

Approval Order

December 30, 2020

I. Overview

Payactiv, Inc. (Payactiv) has submitted to the Bureau of Consumer Financial Protection (Bureau) a formal application (Application)¹ for an approval, pursuant to section 130(f) of the Truth in Lending Act (TILA), under the Policy on the Compliance Assistance Sandbox (CAS Policy).²

Subject to Payactiv's good faith compliance with the terms and conditions contained in the Compliance Assistance Statement of Terms (CAST), dated December 30, 2020, this order (Approval Order) approves of Payactiv's offering or providing the described aspects of its earned wage access (EWA) program set forth in Section IV below (Payactiv EWA Program), as described in the particularized compliance determinations contained in Section V below. This Approval Order, and the particularized compliance determinations herein, are based on the Bureau's assessment of the Application and the factual representations made by Payactiv therein.³

This Approval Order is limited solely to Payactiv's offering or providing the Payactiv EWA Program as set forth in Section IV below. This Approval Order does not apply to Payactiv's offering or providing different aspects of the product or service. In addition, it does not apply to any entities other than Payactiv. This Approval Order is limited to those particularized applications of law (or "particularized compliance determinations") that are contained in Section V below. Moreover, this Approval Order does not constitute the Bureau's endorsement of the Payactiv EWA Program or any other product or service offered or provided by Payactiv.

With this Approval Order, by operation of TILA section 130(f), Payactiv has a safe harbor from liability under TILA and Regulation Z, to the fullest extent permitted by this section, as to any act done or omitted in good faith in conformity with this Approval Order.

II. Purpose of the CAS Policy

The CAS Policy was finalized by the Bureau in September 2019 with a primary purpose of better enabling compliance in the face of regulatory uncertainty. The policy provides for the issuance of approvals that consist of "particularized determinations based on the application of existing

¹ The Application is available on the Bureau's website at https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-request_2020-12.pdf.

² Section 130(f) of TILA is codified at 15 U.S.C. 1640(f). The CAS Policy is available on the Bureau's website at https://files.consumerfinance.gov/f/documents/cfpb_final-policy-on-cas.pdf. In addition, it was published in the Federal Register. See 84 FR 48246 (Sept. 13, 2019).

³ As a condition of the Bureau granting this Approval Order, Payactiv will inform the Bureau of material changes to information included in the Application and of material information indicating that the described aspects of the product or service are not performing as anticipated in the Application.

law to specific factual scenarios.”⁴ More specifically: “Approvals will issue only when they are a rational product of existing law, and they will be expressly limited to the particularized facts and circumstances of the described aspects of the product or service identified by the applicant.”⁵ As a result, subject to good faith compliance and for the period that they are in force, approvals offer a regulated entity that confronts regulatory uncertainty, the assurance that specific aspects of the relevant product or service comply with specific legal requirements.⁶ By facilitating compliance in such circumstances, approvals help further the Bureau’s statutory purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive. Approvals thereby facilitate access and innovation within consumer financial services while also facilitating compliance.

III. Payactiv’s Application

Payactiv’s Application concerns the application of the definition of “credit” under TILA and its implementing regulation, Regulation Z, to Payactiv’s offering or providing the EWA program described in the Application.⁷ The Application is available on the Bureau’s website.⁸

IV. Described Aspects of the Product or Service

This Approval Order applies to the following described aspects of the product or service (collectively, the Payactiv EWA Program),⁹ as represented by Payactiv in its Application:

1. Payactiv contracts with employers to offer and provide to the employer’s employees a suite of financial services, including employee-requested transfers of wages that an employee has already earned (Payactiv EWA Transactions).
2. The amount of each Payactiv EWA Transaction does not exceed the accrued cash value of the wages the employee has earned up to the date and time of the transaction. Payactiv obtains timely information¹⁰ from the employer regarding hours worked and the employee’s applicable wage to determine this amount. Payactiv does not rely upon information provided by the employee, or on estimates or predictions of hours worked or hourly wage rates. Payactiv further limits the available amount of Payactiv EWA

⁴ See 84 FR 48246, 48251 & 48253.

⁵ See *id.* at 48251.

⁶ See *id.* at 48247.

⁷ 15 U.S.C. 1602(f); 12 CFR 1026.2(a)(14).

⁸ See *supra* note 1.

