Earnin
A Brief on Earned Wage Access

September 9, 2022

Prepared by Paul Hastings LLP for Activehours, Inc., d/b/a Earnin.

I. Introduction

Earnin's earned wage access product is an innovative solution to an age-old problem that has vexed workers for thousands of years—getting paid for completed work.

There are billions of dollars held up in the payroll system's pay cycle at any given time. Accurately calculating payroll is a complex endeavor. Contributions to health insurance or retirement benefits, as well as deductions for tax payments, often vary over the course of a given year. And Federal and state laws complicate any effort to shorten the pay cycle. Federal overtime law, for example, necessitates waiting until the workweek is completed to determine how much overtime pay is due on the hours worked.

The result is an antiquated payroll system that delays the earnings of approximately 81.9 million hourly workers.[1] The problems associated with a delayed payroll schedule are striking. Half of respondents to a survey commissioned by the Consumer Financial Protection Bureau ("CFPB") indicated they fall behind on bills because of a timing mismatch between the arrival of income and billing dates.[2] Researchers have also shown that a one-week increase in timing mismatch between income and expense is associated with a 10% increase in the incidence of overdrafts per day, a 34% increase in bounced checks, and a 47% increase in online payday borrowing.[3] Indeed, workers end up borrowing nearly $90 billion per year from payday lenders and spend billions more on late fees, overdraft fees, and pawn shops while they needlessly wait for their already earned pay.[4] Delayed wage payment is simply bad for workers.

Earnin's Earned Wage Access ("EWA") product seeks to solve this problem by empowering workers with the control over when they get paid.

This brief explains the EWA product ("Cashout") and the regulatory structure applicable to it. In short, Earnin is able to provide Cashouts without lending money or charging interest. Earnin retains no legal or contractual recourse against a Cashout recipient in the event of non-payment. Accordingly, Cashouts do not trigger the same policy concerns that have led to the regulation of consumer lending. To the contrary, EWA is a consumer-friendly alternative to payday loans, overdraft, and other short-term liquidity solutions that puts workers in control of their earned wages.

II. Earnin's EWA Product: Function & Structure

Earnin offers Cashout to U.S.-based workers via a mobile application. A worker creates an Earnin account and provides Earnin with access to direct deposit and employment information. The worker can then request and obtain Cashout.

Earnin utilizes a number of proprietary methods to accurately estimate workers' earnings at any point in their pay cycle. Earnin considers this information when setting a maximum amount it is willing to disburse at a worker's direction. Earnin does not sell earnings data, Cashout usage data, or other customer data to any third parties, nor does Earnin report Cashout data to credit bureaus.

Cashout is offered on a "pay what you choose" model. Workers have the option to tip Earnin for a Cashout, but tipping is entirely voluntary and tipping behavior does not impact the services provided by Earnin. Workers also have the option to obtain Cashouts on an expedited basis for a small fee. This option, like tipping, is purely voluntary, and similar to funds disbursement mechanisms used by digital wallet providers. Workers can and do obtain Cashouts without ever tipping Earnin or paying any fee whatsoever. About 10% of Earnin's customers have utilized the service without ever tipping. Tipping has no impact on the services provided; workers receive the same access to Cashout regardless of whether they tip, and without regard to the amount of any tip given. Similarly,

---

1 Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers*, Report 1078 (Mar. 2019) *available at* www.bls.gov/opub/reports/minimum-wage/2018/home.htm.

2 CFPB, *Consumer Insights on Paying Bills* (2018), *available at* files.consumerfinance.gov/f/documents/bcfp_consumer-insights-paying-bills_report.pdf.

3 Brian Baugh, et al., *When Is It Hard to Make Ends Meet?*, RRC Paper No. NB1l7-05. Cambridge, MA: National Bureau of Economic Research (2018), *available at* crr.bc.edu/wp-content/uploads/2017/08/3c.-Full-paper_Jialan-Wang.pdf.

4 *Core Lending Principles for Short-Term, Small-Dollar Installment Lending*, OCC Bulletin 2018-14 (Rescinded), Office of The Comptroller of The Currency (May 23, 2018) *available at* www.occ.gov/static/rescinded-bulletins/bulletin-2018-14.pdf.

whether a worker pays for an expedited transfer of the Cashout has no impact on any other element of the service, except that delivery of the Cashout is expedited.

Most Cashouts are automatically withdrawn from a worker's linked bank account on the worker's regularly scheduled payday. However, a worker may choose to reschedule a payment under certain circumstances, or to revoke their ACH authorization. Earnin does not collect repayment from employers or otherwise require workers to commit to payroll deductions or assignments.

Moreover, workers do not face any adverse consequences for not repaying a Cashout, except that Earnin may choose not to provide future Cashouts to such worker as long as a prior Cashout remains unpaid. Earnin does not retain a legal right to repayment; Cashouts are provided on a "non-recourse" basis and Earnin has no right to charge late fees, sue for repayment, or send accounts to collection agencies. Earnin also does not report nonpayment of Cashouts to employers or credit reporting agencies. This product structure enables workers to use EWA without fear of negative consequences and to avoid the cycle of debt often associated with higher cost liquidity alternatives.

