

**COMPLIANCE ASSISTANCE SANDBOX
SUBMISSION TO CFPB FROM PAYACTIV, INC.**

Compliance Assistance Sandbox Application – Payactiv, Inc.

Pre-Application

- 1. Full name of Applicant including any trade names or DBAs.**

Payactiv, Inc.

- 2. Mailing Address.**

4880 Stevens Creek Blvd.
San Jose, CA 95129

- 3. Please list the contact information of the person responsible for communicating with the CFPB.**

Eric Goldberg
Akerman LLP
750 9th Street NW
Washington, DC 20001
202-824-1761
eric.goldberg@akerman.com

Please address Approval to:

David Reidy
Chief Legal Officer
Payactiv, Inc.
4880 Stevens Creek Blvd.
San Jose, CA 95129
dreidy@payactiv.com

Product or Service Information

- 4. Describe how your product or service functions, the terms on which it will be offered, and the manner in which it is offered or provided (including any consumer disclosures).**

Payactiv partners with employers to offer their employees a comprehensive financial wellness “livelihood” platform that includes several benefits and services. For one of these services, Payactiv funds the payment of earned but unpaid wages to employees prior to their regularly scheduled payday. The service is free to those who direct deposit their wages on a Payactiv prepaid or payroll card. Payactiv assesses \$1 per day for the services for those employees who do not have a Payactiv prepaid or payroll card.

Under the terms of its agreement with employees, its Terms and Conditions (Terms) (attached at Appendix A), Payactiv provides an earned wage access (EWA) payment to an

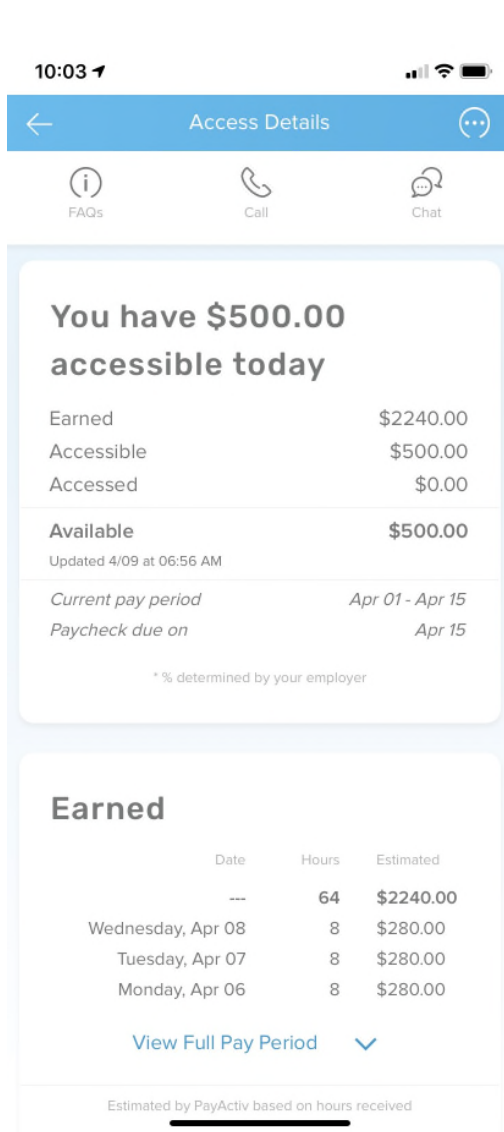
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employee for the sale of the future receivable in that portion of the employee's earned wages. Payactiv refers to this in its Terms as a factored future received wage payment, or FFRWP. As with all non-recourse factoring transactions, Payactiv purchases an employee's right to the receivable and assumes the risk associated with non-receipt of that receivable. Payactiv does not engage in any underwriting or risk-based evaluation of any employee once the employer confirms the employee's employment status and earned wages, and Payactiv does not report any aspect of the transaction to any credit bureau. Payactiv's agreement with employees confirms that the transaction does not constitute an extension of credit, or create a debt, and is not an assignment of wages. In its Terms, Payactiv waives and disclaims any right to pursue debt collection or legal remedies in the event of a failure to recoup EWA amounts (with an exception for fraud, discussed below at 7-8).

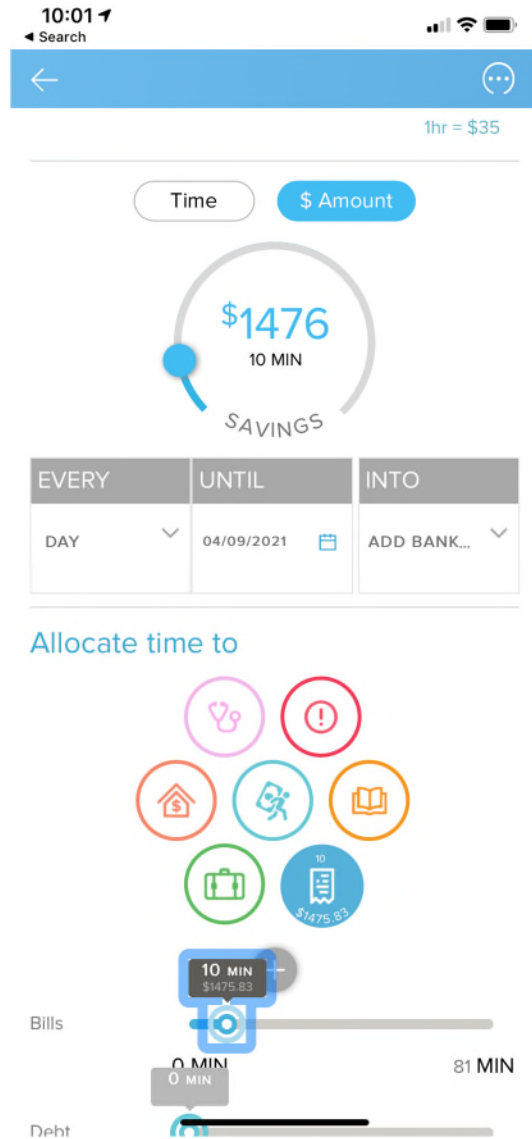
An employee of an eligible employer can enroll in Payactiv for free by downloading the app, creating a profile, and agreeing to Payactiv's Terms. At this point, the employee can use several free services offered by Payactiv, including an ability to see their earnings in real time, access to a savings tool, and prescription discounts. Employees can also apply for a no-fee Payactiv Visa payroll card (if offered by their employer) or prepaid card (offered to all employees), sign up for the employer messaging and notification service, and reach customer service. Screenshots of two of these services, earnings view and the savings tool are below:

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Earnings View Screenshot



Savings Tool Screenshot

A. Payactiv Access Models

Payactiv’s EWA program allows enrolled employees to access their earned wages prior to payday. Consumers can access EWA through a Payactiv-branded card, an ACH deposit to a checking or deposit account or a prepaid card, a transfer to a card via Visa direct or to a PayPal account, used for purchases from Amazon, picked up as cash at Walmart, and can also be used to pay for Uber rides (embedded in Payactiv’s app) or to pay bills.

Employees can request and access their earned wages through the Payactiv mobile app or website. Once logged in, the employee sees his or her available EWA balance, which Payactiv

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calculates based on a percentage of net wages already earned and unpaid.¹ Employees can then choose an amount to access up to the accessible balance. Payactiv offers two models: (i) free access to employees who arrange to direct deposit their paycheck to a Payactiv-branded Visa prepaid or payroll card (Payactiv Access Freedom), and (ii) a non-recurring \$1 program fee for employees who do not have a Payactiv-branded card for a one-day access window (Payactiv Access Choice). Payactiv caps the \$1 one-day access fee to \$3 for a one-week pay period; or \$5 for a bi-weekly pay period in the event of multiple uses by the employee. The prepaid and payroll cards offered by Payactiv are issued by Central Bank of Kansas City on a major network brand that permits use at multiple, unaffiliated merchants. The cards are free to acquire. Payactiv does not impose fees for using the cards to purchase goods or services at merchants that accept it. Additionally, Payactiv imposes neither periodic fees nor fees to withdraw cash from an in-network ATM with significant distribution.

Today, Payactiv actively markets Payactiv Access Freedom and Payactiv Access Choice, but Payactiv has grandfathered a small subset of employers whose employees can only access the legacy programs (\$3/\$5 per one or two week pay period for all access during that pay period), which Payactiv had marketed prior to spring 2020. Except for employees who choose the Visa or Walmart payout options (discussed below), Payactiv imposes no other fees and no interest is ever charged. If an employee does not initiate an EWA transaction, Payactiv does not charge a fee.

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¹ To determine an employee's available balance, Payactiv obtains real time information from the employer regarding hours worked and the employee's hourly wage. If, for example, an employee worked overtime at a higher rate, Payactiv would have that information. Payactiv then calculates the employee's available balance for EWA by reducing calculated gross wages by approximately 60 percent.

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Table 1: Payactiv Membership Models

Plan	Fee	Duration	Other Notes
Payactiv Access Freedom	\$0 if direct deposit loaded on Payactiv-brand VISA card	Employee’s pay period.	All employees can get prepaid card. Payroll card limited to specific employers.
Payactiv Access Choice	\$1	One day.	Employer may limit max fee in pay period to \$3 (for a one week pay period) or \$5 (for a two week pay period).
Payactiv Legacy Program	\$3	One week pay period	Legacy plan, not actively marketed and not part of this application.
Payactiv Legacy Program	\$5	Two week pay period	Legacy plan, not actively marketed and not part of this application.

