January 30, 2025

Chair Michael Marcotte
House Committee on Commerce and
Economic Development
Vermont State House
115 State Street, Room 35
Montpelier VT 05633

Re: H 99 An act relating to earned wage access service providers

Dear Representative Marcotte,

We present these comments on behalf of the National Consumer Law Center (NCLC). NCLC uses its expertise in consumer law to work for consumer justice and economic security for low-income and other disadvantaged people in the U.S. We also submit these comments with the support of Vermont Legal Aid, Inc. Vermont Legal Aid is a non-profit law firm that since 1968 has provided civil legal services for Vermonters, including those living in poverty, with a disability, or over age 60. Thank you for the opportunity to offer testimony regarding H. 99, a Bill that presents a significant threat to consumers, and particularly to low-income consumers in Vermont.

We would like to highlight these key points[1]:

- Both employer-based earned wage advances (EWAs) and direct-to-consumer "tip"-based advances are forms of fintech payday loan and should be regulated as such. There is a strong consensus among nearly 200 consumer, civil rights and labor groups that these products should be viewed as loans.[2]

- EWAs and other fintech payday loans have similar problems of rollovers and multiplying fees as traditional payday loans. Fees look small but drain wages and average 330% APR or higher.[3]

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[1] *See also* NCLC, Earned Wage Advances and Other Fintech Payday Loans: Workers Shouldn't Pay to be Paid (March 3, 2023), https://www.nclc.org/resources/earned-wage-advances-and-other-fintech-payday-loans-workers-shouldnt-pay-to-be-paid/; Center for Responsible Lending, A Loan Shark in Your Pocket: The Perils of Earned Wage Advance (Oct. 14, 2024),https://www.responsiblelending.org/research-publication/loan-shark-your-pocket-perils-earned-wage-advance.

[2] *See* Letter Opposing H.R. 7428 (Steil), Earned Wage Access Consumer Protection Act (April 16, 2024), https://www.nclc.org/resources/letter-opposing-rep-steil-earned-wage-advance-bill/ ("Federal EWA Bill Letter").

[3] *See* NCLC, Issue Brief, Data on Earned Wage Advances and Fintech Payday Loan "Tips" Show High Costs for Low-Wage Workers (Apr. 10, 2023) (describing data from the California Department of Financial Protection and Innovation) ("EWA Data Issue Brief").

- Vermont law is clear that EWAs and other fintech payday loans are loans. H. 99 would override Vermont law to create a large loophole in Vermont's lending laws.

- Any exemption for fintech payday loans would be exploited by traditional payday lenders, who would revamp their products to claim that their loans, as well "represent" wages and are not loans.

I. Employer-based earned wage advances and direct-to-consumer "tip"-based advances are all forms of payday loan.

Earned wage advances (EWA) are a form of payday loan in which funds are advanced, usually by a third-party, to a worker ahead of the payday and are repaid on payday. The amount of the advance is based on the wages that the worker has earned but are not yet due. In the employer-based EWA model the amount of earned wages is determined by integration with the employer's time and attendance system, and the loans, along with finance charges, are typically repaid through payroll deduction or other direct deduction from the wages on payday.

In addition to employer-based EWAs, a number of direct-to-consumer cash advance apps have no connection to the employer, the time and attendance system, payroll, or wages. The lender advances expected wages, public benefits or other income – sometimes, but not always by estimating the amount of wages that have been earned but are not yet due – and then repays itself on the expected payday by debiting the worker's bank account. Consumer are pushed into paying purportedly voluntary "tips" and high expedite fees. When the estimated payday amount is wrong, repayment can trigger overdraft and nonsufficient funds fees.

II. EWAs and other fintech payday loans lead to a cycle of borrowing, like traditional payday loans, and fees that look small add up and drain low wages.

