
The Consumer Finance Podcast and Payments Pros Podcast:
Earned Wage Access: Exploring the CFPB's Proposed Interpretive Rule
Hosts: Chris Willis, Keith Barnett, and Carlin McCrory
Guests: Jason Cover and Mark Furletti
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Chris Willis:

Welcome to the special crossover edition of [The Consumer Finance Podcast](#) and the [Payments Pros](#) Podcast. I'm Chris Willis, the Co-Leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. Today, you're going to hear my colleague, Carlin McCrory talking with several of our partners about the recent guidance from the CFPB about earned wage access products.

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Now, as I said today, we're going to be talking about the CFPB's recent guidance on earned wage access products, and you're going to be hearing a conversation led by Carlin McCrory, who's one of the hosts of the [Payments Pros](#) Podcast. She's going to be talking to our colleagues, Keith Barnett, Mark Furletti, and Jason Cover about this very interesting topic. So, Carlin, let me just turn the floor over to you.

Carlin McCrory:

Well, thanks so much, Chris for that introduction. And Keith, Mark, Jason, very much, looking forward to our conversation today.

Jason Cover:

Thanks, Carlin.

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Carlin McCrory:

Jason, as a preliminary matter, can you just describe what is EWA?

Jason Cover:

Yes. I think EWA stands for earned wage access. That's kind of been convoluted a bit, and there's a variety of different paths that takes in the modern world. But at its core, it's basically a cash advance of some sort that's generally associated in some way or another with wages that are being earned simultaneously.

Carlin McCrory:

Then, common parlance in the industry is to separate EWA between employer partnered EWA and direct to consumer EWA. Can you describe the differences with those models?

Jason Cover:

Sure. I think employer partnered is sort of the more traditional approach, and this is literally where most people get paid weekly, or bi weekly, or monthly, and you're accruing earned wages on a daily basis every day you work. So, in the traditional sense, the employer would literally provide the earned wages in advance of the payroll check, and then deduct them from them. There's sort of hybrids of that, where FinTechs partner with various employers to help facilitate that process. But the idea here, essentially, is that this isn't really a loan. You're merely getting things that you've already earned in advance. There's no deferment of credit, as under most state or federal laws, that would kind of be the traditional definition of credit.

In the direct consumer EWA, this is usually a FinTech or a lender of some sort, standing alone that provides a cash advance. Sometimes it is linked to – they may reference what's your – how much you receive, repay period, or maybe have some tie to the employment or the earned wage. But essentially, you're getting a cash advance, and the hook here is usually that there's no obligation, or no recourse as to that advance. So, again, it gets you out of mostly in federal definitions of credit, because I get this advance, and if I don't want to pay it, I ultimately don't have to. Therefore, there's no deferment of a solid obligation.

Carlin McCrory:

Then, can you also explain how would a provider make money off of an EWA product?

Jason Cover:

Sure. Carlin, I guess one of the other additional hooks that I didn't mention in describing EWA product is there's generally no finance charge associated with it. So, you're not saying, "Look, you must give me \$10 to get access to this type of credit, or not credit, as we'd argue." Instead, there's usually different types of fees or models. So, one model would be to use expedited funding fees that are mentioned in the bureau's bulletin. So, that would be for same day transport. It's 299 or something like that.

Another model is the tips model, which has sort of been in the news over the last couple years. There, there might be like a wheel, and you can adjust it to give a tip, but it's not mandatory. You can literally get the same advance for \$0 if you want. If you feel like the service was valuable to you, you can give the company a little bit of money. Then, another model, we see sometimes, not as often, in this type of product, is a subscription model where there's – maybe someone pays \$50 a month for a variety of products or services, and EWA cash advances is one of them.

Carlin McCrory:

Thanks for that. Then, can you also explain a little bit, Jason, the differences between earned wage access and payday lending?

Jason Cover:

Sure. I guess, in some ways, they look very similar. It's usually something tied to your pay date. There's a cash advance. There's usually a payment authorization for the amount of that advance. I think, critically, there's no fee. So, the vast majority of payday statutes and almost all payday transactions are basically going to be a cash advance in exchange for a fee, and the payment authorization in the amount of the advance, and the fee. You could cover probably 75% of the statutory definition of payday loans at a seat-by-seat basis with that, and that would describe almost all payday loan transactions as well.

Whereas, here, we've got a cash advance, but no. We may have a payment authorization, but there is no fee imposed. Then, critically, again, the payday loan is an obligation. I mean, there is no excuse for not paying. It is a true obligation, and the creditor has complete recourse. So, those are sort of the critical differences in my view.

Carlin McCrory:

Mark, didn't we already have guidance from the CFPB on EWA. Can you tell our audience a little bit about what happened to that guidance?

