

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

August 30, 2024

Rohit Chopra
Director
CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street NW
Washington, DC 20552

RE: “Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work” 12 CFR Part 1026 [Docket No. CFPB-2024-0032]

Dear Director Chopra:

The undersigned Attorneys General of Massachusetts, the District of Columbia, Delaware, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania and Rhode Island (“the States”) write in support of the Consumer Financial Protection Bureau’s (“CFPB”) Notice of proposed interpretive rule, “Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work” 12 CFR Part 1026 (“proposed rule”).

We support the CFPB’s conclusion that Earned Wage Advance (“EWA”) products involve the extension of credit and that charges incident to the extension of credit, including the payment of expedited funds delivery fees and so-called “tips”, amount to finance charges. The proposed interpretive rule would reduce the risk that consumers would become confused or misled as to the nature of these products and thereby become locked in debt-traps. The proposed interpretive rule would also complement State laws and regulations, helping ensure that a new generation of technologically savvy predatory payday lenders do not proliferate.

A detailed examination of the EWA industry by the California Department of Financial Protection and Innovation illustrates the importance of the CFPB’s proposed interpretive rule.¹ The examination found that consumers of EWA products that accept either “tips” or expedited funds delivery fees often end up paying effective APRs of over 300%.² Because most EWA products permit consumers to take out multiple loans per pay period, these consumers ultimately dedicate an average of 25% of their total paychecks repaying EWA loans at these usurious interest rates.³ Indeed, some companies permit consumers to borrow up to 50% of their net

¹ Cal. Dep’t of Fin. Prot & Innovation, *2021 Earned Wage Access Data Findings* (2023), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf>.

² *Id.* at 6-7.

³ *Id.* at 12-13.

earned wages.⁴ Others may allow consumers to temporarily increase the amount they can borrow by referring new consumers to their app, or by asking other users to “vouch” for them.⁵ The effect of these practices can be disastrous for consumers, as the CFPB’s own data shows that the distribution of consumers’ transaction frequency on employer-partnered EWA products is “U-shaped,” with the largest share of users, 27.6%, at the far end of the “U” taking EWA loans in excess of 25 times per year.⁶ For an employee who is paid biweekly, this essentially amounts to an advance on every paycheck. These findings reflect the risk that borrowers who rely on EWA products to bridge the time between paychecks may get stuck in a cycle of dependency, paying considerable fees numerous times a year.

A particularly concerning aspect of EWA transactions is the solicitation and prevalence of expedited funds delivery fees. EWA providers frequently charge consumers for the option to receive funds through the EWA app same-day or instantaneously as opposed to waiting 1-3 days.⁷ The magnitude of these fees ranges between EWA providers from \$0.99 to \$13.99. Notably, in practice, these fees may be unavoidable for EWA users, who by the very nature of the product they are consuming, often need cash quickly. EWA loans are typically repaid within 9-11 days.⁸ A difference of up to 3 days for the receipt of funds under these circumstances may be material to the consumer’s decision to take such loans in the first place. That may help explain why over 82% of transactions on employer-sponsored EWA plans included some fee, and over 95% of fees paid by users were for expedited delivery of funds.⁹

EWA providers’ reliance on the argument that their products are necessary to meet consumers’ short-term liquidity needs underscores the propriety of including expedited funds delivery fees in any finance charge calculation.¹⁰ Extra care should be given to ensure that consumers are not confused or misled about the full costs of a product that is advertised as being useful for defraying or avoiding costs, such as overdraft fees.¹¹

An additional troubling feature of many EWA products is the solicitation of so-called “tips” that have a strong tendency to mislead consumers. The CFPB identified a large range of practices employed by EWA sellers to solicit tips that have the effect of manipulating or pressuring

⁴ U.S. Gov. Accountability Office, *Financial Technology: Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity Is Needed*, GAO-23-105536, at 22 (March 2023), <https://www.gao.gov/assets/820/818014.pdf>.

⁵ *Id.*

⁶ Consumer Fin. Prot. Bureau, *Data Spotlight: Developments in the Paycheck Advance Market* (July 18, 2024), <https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/>.

⁷ *Id.*

⁸ Cal. Dep’t of Fin. Prot & Innovation, *supra* note 1.

⁹ Consumer Fin. Prot. Bureau, *supra* note 6.

