

Early Wage Access Products: Twenty-First Century Innovations or Harbingers of Debt?

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Now more than ever, low-wage workers are struggling to make ends meet. To help cash-strapped households that need money before their next paycheck arrives, fintech companies have begun offering early wage access products (EWAPs), which allow employees to access their earned, but unpaid wages between paychecks. Little is known about how EWAPs function or their impact on consumers. EWAPs may provide necessary relief to financially struggling Americans, but they may also cause more harm than good if left unregulated.

This Note examines the structure of EWAPs and how uncertainty in federal regulation of EWAPs has led to state action through two primary means: (1) state enforcement actions and (2) state legislation. This Note provides consumer-friendly recommendations for regulating these novel products with the goal of encouraging the market to grow while protecting users.

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I. INTRODUCTION

Low-wage workers struggle to make ends meet. Wage stagnation is a likely culprit, as today’s average hourly wage has the same purchasing power as it did in 1978.¹ Indeed, more than seventy-eight percent of American workers live paycheck to paycheck, often not having enough to pay for monthly expenses.² This “new normal” puts immense pressure on individuals and families to find alternative ways to make ends meet between paychecks. As the need for alternative financial products rise, new technology companies have stepped in to meet the challenge.

Financial technology (fintech) companies have created new products called early wage access products (EWAPs) to bridge the gap. Typically, employees receive payment for their work long after that work is performed. EWAPs allow consumers to receive a “wage advance” or immediate payment for hours they have already worked but for which they have not yet received payment. The “wage advance” is paid to the employee and then deducted from their next paycheck. Fintech companies claim that EWAPs are not loans and that they do not charge interest. Instead, they assess a monthly or per transaction fee or encourage consumers to give voluntary “tips” to the provider.

The lack of legal literature analyzing the effects of EWAPs on consumers is unnerving, as researchers estimate that “the app companies handled 18.6 million early U.S. payroll transactions valued at more than \$3.15 billion in 2018.”³ One

1. Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR. (Aug. 7, 2018), <https://pewrsr.ch/2nkN3Tm>.

2. Press Release, CareerBuilder, *Living Paycheck to Paycheck is a Way of Life for Majority of U.S. Workers, According to New CareerBuilder Survey* (Aug. 24, 2017), <http://press.careerbuilder.com/2017-08-24-Living-Paycheck-to-Paycheck-is-a-Way-of-Life-for-Majority-of-U-S-Workers-According-to-New-CareerBuilder-Survey>.

3. Yuka Hayashi, *Pay-Access Apps Face Regulatory Test*, WALL ST. J. (Sept. 2, 2019), www.wsj.com/articles/pay-access-apps-face-regulatory-test-11567416602.

notable exception is Law Professor Jim Hawkins' forthcoming article, *Earned Wages Access and the End of Payday Lending*, which is among the first legal articles to examine EWAPs and their potential to replace payday loans.⁴ Though the market is rapidly growing, the lack of guidance from federal agencies allows these products to exist in a "gray area" outside of regulation.⁵ A few states are grappling with the uncertainty by regulating EWAPs. However, regulation is difficult because EWAPs lack definition. For instance, there is no universal term for EWAPs.⁶ Defining what constitutes an EWAP will help states determine whether the best path forward is to ban, regulate, or take a more *laissez-faire* approach.

Though EWAPs provide consumers access to necessary funds, it is unclear whether the model is merely a relabeled payday lending scheme. This Note argues that EWAPs should be regulated and, specifically, that EWAPs using the tip model (a type of EWAP in which the provider bases its revenue solely on the "voluntary tips" of the consumer for using the product) should be eliminated. Additionally, I argue that model legislation should be drafted to create a consumer-friendly regulatory framework for EWAPs. Model legislation should outline licensure requirements, address issues of non-sufficient funds and overdraft fees, and address the provider's fee structure. Last, I recommend that consumer advocates monitor the on-going investigation conducted by the New York Department of Financial Services (NY DFS) into EWAP providers.

In Part II of this Note, I define early wage access products, analyze the two emerging models of advance wage payment—employer-sponsored and direct-to-consumer—and discuss the advantages and disadvantages of each model. I also discuss the unique features of Earnin, a direct-to-consumer EWAP, which uses the tip model. In Part III, I discuss current federal regulatory uncertainty of the products. In Part IV, I discuss how two states responded to the current regulatory uncertainty of early wage access products. Part V discusses recommendations for regulating EWAPs.

II. THE RISE OF EARLY WAGE ACCESS PRODUCTS

Early wage access products address a growing problem in America: the rising number of adults who live paycheck to paycheck. Unfortunately, this phenomenon no longer affects the few but has become the national norm. Thirty-nine percent of adults, when faced with a four-hundred dollar unexpected expense, would either have to "borrow or sell something to pay for the expense" or could not afford the

4. Jim Hawkins, *Earned Wages Access and the End of Payday Lending*, B.U. L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3514856>. Most literature written about early wage access products consists of news reports. Limited research exists as of the time of publication of this Note. *But see* Todd Baker & Snigdha Kumar, *The Power of Salary Link: Assessing the Benefits of Employer-Sponsored FinTech Liquidity and Credit Solutions for Low-Wage Working Americans and their Employers* (Harvard Kennedy Sch., M-RCBG Associate Working Paper Series No. 88, 2018).

5. Kevin Dugan, *Popular Cash Advance App Earnin Operating in Payday Loan 'Gray Area,' Critics Claim*, N.Y. POST (Mar. 21, 2019), <https://nypost.com/2019/03/21/popular-cash-advance-app-earnin-operating-in-payday-loan-gray-area-critics-claim>.

⁶ Hawkins, *supra* note 4, at 4.

expense at all.⁷ The effect is magnified for low-income individuals and people of color.⁸ To make ends meet, low-income individuals are often relegated to using high-cost products like payday loans. However, with the advent of fintech products, consumers now have access to multiple other options to quickly acquire cash.

A. What are Early Wage Access Products?

Early wage access products provide employees with early access to their earned wages.⁹ Instead of tying employees to the two-week pay period, fintech companies enable employees to access their earned wages on-demand. This is a revolutionary concept in the payroll sector. Currently, there are two distinct categories of EWAPs: employer-sponsored and direct-to-consumer.

The employer-sponsored model is premised on a contract between the employer and the fintech company.¹⁰ The products are integrated into the employer's payroll systems and offered to employees as a benefit.¹¹ The fintech company fronts the money and is repaid either by deducting the amount due from the employee's next paycheck through the employer's payroll system or through the user's bank account.¹² Employer-sponsored EWAPs often charge a monthly membership fee that can range from \$1.99 to \$5.00.¹³ Other employer-sponsored EWAP providers charge a per-transaction fee.¹⁴ Many employers either cover or partially cover the fee for their employees.¹⁵ Mobile applications such as PayActiv, FlexWage, and Green Dot are categorized as employer-sponsored products. Employer-sponsored apps partner with a broad range of companies. For instance, PayActiv provides early wage access services for more than 200,000 employees through a partnership with Walmart.¹⁶

In contrast, the direct-to-consumer model offers services directly to the consumer and "providers recoup the advanced funds directly from [the] user's bank accounts on a set date."¹⁷ In this model, there is no relationship with the consumer's employer, the employee provides "wage history . . . and authorizes

7. FED. RESERVE, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 1, 2 (2019), <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-executive-summary.htm>.