Payactiv typically caps access to earned but unpaid wages at 50% of the employee’s net earnings at the time of the advance. Payactiv or employers may also put in place other restrictions—for example, limiting EWA payments to \$500 per employee per pay period. In addition to EWA, any enrolled member has access to a suite of services typically including:

- Online bill-pay.
- Savings programs.
- Prescription drug discounts.
- Financial counseling.
- Financial education and financial literacy applications.
- Ability to deposit EWA proceeds into one or more bank accounts.
- Ability to access EWA via Walmart’s Direct2Cash service, which allows users to access proceeds instantly in cash at any Walmart store during normal operating hours.
- Ability to access EWA via the Visa Direct, which allows users to deposit funds instantly onto a Visa card.
- Ability to access EWA proceeds via PayPal, Amazon, Uber, and other vendors when available.
- Access to other financial wellness services as and when offered by Payactiv.

After selecting an EWA payment amount, the funds will appear in the employee’s account either that day or the next day, depending on when the employee makes the request and the employee’s selected payout method.

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At the end of each pay cycle, Payactiv provides the employer with a deduction file containing the amount of the EWA and any applicable program fees. Except in Massachusetts, New Jersey, New York, and Puerto Rico, Payactiv's practice is for the employer to deduct the amount of the program fee and the EWA from the employee's paycheck on payday and transmit those funds to Payactiv.² The EWA transaction is a non-recourse transaction. Payactiv may represent a failed deduction, but the employee has no contractual obligation to repay Payactiv if the attempted deduction from the employee's paycheck fails. Further Payactiv permits a customer to request cancellation of Payactiv's representation of failed deductions. For further details, see response to Questions 9 and 12.

5. Describe how your product or service, or the manner in which it is offered or provided to consumers, may further innovation.

The traditional batch payroll system used by most employers in the United States is outdated and slow. Most states have laws that only require employers to pay wages in arrears on a bi-monthly schedule. The gap between earning wages and receiving payment has become an expensive one for American consumers who in essence grant their employers interest free loans. To bridge the gap, many employees now rely on traditional forms of small dollar liquidity such as payday or installment loans or bank account overdrafts that can be quite costly, and can impose additional burdens such as debt collection and negative credit reporting activities. Payactiv employs technology to halt this cycle and allow workers faster access to earned money without imposing additional payroll processing burdens, or indeed any cost, on employers.³

Payactiv's EWA solution enables employers to provide their workers instant relief from their "between-paychecks financial headaches"⁴ through faster access to employee wages prior to employees' regularly scheduled payday. This means employees can access money they have earned rather than borrow money to make it to payday. As noted above, Payactiv has structured the transaction as a factoring transaction where Payactiv trades early access to a portion of an employee's wage for a portion of the wages the employee receives on payday. Payactiv believes this transaction furthers innovation because it provides an alternative to credit products at a far lower cost by adapting well-established factoring principles from the commercial realm into a consumer financial services product.

Through a CAS approval, the Bureau will be able to examine the consumer impact of Payactiv's product, confirm Payactiv's claims about EWA are accurate, and whether consumer outcomes are better than comparable products such as small dollar loans and overdraft services.

² Payactiv is excluding from this application EWA transactions where employers do not not deduct the program fee and EWA from employees' paychecks. Currently, this exclusion encompasses transactions in the jurisdictions identified above.

³ The benefits to consumers from Payactiv's EWA is discussed in further detail in response to Question 7.

⁴ Payactiv, Inc., "About Payactiv," at <https://www.payactiv.com/about/> (last accessed Nov. 12, 2020).

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Requested Duration and Scope

- 6. Describe the requested duration and other parameters of compliance assistance, such as number of transactions, consumers, or geographic scope.**

Payactiv requests a CAS approval that would apply to its EWA programs in every State, as that term is defined under 12 C.F.R. § 1026.2(a)(26). Given that Payactiv already operates in all of these locations, it does not see a need to limit the scope of an approval. Payactiv would request that the approval last for at least two years and, if proven successful, that the Bureau grant extensions in accordance with its CAS Policy or codify the substance of the CAS approval in Regulation Z, as set forth below in response to Question 12.

Potential Consumer Benefits

- 7. Describe the potential consumer benefits associated with your product or service.**

As explained above in response to Question 5, most employees are paid in arrears and, in essence, provide their employers an interest free loan. Many of those same employees must rely on high cost credit products to bridge the gap between paychecks. These employees can pay high interest fees, late fees, and other loan fees to payday and other lenders or high overdraft or NSF fees to their banks. If these employees default, they must then contend with debt collectors, negative credit reports, and difficulties in maintain a checking account. By comparison, employees who use EWA as opposed to credit products pay less interest, avoid debt collectors and negative credit reporting, and do not enter a cycle of debt. Consumers also can access their own funds rather than relying on overdrafts or high-cost cash advances from their credit card issuers. Unlike many payday lenders who profit when borrowers go into greater debt, Payactiv caps fees in any pay period at \$3 or \$5.

Analyses of Payactiv’s EWA product have shown it provides benefits to employees for minimal cost, particularly when compared to credit-based alternatives. A 2018 paper from the Harvard Kennedy School Mossavar-Rahmani Center for Business and Government, which studied Payactiv, found that EWA programs like Payactiv’s “are more efficient than market alternatives and provide clear and compelling benefits to employees.”⁵ This analysis determined that Payactiv’s former \$5 non-recurring program fee (now \$1) was just one-seventh of the typical

⁵ Todd Baker and Snigdha Kumar, *The Power of the Salary Link: Assessing the Benefits of Employer-Sponsored FinTech Liquidity and Credit Solutions for Low-Wage Working Americans and their Employers*, M-RCBG Associate Working Paper Series No. 88 (May 2018), available at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working_papers/88_final.pdf (last accessed Nov. 13, 2020). See also Center for Social Development at Washington University in St. Louis, *Workplace Financial Wellness Services: A Primer for Employers*, (2017), at 10 available at <https://csd.wustl.edu/17-33/> (last accessed Nov. 13, 2020) (noting that Payactiv’s EWA helps employees “eliminate[] costly short-term loans” and “moderate income volatility”); see also “Helping Low-income Workers Stay out of Debt: Employer-sponsored fintech products can enhance financial resilience and inclusion,” Harvard Bus. R. (Nov.-Dec. 2020) (“Proving Payactiv’s advantage [to consumers] was straightforward; the [legacy] \$5 fee is well below the typical \$35 overdraft fee charged by banks and the \$30 most payday lenders charge for a two-week \$200 loan.”).

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overdraft fee and 16.7 percent of the typical charge for a payday loan.⁶ Similarly, the Bureau itself has previously noted the benefits of EWA when it excluded EWA programs from its payday loan rulemaking in 2017.⁷ In that rulemaking, the Bureau:

note[d] that the payment of accrued wages on a periodic basis, such as bi-weekly or monthly, appears to be largely driven by efficiency concerns with payroll processing and employers' cash management. In addition, the Bureau believes that the kinds of risks and harms that the Bureau has identified with making covered [small dollar payday and auto title] loans, which are often unaffordable as a result of the identified unfair and abusive practice, may not be present where these types of innovative financial products are subject to appropriate safeguards.⁸

As noted below, Payactiv's own data and feedback from its corporate customers and employee-users is almost uniformly positive, particularly when compared to more costly alternatives. Some of these clients and customers have provided video testimonials, which can be viewed at: <https://www.payactiv.com/testimonials/>.

8. Provide suggested metrics for evaluating whether such consumer benefits are realized.

Payactiv is open to discussion with the Bureau regarding what metrics can establish that consumers benefit from EWA. Some suggestions might include data regarding the drop in turnover among employee populations with access to Payactiv's EWA program, which would signify increase workplace stability and job security. Another approach could look at the average cost of EWA services paid by Payactiv customers, as compared to the cost of a typical overdraft fee or high-cost small dollar loan.

Potential Consumer Risks and Mitigation Plan

9. Describe the potential consumer risks associated with your product or service.

Payactiv contends the risks to consumers who use EWA are limited, particularly in comparison to traditional short-term loan products. When Payactiv charges a fee, it is nominal, and provides workers with access to money they have earned. If anything, such access can protect these same consumers from higher-cost, riskier alternatives. Payactiv does not charge interest and its fees are far lower than what consumers pay for comparable amounts of credit or overdraft access. Additionally, employees who use Payactiv's EWA incur no debts and Payactiv does not report transactions to credit bureaus. Indeed, the transaction is easy to understand and is listed on the paystub as a deduction, which identifies Payactiv by name and offsets the amount already

⁶ At the time of this study, Payactiv only offered the legacy per-pay period membership program. *Id.* at 11-12. This Study also analyzed a provider in the United Kingdom.

⁷ Consumer Fin. Prot. Bur., Payday, Vehicle Title, and Certain High Cost Installment Loans, 82 FR 54472, 54547 (Nov. 17, 2017).

⁸ *Id.*

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received by the employee. Unlike traditional small dollar credit products, Payactiv's customers do not enter a cycle of debt.

