Letter in Opposition to New Mexico HB 59

HB 59 would exempt fintech payday loans from New Mexico's lending laws and interest rate limits. The bill is based on the model law by the conservative American Legislative Exchange Council (ALEC). It offers a fee limit that would still result in triple digit APRs and mounting fees, places no cap on purportedly voluntary "tips" that people are manipulated into paying, and uses a slew of meaningless protections as cover for exempting a broad swath of cash advance loans from New Mexico's recently enacted interest rate limits and strong consumer protection laws.

Make no mistake: If this bill passes, triple-digit APR payday lending, including by traditional payday lenders, will return to New Mexico.

How Earned Wage Advances and Other Fintech Cash Advances Work

Earned wage advances (EWAs) are loans made ahead of payday, repaid on payday. With employer-based EWAs, a third party typically advances money, based on the amount of wages that have been earned but are not yet due, and is repaid by the consumer through payroll deduction or another method the consumer authorizes. Some employers cover the costs or the programs are structured so they are free to workers, but more commonly workers pay fees.

Other direct-to-consumer cash advances are simply fintech payday loans. They have no connection to payroll and are repaid by debiting a consumer's bank account. Some advance public benefits and other forms of income. They can and do trigger overdraft and nonsufficient funds (NSF) fees. These lenders collect "tips," "donations" or instant access fees.

Both versions result in a cycle of reborrowing and multiplying costs.

The Cost and Impact of Fintech Cash Advances: 330% APR Loans and Paying to be Paid

As data has started to come in, several points have become clear.

1) Most workers pay expedite fees.

Lobbyists focus on free options, but those options are slow, inconvenient, and used by few borrowers. The market is "fast cash" – people who can't wait for payday – and most people pay expedite fees and other costs.

The District of Columbia Attorney General, which sued EarnIn, found that 90% of borrowers have paid a "Lightning Speed" fee and 83% of transactions included those fees. EarnIn has charged $3.99 to $5.99 though EarnIn's cost to provide instant access was 7.5 to 20 cents.

The Center for Responsible Lending found that nearly 8 in 10 survey respondents typically paid a fee to receive funds faster, with 72% of those paying a fee doing so **1-2 times per week.**

The Consumer Financial Protection Bureau found that few employers cover the cost, subsidizing less than 5% of total fees, and that when employers did not cover the cost, **"nearly all workers paid a fee for expedited access to their funds."**

2) Direct-to-consumer apps manipulate people into paying "tips" and "donations."

The California Department of Financial Protection and Innovation identified "**multiple strategies that lenders use to make tips almost as certain as required fees."** These strategies range from putting in high tips by default, imposing dark patterns and other devices to make it difficult to take those tips out, using psychological manipulation, and counting on people's fears that they will not be allowed to keep borrowing or increase their low limits if they do not tip enough.

We reviewed a video of one borrower attempting to take out an advance without a tip and counted **14 different messages about the importance of tipping and 17 additional steps the borrower needed to take to avoid the tip.**

California studied EWAs and collected data on nearly 6 million advances and found that companies that **push "tips" collect them 73% of the time**.

3) Average APRs are high – 100% to 300% APR for little credit.

California found that the average APR is over 330% for both tip-based and employer-based advances. The Center for Responsible Lending found the average APR for an advance repaid in 7 to 14 days was 367%. The CFPB, which studied only

employer-based advances but did not have transaction level data like California's, found a typical 109.5% APR.

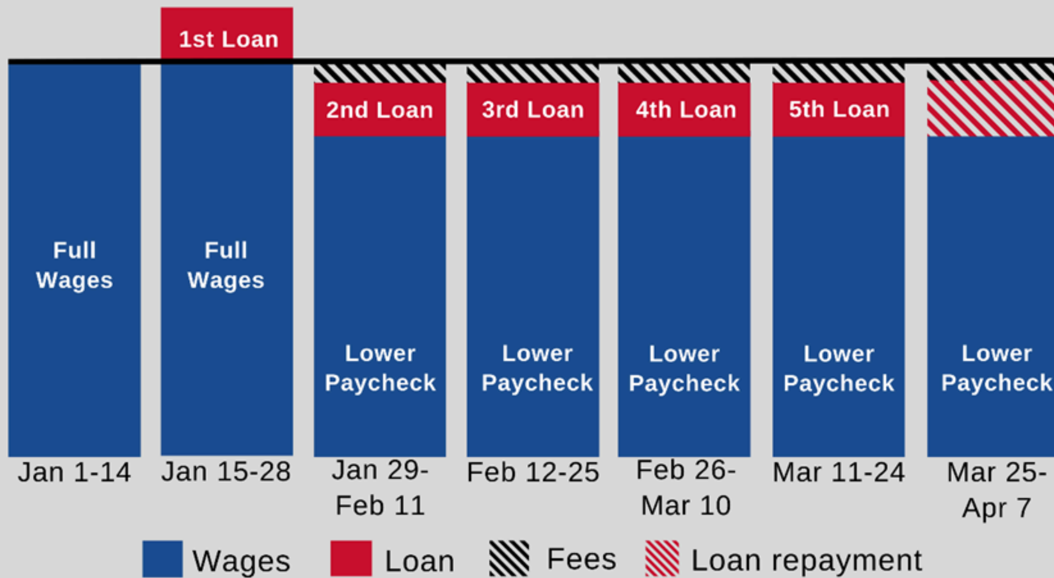
These APRs matter because people get little credit, often under $100, but borrow repeatedly prolifically, with costs adding up.