⁹ This Approval Order is based upon Payactiv’s EWA Program, as described in this Section IV, including all of the listed characteristics and none of these characteristics are necessarily dispositive; additional product terms or features that are not described in this Approval Order could change the conclusion that an EWA transaction is not credit.

¹⁰ Some employers provide real time information to Payactiv via API. Others, particularly small businesses, report data to Payactiv on a daily or other periodic basis. In all cases, Payactiv only provides EWA funds to an employee after it receives payroll data from the employee's employer.

Transactions by capping them at no more than 60% of the accrued cash value of the earned wages. The “accrued cash value of the earned wages” are wages that the employee is entitled to receive under State law in the event of separation from the employer for work performed for the employer, but for which the employee has yet to be paid.

3. Employees may choose to access EWA funds using one of the following models: (i) Payactiv Access Freedom, which provides free access to employees who arrange to direct deposit their paycheck to an account as defined under Regulation E¹¹ that is managed, issued, or otherwise facilitated by Payactiv (Payactiv Account); and (ii) Payactiv Access Choice, which charges a non-recurring \$1 fee to employees without a Payactiv Account for access to an unlimited number of Payactiv EWA Transactions¹² during a one-day access window—under this model, Payactiv caps the fees at \$3 for a one-week pay period or \$5 for a bi-weekly pay period in the event an employee accesses EWA funds on multiple days during a single pay period. Under either model, Payactiv delivers EWA funds to an account of the employee’s choice (which may be the Payactiv Account), and Payactiv does not charge additional fees for the delivery of EWA funds to that account.¹³ The employee is not required to make any other payment, voluntary or otherwise, to access EWA funds or use the Payactiv EWA Program, and Payactiv does not solicit or accept tips or any other payments from the employee.

Payactiv does not charge fees to open the Payactiv Account. In addition, the prepaid and payroll cards associated with the Payactiv Account are issued on a major network brand that permits use at multiple, unaffiliated merchants; the Payactiv Account does not charge fees for use of an associated card to buy goods or services at merchants that accept the associated card; the Payactiv Account does not impose any periodic fees; and the Payactiv Account does not charge fees to withdraw cash from in-network ATMs, which have significant distribution.

4. Payactiv recovers the amount of each Payactiv EWA Transaction only through an employer-facilitated payroll deduction from the employee’s next paycheck.¹⁴ In the event of a failed or partial payroll deduction, Payactiv may re-present the deduction in the two subsequent paychecks. Payactiv permits an employee to request cancellation of Payactiv’s re-presentation of failed deductions for free.

¹¹ 12 CFR 1005.2(b).

¹² Subject to the restrictions on the available amount of such transactions as described in paragraph 2 above.

¹³ Payactiv charges an additional \$1.99 to employees who choose to send EWA funds instantly to a Visa card using Visa Direct or who choose to pick up funds in cash at Walmart using Walmart’s Direct2Cash service. Such fees are charged at the transaction stage, not recovered through payroll deduction. To be clear, there is no additional fee to transfer EWA funds to a Payactiv Account and such transfers are always instant. Payactiv makes standard transfers to other accounts using ACH, meaning such transfers are typically available within one or two business days.

¹⁴ Payactiv does not obtain any authorization to transfer funds from a consumer’s account, such as checks or electronic fund transfer authorizations, under the Payactiv EWA Program.

5. In the event of a failed or partial payroll deduction, Payactiv retains no legal or contractual claim or remedy, direct or indirect, against the employee, although Payactiv may refrain from offering the employee additional EWA transactions or impose other limits on the employee's ability to access EWA funds.
6. Payactiv warrants to the employee as part of the contract between the parties that it:
 - a. Will not require the employee to pay any charges or fees in connection with a Payactiv EWA Transaction, other than the \$1 fee under the Payactiv Access Choice model, as described in paragraph 3 above;
 - b. Has no legal or contractual claim or remedy, direct or indirect, against the employee in the event the payroll deduction is insufficient to cover the full amount of a Payactiv EWA Transaction, including no right to take payment from any consumer account; and
 - c. Will not engage in any debt collection activities related to a Payactiv EWA Transaction, place a Payactiv EWA Transaction amount as a debt with or sell it to a third party, or report to a consumer reporting agency concerning a Payactiv EWA Transaction.
7. Payactiv does not directly or indirectly assess the credit risk of individual employees, including through obtaining and reviewing credit reports or credit scores about the individual employees.