In prior conversations, Bureau staff asked Payactiv to clarify how it handles the small percentage of situations where a scheduled paycheck deduction does not occur on an employee's payday. In Payactiv's experience, a FFRWP transaction does not settle properly in one of four scenarios: (i) the employer is bankrupt or insolvent, (ii) a technical or systems error by Payactiv or an employer causes a payroll deduction to fail, (iii) the FFRWP amount, and applicable fees, cannot be fully settled through a payroll deduction because the employee received insufficient net wages due to wage garnishment, lien, or other deductions, or (iv) fraud by either an employer or employee.⁹

Payactiv has not experienced losses as a result of a bankrupt or insolvent employer, but should this occur, Payactiv could either file a bankruptcy claim against the employer or write off the amounts lost, depending on the circumstances. Broadly speaking, a failed deduction results in the unjust enrichment of the employee, which is why Payactiv may attempt the deduction again on the employee's next two paydays.¹⁰

A small percentage of the time, Payactiv is unable to settle the EWA transaction, causing a loss. In this circumstance, Payactiv does not attempt to obtain the amounts lost from these employees through means other than payroll deductions because, as discussed above, Payactiv has no recourse against the employees. Payactiv does also reserve the right to pursue claims against individuals who defraud Payactiv.¹¹ Payactiv has not exercised this right.¹² Although Payactiv has experienced non-payment due to suspected fraud a handful of times, in each case it decided against pursuing a fraud claim. However, Payactiv believes it is important to limit its exposure to fraud by maintaining this right.

10. Describe how you will mitigate the anticipated consumer risks. *Include any plans for addressing unanticipated consumer harms.*

Payactiv has been partnering with employers to offer EWA since 2013. In that time, Payactiv has had few complaints. The complaints it has received generally concern administrative

⁹ Fraud could occur, for example, if an imposter (potentially another employee) poses as an employee to gain access to a payment. In such situations, Payactiv would not seek to recover from the employee whose identity was misappropriated.

¹⁰ See Terms § 3.2 ("If any FFRWP and Program fee deduction or debit (as applicable) is not successfully deducted or debited (as applicable), or is only partially deducted or debited (as applicable), on the original Scheduled Payday, for any reason including administrative error, other priority deductions or debits (as applicable), or for any reason there are insufficient net wages to cover the FFRWP and any applicable Program fees, you authorize your Employer to attempt such deduction on each of the next two Scheduled Paydays from any wage payment made on those successive Scheduled Paydays, or as applicable you authorize Payactiv to make two further debit attempts, until the FFRWP and applicable Program fees are successfully deducted or debited. Payactiv will not engage in any collection activity or credit reporting. Payactiv will not charge any additional fee or interest of any kind.")

¹¹ See generally Terms § 3.2 (setting forth certain employee representations and warranties about their good faith use of Payactiv's EWA).

¹² As explained below in response to Question 12, these limited rights do not transform the EWA transaction into a recourse-based transaction or loan.

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and technical challenges related to its app, or implementation of EWA, rather than the structure of EWA itself. Payactiv continues to monitor for potential consumer harm and when appropriate it will make adjustments. Unlike a new program applying for CAS approval, Payactiv has seven years of experience it uses to anticipate and adjust to potential risks to consumers. If Bureau staff have particular concerns regarding Payactiv, Payactiv is willing to discuss how to monitor for those concerns including by sharing complaints and Payactiv's response to them.

Statutory and Regulatory Scope

11. Describe the aspects of the product or service as to which you seek an approval.

Payactiv intends to seek a CAS approval regarding the provision of EWA to consumers in a factoring transaction where the consumer sells a future receivable to Payactiv in either of the program structures set forth below:

- a) Payactiv Access Freedom, which offers EWA services to employees for no fee if those employees direct deposit their wages on a Payactiv prepaid or payroll card.
- b) Payactiv Access Choice, which includes a \$1 (non-recurring) program fee Payactiv charges for a one-day access to EWA.

As noted above, Payactiv is excluding its legacy programs from this application.

12. Describe the statutory and regulatory provisions as to which you seek that approval and the potential uncertainty or ambiguity such approval would address.

Payactiv would like the Bureau to provide Payactiv an approval that its EWA product is not credit subject to TILA. Payactiv asserts its product is not credit for two reasons. First, Payactiv does not charge interest and its EWA product has none of the hallmarks of credit. Second, Payactiv established its EWA product so that the FFRWP is a non-recourse factoring transaction, which is not a credit transaction. We explain each of these bases below.

a) Payactiv's EWA Transaction Does Not Function Like a Credit Product

Payactiv provides a service to employees to allow them to access their own wages early. With the Payactiv Access Choice program, Payactiv charges a nominal \$1 fee to employees, which allows them to access the services and benefits detailed above. Other employees who use Payactiv Access Freedom, can access EWA for free. There can be no dispute that free, early access to one's wages is not credit. When Payactiv does charge a nominal \$1 fee, it is similar to other nominal fees paid by consumers and the fee alone does not render EWA a credit product. Credit, as defined by Regulation Z has certain hallmarks not shared by Payactiv's EWA product.

Regulation Z defines credit as "the right to defer payment of debt or to incur debt and defer its payment."¹³ TILA does not define "debt" but the rules governing construction provide that words not defined in Regulation Z "have the meanings given to them by state law or contract."¹⁴

¹³ *Id.* § 1026.2(a)(14).

¹⁴ *Id.* § 1026.2(b)(3).

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Payactiv is aware of no state law that defines a “debt” to include a non-recourse factoring transaction in which the payee receives funds and is under no contractual obligation to return those funds.¹⁵ In any event, Payactiv’s FFRWP is not “debt” under the terms of the contract because the agreement between Payactiv and the employee unambiguously states that the employee incurs no debt by using the service.¹⁶ Instead, Payactiv legally and unambiguously assumes all risk of nonpayment and has no recourse, directly or indirectly, against the employee in the event of nonpayment.¹⁷

This contractual result is buttressed by Payactiv’s actual practice. Payactiv does not charge interest, impose late fees, has never engaged in collection activity, litigation, or credit reporting to collect from an employee in the event of nonpayment. Payactiv works to reconcile erroneous deductions, but Payactiv bears the risk of loss in every transaction and has in fact lost funds on a portion of its transactions. As there is no obligation or liability for the employee—legal or otherwise, matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent. As these practices help make clear, Payactiv does not act like a creditor and does not treat employees like borrowers.

Additionally, unlike most credit products and, in particular, pernicious short term credit products that have been the focus of regulatory scrutiny, consumers cannot end up in a situation where they pay substantial fees, interest, late fees, or incur other mandatory costs as a result of using Payactiv’s EWA. Under Payactiv Access Choice, an employee is limited to a maximum charge of \$3 or \$5 per pay period. Nor can employees incur overdraft, NSF, or other fees through their use of EWA. A nominal fee, without other hallmarks of a credit product, does not render the fee a finance charge and EWA a credit product.

b) Factoring Transactions are not Credit

Payactiv’s FFRWP is also not credit because it is a non-recourse factoring transaction. Factoring is traditionally used by small businesses to fund their operations prior to receiving payment on accounts receivables. In a typical factoring transaction, the funder will provide a lump sum today in exchange for the right to a percentage of the recipient’s future receivables or invoices. If the small business does not earn enough money to repay the funder, the funder will have no

¹⁵ Most states do not define debt and defer to a dictionary definition for undefined terms. *See, e.g.*, TEX. GOV’T CODE § 311.011(a). Black’s Law Dictionary defines “debt” as “[l]iability on a claim” and “liability” as a “financial or pecuniary **obligation** in a specified amount.” Black’s Law Dictionary (11th ed. 2019) (emphasis added); *see Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 380 (1973) (Douglas, J., dissenting in part) (“A debt, however, is more than a binding contractual obligation to pay a sum of money in the future upon the performance of certain conditions by the other party to the contract. It is an unconditional obligation to pay.”) (citing 3A A. Corbin, Contracts § 691 (1960)). Thus, without obligation, there is no debt.

Additionally, over the years, the Federal Reserve Board has set out nine transaction types in the commentary to Regulation Z (subsequently adopted by the Bureau) that are excluded from the definition of credit. *See* comment 2(a)(14)-1, which is discussed below. The Board was able to determine these transactions are not credit without having to refer to state law.

¹⁶ *See* Appendix A ¶ 6.3 (“you have incurred no debt owing to Payactiv”).

¹⁷ *Id.* ¶¶ 3.1 and 3.6.

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recourse against the small business.¹⁸ Courts have held that these factoring transactions are not loans if the funding entity has no recourse and bears the risk of loss.¹⁹ In the small business context, factoring may be an expensive financing option because of the unpredictability of future earnings of a small business. In the context of Payactiv’s FFRWP, however, the cost of the factoring transaction is low because Payactiv only funds the transaction *after* the consumer earns income but before the employer pays it to the consumer. Compared to small business factoring, the risk Payactiv is taking on any one consumer is quite low as employers rarely fail to pay their employees their earned wages. Nevertheless, if a consumer is not paid in the future or is not paid enough to repay the FFRWP, Payactiv will have no recourse against that consumer and may lose funds.

