Department's predecessor agency when statement of law appeared in enforcement action without analysis or reasoning].) In any case, the Department's decision to include gratuities in its APR calculation was warranted because it helped accurately account for the costs actually incurred by consumers to receive IBAs and because under the CFL, gratuities would be treated as charges." Department of Financial Protection and Innovation, Final Statement of Reasons for the Adoption of Regulations Under the California Consumer Financial Protection Law (2024), https://dfpi.ca.gov/wp-content/uploads/sites/337/2024/05/PRO-01-21-Final-Stmt-of-Reasons.pdf.

II. The proposed interpretive rule should be clarified to encompass various models of paycheck advances available to consumers.

There is a wide range of existing and emerging models for paycheck advance loans. To prevent evasions, the Bureau should clarify that TILA's disclosure requirements apply to short-term loan products across different delivery models for the reasons outlined in the proposed rule.

A. Historic evasions in small dollar lending

Unfortunately, fintech cash advances are part of a long and ignoble tradition of finance companies using evasions to pretend they are not making loans. As the CFPB has recognized, income-based advances "share fundamental similarities with payday lending products." This is evidenced by the detrimental impact these products have on consumers, and the way they seek to evade lending laws. Years ago, in states that imposed responsible interest rate caps on payday loans, lenders sought to evade enforcement by claiming that their loans were "deferred presentment transactions," or "deposit advances" not loans.[49] Similarly, and with the same aim, fintech payday lenders brand their loans "Earned Wage Access" and "on-demand pay."

When attempts to re-brand their predatory products failed, payday lenders deployed the rent-a-bank model and formed partnerships with out-of-state banks willing to make triple-digit APR loans to consumers in states with strong rate caps.[50] Similarly here, income-based advance companies are quickly shifting the terms and conditions, structure of transactions, and language used, all in an attempt to evade lending laws.

As the Bureau suggested in the proposed interpretive rule, while earned wage products are commonly considered to be delivered in two models, employer-partnered and direct-to-consumer, some of the differences between these types of products are starting to erode. Existing providers are shifting their delivery models and new models continue to emerge. Some fintech cash advance providers do not purport to lend based upon earned income and some lend using other sources of income, including public benefits. Others charge monthly subscription fees in addition to expedited delivery fees, which can also disguise the true cost of the loans. Further, in response to the release of the proposed interpretive rule, some of the most prominent providers of fintech cash advances have suggested that the rule does not apply to them because they purport to structure their loans as bank-originated overdrafts.

Given the long history of efforts to evade regulation and enforcement in the payday lending industry and the similarities between these products, we expect that attempts to evade regulation and avoid disclosure obligations will continue. We encourage the Bureau to address these evasions in the final interpretive rule and take any additional measures necessary, through supervision, enforcement, and further rulemakings, to ensure that consumers accessing short-term loan products across different delivery models are appropriately protected.

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[49] CFPB Comment to Calif. Dep't of Fin'l Prot'n & Innov. Re Comment on Proposed Rule Addressing "Income-Based Advances" and Related Charges at 2 (Nov. 27, 2023).
[50] NCLC et al, Comments to the CFPB on Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, RIN 317-AA40, at 35-40 (Oct. 7, 2016).

B. TILA is interpreted liberally to protect consumers with a focus on substance over form

The proposed interpretive rule addresses some of the evasions that lenders have been using to claim that they are not offering loans, not charging finance charges, and not covered by TILA or other lending laws. But the world of evasions is myriad, and the CFPB must keep an eye out for other attempts to evade the law.

Below we urge some specific improvements in the rule. But not every evasion merits an interpretive rule. In appropriate cases, the CFPB should use its enforcement authority. In others, guidance or rulemaking could be used. When it passed TILA, Congress was aware that "some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish," and thus Congress "determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation."[51] TILA is a remedial statute that courts have long found must be "liberally construed in favor of borrowers."[52]

In assessing whether a transaction is subject to TILA and how TILA protections apply, courts can look beyond the form of the transaction as structured to determine its true nature and substance.[53] This substance-over-form approach has been applied repeatedly by courts to look through the purported form of a transaction to determine whether TILA applies.[54] Relatedly, in cases going back 200 years, courts have focused on the substance, not the form, of transactions to assess whether state usury limits and state lending laws apply.[55]

Thus, in applying TILA, the CFPB is not limited to how a company characterizes its product. TILA applies, and the CFPB should enforce TILA's requirements, if fintech cash advances and other forms of credit are in substance credit covered by TILA.

Below we address some of the current evasions we are seeing. We urge the CFPB to use the full range of its tools to prevent these evasions. The CFPB should also be vigilant in identifying and stopping other evasions as well.

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[51] Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 365 (1973).
[52] Curtis v. Propel Property Tax Funding, L.L.C., 915 F.3d 234, 243 (4th Cir. 2019); *accord* Cappuccio v. Prime Capital Funding L.L.C., 649 F.3d 180 (3d Cir. 2011); Rubio v. Capital One Bank, 613 F.3d 1195, 1202 (9th Cir. 2010); Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114 (9th Cir. 2009); Rand Corp. v. Moua, 559 F.3d 842 (8th Cir. 2009); Bragg v. Bill Heard Chevrolet, Inc., 374 F.3d 1060 (11th Cir. 2004). *See also* National Consumer Law Center, Truth in Lending § 1.5.2.3 n. 214, (11th ed. 2023) ("NCLC, Truth in Lending") (collecting cases).
[53] *See, e.g.,* Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748, 753–754 (7th Cir. 2000) (courts look to economic substance of transaction, not its form, to determine whether TILA requirements apply); Adams v. Plaza Fin. Co., 168 F.3d 932 (7th Cir. 1999) (courts must penetrate the outer form to find the inner substance when determining how disclosure requirements apply).
[54] *See* NCLC, Truth in Lending § 2.1.2 (collecting cases).
[55] *See* National Consumer Law Center, Consumer Credit Regulation § 3.9 (3d ed. 2020), updated at library.nclc.org.

