August 30, 2024

Via electronic submission
The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work (Docket No. CFPB–2024– 0032)

Dear Director Chopra:

The Consumer Bankers Association[1] is providing these comments in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed "interpretive rule" (Proposed Rule) regarding earned wage access products.[2] The Proposed Rule takes the position that earned wage access products are subject to Truth in Lending Act (TILA) and Regulation Z requirements. The Proposed Rule would apply this interpretation to earned wage access products provided through employer partnerships as well as those marketed by third-party providers directly to consumers, because it would classify the optional charges available for some earned wage access products as finance charges under TILA. The Proposed Rule would similarly conclude that advancing accrued-but-not-yet-paid wages creates a "debt."

Overview

We urge the CFPB to rescind the interpretation and reevaluate the merits of the proposed policy conclusions in light of the legal limitations discussed herein. The process by which CFPB issued this Proposed Rule violates the requirements of the Administrative Procedure Act (APA), the Consumer Financial Protection Act (CFPA), and the Regulatory Flexibility Act (RFA).

Specifically, the CFPB failed to conduct:

- a notice and comment rulemaking process under section 553 of the APA,
- a section 1022 benefit-cost analysis, as required by the CFPA,
- an interagency consultation, as required by the CFPA, and

[1] The Consumer Bankers Association (CBA) is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

[2] 89 Fed. Reg. 61,358 (July 31, 2024).

- an initial regulatory flexibility analysis under the RFA, which is necessary to determine if there is a Significant Economic Impact on a Substantial Number Of Small Entities.

An agency must take each of these steps when it creates new substantive law. Because the Proposed Rule creates new substantive law, even though it is labeled an "interpretive rule," the CFPB has not promulgated the interpretation in accordance with law.

While the Proposed Rule claims to be interpreting existing terms, it in fact proposes to create a new definition of "debt" and dramatically expand the definition of "finance charge." These changes are unworkable and inconsistent with the CFPB's authority under TILA. Finally, because the CFPB failed to complete required rulemaking steps, the Proposed Rule fails to consider the collateral impacts on other consumer financial services.

I. The CFPB's proposed determination that earned wage access is credit under TILA is new substantive law and must be promulgated through a complete Administrative Procedure Act rulemaking process.

In promulgating the Proposed Rule, the CFPB would create new substantive law that deviates from its prior regulatory interpretations.[3] The Proposed Rule would reclassify earned wage access products and purports to subject them to certain requirements of Regulation Z[4] under TILA.[5] Specifically, the Proposed Rule concludes that early wage access is "credit" because (1) earned wage access products provide consumers with "the right to defer payment of debt or to incur debt and defer its payment," (2) consumers 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, (3) because the consumer incurs "debt", this debt is credit under TILA and Regulation Z. Further, because the "credit" is offered or extended to consumers primarily for personal, family, or household purposes, the "credit" also meets the Regulation Z definition of "consumer credit" and (4) because the "credit" includes optional fees for expedited funds or for tips, these optional items are "finance charges" under TILA. Ultimately, according to the Proposed Rule, earned wage access providers would be subject to TILA.

The changes introduced by the Proposed Rule should be subject to the legislative rule process requirements of the Administrative Procedure Act. The Administrative Procedure Act defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice

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[3] See e.g., CFPB's 2017 Payday, Vehicle Title, and Certain High-Cost Installment Loans Final Rule, 82 Fed. Reg. 54,472 (Nov. 17, 20217), CFPB's 2020 Earned Wage Access Programs Advisory Opinion, 85 Fed. Reg. 79,404 (Dec. 10, 2020), CFPB Compliance Assistance Sandbox Approval for Payactiv, note Payactiv's model included charging a non-recurring $1 fee and, potentially, a $1.99 fee to instantly transfer funds to a Visa card. While the program may no longer exist, the foundation for CFPB's legal analysis is still valid because it rests on the 2020 Advisory Opinion and 2017 Payday Final Rule.

[4] 12 C.F.R. Part 1026.

[5] 15 U.S.C. §§ 1601 *et seq*.

requirements of an agency."[6] The Administrative Procedure Act explains that substantive rules (also called "legislative rules") are general statements of policy, interpretive rules, and procedural rules. For any such substantive rule, the Administrative Procedure Act requires federal agencies to publish a "[g]eneral notice of proposed rulemaking" in the Federal Register,[7] and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[8]

In other words, agency action that creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a substantive rule.[9] While the Administrative Procedure Act does exempt interpretative rules and general statements of policy from notice and comment procedures,[10] this Proposed Rule is an "interpretive rule" in name only. It is not a mere interpretation of existing rules because, as discussed below, it withdraws a prior agency interpretation and imposes new substantive obligations on entities otherwise not subject to TILA.[11] By definition, the Proposed Rule cannot be an interpretive rule because such rules "do not have the force and effect of law."[12] Instead, the Proposed Rule is a substantive rule because it withdraws prior agency guidance in conjunction with establishing new binding norms which impose new compliance obligations on regulated parties.

