dailypay.

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2024 Paycheck Advance Interpretive Rule
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Proposed "2024 Paycheck Advance Interpretive Rule" (Docket No. CFPB-2024-0032)

Ladies and Gentlemen:

DailyPay, Inc. (DailyPay), the nation's leading EWA provider, appreciates the opportunity to respond to the Bureau's notice of proposed interpretive rule and request for comment in relation to earned wage access products and services (EWA), dated July 18, 2024 (Proposed Rule).[1]

Since DailyPay's founding, over 4.1 million employees and independent contractors (collectively, workers) have used DailyPay's EWA to meet their short-term financial needs and improve their financial health by accessing their earned but unpaid income. As a result, DailyPay has liberated millions of workers from high-cost personal liquidity solutions, such as payday, overdraft, and title pawn credit products. The results speak for themselves: according to a study of over 1,000 DailyPay users, DailyPay saved workers more than $600 per year, on average, by reducing reliance on high-cost alternatives.[2]

DailyPay achieves these consumer benefits by providing non-recourse, employer-integrated EWA. DailyPay works with and obtains verifications from company clients (employers) concerning the amount of a worker's earned but unpaid income (earned pay). The worker has no obligation to repay in the event the employer does not make payroll. Nonetheless, the Proposed Rule would characterize even non-recourse, employer-integrated EWA to be "credit" and optional expedited delivery fees for EWA proceeds to be "finance charges" for purposes of the Truth in Lending Act (TILA) and Regulation Z. As described below, both of these interpretations now advanced by the Bureau are incorrect, unsupported by fact or law, and effectively overturn the Bureau's November 2020 advisory opinion[3] granting a TILA safe harbor to certain types of non-recourse, employer-integrated EWA that the Bureau had determined are not "credit." The Proposed Rule itself acknowledges that credit cannot exist where there is no debt, yet it inexplicably concludes that EWA is credit, even where (as is the case with DailyPay) there is no

[1] The Proposed Rule was published in the *Federal Register* on July 31, 2024. *See* 89 Fed. Reg. 61358.
[2] *See* Leslie Parrish, Aite-Novarica, DailyPay Use and Impacts: A Summary of Survey Findings (Aug. 2021), https://www.dailypay.com/wp-content/uploads/dailypay-use-and-outcomes-aite-report.pdf.
[3] *See* CFPB, Advisory Opinion, Truth in Lending (Regulation Z); Earned Wage Access Programs (Nov. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf [hereafter, November 2020 Advisory Opinion].

repayment obligation. Likewise, the Bureau mischaracterizes optional expedited delivery fees as finance charges—a conclusion that disregards contrary case law.

Beyond its legal flaws, DailyPay also objects to the Proposed Rule because the Bureau has failed to properly weigh its advantages and disadvantages. The Proposed Rule will harm workers, employers, and providers without supplying offsetting benefits. It will confuse workers about the nature of non-credit EWA and incentivize providers to impose on workers tougher contractual obligations, higher costs, and more severe remedies. It will harm market competition and diversity by favoring business models that are not employer-integrated and participation fee-based pricing models, over employer-integrated EWA, which workers can access at no cost to them. It will harm employers, who are expected to pull back from offering employer-integrated EWA due to the Proposed Rule. And these harms are not outweighed by any countervailing benefit, because the Proposed Rule does not require TILA disclosures for large swathes of the EWA marketplace, and even when it does require TILA disclosures they will not provide any new or useful information to workers and will instead simply confuse them.

The Bureau should start over. Rather than bypass the notice-and-comment rulemaking process by adopting a so-called "interpretive rule" (which is yet another reason the Proposed Rule is legally invalid) the Bureau should instead withdraw the Proposed Rule and work with Congress and other stakeholders to craft comprehensive legislation that codifies important consumer protections that are actually designed for EWA.[4] At a minimum, the Bureau should recognize that the Proposed Rule's one-size-fits-all approach does not match the wide variety of EWA business models and that the "credit" label is especially ill-suited to the unique features of non-recourse, employer-integrated EWA that settles through payroll, which, as recognized in the November 2020 Advisory Opinion, functionally provides access to the consumer's existing assets (i.e., earned pay) and is not credit.

1. An Introduction To DailyPay, The Nation's Leading EWA Provider

DailyPay is the nation's leading EWA provider, offering a suite of software and services to enhance workers' financial wellness, including solutions to provide real-time information to workers, such as information about hours worked, earned pay, and net pay, and provide access to earned pay for work already performed. DailyPay does so by using payroll and timekeeper data made available to it through various applications and data integrations with its employer-clients.

For workers living paycheck to paycheck and seeking to address emergencies or pay bills on time and avoid late fees, earned pay often represents their most significant, if not their only, immediate asset. As a result, for years, expensive payday loans and overdraft programs have proliferated and preyed upon vulnerable workers at an estimated cost of billions of dollars in interest, overdraft penalties, and other fees.[5] The labyrinth of legacy payroll practices and protocols has prevented these workers from exercising their right to their earned pay.

[4] *See, e.g.*, Earned Wage Access Consumer Protection Act, H.R. 7428 (2024).
[5] *See, e.g.*, Telis Demos, The Wall Street Journal, *The Wait for Payday Doesn't Have to Be So Long* (Aug. 10, 2019), https://www.wsj.com/articles/the-wait-for-payday-doesnt-have-to-be-so-long-11565429401.

DailyPay's EWA facilitates workers' prompt access to their earned pay, notwithstanding the longer periodic pay cycles employers otherwise utilize, addressing worker income volatility problems. That access liberates workers from high-cost personal liquidity solutions, such as payday, overdraft, and title pawn credit products. Due to the low cost of DailyPay's service (i.e., no cost, or up to only a few dollars) and the high monetary and social costs of those other financial products, DailyPay's research shows that DailyPay saves people money and improves their lives.

If a participating worker elects, they may receive from DailyPay access to their earned pay as of that time (net of estimated tax withholdings, garnishments, and other deductions). Workers are not able to obtain from DailyPay any amount in excess of what they have already earned, nor any amount representing future, unearned pay, or potential pay. Due to DailyPay's integrations with and verifications by employers, its employer-integrated EWA does not present opportunities for worker double-dipping (i.e., where a worker attempts to access the same earned pay from multiple sources).