C. We recommend broadening the scope of the interpretive rule to appropriately trigger disclosure requirements for all forms of fintech cash advances.

1. The rule should be amended with language that is inclusive of all direct-to-consumer fintech cash advances.

The CFPB states that the interpretive rule applies to products that involve both:

> (1) the provision of funds to the consumer in an amount that is based, by estimate or otherwise, on the wages that the consumer has accrued in a given pay cycle; and
> (2) repayment to the third-party provider via some automatic means, like a scheduled payroll deduction or a preauthorized account debit, at or after the end of the pay cycle.[56]

The CFPB notes two models of products: "employer-partnered" products and "direct-to-consumer" products.[57] While the proposed scope works well for the employer-partnered products, there may be ambiguity as to some direct-to-consumer products. Even those that fall within the rule today could redesign their loans to evade the rule.

We urge the CFPB to:

- Encompass all advances to be repaid by expected income, without requiring the advances to be based on an estimate of accrued income
- Encompass products repaid from other types of income, such as Social Security, public benefits, or other anticipated income.
- Clarify "third-party providers"
- Consider whether some employer loans should be covered

In addition, as discussed in part II.D. below, the CFPB should address other evasions, such as restyling loans as overdraft coverage and charging finance charges through subscription fees.

2. The rule should encompass all advances of income, not merely wages

The proposed interpretive rule is titled: "Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work."[58] It focuses on the "paycheck advance marketplace, including those marketed as 'earned wage advances' and 'earned wage access.'"[59]

While the term "earned wage access" is certainly common in the industry, that term is actually used very little by the actual products, even those most closely tied to the "earned wage" industry. A look at the marketing and terms and conditions for the products shows that the advances need not be tied to wages.

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[56] 89 Fed. Reg. at 61359.
[57] *Id.*
[58] 89 Fed. Reg. 61358.
[59] 89 Fed. Reg. 61358.

The product most closely associated with the direct-to-consumer EWA model is EarnIn. EarnIn certainly markets itself as a way to "get paid as you work."[60] But the terms and conditions are not strictly limited to wages. The overview of the Cash Out product states: "EarnIn allows you to access *certain forms* of your income, *such as* your earned wages (your "Earned Income") prior to when that income is deposited …."[61] Thus, it appears that earned wages are only one type of income that makes consumers eligible for EarnIn.

Other providers are even less tied to earned wages. For example, Cleo[62] and Empower[63] provide advances without specifying that they are advances of wages. Brigit[64] and MoneyLion[65] explicitly state that they make advances based on income from sources other than employment.

A MoneyLion review, for example, indicates that MoneyLion provides advances based on disability income:

> **stuck in borrowing loop with moneylion app**
> i think that moneylion's instacash was a great resource when i was in a pinch, but being able to pay it off every month isn't easy on my fixed disability income. i end up having to borrow again, because im missing money i need after i pay back the last month….[66]

Whether TILA applies or not does not and should not depend on the type of income used to repay a loan. EWA providers could try to escape coverage by arguing that they are not advancing "wages." Borrowers on public benefits, for example, are even more vulnerable than other consumers, and need clear disclosures and other protections of lending laws. To prevent evasions of TILA, the CFPB should clarify that the scope of the interpretive rule applies to advances of any anticipated income regardless of the type.

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[60] EarnIn, https://www.earnin.com/ (last visited 8/20/2024).
[61] Cash Out User Agreement, (Effective Date 2024-01-15), https://www.earnin.com/privacyandterms/cash-out/terms-of-service (last visited 8/20/2024).
[62] Cleo, Terms & Conditions, Last Updated April 5, 2024, https://web.meetcleo.com/page/term-conditions (last visited 8/20/2024) ("The Cash Advance Service enables you to access advances on your anticipated income …")
[63] Empower, Terms of Service, Last Updated: May 17, 2024, https://empower.me/terms/ (last visted 8/20/2024) ("Empower offers qualified users the ability to access 'Empower Advance,' a service that provides a Cash Advance at no additional charge. If we detect that you are likely to overdraft your primary checking account (either Empower Checking or your External Bank Account) ("Primary Checking Account") based on your previous checking account activity, we will alert you to the possibility of overdrawing your Primary Checking Account. Eligible users will then be offered the opportunity to receive a free Empower Advance of an amount specified in the App to their Primary Checking Account….To be eligible for an Empower Advance, you must meet certain minimum qualifications, which are identified when you request access to Empower Advance.").
[64] Brigit, Eligibility Requirements, https://help.hellobrigit.com/hc/en-us/articles/360023697231-Eligibility-Requirements (last visited 8/20/2024) ("Deposit or Income Requirements: To qualify for Brigit Instant Cash you must have at least three recurring deposits from the same employer *or deposit source*.") (emphasis added).
[65] ("'Eligible Direct Deposits' means a recurring direct deposit of your wages, compensation, or other income, …")
[66] Reddit, r/povertyfinance, (2022) https://www.reddit.com/user/_punkbtch/.

3. The rule should apply to any advance of anticipated income, even if not "accrued" wages.

The proposed scope requires the advance to be "based, by estimate or otherwise, on the wages that the consumer has accrued in a given pay cycle."[67] Yet none of the providers we examined specifically state that the amount of their advances are limited to the "accrued" amount.

EarnIn states that it allows consumers to access their "income, such as your earned wages (your 'Earned Income') prior to when that income is deposited …."[68] But that definition of "Earned Income" only states that consumers can access the income prior to when it is deposited, not that it has to be "earned" or "accrued" at the point of borrowing. There is no definition of "earned" in the EarnIn terms, and the definition of "earned income" is simply the statement quoted in this paragraph.