In November 2020, the CFPB issued an Advisory Opinion[13] (2020 Opinion) stating that certain earned wage access products do not involve the offering or extension of "credit" as that term is defined in Regulation Z and TILA. The 2020 Opinion explained that an earned wage access product is not an extension of credit if it meets several conditions.[14] The 2020 Opinion came to a reasoned conclusion that, if those conditions were met, the totality of the circumstances would indicate that the product did not constitute credit. The Proposed Rule not only explicitly withdraws the 2020 Opinion,

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[6] 5 U.S.C. § 551(4).

[7] 5 U.S.C. § 553(b).

[8] 5 U.S.C. § 553(c).

[9] *See Cmty. Nutrition Inst. v. Young,* 818 F.2d 943, 948 (D.C. Cir. 1987) (*per curiam*). *Accord Ctr for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006).

[10] 5 U.S.C. § 553(b)(3)(A).

[11] In distinguishing between a substantive rule and other types of rules, reviewing courts look to "whether the agency 'intended'" for its action "to speak with the force of law. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019). Agency intent alone is not decisive. *POET Biorefining LLC v. EPA*, 970 F.3d 392, 415 (D.C. Cir. 2020). Reviewing courts consider the substantive effect of the rule in question. *See Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) ("The court's inquiry in distinguishing legislative rules from interpretative rules 'is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime.'" (Quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6-7 (D.C. Cir. 2011)); *Office of Commc'n of United Church of Christ v. FCC*, 826 F.2d 101, 105 (D.C. Cir. 1987) ("Since the court reviews not the label but the agency pronouncement that underlies the label, it is that pronouncement itself that governs the determination of its status."); cf. *Strange ex rel. Strange v. Islamic Republic of Iran,* 964 F.3d 1190, 1201 (D.C. Cir. 2020) ("Substance, not name or label, is what matters here.").

[12] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015).

[13] "Truth in Lending (Regulation Z); Earned Wage Access Programs" 85 Fed. Reg. 79,404 (Dec. 10, 2020).

[14] Including: providing the consumer with no more than the amount of accrued wages earned; provision by a third party fully integrated with the employer; no consumer payment, voluntary or otherwise, beyond recovery of paid amounts via a payroll deduction from the next paycheck, and no other recourse or collection activity of any kind; and no underwriting or credit reporting.

but also takes the opposite legal conclusion, finding that the non-recourse nature of earned wage access still makes it a debt, and as such imposes new obligations on regulated entities. Not only does the Proposed Rule state the opposite conclusion, it attempts to rebut the specific arguments the 2020 Opinion relied upon to reach its conclusion. In doing so, it offers new interpretations on a more granular level, which individually and collectively could have broad impact.[15] Before the CFPB's 2020 Opinion, the Bureau finalized its Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule (Payday Lending Rule) – portions of which will take effect next year after a subsequent Bureau rescission rulemaking and litigation going all the way to the Supreme Court – while not considering it credit under TILA.[16] There, the Bureau excluded earned wage access from the scope of the rule because it was largely viewed by the Bureau as a suitable alternative for consumers than high-cost payday lending, in that it did not present the same types of consumer harms as the practices that were prohibited by the rule.[17] Here, in the Proposed Rule, the CFPB fails to reconcile these policy conclusions.

The Proposed Rule also imposes new binding norms on regulated parties. The CFPB's determination that earned wage access providers are "creditors" under Regulation Z is a new interpretation of existing law that has the effect of imposing new substantive obligations on earned wage access providers, including new substantial disclosure and compliance considerations. Accordingly, it carries the force and effect of law. Additionally, reinforcing again why compliance with legislative rulemaking notice and comment procedures under section 553 is necessary, the Proposed Rule states that its proposed interpretations are limited to TILA, but saying doesn't make it so. This is particularly true here because the coverage of credit under TILA is connected to other federal and state laws.[18] Thus, the Proposed Rule both withdraws prior agency guidance, which regulated parties relied upon, and creates new binding norms, making the Proposed Rule a substantive rule in all but name. Because the Rule constitutes the issuance of a substantive rule without following the required notice-and-comment process, it is procedurally invalid under the Administrative Procedure Act.

