

Fintech Focus: Navigating the EWA Regulatory Landscape

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I. Introduction: EWA on the Precipice

The increasing use of earned wage access (“EWA”) by workers in the United States and around the world has helped to bring financial flexibility to many previously constrained by the employer-selected timing of when paychecks are issued.^[1] Even critics of some forms of EWA cannot deny its value as a tool that can ease cashflow problems faced by low-wage workers. But regulatory ambiguity has caused uncertainty for EWA products as the industry awaits promised further guidance from the CFPB and watches a few states address the product in a piecemeal fashion. Below, we discuss key considerations in navigating that ambiguity and delivering a solid EWA product to workers.

II. What is EWA?

EWA refers to a mechanism allowing a worker to obtain access to a portion of wages they have already earned before their regular payday. The involvement of the worker’s employer varies from directly providing such access themselves on one end of the continuum, to having no involvement whatsoever. In the latter case, the EWA provider may be a bank or fintech that verifies the worker’s employment and wages through existing bank account deposit information or otherwise, and provides the worker with a payment. The EWA provider then receives an equal amount from the worker’s next “pay day.” In some cases, EWA is offered as a service without any fee or cost to the worker, usually as part of a suite of services offered by the provider.

The costs of EWA can be borne by the employer, the third-party provider (e.g., the fintech), or by the worker. If the worker bears any cost, that cost can come from some combination of a monthly subscription fee, a transaction fee(s), or a voluntary “tip.” Interest generally is not charged on the funds, because the funds represent wages already earned by the worker.

II. Regulatory Ambiguity

The creation of EWA products was initially met with some optimism that EWA could provide an option beyond payday loans to help low-wage workers with cashflow problems, and the cascading costs suffered when cash is unavailable to pay basic obligations. By 2020, there appeared to be

affirmative regulatory support for EWA products. As EWA has been put into widespread use, however, critics have expressed concerns that some forms of EWA may impose hidden costs that equal or even exceed the interest charged for payday loans, often seeking to characterize EWA as a “loan” or “credit.” Model EWA legislation now exists, and some states have sought to formally establish support for EWA through new legislation.

A. Significant legal and regulatory support for EWA with parameters

In November 2020, the CFPB issued an advisory opinion as to whether EWA products should be considered credit for the purpose of applying the requirements of Regulation Z. Reflecting an acceptance of EWA’s benefits to consumers, the Bureau noted: “Earned wage access products have recently emerged in the marketplace as an innovative way for workers to meet short-term liquidity needs that arise between paychecks without turning to more costly alternatives like traditional payday loans.”^[2] The Bureau concluded that EWA should not be considered credit as long as it conforms to certain parameters, principally that:

- The EWA provider contracts with the employer to offer EWA services to its workers.
- The amounts available for early access are not more than what the worker has already earned as of the time of the EWA transaction, as validated by the employer.
- The worker makes no payment, voluntary or otherwise, to access EWA funds (except for a “processing fee”) or to open or use the account receiving the funds, and the EWA provider or its agents cannot solicit or accept tips or any other payments from the worker.
- The EWA provider recovers the amount of each EWA transaction only through an employer-facilitated payroll deduction from the worker’s next paycheck.
- In the event of a failed or partial payroll deduction, the EWA provider retains no legal or contractual claim or remedy, direct or indirect, against the worker, although the provider may choose to refrain from offering the worker additional EWA transactions.
- Before entering into an EWA transaction, the provider clearly and conspicuously explains to the worker these terms.
- The EWA provider will not directly or indirectly assess the credit risk of individual workers, including through obtaining and reviewing credit reports or credit scores about the individual workers.

Notably, this Advisory Opinion circumscribed the types of EWA products that could be offered in the market without fear of being considered a loan and treated accordingly. But combined with the Bureau’s “Sandbox Approval” to PayActiv in 2020, which gave the company’s EWA products a temporary safe harbor from liability under the Truth in Lending Act and Regulation Z, this Opinion had at least the temporary effect of encouraging fintechs and others to offer EWA products.