The Bureau can conclude that Payactiv’s FFRWP is not credit because consumers do not “incur debt and defer its payment.”²⁰ As noted above, incurring debt implies a contractual obligation to repay that can be “defer[red]” but not extinguished. With Payactiv’s FFRWP, if the customer’s employer does not properly deduct the amount of the FFRWP and any applicable fee, Payactiv’s right to a portion of the employee’s income is extinguished, not deferred. Payactiv’s structure is similar to several exemptions in the commentary to Regulation Z that exclude financing transactions where the obligation to repay can be extinguished because the entity providing funds has no recourse. Specifically, comment 2(a)(14)-1 excludes layaway plans and insurance premium plans “unless the consumer is contractually obligated to continue making payments,” home improvement transactions if the consumer “has no contractual obligation to continue making payments,” borrowing against the accrued cash value of an insurance policy or pension account “if there is no independent obligation to repay,” and mortgage assistance payments where repayment is due “upon the occurrence of certain events.” Payactiv’s FFRWP transaction may be most analogous to the example in comment 2(a)(14)-1.viii, which explains that investment plans where “the party extending the capital to the consumer risks the loss of the capital advanced” are not credit. Here, like in the investment plan example, Payactiv risks the loss of its capital if it is not repaid.²¹

¹⁸ See Steve Nicastro, “Invoice Factoring: Financing for Your Small Business,” Nerdwallet.com at <https://www.nerdwallet.com/blog/small-business/small-business-invoice-factoring/> (last accessed Nov. 13, 2020).

¹⁹ See, e.g., *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable*, 336 F.3d 410, 415-16 (5th Cir. 2003) (factoring transactions with “full recourse” are loan transactions); *Nickey Gregory Co., LLC v. Agricap, LLC*, 597 F.3d 591, 601-02 (4th Cir. 2010) (“agreement between the parties [which required repurchase of a receivable if insolvency was possible] effectively insulated [factor provider] from loss and was therefore a loan rather than a factoring sale”); *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc. 3d 807, 816 (Sup. Ct. Westchester Cnty. 2017) (“In determining whether a transaction is a loan or not, the court must examine whether or not defendant is absolutely entitled to repayment under all circumstances.”); *Merch. Cash & Capital, LLC v. Yehowa Med. Servs., Inc.*, 2016 NY Slip Op 31590, at *5 (Sup. Ct. Nassau Cnty. July 29, 2016); *Prof'l Merchant Advance Capital, LLC v Your Trading Room, LLC*, 2012 NY Slip Op 33785[U], *6 (Sup Ct., Suffolk Cnty. N.Y. Nov. 28, 2012) (“[plaintiff] failed to establish that the subject agreement to purchase credit card receivables was a loan and not an agreement to purchase future receivables for a lump sum discounted purchase price payable in advance by the plaintiff in exchange for a contingent return”).

²⁰ 12 C.F.R. § 1026.2(a)(14).

²¹ *C.f.* comment 2(a)(14)-2. Payactiv’s FFRWP is different from the typical payday lending transaction because, unlike a payday borrower, a Payactiv customer has no further obligation if the initial deduction fails.

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c) Payactiv can Re-Present Deductions, Correct Errors, and Deter Fraud in a Non-Recourse Transaction.

In limited circumstances, Payactiv will re-present a deduction when the deduction is unsuccessful on an employee's payday (*see* Question 9). Often deductions are unsuccessful due to administrative error, such as an error in a data file or the API that causes the employee to accidentally receive the receivable purchased by Payactiv (*i.e.*, the employee received a double payment, the EWA and the same funds in his or her paycheck). This process also allows a consumer to continue using EWA, because it is Payactiv's policy to restrict access to employees for whom it was unable to complete a payroll deduction if the prior deduction is still outstanding. Payactiv also reserves the right to pursue consumers who defraud it.

These policies do not mean that Payactiv has "recourse" nor do they indicate the FFRWP transaction involves an extension of credit. In a factoring transaction, "recourse" refers "to the liability of a seller of receivables to the purchaser if the underlying obligors fail to pay the receivables."²² In a non-recourse factoring transaction, the buyer of receivables "bears the risk of non-performance" if future receivables do not materialize.²³ Payactiv is a factor provider because it ultimately "bears the risk" if it is unable to complete a deduction. Payactiv still bears the risk of loss even though it takes steps—attempting deductions in successive pay periods when initial deductions fail—to minimize its loss and disruption to its users. In none of the examples above in comment 2(a)(14)-1, does the analysis of whether a product is excluded from the definition of credit hinge on the ability of the provider to minimize fraud or unjust enrichment.

Where courts have evaluated whether a factoring transaction is a really a loan, they look at who bears the risk of ultimate loss.²⁴ A limited ability to protect a factoring transaction buyer's interest does not render the factoring transaction a loan.²⁵ Often a buyer in a factoring transaction will introduce controls or processes to make its receipt of receivables more likely while the transaction remains non-recourse. Payactiv takes similar steps when it re-presents deductions if

²² *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 925 (10th Cir. 2004); *see also Official Comm. of Unsecured Creditors v. LG Funding, LLC*, No. BK16-40787, Bankr. LEXIS 3562, at *21-22 (Bankr. D. Neb. Nov. 9, 2018) (a buyer of receivables has recourse if the factoring agreement contains "repurchase obligations, collectability guarantees, or reserves from the purchase price to be released only as receivables come in."); *Nickey Gregory Co., LLC*, 597 F.3d at 602 (repurchase obligations made factoring agreement a recourse transaction).

²³ *Endico Potatoes v. CIT Group/Factoring*, 67 F.3d 1063, 1069 (2d Cir. 1995) ("The root of [factoring] is the transfer of risk. Where the lender has *purchased* the accounts receivable, the borrower's debt is extinguished and the lender's risk with regard to the performance of the accounts is direct, that is, the lender and not the borrower bears the risk of non-performance by the account debtor.").

²⁴ *See In re Dryden Advisory Grp., LLC*, 534 B.R. 612, 623 (Bankr. M.D. Pa. July 29, 2015) ("[I]f a seller conveys its entire interest in a receivable, the transfer is a true sale, even if the seller has a recourse obligation."); *LG Funding, LLC*, Bankr. LEXIS 3562, at *21-22 (factoring agreement was a sale and not a loan even though the seller executed a blanket security agreement and the seller executed a personal guarantee).

²⁵ *See Dryden Advisory Grp., LLC*, 534 B.R. at 617. In *Dryden*, the court held a transaction was not a loan even though the agreement specified some circumstances that would afford the buyer recourse for non-payment. *Id.* at 623 ("While the foregoing provisions limit [the buyer's] risk and provide some forms of recourse, they are insufficient to support recharacterization of the transaction as a loan" because the seller transferred full economic interest in the purchased accounts to the buyer). Nor do courts construe a factoring transaction that involves limited recourse to be a loan. *Id.*; *Complete Bus. Solutions Group, Inc. v. Boreal Water Collection Inc.*, 2017 Phila. Ct. Com. Pl. LEXIS 442, at *5 (Nov. 2, 2017) ("A characterization of [a] transaction with recourse does not automatically convert the transaction into a loan. The whole transaction needs to be examined."); *LG Funding, LLC*, 2018 Bankr. LEXIS 3562, at *21-22.

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its initial attempt fails for the reasons identified in Question 9. If these deductions fail or the consumer cancels them, Payactiv is without recourse and bears the risk of loss.

Relatedly, Payactiv's attempts to protect itself from fraud or to limit unjust enrichment of the employee do not change the nature of the factoring relationship. Parties to a contract can always pursue fraud claims. Reservation of this right is not "recourse."²⁶ Put another way, if a receivables seller fails to remit funds from sales to the buyer as promised, the buyer's suit to recover those funds pursuant to their agreement would not change the "recourse" nature of the transaction.²⁷ Instead, the buyer would be suing to enforce its contractual rights as a factor provider. Were this not the case, a factor provider would have no ability to protect itself from unscrupulous receivables sellers or technological failures that prevented repayment. Here, consumers agree to sell their future receivables to Payactiv. If a consumer takes steps, such as engaging in fraud, to prevent Payactiv from pursuing its contractual right, Payactiv may take legal action to protect itself. This does not transform the nature of the parties' relationship. Nor does Payactiv putting steps in place to limit unjust enrichment of employees change the nature of the relationship. To do otherwise would jeopardize the viability of Payactiv's business.

13. Explain why the requested approval is an appropriate resolution of that uncertainty or ambiguity, and why the described aspect of the product or service complies with the applicable statutory and regulatory provisions.

The number of earned wage access programs, some similar to what Payactiv offers, has grown substantially in recent years. Unsurprisingly, given that earned wage programs are new and garnering increased attention, there have been questions from market participants regarding the application of various laws to these programs. In particular, there is confusion in the marketplace regarding whether federal consumer credit rules apply to EWA. By providing a CAS approval to Payactiv on the application of TILA, the Bureau would alleviate some uncertainty and better allow Payactiv's program to develop and demonstrate to the Bureau and the public how Payactiv's FFRWP benefits consumers and employers. Ultimately, Payactiv expects that its participation in the CAS will provide the evidence necessary for the Bureau to add FFRWP as explained in this application as an additional example of a product that is not credit in comment 2(a)(14)-1.

Payactiv expects a CAS approval will allow it to better market its product to employers. While Payactiv's end user is an employee, Payactiv must first sell its solution to employers—often at the corporate level, with review by the employer's human resources, procurement, and legal departments. EWA programs have certainly become better known in recent years, and employers largely view the rise of EWA solutions as an important benefit for their employees. But some uncertainty persists. Often employers express concern about offering a loan product to employees and potential customers have directly asked Payactiv whether its product is credit subject to TILA. Payactiv has also been informed that competitors have improperly accused Payactiv of engaging in unlawful lending. A CAS approval will serve as an independent verification from the Bureau that Payactiv's FFRWP is not credit under Regulation Z. Importantly, this will also demonstrate

²⁶ See *Dryden Advisory Grp.*, 534 B.R. at 617, 623 (factoring transaction was not a loan even though buyer had recourse if seller lied about his inability to pay).