As with traditional short-term, balloon-payment payday loans, EWAs and "tip"-based advances lead to a cycle of chronic borrowing. A worker who cannot afford an expense out of this week's paycheck is likely to face a shortfall with the next week, triggering another round of borrowing. Data has shown that workers who use EWAs reborrow constantly, on average 36 times a year and as many as 100.[4]

Most employer-based EWAs charge "expedite" fee to receive the advances quickly, and almost all workers pay those fees.[5] Three dollars in fees on a $100 advance repaid in one week is the equivalent of 156% APR. A worker who took two advances a week at $3 per advance could

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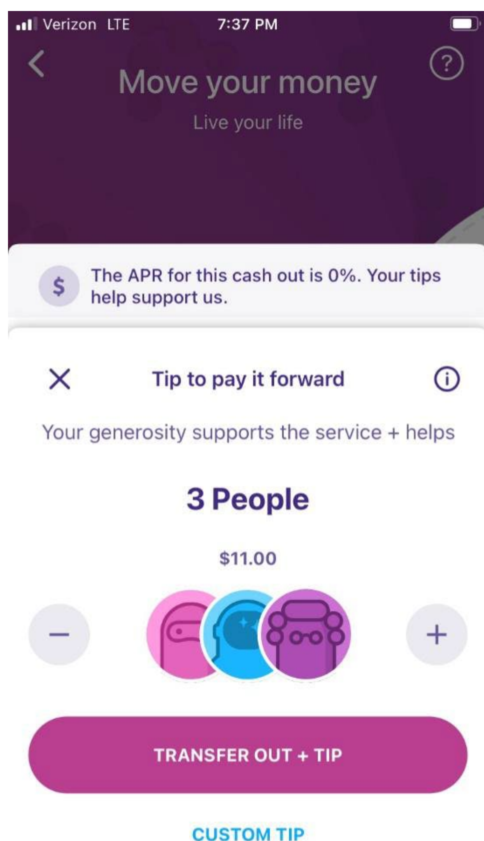
[4] See EWA Data Issue Brief, *supra*..

[5] CFPB, Data Spotlight: Developments in the Paycheck Advance Market, July 18, 2024. Available at https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/ (When employers do not cover the cost, and few do, nearly all workers paid a fee for expedited access to their funds); 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 (Apr. 3, 2024) ("CRL, Not Free") (Nearly 8 in 10 respondents (79%) typically paid expedite fee).

pay more than $25/month – several hours' wages – fees that only go to attempting to fill the hole from the prior EWA.

"Tip"-based advances can be far more expensive. Consumers are steered into paying purportedly voluntary "tips" that can exceed 10% of the advance, plus expedite fees of $3.99 or higher.[6] For example, the Earnin app defaulted to an $11 "tip" for a $100 advance to be repaid in 11 days. With a $3.99 expedite fee included, the cost would be the equivalent of 497%, though the app displayed 0% APR.



Bank account debiting when the advance is repaid can also trigger overdraft or nonsufficient funds fees.

In addition, the cycle of constantly being behind and reborrowing triggers instability. The Center for Responsible Lending found that when people started using cash advance apps their overdrafts increased by 56%.[7] People who were not overdrafting at all overdrafted 2.3 times on average, and as much as 35 times, in the three months after starting to use the apps.

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[6] See Comments of NCLC et al. to CFPB re Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services at 44-59 (May 2, 2022), https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22-1.pdf; Earnin, "Why is there now a fee for Lightning Speed?," https://help.earnin.com/hc/en-us/articles/4407090975635-Why-is-there-now-a-fee-for-Lightning-Speed-.

[7] CRL, Not Free, *supra.*

III. EWAs and other fintech payday loans are extensions of credit and must be regulated as such.

A. A non-recourse loan is still a loan

EWAs and other fintech payday loans are extensions of credit. They are loans. Under nearly all EWA models, a third-party provides the employee with an advance ahead of when wages are due. The company allows the employee to pay back the sum of money at a later date through payroll deduction or another method. This makes the company that provides the money a lender and the transaction a loan. Similarly, "tip"-based advances provide loans ahead of payday, repaid on payday by debiting bank accounts. For years, EWA and other fintech cash advance lenders have been engaged in an intensive nationwide lobbying campaign to convince policymakers that these simple facts about their transactions are not true.