¹⁰ *See, e.g.*, FTI Consulting, *Direct to Consumer Earned Wage Access User Survey Key Findings* (FTI Consulting, July 7, 2021) (According to a survey touted by the EWA industry, 61% of consumers used EWA for paying bills on time, 52% for avoiding overdraft fees, and 52% for buying groceries).

¹¹ *Id.* at 3.

consumers to make such payments.¹² Some EWA sellers have designed their apps such that a “tip” amount must be selected to complete the transaction, with the default set to a non-zero number or a suggested tip pre-selected.¹³ EWA sellers have also attempted to misleadingly suggest that tips are in some way earmarked to help other consumers, with 38% of respondents of one survey who tipped reporting that they did so to “pay it forward to another user.”¹⁴

Recently, California,¹⁵ Connecticut,¹⁶ Pennsylvania¹⁷ and Washington, D.C.,¹⁸ reached consent orders with SoLo, a peer-to-peer lending platform based on concerns about a similar tip model. SoLo advertised “no interest” loans when, in reality, the vast majority of borrowers paid a tip as part of their transactions.¹⁹ SoLo “urged Borrowers to offer the maximum tip amount” through pop-up messaging and “never advised [Borrowers] that they may renege on their prior commitment to make a tip or donation.”²⁰

The CFPB’s recognition that EWA products entail the extension of credit, and that “tips” and expedite fees associated with these products are charges incident to the extension of credit, would ensure that consumers who use these products—including consumers with poor credit, no credit, or intermittent needs for short term liquidity—have the benefit of critical consumer protections.²¹

The proposed rule is also aligned with state approaches to payday lending issues, which states have grappled with for over a century. Indeed, EWA providers employ similar rhetoric to that

¹² Consumer Fin. Prot. Bureau, *Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work*, 89 FR 61358, 61363 (July 31, 2024), https://files.consumerfinance.gov/f/documents/cfpb_paycheck-advance-marketplace_proposed-interpretive-rule_2024-07.pdf; see also Center for Responsible Lending, *State Recommendations for Earned Wage Advances and Other Fintech Cash Advances* (Oct. 2023), <https://www.nclc.org/resources/state-recommendations-for-earned-wage-advances-and-other-fintech-cash-advances/>.

¹³ *Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work*, 89 FR at 61363.

¹⁴ Center for Responsible Lending, *Survey Summary of Earned Wage Advance and Cash Advance Apps* (Aug. 2023), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-ewa-research-factsheet-aug2023.pdf>.

¹⁵ Consent Order, *Comm’r of Fin’l Prot’n & Innov. v. SoLo Funds, Inc.*, at 6 (Cal. Dep’t DFPI May 8, 2023), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/05/Consent-Order-SoLo-Funds-Inc.pdf>.

¹⁶ Consent Order, *In re SoLo Funds Inc.*, NMLS # 1909701 (Ct. Banking Comm’r May 16, 2023) <https://portal.ct.gov/-/media/DOB/Enforcement/Consumer-Credit/2023-CC-Orders/SOLO-FUNDS-INC---CO.pdf>.

¹⁷ Assurance of Voluntary Compliance, *Commonwealth of Pennsylvania v. Solo Funds, Inc.*, Case ID: 240700170 (Philadelphia Court of Common Pleas, July 1, 2024), <https://www.attorneygeneral.gov/wp-content/uploads/2024/07/2024-07-02-SoLo-AVC.pdf>.

¹⁸ Consent Judgment and Order, *District of Columbia v. SoLo Funds, Inc.*, No. 2023 CAB 002665 (Sup. Ct. D.C. May 8, 2023), <https://oag.dc.gov/sites/default/files/2023-05/DC%20v.%20Solo%20Funds%2023%20CAB%202665%20Consent%20Order%20%20Final%20Judgment.pdf>

¹⁹ Consent Order, *In re Comm’r of Fin’l Prot’n & Innov. v. SoLo Funds, Inc.*, at 6-7 (Ca. Dep’t Fin. Prot. & Innov. May 8, 2023), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/05/Consent-Order-SoLo-Funds-Inc.pdf>.

²⁰ *Id.* at 7.