V. Particularized Compliance Determinations

The Bureau reaches the following particularized determinations of compliance with respect to the Payactiv EWA Program based on the interpretation and application of existing laws, as described below, to the specific factual circumstances represented by Payactiv as set forth in Section IV above.¹⁵

Payactiv seeks confirmation that the Payactiv EWA Program does not involve the offering or extension of "credit" as defined by section 1026.2(a)(14) of Regulation Z.¹⁶ The Bureau confirms that credit is not offered or extended in the particular circumstances described by Payactiv.

Section 1026.2(a)(14) of Regulation Z defines "credit" as "the right to defer payment of debt or to incur debt and defer its payment." Neither Regulation Z nor TILA define the term "debt."

¹⁵ While the Bureau's analysis in this Approval Order significantly resembles the Bureau's advisory opinion on earned wage access products (*see* 85 FR 79404, 79404 (Dec. 10, 2020), *available at* <https://www.federalregister.gov/documents/2020/12/10/2020-26664/truth-in-lending-regulation-z-earned-wage-access-programs>), this Approval Order applies only to the Payactiv EWA Program as defined above.

¹⁶ *See* 12 CFR 1026.2(a)(14); *see also* 15 U.S.C. 1602(f).

First, the Bureau concludes that Payactiv EWA Transactions do not provide employees with “the right to defer payment of debt or to incur debt and defer its payment” because the Payactiv EWA Program does not implicate a “debt.” Regulation Z does not define “debt.” The common meaning of the term debt is a “[l]iability on a claim; a specific sum of money due by agreement or otherwise.”¹⁷ The Bureau determines as described below that no such liability of the employee arises in the context of the Payactiv EWA Program. Rather, the Bureau believes that the Payactiv 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.¹⁸

For instance, Payactiv has knowledge, from timely information it receives from the employer about an employee’s applicable wage and hours worked, of the accrued cash value of an employee’s wages at the date and time of the Payactiv EWA Transaction. Payactiv caps the amount of each Payactiv EWA Transaction at no more than 60 percent of this amount, which reduces any remaining risk that EWA funds do not correspond to funds the employee has actually earned and is entitled to receive on payday. Further, Payactiv recovers EWA funds only through employer-facilitated payroll deductions. Such payroll deductions are always attempted in full on the next scheduled payday,¹⁹ which corresponds to the pay period when the employee actually earned the funds related to the Payactiv EWA Transaction. In addition, Payactiv offers employees the option under Payactiv Access Freedom to receive EWA funds to the employee’s chosen account for free, just as receiving a paycheck costs employees nothing. For employees who opt to access EWA funds under Payactiv Access Choice, Payactiv charges, at most, a \$1 fee to provide earlier-than-normal access to accrued wages for one day. The Bureau believes that this fee does not bear hallmarks of fees levied alongside an extension of credit: the dollar value is nominal because, inter alia, it is de minimis in absolute terms and, per the Bureau’s market monitoring, it is approximately commensurate with the prevailing expedited transfer fees for non-credit products currently charged to consumers in the market; further, it does not vary based on factors such as the amount of the transaction, the period of time between the transaction and the payroll deduction, or the creditworthiness of the employee. Indeed, the only eligibility criterion for an employee to participate in the Payactiv EWA Program is whether the partner employer gives the employee access to the program; Payactiv does not directly or indirectly assess an employee’s credit risk for a Payactiv EWA Transaction, just as underwriting is not used by an employer to issue a paycheck to an employee.

Second, interpreting § 1026.2(a)(14) not to apply to Payactiv EWA Transactions is consistent with comment 2(a)(14)-1.v to Regulation Z. This comment provides “[b]orrowing against the accrued cash value of an insurance policy or a pension account if there is no independent

¹⁷ *Debt*, *Black’s Law Dictionary* (11th ed. 2019).

¹⁸ This often occurs in the employer-employee context, for instance, when an individual whose employment has been terminated receives her final paycheck via paper check on her last day at work, which may not be the same day as a scheduled payday.