Since the Bureau's actions in 2020, the American Legislative Exchange Council (ALEC) developed model EWA legislation^[3] that has been introduced in many states and passed in modified form in Missouri^[4] and Nevada.^[5] While ALEC's model law and the Missouri and Nevada laws require that EWA providers register with the state's financial services regulatory agency and avoid charging workers any mandatory payments for EWA, they also expressly disclaim that EWA should be considered credit or a loan and do not require the provider to adhere to most of the parameters set forth in CFPB's 2020 Advisory Opinion. Some of the differences between existing state laws and the CFPB Advisory Opinion are as follows:

- Nevada explicitly permits both employer-integrated EWA services and direct-to-consumer EWA services. Missouri does not distinguish between them.
- Both Nevada and Missouri permit EWA providers to charge fees, as long as there is "at least one option for a user to obtain" EWA services at no cost. They both also permit providers to accept tips or gratuities, as long as they are not required.
- EWA laws in both Nevada and Missouri specify that providers may not compel or attempt to compel a consumer to make a payment through a civil suit, use of a third-party to pursue collection, or sale of outstanding amounts to a third-party collector or debt buyer. Nevada has an exception to this provision for cases where the consumer obtained funds fraudulently or through unlawful means.
- Nevada prohibits an EWA provider from using a user's credit report or credit score to determine eligibility for EWA services. The EWA statute in Missouri has no similar provision.

In sum, the CFPB guidance and laws in Nevada and Missouri provided encouragement to companies to offer EWA products both directly to their workers and to consumers of financial services. But that encouragement coexists today with growing regulatory scrutiny and, in certain cases, express restrictions on EWA.

B. Growing regulatory concerns

A little over a year after it issued its Advisory Opinion and after a new Director of the CFPB took office, the CFPB's General Counsel wrote a letter concerning the Advisory Opinion in response to three representatives of consumer advocacy groups, acknowledging that "the advisory opinion has caused significant confusion in the marketplace."^[6] In the letter, the General Counsel suggested that the Bureau would address EWA in the future to provide greater clarity. Then, in June 2022, at PayActiv's request, the CFPB terminated its prior Sandbox Approval granted to PayActiv to offer its EWA product.^[7]

In March 2023, the U.S. General Accounting Office (GAO) directly addressed the regulatory ambiguity in a report suggesting that the CFPB should issue clarification on the application of TILA for EWA products not covered by the 2020 advisory opinion. CFPB Director Rohit Chopra responded

by noting that “the CFPB concurs with the GAO’s recommendation and intends to issue further clarification in this area.”^[8] While the Bureau has not addressed EWA yet since that note, some observers are skeptical that it would show the same acceptance of EWA that it did in its 2020 Advisory Opinion.

In California, that State’s Department of Financial Protection & Innovation (DFPI) issued its own findings on EWA in March 2023. Assuming the product should be treated as a loan, DFPI calculated that the average annual APR was 334% for companies offering EWA for tips from workers, and 331% for the “non-tip” companies.^[9] These findings were followed by a proposed rule^[10] that would, if finalized, bring EWA within the definition of a loan for purposes of the State’s Consumer Finance Law (CFL).

The proposed regulation of EWA in California would require that providers of “income-based advances” register under the California Consumer Financial Protection Law, which applies to providers of certain financial products, but would not require licensure under the CFL, which specifically applies to lenders. Under the proposed rule, when an advanced payment is made, it must be scheduled for collection in a single payment within 31 days, on a date corresponding to the date accrued income is anticipated to be paid to the consumer. As with the Nevada and Missouri EWA laws, the California rule requires that the provider have no legal or contractual claim or remedy against the consumer for failure to repay the advanced amount in full, and the provider cannot engage in debt collection activities, sell the debt to a third party, or report it to a consumer reporting agency. It also includes detailed requirements around fees: any monthly subscription fee for an EWA program cannot exceed \$12 per month, and the fee must be optional for accessing the EWA service. The “charges”—which include interest fees and other costs charged—collected by the provider, cannot exceed charges that would be permitted under the CFL, effectively imposing an interest rate cap on EWA advances. Commenters from the fintech industry have expressed concern that the proposed rule will stall the development of valuable EWA products for consumers by unnecessarily increasing the costs of compliance and treating EWA advances as loans when they are actually based on earned wages.^[11]

