

Earned Wage Access Services — Legal and Policy Analysis

for Earnin
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Activehours, Inc., d/b/a Earnin (“Earnin”)¹ seeks to solve a problem that has vexed workers for thousands of years—getting paid for completed work. Earnin’s efforts to let workers, rather than their employers, control when they get paid do not trigger the concerns that have led to the regulation of consumer lending. Earnin does not lend money or charge interest. It does not have a legally enforceable right to require its users to repay the wages that it advances, and Earnin provides its service without charge, generating income entirely through voluntary tips provided by its users. Earnin’s service differs from the types of products to which consumers have historically turned to make ends meet between paychecks; and each of the features identified above—the non-recourse nature of the service and the fact that consumers decide whether and how much to pay for it—should alone be sufficient to distinguish its service from lending and check-cashing. This Whitepaper seeks to do three things: (1) explain the problem that Earnin is attempting to solve; (2) explain how the Earnin service should be analyzed under Federal and state lending law; and (3) place the Earnin service within the context of the liquidity services, such as bank overdraft, with which Earnin competes.

I. The Age Old Problem Of Getting Paid For Already Completed Work

Payment is at the heart of the employment relationship. Although a host of variables influence how, when, and where people work, people enter into paid employment in order to turn their time and skills into money. Most people, however, do not give much thought to how the money they earn actually reaches their bank account. After all, the steps seem simple enough: the employer calculates how much the worker is owed, makes the necessary deductions to cover taxes and benefits, and the rest shows up in a bank account or a check. But this simplicity is misleading; the delivery of wages is both legally and operationally complicated.

The challenge of calculating and delivering wages stems, in part, from the complex nature of the relationship between workers and employers. The employment relationship imperfectly aligns the interests of employers and workers. And timely delivery of wages that have already been earned is one of the many issues of contention. All else equal, employers would prefer that workers work first and get paid later—much later if possible. Workers, on the other hand, would prefer to get paid first and work at a later time.

For most of the history of the United States, employers had the upper hand in determining when their workers would get paid, and they employed a long list of practices to delay the payment of wages. Efforts to end those practices and to secure laws guaranteeing minimum wages and maximum hours helped to propel the modern labor movement in the U.S. and elsewhere. But the

problem is not a new one. One of the oldest legal texts in the Western world, Deuteronomy, contains provisions that speak directly to the issue, presumably because disputes about wages were a source of discord even among the ancient Israelites: “[y]ou shall pay them their wages daily before sunset, because they are poor and their livelihood depends on them”² Leviticus

¹ Earnin is a Delaware corporation founded in 2012. ²

Deuteronomy 24:15 (New Revised Standard Version).

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makes clear that “...you shall not keep for yourself the wages of a labourer until morning.”³ The Qur’an also charges employers to “[g]ive the worker his wages before his sweat dries.”⁴

The challenge of paying wages goes beyond determining when wages should be paid. Under U.S. labor law, the actual mechanics of calculating what an employer owes a worker, particularly an hourly worker, is quite complicated.⁵ The problem arises from how the Fair Labor Standards Act (“FLSA”) defines “overtime”. The FLSA generally requires that employers pay their workers at a rate one-and-half times their usual hourly rate when those workers “work” more than forty hours in a given “workweek.”⁶ This calculation is necessarily backward looking; ordinarily an employer cannot know how much overtime pay an hourly worker is due until the workweek is completed.

Calculating net wages adds a further level of complication. Federal, state and local tax codes require employers to withhold tax payments from their workers’ paychecks. Employers also typically deduct the worker’s contribution to health insurance or retirement benefits. These deductions often vary over the course of a given year if, for example, a worker hits the wage cap on Social Security taxes, adds (or subtracts) a dependent, or makes changes to his or her benefits. Termination, voluntary or involuntary, and period-to-period variation in the number of hours worked further complicate the seemingly simple task of wage calculation.

The problem of accurately calculating payroll is complex enough that most companies outsource payroll processing. Firms like ADP⁷ and Intuit⁸ specialize in defining pay periods, calculating wages, withholding funds for taxes and benefits, and actually delivering money to workers. Those firms, however, work for the employers not the workers. They help ensure that employers correctly calculate what they owe their workers, withhold and pay the necessary taxes, and

deliver wages within the time limits proscribed by law (but generally not a moment earlier).

The current system for wage delivery benefits employers at the expense of their workers. The problems associated with a delayed payroll schedule are striking. Workers borrow nearly \$90 billion per year from payday lenders⁹ while they needlessly wait for their already earned pay. Each year, there are billions of dollars held up every two weeks in the payroll system.¹⁰ This

³ Leviticus 13:19 (New Revised Standard Version). ⁴ The Qur'an, *Sunan Ibn Mâjah* (2443). ⁵ See, e.g., *Compliance Assistance – Wages and the Fair Labor Standards Act (FLSA)*, DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, <http://www.dol.gov/whd/flsa/> (last visited Sep. 11, 2019). ⁶ See *Overtime Pay*, DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, http://www.dol.gov/whd/overtime_pay.htm (last visited Sep. 11, 2019). ⁷ *ADP Payroll Services*, ADP.COM, <https://www.adp.com/what-we-offer/payroll.aspx> (last visited Sep. 11, 2019). ⁸ *About Intuit Payroll Services*, INTUIT.COM, http://payroll.intuit.com/?cid=seq_intuit_proll_click_nav (last visited Sep. 11, 2019). ⁹ *Core Lending Principles for Short-Term, Small-Dollar Installment Lending*, OCC Bulletin 2018-14, OFFICE OF THE COMPTROLLER OF THE CURRENCY (May 23, 2018) available at <https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-14.html> (last visited Sep. 11, 2019). ¹⁰ *Average Annual Hours Actually Worked Per Worker*, OEDC.Stat (Aug. 5, 2019), <https://stats.oecd.org/Index.aspx?DataSetCode=ANHRS>; Table B-8, Economic News Release, Bureau of Labor Statistics (Aug. 2, 2019), <http://www.bls.gov/news.release/empstat.t24.htm>; *Characteristics of Minimum Wage Workers*, 2018, Bureau of Labor Statistics Report 1078, March 2019, <https://www.bls.gov/opub/reports/minimum-wage/2018/home.htm>.

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payroll delay affects the earnings of approximately 81.9 million hourly workers.¹¹ Their earnings are spent on late fees, overdraft fees (\$34.3B)¹², pawn shops (\$13.7B)¹³ and short-term loan fees (\$7.4B).¹⁴ A Federal Deposit Insurance Corporation survey found that almost 9 percent of consumer bank accounts had at least 10 non-sufficient fund transactions over the course of a year.¹⁵ According to the Consumer Financial Protection Bureau, young people are particularly vulnerable with one in ten between the age of 18 and 25 triggering ten overdrafts a year.¹⁶

Beholden to the biweekly pay cycle, many workers delay obtaining much needed goods and services. Some miss shifts towards the end of a pay period because they cannot pay for gas or otherwise cover the costs of commuting, a cycle that traps many hourly workers in the lowest end of the income distribution.¹⁷ Some Earnin users report putting off medical care while they

await their delayed income.¹⁸

Bill Simon, CEO of Walmart, has described how consumers respond when they finally do receive a significant periodic payment:

The paycheck cycle we've talked about before remains extreme.... And you need not go further than one of our stores on midnight at the end of the month. And it's real interesting to watch, about 11 p.m., customers start to come in and shop, fill their grocery basket with basic items, baby formula, milk, bread, eggs, and continue to shop and mill about the store until midnight, when electronic — government electronic benefits cards get activated and then the checkout starts and occurs. And our sales for those first few hours on the first of the month are substantially and significantly higher.¹⁹

¹¹ *Characteristics of Minimum Wage Workers*, 2018, Bureau of Labor Statistics Report 1078, March 2019,

<https://www.bls.gov/opub/reports/minimum-wage/2018/home.htm>. ¹² Maria Lamagna, "Overdraft fees haven't been

this bad since the Great Recession," MARKETWATCH, Apr. 2, 2018, *available at*

<https://www.marketwatch.com/story/overdraft-fees-havent-been-this-bad-since-the-great-recession-2018-03-27>. ¹³

Center for Financial Services Innovation, "2017 Financially Underserved Market Size Study," p. 44 *available at*

[https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2017/04/27001546/2017-Market-Size-](https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2017/04/27001546/2017-Market-Size-Report_FINAL_4.pdf)

[Report_FINAL_4.pdf](https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2017/04/27001546/2017-Market-Size-Report_FINAL_4.pdf). ¹⁴ *Payday Lending in America: Who Borrows, Where They Borrow and Why*, 1, Pew

Charitable Trusts, July 2012, *available at*

http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/PewPaydayLendingReportpdf.pdf. ¹⁵ *FDIC*

Study of Bank Overdraft Programs at iv, Nov. 2008,

https://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf. ¹⁶ CFPB, *Data Point: Checking*

account overdraft 3 (July 2014) (noting that 10.7 percent of people ages 18-25 had more than 10 overdrafts per year).