8. *Id.* at 22.

9. Stephen T. Middlebrook & Tom Kierner, *What Employees Need to Know About Advance Wage Payment Products*, NAT'L L. REV. (Aug. 8, 2019), www.natlawreview.com/article/what-employees-need-to-know-about-advance-wage-payment-products.

10. Penny Crosman, *A Payday Lender in Disguise? New York Investigates the Earnin App*, AM. BANKER (Apr. 3, 2019), <https://www.americanbanker.com/news/a-payday-lender-in-disguise-new-york-investigates-the-earnin-app>.

11. *Id.*

12. Chris Opfer, *'Early Wage' Apps Aim to Disrupt Payday Loans, Two-Week Cycle*, *Blomberg Law: Daily Labor Report*, BLOOMBERG L. (Aug. 1, 2019), <https://news.bloomberglaw.com/daily-labor-report/early-wage-apps-aim-to-disrupt-payday-loans-two-week-cycle>; Crosman, *supra* note 10.

13. Opfer, *supra* note 12.

14. *Id.*

15. David S. Reidy et al., *Time for Regulators to Embrace Earned Wage Access*, LAW360 (Oct. 24, 2019), <https://www.law360.com/articles/1094136/time-for-regulators-to-embrace-earned-wage-access>.

16. Chris Arnold, *Walmart and Others Offer Workers Payday Loan Alternative*, NPR (Aug. 16, 2018), <https://www.npr.com/2018/08/16/639236531/walmart-and-others-offer-workers-payday-loan-alternative>.

17. Opfer, *supra* note 12.

repayment of the advance from the worker's bank account."¹⁸ Applications such as Dave, Brigit, and Earnin use the direct-to-consumer model. Dave and Brigit charge a monthly fee of \$1.00 per month and \$9.99 per month respectively.¹⁹ Dave also allows users to leave a "tip" as no interest is charged to the user.²⁰ Earnin forgoes monthly and per-transaction fees altogether, soliciting only a "voluntary tip" from consumers.²¹ Due to Earnin's unique payment model, further analysis is necessary to understand why the tip model should be eliminated.

1. How Earnin Works

To date, Earnin is the only EWAP that solely bases its business model on voluntary tips. In 2012, Ram Palaniappan, current CEO of Earnin, launched Activehours, an app that allowed consumers to receive an advance on their paycheck. Activehours evolved into Earnin.²² In 2019, Forbes ranked Earnin in the top fifty fintech companies of 2019, noting that the app served employees from more than 50,000 companies.²³ Earnin's valuation is at \$800 million.²⁴ NBC News reported that the app had been downloaded more than twelve million times.²⁵

Earnin pioneered the direct-to-consumer model. Users allow Earnin direct access to their bank account to deposit and debit funds. Earnin users self-report their employment and Earnin verifies the employment through GPS tracking.²⁶ Once Earnin verifies the bank account, the user is able to "cash out" funds.²⁷ According to Earnin's website, a consumer may request a cash out a maximum of \$100 per pay period "with a potential for it to increase up to \$500 as members continue to use the app and pay Earnin back successfully."²⁸ Earnin claims that there are no hidden fees or costs and "depend[s] on community to support [Earnin] by tipping what they think is fair."²⁹ Earnin's default for tips is nine dollars, but users are able to tip up to fourteen dollars.³⁰ With such high tips on small loans, many commentators question whether EWAPs are merely an evolved payday loan.³¹

18. Middlebrook & Kierner, *supra* note 9.

19. Andrew Medal, *Cash Advance Apps Can Be a Short-Term Bridge for People Short on Money*, ENTREPRENEUR (June 21, 2019), <https://www.entrepreneur.com/article/335591>.

20. *Id.*

21. *Terms and Privacy*, EARNIN, www.earnin.com/privacyandterms#TermsOverview (last updated Apr. 6, 2020).

22. Cyrus Farivar, *Millions Use Earnin to Get Cash Before Payday. Critics Say the App is Taking Advantage of Them.*, NBC NEWS (July 26, 2019), <https://www.nbcnews.com/tech/internet/millions-use-earnin-get-cash-payday-critics-say-app-taking-n1034071>.

23. FINTECH 50 2019, EARNIN (Feb. 4, 2019), <https://www.forbes.com/companies/earnin/#136684ad1673>.

24. *Id.*

25. Farivar, *supra* note 22.

26. *Id.*

27. EARNIN, HOW MUCH MONEY CAN I CASH OUT WITH EARNIN? <https://help.earnin.com/hc/en-us/articles/223440348-How-much-money-can-I-cash-out-with-Earnin-> (last visited Apr. 9, 2020).

28. *Id.*

29. EARNIN, DOES EARNIN CHARGE FEES OR INTEREST? <https://help.earnin.com/hc/en-us/articles/223283747-Does-Earnin-charge-fees-or-interest-> (last visited Apr. 25, 2020).

30. Hayashi, *supra* note 3.

31. *See, e.g.*, Crosman, *supra* note 10; LAUREN SAUNDERS, NCLC, FINTECH AND CONSUMER PROTECTION 11–12 (2019).

B. Payday Loans vs. Early Wage Access Products

Early wage access products do not fit neatly within the alternative financial product universe. Because of this, EWAPs are often compared to more familiar products like payday loans.³² To understand whether and how to regulate these products, one must understand where EWAPs are situated in the alternative financial product universe or whether they deserve a universe of their own.

1. Why People Use Payday Loans and EWAPs

Over twelve million individuals use payday loans each year to bridge financial gaps.³³ Sixty-nine percent of payday loan borrowers use the loans for recurring expenses like mortgage payments, while only sixteen percent of borrowers use the loans for unexpected expenses.³⁴ Though EWAP user data is scarce, many users claim they use their funds for recurring expenses.³⁵ DailyPay, an employer-sponsored EWAP, reports that ninety-four percent of its users use their funds to pay bills to avoid late fees.³⁶ Consumers appear to use both payday loans and EWAPs for similar purposes—to cover a financial gap.

2. Structure and Fees of Payday Loans

Payday loans are short-term, small-dollar loans.³⁷ Repayment is typically required within a short time frame and borrowing amounts range between \$100–\$500 per loan.³⁸ The average loan is \$375.³⁹ Fees on the loans vary, but lenders generally charge \$15 for every \$100 borrowed.⁴⁰ The annual percentage rate (APR) on payday loans can rise to 400% and beyond.⁴¹ Payday loans are often due in full after two weeks (generally the consumer's next pay period).⁴² In most states, if a consumer is unable to pay the loan in full by the next pay period, the loan can be renewed or “rolled over” for an additional two weeks.⁴³ The consumer pays only the fees due on the original loan and rolls over the principal balance into a

32. Hawkins, *supra* note 4.

33. NICK BOURKE ET AL., PEW CHARITABLE TRUSTS, *PAYDAY LENDING IN AMERICAN: WHO BORROWS, WHERE THEY BORROW, AND WHY* 4 (2012), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

34. *Id.* at 14.