EarnIn borrowers have a "Daily Max" and a "Pay Period Max." Each Pay Period Max is "based on a variety of factors including your bank balance, spending behavior, repayment history, and Earned Income amount…. EarnIn has the right to adjust the factors that impact your Daily Max or Pay Period Max at any time."[69] Similarly, the FAQs state: "Your Maxes are determined based on a number of factors we believe are related to evaluating your financial health. EarnIn is focused on helping community members move money at their speed."[70]

Thus, nowhere in the terms or the FAQs does EarnIn say that the consumer cannot borrow more than their accrued income, or that the advance limit is necessarily based on the amount of wages "accrued in a given pay cycle" as required by the scope of the proposed rule. To the extent that the use of the term "earned" or "earned wages" in the terms does trigger coverage, EarnIn could amend the terms to eliminate use of those terms.

The problem is even more acute for all of the other direct-to-consumer fintech cash advances. Numerous companies such as Brigit,[71] Cleo,[72] Empower,[73] and MoneyLion[74] do not use the term "earned wages" and

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[67] 89 Fed. Reg. at 61359.
[68] Cash Out User Agreement, (Effective Date 2024-01-15), https://www.earnin.com/privacyandterms/cash-out/terms-of-service (last visited 8/20/2024).
[69] *Id*.
[70] https://help.earnin.com/hc/en-us/articles/360036131814-What-is-a-Max (last visited 8/19/2024).
[71] Brigit, Eligibility Requirements, https://help.hellobrigit.com/hc/en-us/articles/360023697231-Eligibility-Requirements (last visited 8/20/2024) (requiring sufficient activity, a 60-day account history, and a balance above $0).
[72] Cleo, Terms & Conditions, Last Updated April 5, 2024, https://web.meetcleo.com/page/term-conditions (last visited 8/20/2024) ("Your eligibility and the amount you are eligible for is defined via an analysis of your transaction and deposit history and patterns.").
[73] Empower, Checking for your Cash Advance qualifications, https://support.empower.me/hc/en-us/articles/360049126374-Checking-for-your-Cash-Advance-qualifications (last visited 8/20/2024) ("Empower determines whether you qualify for Cash Advance based on our review of the transaction history in your primary checking account. We look for a consistent source of income to understand your ability to repay.").
[74] MoneyLion, Terms of Service, Last Updated: May 28, 2024: https://www.moneylion.com/terms-and-conditions/ (last visited 8/20/2024) ("Your available Instacash Advance limit will be displayed to you through your Instacash dashboard on the Site or in the MoneyLion App, and will be based on factors as determined by

have eligibility criteria that do not appear to be tied to accrued or earned income. Dave,[75] which uses an overdraft model (as discussed in Section II.D. below), also does not appear to base advance amounts on the amount of accrued income.

4. The Bureau should clarify the role of a "third party" in the rule.

While it is clear that the Bureau intended to cover both employer-integrated and direct-to-consumer providers, as written, some providers may inappropriately claim that they are not covered. We recommend the proposed interpretive rule be strengthened to avoid any ambiguity and to ensure all providers are clearly covered. The Bureau should clarify that the term "third-party provider" includes lenders using this model, or delete the term "third-party" altogether. The use of this term could create confusion, because some direct-to-consumer EWA providers operate without any involvement at all with the consumer's employer. They provide direct loans to consumers based on anticipated income and may obtain repayment without going through the consumer's employer. Thus, there is no "third party."

5. Some advances directly from employers are loans, not payments of wages

The CFPB states that the rule does not apply to an employer's actual payment of wages.[76] Even if an employer is making a loan, not paying wages, the advance might be outside the scope of the interpretive rule because repayment is not to a third party.

The line between a payment of wages and a loan is not as bright when funds come directly from the employer and there is no movement of money to repay the employer. But employers can still make loans, and they can be repaid officially by payroll deduction even if that deduction is merely a bookkeeping device and not an actual movement of money from the employee to the employer or a third-party lender. Similarly, an employer can make balloon-payment loans repaid on the next payday.

The fees for employer advances can be the same or even higher than for third-party funded advances. Consumers need the same disclosures and other lending protections. Thus, the CFPB should continue to examine this market and be prepared to clarify situations when employers are making loans covered by TILA.

We also note that, while advances directly from the employer may not be repaid directly by money coming from the employee, they still can take the form of a third-party advance. A third party may advance the funds to the employer, which uses the funds to make the advance, and then the employer repays the third party. That is a loan from the employer, even though the loan is repaid in a two-step

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MoneyLion from time to time. These factors include the amount and timing of your Eligible Direct Deposits, MoneyLion's evaluation of your account transaction history, and other information you provide to us. MoneyLion reserves the right to adjust your Instacash Advance limit and our eligibility criteria at any time.").

[75] Dave, Got Questions?, https://dave.com/extra-cash-advances (last visited 8/20/2024) ("How does Dave determine my ExtraCash™ advance amount? ExtraCash™ advances are built to give you what you need within what you can pay back. We use a proprietary underwriting model using a mix of financial health factors to find an amount that can help you out of a pickle without putting a deeper hole in your pocket.").

[76] 89 Fed. Reg. at 61360 at n.11.

fashion: first, a reduction in the worker's paycheck, and then payment of the loan amount plus fees by the employer to the provider.

If the technical form of the transaction and flow of money – immaterial and invisible to the consumer – is what determines whether an advance is a loan or not, evasions will happen. The employer-based model will be restructured to enable fees without the required lending disclosures. Accordingly, to inhibit this evasion, we recommend the CFPB clarify that the interpretive rule may apply to certain employer-based payment of wages.

D. The Bureau should consider other types of evasions in enforcement and for future guidance or rulemakings.

1. The Bureau should not allow fintech cash advances to be disguised as overdrafts.

Companies are starting to disguise their cash advances as overdrafts on fake deposit accounts. In addition, overdraft fees on actual deposit accounts offered through nonbank companies (which are arguably a form of prepaid accounts[77]) have been disguised as "tips." The CFPB should look through the purported form of fake overdraft programs to the substance and take action against programs that violate lending laws. The CFPB should also address the use of tips as a form of overdraft fee on deposit accounts.[78]

The day after the CFPB announced its proposed interpretive rule, the Dave app put out a statement: "Dave's ExtraCash product is structured as a bank-originated overdraft …. As result, we believe ExtraCash and our optional fees sit within the overdraft regulatory framework that is distinguished from EWA and paycheck advance products."[79] MoneyLion appears to be pursuing the same overdraft evasion. In a filing with the Securities and Exchange Commission on August 6, 2024, MoneyLion states that it has amended its agreement with Pathward bank "in order to enable the Company to offer overdraft protection in connection with the Program Services [RoarMoney demand deposit accounts and debit cards with Pathward]."[80]

Overdraft credit is clearly credit.[81] But Regulation Z excludes from the definition of finance charge "[c]harges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing."[82] These providers will likely claim that, notwithstanding the CFPB's clarification that expedite fees and most so-called "tips" are finance charges, their tips and other fees fall under that overdraft fee exclusion.