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[15] For example, the Proposed Rule dismisses the reasoned argument in the 2020 Opinion that Regulation Z comment 2(a)(14)-1.v supports the interpretation that EWA meeting specified conditions does not, when considering the totality of circumstances, constitute "credit." In footnote 29 of the Proposed Rule, the Bureau argues "that comment was promulgated as an exclusion from the definition of 'credit' after notice and comment, which suggests that the product would be subject to TILA and Regulation Z but for the exclusion" and that "[p]roducts similar to products in the exclusion, but not covered by the exclusion, should therefore be presumed to be "credit.'" The implications of this formalistic interpretation are potentially sweeping and would go well beyond the context of this Proposed Rule. For example, is the Bureau saying that Regulation Z commentary can never function as persuasive authority when evaluating the uncertain application of the "credit" definition to new and innovative products?

[16] 82 Fed. Reg 54,472 (Nov. 17, 2017).

[17] 12 C.F.R. pt. 1041, Supp. I, cmts. 3(d)(7) Wage Advance Programs, 3(d)(8) No Cost Advances.

[18] For example, the Military Lending Act expressly incorporates the definition of TILA credit. Additionally, many state laws consumer credit laws rely upon TILA's definition of credit and make a violation of federal TILA a violation of state law.

II. The CFPB failed to conduct a benefit-cost analysis and failed to determine whether the Proposed Rule will have a Significant Economic Impact on a Substantial Number Of Small Entities.

Under Section 1022(b)(2)(A) of the Consumer Financial Protection Act, the CFPB is required to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the CFPA, and the impact on consumers in rural areas. There is no 1022(b)(2)(A) analysis in the Proposed Rule. The CFPB failed to complete these analyses. Additionally, there is no evidence that the CFPB consulted with appropriate prudential regulators and other Federal agencies regarding the consistency of this Proposed Rule with prudential, market, or systemic objectives administered by such agencies as required by section 1022(b)(2)(B) of the Consumer Financial Protection Act.

The Proposed Rule fails to conduct an initial regulatory flexibility analyses and accordingly fails to determine whether the Proposed Rule will have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). Further, as a "covered agency" designated by the Dodd-Frank Act [19] the Bureau must comply with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[20] Under SBREFA, the Bureau must convene and chair a Small Business Review Panel if it is considering a proposed rule that could have a SISNOSE.[21] The additional compliance burdens on earned wage access providers may have a significant adverse impact on a substantial number of community banks and credit unions, with assets below $850 million. We do not know because the CFPB failed to conduct an initial regulatory flexibility analysis as required by the RFA. In declining to follow these steps, the Bureau fails to account for foreseeable harm to small businesses and consumers, as generally required by the RFA and SBREFA.

These are not mere procedural or technical requirements. They were imposed on the CFPB by Congress so that when the CFPB establishes new legal responsibilities, it carefully considers the feedback of other regulators and properly accounts for the impact on consumers and providers, including small entities and those in rural areas. It is troubling that the CFPB continues to ignore these statutory requirements when it imposes new obligations.[22]

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[19] *See* 5 U.S.C. § 609(d), as amended by Dodd-Frank Act § 1100G.

[20] *See* 5 U.S.C. § 603.

[21] 5 U.S.C. § 609(b).

[22] *See* CBA et al. Comment Letter in response to CFPB Interpretive Rule, Truth in Lending (Regulation Z): Use of Digital User Accounts to Access Buy Now, Pay Later Loans, Aug. 1, 2024, https://www.regulations.gov/comment/CFPB-2024-0017-0030.

III. The CFPB's proposed expansion of "debt" and "finance charge" are unworkable and inconsistent with the CFPB's authority under TILA.

Notwithstanding these procedural infirmities, the Proposed Rule goes so far as to create an entirely new definition of "debt", a previously undefined term in Regulation Z. According to the Proposed Rule, "debt" would be defined to include a consumer's receipt of accrued but unpaid wages regardless of whether consumer is obligated to repay those funds. This categorization is inconsistent with the common understanding or "dictionary definition" of debt, and existing Regulation Z.[23] Merriam-Webster defines debt to include "a state of being under obligation to pay or repay someone or something in return for something received: a state of owing."[24] Consumers who have accrued wages don't "owe" their employers anything as a consumer's receipt of earned wages does not create an obligation to pay on the part of the consumer. Instead, the consumers have a legal right to these funds and the employer is extinguishing an obligation to a consumer when the employer makes payroll. When a consumer receives an earned wage access product, the consumer is under no obligation to provide something in return.[25] In other words, the consumer is not left in a "state of owing" after receiving an earned wage product because they are receiving funds they were already entitled to as a matter of law. It follows that because an earned wage advance cannot create a debt, then the provision of an earned wage advance cannot be credit.