¹⁷ See, e.g., Janet I. Tu, *Low pay and long, pricey commute often go hand in hand*, (Aug. 31, 2015)

<https://www.seattletimes.com/business/economy/low-pay-long-pricey-commute-often-go-hand-in-hand/>; Jack Peat,

Six in ten London workers have skipped work because they were unable to afford the commute, (Aug. 1, 2019)

[https://www.thelondoneconomic.com/business-economics/six-in-ten-london-workers-have-skipped-work-because-](https://www.thelondoneconomic.com/business-economics/six-in-ten-london-workers-have-skipped-work-because-they-were-unable-to-afford-the-commute/01/08/)

[they-were-unable-to-afford-the-commute/01/08/](https://www.thelondoneconomic.com/business-economics/six-in-ten-london-workers-have-skipped-work-because-they-were-unable-to-afford-the-commute/01/08/). ¹⁸ See "Waiting Game," Earnin Survey, Apr. 24, 2014. ¹⁹ "Watching

Wal-Mart at Midnight," WALL STREET JOURNAL, Sept. 10, 2010, *available at*

<http://blogs.wsj.com/economics/2010/09/20/watching-walmart-at-midnight/>.

Delayed wage payment is simply bad for workers. Researchers have found that workers tend to reduce spending before income receipt and increase purchases immediately afterwards.²⁰ The periodic payment cycle is so disruptive to workers' lives that multiple studies have shown that mortality rates increase immediately after paydays.²¹

II. On Demand Payroll Lets Worker Decide When They Should Receive Some Or All Of Their Pay

In an age where people can order anything from a hot meal to a comfortable ride in minutes with the touch of a button, it seems odd that workers must wait two weeks after putting in a shift to receive pay for their work. The problems associated with delayed delivery of wages can be solved through on-demand payment systems. And enabling workers to control the delivery of wages will save money for workers and their families, and deliver benefits to their employers. It may even improve the productivity of the economy as a whole.

There is simply no reason to delay wage payment in an era of on-demand technology. Legacy payroll systems are designed to solve the problems that employers face in calculating wages. They rely on batch data updates from time and attendance systems to ensure that employers comply with the state and federal regulatory requirements related to wage calculation and distribution. Although such systems serve a purpose, the costs of performing such calculations have dropped to the point that they can be efficiently done at the request of an individual worker rather than at the request of the employer. With the permission of a user, Earnin can immediately determine whether a given user has worked a shift, how many hours that user worked on that shift, and how much money that user will receive in base pay for the hours worked on that shift.

U.S. consumers would like more immediate access to their wages. In an informal survey conducted by Earnin, for example, 96% of Earnin users reported feeling less stress when given this flexibility.²² When a worker feels in control of his or her finances, it improves his or her work and health. In the survey, 89% of users reported feeling more motivated and productive at work when they had access to their wages before payday and 74% reported having fewer unplanned absences.²³ Nearly half of those surveyed stated that on-demand pay would be the best financial support their employer could offer, outranking even an increase in salary.²⁴

The benefits of payroll on demand are significant for U.S. consumers. As noted above, U.S. consumers spend billions of dollars on fees and interest associated with overdraft, credit cards, payday advances, pawn shops, title loans and other short-term loans. Wide-spread adoption of

²⁰ See, e.g., Jesse Shapiro, *Is There a Daily Discount Rate? Evidence from the Food Stamp Nutrition Cycle*, 89 J. PUB.

ECON. 303-325 (2005)(finding a drop in daily caloric consumption of 10-15% among Food Stamp recipients from when food stamps are paid to just before they are next due).²¹ See, e.g., Elvira Andersson et al., *Income Receipt and Mortality: Evidence from Swedish Public Sector Employees*, Institute for the Study of Labor Discussion Paper No. 8389 (Aug. 2014), available at <http://ftp.iza.org/dp8389.pdf>; William N. Evans and Timothy J. Moore, *Liquidity, Economic Activity and Mortality*, 94 REV. ECON. & STAT. 400- 418 (2012); William N. Evans and Timothy J. Moore, *The Short-Term Mortality Consequences of Income Receipt*, 95 J. PUB. ECON. 1410-1424 (2011).²² See “Your Experience With Activehours,” Earnin Survey, Aug. 17, 2015.²³ *Id.*²⁴ *Id.*

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services like the one offered by Earnin could significantly improve the financial health of millions of U.S. households.

Speeding up the delivery of wages also benefits employers and may actually improve the productivity of the U.S. economy as a whole. When individuals have access to their earned wages, they are more productive and reliable. Workers who have access to their pay report better attendance, less stress and more focus.²⁵ In addition, as Michael Watson, an expert in “just-in-time” manufacturing and an Adjunct Professor at Kellogg, has observed, the lumpy distribution of wages creates sales spikes and logistical challenges for retailers and other consumer facing businesses. On-demand pay systems that enable workers to access smaller paychecks more frequently promise to smooth out some of the inefficiencies associated with periodic wage payments. In fact, Mr. Watson believes that Earnin and similar services could “have a noticeable impact on the economy” if they are widely adopted.²⁶

III. Earnin Lets Workers Decide When To Get Paid For Work That They Have Already Done

Earnin is a technology company that gives people easy access to the pay that they have earned—when they want it, without waiting for payday. It seeks to solve the problem that has plagued workers for thousands of years—getting paid for completed work. Earnin lets workers, rather than employers, control when workers get paid. It provides its service without mandatory fees, generating income entirely through a “pay what you think is fair” model. This flexibility allows workers to manage their cash flow and to spend their wages according to their own needs and schedule, not the arbitrary schedules that employers adopt to meet the minimum requirements of state labor laws.

The Earnin service is simple to use. When a user creates an account, Earnin automatically pulls a user’s direct deposit and employment history. Earnin has integrated with several time and attendance systems to further expedite payment. Once Earnin verifies the hours a worker has

worked, Earnin allows the worker to accelerate the distribution of her paycheck (based on the worker's expected take-home pay and subject to certain limits). Earnin deposits the funds directly into the worker's bank account either instantly or overnight (depending on the bank that the worker uses). On the worker's regularly scheduled payday, Earnin automatically withdraws the amount of the advance from the worker's bank account. This allows workers to use Earnin directly, without relying on their employers. Earnin does not charge any fees for its service. Instead, workers may choose to pay a voluntary tip, which is automatically withdrawn, if authorized, on the worker's payday.²⁷

²⁵ *Id.* ²⁶ Michael Watson, *Just In Time and Lean Concepts in New Areas* (Oct. 20, 2014), <https://medium.com/opex-analytics/just-in-time-and-lean-concepts-in-new-areas-105d20df403e>. ²⁷ *See Terms of Service*, EARNIN.COM,

<https://www.activehours.com/PrivacyAndTerms> (last visited Sep. 11, 2019) ("You are not required to pay any fees or charges to use the Services...You may make voluntary additional payments in appreciation of the services rendered, but you are not required to pay any charge or fee to be eligible to receive or in return for receiving the Services. These voluntary additional payments help fund Activehours."); *see also Does Earnin charge fees or interest? Earnin FAQ*, EARNIN.COM, <https://help.earnin.com/hc/en-us/articles/223283747-Does-Earnin-charge-fees-or-interest-> (last visited Sep. 11, 2019) ("Earnin does not charge fees, interest or have any hidden

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When Earnin accelerates a wage distribution to one of its users, Earnin, not the user, bears the risk of nonpayment by the employer and the risk of nonpayment by the worker. If the account to which the worker has provided Earnin access does not have sufficient funds to repay the accelerated wage distribution or if the user closes the account before the paycheck is scheduled to arrive, Earnin does not have the right to collect the accelerated wage from the user or the employer. Earnin's only recourse is to deny the user access to the service until the user pays the outstanding distribution. In addition, failure to repay an accelerated wage distribution does not affect the user's credit. Earnin does not furnish information about its users to credit reporting agencies or other creditors. The only consequence for a user who does not repay an advance is that he or she cannot receive another advance until the earlier advance is repaid.