35. See Stacy Cowley, *New Payday Options for Making Ends Meet*, N.Y. TIMES (July 4, 2016), <https://www.nytimes.com/2016/07/05/business/dealbook/new-payday-options-for-making-ends-meet.html>.

36. Karl Pawlewicz *What Are On-Demand Payment Solutions?*, DAILYPAY (Aug. 8, 2018), <https://business.dailypay.com/blog/what-are-on-demand-payment-solutions>.

37. BOURKE ET AL., *supra* note 33, at 6.

38. *See id.*

39. *Id.*

40. *Id.*

41. BOURKE ET AL., *supra* note 33, at 29.

42. *Id.*

43. *What is a Payday Loan?*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567> (last visited Apr. 25, 2020).

new loan with new fees.⁴⁴ The Consumer Financial Protection Bureau estimates that more than eighty percent of payday loans are rolled over within fourteen days.⁴⁵ These renewals create a “cycle of debt” in which rollover fees can exceed the original amount of the loan. Notorious for trapping consumers in debt due to their short-term nature and high fees, payday loans are a less than optimal option for low-wage workers.⁴⁶ However, payday loans are often convenient and accessible to low-wage and low-income individuals short on cash.

3. Differences Between Payday Loans and EWAPs

EWAPs and payday loans have similarities like the relative high cost for a short-term product, but there are also major differences. First, though both EWAPs and payday loans have high fees, EWAP fees are often much lower than payday loan fees.⁴⁷ Though there are outliers, EWAP fees are generally less costly than payday loans when considering the dollars per amount borrowed or advanced. Second, EWAPs are nonrecourse products, meaning that the customer is not personally liable for any amount not repaid and providers cannot file suit for nonpayment. In contrast, payday loans are recourse products⁴⁸—lenders are permitted to institute debt collection suits against consumers. Third, EWAP providers do not claim to be lenders and do not advertise the products as loans. EWAP providers typically eschew any reference to loans, credit, or debt. Payday lenders have not fought against the label “lender,” but have attempted to frame themselves as small dollar lenders “offer[ing] a valuable service” that “benefit[s] communities.”⁴⁹ Also, though both payday loans and direct-to-consumer model EWAPs are predicated on consumers granting a third-party access to their bank account, in which payments are automatically withdrawn, the providers deal with issue of nonpayment differently.⁵⁰ When a consumer cannot pay a payday loan in full, payday lenders often urge consumers to “rollover” the loan. EWAPs do not employ “rollovers.” However, users have reported that Earnin attempts to access funds in the user’s account multiple times, causing overdraft fees.⁵¹ Though the

44. *Id.*; *What Does it Mean to Renew or Roll Over a Payday Loan?*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-does-it-mean-to-renew-or-roll-over-a-payday-loan-en-1573> (last visited Apr. 25, 2020).

45. KATHLEEN BURKE ET AL., CFPB DATA POINT: PAYDAY LENDING 9 (2014), https://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf (examining a sample of twenty-six U.S. states).

46. See Scott Horsley, *Payday Loans—And Endless Cycles of Debt—Targeted By Federal Watchdog*, NPR (Mar. 26, 2015), <https://www.npr.org/2015/03/26/395421117/payday-loans-and-endless-cycles-of-debt-targeted-by-federal-watchdog>; *Payday & Other Small Dollar Loans: The Problem*, CTR. FOR RESPONSIBLE LENDING, <https://www.responsiblelending.org/issues/payday-other-small-dollar-loans/problem> (last visited Apr. 25, 2020); CONSUMER FIN. PROTECTION BUREAU, *supra* note 43; *What is Payday Lending?*, STOP THE PAYDAY LOAN DEBT TRAP, <http://stopthedebttrap.org/about/whatispaydaylending> (last visited Apr. 25, 2020).

47. Cowley, *supra* note 35.

48. Though EWAPs discussed in this Note are nonrecourse, other wage advance models are not. For more discussion on this, see Hawkins, *supra* note 4.

49. *Get the Facts*, COMMUNITY FIN. SERV. ASSOC. OF AM., <https://www.cfsaa.com/facts> (last visited Apr. 23, 2020).

50. See Hayashi, *supra* note 3.

51. Karen, Comment to *Earnin App Review – Is it a Better Alternative to Payday Loans*, DoughRoller, <https://www.doughroller.net/reviews/earnin-app-review-is-it-a-better-alternative-to-payday-loans/> (last visited Mar. 28, 2020); Farivar, *supra* note 22.

products use different methods to collect on nonpayment, the result are similar: creating additional debt by causing overdraft on the consumer.

Lastly, EWAPs provide access to funds a consumer has already earned—unlike payday loans which provide access to funds that may exceed the consumer's earned but unpaid wages. This may be a technical distinction, but it is an important one as it allows EWAP providers to distance themselves from payday lenders.

C. Advantages of EWAPs

Whether EWAPs are new payday loans remains uncertain; nonetheless, EWAPs provide consumers and employers with many benefits. First, EWAPs allow consumers to access their paychecks when they need it.⁵² Employees do not have to wait the arbitrary two-week period to access funds they have already earned. This provides abundant flexibility for consumers to use their paychecks in a way that fits their financial needs.⁵³ When bills are due or emergencies occur, consumers can access funds to avoid even greater catastrophes.

When living paycheck to paycheck, a single unanticipated debit from a user's account can lead to a downward spiral. EWAPs may serve as one solution to avoiding the downward spiral by helping consumers avoid overdraft fees.⁵⁴ In 2017, large banks collected \$11.45 billion in overdraft and non-sufficient fund fees, providing banks a steady stream of funds from an overwhelmingly low-income population.⁵⁵ Consumers can use EWAPs to avoid such fees.

Early wage access products may also eliminate the need to rely on higher-cost products like payday loans.⁵⁶ Consumers use EWAPs for the same reasons they use payday loans—to help make ends meet. However, payday loans create cycles of debt that trap consumers. Jim Hawkins states that EWAPs and other small-dollar loan products could potentially eliminate payday loans from the financial scene altogether due to ease of repayment processes, lower transaction costs, and greater access to accurate consumer financial information.⁵⁷ EWAPs can disrupt the payday lending industry's hold on low-wage workers who need to access their funds each month by providing a competitive option.

Additionally, EWAPs are nonrecourse, so if the consumer cannot repay the advanced funds, EWAP providers have no legal recourse to file collection suits.⁵⁸ This is an extremely attractive feature to consumers who would otherwise face collection suits for non-repayment for products such as payday loans.⁵⁹

52. EARNIN, WHITE PAPER: ON-DEMAND PAYROLL (2016), <https://d3jlszua3q4cyr.cloudfront.net/content/web/EarninWhitePaper.pdf>.

