U.S. Chamber of Commerce

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August 30, 2024

Comment Intake—2024 BNPL Interpretive Rule
Docket No. CFPB-2024-0032
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work

To Whom It May Concern:

The U.S. Chamber of Commerce Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau ("CFPB") regarding its Proposed Interpretive Rule on *Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work (the "Proposed Interpretive Rule" or "PRI").* The CFPB is proposing to claw back its 2020 Advisory Opinion on EWA ("2020 EWA AO") and to replace it with the PRI that would apply certain provisions of Regulation Z and the Truth in Lending Act ("TILA") to earned wage access ("EWA") products.

EWA products have benefitted consumers and employers. EWA providers enable employees to request a certain amount of their accrued wages prior to their payday, and the funds are later recouped through payroll deductions or bank account debits. As noted by the PRI, EWA products can address financial challenges consumers may face before receiving their regular paycheck (e.g., biweekly). Importantly, and different from other products intended to provide liquidity to consumers, access to liquidity from EWA is contingent on wages already accrued, but not yet in the possession, of a consumer. EWA products offer consumer-friendly terms and are a vital alternative to payday lending products. EWA products are also an important benefit that companies can offer to their employees. Numerous major employers have adopted EWA programs as a low-cost mechanism to assist their employees. The popularity of EWA is supported by market research,[1][2] and is a valuable tool for employers to attract and retain talent. Here, the PRI presents a substantial increase in regulatory burden that could threaten the available of new EWA products in the market and drive up the cost to provide EWA products, harming consumers instead of helping them.

[1] 89% are willing to work a longer period of time for an employer who offers EWA. 79% would be willing to switch to an employer who offers EWA. Visa Insights 2019: Earned Wage Access, The Impact on employee engagement, health and financial wellness, available at https://usa.visa.com/dam/VCOM/global/run-your-business/documents/visa-earned-wage-access-insights-report.pdf

[2] According to a study from ADP, 96% of employers offering EWA state it helps them attract talent, and 93% state it helps them retain talent. https://www.adp.com/-/media/adp/resourcehub/pdf/adp_ewa_study_whitepaper.pdf

CCMC requests additional regulatory transparency and stability for EWA products to clarify applicable consumer protection requirements, which in turn would promote consistency in those protections across the market. The CFPB should ensure these clarifications are designed to address the specific consumer harms it has observed in the marketplace, rather than making sweeping changes that could disrupt access to EWA products. The CFPB states it is proposing the Interpretive Rule to "help market participants determine when certain existing requirements under Federal law are triggered." The CFPB should have issued a notice of proposed rulemaking, subject to notice and comment, if it is interested in providing regulatory clarity and stability. However, by relying on an interpretive rule, the CFPB invites more questions than it answers. Notably, the PRI's view of what constitutes "credit" is much broader than what is provided for under TILA, and vague explanations for why "tips" and "expedited funds delivery fees" are deemed a "finance charge" raise an alarming signal that the CFPB may believe other optional or convenience fees, not offered as part of an EWA product, must be disclosed subject to TILA and Regulation Z.

<u>We accordingly ask the CFPB to consider the following points</u>:

I. The CFPB should withdraw the Interpretive Rule and instead issue a Notice of Proposed Rulemaking subject to proper notice and comment.

II. The CFPB should further clarify its interpretation of "credit" and "finance charge" under TILA and Regulation Z.

III. The CFPB's effective date must comply with Section 105(d) of the Truth in Lending Act.

I. The CFPB should withdraw the Interpretive Rule and instead issue a Notice of Proposed Rulemaking subject to proper notice and comment.

The CFPB should not have pursued an interpretive rule to claw back the 2020 EWA EO, and instead should have issued a Notice of Proposed Rulemaking to give industry participants who relied on it adequate time to comply with new regulatory obligations. The PRI would impose new legal requirements and obligations on EWA providers, meaning that the CFPB was required to issue a Notice of Proposed Rulemaking subject to notice and comment under the Administrative Procedure Act ("APA").[3] Interpretive rules can only be issued "to advise the public of the agency's construction of the statutes and rules which it administers."[4] Interpretive rules cannot impose new, binding requirements under law, as the PRI would do.[5]

[3] *See* 5 U.S.C. § 553(b)(A).

[4] *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995) (finding that interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers" and "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."). *See also* Administrative Conference of the US, *Agency Guidance Through Interpretive Rules*, Recommendation 2017-5 (Aug. 8, 2019), https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules ("An agency should not use a policy statement to create a standard binding on the public, that is, as a standard with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public. . . . That is, noncompliance with an interpretive rule should not form an independent basis for action in matters that determine the rights and obligations of any member of the public.").

[5] Perez, 575 U.S. at 109 (Scalia, J., concurring) ("An agency may use interpretive rules to advise the public by explaining its interpretation of the law. But an agency may not use interpretive rules to bind the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means." (emphasis in original)). American

Under the PRI, EWA providers would need to comply with numerous requirements new requirements.