IV. Services Like That of Earnin Do Not Pose The Types of Risks of Traditional Small Loans

Because Earnin's service does not present the risks and harms associated with short-term lending that generally justify regulation, the Consumer Financial Protection Bureau ("CFPB") decided to exempt such services from the Payday Rule. The CFPB explained that businesses which provide advances on a no-fee, no recourse basis are "likely to be beneficial for consumer across the

spectrum.”²⁸

When it issued the Payday Rule, the CFPB made clear that it was addressing a specific consumer protection issue: “unaffordable loans [that] cause substantial injury to consumers by spurring extended sequences of reborrowing, bank account fees and closures, vehicle repossessions, collections, and various other harms.”²⁹ The CFPB has explained that its concern with these types of products is tied to the high cost of the service and the ability of lenders to collect both unpaid principal and interest.³⁰ According to the CFPB, the exorbitant finance charges and the adverse consequences of default trap many of the people who use them in debt from which they cannot emerge.

The wage acceleration service that Earnin provides does not pose any of the problems associated with “unaffordable loans.” Earnin *does not* “force[] [its users] to choose between re-borrowing, defaulting, or falling behind on other obligations.”³¹ Failure to repay an Earnin advance does not cause injury to anyone but Earnin. Simply put, Earnin does not extend credit. Earnin provides a free service that puts workers, not their employers, in charge of when they get paid, and it gives its users the ability to manage their finances without having to rely on the very types of products that the CFPB is seeking to regulate. In its zeal to eliminate dangerous products through

costs to use the app. We depend on our community to support us by tipping what they think is fair when they use the app. It’s up to you how much you want to give back, and we don’t require you to pay anything at all.”).²⁸ CFPB,

Payday, Vehicle Title, and Certain High-Cost Installment Loans—Final Rule 281 (Oct. 4, 2017)²⁹ *Small Business*

Advisory Review Panel For Potential Rulemakings For Payday, Vehicle Title, and Similar Loans: Outline of Proposals Under Consideration and Alternatives Considered, CFPB, Mar. 26, 2015, at 3

(http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf)

(last visited Sep. 11, 2019).³⁰ *See, e.g., id.* at 3 (noting consumer harm due to “very expensive credit” and describing

credit targeted by the Proposals as “loans with payments that are often beyond a consumer’s ability to repay” and “unaffordable loans”); *Id.* at 9 (noting concerns regarding consumer’s ability to repay lenders’ ability to collect payment from consumers).³¹ *Factsheet: The CFPB Considers Proposals to End Payday Debt Traps*, CFPB, 1 Mar.

25, 2015, http://files.consumerfinance.gov/f/201503_cfpb-proposal-under-consideration.pdf (last visited Sep. 11, 2019).

regulation, the CFPB chose not to eliminate safe alternatives that are seeking to eliminate those same products through competition.

A. Earnin Does Not Charge Any Finance Charges or Fees For Use of Its Services

Earnin's service is meaningfully different from credit products that include expensive finance charges, *i.e.*, fees associated with the provision of credit. Such finance charges can quickly add up, and many consumers find themselves unable to pay off the loan principals and fees before their due date. Earnin does not charge *any* fee for the use of its service. Unlike traditional loans, including payday loans and other problematic small-dollar loans, the funds advanced by Earnin are not subject to any finance charges or other fees. Earnin allows its users to decide whether to pay and, if so, how much. The use of Earnin's service will not trap consumers in a cycle of debt by racking up fees, finance charges, or ancillary costs. A worker with financial difficulties has no obligation to pay Earnin any fee for use of its service.

Further, Earnin enables its users to receive money they have *already earned*. An Earnin advance is not an extension of "unaffordable credit" or credit at all. Its service puts workers, not arcane payroll processing laws, in charge of their pay schedule. Earnin does not enable people to accelerate wages that they have not earned and may not be able to afford to repay. Earnin automatically collects advances from its users, and it never puts workers in a position of default or forced re-borrowing. As a result, mandated ability-to-repay calculations and restrictive loan terms do not make sense in the context of Earnin's service. Forcing Earnin to comply with regulatory burdens intended to regulate creditors that charge traditional finance charges provides no additional benefit to consumers.

B. Earnin Assumes the Risk of Non-Payment

Earnin's service also differs from traditional sources of consumer liquidity in which the provider has a legal right to collect repayment from the borrower. For traditional loan products, if a borrower defaults on payment, the creditor retains the right to go after the borrower's other assets. For example, if a lender obtains the right to collect repayment from a consumer's account through a post-dated check and the borrower defaults, the lender has the right to enforce the debt against the borrower generally (including accessing a borrower's other assets).

In contrast with traditional lenders, Earnin assumes the risk of non-payment associated with its advances. If an employer does not deposit a worker's wages or the worker does not otherwise repay the advance, Earnin does not require repayment. Furthermore, Earnin has no right to collect from its users in the event that a user fails to repay a prior advance. If a user's account does not have funds sufficient to cover an advance and does not otherwise repay that advance, Earnin does not sell the worker's debt, does not seek to offset the debt based on collateral, and has no ability to attempt collection from any other assets of the worker. Earnin does not report non-payment to credit reporting agencies, and thus, nonpayment will not affect a worker's credit

history or score. While a non-repaying worker will be barred from Earnin's service until he or she repays any outstanding advance, that worker will suffer no other adverse consequences. As such, it is difficult to see any potential consumer harm resulting from Earnin's service.

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C. Earnin's Service *Benefits* Financially Vulnerable Consumers

With no finance charge and no right to repayment, Earnin's service is far removed from the small dollar, high-cost loans that are subject to state licensing regimes as well as Federal regulations that govern the extension of credit to consumers. Earnin provides a tool that consumers can use to get immediate access to money that they have already earned. This enables users to avoid higher cost alternatives such as bank overdraft services, biller later fees, and high-cost shorter term loans. Most borrowers use payday loans to cover regular living expenses, not unexpected emergencies.³² Having control of their earnings means that workers no longer have to use exploitative and abusive alternatives in order to pay their bills.

In keeping with the CFPB's published consumer protection principles related to the development of faster payment systems,³³ Earnin's service puts workers in control of their wages once they are earned. There is no reason why workers should be subject to an arbitrary biweekly payroll; Earnin empowers workers to access their money when they need it. As such, the restrictions set out in existing laws that regulate *loans* make no sense in the context of Earnin's service, and application of existing state or federal loan regulations to Earnin would, in no way, prevent or protect against any kind of consumer harm.

V. The Truth-in-Lending Act and Its Two Primary Implementing Regulations, Regulation Z and the PayDay Rule, Do Not Apply To Services Like The One Offered By Earnin

The Earnin service is very different from the types of consumer credit products regulated at Federal level. A number of federal laws and regulations touch the consumer lending industry, including the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and Regulation E., the regulation, promulgated under the Electronic Funds Transfer Act. The principal Federal law that governs the consumer credit business in the United States is the Truth-In-Lending-Act or TILA. TILA was enacted in 1968 to standardize disclosures related to consumer credit, including disclosures related to the cost of consumer credit. Federal regulators have promulgated two regulations under TILA, Regulation Z and, more recently, the PayDay rule. Earnin's service does

not constitute credit as defined by Regulation Z,³⁴ and it is, as noted above, specifically exempted services like Earnin’s from its Payday Rule.³⁵

A. Earnin’s Service Does Not Fall Within The Scope Of Regulation Z

The obligations under Regulation Z fall principally on what the regulation defines as a creditor. Earnin is not a creditor as defined by Regulation Z.