¹⁹ In the event of a failed or partial payroll deduction, Payactiv may attempt to re-present a payroll deduction only two more times, and the employee may request cancellation of such re-presentments for free. According to the Application, Payactiv attempts such re-presentation infrequently.

obligation to repay” is “not considered credit for purposes of the regulation.”²⁰ As the Board of Governors of the Federal Reserve System explained when it revised Regulation Z to implement the Truth in Lending Simplification and Reform Act, in such instances, “credit has not been extended because the consumer is, in effect, only using the consumer’s own money.”²¹

The Bureau believes there are significant similarities between comment 2(a)(14)-1.v and the Payactiv EWA Program. For instance, like the accrued cash value of a consumer’s insurance policy or pension account, the accrued cash value of an employee’s earned but unpaid wages is the employee’s own money. That is, an employee is “in effect, only using the [employee’s] own money” when she accesses earned wages through the Payactiv EWA Program, and is not incurring debt or deferring its payment. Moreover, “there is no independent obligation to repay” a Payactiv EWA Transaction, since Payactiv recovers corresponding EWA amounts via employer-facilitated payroll deductions and will never seek repayment from an employee directly or through a payment authorization from the employee’s account.

Third, the totality of circumstances of the Payactiv EWA Program demonstrates that it differs in kind from products the Bureau would generally consider to be credit. Courts tend to agree that a transaction’s substance, not its form, controls whether it qualifies as TILA “credit,” and they generally undertake fact-specific inquiries and weigh multiple factors when analyzing the true nature of a transaction.²² The Bureau notes that features often found in credit transactions are absent from the Payactiv EWA Program. Unlike many credit transactions, for instance:

- Payactiv has no rights, including a contractual claim or remedy, direct or indirect, against the employee in the event a payroll deduction is insufficient to cover amounts corresponding to a Payactiv EWA Transaction. Payactiv also will not, with regard to any such transaction, engage in debt collection activities, report to consumer reporting agencies, or sell or place the transaction as a debt with any third party. Employees have no obligation to make any payments directly or indirectly to Payactiv at any time. This is true even if, for instance, an employer goes bankrupt before attempting a payroll deduction.

- Payactiv charges, at most, a non-recurring \$1 fee to obtain one day of access to Payactiv EWA Transactions and otherwise does not charge employees to participate in the Payactiv EWA Program, open a Payactiv Account, transfer EWA funds to the Payactiv Account (or to the

²⁰ 12 CFR part 1026, supp. I, comment 2(a)(14)-1.

²¹ 46 FR 20848, 20851 (Apr. 7, 1981).

²² See *Meyers v. Clearview Dodge Sales, Inc.*, 384 F. Supp. 722, 728 (E.D. La. 1974), *aff’d in part, rev’d in part*, 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977) (“In construing a piece of remedial legislation such as the Truth-in-Lending Act, designed to protect consumers, courts must focus on the substance of a transaction rather than its mere form.”); see also *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 436 (5th Cir. 1998) (applying substance-over-form analysis to TILA claim); *Arrington v. Colleen, Inc.*, No. Civ. AMD 00–191, 2001 WL 34117735, at *4 (D. Md. Mar. 29, 2001) (“A common task of courts is to determine whether particular conduct or transaction falls into a class of conduct or transactions that a statute regulates. Such is particularly the case here, where the TILA regulates the extension of credit in various forms and in fact anticipates that the form of credit will be ever-changing.”).

employee's choice of account²³), or use an associated card issued on a major network to buy goods or services at the multiple merchants that accept the card. And the Payactiv Account and any associated card do not impose any periodic fees, and otherwise allow employees reasonable use of the account at no charge.

- No interest or other fees are charged against a Payactiv EWA Transaction, ensuring that the amount Payactiv is entitled to recover does not “increase[] with the passage of time, another characteristic of a loan.”²⁴ The absence of interest and fees other than the non-recurring \$1 fee demonstrates that Payactiv is not taking on the type of credit risk characteristic of a typical credit transaction.²⁵

- There are no late fees or prepayment penalties associated with a Payactiv EWA Transaction.

- Payactiv does not take any payment authorization from employees, such as a check, ACH, or debit card authorization.

- Payactiv does not pull credit reports or credit scores on individual employees or otherwise assess their credit risk.

- Payactiv does not report information concerning Payactiv EWA Transactions to consumer reporting agencies.

- Payactiv does not engage in debt collection activities related to Payactiv EWA Transactions or place such amounts as debt with, or sell such amounts to, any third party.