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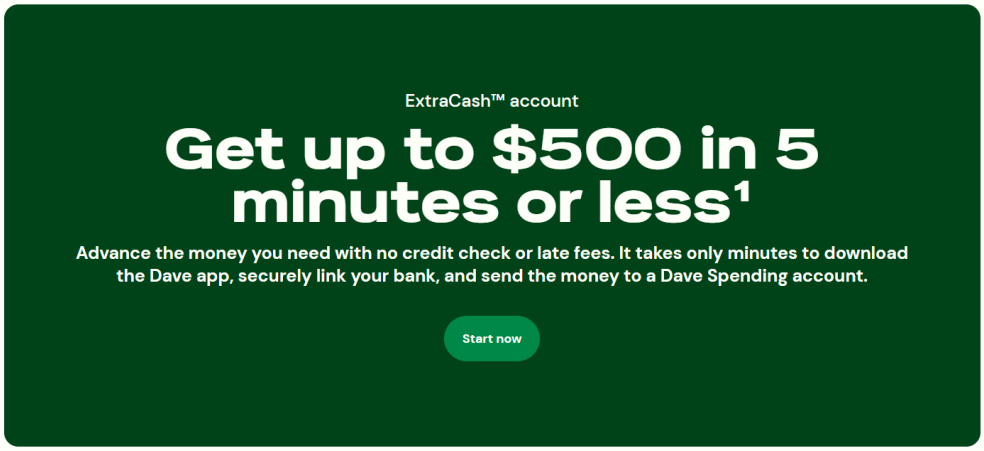
[77] *See* NCLC, Comments on CFPB's Proposed Rule Governing Overdraft Lending at Very Large Financial Institutions, Docket No. CFPB-2024-0002, at 61-64 (Apr. 1, 2024) ("NCLC Overdraft Fee Comments").
[78] *See id* at 56-76.
[79] Dave, Press Release, Dave Issues Statement Regarding CFPB Proposal (July 18, 2024).
[80] MoneyLion Inc., SEC Form 8-K at 1 (Aug. 6, 2024).
[81] *See* NCLC Overdraft Fee Comments at 34-36.
[82] Reg. Z, 12 C.F.R. § 1026.4(c)(3).

The Regulation Z exemption for overdraft fees is not in the TILA statute, was designed in the paper check era for the occasional courtesy of covering a check that would otherwise bounce, and has been exploited by banks over the years in ways that severely undermine TILA.[83] Thus, the CFPB appropriately proposed recently to narrow that exemption for institutions over $10 billion.[84]

But the CFPB does not need to conduct a rulemaking in order to pierce the form of fictitious overdraft coverage and discover the true substance: a loan subject to TILA. The CFPB should use its enforcement and other authorities to stop evasions.

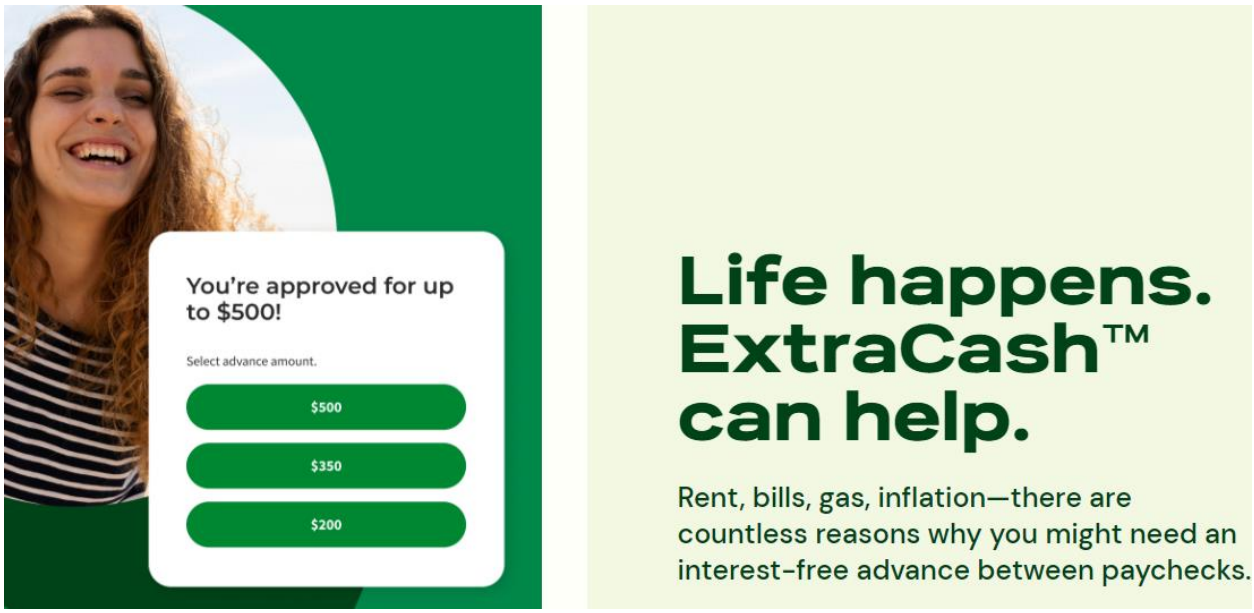
The following analysis focuses on Dave. But a similar analysis might apply to other advances structured as overdrafts.

