CFPB Releases Advisory Opinion Finding that Earned Wage Access Programs, When Structured Properly, Are Not Credit Under TILA and Regulation Z

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On November 30, 2020, the Consumer Financial Protection Bureau released an advisory opinion concerning earned wage access ("EWA") products. The opinion was released as a sort of "launch day bonus" for the release of the Bureau's Final Advisory Opinions Policy and accompanying website page. The Bureau addressed whether EWA providers are offering or extending credit within the scope of Regulation Z. The Bureau determined that "Covered EWA Programs" do not involve the offering or extension of credit under Reg. Z.

What are Earned Wage Access Programs?

EWA programs are aimed at allowing consumers to tap alternative financial sources other than payday loans or similar products before they receive their paychecks. Though they can come in different shapes and sizes, EWA programs typically enable employees to request a certain amount (or share) of accrued wages before payday that are later paid back through payroll deductions or bank account debits on the subsequent payday.

What is the Uncertainty Around EWA Programs that the CFPB Was Asked to Address?

EWA providers—and the CFPB itself—acknowledge that there is uncertainty over whether the Truth in Lending Act ("TILA") and its implementing regulation, Regulation Z, apply to EWA programs. Regulation Z applies to any non-exempt individual or business that offers or extends credit when four conditions are met:

- the credit is offered or extended to consumers;
- the offering or extension of credit is done regularly;
- the credit is subject to a finance charge or is payable by a written agreement in more than four installments; and
- the credit is primarily for personal, family, or household purposes.

12 C.F.R. § 1026.1(c)(1).

Under Regulation Z, "credit" means the right to defer payment of debt or to incur debt and defer its payment. 12 C.F.R. § 1026.2(14). The CFPB notes in the opinion that the definition of "credit" is virtually identical under TILA, and that its analysis applies to both TILA and Regulation Z.

What Does the Advisory Opinion Do to Resolve the Uncertainty?

The advisory opinion concluded that a "Covered EWA Program" is not an extension of credit and thus not subject to Regulation Z.

A Covered EWA Program meets all the following criteria:

- The provider contracts with the employer to offer and provide EWA services.
- The amount of each advance does not exceed the accrued cash value of the wages the employee has earned up to the date and time of the transaction, as determined by the employer.
- The employee pays no fee, voluntary or otherwise, to access EWA funds or otherwise use an EWA program. The advance must be sent to an account of the employee's choice. If the account receiving the advance is a prepaid account as defined under Regulation E and that account is offered by the provider, then additional fee restrictions apply.
- The provider recovers the advance only through an employer-facilitated payroll deduction from the employee's next paycheck. One additional deduction may be attempted in the event of a failed or partial payroll deduction due to administrative or technical errors.
- In the event of a failed or partial payroll deduction, the provider maintains no legal or contractual remedy against the employee. This does not, however, prevent the provider from declining to offer the employee additional EWA transactions.
- The provider must clearly and conspicuously make certain warranties to the employee, including that there will be no fees, that the provider has no recourse against the employee, and that the provider will not engage in any debt collection activities.
- The provider may not directly or indirectly assess the credit risk of the employee.

The CFPB concluded that a Covered EWA Program does not provide consumers with "credit" for the following reasons:

- EWA transactions do not provide employees with the right to defer payment of debt or to incur debt and defer its payment" because Covered EWA Programs do not implicate a "debt."
- EWA transactions operate similarly to the situation contemplated in the commentary in Regulation Z related to the definition of "credit," which provides that borrowing against the accrued cash value of an insurance policy or a pension account where there is no independent obligation to repay is not considered "credit."
- The aspects of a Covered EWA Program differ in kind from products the CFPB would generally consider to be credit.
- This treatment of Covered EWA Programs is consistent with the CFPB's discussion of EWA products in the 2017 Payday Lending Rule.

Arguably, for a transaction to not be considered "credit," simply not creating "debt" should be sufficient. That is, if there is "no legal or contractual remedy" related to non-payment, then under Regulation Z, a good-faith argument exists that there is not a credit transaction. If a lender provides a consumer funds, and the option to repay or not repay, with a promise that non-payment won't result in collection activity or a lawsuit, the transaction probably shouldn't be deemed credit. That may not be a prudent business transaction, but the CFPB has invited feedback to evaluate whether to provide additional guidance about programs that differ from those addressed in this advisory

opinion.

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