³² *Payday Lending in America: Who Borrows, Where They Borrow and Why*, 13, Pew Charitable Trusts, July 2012, available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/PewPaydayLendingReportpdf.pdf. ³³

Consumer Protection Principles: CFPB’s Vision of Consumer Protection in New Faster Payment Systems, CFPB, July 9, 2015, http://files.consumerfinance.gov/f/201507_cfpb_consumer-protection-principles.pdf (last visited Sep. 11, 2019). ³⁴ 12 CFR § 1026.2(a)(14). ³⁵ 12 C.F.R. § 1041.3(d)(8).

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The definition of creditor under Regulation Z has two prongs. Under Regulation Z, a “creditor” is “[a] person who regularly extends consumer credit that is *subject to a finance charge or is payable by written agreement in more than four installments* (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.” *Id.* § 1026.2(a)(17)(i) (emphasis added). The regulation defines “finance charge” as “the cost of consumer credit as a dollar amount.” *Id.* § 1026.4(a). “Finance charge” 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.” *Id.*

Earnin does not meet either prong of this definition. Earnin does not require repayment of advances by written agreement in more than four installments. In fact, Earnin does not require users to repay its advances at all. Earnin users can revoke their authorization for Earnin to withdraw funds or can close the accounts to which they previously provided Earnin authorization to make a withdrawal. In neither case, however, can Earnin compel the user to repay an advance. Earnin’s only recourse in the event of nonpayment is to deny a future advance to a user who has not repaid a prior one. Earnin also does not “charge” users “directly or indirectly” for use of its services. Earnin generates revenue based on voluntary payments or “tips” from users. Users are not required to make voluntary payments to obtain services from Earnin, and Earnin users that decide to tip also decide the amount of a tip. A voluntary payment does not constitute a finance charge under Regulation Z.³⁶

B. Application of the CFPB Payday Rule

Earnin's service is also carved out of the definition of a covered product under the Payday Rule³⁷. The rule defines "no-cost advances" as follows:

Advances of funds that constitute credit if the consumer is not required to pay any charge or fee to be eligible to receive or in return for receiving the advance, provided that before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties:

- (ii) That it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and
- (ii) That, with respect to the amount advanced to the consumer, will not engage in any debt collection activities if the advance is not deducted directly from wages or otherwise repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.³⁸

Earnin's services fit comfortably within this safe harbor, as Earnin provides advances for free, without a legal agreement for repayment, or any recourse (other than to prevent the user from

³⁶ See Adam Levitin, *What is 'Credit'? AfterPay, Earnin, and ISAs* (July 16, 2019), available at <https://www.creditslips.org/creditslips/2019/07/what-is-credit-afterpay-earnin-and-isas.html>. ³⁷

12 C.F.R. § 1041.3(d)(8). ³⁸ 12 C.F.R. § 1041.3(d)(8).

accessing Earnin's services in the future). 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. In promulgating the Payday Rule, the CFPB noted its discussions with non-recourse liquidity providers like Earnin and explained that these companies

are providing products or services that allow consumers to draw on wages they have earned but not yet been paid. Some of these companies are providing advances of funds and are doing so without charging any fees or finance charges, for instance by relying on voluntary

tips.... After further weighing the potential benefits to consumers of this relatively new approach, the Bureau has decided to create a specific exclusion in § 1041.3(d)(8) of the final rule to apply to no-cost advances, regardless of whether they are offered by an employer or its business partner....The exclusion in § 1041.3(d)(8) is thus designed to apply to programs relying solely on a “tips” model or otherwise providing emergency assistance at no cost to consumers.³⁹

The CFPB concluded that such services are “likely to benefit consumers” and are “unlikely to lead to the risks and harms [associated with traditional payday loans.]”⁴⁰

VI. State Consumer Lending Regimes Do Not Apply To The Earnin Service Either

Where Federal law as it applies to consumer lending is relatively straightforward, state law is quite complex. State consumer laws, particularly the state 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 particular state, vary on a number of dimensions. Nevertheless, Earnin’s service does not trigger state lending laws, including laws that regulate short-term or payday loans.

All states other than Arkansas require firms that want to make certain types of loans to obtain lending licenses. Although the precise triggers vary from state-to-state, state licensing laws can be grouped as follows: (1) states that require firms to obtain licenses to extend any loan to a consumer (California,⁴¹ Louisiana,⁴² Maryland,⁴³ Minnesota,⁴⁴ Missouri,⁴⁵ North Dakota,⁴⁶ Oregon,⁴⁷ Rhode

³⁹ Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans (Oct. 5, 2017), available at https://www.consumerfinance.gov/documents/5666/201710_cfpb_final-rule_payday-loans-rule.pdf. ⁴⁰ *Id.* ⁴¹ Anyone who makes consumer loans must be licensed. Cal. Fin. Code §§ 22009; 22100. ⁴² Anyone who makes consumer loans must be licensed. La. Rev. Stat. § 9:3557(A). ⁴³ Anyone who makes consumer loans must be licensed. Md. Code, Fin. Inst. §§ 12-302, 314; Md. Code Ann., Com. Law § 12-30(e)(1). ⁴⁴ Anyone who makes loans of less than \$1000 that require at least 25% of the loan to be paid with 60 days must be licensed. Minn. Stat. § 47.601. ⁴⁵ Anyone who makes loans must be licensed. Mo. Stat. §§ 367.110; 408.500(1). ⁴⁶ Anyone who makes loans must be licensed. N.D. Cent.

Code § 13-04.1-02.⁴⁷ Anyone who makes consumer loans of under \$50,000 must be licensed. Or. Rev. Stat. §§ 725.010(2); 725.045(1)(a).

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Island,⁴⁸ South Dakota,⁴⁹ Washington,⁵⁰ and Wisconsin⁵¹); (2) states that require firms to obtain licenses to extend loans that are subject to a finance charge or payable in installments (Idaho,⁵² Indiana,⁵³ Mississippi,⁵⁴ Nevada,⁵⁵ and Utah⁵⁶); and (3) states that require firms to obtain licenses in order to offer loans at a rate above or a size below a particular threshold (Alabama,⁵⁷ Alaska,⁵⁸ Arizona,⁵⁹ Colorado,⁶⁰ Connecticut,⁶¹ Delaware,⁶² Florida,⁶³ Georgia,⁶⁴ Hawaii,⁶⁵ Illinois,⁶⁶ Iowa,⁶⁷ Kansas,⁶⁸ Kentucky,⁶⁹ Maine,⁷⁰ Massachusetts,⁷¹ Michigan,⁷² Montana,⁷³ Nebraska,⁷⁴ New Hampshire,⁷⁵ New Jersey,⁷⁶ New Mexico,⁷⁷ New York,⁷⁸ North Carolina,⁷⁹ Ohio,⁸⁰

⁴⁸ Anyone who makes loans must be licensed. 19 R.I. Gen. Laws Ann. § 19-14-2(a). ⁴⁹ Anyone who makes loans must be licensed. S.D. Codified Laws § 54-4-52. ⁵⁰ Anyone who makes loans under \$700 for less than 45 days must be licensed. Wash. Rev. Code § 31.45.010(21); 31.45.073. Anyone who makes loans above \$700 or for more than 45 days for a fee must be licensed. Wash. Rev. Code § 31.04.035(1). ⁵¹ Anyone who makes a “payday” loan must be licensed. Wis. Stat. §§ 138.14(2). The statute does not set out minimum amounts or interest rates to be considered a “payday” loan. “Consumer” loans with an APR above 18% are also regulated. Wis. Stat. § 138.09(1m)(a). ⁵² *E.g.*, loans payable in installments or subject to a finance charge are regulated. Idaho Code § 28-41-301(37). ⁵³ Loans above \$550 that are payable in installments or subject to a finance charge are regulated. Ind. Code §§ 24-4.5-3-502(3); 24-4.5-1-301.5(9). ⁵⁴ Anyone who makes loans payable in installments must be licensed. Miss. Code §§ 75-67-105(1); 75-67-103(b). ⁵⁵ Anyone who makes installment loans must be licensed. Nev. Rev. Stat. § 675.060(1). ⁵⁶ *E.g.*, loans payable in installments or subject to a finance charge are regulated. Utah Code Ann. §§ 70C-1-201; 70C-1-302(3)(a)(i). ⁵⁷ *E.g.*, loans under \$1,500 with an APR above 8% are regulated. Ala. Code §§ 5-18-4(a); 8-8-1. ⁵⁸ *E.g.*, loans under \$25,000 with an APR above 10% are regulated. Alaska Stat. §§ 06.20.010; 45.45.010(b). ⁵⁹ *E.g.*, loans under \$10,000 that have a finance charge are regulated. Ariz. Rev. Stat. § 6-601. ⁶⁰ *E.g.*, loans with an APR above 12%