Employers offer DailyPay's EWA as a worker benefit, and a worker's use of DailyPay's EWA is strictly voluntary. It does not affect the worker's status with the employer and is not conditioned on the use of other DailyPay services. In the normal course, a participating worker makes no promise to DailyPay to repay amounts received from DailyPay. If an employer fails to make payroll, DailyPay affirmatively disclaims any right or ability to pursue recovery from the worker for EWA proceeds previously paid to them. From the time received by the worker, EWA proceeds are the worker's to keep.

2. DailyPay Improves The Financial Health Of Workers

DailyPay's EWA delivers real results. In 2021, DailyPay commissioned a study with Leslie Parish from the Aite-Novarica Group, an independent research and advisory firm specializing in consumer protection in the technology and financial services industry.[6] Aite-Novarica studied more than 1,000 DailyPay users, and they estimated savings of $660 annually for workers who had said they previously frequently overdrew their bank accounts, and savings of $624 to $930 annually for workers who had said they previously frequently used payday loans. According to the study, out of the respondents reporting prior frequent or occasional bank overdrafts, 97% reported they either stopped overdrawing their accounts or overdrew them less frequently after using DailyPay, and 75% attributed this improvement to DailyPay. For DailyPay users reporting frequent or occasional prior use of payday loans, the results were similar—95% stopped or reduced their reliance on payday loans, and 88% attributed this change to DailyPay. Out of the respondents reporting prior trouble with bills and loan payments, 88% had less trouble with bills and loan payments, and 94% attributed this change to DailyPay. Out of the respondents reporting previously asking friends and family for money, 96% had stopped or reduced asking friends and family for money, and 88% attributed this change to DailyPay. Finally, respondents agreed or strongly agreed that after beginning to use DailyPay, 82% worried less about money, 60% had less debt, and 75% were better able to plan and budget.

[6] *See* Parrish, note 2 above.

A more recent 2023 study by the Financial Health Network with support from DailyPay (FHN Study) found that most study participants felt that using EWA has improved their financial health, and even participants who disagreed indicated that EWA did not address the fundamental challenge of not earning sufficient income in the first place.[7] Of course, EWA solves for a frequency of pay issue and cannot solve for income insufficiency. Study participants also reported preferring EWA to alternatives like maxing out credit cards, taking out payday loans, incurring overdraft fees, incurring late fees, and borrowing from friends and family.[8]

Given the substantial and proven consumer benefits that DailyPay's EWA provides, the Bureau should proceed with caution and not jeopardize the availability or structure of DailyPay's EWA by foisting inapplicable legacy regulatory regimes on this much needed service.

3. DailyPay's EWA Is Not Credit

DailyPay's EWA is not credit. DailyPay's EWA is not only "non-recourse," but also workers have no legal obligation to repay EWA proceeds whatsoever. Precisely because DailyPay's EWA is not credit, it also lacks any recognized hallmarks of credit. Specifically, there is:

- No application, credit report pulls, underwriting, or approval of workers—the only eligibility criterion is whether an employer gives the worker access to the program.
- No risk-based pricing.
- No interest or any other charges based on the time value of money (e.g., no periodic fees, late fees, or prepayment penalties).
- No installment, balloon, or any other required payments by workers.
- No check, ACH, or debit card authorizations for the worker's repayment.
- No debt collection activities against workers or placing their amounts as debt with, or selling the amounts to, third parties.
- No reporting to consumer reporting agencies.

DailyPay's EWA does not involve unvested or speculative future payment streams for which a user is liable; rather, like an automated teller machine, the amount of EWA available to a worker is only what the worker is already entitled to receive from its employer. Funds drawn from an automated teller machine are promptly deducted from the relevant bank account and cannot be drawn a second time from that bank account. A worker using EWA similarly cannot access the same earned pay twice. And, akin to using an automated teller machine, the worker has no obligation to repay DailyPay—a solution that is the exact opposite of a loan.

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[7] *See* Lisa Berdie & Riya Pail, Financial Health Network, Exploring Earned Wage Access as a Liquidity Solution, Findings From a Study of Earned Wage Access Users (Nov. 2023), https://finhealthnetwork.org/wp-content/uploads/2023/12/EWA-Users-Report-2023.pdf.
[8] *Id.*

4. Credit Cannot Exist Where There Is No Debt, And There Is No Debt Here

(a) EWA That Does Not Obligate Repayment Is Not Debt And Therefore Cannot Be Credit

In the Proposed Rule, the Bureau affirms that "credit" for purposes of TILA and Regulation Z requires "debt," but simply declares without discussion that EWA involves debt, which is not true for DailyPay's EWA. DailyPay's EWA does not involve debt and so cannot be credit under TILA and Regulation Z.

Regulation Z defines "credit" as "the right to defer payment of debt or to incur debt and defer its payment."[9] Neither TILA nor Regulation Z define "debt."[10] In the Proposed Rule, the Bureau turns to numerous sources, including legal dictionaries and other federal and state laws, which contemplate debt as involving a liability or obligation, such as "something owed," "obligation or alleged obligation of a consumer to pay money," "a financial liability or obligation owed by one person… to another," a "sum of money due by certain and express agreement," or a variety of similar permutations.[11] Even assuming these sources are authoritative, they are consistent with what the Bureau calls a "commonsense understanding" that the term "debt" at least requires an "*obligation* by a consumer to pay another party."[12]

Indeed, this understanding of debt underpinned the Bureau's November 2020 Advisory Opinion,[13] which granted a TILA safe harbor to certain non-recourse, employer-integrated EWA that settled through payroll but did not require workers to repay the provider (in addition to other criteria not relevant here) on the ground that such EWA is not credit. In reference to the November 2020 Advisory Opinion, which the Proposed Rule seeks to overturn, the Proposed Rule claims the Bureau previously "did not consider the full scope of available precedent and definitions in common legal usage when reaching its narrow conclusion" regarding the term