Further, the Bureau improperly expands the legal definition of "finance charge" to include optional fees and tips. There is no logical bound to what could be considered "incident to" credit under the Bureau's reasoning. Categorizing voluntary fees as a finance charge is not clearly supported by case law, or existing regulation.[26] The history of finance charge under TILA is complicated and any major changes to that definition, as discussed earlier, must be subject to a more formal Administrative Procedure Act legislative rulemaking process.[27] According to existing Regulation Z commentary, and taking the Federal Reserve Board's approach to evaluating the facts and circumstances, an optional expedited fee is akin to an optional third-party servicing courier fee and ultimately excluded as a finance charge as the expedited fee is to deliver funds, like the courier fee is to deliver documents.[28] The voluntary nature of the expedited fee, and

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[23] *See* Regulation Z, Rules of Construction, "Unless defined in this part, the words used have the meanings given to them by state law or contract." 12 C.F.R. § 1026.2(b)(3)

[24] Debt, Merriam-Webster, https://www.merriam-webster.com/dictionary/debt (last updated Aug. 22, 2024).

[25] As the CFPB itself notes, earned wage access products are specifically non-recourse.

[26] For example, two Circuit Court decisions, *Veale v. Citibank, F.S.B.* in the Eleventh Circuit and *McGee v. Kerr-Hickman, Chrysler Plymouth, Inc.,* in the Seventh Circuit suggest that voluntary fees can be excluded from the definition of finance charge. Since this litigation, the Federal Reserve Board amended the definition of finance charge. In that rule, the Board noted, "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. As a practical matter, most voluntary fees are excluded from the finance charge under the separate exclusion for charges that are payable in a comparable cash transaction, such as fees for optional maintenance agreements or fees paid to process motor vehicle registrations." 61 Fed. Reg. 49,237, 49,239 (Sept. 19, 1996)

[27] *See generally*, Board of Governors of the Federal Reserve System, Report to the Congress Finance Charges for Consumer Credit under the Truth in Lending Act, April 1996, *available at* https://www.federalreserve.gov/boarddocs/rptcongress/fc_study.pdf.

[28] *See e.g.,* 12 C.F.R. pt. 1026, Supp. I, cmt. 4(a)(2)-1.

similarity to a delivery fee are operative to the exclusion. The Bureau also fails to consider whether and to what extent these fees are similar to those paid in a comparable cash transaction.

IV. The Proposed Rule fails to consider the collateral impacts on other consumer financial services and the consumers who use them.

While the Proposed Rule is ostensibly limited to earned wage access products[29], it is unclear how the newly expanded "interpretations" of the terms debt and finance charge can be limited to earned wage access products but not applied to other consumer financial services. Specifically, there are features of consumer deposit accounts that could be implicated by the Proposed Rule's interpretations. Yet as discussed in part II, above, the Bureau failed to consider what impacts this may have on other consumer financial services and the consumers who use those products. For example, some financial institutions offer consumers greater access to their funds in their deposit accounts. One way is through early access to direct deposits. Another is by making funds deposited through check immediately available to consumers. It belies logic to consider the provision of funds that the consumer is entitled to, as a matter of law, as credit. Yet the Bureau's novel interpretation of "incident to" is vague and broad enough to turn any optional payment into a finance charge and create legitimate interpretive questions that would be most appropriately answered during a formal notice and comment legislative rulemaking process. However, the Proposed Rule neglects to even mention, yet alone discuss potential logical outgrowths of its proposed broad propositions.

Conclusion

As discussed throughout this letter, the Proposed Rule is fundamentally flawed because the CFPB failed to complete the required legislative rulemaking processes. Additionally, the policy conclusions in the Proposed Rule are inconsistent with existing regulatory interpretations by the Bureau and the Federal Reserve Board over several decades and have the potential to harm the very consumers CFPB seeks to protect. In light of these failures, we urge the Bureau to rescind the interpretation and reevaluate the merits of the proposed policy conclusions after completing required rulemaking processes, including a robust benefit-cost analysis. Thank you for your consideration of this request. Please contact Rachel Ross at rross@ConsumerBankers.com or 202-552-6366 if you have questions or to discuss our response further.

Rachel Ross
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Associate General Counsel
Consumer Bankers Association

[29] Part II, Section A. Coverage, 1. Earned Wage Products" 89 Fed. Reg. at 61,359.