are regulated. Colo. Stat. § 5-1-301(47).⁶¹ *E.g.*, loans under \$15,000 with an APR above 12% are regulated. Conn. Gen. Stat. §§ 36a-555(11); 36a-556(a).⁶² *E.g.*, loans under \$1,000 that charge interest or fees are regulated. Del. Code Ann. tit. 5, §§ 2227(7); 2202(a).⁶³ *E.g.*, loans under \$25,000 with an APR above 18% are regulated. Fla. Stat. §§ 516.02(1); 516.01(2).⁶⁴ *E.g.*, loans under \$3,000 with an APR above 8% are regulated. Ga. Code §§ 7-3-4; 7-3-6.⁶⁵ *E.g.*, loans with an APR above 14% are regulated. Haw. Rev. Stat. §§ 412:9-100; 412:9-101; 412:9-302.⁶⁶ *E.g.*, loans under \$40,000 with an APR above 36% are regulated. 205 Ill. Comp. Stat. §§ 670/1; 670/15(a).⁶⁷ *E.g.*, loans with an APR above 21-36%, depending on amount, are regulated. Iowa Code §§ 536.1; 536.13.⁶⁸ *E.g.*, loans with an APR above 12% are regulated. Kan. Stat. §§ 16a-2-301; 16a-1-301(46).⁶⁹ *E.g.*, loans under \$15,000 with an APR above 24-36%, depending on amount, are regulated. Ky. Rev. Stat. §§ 286.4-420; 286.4-530.⁷⁰ *E.g.*, loans with an APR above 12.25% are regulated. Me. Rev. Stat. tit. 9-A, § 2-301(40).⁷¹ *E.g.*, loans under \$6,000 with an APR above 12% are regulated. Mass. Gen. Laws ch. 140, § 96.⁷² *E.g.*, loans with an APR above 25% are regulated. Mich. Comp. Laws. § 445.1854(1).⁷³ *E.g.*, loans with an APR above 36% are regulated. Mont. Code Ann. §§ 32-5-103(1); 32-5-301(1).⁷⁴ *E.g.*, loans under \$1,000 with an APR above 24% are regulated. Neb. Rev. Stat. §§ 45-1004(1); 45-1024(1).⁷⁵ *E.g.*, loans under \$10,000 with an APR above 10% are regulated. N.H. Rev. Stat. §§ 399-A:2(I); 399-A:1(XX).⁷⁶ *E.g.*, loans under \$50,000 with an APR above 16% are regulated. N.J.S.A. §§ 17:11C-3; 17:11C-2.⁷⁷ *E.g.*, loans under \$5,000 with an APR above 15% are regulated. N.M. Stat. § 58-15-3(A); N.M.A.C. 12.18.8.8A.⁷⁸ *E.g.*, loans under \$25,000 with an APR above 16% are regulated. NY Banking L. §§ 340; 14-a(1).⁷⁹ *E.g.*, loans under \$25,000 with an APR above 8% are regulated. N.C. Gen Stat. §§ 53-166(a); 24-1, 24-1.1⁸⁰ *E.g.*, loans under \$1,000 with an APR above 28% are regulated. Ohio Rev. Code §§ 1321.35; 1321.36.

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Oklahoma,⁸¹ Pennsylvania,⁸² South Carolina,⁸³ Texas,⁸⁴ Vermont,⁸⁵ Virginia,⁸⁶ Washington, D.C.,⁸⁷ West Virginia,⁸⁸ and Wyoming⁸⁹). The Volunteer State, Tennessee, provides one other variation. Tennessee only requires firms to obtain a license if they provide short term consumer loans on open ended terms.⁹⁰ 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.⁹¹

As with Regulation Z and the Payday Rule, these statutes do not apply to services offered on the Earnin model. The common element in state lending statutes is the concept of a loan. A loan is a

specific type of contract in which one party, the borrower, obtains a sum of money or some other property in exchange for a contractual commitment to repay the funds lent (or return the property) plus a fee that is a condition for access to the loan.⁹² Earnin's service does not include of these elements. Earnin's users do not oblige themselves to repay the advances provided by Earnin, and Earnin does not condition access to an advance on the payment of a fee. Nor Earnin does hold checks and later cash them. And although Earnin obtains an authorization to debit its users'

⁸¹ *E.g.*, loans with an APR above 10% are regulated. Okla. Stat. tit. 14A §§ 3-501(1); 3-502(1). ⁸² *E.g.*, loans under \$25,000 with an APR above 9.5% are regulated. 7 Pa. Stat. §§ 6203(A); 6213(E). ⁸³ *E.g.*, loans under \$150 with an APR above 28% are regulated; loans between \$150 and \$600 with an APR above 25% are regulated; and loans between \$600; and \$1000 with an APR above 18% are regulated. S.C. Code §§ 34-29-20(a); 34-29-140. ⁸⁴ *E.g.*, loans with an APR above 10% are regulated. Tex. Fin. Code §. § 342.004(b); 342.051(a)(1). ⁸⁵ *E.g.*, loans with an APR above 18% are regulated. Vt. Stat. tit. 8, § 2201(a)(1); Vt. Stat. tit. 9, § 41a(b)(1). ⁸⁶ *E.g.*, loans with an APR above 12% are regulated. Va. Code §§ 6.2-303(A); 6.2-1501(A). ⁸⁷ *E.g.*, loans with an APR above 6% are regulated. D.C. Code § 26-901(a). ⁸⁸ *E.g.*, loans with an APR above 18% are regulated. W. Va. Code §§ 46A-4-101; 46A-1-102(38). ⁸⁹ *E.g.*, loans with an APR above 10% are regulated. Wyo. Stat. Ann. §§ 40-14-341(a); 40-14-342(a). ⁹⁰ Anyone who makes loans under an open-ended credit plan must be licensed. Tenn. Code §§ 45-12-102(5); 45-12-103(a). ⁹¹ *See*

Alaska Stat. § 6-50-10 *et seq.*; Cal. Fin. Code § 23000, *et seq.*; Colo. Rev. Stat. § 5-3.1-101 *et seq.*; D.C. Code § 26-301 *et seq.*; Fla. Stat. § 560.402, *et seq.*; Haw. Rev. Stat. § 480F-1 *et seq.*; Idaho Code § 28-46-4 *et seq.*; 815 ILCS 122 § 1 *et seq.*; Iowa Code § 533D.1 *et seq.*; KY Rev. Stat. § 286.9.020 *et seq.*; Mich. Comp. Laws § 487.2121 *et seq.*; Miss. Code Ann. § 75-67-501 *et seq.*; Mont. Code § 31-1-701 *et seq.*; Neb. Rev. Stat. § 45-901 *et seq.*; Nev. Rev. Stat. § 604A; N.D. Cent. Code § 13-08-01 *et seq.*; 59 Okla. Stat. tit. 59 § 59-3101 *et seq.*; Or. Rev. Stat. § 725A.010 *et seq.*; 63 P.S. Ann. § 2301 *et seq.*; S.C. Code Ann. § 34-39-110 *et seq.*; Tenn. Code Ann. § 45-17-101 *et seq.*; 4 Tex. Fin. Code § 341.002; 7 Tex. Admin. Code § 83.83 *et seq.*; Utah Code § 7-23-101 *et seq.*; Va. Code § 6.2-1800-29; Wash. Rev. Code § 31.45.010 *et seq.*; Wis. Stat. § 138.14 *et seq.* (while Wisconsin's statute does not state specifically that consideration is required, Guidance from the Wisconsin Department of Financial Institutions indicates that the statute applies to "typically a very high cost form of credit" *See* Wisconsin Guide to Payday Loans, Jan. 2019,