Dave's fake overdraft advances are far different from true overdraft protection offered on a real deposit account. Dave's website advertises "advances," not deposit accounts with overdraft protection:[85]



Dave offers an "interest-free advance between paychecks," with screens showing "You're approved."[86]

[83] *See* NCLC Overdraft Fee Comments.
[84] See CFPB, Notice of Proposed Rulemaking on Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13852 (Feb. 23, 2024).
[85] https://dave.com/extra-cash-advances (last visited 8/14/2024).
[86] *Id.*



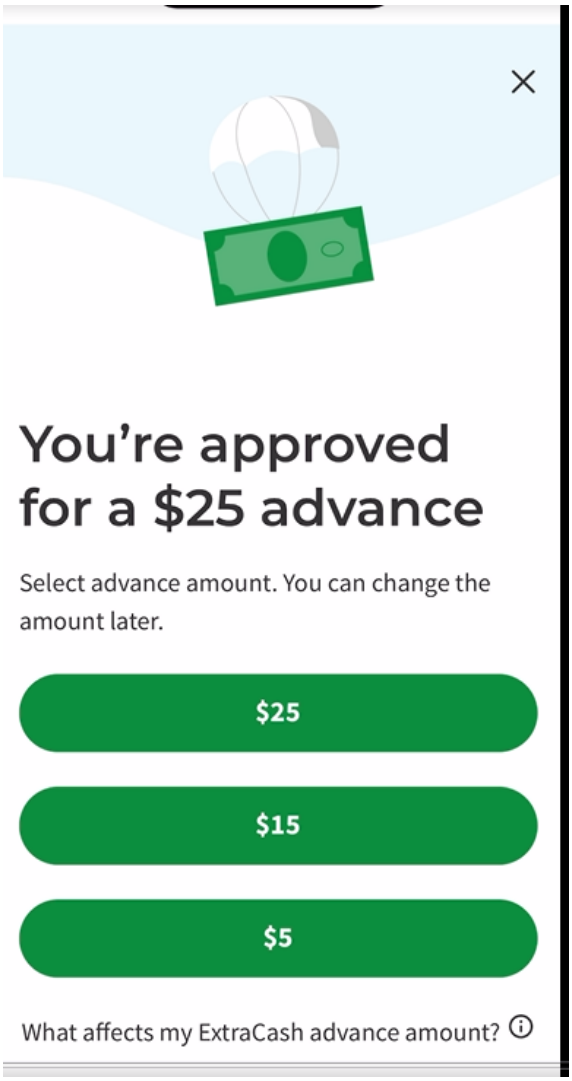
But the fine print in a footnote states that Evolve Bank provides the Extra Cash account, and advances "are provided as an overdraft, which causes the Extra Cash account to have a negative balance."[87]

The footnote links to an agreement for the "Dave ExtraCash Account Deposit Agreement and Disclosures."[88] When a consumer opens an Extra Cash account, the terms state that "we will also establish a deposit account or omnibus custody account ('Sub-Deposit Account') opened in Evolve's name for your benefit." The two accounts "are considered a single account" and "[t]he existence of the Sub-Deposit Account is *only for internal purposes and to accommodate our business needs*, and will not affect the manner in which you use your Extra Cash Account."[89] "Overdrafts" are referred to in the agreement as "Advances." Consumers are also given an "Advance Limit" that is "clearly communicated to you via the Mobile App" when consumers request a transfer.

The deposit account is limited to "a maximum balance of up to $500" and need not contain any balance at all.[90] Consumers who actually want to hold deposits through Dave get the separate Dave Checking Account.[91] Extra Cash Account does not appear to come with any debit card, checks, bill pay, or other mechanism to spend money that might trigger an overdraft.

How "overdrafts" happen is not entirely clear. First, Dave appears to tell the consumer through the app that Dave has agreed to make an advance:[92]

[87] *Id.*
[88] Dave ExtraCash Account Deposit Agreement and Disclosures Last Updated August 9, 2024, https://dave.com/extra-cash (last visited 8/19/2024) ("ExtraCash Deposit Agreement").
[89] *Id.* (under "B. Sub-Deposit Accounts) (emphasis added).
[90] *Id.*
[91] https://dave.com/spending-account (last visited 8/19/2024).
[92] Screenshot of app of consumer taking out an advance, on file with NCLC.



Then, the consumer selects how much of an advance they want and how fast, agrees to the express fee, and agrees to how and why the advance will be repaid automatically from the linked "settlement account." The consumer then clicks "transfer cash," which moves the funds from the ExtraCash account to a linked bank account where they can be accessed or spent.[93] That transfer apparently triggers the negative balance that Dave considers to be the overdraft.

Transfers of the "overdrafts" carry an optional express fee: "3% of the advance amount; $3 minimum" for transfers to the Dave Checking account, and "5% of the advance amount; $5 minimum" for transfers to an external account. ACH transfers are free.[94]

[93] https://dave.com/extra-cash-advances (last visited 8/19/2024) ("I'm approved for an ExtraCash™ advance. Now what? Choose how much of the advance you want to take, up to your approved amount. Then choose how you want to transfer it: instantly to your Dave Checking account (this costs a small fee) or within an hour to another debit card (this costs a small fee too)").
[94] Extra Cash Deposit Agreement.

The whole concept of express fees in an overdraft situation is bizarre. True overdrafts are approved instantly to cover a pending transaction. They are not loans that are delivered on a faster or slower schedule.

The Extra Cash account, with its limited balance and purpose, is a disguised form of credit. The true substance of these advances is a loan, not an overdraft on a deposit account. For purposes of the Regulation Z finance charge exception for charges for "paying items that overdraw an account"[95]:

- The request for an advance, or the transfer of an approved advance, should not be viewed as an overdrawn "item";
- The Dave Extra Cash account should be viewed as a credit account, not a deposit "account" within the meaning of that exception;
- The transfer of the funds, the expedite fee, and any tip or donation should be viewed as ones "previously agreed upon in writing" that are not eligible for the exception. Dave's approval of the request for a loan is such an agreement, and it appears that consumers agree in writing to pay the expedite fee and any tip or donation before the advance is made.