Lobbyists make one basic argument, and repeat it over and over again, to buttress the contention that these advances are not loans and the lenders should be not subject to laws that apply to other businesses that regularly extend credit. They claim that their products are not loans because they forgo the right to engage in other collection methods beyond seeking repayment through payroll deduction, debiting the bank account, or other repayment methods specified in the agreement. They claim the transactions are "non-recourse" obligations because they do not pursue the borrower if the expected repayment method fails. According to the providers, a non-recourse obligation to repay a sum of money does not involve the extension of credit.

The fallacy of this argument is apparent from a brief survey of state and federal law.[8]

For employer-based EWAs, the employee assigns[9] a portion of earned wages to a funder. For several decades Vermont law has defined an assignment of an interest in wages as an extension of credit that is subject to regulation like other loans. According to the Licensed Lender Act:

> The payment in money, credit, goods, or things in action, as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, **whether earned or to be earned**, for the purpose of regulation under this chapter, shall be deemed a loan secured by such assignment.

8 V.S.A. § 2234 (emphasis added). The statute could not be clearer. The payment of money in consideration for an assignment of wages "whether earned or unearned" is a "loan secured by such assignment." *Id.* Section 2234 goes on to state that the amount by which the sum the borrower pays the lender exceeds the amount borrowed is to be treated as a finance charge. *Id.* Finally, section 2234 provides that assignments of wages as consideration for the payment of

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[8] Together with these comments, NCLC has provided the Committee with the text of section 9.10 from National Consumer Law Center's publication, *Consumer Credit Regulation* (3d ed.). This text was recently updated and includes a detailed discussion of treatment of EWAs under federal and state laws.

[9] Lenders may use convoluted language to claim that they are not taking a wage assignment.

money and the related finance charges are subject to the credit regulations found in 9 V.S.A chapters 4, 59, and 61. *Id.* Title 9 includes important limitations on the finance charges allowed for regulated loans. 9 V.S.A. § 41a.

Similarly, direct-to-consumer fintech payday loans that are not tied to employers or payroll also fit the Vermont definition of "loan" because they are a "payment in money … as consideration for .. other compensation" (the compensation being repayment by debiting the bank account).

There is nothing in Vermont law that excludes credit from the definition of loan based on whether the debt is non-recourse. Lenders that have strong repayment mechanisms may not need to pursue borrowers in the rare event that they are not repaid. Payroll deduction is an almost fail-proof method of repayment; the "risk … is quite low as employers rarely fail to pay their employees their earned wages."[10] Repayment is also high when "tip"-based advances or other payday lenders secure the right to debit banks accounts – and to keep debiting it if an initial debit fails. The District of Columbia Attorney General found that EarnIn boasts that it has only a 1% risk of loss.[11] Thus, lenders may choose to forego other debt collection activities, making their loans technically "non-recourse."[12] But that does not mean their loans are not loans.

The simplistic notion that EWAs and "tip"-based advances merely give consumers access "to their own money" is just a public relations slogan that has nothing to do with whether they constitute "credit." Tax refund anticipation loans (RALs) provide consumers with early access to their own money.[13] Yet, regulators had no difficulty recognizing RALs as extensions of credit subject to Truth-in-Lending Act (TILA).[14]

Reverse mortgages are non-recourse obligations, because the borrower is not personally obligated on the debt. Instead, the lender's only recourse is against the home. Federal law regulates reverse mortgages as extensions of credit.[15] Pawn transactions are another example. A pawn transaction is structured as a sale of an item of personal property to the pawnbroker, with the consumer having the option but no obligation to buy it back. More than twenty years ago,

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[10] Compliance Assistance Sandbox Submission to CFPB From Payactiv, Inc. at 12 (Dec. 2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-request_2020-12.PDF.