53. *Id.* at 6 (citing EARNIN YPULSE SURVEY, EARNIN MILLENNIAL STUDY (2014)).

54. See Tom Groenfeldt, *Early Access to Wages, a Prized Benefit, Costs Employers Little or Nothing*, FORBES (Apr. 18, 2019), <https://www.forbes.com/sites/tomgroenfeldt/2019/04/18/early-access-to-wages-a-prized-benefit-costs-employers-little-or-nothing/#3fd4df486312>.

55. PETER SMITH, CENTER FOR RESPONSIBLE LENDING, UNFAIR MARKET: THE STATE OF HIGH-COST OVERDRAFT PRACTICES IN 2017, at 1 (2018), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-unfair-market-overdraft-l-aug2018.pdf>; Baker & Kumar, *supra* note 4, at 2.

56. Baker & Kumar, *supra* note 4, at 3.

57. Hawkins, *supra* note 4, at 7, 14–16.

58. Hayashi, *supra* note 3.

59. See *id.*

Lastly, research indicates that employers who provide EWAPs as an employee benefit experience lower turnover rates, saving millions of dollars in rehiring, retraining, and other employment costs.⁶⁰ Researchers Todd Baker and Snigdha Kumar found that “[a]ctive users of PayActiv had a 19% lower turnover rate than [e]nrolled users.”⁶¹ Additionally, according to a study commissioned by Earnin, employees using the app reported positive attitudinal changes toward their work: “89 percent of users reported feeling more motivated and productive at work when they had access to their wages before payday, and 74 percent reported having fewer unplanned absences.”⁶²

D. Disadvantages of EWAPs

Though EWAPs provide advantages for both the employee and employer, there are also disadvantages to the products. First, early access to wages does not solve financial instability, which is caused by deflated wages.⁶³ Even with early access to wages, low-income workers still face the daunting task of making ends meet on an insufficient salary.

Second, though EWAP providers identify whether their model is based on a monthly fee, transaction fee, or voluntary tips, the total annual percentage rate (APR) is unspecified. Under the Truth in Lending Act (TILA), lenders are required to disclose the cost of their credit as an APR.⁶⁴ EWAP providers claim that TILA does not apply to the products and therefore are not required to disclose costs as an APR.⁶⁵ This presents a two-fold problem: (1) lack of disclosure of the true cost of the advance and (2) the high costs of the product overall. Disclosing costs allows consumers to evaluate the true cost of using an EWAP and to determine whether using the product is advantageous at all. It is difficult to make an informed decision without all the necessary facts like APR. Nondisclosure impairs a consumer’s ability to make a sound decision when weighing whether or how to use the products.

Third, the costs for EWAPs can be incredibly high. Consumers may believe a three-dollar transaction fee on a \$100 payment is small, but the effective APR is 156%.⁶⁶ Suggested tips can exceed 730% APR.⁶⁷ Even though fees and tips may equate to a lower APR than most payday loans, there is still a fee associated with accessing one’s wages early. Lauren Saunders, Associate Director at the National Consumer Law Center (NCLC), describes it as “paying to be paid.”⁶⁸

Additionally, direct-to-consumer products can cause overdraft payments and non-sufficient fund (NSF) fees as easily as other quick cash products.⁶⁹ Because direct-to-consumer products are repaid directly from the consumer’s bank account,

60. Baker & Kumar, *supra* note 4, at 4.

61. *Id.* at 16 (“Active users” use the application two or more times while “enrolled users” use the application between zero and one times.)

62. EARNIN, *supra* note 52, at 7 (citing EARNIN YPULSE SURVEY, EARNIN MILLENNIAL STUDY (2014)).

63. Opfer, *supra* note 12.

64. *See* 15 U.S.C. § 1604 (2012).

65. Farivar, *supra* note 22.

66. Cowley, *supra* note 35.

67. Crosman, *supra* note 10.

68. SAUNDERS, *supra* note 31.

69. *See id.*

the provider is permitted to access payment an unlimited amount of times. Typically, if a consumer does not have adequate funds in their bank account to cover the payment, they are charged an NSF fee.⁷⁰ These fees can accumulate, leaving consumers with additional debt.

Last, as previously mentioned, EWAPs have the potential to create cycles of debt similar to payday loan products. Spending one's paycheck early can cause consumers to be unprepared for unexpected expenses and lead to a cycle of borrowing wages early.⁷¹ Consumers report that advance wage products can ensnare them in a similar "vicious cycle" of advancing their wages to make ends meet each month.⁷²

III. CURRENT FEDERAL REGULATORY UNCERTAINTY

Most early wage access products are less than five years old, allowing EWAPs to exist in a legal gray area. Due to the novelty of the products, there is regulatory uncertainty at both the state and federal levels concerning whether the products should be regulated and, if so, by whom. Whether EWAP providers will be regulated under state or federal law depends on whether providers are designated as lenders. Nearly all EWAP providers deny that they are lenders. Earnin, in particular, terms money transfers "activations" rather than loans.⁷³ If providers are deemed lenders, they would likely be subject to state and federal lending regulation, which providers seek to avoid. Next, I examine the federal regulatory uncertainty of EWAPs, and in Part IV, I examine state regulatory uncertainty.

A. Federal Statute Analysis

To determine the origin of the federal regulatory uncertainty, analysis must begin with the guiding federal consumer lending laws: The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the Truth in Lending Act (TILA). Both laws mandate lenders comply with certain regulations. The Dodd-Frank Act created the Consumer Financial Protection Bureau (CFPB), which has left open the question of whether EWAPs fall under its authority. TILA requires lenders to disclose the APR and finance charges associated with the extension of credit.⁷⁴

The purposes of the Dodd-Frank Act include "improving accountability and transparency in the financial system" and "protect[ing] consumers from abusive financial service practices."⁷⁵ The Act does not define pertinent terms to determine if certain products or practices are subject to the law. For example, the terms "loan" and "debt" are not defined, which makes it unclear if EWAPs qualify as either

70. Baker & Kumar, *supra* note 4, at 19.

71. See SAUNDERS, *supra* note 31, at 11.

72. Farivar, *supra* note 22 (internal quotations marks omitted).

73. *Id.*

74. *What is a Truth-In-Lending Disclosure? When Do I Get To See It?*, CONSUMER FIN. PROTECTION BUREAU (June 8, 2016), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-truth-in-lending-disclosure-when-do-i-get-to-see-it-en-787>.

75. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified at 12 U.S.C. §§ 5301-5641).

instrument. But the Act does define “credit.”⁷⁶ Credit means “the right granted by a person to a consumer to *defer payment of a debt, incur debt and defer its payment . . .*”⁷⁷ Arguably, EWAP’s money transfers create a debt, and the deferred payment creates credit. The Truth in Lending Act defines credit similarly.⁷⁸ Creditor is defined as one who both:

(1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.⁷⁹

Under TILA, to be deemed a lender, an EWAP provider must “regularly extend” credit which is payable in more than four installments or includes a finance charge.⁸⁰ Law Professor Adam Levitin argues EWAPs neither incur a finance charge nor provide payments of more than four installments; thus, in his opinion, the transaction is not a loan for TILA purposes.⁸¹ Other scholars argue EWAPs that charge fees per transaction or “charge only if wages are advanced, suggest[s] . . . a direct condition of the extension of credit,” constituting a finance charge.⁸² Reasonable people disagree, as one could also characterize the tip model as levying a finance charge, reinforcing EWAPs’ uncertain designation.