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[9] 12 CFR 1026.2(a)(14).
[10] *See* 89 Fed. Reg. at 61360.
[11] *See id.*
[12] *See id.* (emphasis added).
[13] The November 2020 Advisory Opinion granted a TILA safe harbor to no-cost, non-recourse, employer-integrated EWA that settled through payroll and satisfied various other criteria. *See* November 2020 Advisory Opinion 10-11. By its terms, safe harbor was not available unless all criteria were satisfied. *See id.* at 12. Reliance on such a safe harbor, however, is not necessary for a non-credit product that would not otherwise be subject to TILA in the first place. And, as discussed in detail in the November 2020 Advisory Opinion and in this comment letter, the absence of a worker's payment obligation or liability demonstrates that an EWA product is not debt and in turn is not credit. No other analysis or safe harbor is necessary for these core, definitional concepts; and reliance on the Bureau's determination that no debt exists where there is no obligation to repay is reasonable even if the safe harbor itself is not available. The Bureau asserts the opinion has erroneously been cited for the general propositions that no-fee earned wage products are not credit, and it cites an Arizona attorney general opinion as an example. *See* 89 Fed. Reg. at 61359 n.9. But the Arizona attorney general opinion does not focus narrowly on the absence of fees, it actually highlights the Bureau's conclusion in its November 2020 Advisory Opinion that no payment obligation exists. *See* Ariz. Op. Att'y Gen. No. I22–005 (Dec. 16, 2022), https://www.azag.gov/opinions/i22-005-r22-011.pdf (highlighting the November 2020 Advisory Opinion's conclusion that "the EWA product discussed does not involve 'debt' because 'a Covered EWA Program facilitates employees' access to wages they have already earned, and to which they are already entitled, and thus functionally operates like an employer that pays its employees earlier than the scheduled payday'"). In other words, the Arizona opinion agrees that no debt exists where there is no repayment obligation.

"debt."[14] The additional sources now cited by the Bureau in the Proposed Rule reiterate that an obligation or liability is necessary for there to be debt.[15] Accordingly, the November 2020 Advisory Opinion was not, as the Proposed Rule suggests, "narrow" in concluding that debt requires a "liability."[16] A liability—just another word for "obligation"[17]—is the very essence of what constitutes debt according to the Bureau's current sources. This all leads to the same conclusion the Bureau now seeks to overturn: *EWA that does not require consumer repayment is not debt, and if not debt, then it cannot be credit.*

(b) The Proposed Rule Simply Assumes Without Support That Workers Have An Obligation To Repay EWA Proceeds

The Proposed Rule simply assumes without support that workers have a legal obligation to repay EWA proceeds. Without discussion, the Proposed Rule simply declares that "In an earned wage transaction, the consumer incurs an obligation to pay money at a future date."[18] The Proposed Rule does not demonstrate how or why such an obligation exists. The Proposed Rule also does not evaluate *who* might have such an obligation, which is particularly important where settlement occurs through employer-paid processes. Instead, the Proposed Rule proceeds to discuss contingent obligations for future repayment, as well as various mechanisms through which payment might occur.[19] The Proposed Rule's focus on contingencies and the mechanism of settlement obfuscates the essential question of whether payment is *required* in the first place.

The mere *existence* of an EWA settlement or an *expectation* of a settlement, regardless of method, does not demonstrate an *obligation* or *who* has such an obligation. A settlement mechanism (e.g., payroll deduction, ACH debit, etc.) used by a provider and a worker does not demonstrate that the worker was obligated to pay in the first place. And it neither matters whether such settlements are one-time or recurring, nor whether they are set up to be "automatic" for the parties' convenience. Indeed, in offering non-recourse EWA, DailyPay affirmatively disclaims such worker obligations in its Program Terms. The nature of the parties' legal obligations to one another is the critical factor when evaluating whether a creditor-debtor relationship exists, but the Proposed Rule simply glosses over this critical factor.

(c) The Proposed Rule Ignores That EWA Provides Functional Access To An Asset

In DailyPay's case, the reason workers have no repayment obligation is that, like an automated teller machine, its EWA provides functional access to an asset. In the November 2020 Advisory

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[14] *See* 89 Fed. Reg. at 61361.
[15] *See id*. at 61360.
[16] *See id.* at 61361.
[17] For example, Black's Law Dictionary defines a "liability" as an "obligation," and an "obligation" as a "liability." *See* LIABILITY, Black's Law Dictionary (12th ed. 2024) (defining "liability" as 1. The quality, state, or condition of being legally *obligated* or accountable; legal responsibility to another or to society, *enforceable* by civil remedy or criminal punishment… 2. A financial or pecuniary *obligation* in a specified amount; *debt*") (emphasis added); OBLIGATION, Black's Law Dictionary (12th ed. 2024) (defining "obligation" as "A formal, binding agreement or acknowledgment of a *liability* to pay a certain amount or to do a certain thing for a particular person or set of persons; esp., a duty arising by contract" (emphasis added)).
[18] *See* 89 Fed. Reg. at 61360.
[19] *See id*. at 61360-61.

Opinion, the Bureau focused on this functional equivalence test, explaining that the subject EWA "functionally operates like an employer that pays its employees earlier than the scheduled payday."[20] In doing so, the Bureau pointed to other instances where functional access to asset accounts is not considered credit for purposes of Regulation Z, including drawing on the accrued cash value of an insurance policy or pension account, reasoning that "credit has not been extended because the consumer is, in effect, only using the consumer's own money."[21] The Bureau determined that a worker using EWA is similarly, in effect, using their own money when they access earned pay through a covered EWA program and is not incurring debt or deferring its payment.[22]

The Proposed Rule does not discuss or refute the Bureau's prior view that EWA provides functional equivalence to asset account withdrawals and therefore is not credit.[23] This functional equivalence is especially present in and a feature of DailyPay's employer-integrated EWA, where DailyPay (i) contracts with the employer for the delivery of EWA to its workforce, (ii) verifies earnings data from the employer, and (iii) outstanding proceeds are settled through the payroll process. As the Bureau observed in the November 2020 Advisory Opinion, "there is no independent obligation to repay [such an] EWA transaction, since the [p]rovider may only recover the corresponding EWA amounts via the allowed employer-facilitated payroll deduction…and has no claim direct or indirect against an employee for nonpayment in the event of a failed or partial deduction." [24] This means that a settlement through payroll is not under such circumstances a repayment—effectively, the worker has already been paid the EWA proceeds, and settlement simply accounts for proceeds previously delivered to the worker to avoid double-payment for the same work. This is a unique feature of non-recourse, employer-integrated EWA settled through a payroll process.