Separate and apart from the technical wording of the Regulation Z exception, these transactions should be viewed as evasions subject to TILA and to the ban on unfair, deceptive or abusive practices.
The CFPB should also consider whether these transactions violate the EFTA ban on compulsory use of preauthorized electronic fund transfers to repay credit.[96] The agreement requires consumers to enroll in a "Balance Settlement feature" that allows funds to be transferred from linked bank accounts into which consumers receive "an ongoing direct deposit." The transfers will be processed "on the date we estimate you will receive your next direct deposit." Given the pattern of repeat use, typically every pay period, that is common for cash advances, these transfers are likely to happen at substantially regular intervals and may be covered by the EFTA rules for preauthorized electronic fund transfers.

2. The CFPB should address "tips" on overdrafts on other nonbank deposit accounts.

In addition to cash advances disguised as overdrafts on fake deposit accounts, other companies such as Chime[97] and Albert[98] are using "tips" as a form of overdraft fee on deposit accounts that do appear to be intended to hold funds.[99] (Albert also requires a higher- level subscription fee, as discussed below.) While this use of tips may be outside the proposed interpretive rule, we encourage the CFPB to address it and prevent evasions.

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[95] Reg. Z, 12 C.F.R. § 1026.4(c)(3).
[96] 15 U.S.C. § 1693k. As noted above, overdraft credit is credit. The Regulation E definition of "credit" is "the right granted by a financial institution to a consumer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment. Reg. E, 12 C.F.R. § 1005.2(f). A negative balance is a debt, and the deposit account agreement gives the right to set-off and collect that debt.
[97] https://www.chime.com/ (last visited 8/20/2024).
[98] Albert's Terms of Use, Last updated: August 5, 2024, https://help.albert.com/hc/en-us/articles/16768060313111-Albert-s-Terms-of-Use (last visited 8/20/2024) ("Albert Instant Overdraft Coverage ('Albert Instant') is an overdraft advance coverage feature that allows you to cover your debit card purchase transactions, ACH transfers, ATM withdrawals, and other electronic transfers from your Albert Cash account to an external account (each, a 'Qualifying Transaction' and collectively, 'Qualifying Transactions') that draw more than the balance available in your Albert Cash account up to a specified amount (the 'Limit')").
[99] NCLC Overdraft Fee Comments at 58-61.

The CFPB's proposed overdraft rule will not reach these programs because they use banks below the proposed $10 billion threshold. In addition to the size limitation, the CFPB's proposed definition of "very large financial institution" focuses on insured depositories may not directly reach nonbank entities like Chime.[100]

One approach is to clarify that nonbank bank accounts are prepaid accounts subject to the Regulation Z rules governing overdrafts and credit features on those accounts.[101] We also urge the CFPB to encompass nonbanks that offer deposit accounts within the overdraft fee rule and to do a subsequent overdraft fee rulemaking to address overdrafts at smaller institutions.[102]

The CFPB should also take appropriate enforcement or other action if entities fail to comply with existing Regulation E overdraft fee rules or commit unfair, deceptive or abusive practices.

3. The Bureau should not allow lenders to evade APR disclosure requirements by splitting loans into pieces

For closed-end credit, TILA requires APR disclosures only if the finance charge exceeds $5.00, or $7.50 for loans over $75.[103] (If advances are offered under an open-end credit plan, then there are more serious loopholes in the APR disclosure requirements.) Thus, lower-cost cash advances will not have to make any APR disclosures.

Lenders may seek to evade the APR disclosure requirement by splitting a larger loan into several pieces. Even if those evasions are not deliberate, consumers who take out multiple loans in a pay period and pay finance charges in total above the TILA thresholds will not get the important APR disclosures required by TILA if each loan is viewed separately for APR requirement purposes.

Focusing on the substance over the form, to protect borrowers and prevent evasions, the CFPB should aggregate all of the costs paid within a single pay period in assessing whether APR disclosures are required. Lenders could comply either by capping costs per pay period to avoid reaching the $5 or $7.50 threshold; by providing APR disclosures for all advances; or by programing their apps to provide APR disclosures once thresholds are reached.

Some lenders already require borrowers to take out multiple loans in order to get their desired advance, separate and apart from whether enough wages have been "earned." They likely do that in order to increase the number of expedite fees and to make the "tips" look smaller. But that manipulation would also help them evade TILA's APR disclosure requirements.

For example, EarnIn advertises prominently on its homepage that people can "access up to $750/ pay period."[104]