B. Consumer Financial Protection Bureau Analysis

To add to the uncertainty, the CFPB appears to exempt EWAPs from regulation under its Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule (Payday Rule).⁸³ The Payday Rule states transactions that advance wages are not *necessarily* credit.⁸⁴ The CFPB provides a relevant example of a situation in which the transaction does not constitute credit:

when an employer allows an employee to draw accrued wages ahead of a scheduled payday and then later reduces the employee's paycheck by the amount drawn, there is a quite plausible argument

76. 12 U.S.C § 5481(7) (2010).

77. *Id.* (emphasis added).

78. 15 U.S.C. § 1602(f).

79. 15 U.S.C. § 1602(g).

80. *Id.*

81. Adam Levitin, *What is “Credit”? AfterPay, Earnin’, and ISAs*, CREDIT SLIPS: A DISCUSSION ON CREDIT, FIN., & BANKR. (July 16, 2019, 1:31 PM), <https://www.creditslips.org/creditslips/2019/07/what-is-credit-afterpay-earnin-and-isas.html>.

82. Hawkins, *supra* note 4, at 37; see 12 C.F.R. § 1026.4 (2017).

83. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54547 (Nov. 17, 2017) (codified at 12 C.F.R. § 1041.3 (2018)).

84. *Id.* (emphasis added).

that the transaction does not involve “credit” because the employee may not be incurring a debt at all.⁸⁵

The CFPB also notes that when the employer “does *not* reserve any recourse upon the payment made to the employee other than the corresponding reduction in the employee's paycheck,” it is also less likely a credit transaction.⁸⁶

Importantly, the CFPB acknowledges that not all EWAPs are created equal, and some structures may constitute credit transactions if outside mechanisms are used to collect on the debt.⁸⁷ Even in the circumstances where an EWAP may be constituted as credit, the CFPB exempts them from the 2017 Payday Rule if the following criteria are satisfied: (1) the early access is granted by the employer; (2) the employee is not subject to any additional fees other than a charge for participating in the program; (3) the EWAP provider has no “legal or contractual claim or remedy against the employee based on the employee's failure to repay in the event the amount advanced is not repaid in full”; (4) the EWAP provider will not initiate debt collection activities nor will it sell it to a third party; and (5) will not report the debt to a consumer reporting agency.⁸⁸

Though the CFPB acknowledges the emergence of EWAPs, many commentators believe the agency did not provide sufficient direction to determine whether these products should be regulated and if so, by whom.⁸⁹ Without guidance from the most well-positioned federal regulatory agency, individual states have risen to the challenge of addressing the uncertainties in regulating EWAPs.

IV. CURRENT STATE REGULATORY UNCERTAINTY

States have taken the lead in providing guidance on how to regulate EWAPs due to regulatory uncertainty at the federal level. This Note is not a broad survey of the fifty states' consumer laws, but rather focuses on two states that have determined EWAPs warrant regulation: New York and California. Both states are often at the forefront of the fight to protect consumers⁹⁰ and due to the regulatory uncertainty at the federal level, each state has deployed a different strategy to address EWAPs. New York proceeded with state regulatory action, while California opted to regulate through state legislation.

85. *Id.*

86. *Id.* (emphasis added).

87. *See id.*

88. 82 Fed. Reg. at 54547.

89. *See* Middlebrook & Kierner, *supra* note 9.

90. Hailey Barthel & Heather McArn, *Governors of California and New York Announce Enhanced Consumer Protection Agendas for 2020*, JDSUPRA (Jan. 30, 2020), <https://www.jdsupra.com/legalnews/governors-of-california-and-new-york-75868https://www.jdsupra.com/legalne>.

A. State Agency Investigation: The New York Department of Financial Services Investigates Earnin

In August 2019, the New York Department of Financial Services (NY DFS) announced that regulators from ten states and Puerto Rico were launching a multi-state investigation of EWAPs to determine if the providers had violated state lending laws.⁹¹ The Superintendent of the Department of Financial Services framed the investigation as a way to determine “whether these payroll advance practices are usurious and harming consumers.”⁹² In particular, NY DFS is investigating whether the monthly fees, transaction fees, or tips are unlawful under New York State law.⁹³ Earnin, a direct-to-consumer EWAP, faces investigation as consumers have raised concerns regarding the model’s structure. To understand NY DFS’s concerns, analysis must focus on Earnin’s use of voluntary tips.

1. The Problem: The Tip Model

After the *New York Post* published an exposé on Earnin’s tip model, the New York Department of Financial Services initiated an investigation into Earnin and other EWAPs.⁹⁴ Earnin does not require any connection to an employer, which raises concerns among consumer advocates and other EWAP providers. With fewer safeguards to protect consumers from harm, these types of EWAPs are more similar to payday loans than are employer-based EWAPs. Lauren Saunders, Associate Director at the National Consumer Law Center, distinguishes Earnin from “true early wage access providers,” like PayActiv and DailyPay which both utilize the employer-sponsored model, billing Earnin as a “look-alike” early wage product.⁹⁵

The primary concern is Earnin’s tip model.⁹⁶ Though the company touts that the tips are voluntary, many users complain that if they do not choose to tip, access to funds is restricted.⁹⁷ By limiting access to funds without payment of a fee, Earnin appears much more like a lender. Since the announcement of the NY DFS investigation, Earnin “quietly disabled a controversial feature for New York users that links the size of its loans to voluntary ‘tips.’”⁹⁸ In general, tips may appear inconsequential, but when APR is calculated as though the tips were interest, the resulting rate can exceed state interest rate caps.

91. Press Release, N.Y. Dept. of Fin. Serv., Superintendent of Fin. Serv. Linda A. Lacewell Leads Multistate Investigation of The Payroll Advance Industry (Aug. 6, 2019) https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1908061 (including Connecticut, Illinois, Maryland, New Jersey, North Carolina, North Dakota, Oklahoma, Puerto Rico, South Carolina, South Dakota, and Texas).

92. *Id.*

93. *Id.*

94. See Kevin Dugan, *Cash-advance App Earnin Changes its Tune Amid NY Probe*, N.Y. POST (Sept. 1, 2019), https://nypost.com/2019/09/01/cash-advance-app-earnin-changes-its-tune-amid-nys-probe_

95. Crosman, *supra* note 10; SAUNDERS, *supra* note 31, at 12.

96. Dugan, *supra* note 5.

97. *Id.*

98. Dugan, *supra* note 94.

2. The New York Department of Financial Services' Regulatory Action and What it Means for the Future

The New York Department of Financial Services is authorized to supervise “persons providing, financial products and services, including any persons subject to the provisions of the insurance law and the banking law.”⁹⁹ NY DFS’s authority to investigate Earnin and other EWAPs is clear in the statutory text.