(d) The Existence Of Associated Fees Or Charges Is Irrelevant To Determining Whether A Product Offers "Credit"

The Bureau also attempts to distinguish the November 2020 Advisory Opinion on the ground that an absence of associated fees or charges had supported the Bureau's conclusion that the subject EWA was not debt, whereas now the Bureau has determined that the "vast majority of earned wage transactions involve consumer payment." [25] This is no basis to distinguish or overturn the opinion. The existence of associated fees or charges is irrelevant to determining whether a product is "credit." Rather, such fees or charges only constitute "finance charges" *if* the underlying transaction is "credit" (i.e., a repayment obligation is owed).[26] Thus, it was

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[20] *See* November 2020 Advisory Opinion 8.
[21] *See id*. at 9.
[22] *See id*. at 8-10.
[23] Evaluating a product's functional equivalence is a practice the Bureau continues to engage in, including within the past month. *See* CFPB, Advisory Opinion, Truth in Lending (Regulation Z); Consumer Protections for Home Sales Financed Under Contracts for Deed 9-10 (Aug. 13, 2024), https://files.consumerfinance.gov/f/documents/cfpb_contract-for-deed_advisory-opinion_2024-08.pdf, ("[T]his [contract-for-deed] structure is functionally equivalent to common definitions of 'mortgage.'").
[24] *See* November 2020 Advisory Opinion 9-10.
[25] *See* 89 Fed. Reg. at 61361.
[26] *See* 12 CFR 1026.1(c)(1)(iii) (applying Regulation Z to creditors who offer or extend credit when conditions are met, including that "the credit is subject to a finance charge or is payable by a written agreement in more than four installments"). EWA does not typically feature more than four installments.

unnecessary for the November 2020 Advisory Opinion to address whether fees were finance charges because it instead determined that the EWA was not credit in the first place. And the Bureau declared at the time that there may be "EWA programs that charge nominal processing fees…that do not involve the offering or extension of credit."[27] In the Bureau's December 2020 sandbox order, moreover, the presence of fees had no bearing on the Bureau's reinforcement of its conclusion that non-recourse, employer-integrated EWA settled through a payroll process is not credit.[28]

The Bureau's determinations in the November 2020 Advisory Opinion and December 2020 sandbox order are consistent with TILA and Regulation Z: an obligation to repay is necessary for debt to exist, debt is necessary for credit, and the presence or absence of fees or charges does not affect whether debt exists in the first place. A determination that an EWA service is not credit is sufficient to affirm that the service is not subject to TILA and Regulation Z, and there is no basis to overturn the November 2020 Advisory Opinion on the ground that some non-debt products have fees and others do not.

As discussed above, the Proposed Rule erroneously concludes that EWA is "credit" because it fails to establish the existence of debt. The Proposed Rule also fails to refute the Bureau's prior conclusion that non-recourse, employer-integrated EWA that settles through payroll is the functional equivalent of early payment because the consumer is, in effect, only using the consumer's own money. Accordingly, the Proposed Rule's assertion that such EWA is "credit" should be withdrawn. At a minimum, the Bureau should recognize that non-recourse, employer-integrated EWA settled through a payroll process is not "credit."

5. The Proposed Rule Improperly Categorizes Expedited Delivery Fees As Finance Charges

The Proposed Rule improperly categorizes optional expedited delivery fees for EWA proceeds as "finance charges," because EWA does not involve a credit transaction, and even if EWA were a credit transaction, optional expedited delivery fees still would not be incident to or a condition of credit. In doing so, the Bureau disregards longstanding, contrary case law establishing that optional expedited delivery fees for loan proceeds are not finance charges. The Proposed Rule purports to address this case law by improperly giving controlling weight to dicta in another agency's rulemaking release, which itself did not even address optional expedited delivery fees.

Regulation Z generally applies to a consumer credit transaction offered by a creditor if it also has a finance charge or is payable by a written agreement in more than four installments.[29] Regulation Z includes a complex set of rules for determining whether a given fee is a finance charge, but the general rule, which is the subject of the Proposed Rule, is that the term includes any charge payable directly or indirectly by the consumer and "imposed" directly or indirectly by

[27] *See* November 2020 Advisory Opinion 4-5.
[28] *See* CFPB, Payactiv Approval Order (Dec. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf. According to the Bureau, the analysis in the December 2020 sandbox order "significantly resembles" the analysis in the November 2020 Advisory Opinion. *See id*. at n.15. The key difference was that the EWA subject to the sandbox order charged fees to workers. *See id*. at 4.
[29] *See* note 26 above.

the creditor as an "incident to or a condition of the extension of credit."[30] As discussed below, optional expedited delivery fees for DailyPay's EWA are completely optional and do not affect the underlying transaction terms.

Nearly 30 years ago, the Eleventh Circuit concluded in *Veale v. Citibank FSB*[31] that optional expedited delivery fees for loan proceeds are not finance charges. The facts in *Veale* are strikingly similar to DailyPay's EWA. In *Veale*, the court held that a $21 Federal Express fee charged by a lender in a mortgage loan refinance transaction and paid by the borrower in order to expedite the pay offs on three mortgage loans being refinanced was not "incident to" the loan.[32] The court reasoned that if the borrower can choose to avoid the Federal Express fee by using regular mail, then the fee is not imposed by the creditor as an incident to the loan and, therefore, is not a finance charge under TILA.[33] All DailyPay users have at least two options to receive their EWA proceeds, both of which are fast: (1) via the Automated Clearing House (ACH), with funds typically available the next business day depending on the funds-availability policy of the worker's financial institution, and (2) via debit push, Real Time Payments, or similar "instant" systems, with funds typically available within minutes. Just like in *Veale*, DailyPay's flat expedited delivery fee is completely optional, and is charged only if the worker elects to enjoy the additional convenience of expedited delivery services rather than ACH delivery.

The Proposed Rule attempts to minimize *Veale* in a footnote, seizing on dicta in the Federal Reserve's adopting release for an amendment to Regulation Z (issued shortly after the decisions in both *Veale* and *McGee v. Kerr-Hickman Chrysler Plymouth, Inc.*[34]) to assert that Regulation Z does not automatically exclude all voluntary charges from the definition of finance charge.[35] The Federal Reserve's quotation was taken out of context from an unrelated rulemaking and is not authoritative here. The Bureau does not mention that only a few sentences before the language the Bureau has quoted, the Federal Reserve stated, "As a practical matter, most voluntary fees are excluded from the finance charge under the separate exclusion for charges that are payable in a comparable cash transaction, such as fees for optional maintenance agreements or fees paid to process motor vehicle registrations."[36] The Bureau also does not mention that the Federal Reserve's rulemaking did not address expedited delivery fees at all—it only addressed the GAP insurance (aka debt cancellation coverage) costs at issue in *McGee*. In doing so, the Federal Reserve reasoned that because GAP insurance, even if voluntarily incurred, cancels the remaining portion of a borrower's debt liability, it thereby alters the fundamental nature of the borrower's repayment obligation.[37] The Federal Reserve's ensuing amendment to Regulation Z expressly included GAP costs as "finance charges" if certain disclosures were not provided.[38]