[11] Complaint at 8, District of Columbia v. ActiveHours, Inc., d/b/a as Earnin, Nov. 19, 2024 available at https://oag.dc.gov/sites/default/files/2024-11/Complaint%20final.pdf ("DC EarnIn Complaint").

[12] Section 2305 of H. 99 leaves some ambiguity about what is "permissible collection" related to "non-recourse" loans. According to this section, the lender at its discretion can proceed with debt collection against the borrower if the lender decides that the borrower intended not to pay or that the borrower provided information that the lender deems false. In the hands of an abusive debt collector the ability to accuse an unsophisticated consumer of fraud can be a powerful collection tool.

[13] *See* National Consumer Law Center, Consumer Credit Regulation ch. 15 (3d. 2020) (discussing RALs). RALs provide advances to taxpayers in exchange for the right to collect a payment from the government in the amount of a taxpayer's anticipated tax refund.

[14] Regulation Z Official Interpretation § 1026.17(c)(1)-17. *See also* Salazar v. Cash Now Store, 31 P.3d 161, 167 (Colo. 2001) (RALS are loans subject to state small dollar loan statute; rejecting argument that they are "choses in action" rather than loans).

[15] *See* National Consumer Law Center, Truth in Lending § 8.8 (10th ed. 2019) (discussing TILA provisions applicable to reverse mortgages).

pawn brokers raised many of the same arguments about non-recourse debt that EWA providers are circulating today. The Federal Reserve Board rejected these arguments when it adopted an Official Staff Interpretation in 1996 and made pawnbrokers subject to TILA.[16] Courts have adhered to this view in holding that non-recourse pawn transactions were debts and therefore extensions of credit under TILA.[17]

B. Improvements in technology and innovation should *decrease* and not *increase* the cost of credit to consumers

The gist of what the H. 99 is designed to do is exempt EWAs from the Vermont Licensed Lender Law.[18] Sections 2234 and 2236a of the Licensed Lender Law regulate EWAs today and subject them to an 18% APR limit. EWA providers want a law that lets them charge whatever APR they want.

Vermont enacted its law regulating wage assignment loans in 1996. At that time many borrowers still went to offices, filled out forms, and documents had to be mailed. The Vermont legislature decided in 1996 that an 18% APR was an acceptable interest cap for wage assignment loans. Since then, with the technology advances of the last 25 years, lenders can now provide loans at a fraction of the costs they incurred to make the loans in 1996. But EWA lenders now want to get rid of the cap entirely and charge APRs that range from 100% to 400%, and higher. In reality, they are arguing that technological innovations that make lending *less* expensive for providers should make it ten or twenty times *more* expensive for consumers. The EWAs lobbying positions do not make economic sense. This is a lobbying campaign that can succeed only if it confuses policymakers about the goals and objectives of the legislation.

D. Requests for "voluntary" payment in connection with an extension of credit are finance charges under Vermont and federal law

Many fintech payday lenders also depend on consumer "tips" for a substantial part of their revenue. They argue that these payments are "voluntary" and therefore not subject to credit regulation. There is no support for this position in state and federal law.

The Vermont Licensed Lender Act mandates that money paid "as consideration for" any sale or assignment of wages "shall be deemed a loan secured by the wage assignment." 8 V.S.A. § 2234. The law does not limit the "consideration" to involuntary payments of money. Section 2234 makes wage assignment loans subject to the limits on finance charges found in 9 V.S.A. § 41a, Vermont's statute limiting finance charges on various types of loan. The subsection of § 41a applicable to fintech payday loans provides:

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[16] 61 Fed. Reg. 14,952, 14,954 (April 4, 1996), now Regulation Z Official Interpretation § 1026.17(c)(1)-18.