https://www.wdfi.org/_resources/indexed/site/fi/lfs/pdl/dfi-lfs-001P.pdf); Wyo. Stat. Ann. § 40-14-362 *et seq.* ⁹² *See*,

e.g., Black's Law Dictionary, 936 (6th ed.1990) (defining a "loan" as "[a]nything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use."); *Security Escrow Corp. v. State Taxation and Revenue Dept.*, 107 N.M. 540, 544 (N.M.App.1988) (holding that there are four elements necessary to create a loan: "(1) a principal sum; (2) a placing of the sum with a borrower; (3) an agreement that interest is to be paid; and (4) a recognition by the receiver of money of his liability for return of the principal amount with accrued interest"); *State ex rel. O'Connell v. PUD 1 of Klickitat County*, 79 Wash.2d 237, 241 (1971) (defining a "loan" as: "an advancement of money or other personal property to a person, under a contract or stipulation, express or implied, whereby the person to whom the advancement is made binds himself to repay it at

some future time, together with such other sum as may be agreed upon for the use of the money or thing advanced”); *Sw. Concrete Products v. Gosh Constr. Corp.*, 51 Cal. 3d 701 , 705 (1990) (a “loan of money is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount”); *Rodman v. Munson*, 1852 WL 5230 (N.Y. Sup. Ct. 1852) (“[a] loan is said to be that which is furnished for temporary use, with a condition that it shall be returned, or its equivalent, with a compensation for the use.”).

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accounts, users can revoke that authorization after obtaining an advance. In the event that the account does not contain funds sufficient to cover the amount that Earnin is authorized to withdraw, Earnin cannot require the user to pay back the advance, and if its effort to obtain funds from a user triggers an overdraft, it attempts to reimburse the user for that overdraft automatically.

VII. Earnin’s Service Is Far More Consumer Friendly Than The Alternative Sources Of Liquidity Available To Consumers

Although the Earnin service does not fit within the regulatory framework for consumer lending at the Federal or state level, the terms on which it extends liquidity to consumers compare quite favorably to the services to which consumers, including consumers in New York, have access to short term liquidity. The discussion above focused on state lending states, but consumers in New York and elsewhere have access to consumer loans and other liquidity services provided by banks based in New York and elsewhere as well as pawn loans. A comparison of the permitted charges in New York for various financial products intended to provide consumers with liquidity is

attached as Appendix A. **a. Bank Overdraft Fees Are Essentially Unregulated By New York**

As noted above, many people rely on bank overdraft services when they do not have enough money available to pay their bills.⁹³ Fees associated with overdrawing a bank account are subject to almost no regulation. Most states do not regulate depository service charges, such as overdraft fees or other charges associated with late payments or insufficient funds.⁹⁴ Federal laws similarly do not establish maximum amounts for fees that may be charged by depository institutions.⁹⁵

For example, existing New York law does not set a cap on the maximum amount that a bank may charge a consumer that writes a check or uses a debit card but does not have funds available to cover the associated withdrawal.⁹⁶ Rather, New York law commits the decision to set a fee to their “discretion, according to sound banking judgment and safe and sound banking principles.”⁹⁷ New York law does cap the fee that can be charged for dishonoring a check at \$10.⁹⁸ Accordingly, for banks serving customers in New York, those that are federally chartered are not subject to any fee limitations⁹⁹ and local banks are only limited in what they can charge to return a bad check.

⁹³ See *supra* note 12 and accompanying text, noting that over \$34 billion dollars was spent on overdraft fees in the last year. ⁹⁴ 50 Consumer Fin. L.Q. Rep. 32. ⁹⁵ See Office of the Comptroller of Currency, U.S. Treasury Dept., Answers about Overdraft/NSF Fees and Protection (July 2017), <https://www.helpwithmybank.gov/get-answers/bank-accounts/overdraft-fees-and-protection/faq-banking-overdraft-05.html>. ⁹⁶ N.Y. Banking L. §§ 108(8)(a); 235-c (the superintendent may regulate the maximum charge for fees related to overdrawing accounts and returned checks). ⁹⁷ N.Y. Comp. Codes R. & Regs. tit. 3, § 32.1(a) (“A banking institution shall be deemed to have reasonably established such charges if it considered the following factors, among others: (1) the cost incurred by the banking institution plus a profit margin, in providing the service; (2) the deterrence of misuse by customers of banking services; (3) the enhancement of the competitive position of the banking institution in accordance with its marketing strategy; and (4) the maintenance of the safety and soundness of the banking institution.”) ⁹⁸ *Id.* at § 32.1(b). ⁹⁹ See *Jacobs v. Citibank, N.A.*, 61 N.Y.2d 869 (1984).

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Notably, New York has imposed no maximum fees on overdrafts, even though New York courts have held that “[g]enerally, the relationship between a bank and its customer is that of debtor and creditor.”¹⁰⁰ And, pursuant to New York common law, “the payment of an overdraft constitutes a loan by the bank to the drawer of the overdraft, a loan for which the drawer is liable.”¹⁰¹ Rather, New York Courts have instead held that “overdraft charges are not interest” within the meaning of the state’s usury statutes, because an additional payment for an account overdraft is a contingency within the borrower’s control.¹⁰² Courts in other states have held similarly.¹⁰³ Likewise, overdraft fees, and even excessive overdraft fees, are typically not considered “interest” under the National Bank Act.¹⁰⁴

b. New York Consumers Have Access To Revolving Credit On Terms Not Regulated By New York

Americans frequently utilize revolving credit to increase their access to liquidity. As of 2019, Americans had over a trillion dollars in credit card debt, and the average American has a credit card balance of \$4,293.¹⁰⁵

Under federal law, revolving credit providers may charge interest per the laws of the state in which they are based. They may also charge fees, such as participation fees, up to 25 percent of the credit limit in effect when the account was opened and avoidable penalty fees (late payment, over-limit,

returned-payment, or other fees the consumer may avoid) not to exceed \$28 for a first offense and \$39 for repeated offenses.¹⁰⁶ Revolving credit providers may also charge users a fee for obtaining a cash advance on a credit line.¹⁰⁷

There is no federal cap on interest rates. National banks are therefore permitted to charge interest on revolving credit up to the highest rate permitted by their home state.¹⁰⁸ Accordingly, some revolving credit products have interest rates of nearly 80 percent per annum, in addition to the other permissible fees.¹⁰⁹ For banks based in New York that lend or advance money through revolving credit, the bank may charge interest per agreement, an annual fee, an over-limit charge

¹⁰⁰ *The Canandaigua Nat. Bank & Tr. Co. v. Palmer*, 969 N.Y.S.2d 801 (2013). ¹⁰¹ *U.S. Tr. Co. of New York v. McSweeney*, 457 N.Y.S.2d 276, 278 (1982). ¹⁰² *Feld v. Apple Bank for Sav.*, 984 N.Y.S.2d 319, 323 (2014). ¹⁰³ See, e.g., *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041, 1054 (S.D. Fla. 1998), *aff'd*, 205 F.3d 1358 (11th Cir. 2000) (holding that overdraft fees do not constitute interest under usury statutes); *Watson v. First Nat'l Bank*, No. 11-01-00098-CV, 2001 WL 34375782, at *3 (Tex. App. Aug. 2, 2001) (NSF fees cannot constitute usurious interest because their imposition is controlled by the depositor's actions). ¹⁰⁴ See 66 Fed. Reg. 8178, 8180 (Jan. 30, 2001); Office of Comptroller of the Currency Interpretive Letter 1082 (May 17, 2007); *Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 136 (1st Cir. 2019) (not usurious interest where Bank charged a \$35 overdraft fee, then if the account remains overdrawn it charged a “‘Sustained Overdraft Fee’ three times: \$30 four business days after the overdraft, another \$30 after seven business days, and a final \$30 after ten business days.”) ¹⁰⁵ Jessica Dickler, Consumer debt hits \$4 trillion, CNBC (Feb. 21, 2019) <https://www.cnbc.com/2019/02/21/consumer-debt-hits-4-trillion.html>. ¹⁰⁶ 12 C.F.R. § 1026.52. ¹⁰⁷ 12 C.F.R. § 1026.52(a)(2)(ii) (limitations on fees do not apply to “Fees that the consumer is not required to pay with respect to the account.”) ¹⁰⁸ *Marquette Nat. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). ¹⁰⁹ Connie Prater, Issuer of 79.9% interest rate credit card defends its product, Creditcards.com (Dec. 18, 2009), <https://www.creditcards.com/credit-card-news/first-premier-79-rate-fees-credit-card-1265.php> (last visited Sep. 11, 2019).