[30] *See id.* 1026.4(a).
[31] 85 F.3d 577 (11th Cir. 1996).
[32] *See id.* at 579.
[33] *See id.*
[34] 93 F.3d 380 (7th Cir. 1996) (determining that costs for optional GAP insurance were not finance charges).
[35] *See* 89 Fed. Reg. at 61362 n.43.
[36] *See* 61 Fed. Reg. 49237, 49239 (Sept. 19, 1996).
[37] *See id.*
[38] *See id.*

Nonetheless, the Federal Reserve still excluded GAP costs from finance charges if certain disclosures were provided and certain other requirements were met.[39]

By directly addressing *McGee* through a regulation but remaining silent on *Veale* (which predated *McGee*), the Federal Reserve implicitly approved *Veale*'s conclusion, which has stood for nearly three decades. But the Proposed Rule now asserts the opposite without any support. Further, the Proposed Rule does not explain why the Federal Reserve's logic regarding GAP should apply to optional expedited delivery fees, which do not have any effect on a borrower's repayment obligations (or the absence thereof). The Proposed Rule also does not explain why the Federal Reserve's dicta, even hypothetically assuming they were on-point, should outweigh the Eleventh Circuit's interpretation of what the law is, especially in the wake of *Loper Bright Enterprises v. Raimondo*.[40]

DailyPay notes that elsewhere in the Bureau's official interpretations of Regulation Z, the Bureau's position is that a fee to expedite delivery of a credit card, either at account opening or during the life of the account, need not be disclosed to a consumer as an amount of a charge *other than a finance charge*, provided delivery of the card is also available by standard mail service without paying a fee for delivery.[41] In a footnote to the Proposed Rule, the Bureau simply asserts that expedited delivery fees for EWA proceeds are different from expedited delivery fees for credit cards.[42] But it makes no sense to draw such a distinction in this context. A borrower would expedite delivery of a credit card for the same reason a worker would expedite delivery of EWA proceeds—the credit card is the device necessary for the borrower's access to funds, and the borrower wishes to accelerate that access. In each case, the expedited delivery fee enables the consumer to access funds more quickly relative to a reasonable alternative. The Bureau's treatment of optional expedited delivery fees for credit cards demonstrates that fees for optional expedited delivery of EWA proceeds also should *not* be considered finance charges.

In this same footnote and elsewhere, the Bureau also attempts to distinguish EWA from various other forms of credit based on the purported contextual importance of time.[43] This approach is misplaced. The importance of time is not unique to EWA and therefore cannot serve as a basis for asserting that the time related to expedited delivery is an inherent aspect of EWA. To the contrary, the time value of money is important in *all* financial transactions, not just EWA. Indeed, this was illustrated by *Veale* and the credit card expedited delivery examples discussed above, in each of which a borrower seeks to expedite access to funds.

In DailyPay's case, both ACH and expedited delivery options are reasonably fast and can meaningfully satisfy a worker's desire to access their earnings before their regularly scheduled payroll date. From DailyPay's perspective, both transactions are essentially the same: DailyPay does not withhold or accelerate funds based on the worker's choice of disbursement method,

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[39] *See id.*; *see also* 12 CFR 1026.4(d) (excluding certain voluntary debt cancellation coverage costs from the definition of "finance charge").
[40] 144 S. Ct. 2244 (2024).
[41] 12 CFR Part 1026, Supplement I, 6(a)(2) at (2)(ix); *see also id.* 1026.6(a)(2) (requiring disclosure of the "amount of any charge other than a finance charge that may be imposed as part of the [credit] plan, or an explanation of how the charge will be determined")
[42] *See* 89 Fed. Reg. at 61362.
[43] *See* 89 Fed. Reg. at 61362 n.42.

rather DailyPay promptly instructs initiation of both ACH and expedited deliveries. This undercuts the Proposed Rule's assertion that expedited delivery of EWA is essentially a different product with different terms relative to regular delivery of EWA. Like in *Veale*, it is up to the worker to decide what is best for their personal circumstances and whether a little more delivery speed justifies a nominal cost. Whether such a choice is popular among workers has no bearing on this analysis.

Further, the FHN Study found that the speed of access to funds was a preferred feature of EWA, but there were differences in how much users valued this aspect, especially when facing fees for immediate or near-immediate access to funds, with several study participants noting that they would rather wait for funds than pay a fee.[44] As such, expedited delivery features are completely severable from the analysis of EWA and whether it is credit.[45]

The Proposed Rule deploys a new "but for" test, reasoning that optional expedited delivery fees occur "because of" EWA, so they are therefore "incident" to EWA.[46] This approach is improper and has no basis in TILA or Regulation Z. In changing the test for what constitutes a "finance charge," the Bureau disregards contrary case law, which long ago established that optional expedited delivery fees for proceeds are not finance charges under TILA. Accordingly, the Proposed Rule's assertion that optional expedited delivery fees are "finance charges" should be withdrawn.

6. The Proposed Rule Will Harm Workers, Employers, And Providers Without Accomplishing Any Significant Regulatory Purpose

(a) The Proposed Rule Will Confuse Consumers

A consumer's receipt of a "Truth in *Lending* Act" disclosure will cause substantial confusion about the nature of EWA by suggesting the existence of a repayment obligation and required fees, when none exist. DailyPay's EWA is not credit, and workers are not obligated to repay it. Indeed, the trend in a growing number of states has been to affirm through legislation or agency interpretation that non-recourse EWA is *not* credit under applicable state law.[47] Yet, the Proposed Rule would still require TILA's credit-specific disclosures to be made for these noncredit services.