[17] Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261, 1262 (9th Cir. 1993) (looking beyond form of pawn transactions to their substance, the transactions were "loans secured by the property, regardless of whether Burnett was personally liable for the debt"); *In re* Spinner, 398 B.R. 84 (Bankr. N.D. Ga. 2008) (pawn transactions are extensions of credit under TILA definitions); Barlow v. Evans, 992 F. Supp. 1299 (M.D. Ala. 1997) (rejecting argument that pawn transaction is not a debt because there is no obligation to repay); Wiley v. Earl's Pawn and Jewelry, Inc., 950 F. Supp. 1108, 1113 (M.D. Ala. 1997) (rejecting pawn lender's characterization of no debt for purposes of TILA where no personal liability for consumer).

[18] H. 99 § 2307(a).

> (b) The rate of interest or the sum allowed:
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> (1) For single payment loans by lenders regulated by Title 8 and federal savings and loan associations, the finance charge shall not exceed 18 percent per annum. 9 V.S.A. §41a(b)

Section 41a(b) caps the finance charge that is "allowed" on a loan. It limits the sum the lender can collect from a borrower. The statute does not distinguish "voluntary" from "involuntary" payment of a usurious finance charge.

Indeed, Vermont law has long held that a lender cannot defend against a usury claim by asserting that the borrower voluntarily paid.[19] In allowing remedies for a borrower under Vermont's 1797 usury statute, the Vermont Supreme Court recognized that individuals in financial distress find themselves "in the power of others," and therefore when usurious charges are paid it is not accurate "to say that the act of paying the money is wholly without constraint."[20] Even 150 years ago there were "numerous cases in the books for the recovery of usury paid—in all which the payments have been voluntary".[21] Otherwise, creditors could routinely evade usury laws by asserting that borrowers "chose" to take out loans at interest rates blatantly in excess of statutory limits.[22]

At the federal level, neither the Federal Reserve Board nor the CFPB has a blanket rule excluding payments labeled as "voluntary" from the scope of the definition of a finance charge. As the Federal Reserve Board stated in construing the TILA implementing regulations: "The Board has generally taken a case-by-case approach in determining whether particular fees are 'finance charges,' and does not interpret Regulation Z to automatically exclude all 'voluntary' charges from the finance charge." 61 Fed. Reg. 49,237, 49,239 (Sept. 19, 1996). The TILA defines a finance charge as a sum that "directly or indirectly" is imposed "as an incident to the

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[19] See, e.g., Davis v. Hoy, 2 Aik. 303, 311, 1827 WL 1387, *8 (Vt. 1827) (borrower's "voluntary" payment of interest in excess of six-percent statutory limit must be treated as "imposed upon the borrower, and not voluntary on his part; he is supposed to be in the power of the lender, and he is also usually in embarrassed circumstances, as well when he pays as when he borrows, and if not constrained to pay from a principle of interest alone, a sense of honor may have extorted from him that which in conscience and honour the usurer ought not to retain."); *accord* Wheatly v. Waldo, 36 Vt. 237, 244 (1863) ("It only remains to enquire then, whether a voluntary payment of usury, precludes the party making it from recovering it back in a suit brought by himself for that purpose. To answer this it is only necessary to refer to the Statute, which specifically provides that it may be recovered back by this form of action … ."). *See also*, Stock v. Meek, 221 P.2d 15, 20 (Cal. 1950) ("The theory of [the usury] is that society benefits by the prohibition of loans at excessive interest rates, even though both parties are willing to negotiate them. Accordingly, 'voluntary' payments of interest do not waive the rights of the payors. 'Payments of usury are not considered voluntary, but are deemed to be made under restraint.' Taylor v. Budd, 217 Cal. 262, 266, 18 P.2d 333, 334. If no loophole is provided for lenders, and all borrowers save fraudulent ones are protected, usurious transactions will be discouraged."

[20] Davis v. Hoy, 2 Aik. 303, 311, 1827 WL 1387, *8 (Vt. 1827).

[21] Wheatly v. Waldo, 36 Vt. 237, 244 (1863).

