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CFPB: Earned Wage Access Advances Are Loans Subject to TILA

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On July 18, 2024, the Consumer Financial Protection Bureau (CFPB) issued a proposed Interpretive Rule addressing the regulatory treatment of earned wage access (EWA) products. The Interpretive Rule would provide that certain EWA products, which allow a consumer to access their earned wages before payday, are classified as loans and subject to the Truth in Lending Act (TILA) and its implementing regulation, Regulation Z.

Significantly, the Interpretive Rule would treat "tips" and expedited delivery fees – both common features of EWA products – as finance charges, requiring upfront disclosure to consumers of such charges and calculation of a single annual percentage rate inclusive of those charges. Once the CFPB finalizes the Interpretive Rule, it would overturn and replace the CFPB's November 2020 EWA Advisory Opinion.

2020 Advisory Opinion backlash

In establishing its position that the 2020 Advisory Opinion is an inadequate approach to federal EWA regulation, the CFPB described the 2020 Opinion as only addressing a narrow subset of EWA products that are "not common in the real market" (i.e., free, employer-based products). CFPB Director Rohit Chopra described the 2020 Advisory Opinion as creating confusion about what rules apply to EWA products, which, according to the Interpretive Rule, has "caused significant regulatory uncertainty."

Specifically, the 2020 Advisory Opinion explains that an EWA product is not "credit" as that term is used in TILA and Regulation Z if the EWA product meets **all** of the following conditions:

1. Providing the consumer with no more than the amount of accrued wages earned.
2. Provision by a third party that is fully integrated with the employer.
3. No consumer payment, voluntary or otherwise, beyond recovery of paid amounts via a payroll deduction from the consumer's next paycheck.
4. No other recourse or collection activity of any kind.
5. No underwriting or credit reporting.

The CFPB states that the 2020 Advisory Opinion did not address whether EWA products that do not meet all of the enumerated conditions would be subject to TILA and Regulation Z. In addition, the CFPB emphasized that the 2020 Advisory Opinion did not address what constitutes a "finance charge" with respect to any such product that is determined to be "credit."

What EWA products are covered under the Interpretive Rule?

The CFPB states that the Interpretive Rule would apply to EWA products that involve both:

- Providing 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.
- Repaying the third-party EWA provider via some automatic means, such as a scheduled payroll deduction or some other preauthorized debit, including but not limited to ACH, check or any other preauthorized debit, at or after the end of the pay cycle.

However, even if an EWA product meets those specific conditions, for TILA and Regulation Z to apply, the EWA product must involve a provider that regularly offers or extends consumer credit and in which the EWA product

is subject to a finance charge.

EWA products as 'credit'

First, noting that Regulation Z defines credit as the "right to defer payments of debt or to incur debt and defer its payment," the CFPB concluded that EWA products are in fact "credit" for purposes of TILA and Regulation Z. This conclusion is largely based on the CFPB's analysis that, for purposes of TILA and Regulation Z, the term "debt" as used in the definition of "credit" includes "any obligation by a consumer to pay another party."

This expansive view of "credit," which covers any payment obligation owed by a consumer in the context of an EWA transaction (regardless of whether the consumer is subject to a fee), directly conflicts with the 2020 Advisory Opinion, which states that some EWA products are not "credit" for purposes of TILA and Regulation Z because they do not constitute "debt." Pointing out that the 2020 Advisory Opinion emphasized that it is the absence of fees in connection with an EWA product that supports a conclusion that such products are not "debt," and therefore not "credit," the CFPB plainly states within the Interpretive Rule that except for a "small number" of employer-provided EWA products, the vast majority of EWA transactions involve a consumer payment obligation and therefore are considered credit for purposes of TILA and Regulation Z.[1]

'Tips' and expedited delivery fees as finance charges

Second, the CFPB reached the conclusion that both "tips" (and similar designations such as gratuities, etc.) and expedited delivery fees would be considered finance charges under TILA and Regulation Z.

