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**12 CFR Part 1026**

**[Docket No. CFPB-2024-0032]**

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

**AGENCY:** Consumer Financial Protection Bureau.

**ACTION:** Advisory opinion rescinding previous advisory opinion.

**SUMMARY:** The Consumer Financial Protection Bureau (CFPB) is issuing this advisory opinion to rescind an advisory opinion it issued in November 2020 that described how one particular type of "earned wage" product does not involve the offering or extension of "credit" as that term is defined in the Truth in Lending Act and Regulation Z.

**DATES**: This advisory opinion is applicable [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]

**FOR FURTHER INFORMATION CONTACT:** George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: https://reginquiries.consumerfinance.gov/. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Advisory Opinion

### *A. Background*

One major source of demand for consumer credit is derived from the mismatch of when American workers receive compensation for their labor and when they incur expenses. While there have long been sources of credit for consumers to pay expenses in advance of receiving

their compensation, there are a number of new offerings that seek to provide additional choices for consumers.

Instead of being paid daily or upfront, American workers generally provide services before employers pay for those services some time later—typically on a biweekly or semi-monthly wage cycle.[1] Employers have a strong incentive to delay payment, since these delays reduce working capital needs. Nearly three-quarters of non-farm payroll employees remain paid biweekly or even less frequently, and the remainder are generally paid their wages weekly. To address liquidity challenges, many consumers therefore turn to credit products, such as payday loans, personal installment loans, and credit cards. In recent years, American consumers have significantly expanded their use of products sometimes marketed as "earned wage access" or "earned wage advance."[2] As these paycheck advance products generally have features that make them subject to the CFPB's jurisdiction, the CFPB has sought to understand these and other products, particularly those offered online, by engaging in ongoing monitoring of the market, including, for example, collecting and analyzing data, engaging with stakeholders (e.g., market participants, consumer groups, and States), tracking and studying market developments, and conducting market research, among other things.

While many of these products have similarities to payday loans, there are important distinctions. The CFPB has found that there are two emerging models of earned wage products: employer-partnered and direct-to-consumer.

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[1] While the terms "employer" and "employee" are used throughout, this advisory opinion applies more broadly to situations where consumers receive payment for work performed.
[2] A recent CFPB report describes rapid recent growth in one part of this developing market. *See* CFPB, *Developments in the Paycheck Advance Market*, at 3 (July 2024) (hereinafter *2024 Paycheck Advance Report*).

For "employer-partnered" products, providers contract with employers to offer funds in amounts not exceeding accrued wages. Those funds are recovered via one or more payroll deductions, lowering the consumer's paychecks accordingly, with other recourse options generally unavailable to the provider. In contrast, "direct-to-consumer" products provide funds to employees in amounts that are not as strictly limited by accrued wages. Some of these products limit advances to an amount *estimated* to be below accrued wages and do not consider other factors. Others consider estimated accrued wages as one of several factors when determining the amount to advance. Still others do not expressly state that estimated accrued wages are a factor considered despite being marketed as earned wage products. Regardless of the exact model, funds are generally recovered via automated withdrawal from the consumer's bank account,[3] and generally without limit to the provider's ability to seek further recourse as necessary.[4]

Some of the differences between these two types of earned wage products, however, are starting to erode. For example, some direct-to-consumer providers are now connecting directly to payroll records and recouping funds from payroll deductions, and ongoing State legal developments may cause them to limit their recourse options as well.[5]

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[3] This includes, without limitation, prepaid and payroll card accounts.

[4] As described, direct-to-consumer products lie outside the scope of the "wage advance" (12 CFR 1041.3(d)(7)) and "no cost advance" (12 CFR 1041.3(d)(8)) exclusions from the CFPB's 2017 Payday Rule. Employer-partnered products, however, may be (but are not necessarily) within the scope of one exclusion or both, with their revenue model particularly relevant to that determination. *See* 12 CFR 1041.3(d)(7)(ii)(A), (d)(8).

[5] *See 2024 Paycheck Advance Report*, *supra* note 2, n.7. Several recently enacted State laws prohibit providers of earned wage products, including direct-to-consumer products, from compelling consumer repayment of earned wage amounts and fees through various means, such as lawsuits or third-party debt collection. *See, e.g.*, MO. REV. STAT. § 361.749(5)(6) (2023); WIS. STAT. § 203.04(2)(f) (2023); *cf.* Mont. Op. Att'y Gen., Vol. 59, Op. 2 (Dec. 22, 2023) (finding earned wage products do not meet the state law definitions of "consumer loan" or "deferred deposit loan" when they are "fully non-recourse," among other criteria).