The NY DFS exerted its authority when the Department subpoenaed documents from Earnin in twenty-one different categories of records including “records of the names of Earnin’s New York customers, the size and number of their transactions, and orders to convert the ‘tip’ amounts it has requested for advances to annual percentage rates, or APRs—and to assume that the fees count as interest.”¹⁰⁰ By deactivating the tip feature, it appears that Earnin believes NY DFS could reasonably consider their tip model in violation of New York consumer protection laws. The investigation is pending, but the outcome will be instructive for states determining whether and how to regulate these products.

B. State Legislation: California’s S.B. 472

California has also taken steps to investigate and regulate EWAPs. Instead of regulatory state action, California has opted to pursue legislation. In February 2019, Democratic State Senator Anna Caballero introduced Senate Bill 472, which provides regulatory and definitional guidance for EWAPs.¹⁰¹ The “Wage-based, work-based, and income-based advances” bill amends the California Financial Code to “establish a regulatory framework for the regulation of earned income access service providers.”¹⁰² One of the primary goals of the legislation is to “provide legal certainty to earned income access service providers.”¹⁰³ PayActiv, an employer-sponsored EWAP, co-sponsored the bill in order to provide Californians less expensive and risky alternative financial products.¹⁰⁴ The bill was amended and passed unanimously in California’s Senate in May 2019.¹⁰⁵ In September 2019, S.B. 472 came to an abrupt halt in the State Assembly’s Committee on Banking and Financial Institutions after moving quickly through the Senate. It is unknown what stopped the bill’s progression, but it is still technically active in the committee.¹⁰⁶ Though the bill’s fate is uncertain, consumer advocates should continue to follow California’s lead by pursuing legislation that regulates

99. N.Y. FIN. SERV. §§ 102, 201(a) (Consol. 2011).

100. Dugan, *supra* note 94.

101. CALIFORNIA LEGISLATIVE INFORMATION, S.B. 472 WAGE-BASED, WORK-BASED, AND INCOME-BASED ADVANCES (2020), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200SB472; *see* Wage-based, Work-based, and Income-based Advances Act, S. 472, 2019-2020, Reg. Sess. (Cal. 2019).

102. *Earned Income Access Serv. Providers: Hearing on S.B. 472 Before S. Comm. on Banking and Fin. Inst.*, 2019 Reg. Sess. 1 (Cal. 2019) [hereinafter *S. Banking and Fin. Inst. Hearings*].

103. *Id.* at 3.

104. *See Earned Income Access Serv. Providers: Hearing on S.B. 472 Before S. Judiciary Comm.*, 2019 Reg. Sess., 8, 15 (Cal. 2019) [hereinafter *S. Judiciary Hearings*].

105. CALIFORNIA LEGISLATIVE INFORMATION, S.B. 472 WAGE-BASED, WORK-BASED, AND INCOME-BASED ADVANCES (2019), https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201920200SB472.

106. CALIFORNIA LEGISLATIVE INFORMATION, S.B. 472 WAGE-BASED, WORK-BASED, AND INCOME-BASED ADVANCES (2020), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200SB472.

EWAPs. S.B. 472 is a blueprint for other state legislation, as the bill incorporates key provisions that help define EWAPs and provides guidance for regulation.

1. Key Provisions

The bill does not treat EWAPs as credit transactions.¹⁰⁷ Instead the bill amends the language of the California Financial Code to reference “providers” rather than “lenders” when referencing EWAPs.¹⁰⁸ The authors of the bill did not perceive an EWAP to be similar enough to a loan transaction to reference them as such in the bill. Additionally, the bill encompasses both direct-to-consumer EWAP providers and employer-sponsored EWAP providers.¹⁰⁹ With these threshold issues in mind, I will examine pertinent provisions of the bill.

First, the EWAP industry is quite small, as noted in the Senate Committee on Banking and Financial Institutions, which found there were “too few companies currently offering earned income access services to support a new licensing law.”¹¹⁰ Instead, the bill regulates EWAPs under an existing licensing law.¹¹¹ The Committee cited financial expenses like the cost of hiring staff to process applications and conduct exams as reason for not creating a new regulatory scheme for EWAPs.¹¹² The bill requires EWAP providers with a net worth of at least \$250,000 to register for a license to operate in the state.¹¹³ The minimum net worth requirement mirrors California’s requirements for lenders and brokers under the existing financial law.¹¹⁴ Without a license, an EWAP provider is prohibited from operating or advertising the business.¹¹⁵

Once licensed, EWAP providers must comply with state disclosure regimes. The commissioner *may* require EWAPs to provide various disclosures like “comparisons . . . [r]etrospective cost and rate calculations . . . [c]ost and rate calculations based upon an average transaction line for each provider . . . [a]ny other cost and rate disclosures” and information regarding consumer rights.¹¹⁶ These disclosures may be implemented by rule, regulation, or order.¹¹⁷ A licensed provider must also generate an annual report which should include information like the total number of advances made and the total number of workers and consumers served for that year.¹¹⁸

S.B. 472 also sets caps for fees and tips. Fees and tips should not exceed “the lesser of fifteen dollars (\$15) per month on average or 7.5 percent of the aggregate

107. See *S. Banking and Fin. Inst. Hearings*, *supra* note 101, at 3–4; see *S. Judiciary Hearings*, *supra* note 103, at 1, 4.

108. See *S. Banking and Fin. Inst. Hearings*, *supra* note 101, at 1.

109. See *id.* at 1–2.

110. See *S. Banking and Fin. Inst. Hearings*, *supra* note 101, at 6.

111. *Id.* at 6.

112. See *id.*

113. See Wage-based, Work-based, and Income-based Advances Act, S. 472, 2019–2020, Reg. Sess., ch. 2.5, § 22104.5(b) (Cal. 2019).

114. See CAL. FIN. CODE §§ 22100, 22104 (Deering 2013).

115. See Wage-based, Work-based, and Income-based Advances Act, S. 472, 2019–2020, Reg. Sess., ch. 2.5, § 22161(a)(3) (Cal. 2019).

116. *Id.* at § 22489(a).