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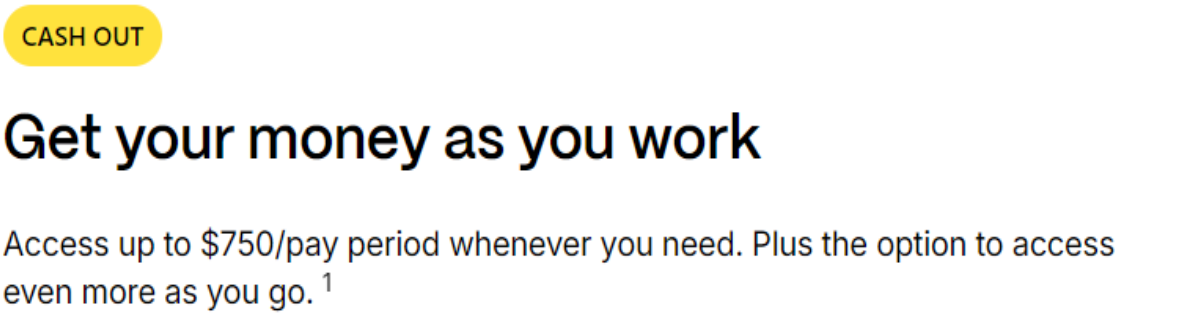
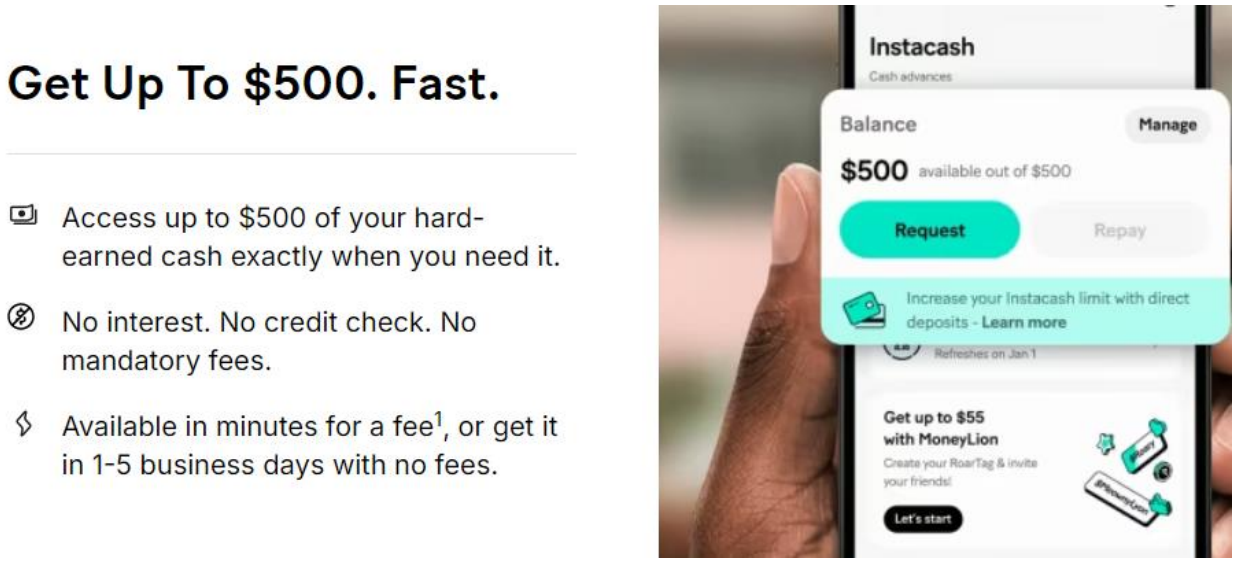
[100] *See id.* at 65-66.
[101] *See id.* at 61-64.
[102] *See id.* at 53-55.
[103] 15 U.S.C. § 1638(a)(4); Reg. Z § 1026.18(e).
[104] https://www.earnin.com/ (last visited 8/15/2024).



But a fine-print footnote says that access to that $750 is subject to a "Daily Max" and directs people to click on the terms of service for details. Buried deep in more fine print, the terms of service merely say that there is a Daily Max, different from the "Pay Period Max," which EarnIn "may increase or decrease (potentially to $0) based on a variety of factors including your bank balance, spending behavior, repayment history, and Earned Income amount."[105] The terms of service tell consumers: "Please refer to the FAQs for more information about increases and decreases to your Pay Period Max." Those FAQs say: "Community members have a Daily Max of up to $100."[106] Thus, a consumer who wanted to borrow $750 would have to take out eight loans – seven $100 loans and one for $50. This artificial (and deceptive) limit serves not only to increase the number of transactions for which EarnIn can charge expedite fees and tips, but also potentially to create the appearance that the finance charge is less than the minimum.

Similarly, MoneyLion promotes "Get Up To $500. Fast," "in minutes for a fee."[107]



[105] EarnIn, Cash Out User Agreement (Effective Date 2024-01-15), https://www.earnin.com/privacyandterms/cash-out/terms-of-service (last visited 8/15/2024).
[106] EarnIn, What is a Max?, https://help.earnin.com/hc/en-us/articles/360036131814-What-is-a-Max (last visited 8/15/2024).
[107] https://www.moneylion.com/instacash (last visited 8/15/2024).

However, a fine-print footnote says "There is a $100 max disbursement amount at a time. For example, if you have a $200 IC Base Limit and need $200, you will have to make 2 transfers: $100 each."[108] It does not appear that there is any limit to the number of advances per day, so apparently several $100 advances could be taken out within minutes of each other – which would be necessary in order to access that $500 "within minutes."

Consumers have complained about these limits:

- "They charge a fee to get funds right away, and will tell you they'll give a certain amount (say, $250), but you can only take up to $100 at a time. So if you actually need that full 250, your fees triple since you have to take 3 separate advances. Luckily have had my head above water enough to delete it, but man did I hate it when I needed it."[109]
- "They say I'm eligible for up to $250, but one can only borrow in $100 increments, or you could do two x $100 + one $50 increment. This is apparently a way to maximize fees earned …."[110]
- "you should be allowed to draw your ax with just one fee and/or the optional tip"[111]

There is no reason why a lender should arbitrarily impose a lower daily or per loan maximum that is below the amount of earned income permitted to be advanced. The CFPB should not countenance manipulations that evade TILA requirements, and the CFPB should make clear that it will enforce APR disclosure rules by looking at the total lending picture, not the evasive form of individual pieces of loans. Even if advance amounts are not manipulated and are limited to the amount of earned income, it is still important to require APR disclosures when total costs for the pay period exceed the TILA *de minimis* levels. The $5 and $7.50 thresholds were undoubtedly designed for larger loans that lasted several months, not for small ones that last only a few days. A *de minimis* fee on a 90-day $500 loan is not *de minimis* on a $100 loan that is reborrowed repeatedly for months at a time.

Costs add up with repeat borrowing, which is why the APR is an important way of helping consumers understand the relative cost of loans that appears low in isolation, as discussed in part I above. Given the way this market works, with a single app and a single account, and a lending cycle focused on a payroll or other income cycle, APR disclosures requirements should be triggered by the full costs of borrowing during a given payroll cycle.