Mark Furletti:

Sure. In November of 2020, under Director Kraninger, the CFPB put out an advisory opinion that related to a particular type of EWA program. That particular type of program involved an integration between the provider, the Ewa Provider and employer. That advisory opinion said that, when you have this integration that enables the provider to see how much in wages the consumer has earned, that under certain circumstances, and there were multiple factors. But if you met these various factors, then it was not, that that product was not subject to the Truth in Lending Act. Primarily, because it didn't meet the definition of credit, because the consumer, in that case, was just obtaining access to wages that they had already earned. So, there wasn't an extension of credit there.

So, that guidance had been in place since November 2020. Then, in connection with this proposed interpretive rule that the CFPB just published, they are going to rescind, proposing to

rescind or replace that prior guidance, the 2020 guidance with this new guidance. They basically are saying that that guidance related to a product that was not very – that is no longer prevalent in the marketplace, and they also thought that that prior guidance created uncertainty and confusion. Of course, that guidance was kind of, I would say, more favorable to the industry, and now, they're replacing it with guidance that seems much less favorable. Just more evidence of this kind of ping pong approach that depending on who is kind of administering the agency, you can get somewhat conflicting views on similar questions, which is obviously not good for regulatory certainty.

Carlin McCrory:

Following up on that Mark, what EWA products does the proposed interpretive rule apply to?

Mark Furletti:

Yes. So, the proposed rule, the CFPB, it says that it applies to products that have two characteristics. One, the provisions of funds to consumers in an amount that's based on the wages that they have accrued during a given pay cycle. So, some tie into how much a consumer might have earned up to that point, kind of maybe, let's say, mid pay cycle. The CFPB notes that a number of consumers have relatively long pay cycles, where, historically, maybe more employees had weekly pay cycles. Now, a number of them have bi-weekly or monthly. So, there can be a long delay between when an employee actually earns wages and then those wages are paid to the employee.

So, first, it's kind of like the product would involve looking at to setting the amount of the earned wage, access to the amount of wages that have been earned by the employee. Then, second, repayment to a third-party provider. So, I think by third party, they mean, some provider other than the employee via an automated means. So, for example, an APH or a debit card debit. So, it's a pretty broad definition, and I think I would criticize it, because it doesn't actually include some of the definitions of any of the elements or prongs of the definition of credit under Reg Z. So, it's just kind of like, you provide funds and you repay it. Of course, they're going to say that this is subject to the Reg Z and Truth in Lending Act, but yet they don't define it in a way that kind of, on its own, standing alone has meets the characteristics of credit under Reg Z.

Carlin McCrory:

Moreover, to that point, what requirements would apply to these products that the bureau is proposing under the interpretive rule.

Mark Furletti:

Yes. So, the key point of the proposed interpretive rule, and as an aside, this is a proposal. It's interesting because the CFPB seems to be taking a different approach here than they took on the buy now, pay later rule, which was to just kind of – or interpretive rule, which was, in effect, making new law out of whole cloth, and then just jamming it down on everyone with almost no notice period. Here, we have them doing something that's similar, but giving – saying there's a

proposal, taking comments. Then, I expect, though, that they'll probably push this down on folks with almost very little time to prepare in a similar way.

In any event, the point of the interpretive rule as it says that, the Truth in Lending Act, namely, Regulation Z covers these products, importantly, when there is an obligation to repay debt. So, to the extent that the law was not clear about that previously, they are seeking to clarify that. Basically, as folks may know, Truth in Lending Act is largely a disclosure statute requiring, particularly for closed end, credit, disclosures that must be provided in connection with the origination of loan obligation.

Jason Cover:

Mark, I'm curious if you agree. My read was that, regardless of whether there is a legal obligation to repay, the CFPB seemed to take the position that requiring a payment authorization, even if one could terminate it after the fact creates an obligation in those credit.

Mark Furletti:

Yes. I mean, I think, the agency is constrained because they are only able to regulate credit as defined by the Truth in Lending Act. So, they're trying to shoehorn a bunch of products, some of which may meet the definition, some of which may not into that definition. So, yes, I think they're making that argument. Whether that's valid, I think is another point. But yes, I would agree with you that they're arguing that somehow, even if there is no obligation to repay that, that if there's just merely a payment authorization, that constitutes an obligation to repay. Despite the fact that that could be possibly canceled at any time without consequence.

Keith Barnett:

Actually, Mark, to that point, you guys bring up an excellent point, because, that is the concern that I have for the FinTechs that are out there, that are just providing the technology without providing the funds. And there are FinTechs out there who provide the tech for the employers, and the employers are the ones that provide the funds. But the interpretive rule says that in an earned-wage transaction, the consumer incurs an obligation to pay money at a future date. They just make a blanket statement, like that's the definition of an earned wage transaction, when we know that's not necessarily the case in all instances. Especially when you have the example that I've just given with a FinTech.

