HUDSON COOK

Earned Wage Access - Now with Fees: A Low-Cost Credit Alternative or State Regulatory Minefield?

February 26, 2021 | Justin B. Hosie

We recently wrote about the Consumer Financial Protection Bureau's November 2020 advisory opinion regarding earned wage access (EWA) programs. In that opinion, the CFPB determined that earned wage access programs — when structured properly — are not credit under the Truth in Lending Act and Regulation Z (collectively, "TILA"). The CFPB has further illustrated its interest in EWA programs by issuing a compliance assistance sandbox (CAS) approval order to PayActiv related to certain aspects of its EWA products. Unlike the Bureau's EWA advisory opinion, this one actually contemplates charging fees.

The Bureau's CAS Policy offers certain limited safe harbors to approved programs, subject to good faith compliance with the Bureau's approval order. PayActiv's approval order protects the company from liability under TILA.

PayActiv's order concerned TILA's definition of "credit" and its potential application to PayActiv's EWA program. Certain aspects of PayActiv's program, are notable. Specifically:

- PayActiv contracts with employers to offer and provide EWA services.
- PayActive warrants to the employee as part of the contract between the parties that it:
    - will not impose fees, aside from the fee charged under one of the models;
    - has no recourse against the employee, including no right to take payment from any consumer account; and
    - will not engage in any debt collection activities.
- PayActiv does not directly or indirectly assess the credit risk of individual employees.
- The advance amount is capped at the accrued cash value of the wages the employee has earned at the time of the transaction, as verified by information from the employer.
- PayActiv offers two programs to consumers, one of which does not require the

employee to pay any fee, voluntary or otherwise, to use the EWA program. The other program is explained in more detail below.

- PayActiv recovers the advance through an employer's payroll deduction from the employee's next paycheck. If a payroll deduction is unsuccessful due to administrative or technical errors, then one additional deduction is allowed.

- If a payroll deduction is not successful, PayActiv has no remedy against the employee, although PayActiv may refrain from offering the employee additional advances.

You'll notice that these program specifications are nearly identical to the criteria for a Covered EWA Program under the CFPB's advisory opinion issued in November. That November advisory opinion forecasted that some EWA programs may be charging nominal processing fees, but do not involve the extension of "credit." While that advisory opinion specifically indicated that it did not cover such a program, it offered providers the opportunity to "request clarification from the Bureau about a specific fee structure" by applying for an approval "under the Policy on the Compliance Assistance Sandbox." So, PayActiv did.

As a result, the biggest difference is that, while PayActiv offers a no-fee program, it also offers a program charging consumers to access funds. The fee-based program, called "PayActiv Access Choice," charges a $1 non-recurring fee to employees who do not have a PayActiv-facilitated account. That fee provides access to an unlimited number of transactions during a one-day access window. If the employee accesses funds on multiple days during a single pay period, then fees are capped at $3 for a one-week period and $5 for a bi-weekly period. PayActiv does not charge fees to open a PayActiv-facilitated account.

Now that the CFPB has clarified that fees can be charged in programs that are not credit, it remains to be seen where the CFPB (and other regulators) will draw the line between credit and non-credit programs. It's clear that to qualify as non-credit, there must not be a debt (i.e., there cannot be a legal claim to repayment against the employee). When an employee has access to the accrued cash value of wages earned, and the wages are paid by employer-facilitated payroll deductions rather than a contractual obligation imposed on the consumer, it seems there is no consumer debt or claim. This is especially the case when the fee charged (a) is comparable to expedited transfer fee for non-credit products, (b) does not vary based on the amount of the transaction or repayment period, and (c) isn't based on the employee's creditworthiness. Other factors weighing towards characterization as "non-credit" are that there is no payment authorization or check, and that the EWA provider agrees that there will be no collections activity, no late fees, and no negative credit reporting.

Taken together, these factors combine to bolster the argument that EWA is not a credit transaction. However, the CFPB is not the only regulator out there. While the CFPB called the fee "nominal," if the transaction was a credit transaction, then a $5 fee for a two-week period on a $100 wage advance, would yield a triple digit annual percentage rate. That's a rate of return that's 1/3 of a typical payday loan, but 3 times as much as

the 36% APR maximum cap often urged by consumer advocates. With that rate of return in mind, it remains to be seen whether consumer advocates, regulators, and state attorneys general will agree with the CFPB's characterization that these transactions are "not credit." In August of 2019, numerous state regulators announced an action alleging that members of the payroll advance industry were engaged in unlawful lending, in part because the targeted companies charged tips, monthly membership fees, or other fees.

We note that the CFPB's approval order applies only to PayActiv and the specific product it outlined in its CAS application, so other companies cannot rely on the same safe harbors for protection from the CFPB, let alone other regulators who are not part of the CAS process. Even so, the CFPB's introduction of "nominal fees" into its regulatory calculus regarding EWA creates a potential disconnect between the Bureau and other regulators, the resolution of which we may not know until a company unwittingly falls in the middle.

HUDSON
COOK

Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

hudsoncook.com