[22] There should be no question that a state can regulate lenders' solicitation of finance charges in connection with extensions of credit. Vermont has regulated the extension of credit continuously since the eighteenth century. Lending is a classic commercial activity. No heightened form of First Amendment protection applies to commercial activities. Connecticut Bar Ass'n v. United States, 620 F.3d 81, 93-94 (2d Cir. 2010).

extension of credit."[23] The item need not be a "condition" to the extension of credit. "Tips" are clearly "incident to" the extension of credit.

The tips model is designed to mask the finance charge associated with fintech payday loans. The providers do not dispute that they depend on tips for a large portion of their revenue. The payments are not tips to a human being for good service. They serve the function of a finance charge because they cover the cost of providing credit.

It is important to consider the tipping systems in the context of the enormous power imbalance in which they appear. On the one hand are cash-strapped low income workers who are in desperate financial straits. On the other hand are sophisticated and well-funded companies that have every incentive to keep the borrowers in a long-term pattern of repeat borrowing. Fintech payday lenders can manipulate their pitches to confuse borrowers about the nature of tips. For example, they may penalize borrowers who do not tip enough in ways not prohibited by the law. They may cut off their overdraft alerts.[24] Large tips may be included by default and be cumbersome to override, or interfaces can make it fast and prominent to proceed with a tip and slow, requiring more attention to select the free option. Overall, the lenders can use new dark patterns and coercive features designed to encourage tipping each time a practice is exposed.

The California Department of Financial Protection and Innovation (DFPI) has found that "tips" are "charges" under California law because they are "received by" the lender.[25] Under federal law, default provisions of contracts may be considered compulsory even if the consumer can opt out, such as by re-setting a default.[26]

Another purportedly voluntary fee that most EWAs and "tip"-based advances charge is an "expedite" or "instant access" fee, which can range from $1 to $9 per advance. The DC Attorney General found that upwards of 90% of workers' pay those fees.[27] The actual cost of

[23] 15 USCA § 1605(a) ("Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.")

[24] National Consumer Law Center, Center for Responsible Lending, et al. Comment to CFPB Docket No. 2022-0003, 87 Fed. Reg. 5801 (Feb. 2, 2022) Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services, pp. 44-50, available at 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 .

[25] Calif. Dep't of Fin'l Prot'n & Innov., Final Statement of Reasons for the Adoption Of Regulations Under the California Consumer Financial Protection Law, California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act PRO 01-21 at 59 (Oct. 22, 2024) ("CA DFPI Final Statement of Reasons").

[26] See NCLC, Consumer Banking and Payments Law §§ 5.2.2.3 5.9.5.1 (6th ed. 2018) (discussing cases interpreting ban on compulsory use of particular accounts for wages and ban on compulsory repayment of credit by electronic fund transfer, 15 U.S.C. § 1693k).

[27] DC EarnIn Complaint, *supra*, at 10 ("the vast majority of District Borrowers have paid a Lightning Speed fee (89.7% since March 2022), and the vast majority of transactions in the District have included the Lightning Speed fee (83% for the same time period)").

sending funds instantly is only pennies (and in some cases free)[28] – and thus the fees may be 20 to 100 times the cost. A fee with such a dramatic markup should be considered a finance charge.

IV. The CFPB and other regulators recognize most EWAs as credit, and "voluntary" tips and expedited delivery fees as finance charges.

In July 2024, the CFPB released a Notice of Proposed Interpretive Rule specifically addressing EWAs.[29] The CFPB soundly rejects the core arguments that EWA advocates rely upon when they claim to be exempt from lending regulation. The CFPB's proposed interpretive rule concludes that EWA transactions are extensions of credit subject to the federal Truth in Lending Act. According to the CFPB, expedited delivery fees and "tips" are finance charges because they are incidents to extensions of credit. It does not matter that the payment of these charges can be characterized as "voluntary." It does not matter that the credit can be obtained without payment of expedited delivery fees or tips. EWA providers routinely collect these charges with loan repayment, and the charges are a significant source of provider revenue.