Finally, the Bureau notes that its interpretation of § 1026.2(a)(14) in the context of the Payactiv EWA Program is generally consistent with the Bureau's discussion of these types of products in its 2017 Payday Lending Rule, where it noted that “some efforts to give consumers access to accrued wages may not be credit at all. For instance, when an employer allows an employee to draw accrued wages ahead of a scheduled payday and then later reduces the employee's paycheck by the amount drawn, there is a quite plausible argument that the transaction does not involve ‘credit’ because the employee may not be incurring a debt at all.”²⁶ The Bureau stated

²³ Note that Payactiv charges an additional \$1.99 to employees who choose to use the Visa Direct instant transfer or Walmart Direct2Cash services. *See supra* note 13 (providing additional detail).

²⁴ *Oasis Legal Fin. Group, LLC v. Coffman*, 361 P.3d 400, 410 (Colo. 2015) (noting in the context of the UCCC that “growth in the repayment obligation over time is a finance charge and a hallmark of a consumer loan”).

²⁵ Note, however, that the absence of fees or interest charges is not per se determinative of whether a product constitutes credit under TILA and Regulation Z. *See, e.g.*, Summer 2020 CFPB Supervisory Highlights, Section 2.6.5 (Sept. 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-22_2020-09.pdf.

²⁶ 82 FR 54472, 54547 (Nov. 17, 2017). The Bureau further noted that this “is especially likely where the employer does not reserve any recourse upon the payment made to the employee other than the corresponding reduction in the employee's paycheck,” but that other initiatives are more likely to constitute “credit” under Regulation Z. *Id.* “For example, if an employer cannot simply reduce the amount of an employee's paycheck because payroll processing

that it “is aware that some of these products provide access to the consumer’s own funds in the form of earned wages already accrued but not yet paid out because of administrative and payroll processes historically developed by employers.”²⁷

Similarly, the Payactiv EWA Program is designed to “provide access to the consumer’s own funds” through Payactiv EWA Transactions that are limited to the accrued cash value of employee wages. Payactiv recovers amounts corresponding to such transactions through payroll deductions and retains no right to pursue claims against employees in the event of a failed or partial deduction.

This Approval Order expresses no view on:

- Whether Payactiv EWA Transactions amount to factoring.
- Whether Payactiv EWA Transactions comply with state wage and hour laws.
- Whether the \$1 fee charged under Payactiv Access Choice would amount to a finance charge in an EWA or wage advance program under which Regulation Z credit was offered or provided.
- Whether other Payactiv programs (*i.e.*, where Payactiv recovers funds by debiting employee bank accounts rather than through payroll deductions), including programs that may not charge fees to customers, involve offering or extending Regulation Z credit.

VI. Additional Considerations

In issuing this Approval Order, the Bureau has also considered a variety of additional factors, including the Payactiv EWA Program’s innovative mechanism for allowing consumers to bridge the gap between paychecks; its potential to provide consumers with a lower-cost alternative to traditional payday loans, other high-cost credit products, and overdraft fees; and its availability to unbanked or underbanked consumers or consumers with poor, limited, or no credit history.

VII. Duration

The duration of this Approval Order is 24 months from issuance. Notwithstanding the foregoing, the Bureau may terminate this Approval Order prospectively prior to the end of its 24-month duration if: (i) Payactiv fails to substantially comply in good faith with the CAST; (ii) the described aspects of the product or service do not perform as anticipated in the Application; or (iii) a statutory change or Federal judicial holding causes the Bureau to conclude that Payactiv

has already begun, there may be a need for a mechanism for the consumer to repay the funds after they are deposited in the consumer’s account.” *Id.*

²⁷ *Id.* at 54548. The Bureau contrasted this with “other products [that] rely on estimates of wages likely to be accrued, or accrued on average, and may make advances against expected wages that are not already earned and accrued.” *Id.*

can no longer rely in good faith on the Approval Order as TILA requires.²⁸ In addition, if Payactiv notifies the Bureau that it wishes to terminate the CAST, thereby terminating its ability to rely on the Approval Order, the Bureau may then terminate the CAST and the Approval Order prospectively.

VIII. Conclusion

Based on the foregoing considerations, and subject to Payactiv's good faith compliance with the terms and conditions of the CAST, the Bureau approves of Payactiv's offering or providing the described aspects of the Payactiv EWA Program as stated in the particularized Regulation Z compliance determinations contained in this Approval Order.



Thomas Pahl, Deputy Director
Bureau of Consumer Financial Protection

²⁸ In accordance with the terms of the CAS Policy, however, the Bureau intends to notify Payactiv of possible grounds for termination, and permit Payactiv an opportunity to respond within a reasonable period of time. *See* CAS Policy, Section E.3.