Workers themselves prefer to utilize a product that provides access to pay they have already earned, which is conceptually easier to understand than taking on debt from a payday lender, pawn shop, or other short-term debt provider. Consumers understand the difference between accessing an existing asset and borrowing against the future and thus would be confused by the

[44] *See* Berdie & Pail, note 7 above.
[45] Other routine and optionally incurred payment fees regularly imposed by other creditors, such as wire transfer fees charged by banks, would also be caught up by breadth of the Proposed Rule.
[46] *See* 89 Fed. Reg. at 61362.
[47] *See, e.g.*, Kan. Stat. Ann. ch. 64, § 49 (2024); Mo. Ann. Stat. 361.749(6); Nev. Rev. Stat. Ann. 604D.190; S.C. Code Ann. 39-5-860 (eff. Nov. 21, 2024); Ariz. Op. Att'y Gen. No. I22–005 (Dec. 16, 2022), https://www.azag.gov/opinions/i22-005-r22-011.pdf; Mont. Op. Atty' Gen. No. 59-2 (Dec. 22, 2023), https://dojmt.gov/wp-content/uploads/Vol.-59-No.-2-arm.pdf.

Bureau's proposed approach conflating the two. DailyPay prefers for its users not to suffer from such confusion.

(b) The Proposed Rule Will Incentivize Providers To Subject Workers To Tougher Contractual Obligations, Higher Costs, And More Severe Remedies

Because the credit or noncredit nature of EWA makes no difference under the Proposed Rule, a provider would be incentivized to pursue protections and privileges available to creditors (but not available to EWA providers) to the detriment of consumers, such as obligating consumer repayment, imposing mandatory fees (not only periodic interest but also a host of non-interest fees), underwriting consumers for creditworthiness (e.g., using consumer reports), and pursuing consumers for nonpayment or reporting their nonpayment to consumer reporting agencies.

(c) The Proposed Rule Will Harm Competition, Workers, and Employers

The Proposed Rule has anti-competitive effects, disfavoring employer-integrated EWA models relative to EWA models that are not employer-integrated. Providers of employer-integrated EWA, like DailyPay, primarily market to, contract with, and integrate with employers to provide EWA to their workforces. DailyPay's employer-clients include some of the largest employers in the United States, and they subject their service providers, like DailyPay, to rigorous diligence and oversight processes. They have already raised questions about the Proposed Rule and its applicability to them and have little tolerance for the types of ambiguities and legal and compliance risks posed by the Proposed Rule. Employers have also advised DailyPay that they do not wish to offer credit products to their workers, in part because of the reputational risks associated with offering credit products to their workers. As a result, DailyPay expects that the Proposed Rule will cause employers to pull back from offering employer-integrated EWA to their workers. Such a pull back will harm both workers, who will be left with fewer options and higher costs for satisfying their liquidity needs, and employers, who rely on EWA as a tool to recruit talent and reduce turnover. EWA that is not employer-integrated will not similarly be harmed, because employers have no role in those other models. As a result, the Proposed Rule will disproportionately harm employer-integrated EWA by causing the portion of workers using employer-integrated EWA to shrink relative to those using EWA that is not employer-integrated.

The Proposed Rule also threatens to undermine the ability to offer EWA featuring flat transparent fee structures and no-cost transfer options, instead favoring participation-fee (also called subscription or membership fees) models, where workers still must pay for EWA, even if they do not actually use it. Regulation Z's definition of "finance charge" expressly excludes participation fees, and therefore transactions under participation-fee models will not require TILA disclosures because they lack finance charges.[48]

[48] 12 CFR 1026.4(c)(4). Participation fees were mentioned in the Bureau's press release accompanying the Proposed Rule, but they are not specifically addressed in the Proposed Rule itself. *See* CFPB, CFPB Proposes Interpretive Rule to Ensure Workers Know the Costs and Fees of Paycheck Advance Products (July 18, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-interpretive-rule-to-ensure-workers-know-the-costs-and-fees-of-paycheck-advance-products/ (referencing monthly subscription fees).

The extremely low cost of EWA and the diversity of providers and their business models demonstrate that there is already a vibrant and competitive marketplace of providers offering EWA on consumer-friendly terms. The Proposed Rule, rather than promoting competition, instead threatens to upset this thriving marketplace and shrink its diversity by favoring participation fee-based pricing models and models that are not employer-integrated over competing pricing and business models, driving up costs for consumers.

(d) The Proposed Rule Will Create Confusion Regarding Other Laws

The Proposed Rule purports to be limited to TILA and Regulation Z and not to affect other federal laws.[49] However, other federal laws and regulations use substantially similar definitions of "credit" or apply to "creditors," "lenders," or "debt."[50] And a number of states often consider federal precedent when charting their own courses. The Proposed Rule's purported limitation is implausible, because "debt" directly or indirectly sits at the heart of these federal laws and regulations, and the Bureau has in the Proposed Rule declared that EWA involves debt. Rather than being limited to Regulation Z and TILA, the Proposed Rule threatens to harm EWA providers by raining down a host of other laws and regulations on them, and the Proposed Rule does not discuss any of them.

A number of states have sensibly recognized and chosen to regulate EWA as a unique financial product.[51] Such states typically adopted statutes that:

- Empower their regulators through comprehensive EWA-specific regimes for licensing and supervision;
- Distinguish between employer-integrated models and direct-to-consumer models;
- Safeguard consumers, including against consumer account debiting, and other collection activities; and
- Obtain annual reporting of EWA-specific metrics.

DailyPay supports regulation that is tailored to EWA and collaborates with legislatures and agencies interested in doing so. DailyPay encourages the Bureau to similarly support responsible and fitting regulation designed for EWA.

(e) The Proposed Rule Will Not Benefit Workers

No-cost EWA transactions and participation fee-based EWA transactions are not covered by the Proposed Rule. Even if EWA is deemed to be credit, no-cost transactions will not require TILA disclosures because they will not have a finance charge.[52] Similarly, as noted above, Regulation Z's definition of "finance charge" expressly excludes participation fees, and such transactions

[49] *See* 89 Fed. Reg. at 61359.
[50] *See, e.g.*, Equal Credit Opportunity Act (15 USC 1691a(d)); Electronic Fund Transfer Act (including implementing regulations (12 CFR 1005.2(f))); Consumer Financial Protection Act (12 USC 5481(7)); Fair Credit Reporting Act (15 USC 1681(r)(5)); Fair Debt Collection Practices Act (15 USC 1692a(4)) (referring to debt); Servicemembers Civil Relief Act (50 USC 3937(d)(2)) (referring to obligation or liability); Military Lending Act (including implementing regulations (32 CFR 232.3(h))).
[51] *See, e.g.*, Kan. Stat. Ann. ch. 64; Mo. Ann. Stat. 361.749; Nev. Rev. Stat. Ann. ch. 604D; S.C. Code Ann. 39-5-830 et seq.; Wis. Stat. Ann. ch. 203.
[52] *See* note 26 above.

likewise will not require TILA disclosures because they also will lack a finance charge.[53] Together, no-cost and participation-fee transactions represent a significant portion of the EWA marketplace, and as a result vast swathes of workers using EWA will not receive TILA disclosures at all under the Proposed Rule.