Before the CFPB's market monitoring of these products intensified, the CFPB issued an advisory opinion in November 2020,[6] that described how one particular type of earned wage product does not involve the offering or extension of "credit" as that term is defined in the Truth in Lending Act (TILA) and Regulation Z (2020 Advisory Opinion).[7] The opinion explained that an earned wage product is not TILA or Regulation Z credit if it meets *all* of several identified conditions, 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.[8] The 2020 Advisory Opinion was silent about whether earned wage products that do not meet all of these conditions are credit under TILA and Regulation Z.[9]

In July 2024, the CFPB proposed an interpretive rule on this same topic (2024 Proposed Interpretive Rule) and voluntarily sought public comment. The comment period closed on August 30, 2024.

*B. Legal Analysis*

The CFPB is rescinding the 2020 Advisory Opinion for two fundamental reasons: (i) its legal analysis is significantly flawed in numerous respects; and (ii) it engendered substantial regulatory uncertainty.

*1. The 2020 Advisory Opinion's legal analysis is significantly flawed in numerous respects.*

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[6]Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 FR 79404 (Dec. 10, 2020).
[7] Regulation Z defines credit at section 12 CFR 1026.2(a)(14).
[8] *See 2020 Advisory Opinion*, *supra* note 6, at 79405-06.
[9] The opinion stated that it had no application to such products. *Id.* at 79408 ("This advisory opinion applies solely to the question of whether Covered EWA Programs (*i.e.*, those meeting all of the characteristics described in part I.B above) fall under the definition of credit in section 1026.2(a)(14) of Regulation Z identified above. This advisory opinion has no application to any other circumstance, and it does not offer a legal interpretation of any other provisions of law.").

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."[10] TILA defines "credit" virtually identically as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[11] However, TILA and Regulation Z do not define "debt." Regulation Z provides that undefined terms "have the meanings given to them by state law or contract."[12]

The first analytical flaw of the 2020 Advisory Opinion is that its consideration of the meaning of "debt" under state law was insufficient. It did not mention the Regulation Z rule of construction that undefined terms have the meanings given to them by state law or contract. It only cited a portion of the definition of debt in a recent edition of Black's Law Dictionary, and did not survey the definitions of debt in state laws, or other relevant bodies of law, including applicable circuit court case law on the definition of "debt" in TILA and Regulation Z.[13]

Second, the 2020 Advisory Opinion inferred that the consumer does not incur a liability when using the narrowly limited type of earned wage product covered by the opinion, but did not sufficiently justify the inference. The main rationale provided for the inference was that this type of product "*functionally operates like* an employer that pays its employees earlier than the scheduled payday."[14] The opinion did not elaborate on what constitutes functional operation, or the relevance of the fact that the employer is not *literally* paying the employee's wages early.

Third, the 2020 Advisory Opinion did not consider all relevant factors as part of the "totality of the circumstances" approach it applied to determine what is "credit." The opinion

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[10] 12 CFR 1026.2(a)(14).
[11] 15 U.S.C. 1602(f).
[12] 12 CFR 1026.2(b)(3).
[13] *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 410 (3d Cir. 2000) ("Although [TILA] does not contain a definition of the term 'debt,' we believe the term as used in [TILA] should be construed as it is defined in the FDCPA.").
[14] 85 FR 79404 at 79406 (emphasis added).

stated only that "features *often* found in credit transactions are absent from" this type of product and that transactions involving this type of product are "[u]nlike *many* credit transactions . . . ."[15] The 2020 Advisory Opinion, however, did not consider any of the features of wage advance products commonly found in credit transactions, including a consumer's receipt of funds, consumer repayment of those funds, and the wage garnishment tool used to effectuate repayment. Nor did the 2020 Advisory Opinion explain how its "totality of the circumstances" approach derived from the definition of "credit."

Fourth, the opinion's claim that it was supported by certain statements in the 2017 Payday Rule is unpersuasive. The Payday Rule did not make a determination as to whether earned wage products are credit, stating only that some product constructs "may not be" credit. The CFPB declined to perform the more detailed analysis necessary to come to a considered conclusion on the boundaries of TILA and Regulation Z at that time because the rulemaking was based on the CFPB's UDAAP authority, not TILA and Regulation Z. Some earned wage products may not be covered by the Payday Rule because of its "wage advance" and "no cost advance" exclusions.[16] However, these exclusions can only apply to earned wage products to the extent that such products are TILA and Regulation Z credit. As a result, the CFPB's earlier decision to exclude certain earned wage product constructs from the Payday Rule has no impact on the credit status of such products under TILA or Regulation Z.

