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STATE OF MAINE
DEPARTMENT OF PROFESSIONAL & FINANCIAL REGULATION
BUREAU OF CONSUMER CREDIT PROTECTION



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Superintendent

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ADVISORY RULING #121

RE: Advisory ruling defining “earned wage access” products as “loans” and defining earned wage access providers as “creditors” or “supervised lenders” subject to the Maine Consumer Credit Code.

BUREAU AUTHORITY / ADVISORY RULINGS

The Superintendent of the Bureau of Consumer Credit Protection may issue advisory rulings concerning the applicability of any statute under the Superintendent’s authority to an existing factual situation (*see* Bureau Rule 02-030 Ch. 110 (VII)). It has recently come to the Superintendent’s attention that Earned Wage Access (“EWA”) products are being marketed and offered to Maine consumers and that some EWA providers are already operating in Maine. This Advisory Ruling describes common attributes of EWA products and explains how the Maine Consumer Credit Code (“MCCC”) applies to EWA products and to EWA providers.

EARNED WAGE ACCESS PRODUCT DESCRIPTION

While there are several types of EWA agreements, and the details of each vary, however, common elements include:

- A. The EWA product is generally advertised as affording wage earners access to pay they have earned but is not yet payable;
- B. Some, but not all, EWAs are integrated into the employer’s payroll system.
- C. The money advanced to consumers comes from an investor.
- D. The consumer may be charged a flat fee to access the funds, or a “convenience” fee to expedite access to the funds and consumers are provided the opportunity to “tip” the EWA provider.
- E. While some EWA transaction options are free of fees and charges, many consumers pay fees to expedite the transaction or feel obligated to provide tips.
- F. The amounts advanced to consumers are relatively small.
- G. In some cases, the consumer may obtain multiple advances and incur fees per transaction.
- H. The advanced amount is deducted from a consumer’s account.
- I. Consumer’s commonly access the EWA product with their phone as an online “app.”
- J. The EWA agreements include non-recourse provisions.

LEGAL ANALYSIS

The MCCC (Title 9-A M.R.S. §§ 1-101 through 16-111) regulates consumer credit transactions and the creditors who regularly engage in the extension of consumer credit. Article 2 of the MCCC sets finance charge limitation caps and Article 8-A of the MCCC implements¹ the Federal Truth-in-Lending Act and the rules and

¹ Maine has obtained and maintained an exemption from the federal Truth-in-Lending Act from the CFPB and predecessor federal agencies who enforce the federal Truth-in-Lending Act (*see* 12 CFR § 1026.29 “State exemptions,” Official interpretation, Comment 29(a)-A: “Maine. Credit or lease transactions subject to the Maine Consumer Credit Code and its implementing regulations are exempt from chapters 2, 4 and 5 of the Federal Act”).

regulations promulgated thereunder. The promoters of EWA products claim that their products are not loans or credit because they contain non-recourse provisions, i.e. consumers who do not repay the debt are not pursued through collection efforts including judicial remedy by the EWA provider or their agents. However, the inclusion of non-recourse provisions in EWA agreements does not mean that those contracts are not loans. For example, in practice, consumers' use of EWA products commonly result in the assessment of fees and charges just like any other loan product.

Pursuant to the MCCC, "Credit" means the right granted by a creditor to a consumer to defer payment of an obligation, to incur an obligation and defer its payment or to obtain possession of property or the benefit of services and defer payment therefor pursuant to an agreement which includes, but is not limited to, a sale of goods, a sale of an interest in land, a sale of services or a loan (*see* 9-A M.R.S. § 1-301 (15)). Similarly, The MCCC defines a "loan" as a creation of debt . . . " (*see* 9-A M.R.S. § 1-301 (23)).

The words "debt" and "obligation" are not defined in The Code. It appears that EWA providers rely on the MCCC's absence of definitions of certain terms to buttress their argument that EWA products are not credit and are not subject to the MCCC.

EWA providers admit that many consumers who receive these advances pay them back. If this were not true, then there would be no EWA business. It is possible for a consumer to obtain an EWA advance and then fail to repay it. That action would terminate the consumer's participation in an EWA program. It would also be difficult for a consumer to accomplish because the consumer must agree that the EWA can deduct the repayment from the consumer's wages or bank account when the wages are due and payable. By authorizing the deduction of money from their pay, consumers are agreeing to defer payment until payday, which creates an extension of credit or a loan.

Maine law further defines "payday loan" as "a supervised loan or other credit transaction in which a cash advance is made to a consumer in exchange for the consumer's personal check or in exchange for the consumer's authorization to debit the consumer's deposit account and when the parties agree either that the check will not be cashed or deposited or that the consumer's deposit account will not be debited until a designated future date" (*see* 9-A M.R.S. § 1-301 (28-A)).

EWA providers claim that the fees and tips they charge to consumers are not finance charges because consumers are provided with an option to receive an EWA payment advance for free. EWA providers claim that fees are only assessed when consumers request expedited payments or if the consumer *voluntarily* pays a tip. Assuming, arguendo, that fees in fact can be avoided and tips are truly voluntary, these costs still fall within the definition of finance charge. Even if convenience fees and tips are not being imposed as a condition to the extension of credit, a claim which is disputable, such fees are being charged as an "incident to" the extension of credit. Fees are charged for faster advances, creating a clear connection between the amount paid and the receipt of the loan. Tips and subscription fees are also directly connected to the loan. EWA's choice of the word "tips" in this context does not comport with common usage. When consumers leave a tip, they pay a person for good service rendered. In this context the tip is going to a company as additional profit, not to a person for personal service. In Maine, the definition of finance charge means "the cost of consumer credit as a dollar amount," and "includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit" (*see* 9-A M.R.S. § 1-301(19)).

The MCCC provides enhanced consumer protection when a loan product carries a finance charge that exceeds 12.25% per year. For example, consumer loans granted by creditors "in which the rate of the finance charge, calculated according to the actuarial method, exceeds 12 1/4% per year" are defined as "supervised loans," and lenders granting supervised loans must be licensed as "supervised lenders" subject to the Bureau's licensing regime pursuant to MCCC Article 2 (*see* 9-A M.R.S. § 1-301(40) & (39)).

ADVISORY RULING / EWA PRODUCTS AND EWA PROVIDERS

Pursuant to the above legal analysis, the Bureau makes the following determination by advisory ruling:

1. EWA products are consumer credit transactions subject to the consumer protections of the MCCC, including the finance charge limitations pursuant to Article 2 of the MCCC, and all other applicable consumer protections afforded to consumers under the MCCC.
2. EWA providers granting “supervised loans” are “supervised lenders” subject to the licensing provisions of Article 2 of the MCCC.
3. EWA providers granting non-supervised loans are “creditors” subject to the notification provisions of Article 6 of the MCCC.

This advisory ruling shall take immediate effect upon publication by the Bureau on its webpage.

Sincerely,

/s/Linda Conti

Linda Conti

Superintendent