²⁷ Nor would the seller's payment to settle that suit using funds other than funds from the original account receivable to resolve that dispute change the nature of the factoring transaction.

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that it is possible for employers to help provide access to earned wages without resorting to offering costly credit products. Thus, a CAS approval would have the dual benefit of removing the regulatory uncertainty Payactiv currently faces when attempting to market its product and also providing this emerging market with an example of an affordable and responsible product that does not trap consumers in a harmful cycle of indebtedness.

Payactiv does not, however, expect a CAS approval to meaningfully affect current and future discussions between Payactiv and state regulators, who have also requested information about Payactiv's offerings. Payactiv believes the inquiries it has received from state regulators are part of a larger effort to better understand Payactiv's offerings as well as the emerging market for products with some features similar to Payactiv's. These requests have been broad, covering topics ranging from corporate structure to marketing materials, in part because a wide variety of state laws could potentially bear on Payactiv's operations in any particular state. In contrast, this CAS is narrowly focused only on the applicability of TILA. A state regulator may view a CAS approval as informative, but Payactiv does not expect such an approval to have a significant effect on current or future discussions with state regulators seeking to interpret state law.

Data Sharing

14. Describe data associated with your product or service you possess or intend to develop that will be shared with the CFPB if the application is granted.

Payactiv intends to discuss with the Bureau what data to share with the Bureau. The data Payactiv would consider sharing includes:

- a. Data regarding consumers' use of provided services including EWA and other program benefits.
- b. Data regarding consumer complaints.
- c. Data regarding instances when Payactiv attempts a payroll deduction after the first pay period.

15. Describe the proposed schedule for sharing the data with the CFPB.

Payactiv is willing to share data on a schedule amenable to the Bureau.

Confidentiality

16. If the applicant wishes to request confidential treatment for certain information or data, the applicant should identify this information or data and the basis for such treatment as specifically as possible.

Payactiv intends to have further discussions with the Bureau regarding data sharing. Payactiv expects to request confidential treatment of data about customer usage of certain program features, size, and frequency of EWA transactions, and other proprietary types of information. Additionally, this submission contains confidential business information about Payactiv's business plan, operations, and customer experiences.

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Payactiv requests confidential treatment of its submissions to the Bureau in accordance with the CFPB's Disclosure of Records and Information rule and FOIA Exception 4. If the Bureau receives a FOIA or other third party request to which Payactiv's application, approval, or other materials provided by Payactiv is responsive, please timely notify Payactiv of the request and the Bureau's intended response to it in accordance with the Bureau's rule regarding Disclosure of Records and Information, 12 C.F.R. § 1070.20(d).

Regulatory Coordination

- 17. If the applicant would like the CFPB to coordinate with other regulators on this application, please identify those regulators and provide their contact information, if available.**

None.

APPENDIX A

PROGRAM TERMS AND CONDITIONS

PayActiv, Inc. ("PayActiv," "we," "us," or "our") permits eligible employees ("Employee," "you," "your," "yours," or "user") to register for the PayActiv Benefit Membership Program ("Program"). PayActiv provides registrants with certain benefits and services ("Services") as set forth below. By registering for or using any of the Services, you agree to all of the terms and conditions set forth below. These Program terms and conditions (Agreement) are between PayActiv and you, and may be updated from time to time without notice. By agreeing to these terms and conditions, you agree to the terms and conditions as they exist at the time of your transaction.

1. Defined Terms

As used herein:

"Bank Account" means your checking, savings, or other consumer asset account held directly or indirectly by a depository institution.

"Business Day" means any day other than a Saturday, Sunday or federal bank holiday.

"Debit Card" means any card, plate, or other single device that may be used from time to time to access your Bank Account.

"Earned But Unpaid Wages" means, as of any date of determination, wages that you have earned from Employer during any Pay Period but that have not yet been paid to you and are scheduled to be paid to you on the Next Scheduled Payday.

"Next Scheduled Wage Payments" means, as of any particular date of determination, the Scheduled Payment that you will receive on the Next Scheduled Payday.

"Next Scheduled Payday" means, as of any particular date of determination, the Scheduled Payday that will occur after such date of determination.

"Pay Period" means the period of time during which you earn wages that are subsequently paid on a Scheduled Payday.

"PayActiv Card" means the PayActiv Visa Prepaid Card, or PayActiv Visa Payroll Card obtained directly by you or through your Employer, or other PayActiv-branded debit or prepaid card.

"Payment Method" means the Bank Account, Debit Card, or PayActiv Card selected by the Employee to pay a Program Fee, pay accessed FFRWPs, or receive a settlement of an FFRWP (as defined below), as applicable.

"Scheduled Paycheck" means the paycheck that you receive from Employer on an applicable Scheduled Payday. You may receive a Scheduled Paycheck by direct deposit, physical check or other method that you and Employer have separately agreed upon.

"Scheduled Payday" means the day on which your Employer will regularly pay to you your wages for a given Pay Period.

"Site" means the website PayActiv.com or any smartphone or tablet application associated with the website PayActiv.com.

2. Registration

2.1. Registering for Services

If your employer designates you as eligible to participate in the Program, you may register on our Site. There is no charge for registering. Only registrants are permitted to obtain Services.

As part of the registration and account creation process, you will select a password and provide us with certain registration information. You are solely responsible for maintaining the confidentiality of your password(s) and for all usage or activity on your account, including the use of your account by any person using your password(s). You agree to (a) provide true, accurate, current and complete information about yourself as required by the Program's enrollment process or any of the Services, (b) maintain and promptly update such information to keep it true, accurate, current and complete, (c) comply with all applicable laws and regulations, and (d) not take any action or direct any other person to take any action that is fraudulent or deceptive,

infringes on the rights of others or PayActiv, or that you know is false or misleading. If we have reasonable grounds to suspect the information you provide is untrue, inaccurate, not current or incomplete, we have the right to suspend or terminate your account and refuse any and all current or future use of the Services.

2.2. Term

Your access to Services in the Program shall begin on the day you register on PayActiv's Site. Some Services do not require you to select a Program Option below. Your access to Services remains active until: **(1)** your employer or PayActiv designates you as ineligible to participate in the Program; **(2)** you notify PayActiv in writing that you wish to cancel your access, or **(3)** Your access is otherwise terminated as indicated above. Some Services will become unavailable to you in the event your employment with the employer offering the Program is terminated for any reason.

2.3. Program Options Available

PayActiv offers several Programs that provide access to earned but unpaid wages. Your Employer chooses which options are available to you. PayActiv's Programs are:

- **PayActiv Access Freedom**. The PayActiv Access Freedom Program is available to users who choose to direct deposit regularly scheduled periodic wage payments onto a PayActiv Card.
 - **Term**: The Access Freedom Service is available to you until you reach the Maximum FFRWP or discontinue direct deposit on the PayActiv Card.
- **PayActiv Access Choice**. The PayActiv Access Choice Program is available to users who choose not to directly deposit their earnings onto a PayActiv Card.
 - **Term**: PayActiv Access Choice participants may only obtain an FFRWP until **(a)** 11:59 pm Pacific time, or **(b)** you reach the Maximum FFRWP.
- **PayActiv Classic**. The PayActiv Classic Program is available to certain Employers that do not offer PayActiv Access Freedom or PayActiv Access Choice.
 - **Term**: The PayActiv Classic Service is available to you until whichever occurs first: **(a)** the last day of the Pay Period in which you elect to use the Service; or **(b)** you reach the Maximum FFRWP.
 - **Limits**: Employees can access up to 3 FFRWPs under bi-weekly and bi-monthly pay periods and up to 2 FFRWPs under weekly pay periods. FFRWP deposits on PayActiv Visa Prepaid Card are unlimited.
- **TimelyPay**. The TimelyPay Program is a limited services program available to certain Employees of Employers who execute a TimelyPay addendum with PayActiv.
 - **Term**: TimelyPay is offered on a per-pay period basis and is available to you until whichever occurs first: **(a)** the last day of the Pay Period in which you elect to use the Service; or **(b)** you reach the Maximum FFRWP.

Each of these options are subject to the terms and conditions set forth in this Agreement. Your employer may offer more than one option, in which case you will choose an option when you elect to activate Services for your current Pay Period. PayActiv or your Employer may change the Programs offered to you at any time. We reserve the right to change Program names and details without notice.

2.4. Access to Services

Once you register with PayActiv, you may obtain access to some Services immediately and without selecting a Program Option. In order to obtain other Services, you must elect to activate the Services for your current Pay Period under one of the Program Options. You must make your election by both: **(1)** notifying PayActiv through an electronic acknowledgement on the Site; and **(2)** if applicable, agreeing to pay the Program Fee as set forth in section 2.5 below.

Some Services are subject to additional terms and conditions. Two of the Services—access to earned but unpaid wages and Savings programs—are offered by PayActiv. Other Services are offered by third parties. PayActiv is not liable for any Services provided by third parties, including a failure to provide those Services. The available Services may be altered at any time without notice by PayActiv or, if applicable, the third party providing the Service.