*2. The 2020 Advisory Opinion engendered substantial regulatory uncertainty.*

In the months and years following issuance of the 2020 Advisory Opinion, it became increasingly evident that it failed to clarify the status of earned wage products under TILA and

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[15] *2020 Advisory Opinion*, *supra* note 6, at 79407 (emphasis added).
[16] *See* 12 CFR 1041.3(d)(7), 1041.3(d)(8).

Regulation Z. Indeed, in 2023, the U.S. Government Accountability Office issued a report recommending that the CFPB clarify their status.[17] This muddying of the waters flowed directly from the extreme narrowness of the opinion. Few if any of the products in the market at the time of or subsequent to issuance fit the mold outlined by the opinion. As a result, stakeholders were left to speculate about the CFPB's view about the credit status of the many products actually being offered.

Worse still, the 2020 Advisory Opinion has been widely cited in support of legal conclusions that it did not reach. For example, it has erroneously been cited for the general propositions that no-fee earned wage products are not credit,[18] and that employer-partnered earned wage products are also not credit.[19]

In addition, some regulatory uncertainty may have resulted from the near-contemporaneous issuance of an "Approval Order" that gave one provider a temporary safe harbor from liability under TILA and Regulation Z with respect to a specific product that did not satisfy all the conditions that the 2020 Advisory Opinion identified as taking such a product outside the reach of TILA and Regulation Z.[20] The 2020 Advisory Opinion applied only to

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[17] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105536, FINANCIAL TECHNOLOGY: PRODUCTS HAVE BENEFITS AND RISKS TO UNDERSERVED CONSUMERS, AND REGULATORY CLARITY IS NEEDED 36-37 (2023) (citing industry requests for clarification). The CFPB has acknowledged the need for clarification in this area. *See, e.g.*, Letter from Rohit Chopra, Dir., Consumer Fin. Prot. Bureau, to Michael Clements, Dir. of Fin. Mkts. and Cmty. Inv., U.S. Gov't Accountability Off., (Feb. 13, 2023) in U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105536, *supra*, at 51; Letter from Seth Frotman, Acting General Counsel, Consumer Fin. Prot. Bureau, to Beverly Brown Ruggia, N.J. Citizen Action, *et al*., at 2 (Jan. 18, 2022).

[18] *See, e.g.*, Off. of the Att'y Gen., State of Ariz., Opinion No. I22-005 (Dec. 16, 2022), available at https://www.azag.gov/sites/default/files/2022-12/I22-005.pdf.

[19] *See, e.g.*, ZayZoon, Comment Letter on Cal. Dep't of Fin. Prot. and Innovation Notice of Proposed Rulemaking [PRO 01-21], at 4 (May 17, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/08/46-PRO-01-21-ZayZoon-US-Inc.-5.17.23_Redacted.pdf; Innovative Payments Ass'n, Comment Letter on Cal. Dep't of Fin. Prot. and Innovation Notice of Proposed Rulemaking [PRO 01-21], at 4 (May 11, 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/08/10-PRO-01-21-Innovative-Payments-Association-5.11.23_Redacted.pdf.

[20] *See* Consumer Fin. Prot. Bureau, *Payactiv Approval Order*, at 5 (Dec. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf.

products that had all of the numerous characteristics identified above, including that they were free to consumers. In contrast, the Approval Order encompassed earned wage transactions in connection with which the consumer incurred fees.[21] However, it was never of general interpretative applicability,[22] and was terminated even before its temporary status expired.[23]

## II. Regulatory Matters

This is an advisory opinion issued under the CFPB's authority to interpret TILA and Regulation Z, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010, which authorizes guidance "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws . . . ."[24] By operation of TILA section 130(f), no provision of TILA sections 130, 108(b), 108(c), 108(e), or section 112 imposing any liability would apply to any act done or omitted in good faith in conformity with this advisory opinion, notwithstanding that after such act or omission has occurred, the advisory opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[25]

The CFPB has determined that this advisory opinion would not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members

[21] *See id.*
[22] *See id.* at 4 n.15.
[23] *See* Consumer Fin. Prot. Bureau, Order to Terminate Sandbox Approval Order (June 30, 2022), cfpb_payactiv_termination-order_2022-06.pdf..
[24] 12 U.S.C. 5512(b)(1).
[25] 15 U.S.C. 1640(f).

of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[26]

Pursuant to the Congressional Review Act,[27] the CFPB will submit a report containing this advisory opinion and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this advisory opinion as not a "major rule" as defined by 5 U.S.C. 804(2).]

**Rohit Chopra,**

*Director, Consumer Financial Protection Bureau.*

[26] 44 U.S.C. 3501-3521.
[27] 5 U.S.C. 801-808.