III. Regulatory Framework

Earnin is subject to a variety of federal and state laws and is accountable to both state and federal regulators, including the CFPB. Still, Earnin's EWA product is sufficiently removed from traditional small loans and their accompanying risks. Indeed, with no finance charge and no right to repayment, Cashouts bear no resemblance to the small dollar, high-cost loans that trigger state lender licensing regimes as well as many of the federal regulations governing consumer credit.

A. Federal Regulation

As a provider of a consumer-facing financial product, Earnin is subject to a host of federal laws, many of which are enforced by the CFPB. Earnin is subject to the Gramm-Leach-Bliley Act, and has adopted a comprehensive information security program and ensures that sensitive consumer data is properly safeguarded. Information is also delivered electronically in accordance with the Electronic Signatures in Global and National Commerce Act, and ACH and debit card transactions comport with the Electronic Funds Transfer Act and Regulation E. Earnin is also subject to the federal prohibition against Unfair, Deceptive, or Abusive Acts or Practices.

Still, EWA is not generally regulated as credit at a federal level. Even where a Cashout falls under the definition of "credit" under various federal statutes, the majority of substantive federal regulations do not apply to Earnin.

For example, Earnin is not subject to the Truth-in-Lending Act and Regulation Z in providing Cashouts. These rules only cover "creditors" that issue cards or extend credit that is either subject to a finance charge or repayable in more than four installments.[5] Earnin does not meet either prong of this definition. Cashout is not a credit card nor does it require repayment in more than four installments. In fact, Earnin does not require users to repay Cashouts at all.

Further, Earnin does not charge users to obtain a Cashout. Earnin generates revenue based on voluntary payments or "tips" from users or fees for premium services like expedited payment. The availability of Cashouts are not conditioned on tipping or the payment of an expedited funds fee; users are not required to tip to obtain services from Earnin, and Earnin users that decide to tip also decide the amount of a tip. As such, neither tips nor expedited funds fees should be considered finance charges. Because Earnin does not impose finance charges nor enable repayment in multiple installments, Earnin does not fulfill the definition of "creditor" under Regulation Z.

The CFPB has also determined that EWA products do not present the risks and harms associated with short-term lending that generally justify regulation, and accordingly has decided to exempt such services from its

5 The provisions of other statutes also have a similar scope. For example, several provisions of the Equal Credit Opportunity Act, including the requirement to provide notice of adverse action, only apply to credit subject to a finance charge or payable in more than four installments. *See* 12 C.F.R. § 1002.3(c).

Payday Rule.[6] In promulgating the rule, the CFPB explained that businesses that provide advances on a no- fee, non-recourse basis and that rely solely on a "tips" model, like Earnin, are "likely to be beneficial for consumers across the spectrum."[7] In fact, this exemption was designed largely with Earnin in mind. Earnin submitted a formal comment letter to the CFPB in late 2016 and engaged in a number of conversations with the CFPB regarding its service, arguing for a safe harbor from the Payday Rule.

In the years since, the CFPB has put out guidance that further suggests that EWA products should not be considered "credit" under Regulation Z. In late 2020, the CFPB released an advisory opinion addressing the applicability of the Truth-in-Lending Act to EWA products in general and, shortly thereafter, an approval order to Payactiv, Inc., one provider of EWA products.[8]

Earnin's products are similar to the EWA products covered by this CFPB guidance in that Earnin only provides access to *earned* wages and does so at no cost and without recourse. However, Earnin does not—in contrast to the products outlined in the CFPB guidance—recoup EWA advances via payroll deduction. Based on these facts, the CFPB guidance may lend support to the proposition that Earnin's EWA product does not constitute "credit" under Regulation Z.

Even if Cashouts were to constitute "credit," however, Earnin's position wouldn't be meaningfully impacted. Indeed, the CFPB recently signaled it is likely to further update its guidance. In response to Payactiv's request, and as part of a broader program of limiting company-specific approvals,[9] the CFPB rescinded its 2020 approval order.[10] The CFPB has further stated that it intends to clarify its advisory opinion regarding EWA with regards to the definition of "credit" under Regulation Z.[11] Importantly, however, even if the CFPB were to determine that EWA products constitute "credit" under Regulation Z, such a determination would have no practical consequences for Earnin under federal law. As described above, Earnin does not constitute a "creditor" under Regulation Z and thus falls outside of the scope of the regulation, regardless of whether its product constitutes credit.

B. State Regulation

Earnin is also subject to state laws, such as those prohibiting unfair or deceptive acts or practices. Earnin, however, is generally exempt from state consumer credit laws that require firms to obtain a license to offer a particular product or that seek to restrict the terms on which a non-bank lender can lend to consumers in a particular state.

Nearly all states require a license of businesses that want to make consumer loans. Although the precise triggers vary from state-to-state, state licensing laws typically turn on the loan size, rate, and other loan terms, including whether the loan is subject to a finance charge or is repayable in installments, or may require a license for any extension of credit to consumers. In addition, some states also separately regulate deferred presentment, check casher, or payday businesses that provide loans secured by post-dated checks or a contract that entitles the holder to debit the consumer's account for a fee.