117. *Id.*

118. *Id.* at § 22486(a), (c).

amount advanced.”¹¹⁹ Monthly fees or membership fees must be confirmed in writing in the contract and should not exceed twelve dollars per month.¹²⁰ S.B. 472 also limits the amount of earned income a consumer may advance to “50 percent of the gross amount owed by an obligator to a worker as of the date and time of the worker’s request.”¹²¹ On the third reading of S.B. 472, the Senate added “specified exemptions up to twice in each semiannual period.”¹²²

Additionally, S.B. 472 requires EWAPs to provide nonrecourse advances.¹²³ The benefit of nonrecourse advances for consumers is EWAPs cannot report failure to repay to credit bureaus and cannot initiate legal proceedings against the consumer or initiate debt collection procedures.¹²⁴ EWAP providers tout this feature to distinguish themselves from payday lenders, which do not offer such terms.¹²⁵

Early wage access providers are also required to make “a reasonable determination of the wages or compensation that have been earned but have not been paid to a worker at the date and time that worker requests an advance.”¹²⁶ This appears similar to an ability to repay provision like the one described in the CFPB’s Payday Rule, but is not explicitly described as such. Last, the bill authorizes the Department of Business Oversight to enforce violations of the proposed law.¹²⁷

2. Major Concerns About S.B. 472

Though S.B. 472 is the first of its kind, some consumer advocates and EWAP providers believe it lacks strong consumer protections and clear terms. The National Consumer Law Center (NCLC) wrote a letter of opposition after initially tentatively supporting the bill contingent upon suggested amendments.¹²⁸ The organization found ten major issues with the amended bill and withdrew its support.¹²⁹ Other EWAP providers voiced concern as well.¹³⁰

A primary concern is that the bill does not distinguish between employer-sponsored EWAPs and direct-to-consumer EWAPs. Consumer advocates, such as NCLC, find this oversight to be a fatal flaw of the legislation. NCLC characterizes

119. *See* Wage-based, Work-based, and Income-based Advances Act, S. 472, 2019-2020, Reg. Sess., ch. 2.5 §§ 22482(c), 22483(e)(1)(B) (Cal. 2019) (“[B]efore making the payment to the provider, the worker is informed clearly and conspicuously in writing before the worker incurs and obligation to the provider.”) (“[P]ayments are collected as membership or subscription fees memorialized in the contract between the provider and . . . the consumer.”).

120. *See id.* at § 22482(c).

121. *Id.* at § 22483(j).

122. S. 472, 2019-2020, Reg. Sess., at 1 (Cal. 2019).

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB472 (select “09/04/19-Assembly Floor Analysis”).

123. Wage-based, Work-based, and Income-based Advances Act, S. 472, 2019-2020, Reg. Sess., ch. 2.5, § 22483(k) (Cal. 2019).

124. *Id.*

125. Dugan, *supra* note 5.

126. Cal. S.B. 472, § 22483(m).

127. *See id.* The Payday Lending Rule, however, is under reconsideration by the current administration.

128. *See* Letter from Lauren Saunders, Assoc. Director, Nat’l Consumer Law Center to S. Anna Caballero, Cal. S. (July 5, 2019).

129. *Id.*

130. S. 472, 2019-2020, Reg. Sess., at 1 (Cal. 2019).

the direct-to-consumer model as akin to payday loans, because “[f]unds [are] advanced to a worker ahead of payday” without employer verification that the wages were actually earned.¹³¹ Employer-sponsored models present less risk that employees will access funds they have yet to earn.

NCLC also highlights that the bill does not provide the Department of Business Oversight (DBO) supervision authority over EWA providers.¹³² By not granting DBO supervision of the providers, the industry will likely resort to self-regulation or rely on consumer complaints, which are often ineffective in deterring violations. PayActiv’s involvement with sponsoring this bill may indicate that it is industry-supported—likely in order to avoid other types of unwanted state regulation.

Additionally, S.B. 472 allows for three non-sufficient fund fees.¹³³ The amended bill allows providers to attempt to collect the payment two consecutive times.¹³⁴ Attempting to collect a payment when a consumer does not have funds can cause overdraft and non-sufficient funds charges. The bill includes language that providers “take best efforts to ensure that there are sufficient funds in the account before attempting to initiate a payment transfer from that account”¹³⁵ however “best efforts” may not be sufficient to avoid overdraft fees.

DailyPay, an employer-sponsored model, also voiced concern regarding S.B. 472. They argued the “bill is drafted in a manner to protect one provider’s business model, and is not inclusive of the broader set of considerations important to consumers in using such a benefit.”¹³⁶ DailyPay’s concerns are valid, as the fee provisions and limitation on amount of funds that can be accessed directly align with PayActiv’s particular business model.¹³⁷ PayActiv charges a membership fee of less than \$14 and allows consumers to access “up to 50 percent of earned wages up to \$500 per pay period,” which aligns with the language of the bill.¹³⁸ Though DailyPay and PayActiv are both employer-sponsored EWAPs, and each set their own fees, it appears that S.B. 472 incorporates PayActiv’s fee structure—not DailyPay’s—which causes concern among other EWAP providers, mainly that the bill is not inclusive of other EWAP models.

DailyPay also asserts that some features of the bill are arbitrary and not based on data, like capping fees to fourteen dollars and limiting fund access to 50 percent of a user’s income.¹³⁹ The point is persuasive. But there simply is little to no data on the effectiveness of EWAPs.¹⁴⁰ The lack of data limits regulators’ knowledge about the products and how to regulate them.

131. See Letter from Lauren Saunders, *supra* note 128, at 1.

132. *Id.* at 4–5.

133. *Id.* at 2.

134. Wage-based, Work-based, and Income-based Advances Act, S. 472, 2019-2020, Reg. Sess., ch. 2.5, § 22484(a)((2)(C)(i)(Cal. 2019).

135. *Id.* at § 22714(a)(6)(B); Letter from Lauren Saunders, *supra* note 128.

136. *S. Judiciary Hearings*, *supra* note 104, at 13.

137. See *id.*

138. *Id.* at 9.

139. *Id.* at 13.

140. Hawkins, *supra* note 4, at 6; Baker & Kumar, *supra* note 4, at 14 (analyzing U.K. EWAP Salary Finance model and U.S. PayActiv model and their effect on employee turnover rates; one of the first independent studies conducted on EWAP providers).

V. RECOMMENDATIONS

EWAPs are innovative products and may provide stopgap solutions for many people living paycheck to paycheck. Yet, EWAPs also have the potential to cause consumers great harm. The novelty of the products demands evaluation. It is not clear whether existing lending laws apply to these products. Clarifying regulations will resolve this uncertainty. Since the CFPB has not issued further guidance on the issue, states have taken the lead. California and New York were the first states to tackle the issue of regulating EWAP providers.¹⁴¹ As demonstrated by Part IV of this Note, both methods of regulation—state agency action and legislation—wrestle with complex legal and policy questions raised by the product.

Though there are many issues with regulating EWAP providers, I offer three recommendations for improving the regulation efforts. First, because the direct-to-consumer model can exist without employing the tip model, I recommend eliminating the tip model as the sole revenue option for providers. Second, model state legislation should be drafted and disseminated through a coordinated campaign by consumer advocates to address the aforementioned concerns associated with California's S.B. 472. Third, consumer advocates should continue to monitor the development of the NY DFS investigation and apply the learnings to future state enforcement actions.