So, that blanket statement is not necessarily true, and it could be considered to be misleading. I guess, it was done in order to allow for a TILA or a Reg Z hook. I say that because in a regular or in other EWA transaction, the consumer does not incur an obligation to pay money at a future date. Instead, the consumer is obtaining money that it had earned at an earlier date. Consumers are not paying money or an obligation to pay, but then they go out and say that TILA/Reg Z does not apply to regular payroll transactions. Because when an employer pays wages, there's no later act of repayment required, deduction, or otherwise. So, they're saying two things all at once. Because the case with EWA, when a FinTech is providing it, is that, the FinTech is providing the technology, and the employer is still paying the wages. So, it just doesn't – the rationale here just does not make sense.

Jason Cover:

Keith, I'd add to that too. They don't identify a consumer harm why there needs to be this distinguishment between the two. I mean, I think, this is, on the whole, can be a very, very good and helpful product to a lot of people, particularly who need funds in advance. It kind of belies the question of, "Well, why is this needed in any event?"

Keith Barnett:

Absolutely right. Because if you think about it, like the CFPB has been on a mission to have some sort of regulatory scheme against payday lending, let's just be honest here. So, you have something that is not payday lending. People only have access to their earned wages. In many instances, only a certain percentage of their earned wages. So, they're not going above and beyond anything that they've already earned, but the CFPB is trying to regulate this by shoehorning TILA and Reg Z into this, when that really does not apply in most instance. So, I agree with you.

Jason Cover:

It does seem, everyone forgets at least one of the CFPB's reported goals is to expand access to credit, right? I think this has the opposite effect at the end of the day.

Carlin McCrory:

Mark and Jason, I'd love to get your thoughts on two focal points of the guidance are expedited funding, fees, and tips. Can you all discuss what the guidance says about these?

Jason Cover:

Carlin, for both instances, the CFPB wants to take the stance that these are finance charges, which, to Keith's point, then gets you the hook to require TILA disclosures. I think it's pretty interesting to take a look at that definition. If you look at Reg Z, it says, a finance charge includes any charge payable directly or indirectly by the consumer, imposed directly or indirectly by the creditor, as an incident to, or a condition of extension of credit.

So, the CFPB really honed in to incident to an extension of credit. They sort of admit that, this isn't explained anywhere. They're going to – Black's Law Dictionary and things of that nature to try to pin something like an optional tip is something that is incident to an extension of credit. But the same time, they completely miss several words before that has to be imposed by the creditor. So, it's really hard to understand how something that is completely optional, and at the choice of the consumer is something that's imposed by the creditor, even if it is somehow incident to the extension of credit. It seems to me to be a very, very weak rational and argument, and something that's right for challenge.

Mark Furletti:

I guess, just on the expedited funding fee, the CFPB makes mention of a case, but a 1996, 11th Circuit decision, *Veal v. Citibank* that involved basically an expedited funding fee. It was a federal express charge for federal expressing a check with the proceeds of a loan, and the fee was \$21. The question before the court was whether or not that \$21 federal express charge was a finance charge, and the court held that it was not. They said, since the bills could have chosen not to pay the federal express fee, and the bank did not require it, then the fee was not imposed as an incident to the extension of credit, and need not be included in the finance charge.

So, the CFPB argues that that was wrongly decided to some extent in a footnote in the proposed interpretive rule. But I think it sets up – we now know in the wake of *Loper Bright* that the CFPB interpretation is not entitled to some extra weight above and beyond, for example, the 11th Circuit or any circuit court. So, I think it sets up, at least. There's probably multiple areas for challenging this proposed rule, assuming it gets adopted, or in the event someone wants to challenge it beforehand, but that certainly has, I think, pretty strong grounds for challenging it.

Carlin McCrory:

Mark, do you have any parting thoughts on the proposed interpretive rule?

Mark Furletti:

Yes. I mean, obviously I've been pretty critical of it. So, I think there's an opportunity for market participants, particularly those who are going to be impacted by it, to submit comments to the CFPB. Comments, I believe, are due by August 30th. So, not that far off from the day we're recording today, on August 6th. So, I'd say, submit comments and pointing out the kind of flaws from the CFPB's analysis that that would probably be a good idea.

Carlin McCrory:

Well, Keith, Mark, Jason, thank you so much for your time today.

Jason Cover:

Thanks, Carlin.

Mark Furletti:

Thank you, Carlin.

Keith Barnett:

Thanks, Carlin.

Chris Willis:

Carlin, you did an awesome job of leading today's episode. So, I'll just close things out quickly. Let me thank you and our guests for being on today, and of course, thank our audience for listening. Don't forget to visit and subscribe to our blogs, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. While you're at it, why not head over to troutman.com and add yourself to our consumer financial services email list. That way, we can send you copies of the alerts and advisories that we send out from time to time, as well as invitations to our industry-only webinars. As I mentioned at the beginning of the show, don't forget to check out our handy mobile app, just search for Troutman Pepper in your app store and check it out. Of course, stay tuned for a great new episode of these podcasts, [The Consumer Finance Podcast](#) and [Payments Pros](#) right on your podcast feed. Thank you all for listening.

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