The PRI does not explain which subsections of Regulation Z would apply to EWA products. This omission fails to provide proper notice to the public and adds to the regulatory confusion the Bureau states it intends to address with the PRI. For example, should the public simply assume that closed-end requirements would apply to most EWA products, or does the CFPB believe intend to cover EWA products that meet the definition of open-end credit? By contrast, the Bureau's recent interpretive rule on BNPL, despite its flaws, plainly stated which subjections of Regulation Z are applicable to these products.[6] This provided the public an opportunity to explain that some provisions of Regulation Z may be appropriate for BNPL, while others are not. The PRI would bypass this opportunity for public engagement on the appropriate regulatory treatment for EWA products.

The CFPB should withdraw the PRI and instead issued a Notice of Proposed Rulemaking to provide clarity and stability to the market. Employers currently offering or seeking to offer EWA benefits may be equally confused about what may be available and may struggle to communicate the impact of their changes to their employees. Although the CFPB states it seeks comments on the PRI, the CFPB does not provide any indication of how the comments will be used. Will the CFPB follow the RFI with a Final Interpretive Rule? Or, as is the case with the Bureau's most recent interpretive rule on TILA, will it simply offer FAQ's in attempt to clear up confusion?[7] The rigorous notice and comment process required by the APA provides more transparency and certainty to market participants about the Bureau's expectations, especially given rules subject to notice and comment offer greater regulatory stability.

II. The CFPB should further clarify its interpretation of "credit" and "finance charge" under TILA and Regulation Z.

a. *Definition of "Credit" under TILA and Regulation Z*

The PRI expands the definition of "credit" beyond the boundaries established by Congress under TILA and Regulation Z. As noted by the PRI, Section 1026.2(a)(14) of Regulation Z defines "credit" as "the right to defer payment of debt or to incur debt and defer its payment." According to the PRI, "all obligations to pay another"[8] are a "debt," and therefore "credit" under TILA and Regulation Z. Under the rationale articulated in the PRI, any payment product that includes a fee could be considered "credit" by the CFPB. This would be an absurd result – sweeping in non-lending services under TILA requirements. The vague approach in the PRI would require payments providers, and potentially any company that provides a

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Bankers Association: "Effective Agency Guidance: Examining Bank Regulators' Guidance Practices" (February 2024), available at https://www.aba.com/-/media/documents/white-paper/abawhitepaperagencyguidance.pdf?rev=3367e0c6ae0d4e81b24e29bdecb05abd

[6] The Chamber similarly requested the CFPB withdraw and reissue the BNPL interpretive rule to comply with the APA. Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans. See comments from the US Chamber of Commerce and American Bankers Association (August 1, 2024), available at https://www.uschamber.com/assets/documents/ABA-Chamber-CoalitionComments_BNPL-InterpretiveRule-Final-PDF.pdf

[7] See Statement from Director Chopra: "What Buy Now, Pay Later lenders are doing to be upfront with borrowers."

[8] Interpretive Rule at 61360

consumer an option to “incur an obligation to pay money at a future date,” to apply a deductive reasoning to all transfers of funds to determine what is *not* deemed credit by the CFPB.

The PRI is an abrupt reversal from the CFPB’s view of “credit” as stated in the 2020 EWA AO.[9] The 2020 EWA AO concluded that at least certain types of EWAs were not debt because "[] the Bureau believes that a Covered EWA Program facilitates employees’ access to wages they have already earned, and to which they are already entitled, and thus functionally operates like an employer that pays its employees earlier than the scheduled payday."[10] The 2020 EWA EO also explains there are “significant similarities” between comment 2(a)(14)-1.v to Regulation Z and EWA[11]: “For instance, like the accrued cash value of a consumer’s insurance policy or pension account, the accrued cash value of an employee’s earned but unpaid wages is the employee’s own money.”

The CFPB should have relied on notice and comment rulemaking and amended definitions as necessary in Regulation Z to provide clarity and stability for EWA products. Regulation Z clearly defines the key terms used in the regulation that are not already defined in TILA.[12] In contrast, through the PRI, the CFPB appears to introduce a new definition of “debt” that it relies on to support its interpretation as to how Regulation Z applies to EWA products. The CFPB cannot properly define a new term, that expands the scope of Regulation Z, without modifying the regulation in accordance with the APA.

b. Finance Charge: Expedited Funds Delivery Fees, Tips

As noted by the PRI, in general, the obligations of Regulation Z apply to any credit provider that regularly offers or extends consumer credit subject to a finance charge. A finance charge includes ‘‘any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.’’ If providers do not disclose finance charges, they violate Regulation Z. The PRI’s treatment of “expedited funds delivery fees” and costs marketed as “tips” require further clarification.

i. Expedited Funds Delivery Fees

The PRI would require a fee for “expedited funds delivery” or “instant funds” be disclosed as part of the finance charge. The PRI asserts that there is “substantial connection” between the extension of credit and the speed with which consumers access funds from an EWA provider. The PRI could create confusion for other consumer financial products.