As with Regulation Z and the Payday Rule, these statutes do not apply to services offered on the Earnin model. State lending statutes regulate the provision of loans. Loans are arrangements in which a borrower obtains a sum of money (or property) in exchange for a contractual commitment to repay the funds lent (or return the property borrowed). Additionally, state conceptions of loans often contemplate imposition of a fee that is a condition of access to the loan. Yet Earnin's service does not include these elements. Earnin's users do not oblige themselves

6 *See* 12 C.F.R. § 1041.3(d)(8).

7 CFPB, *Payday, Vehicle Title, and Certain High-Cost Installment Loans,* Final Rule 281 (Oct. 4, 2017), 82 Fed. Reg. 54548.

8 CFPB, *Truth in Lending (Regulation Z); Earned Wage Access Programs*, Advisory Opinion (Nov. 30, 2020) *available at* files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf; CFPB, *Approval Order* (Dec. 30, 2020) *available at* files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf.

9 *See* CFPB*, CFPB Launches New Effort to Promote Competition and Innovation in Consumer Finance*, Press Release (May 24, 2022)(replacing the office that "confer[ed] special regulatory treatment on individual companies")) *available at* consumerfinance.gov/about-us/newsroom/cfpb-lauches-new-effort-to-promote-competition-and-innovation-in-consumer-finance/.

10 CFPB, *In re December 30, 2020 Sandbox Approval Order*, Order (June 30, 2022) *available at* files.consumerfinance.gov/f/documents/cfpb_payactiv_termination-order_2022-06.pdf

11 *See* State of California Department of Financial Protection and Innovation (DFPI), *The DFPI Signs MOUs Believed to be Among the Nation's First with Earned Wage Access Companies*, (Jan. 27, 2021) *available at* dfpi.ca.gov/2021/01/27/the-dfpi-signs-mous-believed-to-be-the-among-the-nations-first-with-earned-wage-access-companies/.

to repay the advances provided by Earnin, and Earnin does not condition access to an advance on the payment of a fee.

Among the states, California has been unique in how proactive it has been in engaging with EWA providers. In 2021, California signed voluntary memoranda of understanding (MOUs) with multiple EWA providers to better understand how EWA is used by Californians.[12] Under these MOUs, Earnin and other EWA providers report voluntary usage data to the state. Later that year, California announced a proposal to require EWA providers to register and provide reports to the state, essentially acting to formalize the voluntary MOU program. California's proposal was issued under a recently passed law governing consumer financial products,[13] indicating that California considers EWA to be sufficiently novel that it is not covered by its existing lending licensure schemes. This proposed regulation would require registration and data sharing when finalized, but is not expected to necessitate material changes to the Cashout product structure or Earnin's business model, and Earnin supports this approach.

Other states have also considered legislation to cover EWA products,[14] though these efforts have not yet resulted in any enacted law. Again, however, these efforts tend to acknowledge that EWA is not covered by existing lending laws; EWA is a new type of financial product and should be regulated as such.

In sum, Earnin is generally not subject to state lending licensure. However, Earnin strongly supports California's EWA registration process, and similar activities in other states. Earnin recognizes the need for regulatory oversight of EWA and expects to comply with new state law requirements as they arise.

IV. Conclusion

Earnin provides an innovative tool that offers workers the opportunity to access wages on their own terms, giving users the ability to manage income to meet expenses. And, as a company devoted to worker empowerment and worker access to wages, Earnin is simply not the type of company that state and federal consumer lending laws seek to regulate. While regulators have, and should have, legitimate concerns about predatory lending practices and affordability of consumer loans, Cashout does not implicate these concerns. Cashout allows workers to access liquidity without incurring hidden or high fees, and without any prospect of triggering a cycle of toxic debt.

The restrictions set out in existing laws that regulate *loans* make no sense in the context of Earnin's service. To date, federal and state regulator treatment of EWA has recognized this distinction. Earnin has been a vocal proponent of EWA regulation, but it is important that EWA regulation be tailored to EWA products. Lending law is intended to combat problematic practices associated with high fees and lenders' recourse—concerns that are simply not present in the EWA context. Put simply, a Cashout is not a loan and should not be regulated as such. Still, Earnin is actively looking to engage with states to identify regulatory regimes that ensure continued existence of these consumer friendly products while at the same time, ensuring that consumers are sufficiently protected.

---

12 *See* DFPI, Invitation For Comments On Proposed Rulemaking Under The California Consumer Financial Protection Law (Pro 01-21) (Nov. 17, 2021) *available at* dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-Invitation-for-Comments-for-Publication.pdf.

13 The California Financing Law, Cal Fin. Code, § 22000 *et seq*; California Deferred Deposit Transaction Law, Cal Fin. Code § 23000 *et seq*.

14 *See, e.g.,* Wis. Legis. Assem. A.B. 1099 Sess. 2021-2022 (2022); New Jersey Senate, S.B. 2397, Sess. 2022-2023 (2002).