2.5. Program Fee to Access Services

The cost to access Services during a Pay Period is the Program Fee. The Program Fee varies based on which Program option your Employer chooses to make available to you:

- PayActiv Access Freedom – the Program Fee is waived. After validation of your direct deposit on a PayActiv, you will be able to use this Service.
- PayActiv Access Choice – the Program Fee is \$1 to access the Program, which provides access to all Services for one day;
- PayActiv Classic – the Program Fee is \$3.00 per weekly Pay Period or \$5 per bi-weekly / bi-monthly Pay Period.
- TimelyPay – TimelyPay is offered at no cost to the Employee.

Your employer may offer more than one Program option. From time to time, PayActiv and your employer may agree to modify the Program Fee. You agree to review this Agreement each Pay Period prior to electing to activate the Services.

2.6. Payment of Program Fee

When you elect to activate Services you will pay the Program Fee by:

1. authorizing PayActiv to debit your Payment Method or other method;
2. authorizing your Employer to deduct the Program Fee from your Next Scheduled Paycheck on your Next Scheduled Payday and remit such amount directly to PayActiv; or

You acknowledge and understand that you must authorize payment by making an election on PayActiv's Site or by contacting PayActiv directly at **1 (877) 937-6966 Monday thru Friday between 6 a.m. and 6 p.m. (San Francisco time)**.

3. FFRWP Service

3.1. Overview

One of the Services available to Program participants is the ability to receive and retain a portion of Employee's Earned But Unpaid Wages by selling PayActiv amounts on account of Employee's future received wage payments (each, an "FFRWP").

An FFRWP is a "factored future received wage payment." The FFRWP is factored (i.e., "sold") because you are selling to PayActiv all of your right, title and interest in and to the amounts or account of a future received wage payment (not wages themselves) and you retain no rights in the amounts factored. You acknowledge that, in connection with such sale, you have incurred no debt owing to PayActiv or to any other 3rd party and PayActiv cannot report the transaction to any credit reporting agency. The FFRWP is a present transfer of a future right. Upon the sale of each FFRWP to PayActiv, PayActiv acquires a present interest in a future right that you expect to receive (the proceeds of your future wage payment(s) and not wages themselves) but that you may not receive. PayActiv has no recourse against you if you do not receive that future right. The FFRWP relates to a received wage payment but the right that you have sold to PayActiv is not the right to receive your actual wages but only the right to receive amounts that you have actually received from Employer. If, for reason of employer insolvency, you do not receive the wage payment to which the FFRWP relates, there is no received wage payment to which PayActiv has any rights, and you will not owe PayActiv any reimbursement for the FFRWP you may have accessed. You acknowledge and understand that you may not request, and will not receive, any FFRWP with respect to any wages that you have not yet earned from Employer and or any compensation that is not owed to you by Employer. Through PayActiv's contract with your Employer, PayActiv can access time, attendance and wage data of the Employer and you understand that PayActiv will rely on such time and wage information, as it relates to your work, in order to provide the FFRWP Service to you. You also understand that Employer may provide additional personal identifying information to enable PayActiv to verify your identity and you hereby consent to allow your Employer to do so.

3.2. Employee Representations, Warranties, and Authorizations

If any FFRWP and Program Fee deduction or debit (as applicable) is not successfully deducted or debited (as applicable), or is only partially deducted or debited (as applicable), on the original Scheduled Payday, for any reason including administrative error, other priority deductions or debits (as applicable), or for any reason there are insufficient net wages to cover the FFRWP and any applicable Program fees, you authorize your Employer to attempt such deduction on each of the next two Scheduled Paydays from any wage payment made on those successive Scheduled Paydays, or as applicable you authorize PayActiv to make two further debit attempts, until the FFRWP and applicable Program fees are successfully deducted or debited. You may revoke your authorization for any such subsequent deductions at any time without a penalty or a fee. However, if PayActiv is unable to settle an FFRWP transaction, your access to the Services may be limited or suspended until such time as you voluntarily pay the outstanding FFRWP amount and any applicable outstanding fees. PayActiv will not engage in any collection activity or credit reporting. PayActiv will not charge any additional fee or interest of any kind.

You represent and warrant that, to the best of your knowledge, you have earned the net accessible wages to which the FFRWP relates, that those wages are not subject to reduction in whole or in part by reason of a valid lien or garnishment, and that by requesting an FFRWP, you have a reasonable expectation of receiving those net wages in your next scheduled wage payment.

3.3. How to Request an FFRWP

To request an FFRWP, you must notify PayActiv of the requested FFRWP amount. You understand that if the amount of your requested FFRWP exceeds the maximum FFRWP set forth herein, as applicable, the amount of your requested FFRWP will be automatically reduced to such maximum and you will be deemed to have requested an FFRWP equal to such maximum.

The amount of your requested FFRWP (subject to the limitations in this section "How to Request an FFRWP") will be made available to you, upon your election, either:

1. through an ACH deposit in a checking or savings account or accounts that you have linked to your PayActiv App;
2. by crediting such amount to the Payment Method you selected, or your PayPal account, that you have linked to your PayActiv App;
3. in cash through Walmart's Direct2Cash service;
4. Through Visa Direct to a sixteen-digit debit card number;
5. In Amazon Cash;
6. In credit for an Uber Ride; or
7. To pay a bill.

You understand that in some instances access to an FFRWP may be made available through a kiosk that is maintained at your place of employment but operated by PayActiv. If you desire to access an FFRWP through such a kiosk, you will be provided with an access code to be used at the kiosk to receive your FFRWP.

3.4. Obtaining an FFRWP

Employees participating in the PayActiv Classic Program, PayActiv Access Freedom Program, and PayActiv Access Choice Program (the "Programs") may obtain an FFRWP under the following additional terms and conditions:

Minimum and Maximum FFRWP. The minimum and maximum FFRWP amounts are determined by PayActiv and your Employer, may depend on Your employer's payroll schedule, and can be changed without notice. The minimum FFRWP and total accessible balance in any pay period will be displayed in the PayActiv App.

Additional Fees. In addition to any Program Fee charged by PayActiv, you may incur additional costs in connection with the Programs or the Service:

- If your employer is an approved provider, you may have the option of obtaining cash at designated Wal-Mart locations. If you choose this option you agree to pay an additional fee that will be debited to your debit / prepaid card, which will be disclosed at the time of your request, and which you will be required to accept each time you obtain cash in connection with this Service.
- You have the option of instantly depositing an FFRWP onto a Debit or Prepaid Card. If you choose this option you may be charged an additional fee, which will be disclosed at the time of your request, for each instant deposit.
- You have certain indemnification obligations, and you may be required to pay certain fees, costs and expenses as set forth under the heading "Arbitration Agreement".

Term: You may only obtain an FFRWP for the applicable Program term specified herein.

3.5. Settlement of FFRWPs

Except as otherwise noted herein, Employees must settle FFRWPs and any applicable Program Fee through deductions from his or her paycheck. You authorize Employer to make a deduction from your Scheduled Paycheck for each Pay Period during which you elect to activate the Services in an amount equal to the FFRWP that you received before the Scheduled Payday. You further direct Employer to pay such amount and any applicable Program Fee directly to PayActiv on account of the FFRWP that you received before the Scheduled Payday for such Pay Period. For the avoidance of doubt, Employer is a direct third-party beneficiary of this paragraph and may rely upon your direction contained herein.

If you are a resident of a State in which payroll deductions are not offered by PayActiv or your Employer to settle FFRWPs and/or applicable Program Fees, you may be required to settle FFRWPs and/or applicable Program Fees through another payment method, including but not limited to a PayActiv Card or another debit card. You authorize PayActiv to debit such payment method in an amount equal to the applicable FFRWP and/or applicable Program Fee. PayActiv, in its sole discretion, may permit residents of other states to use this settlement method.

You may, at any time, directly pay any portion of the outstanding amount of the FFRWP or any portion thereof by contacting PayActiv directly at **1 (877) 937-6966 Monday through Friday between 6 a.m. and 6 p.m. (San Francisco time)**. If you make any such payment, the amount that will be debited from your PayActiv Card or other Debit / Prepaid Card or deducted from your Next Scheduled Paycheck (if applicable) will be decreased by the exact amount that you paid directly to PayActiv.

In the event your payroll deductions or debits (as applicable) are completely or partially unsuccessful for any reason other than administrative error (by Employer or PayActiv), your access to all earned wages may be suspended until such time as PayActiv successfully deducts or debits (as applicable) the outstanding FFRWP amount and any applicable outstanding fees pursuant to Section 3.2, or until you voluntarily pay the outstanding FFRWP amount and any applicable outstanding fees. In the event PayActiv remains unable to fully settle FFRWPs or unpaid Program Fees in accordance with Section 3.2, your access to all Program Benefits may be suspended until such time as you voluntarily pay the outstanding FFRWP amount and any applicable outstanding fees.