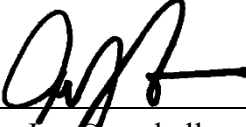
²¹ U.S. Gov. Accountability Office, GAO023-105536, at 21, *supra* note4

historically advanced by the payday lending industry, which argued that payday loan products are not actually loans, but rather deferred check-cashing services.²²


In responding to the tactics used by payday lenders, Massachusetts, for example, recognized that the “[e]nforcement of [pre-20th century] usury laws was largely thwarted by the ingenuity of lenders in exacting from borrowers, in addition to lawful interest, other sums variously described as commissions, fees, charges for services and expenses.”²³ Massachusetts has taken a robust view of interest and expenses, with both the Criminal Usury Statute and the Small Loan Law defining interest and expenses broadly to include sums paid by a borrower for making or securing a loan.²⁴ New York’s Court of Appeals has similarly held that the terms “loan” and “interest” are to be construed broadly when applying its usury laws because the “usurer usually seeks to conceal the usury”; thus “if the court can see that the real transaction was the loan or forbearance of money at usurious interest, its plain and imperative duty is to so declare,” regardless of the name or legal form given by the parties.²⁵ Exempting EWA products from the robust framework of state and federal lending laws designed to protect vulnerable consumers would foster a new wave of predatory payday loans.

Protecting consumers from abuse at the hands of lenders in stronger bargaining positions has long been a priority of our States.²⁶ Usurious EWA products, though presenting themselves as novel financial products, present a risk to vulnerable consumers that is all too familiar to the States that have been combatting predatory lending products for decades. We commend the CFPB for taking this important step in protecting consumers.

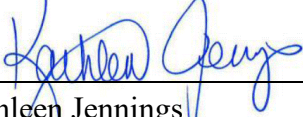
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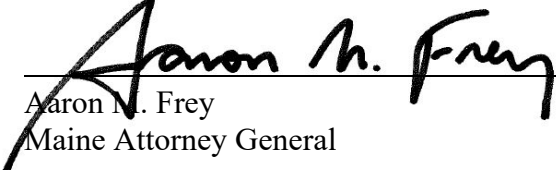
Andrea Joy Campbell
Massachusetts Attorney General



Brian Schwalb
District of Columbia Attorney General



Kathleen Jennings
Delaware Attorney General



Aaron M. Frey
Maine Attorney General


²² Nat’l Consumer Law Ctr., *Testimony in Opposition to Maryland HB 1425/SB 998: Earned Wage Access Services, House Economic Matters Committee* (Mar. 1, 2024), <https://www.nclc.org/wp-content/uploads/2024/03/HB-1425-EWA-Testimony-of-NCLC-UNFAV.pdf>.


²³ *Noteman v. Welch*, 108 F.2d 206, 210 (1st Cir. 1939).


²⁴ Mass. Gen. L. ch 140 § 96 (2023); Mass. Gen. L. ch. 271 § 40 (2023).

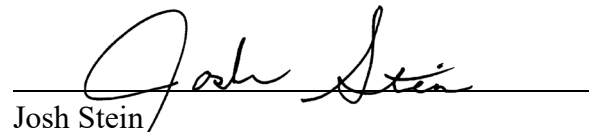
²⁵ *Adar Bays, LLC - v. GeneSYS ID, Inc.*, 179 N.E.3d 612, 620 (N.Y. 2021).


²⁶ *Id.* at 627.



Anthony G. Brown
Maryland Attorney General

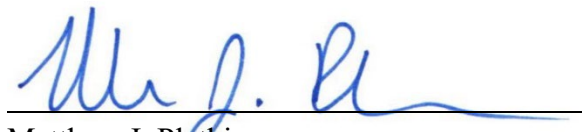

Letitia James
New York Attorney General

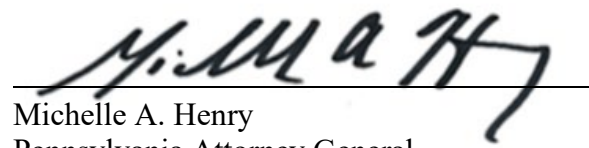

Dana Nessel
Michigan Attorney General


Josh Stein
North Carolina Attorney General

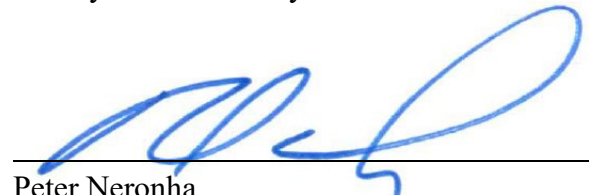

Keith Ellison
Minnesota Attorney General


Ellen F. Rosenblum
Oregon Attorney General


Matthew J. Platkin
New Jersey Attorney General


Michelle A. Henry
Pennsylvania Attorney General


Raúl Torrez
New Mexico Attorney General


Peter Neronha
Rhode Island Attorney General