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[9] Bureau of Consumer Financial Protection. Truth in Lending (Regulation Z); Earned Wage Access Programs. Advisory opinion (November 30, 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf

[10] Ibid.

[11] Comment 2(a)(14)-1.v to Regulation Z provides '[b]orrowing against the accrued cash value of an insurance policy or a pension account if there is no independent obligation to repay' is 'not considered credit for purposes of the regulation.' As the Board of Governors of the Federal Reserve System explained when it revised Regulation Z to implement the Truth in Lending Simplification and Reform Act, in such instances, 'credit has not been extended because the consumer is, in effect, only using the consumer’s own money.'

[12] 12 CFR § 1026.2(b)(1)

The PRI asserts Regulation Z also covers expedited funds delivery fees as finance charges because such a fee is a "condition" of an extension of credit.[13] The CFPB is incorrect here. The expedited funds delivery fee is not a condition of the extension of credit. It is optional. It is a condition of *expedited* funds delivery. An expedited funds delivery fee cannot be considered a "finance charge" unless it is a condition of the extension of credit.

By stating an expedited funds delivery fee is a finance charge under TILA, the CFPB creates new regulatory uncertainty for other payments products, in addition to EWA, that may also offer an option for "expedited funds delivery" or "instant funds." There are deposit products that offer expedited funds delivery for a fee; for example: expedited check deposit into a Regulation E account could be found to constitute credit and a finance charge under this reasoning since the depository institution, having no obligation to accelerate payment, could be said to be advancing funds to the consumer. Similarly, could a fee for same-day ACH also broadly be considered an expedited funds delivery fee? Further, how does the Bureau balance the imposition of a Regulation Z requirement on a Regulation E covered account? The PRI leaves these issues unaddressed, which could lead to confusion in the marketplace.

ii. Tips

The PRI would require a "tip"[14] to be disclosed as part of the finance charge. The PRI explains: "Whatever the exact practice used, when such 'tip' payments are solicited and then paid in connection with the extension of credit, there is a clear and close connection between the 'tip' and the associated extension of credit. In such circumstances, consumers pay the 'tip' for the credit extended, and the credit is the direct and proximate cause of the 'tip.'"[15] The PRI would benefit from more clarity about what, if any, "tip" would not be deemed a finance charge.

The PRI does not provide a meaningful test for determining whether a tip is "imposed"[16] or if it optional. The PRI notes four "relevant considerations" for determining whether a tip is "imposed" by a creditor, but these criteria are vague and the Bureau concedes that the presence or absence of one or all of these considerations may not be determinative. The PRI does not seem to provide any clear avenue for an EWA provider to treat a "tip" as optional.

The CFPB should therefore issue a notice of proposed rulemaking to better clarify its intent and the changes it is requiring. Given the complications with also complying with state laws, EWA providers need more certainty from the CFPB to ensure they are best serving consumers. Through substantial feedback from interested stakeholders, including consumers, the CFPB's rulemaking will be better informed and more directly beneficial to those who need it most. Without such feedback incorporated into the proposal, the CFPB runs the risk of decreasing access to EWA products for workers, which the CFPB should protecting.

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[13] Interpretive Rule at 61363

[14] Interpretive Rule at 61362. Tips are defined to include "gratuities," "donations," "voluntary contributions," or the like.

[15] Interpretive Rule at 61363

[16] The finance charge includes "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit."

III. The CFPB's effective date must comply with Section 105(d) of the Truth in Lending Act.

The PRI does not provide any notice of the effective date. If the CFPB issues a Final Interpretive Rule, it should provide at least six months for EWA providers to comply. The application of Regulation Z and its associated disclosure requirements, as well as other laws concerning "credit" (e.g., Regulation B) would be a major change to the regulatory treatment of EWA products.

Notably, Section 105(d) of TILA requires "any disclosure which differs from disclosures previously required by part A, part D, or Part E shall have an effective date of October 1 which follows by at least six months the date of promulgation," subject to certain exceptions.[17] The Interpretive Rule would clearly require EWA providers to issue disclosures that "differ" given Regulation Z disclosure requirements are not currently applicable to EWA providers. The Bureau may only "shorten the length of time" (i.e., less than six months) if it makes a "specific finding that such action is necessary to comply with the findings of a court or to prevent unfair or deceptive disclosure practices. The Bureau has not cited any specific findings of a court or disclosure practices that are unfair or deceptive.

The CFPB's current posture regarding the PRI creates significant regulatory uncertainty. The CFPB has not provided any insight about the effective date begging the question of if it intends to issue a Final Interpretive Rule that is effective immediately. This would be a mistake. Notably, the CFPB recently issued an Interpretive Rule, seeking to apply Regulation Z to BNPL products, that had an effective date *before* the comment period concluded.[18]

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Bill Hulse
Senior Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

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[17] 15 U.S.C. § 1604(d).
[18] Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans. See comments from the US Chamber of Commerce and American Bankers Association (August 1, 2024), available at https://www.uschamber.com/assets/documents/ABA-Chamber-CoalitionComments_BNPL-InterpretiveRule-Final-PDF.pdf