September 15, 2023

Commissioner Jorge Perez
Connecticut Department of Banking
260 Constitution Plaza
Hartford, CT 06103-1800

cc: Joseph Chambers, Carmine Costa

Re: Department of Banking's Guidance on Earned Wage Access products

Dear Commissioner Perez:

On behalf of the American Fintech Council (AFC) and its members,[1] we are writing to express serious concerns regarding the Department of Banking's (Department) recently issued guidance (Guidance)[2] on earned wage access (EWA) products. As the premier trade association representing the largest EWA providers, we believe in a strong regulatory and consumer protection focused standard and have long supported the creation of regulatory frameworks in states across the country for EWA products that ensure key consumer protections.[3] We appreciate your previous willingness to engage in a dialogue, however we strongly encourage the Department to reconsider its Guidance and provide important clarifications to preserve key EWA product features that are highly beneficial to and safe for Connecticut workers. More than 151,000 employees in the state have utilized EWA since 2012, including through partnerships with over 1,300 businesses. The service is available to approximately one million employees.[4]

AFC and Its Mission

AFC's mission is to promote an innovative, transparent, inclusive, and customer-centric financial system by fostering innovation in financial technology (fintech) and encouraging sound public policy. AFC members are at the forefront of advancing competition in consumer finance and pioneering ways to better serve underserved consumer segments and geographies. Our members

[1] AFC's membership spans technology platforms, non-bank lenders, banks, payments providers, loan servicers, credit bureaus, and personal financial management companies.
[2] Department of Banking Issues Industry Guidance Regarding Public Act 23-126 September 11, 2023.
[3] AFC supported recent legislation in Nevada and Missouri that requires state licensing of EWA providers, enacts key consumer protections, but clarifies that EWA products are not credit or a loan.
[4] Data reported from January 2012 until September 2023 from DailyPay, PayActiv, and EarnIn.

are also lowering the cost of financial transactions, and helping to meet demand for high-quality, affordable products. AFC and its members support a fair financial services system where products are designed in compliance with regulations and where predatory conduct has no place.

About EWA

EWA is a responsible alternative to high-cost products, like online payday loans, credit card debt, and overdraft fees. It enables employees to access wages they have already earned prior to their bi-weekly or monthly payday when they are short on funds between paychecks. Importantly, EWA transactions have no-recourse, interest, late fees, credit impacts, or underwriting. Data from our members finds that the average amount of earned wages accessed by most consumers is about $115 to $150, once a pay period. Most users access their wages to pay bills that come with late fees, like utility bills, credit card bills, and childcare; and typically utilize one platform for about three months. While there are usually some small costs associated with EWA, at least one "no cost" option is offered by most EWA providers, such as through a debit card, or a next business day ACH bank transfer. A nominal fee of about $3 for instant delivery to any bank account is also common.

I. The Guidance is unclear based on P.A. 23-126 (The Act) and how EWA is structured.

First, as described above, EWA is not a lending or credit product based on previous or updated Connecticut law. Unlike the provision of credit or a loan in Connecticut and elsewhere, EWA is again, non-recourse and does not require a credit check, underwriting, base fees on creditworthiness; charge a fee in installments, charge interest, late fees, or penalties; or impact a user's credit score.

Second, the Act's new small loan definition covers an advance made on a "future potential source of money," which is incongruent with the business model of every EWA provider. The earned wages which can be voluntarily accessed by employees through third party EWA providers are not a "potential source of funds;" they are money owed to the EWA consumer. Earned pay is not future pay and earned pay is not defined in law as only being considered as such at the time an employer runs payroll. The Guidance provides no justification for considering earned but unpaid wages to be a "future potential source of money" and based on how EWA is structured, this makes the Guidance extremely confusing.

II. Regulating EWA as a credit product creates adverse outcomes for consumers.

Forcing EWA into a legacy lender regulatory framework would have significantly negative consequences for consumers and will lead to the withdrawal of EWA providers and services from the market – which is the opposite of the regulatory Guidance's purpose.