[108] *Id*.
[109] Reddit, r/AskWomenOver30, justagirlamedDee (2023), https://www.reddit.com/r/antiwork/comments/14543dn/comment/jnj18cd/?utm_source=share&utm_medium=web2x&context=3.
[110] Reddit, r/overtyfinance, djronnieg, "Instacash app is apparently designed to extract accidental tips. Debt/Loans/Credit" (June 2024), https://www.reddit.com/r/povertyfinance/comments/1dhy235/instacash_app_is_apparently_designed_to_extract/.
[111] Eli Hampton, Review of MoneyLion on Google Play (April, 3, 2024),

4. Some subscription fees are disguised finance charges

The proposed interpretive rule does not address monthly fees charged for eligibility for cash advances. The Federal Trade Commission has brought lawsuits over cash advance apps that hide their fees and make it difficult to cancel subscriptions.[112]

The CFPB should investigate whether subscription fees required to be eligible for cash advances are disguised finance charges. To the extent that these fees are imposed as an incident to or a condition of the extension of credit,[113] they are finance charges under TILA.[114] The case for TILA coverage is especially strong if the credit feature, or a larger amount of credit, is only available on a higher-priced "premium" subscription-based version and credit is the primary reason that a consumer would want that version. Depending on the amount of the fee and the other services provided, if credit is the primary benefit of the subscription service, that fee might appropriately be viewed as a finance charge even if credit is available without paying for a higher-level account.

For example, Brigit has a free option that provides "opportunities to earn and get exclusive offers" and a "Finance Helper" to "[s]tay on top of your expenses with spending breakdowns, bill forecasts, and earnings comparisons," but without a credit feature, or a "Plus" subscription that includes "Instant Cash" advances for $8.99/month.[115] Although there are other features that come with a Plus subscription, credit appears to be the primary reason consumers would pay that fee, and the ability to "Get cash fast" is highlighted prominently on the home page.[116] Similarly, Albert requires a Genius level subscription of $14.99, above the regular $9.99 cost, to be eligible for Albert Cash and Albert Instant Overdraft Coverage.[117]

Monthly fees fit the provision of the finance charge definition covering "Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account (except a prepaid account as defined in § 1026.61) to the extent that the charge exceeds the charge for a similar account without a credit feature."[118] The Official Interpretations provide an example:

> A $5 service charge is imposed on an account with an overdraft line of credit (where the institution has agreed in writing to pay an overdraft), while a $3 service charge is imposed on an account without a credit feature; the $2 difference is a finance charge.[119]

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[112] FTC, Press Release, FTC Action Leads to $18 Million in Refunds for Brigit Consumers Harmed by Deceptive Promises About Cash Advances, Hidden Fees, and Blocked Cancellation (Nov. 2, 2023); FTC, Press Release, FTC Acts to Stop FloatMe's Deceptive 'Free Money' Promises, Discriminatory Cash Advance Practices, and Baseless Claims around Algorithmic Underwriting (Jan. 24, 2024).
[113] Reg. Z, 12 C.F.R. §1026.4(a).
[114] We will not, in these comments, address the question of whether the advances are open-end credit (in which case the fee must be disclosed but not included in the APR) or closed-end credit (in which case the fees would be part of the APR).
[115] https://www.hellobrigit.com/pricing (last visited 8/14/2024).
[116] https://www.hellobrigit.com/ (last visited 08/14/2024).
[117] https://albert.com/ (last visited 8/20/2024).
[118] Reg. Z, 12 C.F.R. § 1026.4(b)(2).
[119] Official Interpretation of Reg. Z, 4(b)(2)-1.i.

Although there is an exception to the finance charge definition for fees charged for participation in a credit plan,[120] that exception only applies if there is a credit plan. It is not clear if these advances should be viewed as individual loans or as a credit plan. In addition, as the CFPB explained when adopting the prepaid card rule, the definition of "finance charge" is broad enough to encompass participation fees, as those fees are incident to credit, and without paying the fees, the consumer would not have use of the credit.[121] The participation fee exemption was adopted by the Federal Reserve Board and is not in the TILA statute. The Bureau included participation fees in the finance charge for prepaid accounts because the fees could represent significant credit-related costs to consumers, and the credit could escape the protections under Regulation Z if it carried participation fees but no interest or transaction fees.[122]

The CFPB should look beyond the form of subscription plans that are purportedly for services other than credit to discover the truth: that the subscription fees are finance charges for credit.

Conclusion

The National Consumer Law Center and the Center for Responsible Lending thank the CFPB for providing the opportunity for public input on its proposed interpretive rule that affirms that earned wage advances are credit and associated tips and expedite fees are finance charges.

We believe this rule will provide much needed clarity around the regulation of these credit products and give consumers the transparency in costs that they are entitled to but have been deprived of to date. The Bureau has abundant legal support for deeming paycheck advances credit and debt. Tips and finance charges are correctly deemed finance charges under the law.

We have further highlighted that to fully encompass the variety of product models, the Bureau should revise the interpretive rule to broaden its scope. We have made suggestions to eliminate ambiguities in the proposed rule that could be exploited by providers. Further, there are evolving models for paycheck

[120] Reg. Z, 12 C.F.R. § 1026.4(c)(4).
[121] 79 Fed. Reg. 77102, 77230 (Dec. 23, 2014) ("The Bureau believes that this exception [for participation fees] is not dictated by TILA's definition of ''finance charge.'' Rather, the [Federal Reserve] Board added this exception to § 1026.4(c)(4) in 1981 based on an interpretation letter that the Board has previously issued.366 In the interpretation letter, the Board excluded annual fees for membership in a credit plan from the definition of 'finance charge' because these fees are not imposed incident or as a condition to any specific extension of credit.367 Nonetheless, the Bureau believes that the term 'finance charge' in TILA is broad enough to reasonably include periodic fees for participation in a credit plan under which a consumer may obtain credit because those fees would be 'incident to the extension of credit.' Without paying the periodic fees for access to the credit plan, the consumer could not use the credit plan to access credit.").
[122] *Id*.

advances which are developed to evade state and federal laws. The Bureau should stay aware and protect consumers from evasions of TILA and potential unfair and deceptive practices.

Thank you again for the opportunity to share our support and suggestions.

Sincerely,

National Consumer Law Center

The Center for Responsible Lending

Consumer Federation of America