As for EWA models or transactions with other costs (if any), EWA providers already deliver robust disclosures regarding their transaction details to workers. For example, DailyPay delivers to the worker a detailed transaction summary, disclosing the amount of the prospective payment, the expedited delivery fee, and the settlement date (i.e., payroll date). The worker has an opportunity to accept or decline the transaction terms in each instance. DailyPay also prominently discloses its expedited delivery fees to the worker in DailyPay's Program Terms, during the product tutorial following enrollment on the DailyPay mobile application, each time the worker requests access to earned pay, and again before the worker confirms the execution of each EWA transaction. These types of disclosures are reinforced by state EWA laws, which require providers to clearly disclose any fees.[54]

Even those TILA disclosures that are required by the Proposed Rule generally will not require providers to disclose an annual percentage rate (APR). An APR would be the only new piece of information in a TILA disclosure that providers typically do not already deliver to workers. APR is an ill-suited and confusing metric for EWA, because EWA is available at no cost, is not credit, and it would not enable a consumer to compare the actual costs of EWA with other alternatives. In any event, the nominal optional fees related to EWA are already so low that, even if deemed to be finance charges, an APR still will not be disclosed. DailyPay believes that virtually all major EWA providers receiving transaction fees will qualify for Regulation Z's de minimis exemption, which provides that a creditor need not disclose an APR for any transaction involving a finance charge of $5 or less on an amount financed of $75 or less, or a finance charge of $7.50 or less on an amount financed of more than $75.[55] DailyPay's highest optional expedited delivery fee is only $3.99, which is *always* well below this de minimis threshold.

As a result, even when the Proposed Rule requires TILA disclosures, they will not provide any new or useful information to consumers.

7. The Proposed Rule Is Legally Invalid Because The Bureau Has Failed To Comply With Required Rulemaking Procedures

The Proposed Rule is procedurally invalid under the Administrative Procedures Act (APA), TILA, and Consumer Financial Protection Act (CFPA). Though styled as an "interpretive" rule, it imposes new legal obligations and duties on EWA providers. Such rules are "legislative" in nature and require compliance with the APA's and CFPA's notice-and-comment rulemaking procedures. TILA authorizes no different rulemaking process, and it therefore requires compliance with these default rulemaking procedures. The Bureau has not complied with either statute's requirements, rendering the Proposed Rule procedurally invalid.

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[53] See note 48 above.
[54] *See, e.g.*, Kan. Stat. Ann. ch. 64 § 47; Mo. Ann. Stat. 361.749(4); Nev. Rev. Stat. Ann. ch. 604D.400(1); S.C. Code Ann. 39-5-840; Wis. Stat. Ann. 203.04.
[55] 12 CFR 1026.18(e).

A legislative rule "purports to impose legally binding obligations or prohibitions on regulated parties"[56] by "creat[ing] new law, rights, or duties in what amounts to a legislative act."[57] Thus, a "court's inquiry in distinguishing legislative rules from interpretative rules 'is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime.'"[58]

There can be no doubt that the Proposed Rule amounts to a substantive regulatory change to TILA's statutory regime. Prior to the Proposed Rule, no statute, regulation, or informal interpretive guidance supported the position that EWA triggers obligations under TILA. The Bureau itself had previously concluded that EWA with certain characteristics did not constitute credit and therefore was not subject to TILA. The Proposed Rule does not merely interpret pre-existing requirements: it creates new substantive requirements that did not previously exist. The Proposed Rule is therefore a "legislative" rulemaking because it does not "derive a proposition from an existing document whose meaning compels or logically justifies the proposition."[59]

Moreover, the Proposed Rule will significantly affect private interests, namely the EWA providers, employers, and ecosystems servicing them that have structured their businesses in reliance on the Bureau's November 2020 Advisory Opinion and the employers and workers who rely on the availability of EWA.[60] EWA providers arranged their affairs and business models around the Bureau's conclusion that their products were not credit and therefore not subject to disclosure requirements under TILA. They were able to do so in reasonable reliance on the Bureau's repeated "commonsense" determinations that no debt exists where there is no obligation to repay. For example, over the last few years DailyPay has made significant investments in growing its platform and establishing and reinforcing employer-client integrations in reliance on conclusions and observations regarding the nature of debt and credit made by the Bureau in the November 2020 Advisory Opinion.

The Bureau tacitly acknowledges these realities and the attendant disruption caused by the Proposed Rule by providing for future effectiveness.[61] If the Proposed Rule merely restated existing legal obligations, future effectiveness would be unnecessary and the Bureau would be sanctioning non-compliance in the interim. Likewise, the Bureau would not have suggested that it may modify the Proposed Rule as a result of "considering comments received" from interested parties if the Proposed Rule merely reflected a provider's legal obligations ex ante.[62]

Though the Bureau has provided an opportunity to comment on the Proposed Rule, the process through which the Bureau intends to promulgate and finalize it falls far short of meeting the procedures required under the APA, TILA, and CFPA.

Under the APA, the Bureau must "consider and respond to significant comments received during the period for public comment," not merely "consider" them, as contemplated by the Proposed

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[56] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).
[57] *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 168 (2d Cir. 2013).
[58] *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).
[59] *Cath. Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010).
[60] *See Mock v. Garland*, 75 F.4th 563, 580 (5th Cir. 2023) (significant effects on private interests one factor in identifying a legislative rule).
[61] *See* 89 Fed. Reg. at 61359 (describing intention to publish a final rule after considering comments).
[62] *See id.*

Rule.[63] There is also no indication that the opportunity to comment provided here is a "meaningful opportunity" – *i.e.*, that the Bureau "remain[s] sufficiently open-minded."[64] Instead, all indications are that the comment period is nothing more than a pretense, rather than a meaningful opportunity for the industry to participate in the rulemaking process.