First, it would disincentivize or eliminate EWA's key consumer protections, including its credit invisibility, its lack of underwriting, recourse, and debt collection. This would reduce consumer access by limiting the number of consumers who would qualify to use EWA due to creditworthiness. It would negatively harm workers' credit scores and result in debt collection

when a transaction is not fully completed. There are no other consumer financial products that, on an industry-wide basis, are entirely non-recourse. We encourage Connecticut to carefully consider the consequences before disincentivizing this practice. Second, by making EWA credit, this harms consumers by increasing both the amount and type of fees that can be charged to consumers like interest and late fees, which no one in the EWA industry presently charges.

Third, by making EWA credit, EWA providers will need to limit access to only higher amounts of wages based on lending rate caps, which are incongruous to how EWA is structured, as the nominal fee is voluntary, and the EWA transaction is adjusted in the next paycheck. Finally, EWA is not designed as a lending product, and most providers may withdraw from the state as a result of this new guidance. Workers in Connecticut will lose access to this critical service and will be left with only online high-rate predatory loans, overdraft, and other high-cost alternatives, harming the consumers this guidance is trying to protect. EWA offers important savings, low fees and costs, and no debt creation compared to other traditional products. This is why *EWA is a far better and more affordable option than the alternatives in the marketplace*.

III. **Serious concerns regarding the process that led to this updated Guidance.**

The publicly stated legislative intent of the Act that resulted in this Guidance was centered around income share agreements, which is a distinct financial product with very different terms and conditions and risks and benefits than EWA. If the legislature intended to cover EWA products in the Act, a record of such intention would be evident from the public record. We also understand that the Department claimed that a subsequently adopted amendment was meant to impact one company, a platform for peer-to-peer lending, which operates very differently than EWA companies. There was no testimony or hearings available to the general public that enabled EWA companies or the wider industry to provide information on their programs directly to the members of the legislature who drafted and passed this legislation. Further, *at no point did the Department publicly communicate to the legislature during consideration of S.B. 1033 or make any other public statement that the Act would regulate EWA providers* prior to its public Guidance less than three weeks before it was slated to go into effect.

As mentioned above, we further believe that EWA is not covered by the Act because the modified definition of small loan covers an advance made on a "future potential source of money." Meanwhile, earned wages are derived from time and attendance data collected on the consumer and are therefore not a potential source of funds; they are money that has already been earned and owed to the consumer. Again, earned pay is not future pay, or else any wage could be considered a loan under this interpretation.

We also do not agree that EWA structurally satisfied the previous definition of small loan. We do agree however that the Department has the statutory authority to regulate financial products in the state. It is unclear to our members then, why the Department would publish its first ever EWA guidance that contends EWA has always been credit, together with guidance resulting from a bill unrelated to EWA and require licensure within 19 days.

The Guidance is especially concerning, not just because of its unreasonable short timing requirements, but also because of the very important different business practices that exist

between EWA and the products also included in the Guidance. Lawsuit settlement advances, inheritance advances, and income share agreements all have a legal right to repayment, even if that right is contingent on another outcome such as winning a lawsuit or getting a high paying job. EWA doesn't have any legal right to repayment and shouldn't be lumped in with those other services.

IV. AFC recommends that the Department delay the effective October 1, 2023, date until June 15, 2024.

Prior to the ACT, EWA companies did not require a license. The amount of time given to carefully review the law and this Guidance and complete any necessary next steps, including licensing requirements and modifications to existing business models takes more than 19 days. For this reason, the notice of this Guidance is wholly inadequate leaving little alternative other than responsible companies to leave the state. We request either a delay of the effective date, or a no-action period until at least June 15, 2024. This will allow sufficient time for companies to review the Guidance, determine if or how it applies, and enact all necessary next steps.

Conclusion: Further clarity is needed.

We are requesting the opportunity to meet with the Department again to share our concerns with the Guidance as well as offer meaningful alternatives consistent with the Connecticut law for the Department to consider. We would also like an opportunity to learn from the Department about what information was used to come to the conclusions outlined in the Guidance, especially considering EWA does not appear to be covered by the Act. We support the state's goal of establishing strong regulatory standards that balance innovation with consumer protections and appreciate the Guidance's acknowledgement there is still room for analysis on a case-by-case basis. With some clarifications, the Department can ensure that Connecticut consumers continue to have access to their earned wages in times of need.

Sincerely,

Phil Goldfeder
CEO, American Fintech Council