



House Committee on Commerce and Economic Development
Public Hearing Regarding H. 87
March 13, 2023

My name is Monica Burks, and I am Policy Counsel for the Center for Responsible Lending (CRL), a non-profit, non-partisan policy and research organization dedicated to building family wealth through the elimination of predatory lending practices. CRL is affiliated with Self-Help Credit Union, a national community development financial institution that provides access to safe, affordable financial services to low-income communities and borrowers. I am here on behalf of CRL and the communities we serve to recommend you to vote H. 87 out of committee.

First, I want to express my admiration and appreciation for the careful and critical approach you all have taken in considering the impact of each portion of this bill. Your commitment to the financial wellbeing of the people of Vermont is inspiring. In this spirit, we recommend that EWA providers be regulated as creditors, including being subject to applicable usury laws and finance charge disclosure requirements.

Companies that offer loans directly to consumers against their next paycheck are marketing a technology-based form of payday loan, a harmful product that Vermont and other states have appropriately prohibited, with rates capped at 18% annually for single payment loans in Vermont. These loans are designed similarly to payday loans, with terms that tend to create a long-term cycle of debt for borrowers.

We share concerns expressed by the Department of Financial Regulation that so-called no-cost options for consumers may be illusory and difficult to access, negating their utility for consumers. According to Earnin's terms of service, the non-expedited advance would take 1-2 banking days to be deposited, while the expedited service takes up to 30 minutes. The overwhelming majority of users pay express fees when paying such fees is necessary to get immediate access to cash (after all, that is the entire purpose of getting an EWA advance).

EWA providers use a host of techniques, adopted from the field of Behavioral Economics, to induce users to pay the company a "tip" for a product that is advertised as "free." For example, EWA providers that derive revenues from tips typically design their consumer-facing applications ("apps") to default to payment of a tip, so that the user must take additional steps to avoid paying. Other tactics include suggesting to the users that paying a "tip" helps keep the service available. For example, the Earnin terms of service tells consumers that tips "help fund" the service and "keep [it] going." These tactics have proved highly effective at driving users to pay "tips" to the EWA providers.

The DFR along with NCLC have illustrated the substantial finance charge represented by tipping, expedite fees, and subscription fees. This committee has also heard a representative from Earnin testify

that 40% of their revenue comes from tips and that they would have to significantly change their business model without them. This is actually strong evidence that their business model depends on loans for which the true cost is often going to be higher than advertised or disclosed, with an APR that would well exceed Vermont's usury cap.

Proponents of this legislation have generated significant confusion by asserting that the Consumer Financial Protection Bureau and other states have blessed EWA products like those allowed under the bill. That is flatly inaccurate. In fact, the CFPB and regulators in other states have demonstrated serious concerns about certain types of EWA products authorized by this legislation. At a minimum, these ongoing regulatory processes and investigations should cause this committee to forgo further consideration of this bill rather than enshrine in Vermont law a business model that gives other regulators serious concerns.

First, contrary to what this committee has been told, the CFPB has said only that EWA products that are entirely free to the consumer, including not soliciting so-called "tips" from users, are exempt from the federal Truth in Lending Act. In the waning days of the Trump administration, the CFPB issued an Advisory Opinion that EWA products are not "credit" under TILA *so long as* (among other things) the "employee makes no payment, voluntary or otherwise, to access EWA funds or otherwise use the Covered EWA Program, and the Provider or its agents do not solicit or accept tips or any other payments from the employee."¹ The CFPB later expressly clarified that this Advisory Opinion did not apply to businesses that collect fees from consumers, whether voluntary or otherwise, and so provided no support for legislation similar to that which is before this committee.²

In fact, the CFPB has indicated concerns about EWA models that are not completely free to the consumer, announcing in summer 2022 that it "plans to issue further guidance soon to provide greater clarity concerning the application of the [federal] definition of 'credit'" to EWA products.³ Later, in fall 2022, the agency invoked its authority to supervise nonbank financial companies that provide consumer financial products or services and that CFPB has reasonable cause to determine are engaging in conduct that poses risks to consumers.⁴ Certain EWA providers may end up being subject to CFPB oversight through this area of CFPB jurisdiction. Finally, the Government Accountability Office released a report just one week ago highlighting the risks associated with EWA products and emphasizing the need for the CFPB to clarify its stance on whether EWA providers are subject to the Truth in Lending Act.

Similarly, the California Department of Financial Regulation and Innovation has said only that EWA providers that help employers use *the employer's own funds* to provide payroll advances and charge, at most, nominal fees to the consumer are exempt from the state's lending laws.⁵ The DFPI made crystal clear that EWA providers that *use their own funds to make loans to consumers* "could not rely

¹ https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf

² <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2022/01/1456000-1456884-letter-from-s.-frotman-to-b.-ruggia-et-al-re-ewa-ao-1.18.22.pdf> (January 2022 letter from CFPB General Counsel clarifying scope of 2020 Advisory Opinion)

³ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-special-regulatory-treatment-for-payactiv/>

⁴ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/>

⁵ <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf>

upon [the] reasoning” in its Interpretive Opinion.⁶ In fact, the DFPI has taken steps to investigate EWA providers by signing memoranda of understanding with many EWA providers that require the providers to furnish data about their businesses to the state.⁷ CRL’s understanding is that the DFPI will soon issue a comprehensive regulatory package for EWA providers.

Finally, regulators in nearly a dozen states have announced a multi-state joint investigation in EWA companies like Earnin that use the tips model. New York State, which is leading the investigation, described the investigation as centered on the fact that “some of these firms appear to collect usurious or otherwise unlawful interest rates in the guise of ‘tips,’ monthly membership and/or exorbitant additional fees, and may force improper overdraft charges on vulnerable low-income consumers.”⁸

As acknowledged in their own testimony before this committee, EWA providers target “liquidity constrained and credit thin” laborers living paycheck to paycheck, often struggling with insufficient income to meet their expenses. But costly debt tends to make matters worse. EWA providers should not get a pass from Vermont’s usury limits when lending to these individuals. We do not believe this bill, as drafted, is adequate to protect Vermont consumers. CRL joins the Department of Financial Regulation and NCLC in recommending that any regulation of EWA products include provisions classifying these payday advances as credit, and the providers as lenders. We recommend defining tips and expedite fees as finance charges and subjecting said fees to the existing state usury cap on interest for these single payment loans.

This bill would codify a business model that by design drains millions of dollars from consumers without the guardrails Vermont requires of similarly situated credit products. We urge this committee to decline to vote this bill out of committee.

Thank you for your consideration.

Sincerely,

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⁶ *Id.*

⁷ <https://dfpi.ca.gov/2021/01/27/the-dfpi-signs-mous-believed-to-be-the-among-the-nations-first-with-earned-wage-access-companies/>

⁸ https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1908061