'Tips'

With respect to "tips," the CFPB states that "[u]nder certain circumstances, 'tips' and similarly styled consumer payments may be 'imposed directly or indirectly by the creditor' such that they are part of the finance charge." Importantly, the CFPB takes the position that an EWA provider, when using its authority (whether real or implied) in connection with "exact[ing] a tip," is in fact imposing a payment obligation upon a consumer – whether the consumer chooses to tip or not.

Rather than providing a bright-line test as to whether a "tip" or similar payment is imposed by an EWA provider as part of a finance charge, the CFPB instead provides a list of "[r]elevant considerations"[2] in making such a determination: (i) "soliciting a 'tip' before or at the time of a credit extension (rather than some significant time after it)"; (ii) "labeling the solicited payment with a term (such as 'tip') that carries an expectation that the consumer will make such payment in the normal course"; (iii) "setting default 'tip' amounts or otherwise making it practically more difficult for the consumer to avoid leaving a 'tip'"; (iv) "suggesting 'tip' amounts or percentages to the consumer"; (v) "repeatedly soliciting 'tips,' even in the course of a single transaction"; and (vi) "stating or otherwise implying, directly or indirectly, truthfully or otherwise, that 'tipping' may impact subsequent access to or use of the product."

Expedited delivery fees

With respect to expedited delivery fees, the CFPB states that "Regulation Z also covers expedited delivery fees as finance charges because such a fee is a 'condition' of an extension of credit." Importantly, the CFPB's determination that an expedited delivery fee is a finance charge is not impacted by whether an EWA provider gives a consumer the choice to pay an expedited fee for quicker delivery of funds or to pay no fee for a standard delivery of funds. The CFPB notes that the "[a]vailability of a slower speed does not control the cost of credit for the faster form of credit" and "[t]hough consumers may not have to opt for faster funds, when they do so, the resulting speed is a feature of the credit extended, so the resulting fee is part of the cost of credit."

What's next

The Congressional Review Act (CRA) gives Congress the ability to review and potentially rescind new federal rules issued by government agencies, including interpretive rules. A key component of the CRA in this context is the 60-day "lookback" window. The lookback window opens 60 legislative days from the final adjournment of the 118th Congress. During the lookback window, the rules that a government agency finalizes are subject to review by the next session of Congress, which will begin in January 2025. This lookback period allows the new Congress to review and potentially disapprove rules made at the end of the previous administration to prevent

so-called midnight regulations that may be unfavorable to the incoming administration. Under the CRA, Congress can move to rescind regulations with a simple majority vote in both chambers on a resolution of disapproval. If Congress passes the resolution and the president signs it, the agency is prohibited from issuing a "substantially similar" rulemaking without further congressional action.

Additionally, while some EWA providers may already comply with applicable portions of Regulation Z – particularly if they operate in states that have similar requirements – other applicable Regulation Z requirements may provide new operational and logistical challenges. But even beyond EWA transactions, we note that the Interpretive Rule could impact other alternative financial products. For example, the CFPB's claim that TILA "has long been understood to cover contingent obligations" presents the potential for application of the CFPB's reasoning in the Interpretive Rule to other nontraditional credit arrangements where repayment is contingent upon future events, income, etc.

While the CFPB claims that it is not required to provide a public comment period for the Interpretive Rule under the Administrative Procedure Act, it is accepting comments until August 30, 2024, and the CFPB indicates that it "may" make revisions to the Interpretive Rule based on public comments.

Notes

1. The CFPB explains that "[e]arned wage products provide consumers with 'the right to defer payment of debt or to incur debt and defer its payment' because they incur a 'debt' when they obtain money with an obligation to repay via an authorization to debit a bank account or using one or more payroll deductions. It does not matter that the obligation to repay is sometimes satisfied via payroll deduction. It is still an act of repayment. In contrast, when an employer pays wages, not later act of repayment is required, by deduction or otherwise."
2. With respect to how these considerations play into a determination of whether a "tip" or similar payment is part of the finance charge, the CFPB states that "[t]he presence or absence of one or all of these considerations may not be determinative. The importance and relevance of these and other considerations will vary in the context of a particular product and how it is offered or provided to consumers."

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