3.6. Sale of FFRWPs to PayActiv

You acknowledge that, upon the funding of any FFRWP, you have sold, transferred, and conveyed to PayActiv all of your right, title and interest in, to and under the amounts that you receive with respect to the future received wage payment related to the FFRWP on a nonrecourse basis. An FFRWP is not a credit transaction and there is no interest charged. Except for assignments of wages conducted in compliance with Indiana Code sections 22-2-6-1 and 22-2-6-2, **YOU ACKNOWLEDGE AND AGREE THAT YOU HAVE NOT ASSIGNED, TRANSFERRED OR CONVEYED YOUR WAGES FROM EMPLOYER OR ANY PART THEREOF. PAYACTIV HAS NO RIGHT TO ASSERT A CLAIM AGAINST YOU OR EMPLOYER WITH RESPECT TO YOUR WAGES AND HAS NO RIGHT, TITLE OR INTEREST IN, TO OR UNDER YOUR WAGES.**

3.7. Assignment of FFRWPs by PayActiv

You agree that PayActiv shall have the right to sell, transfer, assign and convey any of its right, title and interest in, to and under any FFRWP and the proceeds thereof without providing you notice of such sale, transfer, assignment or conveyance, and you agree that you do not have any right to consent to any such sale, transfer, assignment or conveyance.

4. Telephone Call and SMS Message Consent

We may contact you from time to time in connection with your account, or any product or service for which you have begun to inquire and or completed an enrollment process.

By providing your mailing address and email address, you agree to be contacted by PayActiv or our affiliates by written notices or letters, email messages, and instant messages, at any mailing address or email address you provided, or from other public and nonpublic databases we may lawfully access.

By providing your phone number, you agree to receive calls and text messages from PayActiv or its affiliates regarding your account even if you have opted into the National Do Not Call List administered by the Federal Trade Commission, or any state equivalent Do Not Call List. You may be contacted using an automatic telephone dialing system or an artificial or prerecorded voice.

If you provided prior express written consent to receive telemarketing calls or text messages from PayActiv, PayActiv or its affiliates may deliver those telemarketing calls or text messages to the phone number you provided using an automatic telephone dialing system or an artificial or prerecorded voice. You do not have to agree to receive telemarketing calls or text messages as a condition of receiving services from PayActiv.

For any phone number you provide to PayActiv, you represent and warrant that you are the subscriber or primary user of that phone number. If your phone number changes, you agree to immediately notify us of your new phone number.

If you have provided consent to receive calls or text messages, you may revoke such consent at any time using any reasonable method that clearly expresses your desire to stop receiving calls or text messages from PayActiv or its affiliates. Consent to be contacted by PayActiv or its affiliates does not terminate upon a change in your employment status unless you expressly revoke consent.

You acknowledge, understand, and agree to the following regarding text messages sent to you by PayActiv or its affiliates:

- (1) **No Limit.** You acknowledge that PayActiv or its affiliates may send you a text message pertaining to your account at any time and there is neither a minimum nor a maximum number of text messages you may receive. Text message frequency may vary by customer.
- (2) **Opt Out.** If you no longer want to receive text messages, you can respond to any text message you receive from PayActiv or its affiliates by texting the word STOP. You may also text the word STOP to (877) 937- 6966 to opt-out of future messages.
- (3) **Assistance.** For assistance, you may text the word HELP to any text message you receive from PayActiv or its affiliates, or please call PayActiv at **1 (877) 937-6966 Monday thru Friday between 6 a.m. and 6 p.m. (San Francisco time).**
- (4) **Standard message rates** may apply from your mobile service or wireless device carrier for text messages you send or receive. These rates may be charged by your mobile service or wireless device provider, and would be payable by you. Such mobile service or wireless device carrier shall not be liable for any undelivered messages or delays in the receipt of the text messages discussed in these Terms and Conditions.

You understand that text messaging services may not be available at all times and in all areas. Neither PayActiv nor its affiliates are responsible for text messages that you do not receive for any reason.

5. Consent to Obtain Information

You acknowledge that Employer has retained and authorized PayActiv, as its servicer, to receive your personal information from Employer as is necessary to permit PayActiv to provide Services to you in accordance with this Agreement.

6. Authorization

6.1. Authorization for ACH and Other Credits

You authorize PayActiv to electronically credit your Payment Method for an approved FFRWP. You represent and warrant that you have the right to authorize PayActiv to credit your Payment Method for payments due to you for the approved FFRWP. You further agree to provide PayActiv with complete and accurate information necessary to initiate any electronic credit. If the Payment Method you selected is jointly owned you: **(1)** represent and warrant that you have the authority to enter into this Agreement independently; and **(2)** will indemnify and hold PayActiv harmless from any claims by any other owner of the Payment Method.

If for any reason your financial institution delays or fails to accept the electronic credit initiated by PayActiv, and PayActiv subsequently debits your Payment Method, you acknowledge and agree that PayActiv may use its best efforts to have your financial institution accept the credit for the approved FFRWP, or PayActiv may otherwise seek a refund to be initiated for the amount of the FFRWP as soon as reasonably possible. You also agree to indemnify and hold PayActiv harmless for any error you

make in providing PayActiv with complete and accurate information necessary to initiate an electronic credit, or for any failure by your financial institution to accept or receive the electronic credit you requested.

6.2. Authorization for Electronic Bill Pay from FFRWP

One of the Services is a bill payment service. If you elect to use this service, you authorize PayActiv to electronically pay your designated biller directly from an approved FFRWP through a third-party bill pay service provider operating on behalf of PayActiv.

You represent and warrant that you have the right to authorize PayActiv and its subcontractors and bill pay service providers to credit your biller for payments due to you for an approved FFRWP. You further agree to provide PayActiv with complete and accurate information necessary to initiate the bill pay transaction to your biller's account. You will indemnify and hold PayActiv and its subcontractors and bill pay service providers harmless from any claims by any other owner of the bill pay account.

If for any reason your biller delays or fails to accept the payments initiated by PayActiv, its subcontractors or its bill pay service providers and PayActiv debits your Payment Method, you acknowledge and agree that PayActiv may use its best efforts to have your biller accept the bill payment for the approved FFRWP, or PayActiv may otherwise seek a refund to be initiated for the amount of the debit as soon as reasonably possible. You also agree to indemnify and hold PayActiv and its subcontractors and bill pay service providers harmless for any error you make in providing PayActiv with complete and accurate information necessary to initiate a bill pay transaction, or for any failure by your designated biller to accept or receive the bill pay payment you requested.

6.3. Authorization for ACH and Other Debits

If you settle FFRWPs and/or Program Fees through a debit of your Payment Method, you authorize PayActiv to electronically debit your Payment Method and, if necessary, electronically credit your Payment Method to correct erroneous debits for your Program Fee and any FFRWP.

You acknowledge that the electronic authorization contained in this section 6.3 represents your written authorization for ACH transactions and other types of electronic debits as provided herein and will remain in full force and effect until you notify PayActiv that you wish to revoke this authorization by calling PayActiv directly at **1 (877) 937-6966 Monday thru Friday between 6 a.m. and 6 p.m. (San Francisco time)**. You acknowledge that you must notify PayActiv at least three (3) Business Days prior to the scheduled date of any electronic debt from your Payment Method in order to cancel this authorization. You agree to provide all information required to cancel this authorization and acknowledge that your failure to provide correct and complete information may make it impossible for PayActiv to stop the withdrawal of the preauthorized electronic debit. You agree to indemnify and hold harmless PayActiv from and against any loss incurred as a result of its withdrawal of a preauthorized electronic debit from your Payment Method, if any of the information relied upon in the stop payment order is incorrect or incomplete or as a result of its failure to withdraw a preauthorized electronic debit for which a valid stop payment order is in effect. If PayActiv receives notice less than three (3) Business Days before the scheduled debit date, PayActiv may attempt, in its sole discretion, to cancel the debit transaction but PayActiv assumes no responsibility for its failure to do so.

You represent and warrant that you have the right to authorize PayActiv to charge your Bank Account or other selected Payment Method for payments due to PayActiv, including Program Fees and settlement of FFRWPs. If the Payment Method you selected is jointly owned you: **(1)** represent and warrant that you have the authority to enter into this Agreement independently; and **(2)** will indemnify and hold PayActiv harmless from any claims by any other owner of the Payment Method.

PayActiv is not responsible for any overdraft fees, over-the-limit fees, insufficient or non-sufficient fund charges, or other charges (including maintenance fees, finance charges, late fees, or similar charges) that result from your failure to maintain a balance or available credit in your Bank Account or other Payment Method sufficient to meet your financial obligations under this Agreement.

6.4. Revoking Your Authorization

Except as provided in section 6.3 regarding stop payment orders, you may revoke this authorization to credit and debit the Payment Method associated with your FFRWP at any time. To revoke authorization, you agree to provide Employer or PayActiv with written notification of any such revocation, which may be executed electronically in accordance with E-SIGN. Any such revocation must be accompanied by the full amount of the outstanding FFRWP made to you and not settled pursuant to this Agreement.

7. Verifying Your Information

PayActiv must verify your identity and bank account information in connection with several of the Services. PayActiv uses Plaid to verify your bank account information and your bank account balance. Plaid may require you to agree to its terms of service. You must provide your online banking username and password (or other identifying information) to use several of the Services. If Plaid cannot verify your identity, you may not be able to participate in the Program.