IV. Practical Considerations for Companies

Given significant differences in regulatory approaches in the states and some uncertainty at the federal level, how can EWA providers best position their products to succeed in the marketplace, serve consumers as intended, and avoid unnecessary regulatory attention? Here are a few brief practical steps to consider:

- ***Track and anticipate state and federal rules.*** The patchwork of EWA regulation is evolving, so any product development should be based on a solid understanding of the rules in each state where the product may be offered and at the federal level, as well as educated guesses as to the likely evolution of those rules over the next three to five years.

- **Conform to CFPB 2020 Advisory Opinion Parameters, where possible.** While neither binding nor even feasible in all circumstances, the CFPB’s parameters provide a basic set of guardrails for EWA products that, if implemented, may assist in staving off the most skeptical regulatory attention. In particular, tying EWA payments directly to earned wages, carefully considering the amount and type of charges required, and refraining from recovery of funds above and beyond the wages actually earned and deposited are the most critical parameters.
- **Cap EWA funds to mitigate regulatory concerns of overuse by consumers.** Irrespective of the terms of EWA offered, if a consumer repeatedly uses the product, this could be viewed negatively. Reasonable limits on its use, such as limiting the number of transactions within a certain time period, may protect both the consumer and the company over time.

Footnotes

[1] One analyst estimated that 55.8 million earned wage advances, totaling \$9.5 billion, were facilitated in 2020, an increase from \$6.3 billion in 2019 and \$3.2 billion in 2018. AiteNovarica, “Making Ends Meet: On-Demand Pay and Employer-Based Loans,” Feb. 2021, *available at* <https://aite-novarica.com/report/making-ends-meet-demand-pay-and-employer-based-loans>. In a recent survey of low-income Americans who receive government benefits, 41% of respondents had access to EWA through an employer, and 40% of those respondents used EWA once a week. Harvard Kennedy School, Mossavar-Rahmani Center for Business and Government, “Earned Wage Access: An Innovation in Financial Inclusion?” June 2023, *available at* https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/214_AWP_final_2.pdf.

[2] Consumer Financial Protection Bureau, “Truth in Lending (Regulation Z); Earned Wage Access Programs,” Nov. 30, 2020, https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf.

[3] American Legislative Exchange Council, Earned Wage Access Act, July 2022, <https://alec.org/model-policy/earned-wage-access-act/>.

[4] See Missouri Senate, SB 586, *available at* https://senate.mo.gov/23info/BTS_Web/Bill.aspx?SessionType=R&BillID=2532580.

[5] See Nevada Legislature, Senate Bill No. 290, *available at* https://www.leg.state.nv.us/Session/82nd2023/Bills/SB/SB290_EN.pdf.

[6] Consumer Financial Protection Bureau, Seth Frotman, “Your letter concerning the CFPB’s advisory opinion on earned wage access,” Jan. 18, 2022, *available at* <https://www.consumerfinance.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>.

[7] See Consumer Financial Protection Bureau, “CFPB Rescinds Special Regulatory Treatment for Payactiv,” June 2022, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-special-regulatory-treatment-for-payactiv/>.

[8] Consumer Financial Protection Bureau, Rohit Chopra Letter to Michael Clements, Feb. 2023, *available at* <https://www.gao.gov/assets/gao-23-105536.pdf>.

[9] California Department of Financial Protection and Innovation, “2021 Earned Wage Access Data Findings,” *available at* <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf?>

emrc=08148f.

[10] California Department of Financial Protection and Innovation, Proposed Regulations Under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act, *available at* <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/PRO-01-21-TEXT.pdf>.

[11] Cal Matters, “The new payday loans? California moves to regulate cash advance apps,” June 2023, <https://calmatters.org/economy/2023/06/earned-wage-access/>.

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