If the Bureau proceeds with the Proposed Rule, the effective date must be delayed under TILA. 15 USC 1604(d) provides that "[a]ny regulation of the Bureau, or any amendment or interpretation thereof, requiring any disclosure which differs from the disclosures previously required by [TILA] or by any regulation of the Bureau promulgated thereunder shall have an effective date of that October 1 which follows by at least six months the date of promulgation." As explained above, the Proposed Rule will effectively require that TILA disclosures be provided in connection with at least certain EWA. Such disclosures were not previously required. Accordingly, October 1, 2025 would be the earliest that the Proposed Rule could become effective under TILA.

The CFPA contains still other procedural requirements that the Bureau must honor. For example, the CFPA requires that rules issued by the Bureau include an assessment of the "potential benefits and costs to consumers, including the potential resulting reduction of access by consumers to financial products or services."[65] The Proposed Rule does not even articulate the potential benefits of the rule to consumers (there are none, as explained above), let alone its costs (there are many, as also explained above, including the harm to consumers, employers, and employer-integrated providers).

Despite the Proposed Rule effecting a sea change in existing law, the Bureau has chosen to characterize the Proposed Rule as interpretive as an end-run around the procedural protections of the APA, TILA, and CFPA. Courts have found cases "in which a government agency seeks to promulgate a rule by another name—evading altogether the notice and comment requirements"—to be the "most egregious" breaches of rulemaking requirements.[66] That is the case here, and renders the Proposed Rule legally invalid.[67]

8. The Proposed Rule Is Not Entitled to Deference or Respect In Court

The Proposed Rule is entitled to no judicial deference should the Bureau seek to enforce it in a court of law. That is the case even had the Bureau complied with the APA's notice-and-comment rulemaking process. In *Loper Bright Enterprises v. Raimondo*,[68] the Supreme Court discarded the *Chevron* doctrine, under which a court would defer to an agency's permissible interpretation of an ambiguous statute. Though the statute is not ambiguous here, and so no such deference would be warranted even under the prior regime, after *Loper Bright* courts "must exercise their

[63] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015).
[64] *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. 2009).
[65] 12 USC 5512(b)(2)(A).
[66] *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014).
[67] *See, e.g.*, *NRDC v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020) (rule that "creat[ed] legal effects" rather than "put[ting] the public on notice of pre-existing legal obligations or rights" was legislative, not interpretative); *Children's Hospital of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 620-21 (4th Cir. 2018) (FAQ that set forth policies that did not appear in pre-existing rule was legislative, not interpretative).
[68] *Loper Bright Enterprises*, 144 S. Ct. 2244.

independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[69] Thus, the thumb on the scale in favor of the Bureau's interpretation that may have previously existed under certain circumstances has been removed.

Nor is the Proposed Rule, however classified, entitled to the non-binding "respect" courts sometimes afford agency interpretations. Under *Skidmore v. Swift & Co.*,[70] agency interpretations "constitute a body of experience and informed judgment" that may be "entitled to respect," but "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[71]

Here, the truncated process through which the Bureau intends to finalize the interpretive rule reveals a striking lack of thoroughness. Though the Bureau is soliciting public comment, and promises to "consider[]"[72] such comments, it does not appear that the Bureau intends to respond to significant comments received during the public comment period. In addition, the Proposed Rule does not comment on the potential resulting reduction of access by consumers to EWA, or how the benefits of the Proposed Rule, in the Bureau's view, outweigh the likelihood of consumer confusion and other costs. The purported interpretive rule is also flatly inconsistent with an earlier Bureau pronouncement issued just four years earlier, and the Proposed Rule's rationale for reversing course is wholly unpersuasive.

Finally, the Bureau's interpretation is also not entitled to so-called *Auer* deference.[73] Courts sometimes defer to agencies' reasonable interpretations of their own genuinely ambiguous regulations, but here the Bureau's rationale for promulgating the interpretive rule does not relate to a potential ambiguity in Regulation Z, nor is there any ambiguity. In any event, to be afforded *Auer* deference, the agency's interpretation must be (i) its "authoritative" or "official position"; (ii) "must implicate its substantive expertise"; and (iii) must reflect the "fair and considered judgment" of the agency.[74] The Proposed Rule does not implicate the Bureau's substantive expertise. Indeed, to arrive at its conclusion that EWA creates "debt" the Bureau consults dictionary and statutory definitions of the term "debt," which anyone, including a court, is fully capable of doing.[75] Additionally, after defining debt in this way, the Bureau does not actually address why EWA should be considered debt notwithstanding the lack of obligation on the worker's part to repay. The Proposed Rule also does not reflect the fair and considered judgment of the agency inasmuch as it conflicts with a prior interpretation of the Bureau. Courts have "only rarely given *Auer* deference to an agency construction 'conflicting with a prior' one."[76]

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[69] *See id.* at 2273.
[70] 323 U.S. 134, 140 (1944).
[71] *See id.*
[72] *See* 89 Fed. Reg. at 61359 (describing intention to publish a final interpretive rule after considering comments received).
[73] *See Auer v. Robbins*, 519 U.S. 452 (1997).
[74] *Kisor v. Wilkie*, 588 U.S. 558, 577-79 (2019).
[75] *See* 89 Fed. Reg. at 61360.
[76] *Kisor*, 588 U.S. at 579.

Under no circumstances, therefore, will the Proposed Rule be given any "deference" or "respect" by a court of law if the Bureau seeks to enforce it. Instead, a court will be tasked with determining whether the Proposed Rule is the best interpretation of TILA. As explained above, it is not.

9. Conclusion

Thank you for the opportunity to comment on the Proposed Rule. As expressed in previous conversations with the Bureau, DailyPay shares the Bureau's desire to make EWA as beneficial as possible to consumers, and DailyPay believes the Bureau should do so by ensuring that it encourages consumer-friendly EWA features rather than focusing solely on whether EWA is "credit" and expedited delivery fees are "finance charges" for purposes of an ill-suited credit-specific regime. Due to the legal, factual, policy, and procedural deficiencies set forth above, and especially considering the many harms it will cause, the Bureau should withdraw the Proposed Rule. At a minimum, rather than seek to impose a one-size-fits-all regulation, the Bureau should recognize that non-recourse, employer-integrated EWA settled through a payroll process is not "credit." DailyPay encourages the Bureau to engage with Congress and other stakeholders to craft comprehensive legislation that codifies important consumer protections that are actually designed for EWA—a better solution towards these shared objectives.

If you have any questions regarding our comments, please do not hesitate to contact us.

Sincerely,

DailyPay, Inc.

By: _____
Name: Jared DeMatteis
Title: Chief Legal & Strategy Officer