4) Fintech cash advances <u>increase</u> overdraft fees, as borrowers end up on a cycle of reborrowing more severe than with payday loans, simply paying to be paid with <u>less</u> liquidity, not more.

California found that workers take an **average of 36 loans a year and up to 100.** The CFPB's study of employer-based products found the average worker had 27 transactions a year.

As with payday loans, using next week's pay to pay this week's expenses leaves a hole in the next paycheck that triggers chronic reborrowing to meet expenses. Fees quickly snowball, and workers end up paying to be paid week after week, with less money rather than additional liquidity.

Not surprisingly then, rather than making it easier to make ends meet, fintech cash advances increase overdraft fees. The Center for Responsible Lending studied data from Brigit, Cleo Dave, EarnIn and FloatMe. CRL found that overdrafts on consumers' checking accounts increased 56% on average after use of an advance product. Prior to using the advances, half had zero overdrafts in the three months prior to using advances.These users newly started to overdraft on average 2.3 times, and as many as 35 times, in the three months after taking their first advance. Even heavy overdrafters had more overdrafts after beginning to use advances.



5) Lenders have recourse to the consumer's paycheck or bank account and almost always collect.

California found that, as a practical matter, with the ability to debit payroll or bank accounts, lenders **collect 97% of the time**, and claims that the loans are non-recourse are "immaterial."

The District of Columbia Attorney General, which sued EarnIn, described the various ways that EarnIn collects, concluding: **"Because it has established all these methods of ensuring repayment, Earnin has only a 1% risk of loss on its loans**, as it boasts to its investors."

Fintech cash advances providers do not need to sue or use debt collectors, but they have other methods to ensure they are repaid. Loans, such as reverse mortgages, can be "nonrecourse" and still be loans.

HB 59 Creates a Broad Exemption for Fintech Payday Loans, and Even Traditional Payday Loans, with Meaningless Protections

The bill exempts fintech payday loans from NM Stat § 58-15-17(J), which caps the APR of loans up to $10,000 at 36%, by declaring that these loans shall not be considered "a loan or other form of credit or debt, nor shall the provider be considered a creditor, debt collector or lender with respect thereto." This will allow loans ***with no limit whatsoever***

on the total cost or multiplying fees. The $7.50 fee limit alone can be 274% for a $100 10-day loan and 684% for a $40 one, and there is no limit on tips.

Lenders could force borrowers to pay multiple fees by artificially limiting loan size – as some already do – requiring borrowers to take out three $100 loans to get $300.

The California Department of Financial Innovation found that the average tip amount on an EWA loan was $4.09 and that workers take out an average of 36 EWA loans a year. With $7.50 expedite fees added in, under HB 59 that would translate into $417.24 in fees and tips from the average EWA borrower per year, or ***almost a whole week's wages for someone making minimum wage in New Mexico.***

Just like payday loans, most earned wage advances are advances of money by a third party, before pay is due, repaid later by the consumer (directly or indirectly). Indeed, the nation's small dollar loan laws arose out of the abuses of salary lenders. In a December 2023 letter, the CFPB traced the evolution of payday advances and found that earned wage advances "share fundamental similarities with payday lending products."

Even traditional payday lenders could exploit the bill's broad scope, which reaches any loan based on income that a consumer "represents" and a provider "reasonably determines" has been earned or accrued in exchange for services. **Payday lenders would merely need to (1) ask for the consumer's representation that they have worked a few days since the last paycheck and to (2) look at bank statements to determine the consumer's paycheck amount and schedule – as payday lenders already do.**

Any payday lender that fit the bill's broad definition would be free to offer triple-digit APR loans in New Mexico. In exchange, the so-called protections offered in the bill are meaningless and merely codify existing business models:

- Providers would have to offer a no-cost option, but they do so today, and those options are slow (delaying the advance) or inconvenient (not into the consumer's own bank account) and are hardly used by consumers. The nature of small dollar loans is based on urgency. That's why the vast majority of consumers pay for expedited funds.

- Declaring that tips are voluntary does not stop their high cost, the use of dark patterns and psychological tricks to push people into tipping or making it hard to undo a tip, or every possible repercussion of not tipping enough.

- The narrow requirement that the lender repay overdraft and NSF fees in limited circumstances does not cover all overdraft, NSF or late fees people

will incur, and pledges to repay those fees do not work today as people cannot get through to customer service or are often rebuffed when they do.

- The prohibition of credit reporting is meaningless, as payday lenders do not use or report to traditional credit bureaus today.

- The “non-recourse” ban on using debt collectors, lawsuits or debt buyers does not help as lenders have recourse to the paycheck or bank account, collect 97% of the time.

Old Wine in New Bottles

Evasions often take the form of new innovations. The payday loan industry got its start by arguing that it was not making loans, just charging check cashing fees on deferred checks. We must reject similar arguments equating fees for fintech cash advances to ATM fees as an excuse for gutting New Mexico’s consumer protection laws.

High-cost earned wage advances drain fees from low-wage workers, disproportionately from communities of color, who just end up paying to be paid. The loans should comply with New Mexico’s lending laws.