8. PayActiv may use various algorithms in order to analyze your cash flow and identify (i) funds in your bank account to consider putting towards your savings (“Safe to Save”), and/or (ii) funds that appear to be available to spend (“Safe to Spend”). However, **PayActiv is not a financial adviser, and these Services are not intended to provide financial advice under any circumstances.** Your financial situation is inherently unique, and PayActiv is not, and will not be responsible for ensuring that your bank account has sufficient funds for your particular needs or purposes. PayActiv does not make any guarantees, representations, or warranties regarding the accuracy of these features, or the information these features rely on. It is Your responsibility to ensure that these features accurately reflect your recent purchases, deposits, and pending charges. Before using Safe to Save or Safe to Spend, you should consider seeing a financial advisor for professional advice on your unique financial situation. **Employee Termination**

If you resign, you are terminated, or you stop working for any reason for Employer, you agree that PayActiv will still have the rights that you have sold to PayActiv with respect to any FFRWP that you have received, including the rights, if applicable, to debit your Payment Method and/or have your Employer remit deductions from your final paycheck directly to PayActiv. You can make cash or check payment for the total amount of FFRWP outstanding by contacting PayActiv at **1 (877) 937-6966 Monday thru Friday between 6 a.m. and 6 p.m. (San Francisco time).**

9. Privacy

PayActiv collects data in connection with offering and providing the Program and Services. Our data practices are described in our Privacy Policy, available on our website at <https://www.payactiv.com/privacy-policy/>. Additional information for California residents is available in our Privacy Notice for California Residents, available at <https://www.payactiv.com/privacy-notice-for-california-residents/>. Our Privacy Policy is part of this Agreement. We reserve the right to update our Privacy Policy from time to time in our sole discretion and without notice.

10. Additional Provisions

You attest that you are of legal age to enter into a binding contract under applicable law. Persons younger than the legal age to enter a binding contract under applicable law are prohibited from registering and using any Services. You also agree to sign this agreement electronically.

11. Warranty Disclaimer

TO THE FULLEST EXTENT PERMISSIBLE BY LAW, AND EXCEPT AS OTHERWISE PROVIDED HEREIN, YOU AGREE AND UNDERSTAND THAT YOUR USE OF THE SERVICES AND ALL INFORMATION, FEATURES, OR CONTENT (INCLUDING THAT PROVIDED BY OR FROM THIRD PARTIES) IS AT YOUR OWN RISK. THE SERVICES ARE PROVIDED “AS IS” AND “AS AVAILABLE” WITHOUT ANY WARRANTY OF ANY SORT. PAYACTIV DISCLAIMS ANY AND ALL CONDITIONS, REPRESENTATIONS, AND WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE. PAYACTIV MAKES NO WARRANTY OR GUARANTEE THAT THE SERVICES WILL MEET YOUR REQUIREMENTS OR EXPECTATIONS, THAT THEY WILL BE UNINTERRUPTED, TIMELY, ERROR-FREE, OR SECURE.

12. Limitation of Liability

TO THE FULLEST EXTENT PERMISSIBLE BY LAW, IN NO EVENT WILL PAYACTIV HAVE ANY LIABILITY TO YOU FOR ANY SPECIAL OR CONSEQUENTIAL DAMAGES, HOWEVER CAUSED, WHETHER IN CONTRACT, TORT, OR ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT YOU HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OUR MAXIMUM AGGREGATE LIABILITY TO YOU FOR BREACH OF THESE TERMS IS FIFTY DOLLARS (\$50).

13. Limitations on Claims

Irrespective of any state or federal law to the contrary, and to the extent permitted, any claim or cause of action arising out of or relating to Your use of the Services must be filed within one year after such claim or cause of action arose.

14. Indemnification

You agree to indemnify and hold PayActiv, its officers, directors, employees, agents, service providers, and any person or entity working on behalf of PayActiv harmless from any loss, liability, costs, penalties, lawsuit, or legal fees that may arise from Your use of the Services, including but not limited to a breach of these Terms and Conditions, applicable law, or rights of any third parties. PayActiv reserves the right to maintain exclusive control over the defense of any indemnified claim.

15. Arbitration Agreement

11.1. You agree that your Employer, PayActiv, and you require that the sole and exclusive forum and remedy for resolution of a covered Claim (as defined below) be final and binding arbitration pursuant to this Arbitration Agreement (the “**Arbitration Provision**”), unless you opt out as provided in Section 11.2 below. This Arbitration Provision is governed by the Federal Arbitration Act (9 U.S.C. §§ 1 – 16). As used in this Arbitration Provision, “**Claim**” shall include any past, present, or future claim, dispute, or controversy involving you (or persons claiming through or connected with you), on the one hand, and Employer, PayActiv, and/or persons claiming through or connected with Employer and/or PayActiv, on the other hand, relating to or arising out of this Agreement, and/or the activities or relationships that involve, lead to, or result from any of the foregoing, including (except to the extent provided otherwise in the last sentence of section 11.6 below) the validity or enforceability of this Arbitration Provision, any part thereof, or the entire Agreement. Claims are subject to arbitration regardless of whether they arise from contract; tort (intentional or otherwise); a constitution, statute, common law, or principles of equity; or otherwise. Claims include matters arising as initial claims, counter-claims, cross-claims, third-party claims, or otherwise. You acknowledge and understand that you will not be able to bring or participate in a class action or act in any arbitration in the interests of the general public, or to act as a private attorney general. The scope of this Arbitration Provision (including the interpretation of this Arbitration Provision and the arbitrability of any Claim) is subject to arbitration and is to be given the broadest possible interpretation that is enforceable.

11.2. You may opt out of this Arbitration Provision for all purposes by sending an arbitration opt out notice to PayActiv, Inc., 4880 Stevens Creek Boulevard, Suite 102, San Jose CA, 95129, Attention: Legal & Compliance Department, which is received at the specified address within 14 days of the date of your electronic acceptance of the terms of this Agreement. You understand that your opt out notice must: clearly state that you are rejecting arbitration; identify the Agreement to which it applies by date; provide your name, address, account number, and a telephone number at which you can be contacted by PayActiv, and be signed by you. You understand that you may send the opt out notice in any manner you see fit as long as it is received at the specified address within the specified time. If the opt out notice is sent on your behalf by a third party, you understand that such third party must include evidence of his or her authority to submit the opt out notice on your behalf.

11.3. The party initiating arbitration shall do so with the American Arbitration Association (the “**AAA**”) or JAMS. The arbitration shall be conducted according to, and the location of the arbitration shall be determined in accordance with, the arbitration rules and policies of the administrator selected (the AAA Consumer Arbitration Rules or the JAMS Comprehensive Rules and Procedures), except to the extent the rules conflict with this Arbitration Provision or any countervailing law. In the case of a conflict between the rules and policies of the administrator and this Arbitration Provision, this Arbitration Provision shall control, subject to applicable law as determined by the arbitrator, unless all parties to the arbitration consent to have the rules and policies of the administrator apply. In the case the procedural rules and policies of the administrator are silent as to a procedural rule or policy, federal law based on the location of the arbitration shall govern. You may review the arbitration rules on the AAA or JAMS web site, respectively, www.adr.org for the AAA rules and www.jamsadr.com for the JAMS rules.

11.4. If you elect arbitration, you shall pay all the administrator’s filing costs and administrative fees (other than hearing fees), although you will not be required to pay any filing and administrative fees in an amount greater than either \$250 or the filing fee that would apply had the matter been filed in a court presiding in the geographical area where the arbitration will be conducted. If you elect arbitration, filing costs and administrative fees (other than hearing fees) shall be paid in accordance with the rules of the administrator selected, or in accordance with applicable law if contrary to the administrator’s rules. Each party shall bear the expense of its own attorneys’ fees. However, if a statute gives either party the right to recover any of these fees, these statutory rights shall apply in the arbitration notwithstanding anything to the contrary herein.

11.5. Any award by the individual arbitrator shall be final and binding and may be entered as a judgment in any court of competent jurisdiction.

11.6. Employer and PayActiv agree not to invoke the right to arbitrate an individual claim you may bring in Small Claims Court or its equivalent limited economic jurisdiction court (covering claims of not greater than \$10,000), so long as the Claim is pending only in that court. **NO ARBITRATION SHALL PROCEED ON A CLASS, REPRESENTATIVE OR COLLECTIVE BASIS (INCLUDING AS PRIVATE ATTORNEY GENERAL ON BEHALF OF OTHERS), EVEN IF THE CLAIM OR CLAIMS THAT ARE THE SUBJECT OF THE ARBITRATION HAD PREVIOUSLY BEEN ASSERTED (OR COULD HAVE BEEN ASSERTED) IN A COURT AS CLASS REPRESENTATIVE, OR COLLECTIVE ACTIONS IN A COURT.** Any challenge to the validity of this paragraph 6 shall be determined exclusively by a court and not by the administrator or any arbitrator.

11.7. The arbitrator may award damages or other types of relief permitted by applicable substantive law.

11.8. This Arbitration Provision shall survive (i) suspension, termination, revocation, closure, or amendments to this Agreement or (ii) the bankruptcy or insolvency of any party or other person. If any portion of this Arbitration Provision is deemed invalid or unenforceable, the remaining portions of this Arbitration Provision shall nevertheless remain valid and in force. If an arbitration is brought on a class, representative, or collective basis, and any or all of the limitations on such proceedings are finally adjudicated to be unenforceable, then no arbitration of the matters subject to the unenforceable limitations, shall be had, and those matters instead shall be heard in court; however, this Arbitration Provision shall be enforced as to all matters that otherwise enforceable.

THE PARTIES ACKNOWLEDGE THAT THEY HAVE A RIGHT TO LITIGATE CLAIMS THROUGH A COURT BEFORE A JUDGE OR JURY, BUT THEY WILL NOT HAVE THAT RIGHT AS TO ANY CLAIM SUBJECT TO ARBITRATION PURSUANT TO THIS ARBITRATION PROVISION.