Virtually all consumers who use EWAs pay "voluntary" fees or tips. A recent study by the CFPB concluded that 90% of participating workers paid for expedited delivery options.[30] According to the same CFPB study, expedited delivery fees accounted for more than 96.6% of all consumer-paid fee revenue by dollar value for certain employer-based EWA providers (who do not collect "tips").[31]

The District of Columbia Attorney General recently filed a lawsuit against EWA provider Earnin for violation of the District's 24% usury cap. In its complaint the D.C. Attorney General noted that, based on its investigation, 83% of the EWA provider's transactions included an expedited payment fee that the borrower "voluntarily" paid.[32]

An opinion by the California Department of Financial Protection and Innovation (DFPI) found that an earned wage provider with a unique business model, FlexWage, did not offer "loans" under California law. There were two "necessary elements" to the California finding that make clear that most other EWAs *are* loans: "(1) employers, *not Flexwage*, provide EWA funds that do not exceed what they already owe recipients; and (2) the fees charged do not suggest that

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[28] See The ClearingHouse, "Simple, Transparent, Uniform Pricing for All Financial Institutions" (showing cost of RTP instant credit transfer at $0.045), https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/rtp_-pricing_02-07-2019.pdf

[29] CFPB, Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work [Docket No. CFPB-2024-0032] July 18, 2024 available at https://www.consumerfinance.gov/rules-policy/rules-under-development/consumer-credit-offered-to-borrowers-in-advance-of-expected-receipt-of-compensation-for-work/ .

[30] CFPB, Data Spotlight: Developments in the Paycheck Advance Market, July 18, 2024. Available at https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/.

[31] *Id.*

[32] Complaint, District of Columbia v. ActiveHours, Inc., d/b/a as Earnin, Nov. 19, 2024 available at https://oag.dc.gov/release/attorney-general-schwalb-sues-pay-advance-company .

the product evades California's lending laws."[33] DFPI noted that "essential" to the finding was that, in FlexWage's model, the funds were paid directly by the employer, not advanced by a third party.[34] According to DFPI, a "third-party with no financial obligation to the employee could not rely upon this reasoning, because the funds provided would be for the recipient's temporary use, and the third-party would presumably arrange to recoup the amounts it advanced."[35] Second, even as to EWAs paid by the employer, DFPI also relied on the fact that the program did not suggest evasion of California lending laws because the fees charged were lower than could be charged on loans by finance lenders.[36] The DFPI opinion went to great lengths to emphasize, more generally, that California's finance law "should be interpreted broadly to cover any transaction where a worker grants someone an interest, or otherwise agrees to allow a someone else to receive, their earned or unearned wages."[37]

California's regulator later finalized regulations that classified income-based advances as loans and expedite fees and tips as charges.[38] Although the regulator temporarily exempted the advances from California's rate limits, that is because the regulator needed additional time to study the economic impacts and address procedural objections.[39]

Connecticut passed amendments to its laws clarifying that EWAs are loans covered by its rate cap. Connecticut's regulator has also served a cease-and-desist order against Solo Funds, finding that purportedly voluntary "tips" on payday loans were the equivalent of APRs ranging from 43% to 4280%, and the lender violated Connecticut's lending and licensing laws.[40]

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[33] Calif. DFPI, File No: OP 8206, Letter from Charles Carriere to Carl Morris re Request for Interpretive Opinion – FlexWage at 4 (Feb. 11, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf (hereinafter "DFPI FlexWage Opinion").

[34] *Id*. at 5. Similarly, the offhand dicta in the discussion of the CFPB's 2017 Payday Lending Rule mentioned an "employer" that allows an employee to draw wages early, not a third party that advances those wages and is repaid later. The opinion also does not address the impact of a state law that prohibits an *employer* from having an employee agree to an assignment of wages, such as 21 V.S.A. § 344.