A. Eliminate the Tip Model as the Sole Means of Income

Employing the tip model as the sole source of income for fintech companies is inherently problematic. To date, Earnin is the only EWAP provider who relies on the tip model as its sole source of income. The problem with the tip model is the tipping amount influences the amount consumers are able to access.¹⁴² This feature resembles a loan product. Under pressure from the NY DFS investigation, Earnin disabled the tip feature and the “pay-to-play” feature of the app in New York.¹⁴³

EWAP providers should instead use fixed monthly or a per-transaction fees. Most EWAP providers only charge a fee when the product is used by the consumer.¹⁴⁴ If the tip model is used, it should be used in conjunction with a fixed fee, like DailyPay's model. Eliminating the tip model as the sole means for EWAP providers' income is an effective way to ensure consumers are not charged usurious rates for accessing their own funds. Flat fees through monthly transactions or a fee-per-transaction will also provide clarity to consumers concerning the true costs of accessing their earned income in advance.

B. Model Legislation

Legislation can be an effective tool for regulating EWAP providers. Though S.B. 472 in California is an imperfect example of the power of legislation, the state deserves credit for acknowledging the existence of EWAPs in the market. To create

141. *See supra* Part IV.

142. *See* Dugan, *supra* note 94.

143. *Id.*

144. *See* Cowley, *supra* note 35.

effective model legislation, I recommend addressing three key provisions: (1) licensure, (2) non-sufficient and overcharge fees, and (3) advance payment fees.

1. Model Legislation Provision: Licensure

Any model legislation must include a provision that requires EWAP providers to be licensed in the state in which they operate. Once an EWAP provider is licensed, the provider must comply with disclosure laws similar to those articulated in S.B. 472 including total fees, costs, APR, and include a copy of the state's consumer's rights regulations.

As in S.B. 472, I recommend setting a minimum net worth amount for EWAP providers who are required to register with the state. Though the Banking and Financial Institution Committee did not debate the merits of the \$250,000 net worth minimum, the requirement is based on the minimum amount of net worth California requires for lenders to file with the state.¹⁴⁵ States should consult their existing licensing requirements for lenders to build a framework for EWAP providers.

Licensure allows states to monitor, regulate, and better understand the business practices of a product. Licensure will help states familiarize themselves with the companies operating within their jurisdiction. It will also enable states to gather information and data on the common practices of EWAPs and help states understand how the products function. Information like this will provide the state a framework for acceptable practices—both practices aimed at keeping consumers safe and practices aimed at encouraging EWAP innovation. Currently, states have little to no knowledge about the innerworkings of EWAPs or how to regulate them. Licensure will provide necessary knowledge to key stakeholders like legislatures, consumers, and EWAP providers on the best practices within the industry.

The licensure process does not have to be costly. If states find it too costly to create a new licensing regime (as California did), they should, at a minimum, incorporate the EWAP licensing requirements into an existing, similar state licensing regime.

Though states should be given flexibility to determine which provision of code should govern EWAP licensure, it is imperative that the state's regulatory department be authorized to supervise, examine, and enforce licensure violations like not complying with disclosure requirements or failing to register. S.B. 472 does not require the Department of Business Oversight, which would oversee EWAPs in California, to engage in examinations or supervisory activities over the industry. However, supervision is crucial to an effective regulatory regime and future legislation should confer supervisory authority to the regulatory department overseeing EWAPs. As in S.B. 472, regulatory departments should also retain the ability to enforce penalties against violators of the licensure law.

2. Model Legislation Provision: Non-Sufficient Fund and Overdraft Charges

Model legislation should also include provisions that protect consumers from non-sufficient fund and overdraft charges. Under the proposed S.B. 472, an EWAP

145. CAL. FIN. CODE § 22104.

provider is to “take best efforts to ensure that there are sufficient funds in the account before attempting to collect . . .”¹⁴⁶ This is insufficient protection for consumers. After an EWAP provider has attempted, unsuccessfully, to access a user’s funds once, the providers should be required to confer with the user and confirm an agreed upon date to withdraw funds for a second attempt to access the payment. If the conferral with the user fails (i.e. the consumer has insufficient funds) or the user attempts to evade the EWAP provider, the provider may attempt to withdraw funds for a second time. This provision is in line with the CFPB’s Payday Rule which also limits withdrawals to two failed attempts.¹⁴⁷ Legislatures should balance the needs of the consumer to not incur unnecessary NSF charges and the EWAP provider’s need to make a profit.

3. Model Legislation Provision: Advance Payment Fees

Model legislation should also address the fee structure of EWAPs through two strategies: (1) explicitly disallowing the tip model and (2) conducting further research on effects of fee structure. As discussed in Part V.A, fees should be limited to monthly and per transaction fees and prohibit the tip model. If the tip model is used, it cannot be the sole source of revenue for providers.

Second, legislatures should conduct research on how other types of fees affect consumers and the industry but should not allow the lack of data to hinder their legislation efforts. In fact, legislators should follow California’s lead by outlining acceptable fee amounts. Legislators should also consider the variety of EWAP structures. For instance, DailyPay charges different fees depending on the delivery mode.¹⁴⁸ For instant delivery, DailyPay charges \$2.99 and for next day delivery, they charge \$1.25.¹⁴⁹ Documenting the effect each EWAP model has on consumers and the industry will greatly inform the legislative process.

C. Monitor and Duplicate New York Department of Financial Services’ Investigation of Earnin

If other state agencies have similar jurisdiction to regulate financial products like New York’s Department of Financial Services, they should investigate, supervise, and enforce their existing consumer protection laws with regard to EWAPs. The success of each state regulatory agency depends upon the legal framework for enforcement. States that imbue their regulatory agencies with authority to supervise and examine financial service providers will likely find success in regulating EWAPs through this method. Because the New York Department of Financial Services investigation is underway, it is difficult to evaluate the success of the model; however, the investigation provides states a potential method of regulating EWAPs in the future.

146. Wage-based, Work-based, and Income-based Advances Act, S. 472, 2019-2020, Reg. Sess., ch. 2.5, § 22714(a)(6)(B)(Cal. Stat. 2019).

147. 82 Fed. Reg. at 54473.

148. See *S. Judiciary Hearings*, *supra* note 104, at 9.

149. See *id.*

VI. CONCLUSION

Americans are struggling to pay for their basic necessities. The status quo of payroll delivery every two weeks should not hinder consumers from accessing funds they have earned. Early access wage products are innovative and consumer advocates should encourage the creation of consumer-friendly products. However, little is known about EWAPs, making it difficult to understand the benefits and harms of the products.

But we are not bereft of tools (or common sense) when dealing with these products. When products take advantage of consumers like Earnin's tip model does, advocates should investigate and eliminate. State legislators should adopt model legislation to provide clear rules and guidance for EWAP providers. Model legislation should consider issues of licensure, advance payment fees, and unintended charges such as non-sufficient fees and overdraft charges. Legislators also take into account the various models of EWAPs in their analysis. Advocates should encourage state regulators to use their authority to supervise EWAP providers. Monitoring the developments of the New York Department of Financial Services' investigation will guide state regulatory agencies on how to approach their own state investigations.

Americans' financial instability will not be solved by EWAPs, but these products may help some individuals pay bills or avoid late fees. The uncertainty surrounding EWAPs raises questions about their effect on consumers and whether these products are the savior for low-wage workers or merely another debt trap.