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once per billing cycle, and a returned payment charge.¹¹⁰ Although New York chartered and based banks are exempt from the civil usury cap of 16 percent, they are subject to the 25 percent criminal usury cap.¹¹¹ Other states, however, allow banks to set whatever interest rate they choose, and those banks, per the Supreme Court, are permitted to lend to New York consumers at rates governed by those state’s laws.¹¹²

Earnin's service also presents far fewer risks than revolving credit accounts. Earnin charges no fees for its services, let alone the interest, regular fees, and penalty fees that revolving credit lines charge. If a user does not pay Earnin back, Earnin's sole remedy is to deny future services to that user. The user is not subject to late fees or other penalty fees. Earnin alone bears the risk of loss. Earnin, as noted above, also reimburses users for the overdrafts that are coincident with its efforts to recover a previously authorized withdrawal. Unlike a revolving credit lender, Earnin does not subject its users to the risk of accumulating balances that they cannot later payoff. Users that receive an advance and do not pay it back simply cannot obtain another one.

c. Pawn Loans Are Subject To A Regulatory Regime Different Than Other Loan Services

In a typical pawn transaction, a consumer gives property to a pawnbroker in exchange for an amount of money. The consumer does not have a legal obligation to repay the money received from the pawnbroker, but the consumer can only regain possession of the property by repaying the pawnbroker a higher amount later. Pawn loans are generally regulated through regimes different than those that cover other types of consumer loans, including often being exempted from usury ceilings.¹¹³ Pawn loans are also exempt from the CFPB's Payday Rule.¹¹⁴

In Iowa, Idaho, Massachusetts, Maryland, Missouri, North Dakota, Nebraska, New Hampshire, South Dakota, Utah, and West Virginia, pawn loans do not appear to be subject to any interest rate ceiling. Other states are more permissive in regulating interest rates for pawnshop loans, with the effective monthly interest rate ceiling for a typical pawn shop loan ranging from 24 to 300% per annum.¹¹⁵ Such interest rates are often well above state usury laws. For example, in New York, pawn loan brokers¹¹⁶ are exempt from New York's licensed lenders statute¹¹⁷ and the usury limit that applies to other consumer loans.¹¹⁸ Instead, pawn brokers may charge an interest rate of 4

¹¹⁰ N.Y. Banking L. §108(5)(e). ¹¹¹ N.Y. Penal Law § 190.40. ¹¹² See, e.g., VA ST §§ 6.2-312(A); 6.2-313(A). ¹¹³ See

Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System And Its Challenge To Current Thinking About The Role Of Usury Laws In Today's Society*, 51 S.C.

L. REV. 589, 598 (2000). ¹¹⁴ 12 C.F.R. § 1041.3(d)(5). ¹¹⁵ Joshua D. Shackman & Glen Tenney, *The Effect of*

Government Regulations on the Supply of Pawn Loans, 30 J. OF FIN. SERVS. RES., 69, 80-82 (2006). ¹¹⁶ Legally

called, "collateral loan broker[s]" and defined as "any person...loaning money on deposit or pledge of personal

property..." See N.Y. Gen. Bus. L. § 52. ¹¹⁷ N.Y. Banking L. § 340. ¹¹⁸ N.Y. Banking L. § 14-a(1); NY GOB § 5-501.

It is also permissible for banks in New York to make advances of money, repayable on demand, of up to \$5,000 made upon title or negotiable instruments pledged as collateral security for repayment, and *collect as compensation any sum agreed to by the parties*. N.Y. Banking L. § 108(3).

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percent per month, or any fraction of a month (48 percent per annum),¹¹⁹ which is *three times greater* than the civil usury rate that consumer lenders may charge in New York.¹²⁰

The most notable distinction between pawn loans and traditional consumer loans, is that pawnshop loans are non-recourse. If a borrower who pawns his or her property in exchange for a loan fails to repay the obligation, the only consequence is that the borrower cannot thereafter regain possession of his or her property. Accordingly, a pawn loan does not cause a borrower to become personally liable for a debt, and is therefore not subject to the same risks as other loans, including the risk of defaulting, re-borrowing, or not being able to meet other financial obligations.¹²¹ This rationale likely explains why pawn loans are not subject to the more stringent regulatory requirements for consumer loans.

Earnin's services presents even less risk of harm to consumers than pawn loans. Earnin does not require workers to pledge their paycheck or turn over any other physical item or title to property in exchange for advanced access to the worker's wages; as explained above, Earnin alone bears the risk of non-payment. As such, the rationale that led to more lenient regulation of pawn loans, should apply with even greater force to Earnin's services.

VIII. Voluntary Tips Are Not "Interest"

Even if a state or federal regulator were to take the position that Earnin's Advances constitute liquidity that can be regulated under one of the enumerated frameworks discussed above, Earnin's receipt of "tips" should not be viewed as "interest" subject to state usury statutes. As the CFPB has recognized, voluntary tips are not "fees or finance charges."¹²² It similarly makes little sense to attempt to categorize a voluntary payment—that is in no way a condition of access to the advancement of funds—as "interest" subject to usury statutes.

The notion that payments within a borrower's control are not usurious has long been legally recognized. There is a significant body of case law establishing that "fees imposed as a result of [an avoidable] contingency are not considered interest in divining a violation of the usury laws."¹²³ Where payment or non-payment of a fee is completely within the borrower's control, the payment of such fee is not usurious.¹²⁴ For example, New York courts have held that loan payments that result from contingencies within borrower's control, such as a default interest rate and prepayment interest rate, among others, were not usurious.¹²⁵ The California Supreme Court has similarly held

¹¹⁹ N.Y. Gen. Bus. L. § 46 ¹²⁰ NY Banking L. §§ 340; 14-a(1). ¹²¹ Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans (Oct. 5, 2017), available at https://www.consumerfinance.gov/documents/5666/201710_cfpb_final-rule_payday-loans-rule.pdf. ¹²² Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans (Oct. 5, 2017), available at https://files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf (“Some of these companies are providing advances of funds and are doing so without charging any fees or finance charges, for instance by relying on voluntary tips”). ¹²³ *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041, 1054 (S.D. Fla. 1998), *aff’d*, 205 F.3d 1358 (11th Cir. 2000) (holding that overdraft fees do not constitute interest under usury statutes); *see also* 28 A.L.R.3d 449 at § 3[a] (Originally published in 1969) (describing extensive number of cases that have found additional charges in the event of default (that would otherwise exceed the usury rate) were not usurious interest). ¹²⁴ *Video Trax*, 33 F. Supp. 2d at 1054; *see also* *Lloyd v. Scott*, 29 U.S. 205, 226 (1830). ¹²⁵ *See, e.g., HGT Capital LLC v. HDS Int’l Corp.*, 60 Misc. 3d 1225(A) (N.Y. Sup. Ct. 2018). *See also* *Feld v. Apple Bank for Sav.*, 984 N.Y.S.2d 319, 323 (2014) (holding overdraft fees were not usurious because they were a

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“that a debtor by voluntary act cannot render an otherwise valid transaction usurious.”¹²⁶ Many other states hold similarly.¹²⁷

This usury exemption has also been recognized more generally in allowing parties to contract for an unknown return that may result in a profit greater than the highest permissible rate of interest, so long as the transaction is not a subterfuge to charge more than what is permitted. The First Restatement of Contracts explains the distinction between conditional and unconditional fees:

A promise, made as the consideration for a loan or for extending the maturity of a pecuniary debt, to give the creditor a greater profit than the highest permissible rate of interest upon the occurrence of a condition, is not usurious if the repayment promised on failure of the condition to occur is materially less than the amount of the loan or debt with the highest permissible interest, unless a transaction is given this form as a colorable device to obtain a greater profit than is permissible.¹²⁸

For example, under California common law, this exception has come to be known as the “Interest Contingency Rule.” For an agreement to be usurious, it “must in its inception require a payment of usury” and “subsequent events do not render a legal contract usurious.”¹²⁹ Interest will only be usurious “when it is ‘absolutely repayable by the borrower.’”¹³⁰ Typically, this rule has come up in

cases where either in addition to, or in lieu of, charging interest, a lender seeks a share of profits for a related transaction.¹³¹ Courts have generally rejected borrower attempts to characterize profits that banks generate on such transactions as usurious.¹³²

In the case of Earnin's services, Earnin is not entitled to payment of a tip, or to repayment of a wage acceleration. It is entirely within the worker's control whether to pay Earnin a tip or to even repay the wage acceleration. Such control is no subterfuge. For example, a 2019 data analysis of Earnin users who have accessed the Earnin app in New York showed that such users have not left a tip on more than 20 percent of their transactions. Earnin's analysis has also showed that nearly two-thirds of Earnin users have opted out of tipping at least once. Every time Earnin allows a

contingency within borrower's control). *But see, e.g., LG Capital Funding, LLC v. PositiveID Corp.*, No. 17-CV-1297-NGG-SJB, 2019 WL 3437973, at *11 (E.D.N.Y. July 29, 2019) (noting that though it is unsettled, the bulk of authority does not view default interest rates as being interest rates subject to criminal usury in New York).¹²⁶ *Sw. Concrete*

Prod. v. Gosh Constr. Corp., 51 Cal. 3d 701, 706 (1990) (holding that late payment fees were not usurious)¹²⁷ *See,*

e.g., Sci. Prod. v. Cyto Med. Lab., Inc., 457 F. Supp. 1373, 1379 (D. Conn. 1978) ("A debtor may not, by his voluntary act, render a transaction usurious which, but for such circumstances, would be entirely free from a claim of usury");

Union Bank v. Kruger, 1 Wash. App. 622, 626 (1969) ("when the contingency, upon which the excessive interest comes into existence, is solely within the borrower's control, and not the lender's, the transaction is not usurious");

United Am. Life Ins. Co. v. Willey, 21 Utah 2d 279, 282 (1968) ("If there is a promise to pay a contingent sum which would make the agreement usurious, it still would not be usurious if the contingency is one which is under the control of the borrower.")¹²⁸ Restatement (First) of Contracts § 527 (1932)¹²⁹ *WRI Opportunity Loans II, LLC v. Cooper*, 154

Cal. App. 4th 525, 533 (2007).¹³⁰ *Id.* at 534. ¹³¹ *Id.* at 534-35. ¹³² *Id.*; and see *Adar Bays, LLC v. GeneSYS ID, Inc.*, 341

F. Supp. 3d 339, 354–56 (S.D.N.Y. 2018) (holding that discount on converted stock was too uncertain at time of contracting to be included as "interest" for determining whether a loan was usurious).

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worker to accelerate his or her wages, Earnin faces a real risk that it will not receive any payment for its services.

Earnin bears both the risk that it will receive no additional payment whatsoever for any transaction, and the risk that it will not be paid back at all, as the worker could, for example: not get paid; not get paid in the account Earnin has access to withdraw from; withdraw consent for Earnin to recoup the wages advanced from its account; or close the bank account entirely. In such cases, Earnin would not receive any payment whatsoever for the funds extended or any tip, and Earnin would have no legal or contractual claim to any amount. Tips received from users are not

interest, and under well-established law in New York and elsewhere, they should not be characterized as usurious.

IX. The CFPB and Other Regulators Have Other Regulatory Authority Over Earnin

Although federal and state laws regulating loans do not apply to Earnin, the CFPB and other regulators maintain significant regulatory oversight over Earnin's service. As a provider of a consumer-facing financial product, Earnin fully complies with all applicable laws—many of which are enforced by the CFPB. Earnin complies with the Gramm-Leach-Bliley Act¹³³, having adopted a comprehensive information security program and ensuring that sensitive consumer data is properly safeguarded. Information is delivered electronically in accordance with the Electronic Signatures in Global and National Commerce Act¹³⁴, and ACH transactions comport with the Electronic Funds Transfer Act¹³⁵ and Regulation E¹³⁶.

Earnin also complies with the prohibition against Unfair, Deceptive, or Abusive Acts or Practices (“UDAAP”). Earnin's service does not cause substantial injury to consumers nor does it mislead consumers, and Earnin does not interfere with consumers' ability to understand a term or condition of the service or take advantage of a consumer's lack of understanding. Earnin's service does not cause financial injury to consumers—to the contrary, Earnin's service increases financial stability and enables workers to avoid risky payday loans and other high-interest financial products. Accordingly, consumers find the service useful; so useful, in fact, that many are willing to voluntarily tip the company for its service. The service fills an important consumer need and Earnin's employees have encouraged, and continue to encourage, friends and family to use the service.

In addition, Earnin provides clear and conspicuous disclosures to consumers about the service and maintains complete transparency regarding the terms and costs of the service. Moreover, the service's success is tied to the consumer's ability to repay the advance—Earnin does not benefit if a consumer cannot repay. Earnin and consumers' interests are aligned; this is not a situation where a company seeks to capitalize on a consumer's lack of understanding or naiveté.

Finally, and perhaps most importantly, Earnin gives its users the benefit of the doubt when issues arise. Earnin has a Net Promoter Score that is among the highest in the financial services

¹³³ Pub. L. 106-102, 113 Stat. 1338 (1999).

¹³⁴ 15 U.S.C. § 7001 *et seq.* ¹³⁵ 15 U.S.C.

§§ 1683 *et seq.* ¹³⁶ 12 C.F.R. 1005.1 *et seq.*

industry, and it has received only a small handful of formal consumer complaints over its entire history.

X. Conclusion

As a company devoted to worker empowerment and consumer access to wages, Earnin is simply not the type of company that state and federal consumer lending laws are designed to regulate. While regulators have, and should have, legitimate concerns regarding predatory lending practices and affordability of consumer loans, Earnin's services do not implicate these concerns. Earnin has, in fact, designed a liquidity service that consumers can access without fear of incurring hidden fees or triggering a cycle of toxic debt. Earnin offers consumers the opportunity to access wages on their own terms, giving users the ability to pay bills and meet their other life needs when the bills are due and the needs arise, rather than simply when their employer chooses to pay them.

Appendix A

Comparison of Regulation of Charges for Financial Services in New York

Product: Maximum

Interest Rate:

Regular Fees Permitted:

Avoidable Penalty Fees Permitted: Unlicensed Consumer Lenders:

16 percent per annum.

None in addition to interest rate.

Case law indicates avoidable fees are not “interest.”

\$20 max fee for returned check. Licensed Consumer Lenders:

25 percent per annum.

None in addition to interest rate.

Case law indicates avoidable fees are not “interest.”

\$20 max fee for returned check. Revolving Credit:

Per agreement, up to 25 percent per annum.

Up to 25 percent of credit limit.

\$28 for first offenses, and

\$39 for repeat offenses per billing cycle. Pawn Loans: 48 percent per

annum.

None in addition to interest rate.

Case law indicates avoidable fees are not “interest.” Local Banks and Trust Companies:

16 percent per annum on loans.

Established by contract for cash advances of \$5,000 or less on pledged collateral security.

Fees to secure the loan, or perfect any security, and actual expenditures for any necessary court process.

Case law indicates avoidable fees are not “interest.”

No limit on overdraft or NSF fees.

\$10 max fee for returned check.

Default fees of 5 cents per dollar on installment loans, which must not exceed \$5 per period.

National Banks (chartered outside NY):

Set by state- charter.

Yes. Yes.

Check cashers:

2.11 percent of the amount of the check

None in addition to interest rate.

None.

Earnin’s Services:

No Interest. No Required

Fees.

Voluntary tips accepted.
No Penalties.