[35] *Id*. at 4.

[36] *Id*. at 5-6.

[37] *Id*. at 4. The DFPI opinion also discusses how the Uniform Small Loan Law of the early 20th century, on which most states' small loan laws are based, was intended to capture advances of wages both earned and to be earned. See id. at 3.

[38] CA DFPI Final Statement of Reasons, *supra.*

[39] *Id.* at 23 ("While the Department did not have convincing evidence to suggest that application of [California Financing Law] rate caps would prevent [income-based advance] providers from offering their services in California, it determined that removing the rate caps at this time was necessary to address procedural objections raised in other comments."); *id.* at 24 ("Providing this exemption is not a determination that income-based advances are not loans or that the CFL's rate caps or other requirements are not appropriate for income-based advances. Rather, the Department needs the additional time and data that a registration period will afford to study associated economic impacts.").

[40] *See* In the Matter of Solo Funds, Inc., NMLS No. 1909701 Connecticut Banking Commissioner's Order May 4, 2022 available at https://portal.ct.gov/-/media/DOB/Enforcement/Consumer-Credit/2022-CC-Orders/Solo-Funds-Inc--Temp-CDRestNOI-CDCPOLER.pdf.

Maryland's regulator also issued guidance stating that earned wage advances are covered by Maryland's lending law and must comply with Marland's interest rate limits unless the advances are provided directly by the employer at no cost.[41]

V. Traditional payday lenders will exploit any loopholes in Vermont's credit laws

Vermont should exercise great caution in creating loopholes in its consumer protection laws governing payday loans and other forms of credit. Those loopholes will not only be problematic for fintech payday loans that bear a close resemblance to traditional payday loans. The loopholes will also be exploited by regular payday lenders.

Lobbyist are pushing to exempt from lending laws a category of earned wage advance that goes far beyond employer-based programs integrated with time and attendance systems and repaid from payroll. As in the model bill by the American Legislative Exchange Council (ALEC), the exemption would be available to any lender that claims to be making payments loosely "based on" wages that the consumer has "represented" and the provider has "reasonably determined" have been earned or accrued. Yet that definition could be satisfied any time a consumer goes to a payday lender when the paycheck is running out before the next payday.

The tremendous threat that EWA bills pose to predatory lending protections is why a coalition of 192 consumer, labor, civil rights, legal services, faith, community and financial organizations and academics opposed a bill to declare that EWAs are not loans under federal law.[42]

Vermont has strong laws that prohibit the debt trap of payday loans that devastate consumers in many other states. It should be leery about allowing clever lobbyists to eviscerate those protections. Payday loans exist because, decades ago, lobbyists convinced legislatures that the "deferred presentment" of checks was not a loan. Today's fintech payday loans are the same thing: Old wine in new bottles.

VI. Conclusion: H. 99 creates a loophole in Vermont consumer protection law that will promote evasions and predatory lending.

Vermont has built a strong framework to protect consumers from predatory lending. These include the prohibition against payday loans and careful regulation of wage assignments.

The Legislature should be leery of sales pitches asserting that an innovative new technology justifies tearing down consumer protections that have been in effect for decades. The jargon about "non-recourse" loans and employees who only want to access "their own money" are the emperor's new clothes. There is really nothing there, except a studied attempt to confuse policymakers into overturning settled state law. The fintech payday lenders' reasoning leads to a very slippery slope. Waiting in the wings are a host of purveyors of other shaky and dangerous financial products ready to tell the legislature that their loans are not really loans and their credit is not really credit.

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[41] Maryland Commissioner of Financial Regulation, Industry Advisory Regulatory Guidance on Earned Wage Access Products (Aug. 1, 2023).

[42] Federal EWA Bill Letter, *supra.*

We ask that the Legislature proceed with extreme caution in this area and act only with benefit of data that should become available to policymakers in the years to come.

Yours very truly,

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